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Letters

MASS INCARCERATION DEBATE
Whatever flaws the United States system of criminal justice may have, “mass incarceration” is not one of them, as stated in “Marked for Life,” May, page 40.
Mass incarceration is the rounding up and jailing of groups of people. That does not happen in the United States. U.S. criminal law requires that for an individual to be deprived of life, liberty or property, that person must be convicted in a court of law under due process conditions. That is, the state must prove in a public proceeding that the individual has, beyond a reasonable doubt, committed all of the elements of a specific crime. Where multiple people are involved in a single set of operative facts, the defendants may be tried separately in order to avoid conflicts of interest among the defendants.
There is no denying that the U.S. criminal system runs on a case-by-case basis. We even keep track of the cases by using the names of the defendants. Criminal trials with multiple defendants are rare and only occur with the consent of the defendants. Mass incarceration is a political propaganda term, a gross misnomer that has no place in the ABA Journal.
Valerie E. Looper
Vista, California

EDITOR'S NOTE: On April 29, reader comments on ABAJournal.com were disabled indefinitely.

ENDING ONLINE COMMENTS
While I am saddened to see the ABA Journal close down the comments feature of its online articles, I applaud you for doing it. I have been appalled by the obvious presence of troll-driven comments and troubled about what this says about the viability of public venues for input.
The tone of the comments has all too frequently been just as noted—unsatisfactorily rancorous and uncivil. Given what is happening with social media, trolls, fake news and manipulation of storylines, we may have to face the difficult choice: that accommodating open speech will require the true and full identity of the speaker to be revealed. I believe we would eliminate the vast majority of the problem if the true identities of the commenters were to be known.
Robert Cheasty
Berkeley, California

MARGARET SANGER, ‘THE PILL’ AND EUGENICS
Your article, “FDA Approves First Birth Control Pill,” May, page 72, addresses an important part of our history. And you are correct that Margaret Sanger fought for women’s right to control our reproductive health. But we can’t discuss her activism without honestly acknowledging that it was motivated in part by her belief in eugenics: the doctrine that reproduction should be controlled to maximize supposedly desirable characteristics. The Nazis cited that doctrine to justify their genocide. So, thank you for crediting and celebrating the groundbreaking role that Sanger played in women’s right to control our own bodies. But let’s condemn, not celebrate, the eugenics doctrine that she promoted.
Justice Sheryl Gordon McCloud
Olympia, Washington

‘IDEAL TEXTUALIST’
I enjoy Bryan Garner’s monthly column and have written on textualism, the subject of “It Means What It Says,” April, page 28. Here’s the salient line from that column: “So the ideal textualist is content-neutral, at least in theory.” Mark that: in theory. Actual practice is far different. In high-profile cases, cases that broadly shape the law, cases with political and ideological significance, self-proclaimed textualists reach conservative results with uncanny regularity. All judges start with text and make textual arguments, of course, but they almost always lead textualists in the same direction.
You can recognize the textualist brand in a number of ways: by strenuous parsing in an effort to resolve ambiguity, followed by the assertion that it doesn’t exist; by overreliance on highly malleable and often-conflicting canons of construction; by a boundless confidence that the “plain language” of a statute compels such-and-such a result; by a general aver- sion to legislative history and a reluctance to consider values and sensible policy, even in close cases; and, above all, by a propensity to reach for dictionaries—those great grab bags—and pluck out convenient definitions.
Textualism is just as squishy, just as pliable, as any other theory of interpretation.
Joseph Kimble
Lansing, Michigan

CORRECTIONS
“The Second Founding,” May, page 11, should have said that some items on display at the National Constitution Center belong to the Civil War Museum of Philadelphia but were housed at the Gettysburg Foundation before coming to the Constitution Center.
Another Shot,” May, page 34, erroneously stated that an increasing percentage of Association of Corporate Counsel members are coming from law firms. The percentage is not increasing.
“Marked for Life,” May, page 40, should have credited the National Inventory of Collateral Consequences of Conviction as the source for the number of collateral consequences. The NICCC began as a project of the ABA Criminal Justice Section. The Collateral Consequences Resource Center is an independent, nonprofit organization. The Journal regrets the errors.

Letters to the Editor You may submit a letter by email to abajournal@americanbar.org or via mail—Attn: Letters, ABA Journal, 321N. Clark St. Chicago, IL 60654. Letters must concern articles published in the Journal. They may be edited for clarity or space. Be sure to include your name, city and state, and email address.
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President’s Message

|| By Bob Carlson

Defense of the Unpopular

Lawyers should not suffer backlash for defending rights of unsympathetic clients

In 1770, John Adams risked his reputation and inflamed the ire of his fellow patriots when he represented the British soldiers who were accused of killing five colonists in the Boston Massacre. Even before the creation of a United States, a Declaration of Independence or a Constitution, Adams understood that for a legal system to work, everyone accused of a crime must have representation.

Adams won acquittal from murder charges for six of the soldiers and reduced manslaughter convictions for two others. Adams went on to become the first of 26 lawyers who would serve as president of the United States. But the backlash that Adams received 250 years ago is still an issue today.

Equating the bad acts of the accused with the attorney representing them can be a natural human impulse, especially when the crimes alleged are heinous and the defendants are unpopular. Lawyers, however, should not be ostracized or face penalties such as loss of business or abuse if they choose to defend a reviled client.

Lawyers are not defending the crime. They are defending rights and liberties—to which we all are entitled—that are enshrined in the Constitution. They are ensuring that the procedures are fair, that the accused has not been mistreated and that the government has met its burden of proof beyond any reasonable doubt. These safeguards ensure that justice is there for the innocent and the guilty, the sympathetic as well as the unsympathetic defendant.

Our adversarial justice system requires a defense attorney to stand up for the accused and balance the arguments of the prosecution. A lawyer can guide a client through the process and defend their civil rights without excusing or condoning what the client is accused of doing. Even Nazi war criminals were afforded counsel. It did not mean their lawyers were sympathizers.

The American Bar Association’s Model Rules of Professional Conduct clearly state that, “A lawyer’s representation of a client … does not constitute an endorsement of the client’s political, economic, social or moral views or activities.” The Sixth Amendment of the Constitution defines defendants’ right to have “assistance of counsel” in their defense. It doesn’t define what kind of client is afforded that right.

The right to counsel only has meaning if defense attorneys can represent the most despised defendants without adverse consequences from society. Adams taught us this lesson more than 250 years ago. We would be wise today to follow Adams’ advice when he said, “Always stand on principle … even if you stand alone.”

My tenure as president of the ABA has given me a chance to witness firsthand principled lawyers working diligently to make our system and our country better. I am proud to be part of a profession that stands up for fair trials and protects judicial independence and the legal profession around the world and at home.

Advancing access to justice for all, fighting for an impartial judiciary and promoting diversity are noble endeavors. I have been honored to have played a small role in furthering them, as well as many other important efforts.

I have been privileged to see volunteers and staff helping asylum-seekers at the border and assisting victims of natural disasters around the country. I have been humbled to witness the lengths lawyers have gone to help their colleagues suffering from addiction and depression. I was proud when the ABA spoke out in defense of a free press and free speech at Law Day and teamed with the Clooney Foundation for Justice and others to launch the TrialWatch program to help shine a light on trials around the world where journalists, among others, are being unfairly prosecuted.

When my successor, Judy Perry Martinez, becomes ABA president in August, she will be bolstered by an association and a profession that cares about these causes and other efforts that advance the calling of the legal profession. I know she will stand for principle, and because of the ABA, I know she will not have to stand alone.

Follow President Carlson on Twitter @ABAPresident or email abapresident@americanbar.org.

“I WAS PROUD WHEN THE ABA SPOKE OUT IN DEFENSE OF A FREE PRESS AND FREE SPEECH AT LAW DAY”

—BOB CARLSON

PHOTO BY TOM SALYER PHOTOGRAPHY
GAME TIME

ENTREPRENEURS EDUCATE BY GAMIFYING THE LAW

CHICAGO CRIMINAL DEFENSE ATTORNEY April Preyar is making sure youth are game to learn about the law.

Preyar has been on a mission to educate teens about what to do—and what not to do—during encounters with police. And she hopes the board game she developed, Trials & Triumph, will help keep kids out of jail. The idea for the game evolved after videos of Preyar giving tips on how to interact with law enforcement went viral on Facebook.

“Once I saw the response to that, I realized I had an obligation because this wasn’t something that people were taught in school,” says Preyar, co-owner and partner at Shiller Preyar Law Offices.

Trials & Triumph features 54 real-life scenarios to which players respond as they navigate the board, guided by a set of rules applied to police encounters: Don’t run, reach, resist or “run your mouth.” Do request a lawyer, refuse all DUI tests and refuse consent to search. Preyar believes an interactive approach to learning about criminal justice is more effective than a lecture.

“Instead of preaching at them from in front of the room and saying this is what an armed robbery is and this is what happens if you and your friends commit this crime or that crime, they can actually see it,” Preyar says.

Preyar launched an Indiegogo campaign to help finance the venture and has sold hundreds of games so far.

But Trials & Triumph isn’t the only law game in town. In April, Japan-based Capcom Co. re-released its classic...
Opening Statements

*Phoenix Wright: Ace Attorney Trilogy* for for PlayStation 4, Xbox One and other gaming consoles. Users play a newbie lawyer investigating crimes by surveying scenes, interviewing witnesses and gathering evidence. They get into courtroom action, using case files to examine witnesses, call out contradictions in statements and advise clients on the stand. The $29.99 game is rated T for Teen by the Entertainment Software Ratings Board.

Preyer’s teen-targeted board game and *Phoenix Wright* are among the latest offerings that gamify law for a new generation, but there are others on the market hoping to educate and captivate.

The State Bar of Texas’ Law-Related Education department has a suite of online games, including the evidence law game *Objection! Your Honor*. And retired U.S. Supreme Court Justice Sandra Day O’Connor founded *iCivics* in 2009 to boost civic education via online games at no cost to schools. More than 6 million elementary to high school students have used the game, says Louise Dubé, executive director of the Cambridge, Massachusetts-based nonprofit. Titles include *Do I Have a Right?* in which students play at running their own law firm.

“[O’Connor’s] vision was to go in when they’re younger,” Dubé says. “It’s really to build a sense that you belong to a country and that it’s very important to know how it works. What are the rules? What are the rules of law? What does it mean?”

Chris Smithmyer, vice president of international affairs at Brâv Online Conflict Management and an adjunct professor at Penn State University Altoona College and the University of South Florida St. Petersburg’s Kate Tiedemann College of Business, notes that gaming is a good way to teach legal concepts to millennials.

“Gamification is a very important element in modern academic thought, specifically related to the legal industry,” Smithmyer says.

Tina Nelson’s *Lawsuit*! board game has a younger generational target. She created the game as a Father’s Day gift to teach her children about what she and her husband—they are both in private practice in New York City—do at work. Players collect money when they win lawsuits and reach settlements, lose turns when parties fail to come to terms, and pay money when they fail to file appeals on time. Friends encouraged Nelson to mass-produce the game. It’s sold for about $35 at the Supreme Court Historical Society Gift Shop, the National Constitution Center and the Madison Museum of Contemporary Art, as well as online.

“Basically, I tried to make it fun and mimic what it’s like to be a lawyer as much as I could without losing the fun aspect of the game,” Nelson says. “Young kids don’t care necessarily that they’re learning. They just want to have fun.”

Food, Service, Industry

This Hudson Valley lawyer serves up a deliciously different practice model

*WHEN JASON M. FOSCOLO* decided to go solo, he had something very specific in mind. He wanted to work exclusively with farmers and food entrepreneurs. He wanted to work with his clients like a general counsel would—with depth and consistency—rather than just being the guy who got called in a crisis. He also wanted to live and work where he and his family could be closer to the land. While Foscolo could envision the goal, he wasn’t exactly sure he’d get there with his background as a judge advocate in the U.S. Marine Corps. But achieve it he did. Today, he’s the founder of the Food Law Firm, a four-lawyer shop that serves its clients through an innovative subscription billing service that allows Foscolo to keep both his hours and his income steady. He also lives and works in Red Hook, a charming town in New York’s Hudson Valley known for its family farms, scenic nature trails and sophisticated restaurants.

**Tell me about the name the Food Law Firm.** I mean, it’s great marketing—there’s no question about what type of law you practice!

Technically, the name of my firm is Jason Foscolo PLLC, but calling it the Food Law Firm gives me the sandbox to integrate all the regulations that affect the food business. My theory from the very beginning was that I had to be comprehensive, to offer soup-to-nuts service for the food business.

**You started your career as a JAG lawyer practicing mostly criminal law. How did you get the idea to combine law and food? Did you have food industry experience?**

No. I had no food industry experience whatsoever. It was the biggest decision I ever made on limited information! I had no experience in food law, but I always had an interest in food. I was stationed in Japan for two-and-a-half years, and being there really put me on the food path. This was my successful attempt to merge a personal passion with my profession.

**How did you learn about food industry law?**

My wife and I were on a road trip, and we just happened to pass through Arkansas, and I just happened to notice that the University...
needed to allocate their legal resources. I thought, “What would they need?” and I sat down and made a list that would keep me engaged with them. Like a menu. I said, “Here are 12 things I can do, and if you communicate with me for 30 minutes a week, I can save you six hours.” The subscription plan flowed naturally from that.

Are all your clients subscription now?
Yes. My monthly gross is like 96% subscriber income now. I do a little bit of hourly stuff, but I don’t like to do it. I’ve got 36 active subscribers, and they demand a lot of my time.

I imagine it’s nice to have a steady income rather than the ups and downs that can come with solo and small-firm life.
That’s a great thing! There are a lot of advantages for a firm to run things like this, and cash flow is at the top of the list. I know how much I am going to make new months in advance. When I was working hourly, I’d have a good month, and then I’d have a slow month. Administratively, I’d have an infinite number of retainers, each with different variables. This way, I have only three retainer agreements: two, four or six hours per month. You tell me which one you want, and I pull it off the shelf and fill in the name. You can sign it with your finger on your phone. I establish a curriculum at the beginning of the relationship with the risks I see and what I am going to do to address it.

That way, you have more time to enjoy living in the Hudson Valley, which is like a foodie paradise.
We do have good food here. We actually picked this place for food and quality of life. My kids go to school across from a cornfield, but we’re only an Amtrak ride away from the museums and concert halls of New York City. And it’s also top five nationally for mushroom foraging!

Which is your hobby, right?
How did you get into that?
It’s just fun. The first time I ate a wild foraged mushroom, I thought I would burst into flames. I thought it was this deadly, risky thing. It turns out that it’s easy to identify the species, and there’s almost no risk involved in eating them. If you know what you’re doing, you can have a good time in the woods and come home and have a good time in the kitchen. I like going into the woods, and I like eating, I like going for a walk and finding food. It’s combining two great things—like food and practicing law.

Have you ever thought about marketing your subscription law program or doing some sort of consulting?
I have. I’d eventually like to offer consulting services to other attorneys because this has revolutionized my practice and completely changed my life. And I don’t talk like that normally. But as professionals, we need to rethink the hourly system. You couldn’t do this for bankruptcy or criminal, but you could do it for real estate or construction law. There is no better way to make yourself commercially attractive than by becoming predictable, becoming a line item in someone’s business. I didn’t add more skills to my skill set to do this—I am providing the same services as an hourly guy, but I am making five times more as a subscription guy. I just repackaged what I was doing to become more accommodating, and here I am.

—Jenny B. Davis
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LEGAL LESSONS FROM THE HOLOCAUST: WHEN LAWYERS REMAIN SILENT
Presented by the ABA Office of the President; Center for Human Rights
Current affairs remind us that the rule of law is fragile. Lawyers particularly have an obligation to stand up and speak out when the rule of law is under attack. Starting in 1933, few German lawyers sounded the alarm when the Nazis enacted a series of laws designating German Jews as less than full citizens and implemented occupational bans that over five years barred all Jewish lawyers and jurists from the legal profession. We know, however, there is no set roadmap to undermine the rule of law. This engaging program, in conjunction with the Center’s Lawyers Without Rights: Jewish Lawyers in Germany under the Third Reich project, explores why silence is not an option when the rule of law is under attack.
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### A Natural Migration

By Mónica Ramírez

#MyPathToLaw is a guest column that celebrates the diversity of the legal profession through attorneys’ first-person stories detailing their unique and inspiring trajectories. Read more #MyPathToLaw stories on Twitter.

My path to the law started on dirt roads and in farm fields—those that I traversed and those that my family members traveled years before me. Several generations before I was born, my maternal and paternal family members migrated to the United States from Mexico. Like many migrant families, they came in search of opportunity and with hopes of realizing the dream that so many hold tight when they courageously leave their homes, families, community and country behind to make a life in the U.S.

Today, many migrant men, women and children are also fleeing their homelands to seek safety from violence.

My great-grandparents, grandparents, parents and other relatives sacrificed and contributed to this country by toiling in the agricultural fields, harvesting fruits and vegetables, picking cotton and detasseling corn, among other jobs. They settled out of the migrant stream in rural Ohio, where I was born, grew up and live today.

As a child, my parents often talked about how difficult things were for farmworkers. My parents’ teachings about justice and engaging in public service, as well as the plight of farmworkers, led me to want to learn more about the larger farmworker movement in the United States. When I was a teenager, I started writing about farmworkers around the area where I grew up and quickly learned that the conditions my parents had taught me about had not changed. These lessons guided me to become a summer outreach worker for a local legal services organization and eventually to my career as a public interest attorney committed to fighting to address these terrible conditions. Along the way, I also learned about the importance of collective power and that everyday people could effect great change.

My career has not been a traditional legal career by most people’s standards. Some might say that it is a prototype of what it means to be a “people’s lawyer.” To me, my career is reflective of someone who fiercely believes in justice and that we all are entitled to live in a just society, no matter where we are from, where we work or how much we earn. My work has been focused on making this a reality, especially for low-paid workers, women of color, immigrants and children—those who are among the most vulnerable and susceptible to rights violations.

In 2003, I created the first legal project in the U.S. focused on addressing and ending sexual harassment and other forms of gender discrimination against farmworker women as a fellow at Florida Legal Services. In 2006, I returned to my family’s southern roots: this time as a lawyer in Montgomery, Alabama, instead of a cotton picker in Mississippi, as my father had been as a child. There, I turned my state-based initiative into a national initiative on behalf of farmworker and other low-paid immigrant women lawyers at the Southern Poverty Law Center. Later, in 2014, I further expanded my work and created a new, national organization—Justice for Migrant Women.

Over the years, I have met brave survivors of human trafficking who escaped captivity. I have served courageous women who were victims of sexual violence by their bosses and supervisors. I have helped educate thousands of workers about their rights and our legal system. I am fortunate to have had the opportunity to choose and pursue my profession, to learn from incredible human beings and to work alongside fierce advocates.

And as I was building my legal projects and pursuing justice through the law, I was also organizing with incredible women leaders, many who had previously worked in agriculture and some of whom continued to work in the fields even then. Together, we founded and launched Alianza Nacional de Campesinas [National Farmworker Women’s Alliance], the first national farmworker women’s coalition in the country. In addition, most recently, I have been advocating alongside domestic workers through the National Domestic Workers Alliance and trying to build a cross-sector initiative to secure gender equity for all workers.

In 2017, I wrote the “Dear Sisters” letter on behalf of 700,000 farmworker women, whose interests Alianza represents, to individuals in the entertainment industry who had disclosed sexual violence against them by powerful men, including Harvey Weinstein. Their disclosures helped create the #MeToo breakthrough, which was originally created by Tarana Burke’s visionary work and Alyssa Milano’s public call to action. My letter was published in Time magazine and went viral.

This letter has been credited with helping to spark the Time’s Up movement, which was founded by women in the entertainment industry. None of us will ever know why that letter caught fire, but I imagine it’s because it was a powerful demonstration of solidarity and empathy among the least likely of partners.

Our profession is one of the most interesting, complex and challenging
because it allows us to use our training in a variety of ways. We can use it to advocate for a cause, defend a position, create an area of practice or do all these things over the course of our careers. For many of us, our careers have not necessarily been a straight path.

In my case, I certainly never would have thought that farmworker women, women in entertainment and women across other industries would link arms to fight for gender equity, parity and power as we are today, or that I would be in any way directly connected to it. But sometimes the best things come from those that are least anticipated.

Now, for me, the most pressing question is whether we will be able to use the current momentum to ensure that the most visible to the least visible workers among us—from actors to fieldworkers—will one day be afforded equal rights and opportunities in our society. We are working toward that end. Until then, I will continue to find my way down this less-traveled path until we see the day that justice, fairness and equality belong to all of us—without exception.

Mónica Ramírez is the founder of Justice for Migrant Women, a co-founder of Alianza Nacional de Campesinas, and gender justice campaigns director for the National Domestic Workers Alliance. She was named a recipient of the Smithsonian’s 2018 Ingenuity Award for Social Progress. Ramírez is a graduate of Loyola University Chicago, the Ohio State University Moritz College of Law and Harvard Kennedy School.

Kim Kardashian West is pursuing her passion for criminal justice reform by studying to be a lawyer. The reality star, who didn’t finish college, lives in California, one of four states in the country that allows students to take the bar exam without a law degree. Candidates must complete a minimum of 18 hours of study per week for four years in a law office or judge’s chambers and get tested on their studies at least once per month. Last year, Kardashian West successfully lobbied President Donald Trump to grant clemency to Alice Marie Johnson, who had been in prison on a nonviolent drug charge since 1996.

Did You Know?
Six out of seven chief judges in the Chicago-based 7th U.S. Circuit Court of Appeals will soon be women, after Pamela Pepper succeeds William Griesbach in Wisconsin’s eastern district later this year. This summer, Rebecca Pallmeyer becomes the first female chief judge of the northern district of Illinois. There are already four female chief judges in the 7th Circuit, which consists of Illinois, Indiana and Wisconsin.

Don’t Tread on Me!
Plaintiffs in Saginaw, Michigan, made a federal case out of tire chalking, claiming the practice of marking tires with big lines in zones without meters in order to enforce time limits and issue tickets violates the Fourth Amendment rights of drivers. The case went all the way up to the Cincinnati-based 6th U.S. Circuit Court of Appeals, which agreed that marking car tires to issue tickets constituted an unreasonable search and a trespass for the purpose of gathering incriminating information.
A Tangled Web

ADA questions remain over web accessibility cases and the lack of DOJ regulations

By Amanda Robert

Karla Gilbride kept getting lost while trying to navigate unlabeled buttons and unorganized graphics when searching online for someone to handle her wedding registry and invitations.

Gilbride, who is blind and uses a screen reader, refuses to make even one-time purchases from companies with un navigable websites. She can’t walk into a store and see products on the shelves, but she can scroll down a page and learn about them if a website is accessible.

“It is something I deal with every day in my life, trying to purchase things online and do my job and get around the internet,” says Gilbride, a staff attorney at Public Justice, a nonprofit legal advocacy organization in Washington, D.C. “I encounter frustrations daily with roadblocks to using the internet, which could be such a gateway to leveling the playing field.”

Disability rights advocates say web accessibility—the practice of designing and coding websites so that people with disabilities can use them—can be accomplished through simple changes, such as changing color contrast and adding video captions.

However, the legal landscape surrounding web accessibility has become more complex.

The Americans with Disabilities Act, signed into law in 1990, requires in Title III that businesses serving as “places of public accommodation” remove barriers to access for people with disabilities.

Under the ADA, places of public accommodation include restaurants, theaters, retail stores and more. The law does not explicitly address the internet or mobile applications, leaving courts around the country to decide how the law applies to commercial websites.

Despite calls for clarity, the Department of Justice, the federal agency responsible for enforcing the ADA, has not provided regulations on the scope of the law in terms of web accessibility.

Related lawsuits have also increased dramatically, with the vast majority filed by a small
number of law firms representing a small number of plaintiffs, says Kristina Launey, managing partner of Seyfarth Shaw's Sacramento, California, office and a member of its ADA Title III Specialty Team.

“We are in a state of no regulation,” Launey says. “No regulations are going to happen anytime soon, and the number of lawsuits year after year has been increasing exponentially, partially as a result of that.”

According to Seyfarth’s ADA Title III News & Insights blog, which tracks web accessibility cases using data from Courthouse News Services, at least 2,258 federal lawsuits were filed in 2018. This is an increase of 177% over 2017, when 814 were filed. Comparatively, only 262 web accessibility lawsuits were filed in federal courts in 2016, and 57 were filed in 2015, the blog also found.

A HISTORY OF SPLIT DECISIONS

Web accessibility was the primary focus of National Federation of the Blind v. Target Corp. in 2016, when the organization sued the retail chain over its website in Northern California. The NFB alleged that Target violated the ADA and California state laws by discriminating against people who were blind and visually impaired in places of public accommodation.

A federal judge ruled that the lawsuit could proceed, holding that the aspects of Target’s online services that were sufficiently integrated with those of its physical stores were covered by the ADA’s nondiscrimination provisions. The case was later settled.

In 2011, National Association of the Deaf v. Netflix Inc., which was filed in federal court in Massachusetts, alleged that the video streaming service violated the ADA by failing to provide closed captioning on most of its “Watch Instantly” programming.

Despite Netflix’s arguments that the ADA applied only to physical places, the judge ruled that the law also covers website-only businesses and allowed the case to proceed.

NAD CEO Howard Rosenblum, who is deaf, says Netflix settled with NAD and agreed to 100% captioning of its video content. NAD then negotiated for 100% captioning on all major video streaming services and reached an agreement with Gogo to caption in-flight movies.

“Prior to our Netflix case, most service providers did not perceive web accessibility as a necessity or legally required,” Rosenblum says.

While some courts have agreed with the rationale in the Netflix case, others found that websites are subject to the ADA only if there is a close nexus between the website and a physical location.

In 2012, a federal court in California held in lawsuits against Netflix and eBay that places of public accommodation must be physical spaces. As a result, the 9th U.S. Circuit Court of Appeals confirmed in two unpublished opinions in 2015 that Netflix’s streaming service and eBay’s web-based business were not subject to the ADA.

The DOJ responded to Rep. Ted Budd, R-N.C., in September, contending that it interpreted the ADA to apply to public accommodations’ websites more than 20 years ago.

“This interpretation is consistent with the ADA’s Title III requirement...
that the goods, services, privileges or activities provided by places of public accommodation be equally accessible to people with disabilities,” the DOJ said.

The DOJ also stated that in absence of specific web-accessibility regulations, public accommodations can be flexible in how they comply with the ADA’s general nondiscrimination and effective communication requirements.

Lainey Feingold, a disability rights lawyer in Berkeley, California, who has worked on web accessibility cases since 2000, says that means the DOJ never doubted that the ADA applies to websites.

“The ADA, since the beginning, has had language that if you are covered by the ADA, you have to effectively communicate with the public, your members, your patients,” she says. “The only way to effectively communicate information on a website or mobile application is to have that website or mobile app be accessible.”

The ABA House of Delegates weighed in at the 2018 annual meeting, urging courts and government entities to interpret the ADA as applying to technology, goods and services delivered via technology, regardless of whether the entity solely exists virtually or has a nexus to a physical location.

Despite the lack of specific regulations, Launey says her clients are making their websites more accessible in light of the DOJ response and the Domino’s decision.

She adds that many of them delayed making expensive changes in case the DOJ issued a standard other than the WCAG 2.0 AA—which is the standard experts say affords maximum accessibility but is still attainable. WCAG 2.1 AA was published in June 2018 and includes the same requirements.

Feingold calls the unresolved questions around web accessibility distractions, saying that companies have the tools to make their websites accessible. (Go to ABAJournal.com to read “How to make a website accessible.”)

“It is not complex as to how to develop an accessibility program,” Feingold says. “As with everything worth doing, it does take expertise and commitment.”

Failure to Appear

Videoconferencing’s promise of increased access to justice has a disconnect in immigration courts

By Lorelei Laird

K.T. showed up early for his immigration court hearing, but it was adjourned without him anyway.

For this hearing, K.T. did not appear at New York City’s Varick Street Immigration Court, where his case was being heard. Instead, he went to the teleconferencing room at the Orange County, New York, jail, which was holding him under a contract with Immigration and Customs Enforcement.

According to a complaint in a lawsuit filed later, the guard told K.T. at 8:30 a.m. to wait for the court to call. So he waited. And waited. And waited.

At noon, the guard called the immigration court and learned that the judge in K.T.’s case had intentionally never called. The judge had already connected the court’s one videoconferencing line to another jail and, regardless of what other hearings were scheduled, didn’t want to disconnect for fear that he would never be able to reconnect. Then the judge adjourned the case, in part, because K.T. didn’t appear by video—even though he was waiting the whole time.

K.T.’s hearing was rescheduled for April, five months after his original hearing and nine months after he was first detained. He is now one of the plaintiffs in a federal lawsuit alleging that an ICE policy of exclusively using teleconferencing at Varick Street is intended “to expedite deportations at the expense of due process.”

In fact, advocates for immigrants have argued for years that the misuse of videoconferencing could violate their due process rights. That’s even though many state courts see it as a money-saver—and in some cases, a way to increase access to the courts when travel is difficult. The most experienced state courts are already following at least some of the best practices for the use of video in courtroom proceedings, as outlined by a 2014 report from the Center for Legal & Court Technology at William & Mary Law School. But by the same metrics, the immigration courts appear to be faltering—in a way that the plaintiffs in K.T.’s lawsuit allege can affect the outcomes of the cases.

“Generally, our understanding is that this is a far less efficient system than what is sometimes available in other courts,” says Brooke Menschel, civil rights counsel for Brooklyn Defender Services and an attorney on K.T.’s case, P.L., et al., v. ICE.

The seven lead plaintiffs in P.L., a proposed class action lawsuit that seeks to include thousands of detainees with cases at Varick Street, say ICE is denying immigrants appearing at the court due process, the right to counsel and the right of access to the courts.

TECHNICAL DIFFICULTIES

Videoconferencing for immigration hearings is not unique to the Varick Street Immigration Court. It’s used throughout the national immigration court system, occasionally in some courts, but exclusively by judges at two special VTC-only “Immigration Adjudication Centers” in Falls Church, Virginia, and Fort Worth, Texas. The technology is especially likely to be used for immigrants detained in rural areas far from an immigration court.

But for immigrants in New York—where most are held in suburban or upstate jails that contract with ICE—the distance to the court is not the problem. Rather, ICE’s New York field office decided last June that it would no longer bring any immigrants to Varick Street in person.
requiring all of those people to appear via videoconferencing. The agency cited safety concerns stemming from a protest of the Trump administration’s family separation policy on June 25, 2018, which had shut down operations at the court that day. The policy was announced two days later.

The lead plaintiffs in P.L. allege that the real reason for the decision is to make it harder for immigrants to win their deportation cases.

“Since the government stopped producing people in person last June, technical failures across the board have prevented our clients from understanding what’s happening in court,” Menschel says. “Very, very regularly, the audio cuts out, and they can’t hear what’s happening.”

This is a long-standing issue in the immigration courts, according to immigration judge Ashley Tabaddor, president of the National Association of Immigration Judges. Tabaddor, who is a sitting judge in Los Angeles but emphasizes that she’s speaking in her role as a union leader, says that kind of technical problem, if not resolved quickly, can be enough to get a case postponed.

Menschel says that problem is compounded when the immigrants need a translator and poor audio quality hurts the work of the translator, especially if the translator is appearing by telephone and that signal must be piped through the videoconferencing software. Cognitive or mental health disabilities that impede communication can also be worsened by videoconferencing.

Tabaddor adds that old computers and other technical equipment can also slow cases, even if the videoconferencing works.

“For all the stars to be aligned correctly all the time is not routine,” Tabaddor says.

And immigrants also can’t necessarily see what’s happening. Menschel says, because the camera angle doesn’t change when the speaker does. If the speaker is off-screen, immigrants watching from a county jail miles away might not even realize that they’re missing something. Poor video quality can interfere with their ability to do things like show scars from mistreatment in their home country. And she says camera angles can further mislead the courtroom about the immigrants’ body language and credibility.

The distance is a problem for those represented by counsel because the lawyer is generally in the courtroom—a necessity because the same lawyer may represent multiple immigrants with hearings scheduled on the same day, even when the immigrants are held in different jails. There’s no opportunity to confer privately unless the immigration judge agrees to clear the courtroom, which the lawsuit says judges are reluctant to do because of the large and growing immigration court backlog.

According to Syracuse University’s Transactional Records Access Clearinghouse, which tracks the backlog via Freedom of Information Act requests, the backlog stands at 892,517 cases as of the end of April. It’s unclear what defense the government has raised, since the case is sealed.

ICE’s parent agency, the Department of Homeland Security, directed the ABA Journal to talk to its attorneys at the Department of Justice; the department didn’t respond.

BEST PRACTICES

The plaintiffs’ situations likely violate the best practices for the use of video in federal administrative courts laid out in the Center for Legal & Court Technology report. That report was addressed to the Administrative Conference of the United States and looked at the use of video in numerous federal administrative bodies, including the immigration courts.

Among the best practices the report outlines: Cameras should face the person speaking at all times; judges should be able to redirect cameras to achieve that; and agencies should have as much bandwidth as they can afford to ensure good quality images and sound.

The lawsuit suggests that these practices aren’t being followed in immigration courts, but similar practices are not uncommon in state courts that use videoconferencing.

Bill Raftery of the National Center for State Courts has no record of how many of the nation’s 15,000-plus state courts use videoconferencing, but he says it’s often used for preliminary matters where the cost or risk of travel is high relative to the amount of time in court.

That’s different from its use at Varick Street and other immigration courts, where full hearings are routinely conducted by video for thousands of detained immigrants across the country.

That’s come under criticism from the ABA Commission on Immigration in an update to its report on Reforming the Immigration System released in March, which says that videoconferencing raises due process concerns because the frequently poor connections make it more difficult for immigrants to argue their cases and establish credibility—potentially affecting the outcome. The report suggests using videoconferencing only for “nonsubstantive” hearings involving adults who consented to use video.

Due process concerns are echoed by two other reports submitted to the federal government. A 2017 Booz Allen Hamilton report to the Department of Justice notes that 29% of court staff said videoconferencing equipment “caused a meaningful delay” in their daily work. The report says faulty equipment “can disrupt cases to the point that due process issues may arise.” Similarly, a Government Accountability Office report from just two months later says “differences in the technical quality of VTC hearings could have an effect on the outcomes.”

That’s a point that Menschel and her co-counsel make expressly in P.L. That case was still seeking a preliminary injunction in June. But the alleged problems for detained immigrants in New York City—a class that plaintiffs estimated would include thousands if a class action is certified—likely continued.

“There are regular adjournments because of interference in the video line,” Menschel says. “We’ve seen cases adjourned multiple times because of no line or a bad connection.”

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‘Hitting His Stride’

After nearly 30 years on the court, Clarence Thomas’ supporters and detractors are still debating who he really is

By Mark Walsh

Justice Clarence Thomas is known for rarely speaking during oral arguments at the U.S. Supreme Court. But it was a chatty and jovial Thomas who appeared in the courtroom last month—several hours after the day’s court session had adjourned—for a conversation with an interviewer before members of the Supreme Court Historical Society.

“I really don’t have a lot of stress. I cause stress,” Thomas said with a laugh to financier and philanthropist David Rubenstein on June 3.

Thomas has reason to smile. With Justice Anthony M. Kennedy’s retirement last year and the confirmation of Brett M. Kavanaugh to fill his seat, the court is widely perceived as having moved to the right, where Thomas has been all along. And Thomas is now the longest-serving member of the court and the senior associate justice. (Chief Justice John G. Roberts Jr. is considered most senior because of his position, and he assigns opinions when he is in the majority.)

President Donald J. Trump has nominated many of Thomas’ former law clerks to federal judships or important positions in the executive branch, including eight to the federal courts of appeals.

And this past term, Thomas has continued to let his judicial pen do most of the talking as he wrote provocative solo opinions in areas such as abortion, freedom of the press and the right of criminal defendants to be represented by a lawyer.

“I would say he’s hitting his stride,” says Carrie Severino, a former law clerk to Thomas who is the chief counsel and policy director of the Judicial Crisis Network, a conservative group focused on court nominations. “It’s great to have someone of his stature and his ability on the court, and a real leader of the originalist wing of the court.”

RETIEMENT RUMORS

With all this going for him, could Thomas possibly be considering retiring after nearly 28 years on the court? That’s a theory that emerged this spring based on the idea that stepping down now would give Trump the opportunity to keep his seat occupied by a solid conservative for another quarter-century or more.

Thomas, who turned 71 last month, emphatically told a crowd at a Pepperdine University School of Law event in Beverly Hills, California, in late March that he was not retiring, not even in 20 years or 30 years.

At the Supreme Court Historical Society event, Thomas said his wife, Virginia Thomas, informed him of a news alert she had received that suggested he was retiring. “Wow. Glad to know that,” was Thomas’ response, he told Rubenstein. “I have no idea where this stuff comes from.”

Unless Thomas pulled off a major head fake and announced retirement plans at the end of the term (after this column went to press), he is poised to help shepherd the newly more conservative court in a rightward direction.

Thomas was active this term in filing separate opinions—often solo concurrences or dissents, but sometimes joined by new conservative colleagues such as Kavanaugh or Justice Neil M. Gorsuch, who joined the court in 2017.

In February, Thomas concurred in the court’s denial of review of a defamation case brought against Bill Cosby, the comedian and convicted sex offender. In that case, a woman who alleged she was a victim of Cosby’s was found to be a limited-purpose public figure under libel law by the district court, and the Boston-based 1st Circuit upheld. Thomas said in McKee v. Cosby that he agreed the high court should not take up that “factbound question” of whether she was a public figure.

But he went on to write 14 pages questioning a landmark Supreme Court free press decision, New York Times Co. v. Sullivan, which set a standard limiting public figures from winning libel suits unless the statements in question were made with “actual malice,” meaning with the knowledge they were false or made with reckless disregard for the truth.

“There are sound reasons to question whether either the First or Fourteenth Amendment, as originally understood, encompasses an actual-malice standard for public figures or otherwise displaces vast swathes of state defamation law,” Thomas wrote.

“I write to explain why, in an appropriate case, we should reconsider the precedents that require courts to ask” whether libel plaintiffs should be classified as public figures, he wrote. The phrase “in an appropriate case” is one Thomas uses often to invite litigants to follow up on his theories.
Also in February, Thomas dissented in a criminal procedure case, *Garza v. Idaho*, and expressed doubt about *Gideon v. Wainwright*, the court’s 1963 decision that said the Sixth Amendment requires the government to provide counsel to indigent defendants accused of serious crimes. Gorsuch joined Thomas’ dissent.

And as the issue of abortion presented itself to the court in various cases, Thomas used separate opinions to lend support to the momentum of anti-abortion forces.

The justice used his opinion concurring in the judgment in *Timbs v. Indiana*, a case about excessive fines and whether the Eighth Amendment was incorporated against the states, to (again) question substantive due process, a basis for the privacy right central to the abortion rights recognized in *Roe v. Wade* in 1973.

"Because the court’s substantive due process precedents allow the court to fashion fundamental rights without any textual constraints, it is equally unsurprising that among these precedents are some of the court’s most notoriously incorrect decisions," Thomas wrote, citing *Roe* and *Dred Scott v. Sandford*, the notorious 1857 decision that held black slaves were not U.S. citizens.

And in May, Thomas wrote a concurrence to the court’s unsigned opinion in *Box v. Planned Parenthood of Indiana and Kentucky Inc.*, which upheld a provision of Indiana law that dealt with the disposition of fetal remains but declined to review a lower court’s ruling invalidating a law barring abortion providers from carrying out the procedure for reasons of race, sex or disability.

Thomas’ 20-page concurrence compares such trait-selective abortions to the eugenics movement of the early 20th century. The opinion drew criticism from some in the legal academy.

Thomas “is welcomed to deliver sermons against eugenics but should have the decency to acknowledge that the sermon is one of constitutional morality and not of constitutional history or constitutional law,” wrote Mark Graber, a professor at the University of Maryland Francis King Carey School of Law in Baltimore, at the Balkinization blog.

**THOMAS THE ‘ENIGMA’**

Thomas will be the subject of a new book this fall and a documentary film next year. The book comes from a Thomas critic, while the film is expected to be more complimentary.

Corey Robin, who teaches political science at Brooklyn College and the City University of New York Graduate Center in New York City, has written *The Enigma of Clarence Thomas*, to be published in September by Metropolitan Books. It will argue that while Thomas has made a broad and deep imprint on the law, he has remained something of a mystery to most Americans.

“His kind of like Ralph Ellison’s *Invisible Man* on the Supreme Court,” Robin says. “Everyone seems to know about him, but they know very little about him, and what they do know is kind of wrong.”

The book will argue that “the mainspring of Justice Thomas’ jurisprudence is black nationalist conservatism,” as Robin characterizes it. The justice’s race-conscious conservatism is not just a theory, but a set of values and beliefs—as well as policies and prescriptions—that Thomas has sought to cultivate in the black community, Robin says.

The author, a progressive, uses terms such as “extreme” and “bitter” to describe Thomas, who succeeded Justice Thurgood Marshall in 1991 after his heated confirmation battle.

But Robin agrees that the justice is having a moment in which many of his long-held solo views are starting to gain traction. “For many years, he has written these solo dissents that were hardly read by anyone,” he says. “It’s like he is writing messages in a bottle. Someday, someone will find them.”

A more glowing look at Thomas is expected from a documentary in the works from Manifold Productions, which has produced several films with a conservative bent. The justice is said to be cooperating with the production of *Created Equal*, which Manifold says on its website “will tell the Clarence Thomas story truly and fully, without cover-ups or distortions.”

After Thomas’ nearly 30 years on the court, his critics and supporters are still debating who Thomas is. But the June 3 conversation in the courtroom before the historical society, Thomas mostly seemed at peace with himself and his role on the court.

“I think I am so blessed to be here, to have the opportunity to live up to my oath, to be a part of this country and ... the constitutional system in this country,” he said. “So, this is fine. My wife and I are doing fine.”
A law firm partner once advised me to “grow a thicker skin!” when networking at legal conferences. He disapproved of my quieter, one-on-one approach. I tried mirroring his extroverted, aggressive style. It didn’t work. I felt fake and awkward, annoyed and stressed. Years later, after writing The Introverted Lawyer, I finally understood why walking into a room of 300 lawyers or potential clients at a legal conference and feeling pressure to instantly forge business development connections felt daunting. The fluorescent lights, the sea of suits and the din of rapid-fire chatter seemed chaotic and not conducive to authentic conversation. I usually circled the perimeter, clutching a glass of pinot grigio, not knowing how to infiltrate this “club” to which everyone else already seemed to belong.

Last year, my entire perspective on networking changed. On the opening night of a legal conference, I attended the welcome dinner, a raucous affair in a brewery. High-powered lawyers hobnobbed near the buffet. The venue was loud, brightly lit and chock-full of gregarious extroverts. What am I doing here? I looped the rustic space, perused the appetizers, scanned nametags for conversation starters and chided myself for wanting to leave. I bumped into my co-panelist, who mouthed, “This is introvert hell.” Laughing, I responded, “Want to spend another half-hour here and then grab dinner at the hotel?” Newly emboldened as a team, we dove back in for 30 minutes, intermingling with different groups, inviting individuals to our panel and learning about other upcoming presentations that piqued our interest. We then hopped in an Uber, returned to the conference hotel and shared a wonderful dinner and vivacious conversation, solidifying a new friendship. Since that dinner, we have collaborated and cross-promoted one another’s work several times. This lasting connection sprang out of shared authenticity and vulnerability. Instead of forcing extroversion in high-pressure networking scenarios that naturally drain our energy and cause unnecessary internal conflict, introverts can be powerful connectors by recognizing and capitalizing on our inherent strengths. For naturally quiet individuals, being a good networker is not—as is often suggested—about “boosting our confidence.” We are confident. We’re good at what we do. Instead, it’s about strategically choosing circumstances that play to our gifts: impactful one-on-one connections in environments that ignite, instead of sap, our spark.

**A FEW STRATEGIES**

“Know thyself.” Socrates championed this mantra. If you are a naturally quiet lawyer, first get to “know thyself”—your personality strengths and perceived challenges. Read books on introversion and understand why highly stimulating networking environments can feel energy-sapping—instead of energy-generating as they might be for extroverts. In what types of interpersonal interaction do we thrive? One-on-one? Small groups? Attending presentations and connecting with the speakers? Sports outings? Volunteering? In what venues of interpersonal interaction do we not thrive? I do not thrive in “speed networking,” small talk, situations involving constant interruption and high-pressure “sales” scenarios. Make a list of your networking likes and dislikes.

**Identify concrete, long-term and event-specific goals.** It’s important to identify why we want to develop business: Is it because someone is telling us we have to, or is it because it’s valuable for our personal growth and professional fulfillment? Let’s own exactly what we want for ourselves. Is the goal to land one giant client now, or plant multiple seeds of connection for the future? What type of clients or cases do we want five years or 10 years from now? What types of individuals—personality, character, demeanor and values—do we want to work with in the near and distant future? For specific events, is the goal to gather piles
of business cards, or instead initiate three new potentially noteworthy relationships?

**Don your research hat.** Before networking events, identify the attendees, what their roles are, who might fit into your long-term plan and what makes these folks interesting outside the law. People love to talk about hobbies, travel, sports, families, art, music, food and adventure. It’s much easier to connect with a stranger over a mutual appreciation for Italian travel, artisanal doughnuts, Frida Kahlo or indoor rock climbing than it is to ask the individual to hire you. Have any of these potential “connectors” written anything intriguing? Most authors love to bond with “fans.” Positive feedback sparks instant connections.

**Establish boundaries.** An effective networker does not need to meet everyone, gather every business card or attend every coffee break, meal or social gathering of a full-day or multi-day event. I can be highly functioning for a couple hours of social interaction, and then I absolutely need to be far away from people to rekindle energy. Intersperse breaks into your networking schedule: a walk outside, especially to explore an unfamiliar city; a quiet half-hour in an art gallery in the middle of the day; a retreat to a peaceful hotel room; or a solo workout.

**Recruit a teammate.** Team up with a networking collaborator at an upcoming event and develop a joint plan for infiltrating conversations and navigating the room. You can split up and later regroup at a set time so you have a known end point for solo networking efforts. Develop an interesting tag line for co-introductions: “This is my friend Carlos. He’s a bankruptcy lawyer from Chicago, but he also trains in Krav Maga.” Or: “This is my colleague Prianka. She does M&A work in Orange County and just ran the D.C. Rock ‘n’ Roll Marathon.” When I don’t have a teammate for an event, I allot myself 15 minutes to ease into the space and scope out any obvious fellow introverts lurking alone. I approach them first, usually with a joke about how “I’m the worst at small talk.” If the person is responsive and open to bonding over introversion, it’s a great opportunity to develop engaging tag lines for one another and then test them out “in the field.”

**Create a role.** Task-based roles at networking events serve as automatic ice breakers. Volunteer to run the registration desk, create nametags, distribute handouts or circulate sign-in sheets. Speaking on panels is another way to participate in a networking event and showcase your creative persona through engaging slides or content. People will want to connect with you—the subject matter expert—after your presentation. Your topic is a ready-made focus for follow-up dialogue. Further, if a networking group does not exist in a subject matter area in your geographical area, create one and be the leader.

**Be you.** As a naturally quiet person who grapples with performance anxiety, I was told all my life to “fake it till I make it.” That was terrible advice. Dressing up in a suit and trying to fake extraversion made me an abysmal networker instead of a great one. Now, I wear something professional that makes me feel like me. I approach each person individually, with open and authentic engagement. People will want to connect with you—the subject matter expert—after your presentation. Your topic is a ready-made focus for follow-up dialogue. Further, if a networking group does not exist in a subject matter area in your geographical area, create one and be the leader.

Heidi K. Brown is an associate professor of law and director of legal writing at Brooklyn Law School. She is the author of The Introverted Lawyer: A Seven-Step Journey Toward Authentically Empowered Advocacy (ABA 2017) and Untangling Fear in Lawyering: A Four-Step Journey Toward Powerful Advocacy (ABA 2019).
The devil is in the details
By David L. Hudson Jr.

Special Counsel Robert Mueller's report on Russian interference in the 2016 election is filled with pages and pages of black boxes that cover up text. The four categories of redactions made by U.S. Attorney General William Barr include grand jury material, sensitive material, matters that could affect ongoing investigations and infringements on the privacy rights of peripheral third parties.

Blackouts in the Mueller report are a high-profile example of what lawyers do on a regular basis to protect client information in public documents: redact.

But sometimes lawyers or legal staff fail to properly redact information, and such failures can lead to the release of embarrassing information, civil liability or disciplinary action. Earlier this year, lawyers for President Donald Trump's former campaign chair, Paul Manafort, failed to properly redact a PDF document filed in response to an information request by Mueller.

Failing to redact documents correctly can have significant consequences. Without the investment of time and extra layers of eyes, mistakes can occur, whether technology is used or not.

“The improper use of technology to redact a document is one example that may receive less attention on tech best-practices lists,” says Jan L. Jacobowitz, director of the Professional Responsibility & Ethics Program at the University of Miami School of Law. “Yet, this seemingly mundane task becomes monumental if a lawyer produces a document on which confidential or privileged information appears to be redacted but is actually highlighted.”

Mistakes like these can lead to the waiver of the attorney-client privilege, a malpractice lawsuit or even professional discipline in egregious cases. “It has never been as important as it has been today to redact information properly because the impact and consequences are much greater,” says Dave Deppe, president of UnitedLex, a legal services outsourcing firm.

LEGAL REQUIREMENTS

The law often requires attorneys to ensure that client information is redacted. For example, the Federal Rules of Civil Procedure require attorneys to redact certain personally identifiable information in court filings. Rule 5.2(a), titled “Redacted Filings,” provides that filings can only include the last four digits of a Social Security or tax ID number, the year of an individual’s birth, a minor’s initials or the last four digits of a financial account number.

The legal challenges increase if lawyers have to comply with the privacy requirements of other countries.

When lawyers fail to properly redact information, they conceivably violate a number of provisions in the ABA Model Rules of Professional Conduct.
Conduct. If a lawyer fails to make reasonable efforts to redact privileged or other protected confidential client information, at a minimum the lawyer violates Rule 1.6 on Confidentiality of Information, explains ethics expert Leslie C. Levin, a professor at the University of Connecticut School of Law: "It's also a violation of the duty of competence under Rule 1.1. Under Rule 1.1, competent handling of a matter includes giving the required attention to a matter."

The general confidentiality provision is Rule 1.6(a), which provides that a "lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted" by a separate provision.

Rule 1.1 states that a lawyer "shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." A specific comment to Rule 1.1—Comment 8 or the technology clause—also comes into play. It provides: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." This can include understanding the variety of technology tools available to redact client information.

Another rule comes into play for lawyers who have supervisory authority over other lawyers or legal assistants. A lawyer "having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer," according to Rule 5.3(b).

"A lawyer's misstep may also implicate the rules relating to supervision of nonlawyers if the lawyer tasked a legal assistant with the redaction of documents," Jacobowitz says.

CHALLENGES LAWYERS FACE

Redacting all the necessary information is more difficult than it sounds. It requires significant attention to detail and, ideally, layers of review. Mistakes can occur because of the volume of material lawyers handle on a regular basis.

"Even when lawyers work hard to redact all privileged and other protected confidential information, it can be hard to eliminate all errors. This is especially true when lawyers are producing massive numbers of documents," Levin says.

Wrong ways to redact information include changing the font to white, blacking out with comment tools, deleting certain passages or covering text with a black marker. Perhaps an essential first step for most lawyers is to consult Adobe Acrobat Pro software's instructions on how to properly redact material from PDF files. Adobe Acrobat's X's White Paper lists a seven-step process for redaction that includes the following stages: "Scope, Document Preparation, Mark Items, Review, Apply, Remove MetaData and Save." (See also on ABAJournal.com: "How to redact a PDF and protect your clients."

"Lawyers need to think creatively about all conceivable search terms to identify privileged and other confidential material," Levin cautions. "They need well-trained lawyers to review the documents to make the determinations about whether the material should be redacted."

UnitedLex's redaction technology includes an auto-redact function that will obscure items such as Social Security numbers, dates of birth and home addresses.

But while technology can streamline the process, human participation in the process is key. "Once potentially confidential information is identified, there is no substitute for human review of the documents," Levin says. "Lawyers need to make the final judgments."
“I think about walking out of my job all the time, but I have no idea what I’d do. All I know how to be is a lawyer.”

This is something I hear frequently from the lawyers I work with. Many lawyers excelled in academics, so they just followed the list: Do well on the SAT, get into a good college, do well on the LSAT, go to law school, pass the bar, get a good law firm job and eventually make partner. They believed this path was the ticket to a comfortable, secure and happy life.

Yet, for some, checking all the boxes and being successful only leads to discontent and a feeling that there must be something more to life. Navigating a career transition is often a messy and complicated journey. Lawyers tend to strongly identify who they are with what they do. A frequent question I see lawyers struggle with is, “If I am no longer a lawyer, who am I?” They fear what others would think of them if they left the law. It’s scary to think about abandoning the incredibly difficult and long journey. They take pride in how hard it was to get to where they are.

I often see that these feelings of discontent were there for a long time. There was an inner voice that told her she didn’t really want the law firm job, but she took it anyway because she should. She struggles to find meaning and fulfillment in her work, but she can’t. The crushing billable hours and the grind of the work leaves very little time for anything more. Then one day, she looks up and realizes she’s been at this job for 11 years.

If this sounds familiar to you, here are some mindful practices that may help to guide you and make a more easeful transition.

LET GO OF ‘ALL-OR-NOTHING’ THINKING

Often, lawyers will get stuck in binary thinking. “I have to quit my BigLaw job immediately or stay forever.” Having to choose between two monumental decisions generally tends to cause anxiety. The thought loop might look something like this. I hate my job, but I can’t quit because I still owe $150,000 on my student loan. I have to pay the mortgage and my kid’s nursery school. Besides, I have no other skills, so I can’t do anything else.

Consider the possibility that there may be many alternatives that you just can’t see yet. Change the inner dialogue to: I’ve been a lawyer for a long time, so it’s going to take some time to figure out what I want to do next. I don’t have to make a decision right now. I have time to explore. In the meantime, I am grateful that I have the means and the resources to be able to figure things out.

Start to identify “all-or-nothing” thinking. Every time you catch yourself stuck in that thought loop, practice replacing it with a more helpful thought.

FOLLOW YOUR CURIOSITY

When I was going through my own career transition, the coach I was working with asked, “What do you love to do?” Confused, I asked for clarification. She asked, “Do you have hobbies? Things you do simply because they give you joy?” The answer was that I didn’t. I just didn’t have time for anything more than work and family. The idea that I could take time for myself and do something for the sheer joy of it was so foreign to me. Also, it felt self-indulgent and selfish.

Over the course of a year, with a lot of gentle nudges from her, I eventually did start to explore my curiosity. I signed up for a fiction writing class, a public speaking class, and I tried beer making. I bought a sewing machine and started sewing again. I learned how to make bread from scratch. I reached out and met people who had interesting jobs. I started taking long walks on Sunday mornings, intentionally leaving the iPhone in
the car. I started to learn and identify when I felt joy.

Eventually, when it came time to find the next job, all of these seemingly unrelated practices fell into place. I knew myself better, and I was able to easily identify those opportunities that felt right—and perhaps more important, those opportunities that weren’t meant for me.

Carve out a small chunk of time, even if it’s just 30 minutes a week, and put it on your calendar. Earmark that time to do something you enjoy. It can be reading a fiction book, writing, going to a class or going for a bike ride. Don’t worry about whether you’ll actually enjoy the activity or not. Don’t worry about whether it’s making good use of your time. Simply choose something that sparks your curiosity or something that seems like fun—and try it.

**BE GENTLE WITH YOURSELF**

You’re not bound by who you thought you should be when you were in your 20s. There was no way for you, as a 20-something, to know what you should be as a 40-something. It’s OK to change. It’s OK to take a detour.

I recommend keeping a journal to write down what you’re experiencing and to help you untangle some of the complex emotions. Notice the inner critic. What is that voice saying? How is that voice keeping you small? How is it holding you back?

One of my favorite mindfulness exercises is by Dr. Kristin Neff, who studies compassion. Set aside a bit of time, and repeat the following phrases:

May I give myself the compassion that I need.

May I learn to accept myself as I am.

May I forgive myself.

May I be strong.

May I be patient.

Finally, recognize that you may go through many careers in your lifetime, and this is OK. Give yourself the permission to course-correct. Ask yourself: What would I tell my best friend or my child if she struggled with the same issue? Have an open mind.

As the adage goes: “In the beginner’s mind there are many possibilities, but in the expert’s there are few.”

Go to jeenacho.com/wellbeing for an audio version of the compassion practice.

**Jeena Cho consults with Am Law 200 firms, focusing on strategies for stress management, resiliency training, mindfulness and meditation. She is the co-author of The Anxious Lawyer and practices bankruptcy law with her husband at the JC Law Group in San Francisco.**
On Conciseness and Clarity

An ‘interview’ with the late
British philosopher Jeremy Bentham

By Bryan A. Garner

Jeremy Bentham (1748–1832) is known as a philosopher, economist and legal theorist whose work greatly influenced 19th-century legislation. He embarked on reforming many things, including legal language. A utilitarian, Bentham detested legal jargon, which he called the “perversion of language to the purpose of securing ignorance and misconception of the law on the part of the people.” It “converts the whole field of legislation into a thicket, impenetrable to the legislator’s eye: when he does work, he works blindfold; he works at random, at the hazard of creating more mischief than he cures.”

I sat down with Bentham’s books, ready to interrogate them as part of my series of “interviews” with long-dead authors. Bentham used a heavily masculine language that was typical of his time. The replies are his words verbatim from the 11-volume Works of Jeremy Bentham (1843), edited by John Bowring.

Garner: Do you give much thought to writing style?
Bentham: In a certain sense every man has power over his own style; at any rate, whatsoever be the language which he employs, his style is such as he has made it.

Garner: Yes, but what style is most desirable?
Bentham: To know what are the properties desirable in a language is ... to know the properties desirable in the sum of the discourses used by all those several individuals on all the different purposes and occasions taken together, for and on which they can have need to use the language. Some properties will be alike desirable, or at any rate desirable to all purposes and on all occasions without distinction.

Garner: But conciseness is surely desirable, right?
Bentham: The greater the number is of the words that are employed in the expression of a given import, the less clear is the discourse which they compose.

Garner: How do you define conciseness?
Bentham: The conciseness of an expression is inversely as the number of words employed in the conveyance of the idea intended to be conveyed by it.

Garner: Are you pulling my leg? Conciseness does lead to clarity, doesn’t it?
Bentham: To a certain degree conciseness is contributory to clearness; that is to say, the want of it is contributory to the absence of, or is opposite to, clearness—is contributory, at any rate, to obscurity, and it may be to ambiguity.

Garner: I’ve read your work as being critical of those who use imprecise words or simply wrong words.
Bentham: In proportion to the degree to which a man’s discourse is seen to be defaced by these imperfections is the degree of weakness under which his mind is seen to labor.

Garner: You’ve written a fair amount about speech. You’re critical of those who are underprepared for speaking.
Bentham: Fumbling is the natural result, and by that means a symptom, of want of preparation. ... In every spoken discourse, in general, want of adequate preparation is much more apt to be unavoidable than in any written discourse. In a spoken discourse, laxity and fumbling are accordingly more excusable and less offensive than in a written discourse.

Garner: You’ve written a good deal about legislators. What are your views about them?
Bentham: The science of legislation is still in its cradle—it has scarcely been begun to be formed in the cabinets of philosophers: Among legislators in name, scarcely any other practice can be found than that of children, who in their prattle copy what they have learned of their nurses. That a science may be learned, a motive is necessary; that the science of legislation may be learned, or rather may be created, motives so much the more powerful are necessary, as this science is most repulsive and thorny. For the pursuit of this study, an ardent and persevering mind is required, which can scarcely be expected to be formed in the lap of ease, of luxury and of wealth. Among those whose wants have been forestalled from their cradle—among those who become legislators to gratify their vanity or relieve their ennui—there can scarcely be found one who could be called a legislator without mockery.

Garner: What makes for good legislation?
Bentham: The end and aim of a legislator should be the happiness of the people. In matters of legislation, general utility should be his guiding principle. The science of legislation consists, therefore, in determining what makes for the good of the particular community whose interests are at stake, while its art consists in contriving some means of realization.

Garner: But you don’t seem to like the state of legislation.
Bentham: Confusion ... pervades the substance of the several statutes.
Garner: Drafting clear legislation is difficult. You’ve sometimes suggested that statutes are purposefully unclear.

Bentham: Words being heaped together at so much a dozen, the consequence is alike necessary and obvious. In this case, too, lest the virtues of tautology and surplussage should not be sufficient, the aid of disorder, and a religious exclusion of those helps to elucidation with which no other species of composition is unprovided, have been called in and carefully preserved.

Garner: Many of your objections are about the hopelessness of voluminously scattered statutes, aren’t they?

Bentham: The more bulky and obscure the subject matter, the more urgent the need which, in its struggles with the difficulties of the subject, the mind has of ... apt arrangement.

Garner: Is apt arrangement what you mean by the phrase “rule of distribution”?

Bentham: The rule is: let the whole mass of legislative matter be broken down into parts, carved out in such sort, that in hand, and thence in mind, each man may receive that portion in which he has a personal and peculiar concern, apart from all matter in which he has no concern.

Garner: You favor readability for the sake of efficiency, don’t you?

Bentham: So grievous is the charge imposed upon a man’s faculties, pecuniary and mental together—so grievous, in many cases is it capable of being, ... that the reducing of it to its minimum is a duty.

Garner: What do you think about the argument that verbose legal language is precise?

Bentham: For this redundancy—for the accumulation of excrementitious matter ...

Garner: Excrementitious?

Bentham: Excrementitious matter in all its various shapes, in all that variety of forms that have been passing under review—for all the pestilential effects that cannot but be produced by this so enormous a load of literary garbage—the plea commonly pleaded—at any rate, the only plea that would or could be pleaded ... is that it is necessary to precision.

Garner: You’re not buying it?

Bentham: A more absolutely sham plea never was countenanced, or so much as pleaded, in either King’s Bench or Common Pleas.

Garner: You dislike impenetrably dense type, don’t you?

Bentham: Denominate, enumerate and tabulate. It facilitates reference and thereby, contributes to conciseness.

Garner: Legal drafters need a good numbering system ...

Bentham: Break a law down into parts, and affix a different number to each part.

Garner: You’ve also been critical of lawyers’ pleadings, haven’t you?

Bentham: Pleadings ... [are] expressions imperfectly and discordantly understood by lawyers themselves, rendered completely and manifestly unintelligible to everybody else.

Garner: You really do despise legal jargon, don’t you?

Bentham: By the heaps of filth, moral and intellectual, of which legal jargon is composed, it becomes a perpetual source of disgust, and serves as a perpetual repellent to the eye of scrutiny.

Mr. Bentham combined passion with a penetrating intellect and a sometimes-caustic writing style. Much of what he wrote in the late 1700s and early 1800s is as searing today as it was then. But then, I’ve given you highlights: There are long, dreary passages as well.

A tidbit of no particular relevance here: Shortly before his death, Bentham made a will requesting that his head be severed from his body and preserved in the style of the Maori—native New Zealanders. Bentham wanted to create an “auto-icon” so his preserved body could be wheeled out at parties if friends missed him. In 1850, his body was acquired by University College London, and it has had a storied existence.

Bryan A. Garner is president of LawProse Inc., editor in chief of Black’s Law Dictionary (available this year in an expensively remade 11th edition), and author of the soon-to-be released Garner’s Guidelines on Drafting and Editing Contracts. Twitter: @bryanagarner.
Attend the most popular CLE seminar of all time. More than 200,000 people—including lawyers, judges, law clerks, and paralegals—have benefited since the early 1990s. You’ll learn the keys to professional writing and acquire no-nonsense techniques to make your letters, memos, and briefs more powerful.

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www.lawprose.org
Apps and services promising to make divorce easier and cheaper have grown in popularity—but do they deliver?

By Danielle Braff

Parvin Lilley, a caregiver for seniors in Concord, California, tried to file her own papers for her divorce twice. She was rejected—twice.

Lacking the money to hire a divorce attorney, Lilley didn’t think she had any options remaining. Then she discovered Hello Divorce, an online platform for divorce in California with flat fees, such as $500 per month to prepare and file forms. “After just one round of going through their questions and following the Divorce Navigator, my divorce was processed,” she says. “I wish I had used Hello Divorce sooner.”

Divorces can drag on for months if not years—and the attorney fees rack up quickly. So it’s no surprise that automated, DIY and flat-fee divorce services have popped up in recent years. Companies including Divorceify, Hello Divorce and Wevorce purport to simplify the process by using tech to automate document production; providing resources for custodial issues, financial planning and housing; and offering counseling and hand-holding.

“As technology progresses, more and more companies are providing consumers with do-it-yourself options when it comes to things like divorces, estate planning or business formation,” says Marie Oates, a partner at The Hive Law in Atlanta. “With this, people are able to opt out of paying attorney fees and be more in control.”

For example, Hello Divorce was launched in 2017 as part of a law firm, and it offered instructional videos, DIY templates, legal coaching and paralegal help. In 2019, Hello
Divorce became a nonlaw corporation that offers free tools and resources, a DIY divorce through templates and videos and access to legal coaches who can answer questions and review documents. If users want or need legal coaching, they can access, purchase and schedule time with a lawyer through the platform. That lawyer then works within the Hello Divorce platform so the user doesn’t have to start over with intake with a new lawyer or service.

All fees—whether subscription-based or fixed-rate—average a total of about $1,500 on Hello Divorce, and 90% of its paid users complete the divorce via the platform or services.

On the flip side, traditional divorce attorney fees can range from $100 to $450 per hour, with an average of $275 per hour, according to Divorce magazine. The actual divorce can range greatly in pricing, from about $8,000 to more than $130,000 depending on its complexity.

FROM FREE TO PAID USERS

“Sometimes, couples will work with a mediator to resolve one or two issues, but then they return to Hello Divorce to prepare and process paperwork,” says Erin Levine, the Oakland, California-based owner of Levine Family Group, and CEO and founder of Hello Divorce.

Hello Divorce has only had about 1,000 users and just over 100 paid users, though they say that they’re gaining users every month. “Most of our users are free users, but many convert to paying customers,” says Levine, who notes that from mid-April to mid-May, the platform had approximately 100 sign-ups with 29 becoming paying customers.

At Divorceify, clients fill out a form before being matched to vetted pros from the company’s network. Each professional offers services ranging from mediation to litigation—ideally, the client wouldn’t pay for anything more than they need. Divorceify also offers resources and clickable tools such as budget worksheets, pet custody planning and parenting calendars.

Ariella Deutsch, an associate at Goldweber Epstein, is one of the divorce attorneys in New York City who works with Divorceify.

She says Divorceify gives prospective clients information about an attorney’s pricing and practice style that they would not otherwise have without a paid consultation.

“By laying out the options, Divorceify encourages people to think more deeply about how they want their divorce to go, how much they’re willing to pay to fight and what qualities they are most looking for in an attorney,” Deutsch says.

These automated divorce companies are, at best, modern versions of the attorney referral service, says Peter Walzer, president of the American Academy of Matrimonial Lawyers and founding partner of Walzer Melcher family law firm in Los Angeles. Their services generally meet the needs of lower-income consumers who phone an operator to get the names of attorneys—and these companies match them with attorneys who pay to be listed.

“A consumer is not necessarily getting the most qualified attorney or an expert in the field,” Walzer says. “They are getting a list produced by an algorithm that matches them to attorneys.”

But do these divorce services work? And how are they changing the divorce paradigm?

When a divorce is simple: no children, agreement on assets,

Continued on page 34
The Access to Justice Gap is a Product-Market Fit Problem
By Jack Newton

Something that hasn’t been talked about nearly enough in the legal industry is the data from the World Justice Project (WJP)’s 2018 report, “Global Insights on Access to Justice.” The document features survey research that looked at legal needs and dispute resolutions in 45 countries. According to the report, 48% of those surveyed in the US experienced a legal issue in the last two years—47% of which still had their issue unresolved.¹

What’s most striking is that 77% of those facing a legal problem did not turn to an authority or a third party for help. Yet we see lawyers struggle to find clients to sustain their businesses.

When over three-quarters of legal problems don’t receive legal assistance, it’s clear that something in the system is broken. Legal problems can profoundly inhibit access to economic opportunities and undermine human growth potential—a view maintained by the Organisation for Economic Co-operation and Development and endorsed by the United Nations.

Traditionally, the problem has been looked at as an issue of affordability. But when we look at the issue through a business lens, it becomes more actionable through a broader range of solutions.

As a business problem, the access to justice gap becomes an issue of product-market fit: there is a clear and overwhelming demand for legal services—we just haven’t found a way to satisfy that demand.

When there’s such high demand not being addressed by the status quo—which is what we see when 77% of people don’t seek help for their legal problem—this is what’s known as latent demand, and it indicates an industry is ripe for innovation, and failing that, disruption.

We’ve seen it already in other industries. Take companies like Netflix, Uber, AirBnB, and Amazon. The prevailing myth is that these companies achieved meteoric success by cannibalizing their incumbents. The reality is that these companies built their success by tapping demand previously unserviced in their respective industries and grew their total markets.

With $16 billion in revenues in 2018, Netflix has far surpassed the market dominance of Blockbuster, which earned $6 billion in annual revenue at its peak.² Netflix made it easier to consume visual media than ever before, substantially increasing the total viewership for television and movies.

Similarly, the data shows that finding new ways to deliver traditional services has a profound effect on overall market growth: rideshare services like Uber have increased the overall usage of private transportation services; AirBnB has increased the amount people travel; and e-readers based on Amazon’s Kindle products have increased reading consumption.³

What’s the opportunity in legal? According to the US Census data, Americans spent $246 billion on lawyers in 2012 ($261 billion if you count what was spent on legal services beyond those provided by law firms).⁴ Now consider the justice gap discussed earlier—or the product-market fit problem. If 77% of legal problems don’t receive legal help, consider what the potential market for legal services could be if these needs were met.

How should lawyers tap that latent demand? To start, the likes of Netflix, Uber, AirBnB, and Amazon built their success on being relentlessly obsessed with the needs of their customers.

I’ve written previously on client satisfaction at law firms and how many lawyers don’t take the time to collect regular feedback. At Clio, for more than a decade, we’ve built our company based on the practice of listening to customers and learning how we can improve our technology for lawyers. If you listen to what people say, you get a richer understanding of how to better meet the needs of your next potential client.

For any law firm looking to tap new markets and develop new sources for clients, start by asking: what makes you an obvious choice for prospective clients?

¹ https://worldjusticeproject.org/law-work/wpj-rule-law-index/special-reports/global-insights-access-justice
² https://www.macrotrends.net/stocks/charts/NFLX/netflix/revenue
⁸ https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk
(2012 NAICS code 54111, Offices of lawyers, Establishments subject to federal income tax, all establishments)
etc.—then there may be no reason to contact a divorce attorney, says Lisa Marie Bustos, of Bustos Family Law in Austin, Texas. In fact, Bustos says, sometimes a potential client’s case is relatively simple, and the cost of going to a divorce attorney outweighs the benefits.

“Most of the time, clients who agree on every aspect of a case won’t even call a divorce attorney,” Bustos says. “Instead, they’ll use free public forms to complete the process.”

**IT CAN GET COMPLICATED**

The key: These services should only be used for an uncontested divorce, says Richard Hathaway of the Hathaway Law Group in Omaha, Nebraska. A traditional divorce attorney is able to identify the ideal method for each couple, which can range from negotiation, mediation, collaboration or litigation—and an app is not equipped to do this, Hathaway says. Those fearing high legal fees who already understand how they want to divide everything may be able to go this route to save money, however.

But, Hathaway says, it’s not always as simple or as inexpensive as it originally appears.

“Many apps are self-directed, or you incur additional fees if you need guidance from a paralegal or contract attorney within the app’s network,” Hathaway says. “This sometimes leads to wasted fees, because after paying for and becoming frustrated with the application, the person then decides to hire a local divorce attorney.”

Unless your divorce is uncontested and you have already divided your property, determined what parenting plan works best for you and your children and resolved any other issue you may have, you may be disappointed with a one-size-fits-all model, he says.

Another issue with the automated divorce services is that some couples may believe that their divorce will be simple—but they don’t anticipate everything that should be addressed and negotiated, such as distribution of retirement assets, debt, appropriate amounts of support and more.

“Certainly, free divorce software may sound tempting to some, but there is far more entailed than filling out paperwork,” says Galit Moskowitz, family law attorney with Moskowitz Law Group in New Jersey. “At the end of the day, many people learn the hard way that it is more cost-effective and beneficial to retain a skilled attorney to guide them through uncharted territories.”

The attorney would ask key questions such as: Do you have terms to refinance the home so that it’s in the sole owner’s name? Are property taxes paid up? If not, who is going to pay them? Do the titles properly transfer the house?

“You would be surprised at how many self-made divorce decrees I’ve seen that award a home to a spouse, but deeds were never executed and transferred to the home,” Bustos says.

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**Bar Talk**

#AppellateTwitter gives appellate lawyers a chance to chat, help one another and even develop business

By Richard Acello

#AppellateTwitter may not be quite as convivial as the bar “where everybody knows your name,” but members of the appellate bar like to gather at the online Twitter community just the same.

There’s almost nothing that can’t be discussed on #AppellateTwitter, it’s open 24/7, and lawyers can visit in their bathrobe or gym shorts. For members of a legal discipline who often keep long hours away from their colleagues, it’s a break in the day and an opportunity to communicate with others in their shoes.

The group traces its history to a 2016 tweet from Raffi Melkonian, an appellate partner at Wright Close & Barger in Houston. “#AppellateTwitter is having a DC powwow. We provincials will watch from afar,” he wrote on June 8, 2016.

“Appellate is kind of a solo enterprise,” he says. “I joined Twitter specifically looking for appellate people. I wanted to find other practitioners I could talk to, and it worked out.”

The hashtag caught on and has become a community for appellate lawyers looking for help, information or friendship. In recent months, lawyers have taken to #AppellateTwitter to seek help with the rules for amicus briefs in Minnesota state court, post orders of the Texas Supreme Court, discuss getting chastised by a judge, post employment opportunities and catch up with colleagues who have been too busy to post. “I never anticipated there would be a lot of people who would like to meet up and didn’t anticipate that judges would participate, and that’s also been a great thing,” Melkonian says.

“I get excited when I see a new post,” says Chad Ruback, a Dallas-based appellate lawyer who has been solo for the last 14 years. “#AppellateTwitter is a 21st-century version of lawyers mentoring each other.” —Chad Ruback

“#AppellateTwitter is a 21st-century version of lawyers mentoring each other.”

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**Business of Law**

Continued from page 32

**Social Media**

"#AppellateTwitter" is a 21st-century version of lawyers mentoring each other.”

—Chad Ruback
the hall or the lawyer across town, except you are not limited by geography, so a New York City lawyer can talk to a lawyer in rural Kansas."

Ruback has served as president of the approximately 3,000-member Dallas Association of Young Lawyers and on the board of directors of the over 11,000-member Dallas Bar Association, so he's accustomed to being in the public eye. But the appellate practice can be “isolating,” he says.

#AppellateTwitter member Kristen Vander-Plas, the sole appellate attorney at Davidson Sheen in Lubbock, Texas, says her business has benefited from being visible on #AppellateTwitter. “I can think of five or six cases sent to me by other appellate lawyers that I never would have known about otherwise,” says Vander-Plas, who gets a lot of her appellate-related news from the community.

Samuel Berbano, a federal client manager with Thomson Reuters in Washington, D.C., who trains workers in government agencies to use the company’s legal research tools, says Twitter can be helpful in finding out what research tools people like or would be interested in. "On #AppellateTwitter, people will offer unsolicited feedback about legal research questions, or they’ll say, ‘I wish there was something that did this,’ ” Berbano says. “So it’s great from a customer service perspective.”

In addition to using the hashtag to keep up on appellate attorney meetups in Washington, Berbano says he likes to “keep up and stay aware of what people are talking about and to communicate with people that I wouldn’t have a chance to meet other than on Twitter.”

Likewise, Sean Marotta, a partner in the Appellate Practice Group at Hogan Lovells in Washington, D.C., appreciates the ability to meet with his fellow practitioners. However, he cautions that "you shouldn’t take advice from anyone on the internet unless they are your attorney.”

Ruback agrees, emphasizing: “It’s important when you are posting on #AppellateTwitter not to betray any client confidences. You wouldn’t want to say anything that could get you in trouble with the state bar, so don’t say anything on Twitter that you wouldn’t say at a state bar luncheon—be judicious. Just because you’re sitting in your pajamas at 11 o’clock, you’re not absolved of your duty of care.”
Business of Law

All for One, One for All
Fed up with pay inequities and the ‘boys club’ mentality, a San Diego lawyer launched an all-female, all-partner virtual firm

By John Roemer

The fledgling virtual firm Vanst Law in San Diego has no office, no break room and no conference room of its own—so the partners get creative about finding ways to stay collegial.

“Our firm culture is extremely important to us. We can’t meet at the watercooler, but isolation isn’t a problem,” says founder and CEO Cynthia Morgan-Reed.

Instead, the five women who currently comprise the partnership roster make a point of assembling at local events. There are meetings of the Lawyers Club of San Diego, an all-female bar association. There’s Equality California’s annual awards dinner, where one of the partners hosts a table. When the firm onboards a new partner, as it has every other month or so since Morgan-Reed opened the virtual doors in September 2018, members gather for a welcome session, sometimes at Enrich, a coworking space for solo and small-firm lawyers.

Morgan-Reed planned it that way when she transitioned from her solo practice last year. Earlier, she had spent 12 years in traditional firms not her own, and she was fed up with the pay disparities, the structural rigidities and the misogyny, she says. Why the name? “Vanst” is a mashup of the first letters of Morgan-Reed’s children’s names, Vaughn and Stella, with an “n” in the middle for “and.” Plus, it sounds like “advanced,” Morgan-Reed points out.

Indeed, one of her goals was to create an innovative, forward-thinking firm. So she created a software-connected work-from-home firm where everyone’s a partner and all receive 70% of what they collect on their own clients. Thirty percent goes to overhead and compensation for Morgan-Reed and her chief operating officer, tax attorney Allison Soares. New partners must arrive with a $250,000 book of business, but once at the firm, they can set their own rates and monthly schedules. As Morgan-Reed puts it on the firm’s website, there are “no long commutes to an office, no face time, no office politics. We lower our carbon footprint and increase our impact.” The cost savings can be passed on to the client through lower billable rates, she adds.

Partners themselves handle most back-office duties. “They may charge a lower rate or a flat rate for associate-level work,” Morgan-Reed says. “They are also free to hire paralegals or contract attorneys to assist. We leave it to their discretion; they know their needs best.”

The firm’s civil litigator, Jacqueline Vinaccia, uses a paralegal. Morgan-Reed says she’s hiring a planner as an independent contractor to help with her land use work. The firm has an administrator, and the individual partners hire her as each needs help, Morgan-Reed says.

“There’s no black box. We are transparent with our formulas,” Morgan-Reed says. “Our philosophy is based on community and support. We won’t fight over how much each gets of the pie. We don’t want sharp elbows. We’ll just make more pie.”

Law firm strategist Kent Zimmermann of the Zeughauser Group consultancy says a drawback to virtual firms is that they lack the breadth and depth that raise the profiles of traditional firms. He points out that traditional firms also tend to have robust internal...
referral networks. “Virtual firms seem like a compromise between going solo and going to traditional firms,” he says. “What’s the benefit of keeping 70% of your collections instead of keeping all your earnings? I’m a little skeptical. Why not hang out your own shingle and be friends with other lawyers?”

‘PYRAMID SCHEMES’

Morgan-Reed is happy to be out of the conventional law firm system. “Those firms had a culture that a lot of women and men experience with frustration,” she says. “The good old boys are at the top—the equity partners who make all the money but don’t reflect the demographics of their firm. The income partners are in the middle, and the minions slave at the bottom. These are pyramid schemes. I spoke with my feet and left, like a lot of women choose to do.”

In Philadelphia, commercial litigator Nicole Galli founded Women Owned Law in 2016 “to advance women legal entrepreneurs.” According to her, the group has grown to about 200 members in the East, Midwest and South.

“Opening a business is never for the faint of heart, but actually, being a woman opening a firm can be a plus,” Galli says. “You’re not dealing with all the implicit biases. And you get paid what you should.”

Nicole Auerbach, a Chicago lawyer and a veteran of big law firms, agrees. Auerbach, a founder of Valorem Law Group, teamed with Patrick Lamb last year to open ElevateNext, a four-lawyer majority woman-owned firm spun off from law services consultant Elevate. “It’s good marketing to say majority woman-owned, it’s a nice differentiator,” Auerbach says. “It used to be not so commonplace. You felt you needed a man’s name on a firm. No longer.”

Morgan-Reed says she could have remained a solo, busy with the land use and real estate practice she had established. “But I kept hearing the same stories from colleagues and associates at local firms about how they feel disrespected. I heard it all the time: ‘I’m not valued here,’ ” she says. “So I decided to create a model disrupter. I decided to take that pyramid and flatten it. I decided to create a lateral daisy chain, an all-partner firm.”

For the time being, the firm is still all-woman, but Morgan-Reed says she is interviewing men as well. “It would be truly ironic for me to discriminate against men,” she says. “We’d welcome them.”
For lawyers, being mocked or even attacked in pop culture goes with the territory. Between William Shakespeare’s famous line about killing lawyers to the many, many movies and shows portraying lawyers as sleazy, unethical or downright evil, it seems as if lawyers rank somewhere between used-car salesmen and the devil on the scale of likability.

So it may be surprising to learn that, comparatively, there don’t seem to be nearly as many songs about hating lawyers. Perhaps it’s because behind every successful musician stands an army of top lawyers and law firms ready to spring into action. Whether it’s filing suit to get out of a bad record contract, defending against plagiarism accusations or even appearing at arraignments to argue for bail, musicians have long realized that they need to have their attorneys on speed dial. There’s little to be gained by alienating or attacking them in song.

Occasionally, a band or artist will be involved in a lawsuit so groundbreaking and important that it will set a precedent—either one that’s enshrined in the law that can be followed by everyone, or one that is less official but nevertheless binds future generations. Here are some of the songs or albums that helped move the law.
Copyright Law: Plagiarism

Always known as the "Quiet Beatle," George Harrison tried to dispel that notion by releasing "All Things Must Pass," a highly acclaimed and popular triple album, in 1970—the same year the Beatles officially broke up. "My Sweet Lord," a light, breezy tune with an overt religious theme that was the biggest hit from the album, became the subject of intense litigation for more than 20 years that ended up establishing precedents in multiple areas of the law.

In 1971, Bright Tunes Music Corp., which held the copyright on the Chiffons' 1963 hit "He's So Fine," sued Harrison's publishing company, Harrisongs Music Ltd., for plagiarism. Bright Tunes alleged that "My Sweet Lord" copied the melody and song structure of "He's So Fine," while Harrison claimed that the song had come to him organically.

During litigation, Harrison admitted he had known of the Chiffons' song, but denied that it had influenced him. Harrison turned to his lawyer, famed music attorney David Braun of Hardee, Barovick, Konecky & Braun, for help. "He impressed me as a very down-to-earth guy," says Joe Santora, head of litigation at Braun's firm who ended up trying the case. "I found that amazing, considering his experience making all those millions of dollars and being chased by all those women. How can anyone keep a level head after that?"

Harrison testified on his own behalf and even brought his guitar to court to show how he had composed "My Sweet Lord." Santora recalls the New York courtroom being packed to the rafters as if it were Yankee Stadium. "George's testimony was perfect," Santora says. "It saved him. It kept the judge from calling him guilty on intentional infringement." Instead, Harrison was found liable for subconsciously infringing the Chiffons, which lowered his damages considerably.

The court awarded $1.6 million to Bright Tunes. However, before Harrison could pay, his former manager, Allen Klein, switched sides, bought the rights to "He's So Fine" and continued the case against his former charge. "I pointed out that this could be the one time in history where the same person drew up the complaint and response in the same case," Santora says. Citing his manager's breach of fiduciary duty and conflict of interest, the court knocked damages down to $587,000. Further squabbling over this figure meant the case would not be resolved until 1998—three years before Harrison's death.

By finding Harrison liable for subconscious plagiarism, the long-running case significantly expanded the scope of copyright infringement law. Harrison's legal woes also established a precedent whereby anytime there's a whiff of similarity, musicians and publishers will try and appease the copyright holders by giving them co-writing credit or a share of the royalties. It's a phenomenon that could become even more widespread thanks to lawsuits involving Robin Thicke's 2013 hit "Blurred Lines" and Led Zeppelin's classic "Stairway to Heaven."

In the former, a jury ruled in 2015 that Thicke and co-writer Pharrell Williams plagiarized Marvin Gaye's "Got to Give It Up." Thicke and Williams admitted to being influenced by Gaye's vibe and style, but argued there were enough differences between the songs (they were in different keys, the chord progressions were different) so it wasn't plagiarism but an homage. After losing before the San Francisco-based 9th U.S. Circuit Court of Appeals, the parties settled out of court. "There's no guidance available," says Howard King, partner at King, Holmes, Paterno & Soriano, who represented Williams and Thicke. "There's no definitive way to determine whether or not a song will later be found to have copied another one."

As for Zeppelin, a federal jury in 2016 cleared the band of plagiarizing "Taurus," a song by the 1960s band Spirit. However, a three-judge panel for the 9th Circuit reversed the verdict, finding that the trial judge should have advised the jury that, while individual chords, notes and scales cannot be copyrighted, a combination of them could qualify as original and deserving of protection under the law. In June, the 9th Circuit agreed to hear the case en banc.
Known for its sexually charged lyrics, album covers, performances and, well, pretty much everything, 2 Live Crew became the most infamous band in America in 1989 when it released its magnum opus, *As Nasty As They Wanna Be*. Anti-obscenity activist Jack Thompson (an attorney who was later disbarred in 2008) instigated an investigation into the album in the hopes of getting it pulled from record stores. About a year after the album’s release, his efforts bore fruit after police obtained an order from Broward County (Florida) Circuit Judge Mel Grossman declaring the album to be obscene.

The band decided to fight back and hired Bruce Rogow, a famed litigator who had made his bones defending civil rights activists in Mississippi and other states in the 1960s. According to Rogow, he told the band he intended to file a petition for declaratory judgment with the U.S. District Court for the Southern District of Florida that the album was not obscene. When band leader Luther Campbell asked if they could win, Rogow’s response was straightforward. “I told him that even if we lost he would win, to which he asked, ‘What kind of jive white man talk is that?’” Rogow recalls. “I explained that if the record was declared obscene in federal court here, everyone would want it.”

Indeed, the album ended up going platinum. However, Campbell and his cohorts found themselves in legal jeopardy after Judge Jose Gonzalez declared the album to be obscene in June 1990. Days later, members of the band were arrested for performing songs from the now-banned album in a club. Rogow got them acquitted in October 1990. Two years later, the Atlanta-based 11th U.S. Circuit Court of Appeals overturned Gonzalez’s order. Campbell and company weren’t done. To appease some of its critics, the band had released a “clean” version of the album that removed the explicit lyrics. The band added a newly recorded song, a parody of Roy Orbison’s classic “Oh, Pretty Woman.” This new song drew the ire of Orbison’s estate, which sued for copyright infringement.

“The main legal issue was the scope of the fair use doctrine,” says Alan Turk, a Nashville attorney who represented 2 Live Crew in federal court in Tennessee and in the Cincinnati-based 6th U.S. Circuit Court of Appeals. “According to the 1976 Copyright Act, certain types of work can take from the original, and one of them was parody. That was the main focus—whether or not this was a parody.” Turk prevailed before the trial court, only to lose on appeal. The 6th Circuit had held fair use was presumed not to apply to the 2 Live Crew version because of its commercial nature. According to Turk, the result sent chills up the spines of professional parodists such as Lorne Michaels, creator of *Saturday Night Live*, and *MAD* magazine. “I called Lorne Michaels after the [6th Circuit] issued its opinion,” Turk says. “I told him to get his lawyers ready.”

When the case reached the U.S. Supreme Court, Rogow took over and secured a unanimous opinion holding that fair use could apply to commercial parodies. While Turk admits he was hurt that he didn’t get to argue the case, he was proud to be a part of its history. “There wouldn’t be *Family Guy*, *South Park*—certainly no impersonations of Donald Trump on *SNL*,” Turk says. “This is still the leading case in the area of fair use and parody.”
Attorney Fees

There are breakups, there are bad breakups, and then there’s Creedence Clearwater Revival. One of the seminal bands of the late 1960s and early 1970s, Creedence melted down amid a flurry of recriminations, accusations and, eventually, litigation. In order to go solo and escape Fantasy Records, a label he had come to despise, lead singer and primary songwriter John Fogerty signed over his rights to the Creedence catalog to label head Saul Zaentz.

Fogerty mounted a comeback in 1985 with the hit album *Centerfield*. The album caught the attention of his old label, which complained that the lead single, “The Old Man Down the Road,” sounded too much like the Creedence song “Run Through the Jungle” (Fogerty had written both songs). The label, which owned the copyright for the CCR song, sued Fogerty for plagiarism—effectively sounding like himself. Fogerty prevailed at trial and subsequently moved for attorney fees pursuant to the 1976 Copyright Act. The U.S. District Court for the Northern District of California ruled against him, finding Fogerty had not proven that Fantasy had brought the suit in bad faith as required by the statute. The 9th Circuit affirmed, and the U.S. Supreme Court agreed to hear the case. "I told John if the Supreme Court granted cert, then that means they’ll change the law," says Kenneth Sidle, Fogerty’s lawyer and a partner at Gipson Hoffman & Pancione. Sidle pointed out that the rule was illogical—Fogerty could have recovered had he been the plaintiff for plagiarism—effectively sounding like himself.

Fogerty prevailed at trial and subsequently moved for attorney fees pursuant to the 1976 Copyright Act. The U.S. District Court for the Northern District of California ruled against him, finding Fogerty had not proven that Fantasy had brought the suit in bad faith as required by the statute. The 9th Circuit affirmed, and the U.S. Supreme Court agreed to hear the case. "I told John if the Supreme Court granted cert, then that means they’ll change the law," says Kenneth Sidle, Fogerty’s lawyer and a partner at Gipson Hoffman & Pancione. Sidle pointed out that the rule was illogical—Fogerty could have recovered had he been the plaintiff for plagiarism—effectively sounding like himself.

Copyright Termination

Detailed figures are not available, but it’s a safe bet to assume that the Village People’s 1978 disco classic “Y.M.C.A.” brings in tons of royalty revenue every year. In fact, it’s probably playing right now at a stadium, arena, dance club or wedding somewhere in the world.

So there was a lot of money at stake when the group’s lead singer, Victor Willis (the cop), sued to terminate the copyright on his signature song. As a young artist, Willis had signed over his copyrights for the song and several other Village People hits. Under the 1976 Copyright Act, artists can terminate transfers of copyrights after 35 years with the rights then reverting back to the original songwriter.

The publishers, Scorpio Music and its administrator in the U.S., Can’t Stop Productions, countered that because Willis had co-written the song with two others (a subsequent jury found that one person originally credited as a co-writer, French producer Henri Belolo, was not involved with the writing process, resulting in the songwriting credits being assigned solely to Willis and producer Jacques Morali), a majority of them had to agree to terminate the copyright transfer. Willis, however, argued he could terminate his share, receiving back his 50% of the song.

In 2012, the U.S. District Court for the Southern District of California ruled for Willis. “The public policy behind it is that when a creator creates copyrightable subject matter and conveys it, 1) they don’t know the true value of what they convey because it hasn’t been commercially exploited yet and 2) they’re often young and naive and taken advantage of,” says Brian Caplan, Willis’ attorney.

Other artists, such as Bob Dylan, Paul McCartney and Duran Duran, have already filed to reclaim publishing rights to some of their songs. "I think the Willis lawsuit really opened songwriters’ eyes to the rights they have," Caplan says.
Sometimes it pays to be a fan of all sorts of music. Evan Cohen of Los Angeles was a fan of New York-based hip-hop group De La Soul and had bought its 1989 debut album, *3 Feet High and Rising*, right after its release. “I had the cassette tape and was listening to the album with my friend, who knew more about ‘60s music than I did,” Cohen recalls. “All of a sudden [the De La Soul track] ‘ Transmitting Live From Mars’ comes up. She says: ‘You know that’s the Turtles, don’t you?’ ”

A lawyer in a firm with his father, who represented the Turtles, Cohen was stunned. After rushing back to the office, he realized that De La Soul had used an unauthorized sample of the Turtles’ 1968 recording of “You Showed Me,” a song originally co-written by Jim (later “Roger”) McGuinn and Gene Clark of the Byrds.

The sampling phenomenon was relatively new at that point, but hip-hop acts were already using samples liberally. The Beastie Boys, for instance, had an entire album full of layers and layers of samples mixed together. “There was no standardized way of dealing with sampling,” Cohen recalls. “Record companies and artists took the position that they didn’t know if it was illegal and that it might be fair use. Not where I come from. It’s infringement to use any part of a sound recording.”

Cohen filed suit against De La Soul and its record label, Tommy Boy Records. The parties ultimately settled out of court but not before establishing a precedent that artists and labels will obtain permission and pay for samples before using them on a new recording. Now, there are companies whose main purpose is to obtain copyright clearance for samples. “It’s almost unfathomable to remember back to a time before this when people didn’t care about clearing samples—they just did it,” Cohen says. “And most of the time, they got away with it.”
Truth in Advertising

Perhaps no song better epitomizes early '90s dance music than C+C Music Factory’s “Gonna Make You Sweat,” an infectious and energetic hip-hop anthem that’s still regularly played at events everywhere while serving as a go-to song for dance montages on screen. Like many of its competitors, C+C Music Factory was heavily manufactured; the only permanent members of the band were the two producers in charge. When it came to vocals, the band lived up to its “factory” moniker, relying on a conveyor belt of rappers and singers.

One of them was Martha Wash, a well-respected singer who as half of the Weather Girls had a major hit in the 1970s with “It’s Raining Men.” A studio veteran, Wash was often hired to sing parts for producers or groups on an as-needed basis. One of them ended up being the hook on “Gonna Make You Sweat.”

When the song, album and video were released, however, her name was nowhere to be seen. In fact, a model/singer lip-synced to Wash’s vocals on the video, which was also a smash hit. This had actually happened several times to Wash over the years; she had sung lead on Seduction’s 1989 hit “(You’re My One and Only) True Love” (which was produced by one of the members of C+C Music Factory) and on several songs for the Euro dance group Black Box, only to be replaced when it came time to shoot the video.

As with Black Box and Seduction, Wash decided to sue and turned to her longtime lawyer, Steven Ames Brown. According to him, he secured “buckets of cash” for Wash in the prior two cases, but that they slid under the radar because the songs in question hadn’t been big hits. The tremendous success of “Gonna Make You Sweat” made people take notice of Wash’s lawsuit. “They had to credit her,” Brown says, “pay her a bucket of cash and give her a royalty.”

Between this and the Milli Vanilli lip-syncing scandal, record labels began to make sure every performer on a given recording was properly credited. Several pieces of legislation were proposed throughout the country that would have mandated proper music credits. Ultimately, the Music Modernization Act, which was signed into law in October 2018, ensures that producers, engineers, side artists and others be awarded royalties and credit with the artist’s consent. Brown adds: “I think American artists have a better understanding of their right to credit for their performances. Record companies recognized not just the monetary risk but the risk to goodwill if they tried to usurp a person’s persona.” As for Wash, Brown notes that “her talent made her noteworthy, her lawsuits made her famous.”
Product Liability

Violent lyrics have been blamed for everything from school shootings to gang warfare to killing cops to even Charles Manson’s crime spree. In the late ’80s and early ’90s, two songs faced legal challenges alleging that they had caused the deaths of several teenagers by suicide.

After a 19-year-old California man shot himself in 1984 in his bedroom while Ozzy Osbourne’s Blizzard of Ozz album was on his turntable, the man’s parents sued the singer, alleging that his song “Suicide Solution,” which was on the side that had been playing on the record player, caused his death. The case was eventually dismissed in 1988 after a judge found that it was not foreseeable that the man would kill himself after listening to “Suicide Solution.”

Meanwhile, a couple of years later, the British metal band Judas Priest went to trial after two young men shot themselves in the head—one died instantly while the other lived for three more years with a horribly disfigured face and in constant pain before dying. Before he passed on, he blamed alcohol and Judas Priest for his suicide attempt. Lawyers for the men’s families pointed specifically to “Better by You, Better Than Me,” accusing the band of implanting subliminal messages such as “try suicide” and “do it” that enticed the men to shoot themselves.

The general counsel for Columbia Records, which distributed the album, retained William Peterson, now of Snell & Wilmer, for the trial. “This was a really unusual case,” Peterson recalls. “I’ve dealt with suicide cases and product cases, but nothing on the order of an artistic product that results in such an inquiry.” Nevertheless, Peterson says he saw enough common threads between the Judas Priest case and his other matters that he felt confident going to trial. “Like any other case, lawyers get geared up with respect to the subject matter,” he says. “There are principles of law and equitable principles of justice that apply to all cases. Like the First Amendment or product liability. I saw this kind of like an adulterated food case.”

Indeed, this was not a free speech case. The judge presiding over the case, Jerry Carr Whitehead of Washoe County Second Judicial District Court in Reno, Nevada, had issued a pretrial ruling that subliminal messages are not a form of speech and therefore are not protected by the First Amendment. Despite that, Whitehead ended up ruling for Judas Priest after a 19-day trial in 1990, finding that the plaintiffs had failed to prove the band’s product was defective and that the band had not intentionally planted subliminal messages on the record. Instead, Whitehead found that the messages in question had been the inadvertent product of several different sounds mixed together.

The Judas Priest ruling did not put an end to lawsuits accusing artists of inciting or inspiring violence. However, Whitehead’s decision focusing on unintentional messages provided some sense of security to record labels and artists, protecting them from having to answer for sounds and words that they never meant to produce. “I would say it frees up artists to experiment and gives them more freedom of expression than they might otherwise have,” Peterson says. “Otherwise, they might think ‘my music might cause someone to do something that I would be blamed for.’”

Members of Judas Priest in 1979: K.K. Downing (from left), Glenn Tipton, Rob Halford and Ian Hill

John McCollum holds one of the albums he says brought about the death of his son, who put a gun to his head after listening to the song “Suicide Solution.”
MP3s/Online Streaming

While they may be ubiquitous now, MP3s were once a foreign concept and were, effectively, only accessible by a small percentage of people who had a high-speed internet connection and didn’t mind spending a minimum of three hours downloading a three-minute song.

Napster soon eclipsed the other available peer-to-peer networks. Founded in 1999, Napster boasted a simple interface and large numbers of users and quickly became the most well-known place to download and upload MP3s.

One such file led to a high-profile lawsuit that ended up killing the site. A demo of Metallica’s “I Disappear,” which was eventually released on the soundtrack for the film Mission: Impossible II, made its way to Napster, drawing the ire of band members, particularly drummer Lars Ulrich. After learning that its entire back catalog was available on Napster for free download, the band decided to file suit.

“We thought this was a no-brainer,” says Howard King, partner at King, Holmes, Paterno & Soriano and longtime lawyer for the band. “It seemed so obvious to me that they couldn’t steal music this way.” He admits he and Ulrich, who was the most active band member involved in the litigation, were caught off-guard by the ensuing backlash against them. “It wasn’t until we starting making public appearances that we realized there was a huge constituency that thought music should be free,” he says.

Due to the backlash, only one other artist was willing to join the lawsuit: Dr. Dre, who happened to be another King client. Ultimately, the case settled with Napster agreeing to implement a system whereby artists could opt out of having their files available on the site. The agreement, however, became moot when Napster soon went bankrupt and shut down.

Illegal streaming sites continue to face legal scrutiny. In 2009, owners of the website The Pirate Bay, a site where users could download copyrighted movies, albums and games for free, were sentenced to prison and hit with multimillion-dollar fines in Stockholm. Additionally, in 2012, a federal appeals court ordered a Minnesota woman to pay $220,000 in fines for illegally downloading music.

Meanwhile, Napster was just the first phase of a fundamental transformation of the record industry from a brick-and-mortar record store-based business model to one that primarily exists online. It’s a change that the record industry continues to deal with. Music publishers have sued streaming giants such as Spotify and Pandora and settled lawsuits over the last several years. Moving forward, the new Music Modernization Act makes it easier for artists to receive royalties from streaming services.
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As he prepared to leave prison for the second time, David Figueroa decided he was going to walk away from the Chicago street gang he belonged to since he was a boy and build a better life for himself. “I wanted to do the right thing this time,” he says. “I wanted to get a job. I wanted to get married. I wanted to have children.”

He knew finding work would be hard because of his criminal record. “It was a very scary moment,” recalls Figueroa, whose hands, fingers, arms and chest were covered with gang tattoos when he left prison in 2005 at the age of 29. He thought at the time: “Wherever I go, I will be looked at as a scary person.”

Figueroa grew up in Chicago’s Humboldt Park neighborhood, notorious for its violent street gangs in the ’80s and ’90s. He wanted out, and he hoped to work in construction. But doors began slamming as soon as he filled out job applications. “Every time I checked the box that asked whether you were a convicted felon, I never got a call back,” he says.

While looking for work, Figueroa got help from a community-based organization that offered ex-offenders classes in life skills, including anger management and financial literacy. Not long after that, a construction company hired Figueroa, and he stayed there for several years. But then he injured his back after falling off the roof of his home and spent nine months recovering. Figueroa was able to return to his old job, but he had lost his seniority and sensed he was not wanted anymore. “I could see the writing on the wall,” he says.

Rather than face the prospect of looking for another job, he decided to create his own business. Pulling together his savings, Figueroa launched a home renovation company in 2014. He promised himself that he would employ others with criminal records, offering them opportunities he never had. “We all have done something we regret,” he says.

He decided to name his company Second Chance Renovations.

Created their own paths

Formerly incarcerated people like Figueroa have a difficult time separating themselves from their criminal histories, which makes getting jobs a struggle. Even when they’re eligible to get their records sealed or expunged, most don’t go through the process because they are...
either unaware of how to do it or lack the legal help they need to get it done. For example, a study in an upcoming Harvard Law Review found that only 6.5% of people in Michigan legally eligible for expungement obtained it within five years of eligibility. For those who don’t pursue expungement, the accessibility of their records makes it harder to find employment, even in states that have “ban the box” laws that prohibit certain businesses and government agencies from asking about convictions on job application forms. (Those employers are still free to perform criminal background checks on their own.)

According to “Expungement of Criminal Convictions: An Empirical Study” by J.J. Prescott and Sonja B. Starr, professors at the University of Michigan Law School, those who got their records expunged were more likely to stay out of trouble and get steadier and higher-paying jobs than those who didn’t.

“There can be lifelong consequences for not only a felony conviction, but also for a misdemeanor conviction,” says Lucian Dervan, chair of the ABA Criminal Justice Section and an associate professor of law and director of criminal justice studies at Belmont University College of Law.

The ABA Criminal Justice Section has for decades supported efforts to remove the many barriers that prevent people with criminal records from moving forward with their lives. This past January, the ABA House of Delegates passed Resolution 109B, which supports the expungement and sealing of records for nonviolent convictions. “Affording these individuals a way to expunge or seal their nonviolent convictions recognizes both the accomplishments of the individual in building a life free from further contact with the criminal justice system and the need to reduce the collateral consequences of a conviction,” the resolution’s report states.

Rather than face continued rejection, some formerly incarcerated men and women are taking another path. They’ve decided to create their own businesses, drawing on their intelligence and street smarts while also committing to help formerly incarcerated people get back on their feet.

GANG TERRITORY

David Figueroa grew up with a single father who had to raise six kids on his own and wasn’t very good at it, he says. His memories of his dad, who had a construction business, are not happy ones. He remembers him as verbally abusive and often angry. Figueroa’s oldest sister took care of him and the younger siblings. Figueroa says he was a good student but had a behavior disorder that landed him in trouble.

Like other troubled kids seeking connections and a sense of belonging, Figueroa joined a street gang when he was about 11 years old. “I started selling drugs. I ran away from home when I was about 11½ years old and never went back,” he recalls.

“I learned how to steal cars at an early age, so I would steal cars to sleep in.”

He didn’t want to go home to his angry father. “I would sleep in gangways, and I had a couple of buddies and would stay over at their houses a couple of nights a week to take showers,” he says. “That was the life I chose. I didn’t want to go back home.”

Figueroa’s path led him to prison twice for drugs, weapons and aggravated...
battery convictions. The last time he was arrested, some detectives visited him at the Cook County Jail. “They took me back to the station for a lineup and put a murder charge on me,” he says. Prosecutors offered him a plea deal, but Figueroa refused, he says, because he didn’t do the crime. He went to trial and was found not guilty.

Figueroa doesn’t dwell on his past, nor does he hide from it. But he doesn’t ask those seeking jobs at Second Chance Renovations to explain theirs. He asks applicants about their future goals instead. “I don’t look backwards,” says Figueroa, who’s strong voice still has echoes of the streets from which he came. He is tall and fit with closely cropped brown hair and a goatee. “I don’t care what you’ve done in the past.”

New employees start at $12 an hour, even if they have no experience. If they consistently work hard and show promise, they get a raise. After they get their first paychecks, the workers are responsible for buying their own basic hand tools. Figueroa provides power tools.

Figueroa teaches his recruits skills in construction, carpentry, drywall installation, window replacement, hanging doors, painting and more. “I love to teach. If I can tell that you’re someone eager to learn, I’m patient,” he says. “I tell my guys: ‘I want you to work so hard that you go home so tired that you have no time to do nothing else but go home, eat, spend some time with your kids and go to bed so you can do it all over again tomorrow.’”

His goal is to help employees develop habits they may never have had. “I’m really hard on my guys for the first 30 days because a lot of them don’t have any work experience,” he says. “Sometimes it’s very hard to get these guys to commit and understand this is not a game.”

“I kept seeing that over and over in prison: the spark in someone’s eye saying, ‘I’m gonna make it,’ and then the return of someone whose light had been dimmed by the reality.”

—Teresa Hodge
ENCOURAGING ENTREPRENEURSHIP

Not long after Teresa Hodge went to federal prison to serve a nearly six-year sentence for mail fraud and money laundering, she began planning her future.

Hodge listened to a lot of women talk about their dreams of pursuing a better life once they got out. But for most, they remained dreams. “I learned from the women who were in and out just how challenging it was for them to connect with the hopes and dreams they had while in prison,” she says. “It was as if prison provided a moment of clarity—a place to plan and figure out life and to determine how to start over—and yet somehow there was this huge disconnect from that vision and desire to actually being successful.”

The women spoke of the difficulties getting a job, finding a place to live, reconnecting with family. “What I heard was lots of despair,” Hodge says. “I kept seeing that over and over in prison: the spark in someone’s eye saying, ‘I’m gonna make it,’ and then the return of someone whose light had been dimmed by the reality.”

Hodge thought about this a lot. She had advantages going into prison that would serve her when she got out. She had been an entrepreneur and had a loving family. But she recalls feeling very frightened and ill-prepared before she began serving her sentence.

“My experience prior to incarceration was watching television,” she recalls. “I was filled with fear. I was afraid I was going to be shanked. I was afraid to go in the shower. I was afraid I would get into fights. I would be harmed by guards. I just didn’t know what to expect.”

Her fears were not realized, and she connected with many women at the Alderson Federal Prison Camp in West Virginia. (Martha Stewart served time there.) Hodge listened to their stories. “I was unaware of mass incarceration and its impact on society as a whole.”

Hodge shared what she learned with her daughter, Laurin, and together they discussed ideas about how to help women make a successful transition home from prison. “I wanted to take the stories and the experiences that I heard, and I wanted to try to clear a pathway for people who were choosing entrepreneurship because they had no other alternative.”

Laurin, then a graduate student at Johns Hopkins University, submitted a business plan in a university-wide competition. That plan eventually led to Mission: Launch Inc., a Baltimore-based nonprofit that initially was created to teach financial literacy, technology and entrepreneurship to previously incarcerated women to help them become self-sufficient.

“We felt as a family the effects of incarceration,” Hodge says. “We felt through the power of entrepreneurship, through the power of work, that people would have an opportunity to reconnect with their communities, be productive citizens but more importantly, reestablish family connections.”

The organization, which launched in 2012, has since expanded to include both women and men and offers leadership training, technical assistance and help getting access to capital for budding entrepreneurs. “For a lot of people, they turn to entrepreneurship out of frustration.”

“I want to create my own destiny instead of relying on someone else.”

—Marcus Bullock
Many of the people I met in prison are extremely resilient, and entrepreneurship is about being resilient. The ability to survive and to have drive, to maintain hope and maintain courage while you are in prison is certainly a strength that can be used,” Hodge says.

One of Mission: Launch’s latest ventures takes a deeper and potentially a more fair-minded look at people with criminal records by allowing them to be evaluated by more than just their records. It’s called R3 Score, and it’s a score and a report based on an algorithm that quantifies criminal history with other factors such as education, volunteer work and other aspects of a person’s life. People are evaluated on a scale of 300 to 850, much like a credit score. An R3 Score might be used in applications for occupational licensing, bank financing, commercial contracting or other opportunities.

Hodge says it gives a more rounded picture of the people trying to rebuild their lives—so that they’re not judged solely by their criminal pasts. Paraphrasing a familiar line from public interest lawyer Bryan Stevenson, Hodge says that people are more than the worst thing they’ve ever done. “It was in prison that my humanity was brought to another level,” Hodge says. “I saw the women who I was incarcerated with as humans, as other people who were deserving of a second chance.”

Hodge created her own second chance, but she will always be reminded of her past. “The hardest thing I had to do was to forgive myself. The hardest thing I had to do was to move forward in spite of this—knowing that some people were going to judge me harshly, potentially for the rest of my life,” she says. “For the rest of my life, I may always have to get over that hurdle that is the life sentence for people with a criminal record after they serve their sentence in prison.”

IMAGE CONTROL

Marcus Bullock has been out of prison for 15 years now, and by all accounts has been a model citizen. He’s a successful businessman. He’s been featured in the Washington Post, in Forbes and on NPR. Yet he still has trouble renting an apartment because of his criminal history. But that’s getting ahead of the story.

Bullock, who grew up in Washington, D.C., was just 15 years old when he went to prison. He was convicted as an adult for carjacking, attempted robbery and gun charges. Like a lot of teens, he easily got bored. To pass the time behind bars, he studied for his high school equivalency diploma. He also took classes in business and computers.

“I knew I didn’t want to go back home and go back to the same neighborhood where all my friends were selling drugs,” he says. “I don’t want to put my mom through another prison visit ever again.”

He was released at age 22 and tried to figure out what he wanted to do. He took real estate classes and passed the licensing exam. When he took the results to get his certificate, a clerk said, “It looks like there’s a problem with your background. Are there any issues you want to tell us about?” he recalls. “My heart sinks to my toes. I said ‘Yes,’ unapologetically, ‘I’m a convicted felon. I made a mistake about 10 years ago. I was a kid.’ ”

“He said, ‘I’m sorry, you can’t get your real estate license,’ ” Bullock says.

It was a jarring moment that showed Bullock how collateral consequences can put a wedge between people with criminal records and their dreams.

“You talk about a high and low in the same moment,” he says. “Now I have to go home to my mom and tell her that all the classes I took, all the money we spent for school, all the books that I bought—all of that running and hustling to the train station, every single day. All in vain. Now I have to go back to square one where I had been turned down for every job I ever applied for.”

All signs were pointing for him to go back to the streets and sell drugs. Instead, he went looking for jobs. Bullock recalls filling out 141 job applications. Most of them were for retail or service-related jobs.

Then, he filled out an application at a paint store.

“The question on the application was ‘have you been convicted of a felony within the last seven years?’ ” he recalls. His conviction was 10 years old by then, so he answered no and got the job.

But Bullock wanted more. “I want to create my own destiny instead of relying on someone else,” he says. “I’m naturally an entrepreneur, I sold candy in school.”

He started by building his own painting and remodeling company. From there, he worked to develop a business plan drawn from a phenomenon he observed while in prison. Every day he saw that mail call was the best part of the day for him and his fellow inmates. Getting something, anything, in the mail was like gold. He could see that communicating with family members helped instill hope about the possibilities of life on the outside. But not many inmates got letters. Social media had shifted how people communicate, and sending letters and photos was not as common as it used to be.

Because inmates are not allowed access to social media, Bullock saw an opportunity. He created Flikshop, an app that allows family and friends to take photos and
write messages that are then printed on postcards and mailed to registered correctional facilities across the country for just 99 cents each.

His company was a hit, attracting investors and grants, including $50,000 from Unlocked Futures, which is affiliated with John Legend, the Grammy-winning recording artist and criminal justice reform advocate. (Hodge’s Mission: Launch also received a $50,000 grant from Unlocked Futures.) Bullock now has seven employees—many of whom are formerly incarcerated. “In our company, it’s frowned upon if you haven’t been to prison, which is interesting,” he says with a laugh. “The people who haven’t been to prison feel isolated among the community because they don’t get the jokes, they don’t get the humor.”

He wants to help erase the stigma formerly incarcerated people feel, especially when applying for jobs. “People don’t need to feel shame coming in the door. They talk about which prison they went to, about common friends and complaints, and they can be themselves,” he says. Bullock sees his company as a springboard for employees to move on to bigger and better jobs or to pursue their own entrepreneurship. “They can leverage up and learn about business and marketing,” he says. “If we do this right, we’re changing the world, we’re changing the narrative.”

He knows there are challenges as soon as people walk out of prison, challenges that are likely to follow some for the rest of their lives. “It doesn’t matter how many companies I build, how successful we are, what tools we come up with, I still have to walk around with this stamp on my chest,” he says.

That stamp, for example, has kept Bullock from being able to rent an apartment in his own name in many places, even after going straight and succeeding as a businessman for 15 years. “It continues to follow me.”

Bullock frequently visits prisons to teach basic entrepreneurship skills to inmates. “I never tell them it’s going to be easy, but this is a first step,” he says. “Now, entrepreneurship isn’t for everyone. But for those who want it, let’s give them an opportunity to provide for their families.”

Bullock is right, it’s not easy. “Some of the barriers you face with entrepreneurship are not simply because of your past,” says Christopher Ervin, founder of the Lazarus Rite Inc., a Baltimore nonprofit that provides reentry and job-training services for formerly incarcerated people, including training for commercial truck driving. “It’s often because you have little or no credit history because you’ve been gone so long. You have debts. You may have child support to pay.”

In addition to his nonprofit, Ervin, who also is formerly incarcerated, launched his own commercial trucking company last year. He says that the term entrepreneurship may sound sexy, but the reality is getting down and dirty to build a small business and raising the money to do it. “You may have the greatest idea—but how do you get the capital to get that idea done?” Ervin says. “There is so much to do.”

That’s why as part of his talk, Bullock counsels inmates on rebuilding credit by establishing a small bank account, borrowing from it and paying it back to help build savings and finance their businesses. He wants to show them the possibilities. “We want to brighten the path,” Bullock says. “And that’s why I’m so passionate about what I do.”

BUILDING BLOCKS

On a recent spring morning, David Figueroa has assembled a crew of three—his foreman and two men recently released from prison—to work on a two-bedroom apartment in a six-unit building they’re renovating on the city’s far South Side. There are cracks in the walls and ceiling from water damage caused by a leaking radiator. The floors need refinishing, and the kitchen and bathroom need makeovers.

Figueroa spends days like these taking structures that have suffered from neglect and disrepair and shaping them into something better and stronger, much in the way he tries to help the men he hires.

One of his crew members is Harry King, 31, recently released from prison and living in a halfway house on Chicago’s West Side. King has taken classes in carpentry, plumbing and electrical work. “I wanted a trade, to learn something I could do,” King says. “I needed work. I wanted work, and David came from the same background as I do. It’s easy to relate to him because he came from the streets like I did”—on the streets of Chicago.”

King is grateful for the second chance that Figueroa
has given him. “He’s taught me new skills. I appreciate the opportunity he’s given people,” King says. “He’s opened my eyes and showed me that if you want to dedicate yourself to being something, you can. He goes above and beyond.”

King has two children, ages 8 and 5, and he is seeking custody rights. Figueroa admires King for his resolve. “He’s fighting for his kids, he’s fighting for his future,” he says.

“Everything is lining up for me,” King says. “I don’t want to go back.”

Helping men like King has given Figueroa a sense of purpose. “It feels good, helping them get started right away, helping them land on something stable, get a paycheck right away and not have to worry about going back on the street to hustle,” Figueroa says. “That’s the purpose of second chances, the whole purpose.”

Ending the cycle of mass incarceration, he says, must start with employers being open-minded about hiring people with criminal records and evaluating them for who they are. “People think they’re thugs, scum. But they still have kids. They still have bills. I think the system is rigged to keep a certain amount of people in prison,” Figueroa says. “I hate injustice. I’m not a Republican, I’m not a Democrat. I stand for justice. Everyone makes mistakes.”

Since being released 14 years ago, Figueroa has achieved the three things he set out to accomplish. He’s married, has children and has a job. He also had his gang tattoos removed by laser. “I used to be really heartless. I had no emotions,” he says. “Once I had my children, it completely changed me.”

He also recognizes that everything he’s done in the past has led him to where he is now. “Am I regretful of some of my actions? One hundred percent,” Figueroa says. “I’m not proud of some of the things I have done. Am I regretful of who I am? I’m not. I’ve had a lot of experience in life. I’m just grateful. I’m so grateful.”

David Figueroa, his foreman Alex Rivas, left, and crew member Harry King walk through their newly renovated project nearing completion.

This story is part of an ongoing series in the ABA Journal and at ABAJournal.com. Also, on the web, read about a formerly incarcerated man who created his own employment agency to help those with criminal records.
Difficult times for law schools have prompted several to attempt to be acquired by other schools.
Law school enrollment has decreased significantly since the Great Recession, as have many law schools’ reputations. Fewer graduates are passing the bar, and for the past two years, less than 70% of new lawyers were hired for full-time, long-term jobs that require bar passage after graduation—jobs that, at one point, had been the minimum expectation for newly minted JDs.

In the past three years, seven law schools announced plans to partner, gift or sell themselves to universities—all but begging the question: Why would anyone want them?

The answer comes down to net tuition revenue, which matters more than academic reputation, says Ken Redd, the senior director of research and policy analysis at the National Association of College and University Business Officers.

According to him, a private institution with net tuition that grows 3% or more annually is generally seen as desirable. “It’s about trying to make as much money as possible for healthy institutions. If there was some scandal that made the news, you might see some hesitation. But if it’s just something garden variety, like ABA probation, [universities] do not care about that,” Redd says.
Also, while there are approximately 235 law schools, there are only 203 accredited by the ABA.

“It remains a quality brand,” says Barry Currier, the ABA’s managing director of accreditation and legal education. “Law schools used to be a so-called cash cow for universities. I’m not sure that was really true, but at least they broke even or slightly better. Now law schools are having to be subsidized by their universities, and that makes them less attractive than they might have been.”

In some cases, these proposed mergers were actually bailouts designed to rescue failing schools. Not all, however, are failing schools.

Approximately two years ago, Florida Coastal School of Law, one of three for-profit law schools operated by the InfiLaw System, announced that it was looking for a non-profit partner. Around the same time, the law school was given a “zone” rating by the U.S. Department of Education, which means that it was close to not meeting gainful employment standards, and must pass the gainful employment standard in one of the next four years to stay in good standing.

In February 2019, the law school filed an application to switch to non-profit status with the ABA’s Section of Legal Education and Admissions to the Bar. Scott DeVito, the law school’s dean, says that if the plan is executed, the next step would be to become affiliated with a non-profit university.

Only two proposed mergers have been approved so far. A deal between Michigan State University College of Law (an independent entity) and Michigan State University remains pending, while the University of Illinois at Chicago’s acquisition of John Marshall Law School, a stand-alone school, is nearing completion.

A fellow InfiLaw school, Arizona Summit Law School, had tried in 2017 to affiliate itself with Bethune-Cookman University, only to announce it would shut its doors the following year. Meanwhile, Valparaiso University Law School and Whittier Law School both decided to close after mergers were either rejected or failed to materialize; and Western State College of Law at Argosy University, currently in receivership, filed a teach-out plan (which closing schools take to ensure students complete study programs) that was approved by the ABA in May. The ABA also approved an alternative option for Western whereby it would be acquired by an unnamed university.

20 YEARS LATER

It’s not the first attempted pairing between UIC and John Marshall. The two schools announced a merger plan in 1998, and one of the main sticking points was the law school did not want to lose control of its real estate, says UIC political science professor Dick Simpson.

Nearly two decades later, the two schools revisited the matter. This time, John Marshall decided to gift itself and its downtown real estate to UIC, and in July 2018, the schools announced the deal, with John Marshall being rebranded as the UIC John Marshall Law School.

The transaction, which has been approved by both schools and was greenlighted by the Section of Legal Education and Admissions to the Bar in November, is expected to be completed in August, with the first students arriving at the newly branded school in the fall.

Adding a law school is good for UIC’s ambition to be seen as a major university, and get it out of the shadow of University of Illinois at Urbana-Champaign, which also has a law school, says Kent Redfield, an emeritus political science professor at the University of Illinois at Springfield. It also plays well politically.

Chicago has six law schools, but UIC John Marshall will be the only public one. It’s estimated that full-time tuition for the 2019-2020 school year will decrease from approximately $47,000 to $36,000 for in-state residents.

“You’re talking about diversity, access and public education. That resonates in Chicago and Cook County,” says
Redfield, whose work focuses on Illinois campaign finance and political ethics.

Also, being the city’s only public law school could draw more applicants, which could lead to increasing the law school’s median LSAT score, which is 149, according to its Standard 509 Information Report for 2018, and its median undergraduate grade-point average, which is 3.18. Drawing from a deeper pool of applicants could also boost the school’s outcomes. In 2018, 236 John Marshall graduates sat for the Illinois bar, and the pass rate was 62.29%, according to ABA data. For graduates of ABA-accredited law schools, the Illinois bar pass rate that year was 76.23%. John Marshall’s ultimate bar passage rate, going back to the class of 2016, is 89.27%. In terms of employment outcomes, for the class of 2018, 55.11% had long-term, full-time jobs that require bar passage. The national average was 68.4%.

Darby Dickerson, the law school’s dean, hopes that the deal will help John Marshall break into U.S. News & World Report’s top 100 schools in the next five years.

The move could also help boost John Marshall’s bottom line. Susan Poser, a former law school dean, joined UIC in 2016 as its provost and vice chancellor for academic affairs. The proposed deal was already in discussions, and she was tasked with examining finances with a member of the law school’s board of trustees.

According to tax returns, John Marshall’s 2016 tax return showed a total of $46,866,930 in revenue and $48,850,794 in expenses. The same return shows that the law school’s 2015 total revenue was $49,259,759, and its expenses were $49,748,609. Despite that, Poser points out that John Marshall had some important assets, most notably its four pieces of real estate, appraised at $33 million.

“I had to make sure that we had some confidence that this transaction could be done without utilizing funds at UIC. If I had to go to the deans and tell them that I would be taking money from their colleges to take in the law school, I knew the deal would be dead in the water,” she explains.

For the past three years, the school has had total enrollment of approximately 900 students, according to 509 reports. Dickerson anticipates the deal will boost total enrollment at the law school—eventually landing somewhere between 1,200 and 1,300 students, including the non-JD programs.

“We would have had a bright future remaining independent. Would there have been challenges? Sure—there always are. But we would have continued to train outstanding lawyers and leaders,” she says.

NO DEAL

Not all deals go so smoothly. In October 2018, Middle Tennessee State University reached an agreement to acquire Indiana’s Valparaiso University Law School. Under the proposal, the law school infrastructure would have been gifted to the Tennessee school, and beginning in the fall of 2019 would operate in both states, with MTSU offering reimbursement to Valparaiso for interim expenses.

The Tennessee Higher Education Commission, in an 8-5 vote, rejected the proposal the same month it was announced.

After that, the law school filed a teach-out plan with the council of the Section of Legal Education and Admissions to the Bar. It was approved in February and calls for accreditation to run until the end of 2020.

Unlike the John Marshall/UIC agreement, this deal would have been more of a rescue operation. In 2016, Valpo Law received a public censure from the ABA for being out of compliance with admissions standards. It came back into compliance in November 2017, but its first-year class only had 28 students. That same month, Valparaiso University’s board of directors announced that the law school would not be admitting an entering class for the 2018-2019 school year.

In 2018, the law school had a total of 103 students, according to its 509 report. The same year, its Indiana bar passage rate was 40%, ABA data shows. For graduates of ABA-approved law schools, the Indiana bar passage rate in 2018 was 73.25%.

“You’re talking about diversity, access and public education. That resonates in Chicago and Cook County.”

—Kent Redfield
Tennessee has six law schools, five of which are ABA-accredited, including two public law schools. It's a fiscally conservative state, and many of its politically connected lawyers graduated from Knoxville's University of Tennessee College of Law, a public school, says Michelle D. Deardorff, head of the political science department at the University of Tennessee at Chattanooga.

Junior college in Tennessee is free, and by 2020 there will be scholarships for UT undergraduates whose families earn less than $50,000 annually.

"The state wants to have a good investment for students, and quality was not in Valparaiso's favor. It's not like they were trying to bring in a really strong program that was known for being accessible," Deardorff says.

George T. Lewis, a Baker Donelson litigation partner in Memphis, is a University of Tennessee law school graduate who opposed MTSU taking in Valparaiso University Law School. According to him, his alma mater and the state's other public law school at the University of Memphis both have the capacity to take more law students who are qualified.

"The one reason I was a strong objector was that we didn't need it. I see really fine students, in the top third of their class, who have trouble finding jobs. And if you were going to bring in another law school, why not bring in a strong law school?" says Lewis, a former Tennessee Bar Association president.

Neither MTSU nor Valparaiso Law School would comment on the matter.

Before the proposal was nixed by the state's higher education commission, the Murfreesboro Post reported that MTSU saw adding the law school as something that would greatly benefit its students, who wanted affordable, accredited legal education in central Tennessee.

"What happens to the working-class kids who don't get into law school at Knoxville, and don't want to go into debt at private law schools in Nashville?" Deardorff asks.

"The concern about accessibility in the center of the state is a fair one."

So is access to justice, says Kellye Testy, the executive director and president of the Law School Admission Council.

"A lot of people misunderstand legal education, and think that everyone goes to law school to become a big firm lawyer. You need to educate people about the difference that a law school can make in a community," she says.

When a law school closes, Testy adds, residents lose a fair amount of community service work. And if there are two law schools in a region that compete for the same students, she says, a merger might make sense.

"Say there's another law school 20 miles away that's not doing so good. Mine is doing OK, but we could use a few more students. I can take all the administration out of that law school, and bring the students over to my law school. And it would eliminate some of the competition," says Marjorie Kaufman, a managing director with Getzler Henrich & Associates. The consulting group does middle market corporate turnaround and restructuring.

Another proposed agreement that ultimately died involved the for-profit Arizona Summit Law School and Florida-based Bethune-Cookman University, one of the nation's historically black colleges and universities. Announced in 2017 as an affiliation agreement, with plans for early Arizona Summit admission through a Bethune-Cookman prelaw program, both the law school and university presidents said it would be great for diversity. A press release stated that 40% of Arizona's population were people of color but comprised only 8% of the state's lawyers.

For 2017, the law school's first-time bar passage rate was 26.53%, according to ABA data. The proposal was announced in March of that year, and a few weeks
later, the ABA placed Arizona Summit on probation for being out of compliance with various accreditation standards.

“This was a train wreck waiting to happen,” says D’Andra Orey, a political science professor at Jackson State University, a Mississippi HBCU. “Some law schools prey on people of color. I can only speak for what I’ve seen in the black community, but with those types of law schools, I can see them preying on HBCUs in the same context.”

Arizona Summit was ultimately unsuccessful in being removed from probation by the ABA, and in November 2018 a teach-out plan was approved with a closure date for the end of spring 2020. Bethune-Cookman has had problems as well. President Edison O. Jackson stepped down and was sued by the university in January 2018, based on allegations that millions of dollars in improper payments were made with developers for a new dorm building. It was originally estimated to cost $72.1 million, but by 2018 was expected to cost $306 million over 40 years, the Daytona Beach News Journal reported. The lawsuit remains ongoing.

A spokesperson for Bethune-Cookman declined an ABA Journal interview request. C. Peter Goplerud III, Arizona Summit’s interim president, also declined comment.

UNCERTAIN FUTURE

Like Valparaiso University and Arizona Summit, California’s Whittier College tried and failed to find a school that would take on its law school. Whittier’s board of trustees announced in April 2017 that it would eventually close. (See “Closing Time” on ABAJournal.com.)

Rich Ruben, a retired litigation partner from Jones Day, chaired a committee the college’s board formed in 2015 to focus on improving law student outcomes. Whittier College graduates were doing well, Ruben says, but the law school’s first-time pass rate for the July 2015 California bar exam was only 38%. “Selling or merging was our sole focus, after we reached the decision that we had to take some action. We reached out to everyone we could think of and used a consultant to give us leads,” he says.

Whittier College in January 2016 sold the Costa Mesa property where the law school is located. One proposal, which ultimately could not be worked out, had the buyer taking on the property and the law school, Ruben says.

The law school had a total of 128 students in 2016, according to the 509 report for that year. Its 2017 first-time bar passage rate was 35.25%, according to ABA data. At the time, Orange County, where Whittier Law School is located, had three other ABA-accredited law schools.

When the closure was announced in 2017, Whittier Law School faculty sought a Los Angeles County Superior Court temporary restraining order to stop it. The motion was denied in April 2017, and the ABA later approved a teach-out plan.

Meanwhile, Florida Coastal School of Law is looking for a nonprofit partner for a merger or a change in ownership. It is the only InfiLaw school that remains open and is not operating under a teach-out plan, and it recently filed a major change application with the ABA to become a nonprofit law school.

DeVito says becoming a nonprofit law school will make Florida Coastal more attractive to potential partners.

“What I’ve tried to do is identify what we think is in the students’ best interest, and the students have said that they would like the school to be part of a larger institution,” says DeVito, whose law school in October 2017 received public notice that it was out of compliance with ABA accreditation standards involving program objectives, academic advising and admissions policy. The ABA legal education section’s council in June announced it was removing “specific remedial actions” imposed on the law school because it demonstrated compliance with the standards in question.

On its 509 report, Florida Coastal reported that it has a total of 207 students. For 2018, the law school’s Florida bar passage rate was 63.36%, according to ABA data. For graduates of ABA-accredited law schools, the overall 2018 pass rate for the Florida bar was 65.15%. Out of 186 members in Florida Coastal’s class of 2018, 50.54% had full-time, long-term jobs that require bar passage.

DeVito first announced that he was interested in making some sort of agreement with a nonprofit university in January 2017, and he says the idea has been discussed internally since 2015.

“We would like our partner to be somewhere in the Southeast, that’s our goal,” he said. “We’re hoping to have between 400 to 500 students when everything settles down.”

Another school farther along in the process is Michigan State University
College of Law, which despite its name is a private, stand-alone school that is working toward a merger with the state university of the same name. The two schools have been affiliated since 1995; however, the law school is a separate legal entity and on its own financially, says Dean Lawrence Ponoroff.

Under the proposed merger, the law school would no longer be private and would move completely under Michigan State University’s umbrella. The deal, which was approved by faculty and boards of trustees at both schools, isn’t expected to close before 2020, according to Ponoroff. “The difficult financial issues that law schools and legal education has faced certainly plays a factor into why we are doing this now, but it’s not the only reason,” says Ponoroff, citing interdisciplinary programs and research as well. Administrative costs for things such as legal counsel and auditors are also issues at a free-standing law school.

The law school had a total of 710 students in 2018, compared to 784 students in 2017. Its Michigan bar passage rate for 2018 was 84.21%, according to ABA data. For graduates of ABA-approved law schools, the Michigan bar passage rate that year was 73.91%. Out of 255 members of the class of 2018, 67.45% had full-time, long-term jobs that require bar passage.

For the 2018 entering class, Ponoroff says that the school purposely admitted fewer students because he thinks that will help the law school with job placements. According to the law school’s 2016 tax return, its total revenue was $38,374,587, and its total expenses were $40,115,786. An endowment will come with the law school if it merges with MSU. The law school also owns a building in downtown Lansing that is currently for sale. Annual tuition at MSU Law is $44,000 for full-time students. Once it joins Michigan State University, which is public, Ponoroff expects law school tuition to go down for in-state students.

If the deal doesn’t go through, Ponoroff has concerns. “Not in the sense that we would close our doors, but it would mean abandoning a lot of our strategic planning in terms of student and faculty quality,” he says. “I think the bottom line is that unless things change dramatically, it would have been a far less interesting law school—and a far less attractive place to be—for students and faculty.”

Three years ago Robert Zemsky, a professor at the University of Pennsylvania and a member of the board of trustees at Whittier College, predicted that if law school enrollment continued to decrease, 10 to 15 schools might close. His study, “Mapping a Contracting Market,” analyzed 171 law schools and found that between 2011 and 2015, enrollment dropped by 21% at private law schools and 18% at public law schools.

Between 2017 and 2018, there was a 1.2% increase in law students overall, according to ABA data. Nevertheless, Zemsky says that for the most part, it still doesn’t make much sense to acquire a law school.

“If you’ve got a fairly good stand-alone school, where the flagship doesn’t have a law school, that could be likely. But I don’t think anybody is looking for that, because it’s a loss leader of an extraordinary nature,” says Zemsky, adding that stand-alone law schools are in the most danger: They don’t have a university to absorb costs.

Likewise, he doesn’t see law schools that are part of universities closing or being sold off.

“Even though law schools are expensive, they’re small. So at a big public university, they can cover the losses for a long time. It’s easier to cut costs where you can, hold your breath and soldier on.”
ensuring that all children have equal opportunities.

At the same time, she developed an interest in the criminal justice system. She recognized how the war on drugs affected her community through the 1970s, and she wanted to help address the problem of mass incarceration.

“Rondo was the training ground; the educational system was the passion that hit my heart; and the criminal justice system was just up close and personal to me,” Tyner says. “I saw the disproportionate impact on communities of color, disenfranchisement of folks and, basically, the creation of a new second-class citizenship.”

PAYING IT FORWARD

Tyner created the Planting People Growing Justice Leadership Institute—a nonprofit organization in St. Paul that seeks to inspire social change through education, training, and community outreach—in 2017. She had graduated from the University of St. Thomas School of Law in Minneapolis in 2006 and was working as the school’s associate vice president for diversity and inclusion when she sent a friend data about illiteracy rates in prison.

Through her work with the Community Justice Project, a civil rights clinic at the law school, she met clients with the same story: They learned how to read in prison. The data confirmed her suspicion, she says. Depending on the study, 60% to 80% of inmates were illiterate.

Tyner not only wanted her nonprofit to address the correlation of illiteracy, but also to ensure that all children have equal opportunities.

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SOWING SEEDS

Artika Tyner uses education to nurture social change

By Amanda Robert

A trio of early influences led Artika Tyner to what she calls her life mission—promoting literacy, training the next generation of leaders and advancing diversity and inclusion as the founder of the Planting People Growing Justice Leadership Institute.

She grew up in Rondo, a historic neighborhood in St. Paul, Minnesota, that had a thriving African American community until the construction of Interstate 94 cut it in half in the 1960s. She saw families lose their homes and businesses shut down, and she decided to become an attorney to fight for social justice.

Before Tyner found the law, she found education. She considered following in her favorite high school English teacher’s footsteps but was devastated when she realized there were racial disparities in the classroom. She wanted her work to include
between illiteracy and future incarceration, but also the lack of diversity in literature. As she launched the organization, she realized that only about 10% of books were written by authors of color or featured diverse characters, she says.

“How can we create an interest in reading and passion around reading and address some of these disparities unless people are able to see themselves in the books they are reading?” she asks.

She wrote her own children’s book and worked with a group of volunteers on a crowdfunding campaign to raise the $20,000 needed for the production process. She published Justice Makes a Difference: The Story of Miss Freedom Fighter, Esquire, a story about an 8-year-old girl named Justice who decides she isn’t too young to change her community. Inspired by civil rights leaders such as Ida B. Wells, Charles Hamilton Houston and Paul Robeson, Justice decides to become an attorney.

The book sales support Tyner’s nonprofit and its initiatives, including an annual leadership institute at Highland Park Senior High School, her alma mater. They have also made it possible for Tyner to donate more than 1,000 copies of Justice Makes a Difference to children around the world.

Tyner, a member of the ABA since 2006, coordinates with the Solo, Small Firm and General Practice Division to visit local schools during its meetings. As part of the pipeline initiative to support young leaders, she meets students, reads her book and donates copies.

She recently received photos of students reading her book in Houston and their responses to one of the questions she always poses: How will you lead change?

“To read their perspectives, and the things they wanted to do—and a few were inspired to be attorneys—was something that was my morning inspiration today,” she says.

People often jokingly ask Tyner when she finds time to sleep, and she answers easily. She is motivated by her faith, she says, and believes there is nothing too big for God. “When I read that data, it spoke to me,” she says. “In the end, it was a project larger than the team that was sitting at my table in the dining room, but it was something I believed was a mission and a calling for our lives.”

“We had to come together in that season and have enough space to say, although it looks impossible, we can do it.”

For Tyner, the work doesn’t even stop there.

She has taken the Planting People Growing Justice Leadership Institute abroad, making several trips to Ghana to meet with students and host youth leadership summits. She also partners with the Ghana Scholarship Fund and Book to Read Foundation, two other nonprofits that are committed to improving education and literacy.

Tyner made the connection through one of her students, Monica Habia, who was born in Ghana and wanted to study the role of its female leaders. When Habia received a fellowship in 2015, she asked Tyner to come as her program adviser.

Habia has continued to travel with Tyner to Ghana and also works with the Planting People Growing Justice Leadership Institute. She has been inspired by Tyner’s genuine concern for children and how the law shapes both education and the criminal justice system.

“We have people who just talk, talk, talk and don’t really show the way,” Habia says. “For her, she is concerned about the issues and also goes a step further to see what we can do.”

Tyner, who is also a member of the ABA Rule of Law Initiative’s Africa Law Initiative Council, regularly travels with other students and community members to Ghana. She hopes to expand the youth leadership summit and take it to other parts of the world in the future.

She also plans to release an activity book and teaching curriculum for Justice Makes a Difference so more schools can teach its lessons to students on their own.

She has written and published other books, including Amazing Africa: A to Z, with Habia, and Joey and Grandpa Johnson’s Day in Rondo. She has also partnered with the ABA to publish The Lawyer as Leader: How to Plant People and Grow Justice and The Leader’s Journey: A Guide to Discovering the Leader Within.

Earlier this year, Tyner became the director of the new Center on Race, Leadership and Social Justice at the University of St. Thomas School of Law.

Armed with not only her law degree but also a master’s degree in public policy and leadership and a doctorate in leadership, she hopes to convene a national collective of thought leaders on education and criminal justice at the center.

“My vision is training the next generation of social engineers,” Tyner says. “These are lawyers who are able to use their law degree to make an impact for social justice but also to deal with some of the most critical issues of our time. “How can you use the critical thinking skills and analytical skills that we have to leave the world a better place?”

PHOTOS BY MIKE EKERN, UNIVERSITY OF ST. THOMAS; PLANTING PEOPLE GROWING JUSTICE PRESS

Members Who Inspire is an ABA Journal series profiling exceptional ABA members. If you know members who do unique and important work, you can nominate them for this series by emailing inspire@abajournal.com.
### ABA Events

**SUMMER / FALL 2019 • Save the Date**
For the latest info, go to americanbar.org and click on Events & CLE.

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Comic Books 101: An Overview of the Comic Book Industry  
Forum on the Entertainment and Sports Industries • CLE credit |
| **JULY 24**| **Webinar**  
Transformative Mediation—Theory and Practice  
Section of Dispute Resolution • CLE credit |
| **AUG. 8-13**| **2019 ABA Annual Meeting**  
Location: San Francisco  
American Bar Association • CLE credit |
| **SEPT. 20**| **2019 Construction Law Regionals: Sticks & Bricks**  
Location: Sacramento, California  
Forum on Construction Law • CLE credit |
| **OCT. 1-3**| **IP West 2019: The Forum for Current Issues in Intellectual Property Law**  
Location: San Antonio  
Section of Intellectual Property Law • CLE credit |
| **OCT. 3-5**| **2019 Fall Tax Meeting**  
Location: San Francisco  
Trust and Estate Division of the Real Property, Trust and Estate Law Section;  
Section of Taxation • CLE credit |
| **OCT. 14-15**| **The Criminal Justice Eighth Annual London White Collar Crime Institute**  
Location: London  
Criminal Justice Section • CLE credit |
ABA-sponsored app helps families access advance directives and medical information

By Amanda Robert

It was Barbara Keller’s experiences in elder law and caretaking for her parents that inspired her to develop the Mind Your Loved Ones app.

Keller, the senior partner at the Keller Legal Group in New York City, helps pro bono clients of the City Bar Justice Center’s cancer advocacy and elder law projects with their advance care directives. These include legal documents such as living wills that allow them to express their wishes for health care in case they are later incapacitated.

Keller needed quick access to her own family’s advance care directives when called in an emergency situation, when helping them in the hospital and in a rehabilitation center, and in figuring out how to set up home care.

She also saw several clients and their family members walk into hospitals with shopping bags full of critical information and realized they needed a more practical storage spot. She understood the importance of properly organizing that information.

“The idea of the app was really that simple,” she says. “It’s to ensure that vital information that affects critical health care decisions is controlled by the individual or by their loved ones and is readily accessible at the right time and the right place.

“Most people leave the information at home or in a drawer or somewhere, but there is no better place than to have it on your phone.”

Mind Your Loved Ones, a mobile app sponsored by the ABA and officially launched in May, allows users to create customized profiles for each member of their family, including their pets. Each profile contains not only their advance care directives, but also other important medical information.

The data is stored locally on each user’s smartphone but can be backed up in a Dropbox or iCloud account and emailed, faxed or printed. Mind Your Loved Ones can only access a user’s name and email address and none of his or her private information.

“It is truly saving people’s lives to have the information at your fingertips when you’re able to tell the hospital that a parent can or can’t take an MRI, or they can drink a certain contrast or can’t drink a certain contrast,” Keller says. “These are such simple pieces of information, but you would be surprised how many of us don’t know the answers.”

WEALTH OF INFORMATION

The ABA Commission on Law and Aging’s first foray into storing and sharing advance care directives came in 2014 with its introduction of the My Health Care Wishes app.

When the ABA stopped distributing the app, Keller contacted the commission and bought the rights in 2017. She brokered a new relationship with the ABA and made plans to expand the app to cover more aspects of health care.

Jennifer VanderVeen is an elder law attorney with Tuesley Hall Konopa in South Bend, Indiana, and president of the National Academy of Elder Law Attorneys. She used My Health Care Wishes. So did her family, clients and colleagues.

The app was particularly helpful when her father was caring for her grandmother, and he used it to email his copy of her advance care directive to a physician when he was traveling.

After My Health Care Wishes ceased, VanderVeen continued to encourage clients to keep copies of their advance care directives on their phones. Mind Your Loved Ones puts everything caregivers need to assist aging relatives in one place, she says.

“A lot of times elderly people have four, five, six different doctors they may be seeing, and any time there is a hospital admission or a new doctor, they ask you all of those questions about your medications and insurance,”
Your ABA

Key Features of the Mind Your Loved Ones App

The first section contains the person’s basic information, including phone number, address, profession, spoken languages and whether he or she lives alone. It also compiles medical information, such as allergies, preexisting conditions, blood type and immunizations.

It asks for information on emergency contacts and the health care proxy agent—the designated agent who makes health care decisions on behalf of a person who can no longer make those decisions on his or her own.

The second section of the app collects specially contacts that may be needed in an emergency, including doctors and other health care professionals, hospitals and rehabilitation centers, pharmacies, attorneys, accountants and financial advisers.

The third section includes an area for notes so users can keep track of doctors’ directions. It also includes a place to chart routine appointment and test outcomes. It also monitors activities of daily living, including bathing, continence and dressing, and instrumental activities of daily living, which are not necessary for fundamental functioning but allow a person to live independently. These include driving, caring for pets and managing medication.

The fourth section contains advance care directives and medical records, which can be scanned and uploaded. It also provides more information about advance care directives, why they are important and how to complete them.

The fifth and sixth sections of the app similarly allow users to scan and upload copies of insurance cards, insurance forms and prescriptions. Users can also upload photos of medication.

she says. “This makes it so easy to have it right there.” VanderVeen contends that everyone would benefit if Mind Your Loved Ones was automatically downloaded on their phones.

“Not enough people realize they need these documents and how important they are,” she says. “Anything we can do to make it easy for people to get them in place is helpful.”

RIGHT TIME, RIGHT PLACE

As Keller developed Mind Your Loved Ones, she thought adults between the ages of 40 and 70 who were taking care of parents or children with special needs were the target audience.

She soon realized that anyone could use the app. More people are visiting urgent care instead of seeing general practice physicians, she says, leading to increasing issues with inconsistent medical records.

“Every time you go to an urgent care, you don’t know who you saw last or even what was the problem,” Keller says. “So I would say the app is really for anyone who is managing their own care or the care of others.”

Amos Goodall, an elder law attorney with Steinbacher, Goodall & Yurchak in State College, Pennsylvania, tells clients when they create advance care directives to ensure they appoint an agent who can be a proper advocate.

“Having this app on that person’s cellphone will give them more tools and more support in making sure what you want to have happen is actually what happens,” he says.

The same is true for Mind Your Loved Ones users who include their own advance directives and medical information, Goodall says.

“Clients want ways to carry their health care documents with them so they’re available when they’re needed and when they might not be thinking quite clearly in a stressful situation,” he says.

Keller wanted to work with the ABA on Mind Your Loved Ones since the Commission on Law and Aging has promoted advance care planning and the use of advance care directives for decades.

“This app plays right into the messaging from the ABA about the importance of advance care directives and the importance of health planning,” she says. “I think that having it at the right time and place when it actually becomes needed is the purpose of this whole thing.”

The Mind Your Loved Ones app is available with a $4.99 annual subscription through the ABA Store, the App Store or Google Play.

Visit mindyour-lovedones.com for more information.
When quality and variety matter, trust TASA when choosing an expert.

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ABA Notices

2019 CONTESTED STATE DELEGATE (VACANCY) ELECTION

The following persons accredited to the state of Arizona have filed petitions for nomination for the office of State Delegate. The term is for one year and will commence immediately upon certification and will expire at the conclusion of the 2020 Annual Meeting. The names of each contested nominee and the names of 25 signers of his/her petition are published below in accordance with Section 6.3(b) of the Association’s Constitution.

Jeffrey Willis of Tucson, Arizona.

2020 REGULAR STATE DELEGATE ELECTION

Pursuant to Section 6.3(a) of the ABA’s Constitution, 18 states will elect State Delegates for three-year terms beginning at the adjournment of the 2020 Annual Meeting. The states conducting elections and election rules and procedures can be found at ambar.org/2020-statedel.

NOTICE BY THE SECRETARY: NOMINATING COMMITTEE MEETINGS

The Nominating Committee will meet in conjunction with the 2019 Annual Meeting in San Francisco, California, on Sunday, Aug. 11, beginning with the business session at 9 a.m., at the Marriott Marquis Hotel, in the Golden Gate Ballroom A, B2 Level. Immediately following the business session, the Nominating Committee will hear from candidates seeking nomination at the 2020 Midyear Meeting. This portion of the meeting is open to Association members. If you have questions regarding the foregoing, contact Leticia Spencer at 312-988-5160 or leticia.spencer@americanbar.org.

NOTICE BY THE SECRETARY: MEETING OF THE MEMBERSHIP

Pursuant to Section 6.11, the Secretary hereby gives notice to members of the American Bar Association that the meeting of the membership will be held in conjunction with the Nominating Committee Business Session and Coffee with the Candidates Forum on Sunday, Aug. 11, at 9 a.m., at the Marriott Marquis Hotel in the Golden Gate Ballroom A, B2 Level.

Mary L. Smith,
ABA Secretary

PROPOSED AMENDMENTS TO THE CONSTITUTION, BYLAWS AND HOUSE RULES OF PROCEDURE

Proposed amendments to the Constitution, Bylaws and House Rules of Procedure of the American Bar Association summarized below have been duly filed with the Secretary of the Association by the indicated sponsoring members of the Association for consideration by the House of Delegates at the 2019 Annual Meeting in San Francisco. For the full text of this notice, go to ambar.org/amendments.

ANNUAL MEETING OF THE MEMBERS

The Annual Meeting of the Members of the American Bar Endowment will be held in San Francisco on Monday, Aug. 12, at 8:45 a.m., at the San Francisco Marriott Marquis in the Yerba Buena Ballroom. The agenda includes the election of two Board members. Go to abendowment.org for the full text of this Notice.
Advocacy Amplified
ABA Grassroots Action Center helps members connect with their representatives

By Eric Storey

Question: Are legal professionals the most influential group in Washington?
Answer: They could be.

During the ABA Annual Meeting in August, the House of Delegates will consider dozens of resolutions submitted by ABA entities and individual members. If a resolution is adopted, it will become association policy on which we can advocate. That advocacy can take many forms, including ABA presidential statements, lobbying efforts, amicus briefs, testimony and letters to Congress or federal agencies. As the association’s spokesperson on policy matters, the ABA president approves all advocacy efforts on behalf of the association.

ABA members often ask: How can I help?
Congress is listening to constituents like never before. ABA members now have new tools to better connect with elected officials and to help the ABA with its advocacy efforts in the process.

The ABA’s Governmental Affairs Office regularly coordinates with members of Congress on legislation of interest to the legal profession. But lawmakers want to hear from constituents rather than lobbyists when deciding how to vote.

In a 2015 survey by the Congressional Management Foundation, eight of the top 10 reasons congressional leaders and staff cited for their votes involved hearing directly from a constituent on an issue. A visit from a lobbyist was not even in the top five.

Recognizing the importance of member involvement in ABA advocacy, the Governmental Affairs Office has created an ABA Grassroots Action Center, which allows ABA members to enter their home address to quickly connect to their lawmakers.

When an ABA priority issue starts moving in Congress, the Governmental Affairs Office creates summaries, resources and predrafted email messages you can use to connect directly with your congressional representatives.

TOOLS TO ADVOCATE
During this year’s annual ABA Day lobbying event, ABA members found information in the Grassroots Action Center on the importance of two of the ABA’s current legislative priorities—preserving Public Service Loan Forgiveness and funding the Legal Services Corp.—to use during advocacy visits in Washington and in their home districts. ABA members also used the center to send more than 200 emails and 400 social media messages directly to their elected officials. Emails can be personalized by ABA members to share their perspectives and experiences for an even greater impact.

Don’t want to communicate in writing? The Grassroots Action Center has an option to connect to your congressional offices by telephone with talking points. Our social media center has even more ways to reach out and includes images created for ABA members to use.

Never advocated before? We’ve got you covered. The ABA Grassroots Action Center includes tutorials, tips and best practices to help you every step of the way. For the more experienced advocates, the center has in-depth research, one-page issue summaries with specific ABA policy requests and more to take your advocacy efforts to the next level.

Regardless of the method used, the Grassroots Action Center can help members stay abreast of the ABA’s priorities on Capitol Hill and empower them to add their voices to the conversation in under five minutes, while also amplifying the ABA’s message in the process.

Want to get more involved? Sign up to join our Grassroots Action Team and let us know what issues interest you most so we will be aware of the issues you care about. By becoming an active member of our Grassroots Action Team, you will have the opportunity to magnify ABA advocacy by adding your voice to ours in Congress when it is needed most.

Go to ambar.org/grassroots to learn more. For ongoing updates, follow us on Twitter at @ABAGrassroots.
The ABA Journal is hosting and facilitating conversations among legal professionals about their profession. We are accepting thoughtful, nonpromotional articles and commentary by unpaid contributors to run in the Your Voice section of our website, ABAJournal.com.

**Your Voice**

Join the Conversation

Get submission guidelines at ABAJournal.com/voice.

*CONGRATULATIONS* to Mark W. Haigh of Sioux Falls, South Dakota, for garnering the most online votes for his cartoon caption. Haigh’s caption, below, was among about 100 entries submitted to May’s *ABA Journal*’s cartoon caption-writing contest.

“My client wishes to exercise its right to remain silent.”
—Mark W. Haigh of Sioux Falls, South Dakota

Thanks for playing along. The *ABA Journal* will be unveiling a new design in the coming months, and we are ending the cartoon caption contest. Go to ABAJournal.com/cartoons to see all the winners from this year.

Visit ABAJournal.com/contests for complete rules, links to past contests and more details.
Precedents || By Allen Pusey

A depiction of William Kemmler’s death by electrocution

First Execution by Electric Chair

BY VIRTUALLY ANY RECKONING, William Kemmler—an illiterate vegetable peddler, a boundless alcoholic and a confessed ax murderer—was both an unwilling and an unlikely pioneer. But by the time he was executed—for having murdered his common-law wife during a hungover spasm of jealousy—Kemmler had become both a symbol for a growing public revulsion toward capital punishment and a pawn in a high-stakes struggle over control of America’s nascent electrical power grid.

New England in the 1880s was the heartbeat of a post-Civil War surge in industry, technology and conspicuous consumption tagged by Mark Twain as the Gilded Age. It was also the heyday of conspicuous corruption and a period of intense cultural reflection spurred by a belief that scientific innovation could solve any problem.

One such cultural reflection pertained to capital punishment. The growing sense that hanging—the traditional method of execution in most states at the time—was inappropriate to a modern age gave rise to a search for “humane” alternatives and a debate over whether capital punishment should be tolerated at all.

In New York, Alfred Southwick, a dentist and former steamboat captain, had a reputation in Buffalo as a man of science despite an education that ended with high school. And as arc lamps and incandescent light bulbs replaced gas lamps and candles, Southwick became fascinated by the possibilities of electricity. When a local man was killed instantly after grabbing at the electrodes of a dynamo, Southwick conceived of using electricity as a means to execute criminals instantly and humanely.

He published in technical journals several conceptions of a device which, with Southwick being a dentist, centered on the functional convenience of a chair. His idea caught the fancy of a few powerful influencers, among them Thomas Edison. As an opponent of capital punishment, Edison had no interest in pursuing capital electrocution, and he worried that electrocuting anyone—even on purpose—would make his electrical products seem unsafe in the public mind.

Still, Edison found a way to benefit. Edison’s company developed and sold large-scale electrical distribution and lighting systems to cities and towns throughout the country. His system was based on direct current technology, while that of his chief rival, George Westinghouse, was based on alternating current, a higher-voltage European technology more adaptable for large-scale distribution.

Hoping to demonize the Westinghouse system, Edison deployed proxies to promote, legislate and secure Southwick’s conception as a model for execution in New York. And by June 1888, when Gov. David Hill signed it into law, Edison allies were firmly in control of the technical development of the “electric chair”—actually, three of them: at state prisons in Dannemora, Sing Sing and Auburn, with the use of Westinghouse AC technology a foregone conclusion.

In May 1889, when Kemmler was convicted by a jury in Buffalo and sentenced to death for murdering Matilda Ziegler, it went almost unnoticed he was eligible for electrocution under the new law. But as it dawned on the public that the nation’s first use of electrical execution was on the verge of reality, it also dawned on Westinghouse that Edison’s hand was behind what might prove to be a devastating blow to the AC technology upon which his fortune depended.

Like Edison, Westinghouse downplayed the extent of his involvement, but he bankrolled high-priced lawyers for Kemmler’s appeals all the way to the U.S. Supreme Court and moved to block any sale of Westinghouse dynamos, new or used, for the planned execution. And through his own proxies, Westinghouse challenged the validity of the gruesome animal experimentation that had been used—even at Edison’s lab—to test the process.

All of it proved unsuccessful. On Aug. 6, 1890, Kemmler was strapped to a wooden chair, and two electrodes were attached to his shaved scalp and spine. A switch was tripped allowing as much as 1,500 volts to surge through his body. The switch was tripped off after 17 seconds, but when Kemmler’s mouth foamed and chest heaved, an attending doctor declared Kemmler alive and demanded that the current be reapplied. The second surge left burns in Kemmler’s scalp, raising doubts about whether the new technology was, in fact, a humane improvement over the rope.
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