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Resiliency Is the New Normal

Lawyers, ABA adapt and lead in tackling pandemic challenges

BY JUDY PERRY MARTINEZ

The COVID-19 pandemic has caused great tragedy and unprecedented social and economic change in our country and the world. The legal profession and justice system have been forced to adapt on multiple levels over a compressed time period. Changes in how we work that most technologists thought would occur over the next decade were embraced in less than a springtime and continue to evolve quickly.

Lawyers are working to adapt their remote operations, manage employees’ safety and attend to their own and their families’ health. On a professional level, lawyers are employing new skills for the benefit of their clients. Across major cities, small towns and rural farmlands, we have singularly and collectively come to appreciate and understand how our roles in society and our responsibilities to others affect our neighbors. In some ways, our forced separation has brought forth an acute awareness of our oneness.

The American Bar Association has been working proactively throughout these challenges to bring useful new resources to lawyers while continuing to advocate for the profession we serve. In the interest of safety, the ABA has transitioned its 2020 annual meeting to a completely virtual one.

The ABA’s Task Force on Legal Needs Arising Out of the 2020 Pandemic (ambar.org/coronavirus-taskforce) was created within days of the initial shelter-in-place orders. It taps the knowledge and creativity of legal experts in disaster response, health law, insurance, small business, criminal justice, civil rights, medical and employment benefits and more.

The task force’s website contains information and updates on new benefits, protections against evictions and other actions due to job losses, court closings and mobilization of pro bono efforts. The site, which is regularly updated, also includes:

- Free resources and guidance for lawyers in all practice settings with short videos and links about working remotely, disaster response, planning/preparedness plans, laws on quarantine orders, protecting against cybersecurity threats, and lawyer health and well-being.
- Pro bono opportunities: For example, lawyers in 42 jurisdictions can participate in ABA Free Legal Answers, which allows them to answer civil legal questions from their homes without expectation of long-term representation.
- The ABA CLE Marketplace, which has nearly 600 widely accredited online and on-demand programs on pandemic-related and other topics free to ABA members.

Throughout the pandemic, the ABA has continued its robust advocacy for the profession and our clients. For example, the ABA urged federal officials to consider “essential” critical legal work that cannot legally or practically be done remotely during stay-at-home orders. We also promptly released guidance to state supreme courts and bar admissions officials urging state licensing authorities to adopt rules authorizing 2019 and 2020 law graduates who cannot take a bar exam because of the pandemic to engage in a limited practice of law with supervision by a licensed attorney.

Legal aid and criminal justice continue to be a focus of our advocacy. The ABA urged House and Senate leaders to include $100 million of supplemental emergency appropriations for the Legal Services Corp. to serve pandemic-related legal needs of low-income Americans. The ABA also requested federal officials promote public health by instituting protections against the spread of COVID-19 in jails and prisons.

During this time of challenge and change, resilience is critical. We must be flexible in our processes and traditions but firm in our commitment to our principles and justice.

The ABA, through its committed staff and dedicated volunteer leadership, will continue to lead our profession through the pandemic. We are all part of a historic chapter for the ABA, the profession and our nation as we perfect new ways of interacting and learning from one another.

Much work remains to be done, but our embrace of resiliency will lead us down a new path that positions us to best serve our clients and the public in this time of need and beyond. Together, we will emerge a stronger and more vibrant profession.
A Message to Our Readers

BY JOHN O’BRIEN

The June-July issue of the ABA Journal you’re reading now marks the second edition of the magazine you’ve received since the COVID-19 crisis forced fundamental changes to American society. Since the disease first became an issue, and particularly since the pandemic escalated in March, the Journal staff has produced significant coverage of the crisis at ABAJournal.com. As the virus continued to force changes to the way attorneys practice law, how courts hold proceedings and how clients access legal services, our staff has been there to provide uninterrupted coverage on our digital platforms, just as we worked to ensure you would be holding this magazine right now.

Looking back to when the ABA Journal staff wrapped up production on the April-May magazine, it was a different world.

The COVID-19 pandemic already was an international crisis, and the disease already had started to take root in the United States, but life for many Americans had yet to be upended the way it has been for the last few months. It was March 12, and most of the Journal staff was working out of our office in Chicago. We had sent the final pages to our printer in Wisconsin and were proud of the product that soon would be delivered to ABA members.

A fast-moving story

Because of the deadlines required to produce the publication, the vast majority of material for the magazine had been submitted more than a month earlier. Most of the pieces had been in the works for weeks, if not months, before that. Indeed, when most of the April-May stories were being created, COVID-19 had yet to become widespread front-page news.

But in the course of the magazine’s production, the situation began to escalate, and we considered how to address it in print. We soon realized the crisis was evolving so quickly that any coverage we’d try to provide in the magazine surely would be outdated by the time it arrived in your mailbox near the end of March. What we didn’t know was how dramatic that evolution would be.

Within days of wrapping up the April-May issue, all of us were working remotely. All schools and many businesses were closed, and we were ordered to shelter in place.

But the societal impacts were more significant. The number of coronavirus cases began to rise, as did the numbers of those who tragically lost their lives to the disease. By now, many of us know someone who’s been struck ill by the virus. And many of us know someone who’s lost their life to it. If not, I pray that continues, just as I pray for the continued health and safety of all my co-workers, our members, your families, staffs and friends.

Even though our nation has been struggling with the crisis for months, it’s too early to know what lasting effects it will have on our society. How many people will fall ill—and how many lives will be lost—are questions I’m not sure I want to know the answer to.

Likewise, how this crisis will ultimately affect the legal profession and justice system is still unknown. Surely some impacts will be felt for years. That uncertainty, coupled with the continued rapid evolution of the pandemic, led us here at the ABA Journal to conclude our production process wouldn’t allow us to provide comprehensive coverage of the crisis in this issue.

Our commitment to you

Although the nature of our production process has limited our ability to cover the pandemic in the print magazine, our staff has worked tirelessly to provide robust coverage of the crisis online. Our coronavirus-related reporting is compiled at ABAJournal.com/covid-19, and we continue to update that page frequently.

Rest assured that in the coming months and years, the Journal will continue to cover the impacts of this crisis on the legal community. It’s part of our commitment to serve our members and the legal profession—one that hasn’t wavered in the face of this adversity.

John O’Brien joined the ABA Journal as editor and publisher in November.
Addressing a redress
I found “Truth and Reparations,” April-May, page 9, fascinating. I have not entirely made up my mind on reparations. As a white male, I have emotionally vacillated between two poles over time. Liane Jackson’s article, though, made me really examine my own thoughts again. On the one hand, it has always been tempting to cling to the idea that I didn’t participate—at least not intentionally—in slavery and everything that came after. I am not even sure if my ancestors did. So why should I pay for it?

On the other hand, as I get older, I find it impossible to deny the ongoing societal effects and legacy of slavery, institutionalized racism and so many other related problems—and that I have undeservedly enjoyed a white privilege to varying degrees throughout my life (it is a hard-to-come-to realization that you didn’t earn everything you have entirely on your own merit).

I do not pretend to know what the “right” answers are—or to presume the “right” answers will be right for everybody; however, I have come to a more humanistic and interconnected understanding that if my black neighbors and friends suffer, my whole neighborhood suffers. From that place, without assigning blame or merit, I find it much easier to consider reparations or other policies to promote a more just and equitable society—and in so doing, to help right the wrongs of the past. Articles like yours are important to promote these conversations. I was particularly interested in the idea of sales tax proceeds from recreational marijuana as a funding mechanism for reparations.

Jeremy M. Goodman
Phoenix

Excellent article about reparations. My great-great-great grandfather Joseph Rucker was the first millionaire in Georgia. He obtained this status because of his numerous plantations and the hundreds of slaves he owned. I support reparations because of what he and other family members did prior to the Civil War. I encourage the ABA Journal to keep writing about this issue. It brings up a lot of well-buried dirty laundry, but it’s familial facts that have to be addressed.

K. Denise Rucker Krepp
Washington, D.C.

Combating negative PR
As always, I found the ABA Journal relevant and informative. Of particular interest was “Good Press,” February-March, page 18, by Danielle Braff, regarding the oft-cited and ever-present public relations challenge facing attorneys and the legal profession as a whole. The premise of the well-presented article identifies a perceived lack of public trust with our profession and addresses those concerns with commercial marketing and social media strategies—or PR campaigns—to “bolster [the] credibility and expertise” of attorneys.

I suggest that missing among the tools available to repair negative public perception about the legal profession is the full-throated recognition and publicity of the existence of each state’s Lawyers’ Fund for Client Protection.

Client protection funds are often referred to as the best-kept secret of the legal profession. This characterization is puzzling, given these lawyer-financed programs provide reimbursement to victims of dishonest lawyers and reflect the commitment of the overwhelming majority of honest lawyers to restore the public’s faith and promote confidence in the legal profession. In fact, the legal profession is the only profession that offers such protections to its clients. In a very real sense, client protection funds exist because of good lawyers.

Michael J. Knight Sr.
Albany, New York

Corrections
“True Conviction,” April-May, page 56, should have credited Anna Ream LLC for the photograph of Deborah Espinosa.

Photographer Zack Smith’s name was misspelled on page 6 of our September-October, Winter, February-March and April-May issues. 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, 321 N. 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.
Insights

with Jack Newton

Lead with Empathy
By Jack Newton

Earlier this year, COVID-19 kicked off massive waves of change across daily life as we know it, leaving a lasting impact on virtually every industry. Law firms, lawyers, and courts that were previously reticent to adopt technology were forced to rapidly adapt to a new reality, or be faced with irrelevance or failure. Change that may have otherwise taken a decade or longer happened in a matter of weeks. Some law firms couldn’t adapt quickly enough, and their businesses and clients paid the price.

But some firms did adapt. I saw firms of all types, including highly traditional firms with dated on-premise technologies and traditional bricks-and-mortar offices, make a transition to a cloud-based, fully distributed way of working with such speed it was almost inconceivable. Firms that already had cloud-based technology had a head start, but still had a significant adaptation to undergo in terms of how they work both internally and externally.

However, those firms that did find ways of adapting are now set up to reap disproportionate successes. They are positioned to focus on strategies to best serve their clients while protecting the long-term financial health of their firms—a critical consideration as the aftershocks of COVID-19 continue to ripple throughout the economy. We’re all struggling right now, but those who’ve adopted cloud technology to run their law firms and fully embrace distributed work are best positioned to emerge from this crisis stronger.

Looking to the coming months, it’s crucial we lead with empathy—for ourselves, for our clients, and for our colleagues.

What does that mean, practically speaking? Now more than ever, it’s critical for law firms to get laser-focused on what clients actually want out of their legal experiences, so that they’re not wasting precious time or money on anything else. Stop spending time and money sending letter updates via mail when a simple email update will do.

Today, law firms must remember that taking a client-centered approach does not mean taking a client first approach, and that the health and financial well-being of their families, staff, and their business must be taken care of so that they can serve clients and keep law firms running. Maybe you ask your clients to top up their retainers sooner than you normally would to protect cash flow at your firm. Certainly, many clients are likely facing financial difficulties of their own, but you won’t know what’s possible until you ask, and you may be surprised at the answer.

And, now is the time for those in the legal industry who have already adopted technology to lead with empathy for their less technologically inclined counterparts. COVID-19 triggered a mass migration to the cloud for law firms, and whether we’re still working remotely or not, it’s clear that the legal industry needs the adaptability provided by the cloud long term. The faster we can get each other up and running, the better.

Encourage those moving to the cloud for the first time as they face new challenges. Be bold and share your successes online so that others can learn from them. Take care of yourself first, but if you’re able, meet with a colleague you know who’s struggling with technology to answer some of their questions—you might make a significant difference in the health of their law firm long term.

Finally, if you own a law firm that has struggled to adapt to a distributed work reality, lead with empathy for yourself, and focus on the future. The best time to adopt cloud-based technology at your law firm was five years ago. The second best time is today.

The technology is available now to enable lawyers to work from anywhere, while providing the same level of client service as from their traditional office space. For lawyers and legal professionals that have yet to move to the cloud, there’s no time like the present, and we’re here for you: Visit clio.com/work-from-home for resources and advice on setting up an adaptable, distributed law firm.

Jack Newton is the founder of Clio and a pioneer of cloud-based legal technology. Jack has spearheaded efforts to educate the legal community on the security, ethics, and privacy issues surrounding cloud computing, and is a nationally recognized writer and speaker on the state of the legal industry. Jack is the author of “The Client-Centered Law Firm,” the essential book for law firms looking to succeed in the experience-driven age, now available at clientcenteredlawfirm.com.
As the Democratic primaries wind down and the general election approaches, America faces an unprecedented test of its electoral system. Dogged by the threat of Russian interference, plagued by allegations of voter suppression and shadowed by the specter of a deadly pandemic, the November election promises a perfect storm of controversy, conflict and lawsuits.

Election-related litigation is nothing new. But in recent years, voting rights advocates have been filing lawsuits in earnest as quickly as states erect impediments. These efforts have had mixed results, with battles won on one front and ground lost on others. In many ways, voter suppression is like fighting malware—as soon as one threat is fixed, a novel one is created to attack.

Same song, different tune
Blocking the right to vote is as American as apple pie. The U.S. has a long and notorious history of disenfranchisement—primarily targeting people of color, the young, senior citizens and the poor. While there are no poll taxes or literacy tests at election sites today, voter suppression tactics have nonetheless proliferated, with some of the same old tricks ginned up with modern twists.

Restrictions on voting rights include reducing polling locations—primarily in minority neighborhoods and on college campuses; crippling Voting Rights Act oversight; creating oppressive voter ID laws; hampering voting access on Native American reservations; enforcing fines and fees on reenfranchised ex-felons; and purging voter rolls. Although lawyers are challenging suppression efforts in courts across the country, they face a losing battle if judges don’t uphold citizens’ rights.

Over the years, court fights over ballot access have become a bitter partisan cage matches. Political parties recognize that winning or losing usually depends on who controls local election rules, which in turn hinges on control of state legislatures and gerrymandering in a continuous power loop.

Mailing it in
In addition to the myriad problems already plaguing state election infrastructures, the coronavirus poses an existential threat. Look no further than Wisconsin’s April election, where the combination of a pandemic, a Democratic presidential primary and a hotly contested state supreme court seat caused a frenzy of litigation and 11th-hour chaos.

Across Wisconsin, the threat of contagion resulted in a paucity of poll workers and polling places. Conflicting directives on absentee voting meant many residents didn’t request mail-in ballots far enough in advance. At the last minute, Gov. Tony Evers issued an executive order changing the election date to protect the health of Wisconsin citizens. For Republicans, changing the election date, which might benefit Democratic turnout, was a nonstarter. Instead, the Republican Party of Wisconsin sued to force the country’s most dangerous election to go forward.
On the eve of the election, the U.S. Supreme Court waded into the fray, overruling determinations by a federal district court and the Chicago-based 7th U.S. Circuit Court of Appeals that absentee balloting could extend for a discrete time after the election—to protect those who hadn’t received their ballots and to prevent contagion. Instead, the court’s conservative majority created new rules: Absentee ballots had to be postmarked by election day and received within six days after the election in order to be counted.

Ordinarily, lower courts are given deference in emergency stay requests. But the Supreme Court’s recent history has evinced a troubling pattern of deferring not to its federal bench but to a particular political party. In a dissent signed by the liberal wing of the court, Justice Ruth Bader Ginsburg decried the decision, writing: “The court’s suggestion that the current situation is not ‘substantially different’ from ‘an ordinary election’ boggles the mind.” She also warned the order “will result in massive disenfranchisement.”

But that was precisely the goal. The court’s party-line decision meant voters without the apocalyptic prescience to request an absentee ballot weeks in advance would have to either risk their lives at the polls or forfeit their right to vote. On election day, masked voters stood in line for hours at the polls, including many who’d requested absentee ballots they never received.

The court’s conservative justices insisted the decision addressed “a narrow, technical question about the absentee ballot process” and a district court’s jurisdiction in such scenarios, chastising last-minute interference by federal judges in state electoral processes, then interfering at the last-minute in state electoral processes.

NAACP Legal Defense and Educational Fund President and Director-Counsel Sherrilyn Ifill called the court’s ruling “unconscionable” and “one of the most cynical decisions I have read from this court—devoid of even the pretense of engaging with ... reality.”

A brewing battle
With Wisconsin as a cautionary tale, Democrats are pressing to expand early voting for the general election and for a nationwide vote-by-mail system. But the logistical challenges, and cost, are daunting. According to the New York Times, five states—Colorado, Hawaii, Oregon, Utah and Washington—already have all-mail elections, where ballots are automatically sent to every registered voter. Arizona and California allow voters to add themselves to a permanent list for mail-in voting. But absentee balloting is far from widespread.

The Trump campaign has launched a multimillion-dollar legal effort to block attempts to implement nationwide mail-in ballots, and the president has expressed concerns that allowing more absentee voting would increase Democratic turnout and hurt Republican candidates—a debunked but revealing commentary.

Trump and Republican strategists have falsely alleged that voting by mail increases voter fraud. Meanwhile, Trump admitted he voted by mail in Florida’s March primary.

“We have a different value system about what voting means to a democracy,” Speaker of the House Nancy Pelosi (D-Calif.) said of her bloc’s efforts to expand mail-in voting. “Clearly, we want to remove all obstacles to participation.”

It’s a tall hurdle. Although voting may be a cornerstone of the rule of law, the idea of representative democracy in the United States—one person, one vote—is a chimera. Voting rights aren’t even protected in the U.S. Constitution. But that hasn’t stopped the fight against voter suppression in all its forms.

Activists are carving paths for more widespread participation wherever they can.

And however they can. After the Supreme Court’s Wisconsin decision, University of California at Irvine law professor Rick Hasen, writing at his Election Law Blog, made a dire forecast: “The message from today is: Don’t expect the courts to protect voting rights in 2020.”

ON WELL-BEING

Tackling Implicit Bias

New tool offers insight, answers

BY JEENA CHO

The existence of implicit bias in the legal profession is both obvious and well-documented. In 2016, the American Bar Association Commission on Women in the Profession and the Minority Corporate Counsel Association partnered with the Center for WorkLife Law at the University of California’s Hastings College of the Law in San Francisco to conduct research to further understand law firm and in-house lawyers’ experiences of bias in the workplace. The research confirmed “many of the traditional diversity tools we have relied upon over the years have been ineffective.”

The study, You Can’t Change What You Can’t See: Interrupting Racial & Gender Bias in the Legal Profession, documents four specific biases against women and people of color:

- Prove-It-Again: Being forced to work harder than white male counterparts.
- Tightrope: A narrower range of behaviors is deemed acceptable.
- Maternal Wall: Bias against mothers.
- Tug of War: The conflict between different disadvantaged groups when only a limited number of opportunities are available.

Despite evidence that diverse workplaces perform better and lead to better financial results, the legal profession has been slow to respond. Conscious and unconscious biases are baked into the
system through hiring, how career-enhancing work is assigned and how lawyers are evaluated and compensated. The report suggests organizational changes to reduce the impact of unconscious bias.

But there is also recent research on how individuals can uncover their implicit bias through meditative practices—which can lead to systemic change.

**Facing unconscious bias**

It caught me by surprise when I first took the Harvard Implicit Association Test, which measures unconscious bias. The test revealed I had many common biases: preferring younger people over older; people with lighter skin; and white people over black people.

My initial reaction was surprise, then denial. After all, I’m a person of color and a woman. Surely I couldn’t have bias against other minoritized groups? But this is actually a common phenomenon.

Certain types of mindfulness and meditation practices can impact implicit bias. Much of the research in this area focuses on a specific meditation called loving-kindness meditation. LKM has been shown to increase a person’s capacity to be compassionate.

LKM appears to strengthen our compassion toward people who are outside of our circle of trust.

A 2013 Yale study examined the impact of LKM on improving implicit attitudes toward members of stigmatized groups.

The researchers used Harvard’s test to measure implicit bias, concluding that actively practicing loving-kindness meditation significantly decreased implicit bias as opposed to merely discussing the concept. A 2012 study out of Stanford University demonstrated that compassion cultivation training, which utilizes LKM, significantly increased empathy.

**Practice makes perfect**

According to the Stanford study, compassion is a multidimensional process through four stages: the awareness of suffering, an affective concern for others, a wish to relieve that suffering and a readiness to relieve that suffering.

The six steps of loving-kindness mediation are: (1) settling the mind through mindfulness meditation; (2) bringing to mind someone you care about, noticing the feeling of compassion, offering words and thoughts of well-wishes; (3) extending this sense of caring and compassion toward yourself; (4) offering compassion toward others; (5) bringing compassion toward all beings; and (6) imagining taking away the suffering of others.

During LKM, you repeat phrases of well wishes toward the individuals or groups such as: “May you be happy, may you be healthy, may you live with ease, may you be free from suffering.”

I had the opportunity to take the CCT course at Stanford and found myself having to look at, examine and contend with my own blind spots. I looked at the people I surrounded myself with and the content I consumed more critically. I examined the books I read, the podcasts I listen to, the people I follow on Twitter. What surprised me was how homogeneous this population tended to be. I noticed a bias toward consuming media created by well-educated white males. Perhaps this is the part of implicit bias that is so insidious and difficult to change—the favoritism. It is not overt racism, sexism or ageism I struggled with, but rather that I favored those voices who were in the majority and therefore more familiar.

The legal profession is contending with the question of how to address implicit bias. Some states now mandate CLE on the topic. What is clear is that it is not enough to simply understand what implicit bias is. We need a tool like LKM to interrupt and acknowledge our own implicit bias—and more important, see how it harms minoritized groups. Only then can we create a more diverse and inclusive profession.

Jeena Cho consults with law firms on stress management and mindfulness. She co-wrote The Anxious Lawyer and practices bankruptcy law with the JC Law Group in San Francisco.

**A Life of Fighting Injustice**

**BY DALE MINAMI**

Character Witness explores legal and societal issues through the first-person lens of attorneys in the trenches who are, inter alia, on a mission to defend liberty and pursue justice.

I am a third-generation Japanese American. My grandparents emigrated from Southern Japan in the early 1900s seeking “streets of gold” and fleeing deteriorating conditions in their home country. My parents were born in California, citizens by birth. But they were incarcerated with their families during World War II, solely because of their ancestry: first in fetid horse stalls, and later in dismal prisons in the Arkansas swamplands.

I was born at the Japanese Hospital in East Los Angeles, the only hospital that admitted Japanese doctors then. My father was a farmer, a gardener and the owner of a small sporting goods store. My mother worked there and at home. I have two older brothers who taught me lessons involving books, sports and unwanted violence upon my person—all valuable lessons later in life.

My parents rarely talked about their degrading incarceration experience, but by their example I was taught to honor the Founding Fathers’ prescription that all Americans are created equal and should be treated accordingly. But watching the civil rights movement unfold on television in the early 1960s, when peaceful African American demonstrators were attacked by vicious dogs and water cannons just because they wanted to eat at a restaurant, utterly confused me. As did the Watts
rebellion in 1965—witnessing Los Angeles seemingly burning down, ignited by the frustrations of African Americans whose “American dream” was really a nightmare.

**Year of unrest**

I could not reconcile the elegant rhetoric of the American promise with such appalling events and with the subtle racism I experienced at the University of Southern California. I graduated in political science with no marketable skills besides selling Converse athletic shoes. My best option was to attend law school. So in 1968, I stepped onto the Berkeley Law campus, where virtually every day produced a new protest or demonstration accompanied by the sting of tear gas. To me, it was the epicenter of our (boomers) generation’s coming of age in such turbulent times. In that year, milestone events erupted—student protests around the world, the assassinations of Martin Luther King Jr. and Robert Kennedy, black-gloved fists raised by Tommie Smith and John Carlos at the Mexico City Olympics protesting racism in the USA, the Democratic National Convention riots, bloody anti-Vietnam War protests against a meaningless conflict, and perhaps the most influential event for me—the Third World Liberation Front strike at San Francisco State University challenging the narrative of history that minimized and distorted the stories, cultures, contributions and characters of people of color.

I was drawn to issues of injustice, and I only later realized how my passion and outrage was formed by my experiences at USC and the urgency of a life-and-death mandate to fight in Vietnam. Perhaps the greatest influence on my perspective was personal—the unjust banishment and imprisonment of my family and 120,000 other Japanese Americans in violation of their Constitutional rights to an attorney, a trial or notice of criminal charges, all justified by a vague and unsupported claim of “military necessity.” The U.S. Supreme Court upheld the constitutionality of my family’s exile in *Korematsu v. United States*. The law had failed my community.

By the miracle of relaxed grading, I graduated from Berkeley Law and passed the bar. A group of friends and I started a nonprofit community interest law firm, the Asian Law Caucus, dedicated to helping empower the Asian Pacific American community—a population invisible to the rest of the country whose history, culture, problems and achievements were widely misunderstood or ignored.

We bonded with a fierce collective purpose to make the system responsive to our communities. The ALC unintentionally evolved into a nonprofit private law practice. We were inept at managing a law practice as a business: We focused so much on pro bono social justice causes that we ignored rent and bills!

Anxiety over our lack of practical skills became a nighttime companion, especially without day-to-day mentors. So every Wednesday, I would pack a lunch and hunker down in the law library to study practice books all day. I had to self-educate since I accepted virtually any civil or criminal case that walked through the door.

But besides our lack of experience and knowledge, we faced other daunting opponents—racist and hostile treatment by judges who used slurs or sarcastically asked me, a Japanese American, to translate for my Chinese-speaking client. We suffered through conferences and hearings where judges clearly favored nonminority opposing counsel. Many nights I returned home with my head on fire, outraged and angered. We realized that changing the composition of the bench was the best strategy. So we embarked on a campaign to transform the complexion and gender of the bench through lobbying governors, joining judicial applicant review committees, running candidates and developing contacts with influential allies. The lack of diversity, we realized, derived from lack of power. We have made great progress, but there are miles to go before we sleep.

**Seeking justice**

We made a living, but I was most drawn to nonremunerative social justice cases—fighting for tenure for professor Don Nakanishi at UCLA; class action lawsuits against discriminatory police sweeps; lawsuits against systematic discrimination at a major insurance company; suing a university to im-
plement an Asian American Studies program; and the overturning of Fred Korematsu’s 40-year-old conviction for his resistance to military orders banishing Japanese Americans.

Korematsu’s conviction during WWII was upheld by the Supreme Court in 1944 in a landmark and much-criticized decision justifying the exile of Japanese Americans. But the more dangerous precedent was the Supreme Court’s near-total deference to the fraudulent proof presented and later revealed in our case—that the government altered, suppressed and destroyed evidence contradicting the government’s claim of disloyalty and the danger of Japanese Americans.

We still hear the echoes of history today. And it is infuriating to see the demonization repeated against Muslims, Arabs, immigrants and marginalized groups. It is also disheartening to repeat the same deference to the president that was the centerpiece of the Korematsu case. Our campaign, Stop Repeating History (stoprepeatinghistory.org), hopes to remind America of the damage racism and unfettered power can wreak on disfavored people and on our nation’s soul.

Maybe the path I took was somewhat nonlinear. I was trying to navigate in a racialized society, harmonizing my love for this country with the cruelty it inflicted and admiring the rule of law but recognizing its limitations. In a mid-career crisis, I once questioned whether I should find another occupation. I lined up the qualities I wanted in a job, measured them against my strengths and weaknesses, and discovered that I was best fit to practice law with my partners who have the same passion for justice, hard work and great legal skills. I never had to look back.

Dale Minami is senior counsel at Minami Tamaki, an Asian American-owned firm in San Francisco, and he specializes in personal injury law. He is a past recipient of the ABA’s Thurgood Marshall Award and Spirit of Excellence Award, and he was the 2019 ABA Medal awardee.

10 QUESTIONS
Reversal of Fortune
He was once in prison for life, but now this New Jersey lawyer’s story has inspired an ABC TV series
BY JENNY B. DAVIS

In 1991, a Somerset County, New Jersey, jury decided Isaac Wright Jr. was a drug kingpin and sent him to prison for life plus 70 years on related charges. Except Wright didn’t do it—he was framed by the very prosecutor arguing the case against him. Wright spent the next seven years studying law from his maximum-security prison cell, eventually proving his innocence and winning his freedom. He achieved significant legal victories for 20 of his fellow inmates along the way.

Sounds like the perfect plot for a TV show, right? That’s exactly what rapper/TV producer Curtis “50 Cent” Jackson thought when he heard Wright’s story. Jackson assembled a team to adapt Wright’s story, and the fictionalized drama, For Life, debuted in February on ABC.

But there’s more. To overturn his convictions, Wright first won a state supreme court case for another inmate, which he then used to invalidate his own kingpin conviction. The remaining convictions crumbled after a dramatic court hearing where Wright got a veteran police detective to admit he’d lied to the jury in Wright’s original trial.

Later, both the judge and the prosecutor involved in Wright’s original case were investigated by federal authorities for crimes unrelated to Wright’s case, including tax fraud and embezzlement. Both were convicted. The judge ended up disbarred and in prison; the prosecutor killed himself rather than serve time.

Wright was pro se when he did his trial from prison, unlike his TV persona. He spent seven years post-release earning back-to-back undergraduate and law degrees. Today, Wright is a litigator with the Newark, New Jersey-based firm Hunt, Hamlin & Ridley, primarily practicing criminal law. He also founded the Isaac Wright Jr. Network for Justice, which upon its completion will be a searchable national online database for legal and social justice nonprofits.

Congratulations on the show! How has its success impacted your daily life?
It’s all been positive, but it has increased the burden a thousandfold in a number of different ways. We have a huge firm, and we have a lot of attorneys who are very experienced, very competent and very aggressive, but everyone who calls wants Isaac. A lot of them don’t really need me, but they want me. I take a lot of pro bono cases, and I always have to balance my pro bono cases with my paying clients because this is a law firm—this is a business.

How involved were you in bringing For Life to life?
I was extremely involved. I was there pitching it to ABC, and I sat with the writer as he was developing the idea around my story. I read every script, and I was right there while it was being filmed.

Was it weird to see your life story transformed into fiction?
One of the things I learned early on—and had to deal with early on—was the issue of liberties. During the time I spent with the writer, I got to understand and be comfortable with the liberties. For example, the pilot is based on a client I actually helped get out of prison while I was in prison, but I was not able to argue the case.

Let’s talk more about your courtroom advocacy before you were a lawyer. You represented yourself at trial. Did you have previous legal experience?
No. I had no idea about the law. I didn’t know anything about it. It was the very first time I had gotten in trouble, it was the very first time I had read a law book. But the very first sentence I read, I felt like I had been doing this all my life. I discovered a gift I never knew I had, and I felt really comfortable in my decision to represent myself.

How did you figure it all out? Was there an “aha” moment when you realized how it all fit together?
Once I made the decision to represent myself, I knew that I was very, very far behind in learning, understanding and in skills. I just went on a quest and spent 16 to 18 hours every day teaching myself the law. It was a very onerous undertaking. But one of the things I realized early on is that the holdings of the courts are separated by key numbers. I went through the entire library in seven years, just reading key numbers. Now when I read a case and a factual issue would come up, I recall holdings that are associated with that factual issue.

Did you think you would win your jury trial?
No. That was one of the reasons I made that decision. The day I was arrested, the police brought this guy to see me. He was in a suit, I thought he was my attorney. But he said, “I just wanted to come here to introduce myself. I am Nicholas Bissell, the chief prosecutor, and I am trying your case personally.” That was major. A head prosecutor got out of his bed in the middle of the night to come tell me that he was going to be trying my case personally. I knew at that point that I was in a lot of trouble. Later, after seeing the corruption, the lies, the false police reports … there was no doubt in my mind that I was going to prison for something I didn’t do, and no one was going to be able to prevent it.

Every attorney I interviewed insisted I plea to 15 to 20 years. I made the decision that if I was going to go down, I was going to go down on my terms. I wasn’t going to pay another person to send me to prison.

So your strategy was to create a record for appeal?
Yes, that was my entire strategy. Once I understood what was going to happen—that I was going to prison for life—my end goal was making sure they wouldn’t be able to keep me there.

You weren’t the only person victimized by Nick Bissell. Was there an investigation underway before that pivotal hearing when the detective in your case recanted?
Early on, there was some information I had obtained regarding the corrupt activities of Bissell and my trial judge. I had written this information down and shared it with a few of my co-defendants during a visit to the library. What I didn’t know at the time was that one of them was an informant. After we left the library, I came back to my cell. I couldn’t have been there five minutes before the prosecutor sent officers to my cell and rushed in. They threw me on the cell floor, cuffed me and searched my cell. They found the information. But I had memorized it. After I got convicted, I put in a motion for bail pending appeal. By the time I put in this bail motion, I knew it was going to be denied. But I also knew there would be reporters in the courtroom. So just as the judge was denying the motion, I started shouting out in the courtroom all these things that I had discovered about Bissell and the judge—the things from the note. The reporters wrote about it, and once it was in print, people started coming out. Then more prominent people started coming forward, and [the authorities] … started the investigation. By the time I got to the hearing 7½ years later, a lot of that stuff was already out about the prosecutor and the judge, and ultimately, even more came out during that hearing.

After you passed the bar, the state supreme court’s Committee on Character took nine years to approve your bar admission. Did you anticipate it taking so long?
I had no idea. I knew it was going to be tough, but everything had been dismissed and my record was clean, so I literally thought, at the most, it would be maybe six months to a year. Around year eight, I cold-called a retired state supreme court justice who had ruled in my civil case, holding the state liable for prosecutorial misconduct. She was upset about what was going on. She said she couldn’t represent me because of conflict of interest, but her husband would. Within six months, I had my license. There’s a picture of me taking the attorney oath, and she’s the lady giving me the oath. She was able to swear me in.

After your admission, you could have gone anywhere. Why did you stay in New Jersey to practice criminal law?
I left a lot of people behind who didn’t belong where they were at. I looked at what God did for me as a sign that I had to give back. I have my freedom, I have regained my success. At this point, I think the journey, what I have gone through, the way I have been delivered, and my trials and my tribulations were for a purpose—for me to go back and deliver those who could not deliver themselves. I am going to live and die in the trenches.
Imprisoned While Female

A new study looks at the prison system’s failure to address women’s health and safety behind bars

BY DARLENE RICKER

When asked which legal right most needs to be remedied for women in prison, former federal inmate Sharanda Jones put it plainly: “the right to not be there in the first place.”

For Jones, the inconveniences, degradation and safety risks she experienced frequently paled in comparison to the big picture. A first-time offender of a nonviolent crime—one count of conspiracy to distribute crack cocaine—she was shocked to learn she would have to serve her entire sentence.

All she could think was, “This is my end. I’m going to die in this place,” says Jones, who was sentenced to life in prison without the possibility of parole in 1999. In the federal system, she notes, “A life sentence is not a life sentence; it’s a death sentence. You are sent there to die.”

Then-President Barack Obama commuted her sentence in 2015, but few get that escape route. The number of incarcerated women is growing, and with it the unique and pressing needs of female prisoners in the system.

In response, the U.S. Commission on Civil Rights did an 18-month investigation. It released a report, Women in Prison: Seeking Justice Behind Bars, in February.

The population of women in prison has increased dramatically since the 1980s, according to the report, and the rate of increase has outpaced that of men. In 2017, women accounted for approximately 225,000 of the slightly more than 2 million people in local, state and federal facilities in this country, according to the Sentencing Project, which tracks incarceration statistics.

The Women in Prison report cites disciplinary disparities between men and women—with a particularly negative impact on LGBT-identified women and women of color—and notes that many prisons do not meet the health, prenatal and personal hygiene needs of female inmates. It stresses the impact of women being incarcerated far from home with limited visitation access and having their parental rights terminated.

The commission is calling on the Department of Justice to expand its investigation capacity and continue to litigate enforcement of incarcerated women’s civil rights in states that violate them; it asks Congress to enact stricter penalties for noncompliance with the Prison Rape Elimination Act, focused on inmate safety, and to consistently appropriate funding sufficient to ensure correctional agencies comply; and it urges institutions to provide more mental health treatment programs.

“We were aghast at the experiences we learned about for so many women who are incarcerated,” commission chair Catherine Lhamon says. “Some judges were incarcerating women as a means of providing them access to rehabilitation because they knew there was no other way.”

First steps

Kevin Sharp, former chief judge of the U.S. District Court for the Middle District of Tennessee, found a way. He recalls a young female addict who came before him for sentencing as a first-time offender. Like many female defendants, he says, she had been “forced to do the dirty work” of picking up a shipment of drugs for her boyfriend.

“No one wanted out of this way of life more than she did,” says Sharp, who gave her the lowest sentence possible.
After serving her sentence, she failed a drug test, which violated the terms of her release. She again appeared in front of Sharp, who sent her to an inpatient program rather than back to prison.

Sharp says he is starting to see improvements in the legal treatment of women, pointing to the First Step Act, for which he was a vocal proponent; he was invited to a White House meeting about the legislation with President Donald Trump, who signed it into law in 2018.

Among the goals of the act are to reduce the federal prison population and recidivism; advance sentencing reform; provide drug treatment and other programs to prepare inmates for post-release lives; and improve prison conditions and safety procedures. It requires the federal Bureau of Prisons to implement policies that allow for good-time credit and compassionate release. Key provisions provide that federal female inmates do not have to pay for feminine products and cannot be shackled during pregnancy or childbirth.

Dallas attorney Brittany Barnett, who obtained clemency for Jones, was part of the effort to pass the First Step Act. She sees it as just that: the first step.

“There is still lots of work to be done,” she says, noting that of the four sentencing law improvements in the legislation, provisions of only one, the Fair Sentencing Act of 2010, are retroactive. That improvement reduced mandatory minimum penalties for crack cocaine offenses, which have been widely condemned for their disparate impact on minorities.

Barnett’s memoir about her legal journey with Jones, A Knock at Midnight, is scheduled for release by Crown in September.

In a joint effort with Jones and Corey Jacobs, a man sentenced to life for whom she obtained clemency, Barnett founded Buried Alive. The organization contends the First Step Act’s revision to the three strikes law, which reduced a mandatory life sentence without parole for certain three-time offenders to a 25-year mandatory minimum, should also become retroactive.

New urgency
Given the COVID-19 pandemic, “If ever there was a time to focus on lowering the prison population and looking at who could be [housed] in less restrictive settings, it is now,” says Judith Resnik, a Yale Law School professor and founding director of its Arthur Liman Center for Public Interest Law.

She calls the coronavirus crisis “an early cri de coeur [a passionate outcry] that makes that plain many women do not need to be in prison.” And she adds, “There is nothing in the law saying that people can be sentenced to the risk of serious illness or death.”

In an effort to mitigate virus risks after some staff members and inmates tested positive, Decatur Correctional Center in Illinois released several mothers and babies in March.

Attorney Julie Abbaté observes, “Prison systems were not built with women in mind.”

Abbate, national advocacy director of Just Detention International in Washington, D.C., has been a relentless fighter for the rights of female prisoners. She is the former deputy chief in the Special Litigation Section of the Civil Rights Division, a member of the ABA Criminal Justice Section, and she testified before the commission in hearings about the study.

She drafted a resolution adopted by the ABA House of Delegates in 2019, urging governments to enact legislation, and correctional and detention facilities to enact policies that provide female prisoners with unrestricted access to free toilet paper and a range of free feminine hygiene products. Since then, she has been working with state correctional agencies and county sheriffs to help implement the ABA policy.

Abbate says disparate prison disciplinary rules are also a particular concern.

“For men, an assault in prison usually involves a violent fight. For women, it could be pushing or hair-pulling. For both, it’s punished as assault,” she says, adding that women are particularly at risk of violence and sexual abuse in prison. “Whenever you have scarcity and deprivation, it creates power over women. An unscrupulous correctional officer could pressure a woman to perform a sexual act on him [and say], ‘Do it, or I’ll put you in isolation.’ The fear of being separated from her children drives a woman to comply.”

The report also notes solitary confinement for minor violations denies women good-time credits and shorter sentences.

The commission is calling on prisons to implement evidence-based, trauma-informed discipline policies to avoid harsh punishments for minor infractions.

In some states, things seem to be improving, albeit slowly. Lhamon points to recent disciplinary changes under guidelines adopted and enforced by the Alabama Department of Corrections and MCI-Framingham, a women’s medium-security facility in Massachusetts. She says data showed “astonishing progress” in inmate safety after those institutions implemented a gender-responsive trauma-informed disciplinary policy.

Those policies are informed by studies on the different characteristics and pre-incarceration experiences of men and women (particularly trauma), and generate information on how to meet the unique needs and challenges of female inmates.

Data after implementation of those policies has shown “extraordinary, just jaw-dropping” improvements, she says, adding that the new disciplinary policies could be models for other states to follow.

Lhamon says the commission is working with Sen. Brian Schatz (D-Hawaii) on his bipartisan efforts with Sen. John Cornyn (R-Texas) urging better oversight of Prison Rape Elimination Act compliance. The commission is also working with U.S. Rep. Pramila Jayapal (D-Wash.) on the Dignity for Incarcerated Women Act, which she co-sponsored with U.S. Rep. Karen Bass (D-Calif.). The bill addresses many issues raised in the commission’s report, and companion legislation was reintroduced in the Senate last year by Elizabeth Warren (D-Mass.) and Cory Booker (D-N.J.).
All-Seeing Eye

Do police drones foster trust or threaten civil rights and privacy?

BY MATT REYNOLDS

A report comes in of a man at a local taco stand waving a dark object, maybe a gun. From a control room, pilot Matt Hardesty dispatches a sleek black drone from the rooftop of the Chula Vista Police Department in Southern California. One minute and 24 seconds later, it’s above Roberto’s on Broadway.

The taco stand casts a long shadow over a man with buzzed hair. He’s wearing a tucked-in purple polo over a white long-sleeved T-shirt and talking to himself. Hardesty, watching on a monitor, can’t tell if the man is wielding a replica firearm or a real one. “I’m voting on the side of it being a gun,” Hardesty recalls.

A unit of six officers is two blocks away. Video from the scene is transmitted to their smartphones. The officers know the next moments are critical. Similar situations involving fake guns have ended in tragedy.

Hardesty rolls his hand over a trackball mouse, the drone giving him an overhead view as the man is joined by a friend, lifts the object and lights a cigarette. Smoke drifts from his mouth. Hardesty’s relief is palpable. He tells the officers the man probably has a novelty lighter.

The drone debate

Police say unmanned aerial systems can build trust in the community by deescalating incidents such as the one in Chula Vista. Critics warn, however, that drones sow fear and distrust.

“As drones become smaller and quieter and more sophisticated, we are entering a world where there’s no technological limit on the government having cameras everywhere looking down at us,” says Adam Schwartz, a senior staff attorney with the digital rights group Electronic Frontier Foundation.

Public safety agencies across all 50 states have drones, the Center for the Study of the Drone at Bard College says in a March 2020 paper, with 70% of disclosed public safety agencies working with drones in law enforcement. A patchwork of state regulations governs their use, and the law is lagging behind. Congress and the Federal Aviation Administration, which regulates drone safety, have not set guidelines on the concerns around speech, privacy and discrimination.

Experts predict a police drone case eventually will reach the U.S. Supreme Court, though none was aware of any such cases currently pending at the federal level.

Two cases from the 1980s could be instructive. In California v. Ciraolo and Florida v. Riley, the Supreme Court found warrantless surveillance by the police from an airplane and a helicopter did not violate the Fourth Amendment right to be free from unreasonable searches and seizures.

Recent decisions on GPS locators, thermal scanners and smartphones could come into play. In 2018, the Supreme Court reached one of the most significant privacy rulings in the digital era, finding in Carpenter v. United States that without a warrant, law enforcement could not force cellphone companies to hand over location data that continuously tracks users.

There are 29 states with laws on drone use and privacy, according to the National Conference of State Legislatures, including warrant requirements for police departments. In at least 18 states, police officials must secure warrants for drone video surveillance and searches.

The EFF isn’t opposed to police and government agencies having drones, Schwartz says. But he would like federal warrant requirements that limit how authorities can collect, retain and share information using the technology. He would urge the courts not to consider drones in isolation but “as one thread in a tapestry” of technological advances.

Arguably, drones are harder to detect than police helicopters and airplanes. Add high-definition cameras, facial recognition software and license plate readers, and the police could have limitless spying capabilities. Daniel Massoglia, of counsel at MK Law in Chicago, thinks civil rights could be violated.

“The risk, as always with surveillance, is that it’s going to target political activists, political protesters, people expressing their First Amendment rights, and it’s going to be targeted at communities of color,” Massoglia says.

In 2018, Chicago Mayor Rahm Emanuel pushed for legislation in Illinois to permit warrantless drones to monitor large gatherings. The bill, though defeated, put Karen Sheley, the
director of the Police Practices Project of the American Civil Liberties Union of Illinois, on alert.

“Collecting that information without having to go through standards to ensure that it’s being collected for the right reasons, and with procedures to destroy it, is antithetical to having a free society,” Shley says.

**Early drone adopters**

From his control room on the first floor of the Chula Vista Police Department, Hardesty has flown hundreds of drone missions as part of the FAA’s first Unmanned Aircraft System Integration Pilot Program, which experiments with how to integrate drones into the national airspace. Since October 2018, the department’s drones have swooped in to record crash scenes, track fleeing suspects and find missing people.

In 2014, public safety agencies increasingly used consumer drones. Before that, only a handful of agencies had them, according to the Center for the Study of the Drone. By April 2017, at least 347 agencies had drones. Thirteen months later, at least 910 had them. The center’s 2020 report states public safety agencies now have at least 1,578 drones, a 73% increase from 2018.

Drones are far cheaper to operate than airplanes or helicopters, and they are funded by local and state agencies, according to Alan Frazier, a drone researcher, professor and former Grand Forks County sheriff’s deputy in North Dakota. Police departments may use civil asset forfeiture money and apply for grant money from foundations, the state and the federal government as well, says David Maass, a senior investigative researcher at the EFF in San Francisco.

Lt. Don Redmond, who heads Chula Vista’s program, calls drones a “game changer” for law enforcement. His fleet of four drones responds only to emergency calls. Digital evidence is stored for no longer than a year unless it is part of an ongoing investigation, the department’s website says.

“Our drones do not have facial recognition,” Redmond says. “They are not armed. They’re only there to get on the scene.”

**A legal model**

Illinois is the legal model for what some attorneys would like to see nationwide. Under the 2014 Freedom from Drone Surveillance Act, public agencies are barred from collecting any “evidence, images, sounds, data or other information” using a drone.

There are exceptions to the Illinois law in the event of a terrorist attack; if a warrant for probable cause is obtained; or if law enforcement must quickly apprehend a suspect, find a missing person, or respond to a crash scene, disaster or public health emergency. If a court finds the drone use was not justified, it can rule evidence is inadmissible.

But Maass warns that drones could become more invasive, and he foresees a time when they could be up in the air for hours.

“It’s being mindful of the growth of this technology because it does creep over time,” Maass says.

In response to the coronavirus pandemic, police in China used drones to ensure compliance with quarantines and social distancing. In America, more than 600 police departments have employed Clearview AI’s facial recognition software, which uses data collected from billions of social media images, according to a *New York Times* investigation.

Drones could also be weaponized with rubber bullets or tear gas. A 2015 law in North Dakota bars police from equipping drones with “lethal” weapons but seems to permit nonlethal weapons such as stun guns.

SZ DJI Technology Co., Ltd., or DJI, supplies more drones to police departments in the U.S. than any other manufacturer. Romeo Durscher, a spokesman for the Chinese company, says police drones could become smaller but need to be large enough to house spotlights, thermal imaging cameras and speakers.

Would DJI weaponize drones?

“Absolutely not. We make technology for peaceful purposes,” Durscher says.

Jennifer Trock, chair of the ABA’s Forum on Air & Space Law, says the concerns surrounding drones are part of a broader pattern of data harvesting. The legal landscape will evolve, Trock says, but she doesn’t “see the issues as materially different than what we’ve already been addressing on the privacy front.”

Redmond notes that some Chula Vista citizens would like drones to monitor drug dealers who are blighting their communities. His answer is always the same.

“We don’t want to launch a drone to do something that we legally do not have the right to do, or what we’ve told the community we would not do ... because as soon as we do that, we’ve lost the trust of our community.” ■
Awards Season

Awards are great marketing tools and can demonstrate expertise, but they’re not all created equal.

BY LYLE MORAN

Lucy Davis of Davis Law Group in Seattle is not an attorney. In fact, she is ineligible to sit for the bar.

That’s because she’s a poodle. Nevertheless, that didn’t prevent her from being honored as a Lawyer of Distinction in the personal injury field in 2017.

After receiving the payment required for membership and its associated benefits (which at press time cost $475 per year for the lowest tier of membership), Lawyers of Distinction sent Lucy a plaque naming her one of the top 10% of attorneys in the country and congratulated her on Twitter.

It did so even though the webpage Davis Law Group submitted with Lucy’s application made it clear she was a dog, mentioning she had received a “Juris Dogtor” and was a member of the King County Bark Association.

Ian Waldron, Davis Law Group’s director of operations, says the goal of submitting Lucy for Lawyers of Distinction membership was to test whether there was any research being conducted by such groups prior to distributing awards. In his opinion, this incident exemplifies how many of the growing number of entrants in the legal awards industry seem more focused on generating revenue than identifying the best lawyers and firms in their fields.

According to Waldron, “There are organizations that have a higher bar for what it takes to get a good impression out there, and that is being cheapened by this type of activity.”

Cheryl Bame, the principal of Los Angeles-based Bame Public Relations and a former journalist, agrees there has been a proliferation in the legal industry of what she considers to be “bogus awards.”

She says honors falling into that category are those offering to recognize attorneys only if they agree to pay the organization hundreds of dollars for items such as a plaque, a profile on the company’s website, a press release announcing the award and a logo the lawyers can put on their own websites, among other things. These solicitations are typically made directly to attorneys by marketing companies that don’t undertake any sort of vetting process before doling out honors.
Bame, whose firm represents national and regional law firms, says solo and small-firm attorneys are more susceptible to paying for little-known awards than BigLaw lawyers because they are less likely to have access to marketing professionals who would warn them not to waste their time.

“It’s frustrating because attorneys get spammed with this, and a lot of times they don’t know what they are getting,” Bame says. “They think, ‘Wow, somebody wants to honor me.’ But they really just want their money.”

**Valued commodity**

Marissa Grignon, a California-based senior business development manager at Troutman Sanders, says her firm steers away from submitting its lawyers for what she calls pay-to-play awards.

However, she says attorneys often are not as familiar with the differences between the growing number of awards and rankings. This creates a need for staff to spend time explaining why the firm is submitting them for certain honors and not others.

Awards Troutman Sanders considers worthwhile because of their research processes and the prestige associated with winning them include honors bestowed by the *American Lawyer*, *U.S. News & World Report*, Chambers and Partners, the Legal 500 and Law360.

“They have large research teams,” Grignon says. “They conduct interviews.”

Marketing and business development professionals say the more trustworthy awards are worth pursuing, even amid the spike in scamlike honors, because of the role they can play in generating new business.

“We call these trustmarks,” said Conrad Saam, president of Mockingbird Marketing in Seattle. “Adding trustmarks to a law firm website improves the conversion rate, no question.”

Grignon agrees the awards are a trust symbol that potential clients can find comforting.

“It is nice when you see an attorney bio, and they have a bunch of credentials and recognitions,” she says.

**Lessons learned?**

Despite marketing professionals sharing that certain awards are worth seeking, some of them worry that consumers don’t know how to distinguish between legitimate honors and the pay-to-play offerings. This, in turn, can lead to members of the public believing some lawyers are well-qualified on the basis of awards they have received and not undertaking any additional due diligence.

“No one knows what these things are,” Saam says. His marketing firm has used its blog to try to raise awareness among the legal community and broader public about issues with some of the awards and directories out there, including Lawyers of Distinction.

One of Saam’s colleagues wrote a 2016 post titled “When the top 10% means nothing,” which prompted Lawyers of Distinction to send Mockingbird Marketing a cease-and-desist letter. Saam told Lawyers of Distinction he would not be removing the post and trusted it would not need to contact him again. The company never pursued legal action.

In 2018, Saam detailed in a post how he submitted his child’s pet chicken, Zippy, for Lawyers of Distinction membership using the nonexistent website deshickeenlaw.com. Saam wrote that he successfully got through to the page where he could have paid $775 on Zippy’s behalf for top-tier benefits, including a plaque, but he declined.

A spokesperson for Lawyers of Distinction, which was incorporated in 2014, said it implemented a new vetting process in 2018.

“In response to critics who have pointed out past mistakes in our vetting process, we would like to firstly say that we acknowledge past errors and have learned from past mistakes,” Keith Allen, Lawyers of Distinction’s director of operations, said in an email.

The company previously allowed anyone to be nominated through an automated system, and a nomination would trigger an immediate email to the nominee notifying them they could apply for membership. “Due to trolling and abuse by people with ulterior motives, we removed this feature and implemented a manual review for all referrals,” Allen said.

According to Allen, the platform now evaluates nominees based on factors that consider their achievements and peer recognition. Additionally, a background check is conducted to make sure attorney nominees do not have any disciplinary history in their respective states within the last 10 years.

On the other hand, Waldron says Davis Law Group recently received a request that Luci the poodle accept her nomination for 2020 membership.

“That tells me there is not a whole lot of vetting or due diligence going on there,” Waldron says.
BUSINESS

Touching the Third Rail

Some lawyers have baked their political views into their firms’ DNA

BY DANIELLE BRAFF

It’s long been acknowledged that politics should be a topic avoided on dates, at family gatherings and at work.

But for some attorneys, being political has become part of their business model.

Daniel Uhlfelder, a Florida attorney, saw his Twitter followers climb from 400 in December to more than 100,000 in April after tweeting about former Arkansas Gov. Mike Huckabee, who wanted to keep the public off the beach in front of his Florida home.

Uhlfelder, who had been representing Florida Beaches for All, argued against Huckabee’s requests and mocked him. Huckabee responded by filing a complaint with the Florida Bar against Uhlfelder, giving the latter more notoriety and fame.

“Every time I take a political stance, I know that I run the risk, even the probability, that I may lose or harm a valued relationship,” says Malek, who is a Republican.

Malek says his firm has lost clients because of the political positions he’s taken, and a few other clients have expressed anger and frustration. The flip side, he says, is that the firm has attracted new clients and developed strong relationships with new and existing ones.

He also credits his experience performing constituent services with helping him build relationships with clients.

Meanwhile, Jeremy Peter Green, founder and managing attorney at JPG Legal, a trademark firm with a four-person practice in Brooklyn, New York, believes it’s better to have clients who align with his political views rather than being forced to defend clients he doesn’t agree with personally.

Green, who regularly hosts Democratic Socialists of America events and political fundraisers in his office, is very open about his beliefs. He even goes so far as to hint at his politics when he lists job openings so applicants know what they’re getting into.

“A few of my clients mention that they like my politics, and maybe a few also decide not to hire me because of it,” Green says. “One of the best things about running your own business should be that you don’t have to worry so much about openly being yourself.”

Work and social worlds

Green’s thinking is indicative of much of the country, where Americans appear to increasingly want to work with others who share their values. A 2016 study by researchers at Wellesley College in Massachusetts and the University of Kansas found that rather than being attracted to those who have oppositional values, we’re drawn to like-minded people.

“You try to create a social world where you’re comfortable, where you succeed, where you have people you can trust and with whom you can coop-

Daniel Uhlfelder, a Florida attorney, tweeted about former Arkansas Gov. Mike Huckabee and watched the number of his followers greatly increase.
erate to meet your goals,” says Chris Crandall, a psychology professor at the University of Kansas and co-author of the study. “To create this, similarity is very useful, and people are attracted to it most of the time.”

But is this applicable to the workplace?

On the one hand, you need to worry if clients are dropping you because of your politics, says Joseph Hoelscher, managing attorney with Hoelscher Gebbia Cepeda in San Antonio.

In his office, there is a policy that lawyers are entitled to their beliefs, and they are welcome to advocate publicly for what they stand for (Hoelscher, for example, has frequently tweeted about his affection for former presidential candidate Bernie Sanders), but firm resources can be used for politics only after a partner vote.

However, Hoelscher says the members of his firm made the decision to be open advocates for certain causes because they believe in them. These include marijuana legalization, criminal justice reform and child welfare issues. “From a business perspective, we figured that raising our profile wouldn’t hurt our firm because the causes we advocate are aligned with our practice,” he says. ■

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Not Just About Tech

ABA Techshow 2020 adopted a holistic approach to law, highlighting wellness, marketing, ethics and more

BY VICTOR LI, MATT REYNOLDS, STEPHANIE FRANCIS WARD AND AMANDA ROBERT

“I’m not a lawyer,” Mary Shen O’Carroll said during her keynote speech at ABA Techshow 2020, which took place Feb. 26-29 at the Hyatt Regency hotel in downtown Chicago.

The director of the legal operations, technology and strategy team at Google has always been interested in working faster and making things more efficient—two qualities that never have been associated with lawyers.

However, she argued the legal industry finally seems to be moving closer to where she’s always been.

“This is an industry that’s been stuck in time for a long time,” she said. “There are changes happening all around us, and [they’re] accelerating.”

She added that bringing about necessary changes in the legal industry would require collaboration and cooperation.

In that vein, this year’s incarnation of Techshow promoted a holistic approach to legal technology. A diverse group of speakers and panels provided conferencegoers with information, tips and strategies across a wide range of topics, including the accuracy of artificial intelligence in legal research, marketing, online dispute resolution, wellness, ethics, recruiting and retention of employees.

Rather than promoting tech for tech’s sake, conference speakers and panelists recommended attendees evaluate their needs and think about potential consequences before adopting new programs, platforms or apps.

“In terms of how I decide to use technology, I ask myself if it will make me a better instructor. I never try to use technology just because I want to use technology; there’s got to be a pedagogical reason,” April Gordon Dawson, a constitutional law professor at North Carolina Central University School of Law, said during a Feb. 27 panel titled “Skills Building: Best Practices for Teaching Tech to Law Students.”

Dawson said she uses QR codes to take attendance. Additionally, her students submit summaries of what they have learned—and have an opportunity to ask questions about—on the online platform Airtable.

Meanwhile, lawyers looking to utilize cloud computing and storage should stay up to date on technological advances and thoroughly vet cloud storage providers before using them, while recognizing that in some cases it might not be for them. During a Feb. 28 panel titled “Cloudy, with a Chance of Sanctions—or Success!” Nicole Black, who is the legal technology evangelist at MyCase and an ABA Journal columnist, cautioned that if a firm has a client who is a celebrity, a dissident or even a terrorist, it should think twice about using the cloud.

“There’s certain things that are that sensitive that you probably want to protect and not put in the cloud and have this extra layer of protection within your office, because that information is so valuable to people that have a reason to try to access it, whether it’s for money or political gain,” Black said. She added firms should ensure they thoroughly vet cloud-computing providers before signing up, measuring security and the provider’s backup strategy.

For lawyers interested in setting up a subscription plan, Atlanta solo practitioner Kimberly Bennett said using technology to keep overhead as low as possible while allowing lawyers to work more efficiently is a must. That means, at a minimum, document-automation software, practice management tools and e-payment programs.

Bennett cautioned, however, that lawyers must first go over their books and figure out what kind of firms they are before implementing wholesale changes. “You must understand what’s happening in your business now before you decide to go to a model like a subscription later,” she said during panel titled “You’re So Predictable: Subscription Legal Services” on Feb. 27.

“After all, you’re not going to design a subscription that’s not profitable.”

Of course, sometimes you have to know when to disconnect. During a Feb. 28 panel titled “The Intersection of Ethics and Well-Being,” criminal defense attorney Jennifer Gerstenzang of San Diego said there are several factors contributing to issues with attorneys’ mental well-being, including the feeling of always being on call and unable to disconnect. She said while technology helps attorneys with efficiency, it also makes it difficult for them to take the time they need to recharge.

Fellow panelist Sharon Nelson, co-founder of Sensei Enterprises in Fairfax, Virginia, agreed that it’s important for legal professionals to recognize that technology and constant connectivity play a large role in well-being issues.

“In a technology conference, sometimes you have to teach people how not to use technology and how to carve some time for their own well-being,” she said.
E
each year, the treasurer
provides a report on the
association’s finances
that is printed here in
the ABA Journal. This year, as I
began to prepare this report, the
spread of COVID-19 was on the
rise. At this time, it is too early
to quantify or report on the
financial impact of the pandemic
on the association. However,
you should know that your
ABA financial services team is
working hard to mitigate losses
so that the association can use
its resources to help members,
the courts and the public during this unprecedented time. So
although this report is being prepared at an extraordinary
time, it will be a fairly traditional report.

This report will cover fiscal year 2019 results as audited by
Grant Thornton. I will then reflect on operating trends seen
during my three-year tenure serving as your ABA treasurer, and
lastly, I will discuss looking forward to the fiscal 2021 budget
and beyond.

Year-end audit and financial results
Grant Thornton issued an unqualified audit opinion for the
fiscal year ended Aug. 31, 2019, that includes an audit of our
government grants. The audit was accepted by the Board of

The following is a summary from the audit report. You can
visit ABAJournal.com/audited_results for the complete ABA
financial statements and audit report.

As you can see in our consolidated ABA results through
August 2019, operations resulted in a deficit of $0.7 million,
which was $5.8 million favorable to budget and $9.2 million
favorable to prior year’s operating deficit. Operating expenses
came in $16.2 million favorable to budget, consistent with pri-
or year and reflective of diligent expense management. How-
ever, operating revenues fell $10.4 million short of budgeted
revenue. (See Consolidated ABA Results table below.)

The $10.4 million operating revenue shortfall is driven by
softness in both dues ($3.5 million) and nondues revenue ($4.3
million). Nondues revenue is unfavorable to budget in meeting

### Consolidated ABA Results - Fiscal 2019 Final

<table>
<thead>
<tr>
<th></th>
<th>Actual</th>
<th>Budget</th>
<th>Prior</th>
<th>Variance to:</th>
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<td><strong>Operation Revenues</strong></td>
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### Consolidated Statements of Financial Position

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<th>Aug. 31 2019</th>
<th>Aug. 31 2018</th>
<th>Prior Year Variance Favor/(Unfavor)</th>
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<tr>
<td>Cash &amp; Equivalents</td>
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<td>Long-Term Investments</td>
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<td>396.5</td>
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<td>Other Assets</td>
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<td><strong>Total Assets</strong></td>
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<td>$341.0</td>
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<td><strong>Liabilities</strong></td>
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<tr>
<td>Deferred Revenue &amp;</td>
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<td>Deferred Rent Abatement</td>
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<td>Pension Liability</td>
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<td>Loan to Fund Pension</td>
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<tr>
<td>Payables &amp; Other Debt</td>
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<tr>
<td><strong>Total Liabilities</strong></td>
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<td><strong>Net Assets</strong></td>
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<td><strong>Total Liabilities &amp; Net Assets</strong></td>
<td>$317.1</td>
<td>$341.0</td>
<td>$(23.9)</td>
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fees, grants, publications, advertising, and contributions and sponsorships. The remaining $2.6 million shortfall relates to the amount of investment income used to support operations. The use of investment income to support the value proposition is drawn only as the expenses are incurred, so this reduction in the use of investments really reflects the fact that the association did not incur as much in the expense line as expected for the value proposition. More than offsetting revenue shortfalls to budget are favorable expenses in nearly all reporting lines.

Although operations resulted in a modest deficit of $0.7 million, our net assets declined $28.1 million. Below the line, we saw below-average investment performance (only $3.7 million in investment income due to market timing) and we used $13 million in investment income to support operations and launch the value proposition. Additionally, our year-end pension adjustment accounts for $16.6 million of the decrease to net assets. I will speak more to the impact our pension has on our results and balance sheet later in this report. (See Consolidated Statements of Financial Position table, page 25.)

At the close of fiscal 2019, the association had $317.1 million in assets with $169.3 million in liabilities, resulting in net assets of $147.8 million. This is a $28.1 million decline from prior year. While the association’s balance sheet continues to be strong, we did see significant unfavorable changes year over year in both assets and liabilities.

Within assets, our long-term investments balance decreased $20.8 million year over year, mainly driven by less investment income year over year. We utilized $13 million of investments to support operations and our membership value proposition but only had a modest investment gain for the fiscal year. While fiscal year 2019 (through Aug. 31, 2019) had a net investment return of only 2%, calendar year 2019 (through Dec. 31, 2019) had returns of nearly 18%.

Within liabilities, our pension liability increased $19.1 million year over year. The pension liability is largely a function of interest rates: the lower the interest rate, the higher the pension liability. Over the past few years, rising interest rates and loans used to fund the pension obligation reduced our overall obligation. However, in fiscal 2019, we experienced falling interest rates as the U.S. 10-year Treasury rate declined to a three-year low of 1.5% at Aug. 31, 2019, which is our measuring date for the pension valuation. This resulted in our pension liability spiking in fiscal 2019 to close the fiscal year at $43 million.

While a falling interest rate increases our pension liability, it also produces lower costs for borrowing. After fiscal 2019 concluded, the association entered into another borrowing transaction and contributed those funds to the pension plan to meet future expected contributions.

This loan did not increase the association’s overall liabilities but rather reduced the unfunded pension liability line item and increased the pension loan line item. The loan also had the benefit of reducing the overall interest rate on our outstanding pension loan and extending the repayment period.

**Trends in general operations**

In addition to focusing on results from current operations, it’s equally important to watch trends. Over my term as treasurer, here are some of the important trends we’ve been watching:

**General operations dues revenue and membership.** The chart below shows the trend of membership and dues revenue. You will see over the last four fiscal years that dues attributable to general operations have declined from $59.2 million in fiscal 2016 to $51.4 million in fiscal 2019. Dues for fiscal 2020 were budgeted at $42 million, which is a result of the repricing strategy implemented to reverse the decline in membership. The decline in dues revenue is a trend that goes back to 2008, and the increased revenue shown in 2015 was the result of a dues rate increase. Note that dues revenue immediately began to decline in the year after the 2015 dues rate increase.

**General operations nondues revenue.** Over the last four fiscal years, despite declining dues-paying members, our nondues revenue has remained relatively flat. This means that while the number of members declined, the use and engagement with nondues activities remained the same or increased slightly.

**General operations expense.** On the expense side, our general operations expenses went from $103 million in fiscal
2016 to $87.5 million in fiscal 2019. Budgeted expense in the current fiscal year is $85.4 million. The significant expense reductions have come as a result in the reduction of personnel. Those reductions have been through a combination of shifting personnel out of general operations and a reduction in the workforce through our voluntary separation a year ago. Because approximately 80% of our general operations budget is people and space, further reductions are a challenge unless the association strategically changes what we do or how we do it. (See General Operations Expense graphic below.)

**General operations investment funding.** Over my tenure, we’ve changed our spending policy. Initially, our policy allowed for up to 5.5% of investments to be used to support operations. However, watching the trend of overreliance on investments to support operations caused the Board of Governors to pass an updated policy in fiscal 2018, limiting investment spending for operations to no more than 3.5%. Additional amounts can be used for capital projects like the value proposition. The chart below shows the spending from investments from fiscal 2016 to present.

### Fiscal 2021 budget and beyond

As we continue into the fiscal 2021 budget and beyond, we will continue to evaluate how dues and nondues revenues are progressing against our membership model. The value proposition is a multiyear effort. We know it will take time to communicate and demonstrate the enhanced benefits available to prospective members and for those prospective members to give us the opportunity to serve them. Therefore, we will continue to invest in the value proposition over the next four years.

The budget process is undertaken each year to allocate resources for the next fiscal year. Over the last several years, our budgeting has focused on reducing expenses in light of the declining revenues. The amount of the cost reductions varied greatly from year to year. For fiscal 2021, to enhance strategic planning, the Finance Committee is working to incorporate a longer-term view of the budgeting process. Given that the value proposition is a multiyear effort with resources dedicated to the multiyear expenses, this is an ideal time to introduce this longer-term view for budgeting. We will still submit a balanced budget each year, but we’re looking longer-term to anticipate income and expenses and prepare accordingly.

In developing the model, we looked at all components of our operating budget. We considered both dues and nondues revenue projections through fiscal 2024. We also reviewed expense projections, including annual inflationary changes. To create a smoother, more equitable allocation of that budget gap, we then divided the gap over the four-year period of consideration. Using this approach, we have estimated the total annual budget task required through fiscal 2024. That said, we are constantly updating the process in light of new information resulting from the COVID-19 pandemic. As such, the fiscal 2021 budget will present more of a challenge than we originally anticipated as we work to make strategic decisions to reduce costs and limit the use of our resources.

The association has resources both in financial and human capital. We must think critically as we deploy those resources to ensure that the association can carry on its work, which is critical to the legal profession and the judicial system. It is more critical than ever that we think strategically, listen carefully to what the market is telling us, analyze the trends and data, and then make strategic but bold decisions to propel this association forward.

Thank you for the opportunity to serve as your treasurer.

*Michelle Behnke*
I attended a showing of the film *Downton Abbey* at a local theater before the COVID-19 pandemic gripped the nation. The plot, centered around disruptions caused by the king’s visit to an English estate in 1927, was recycled from an episode of the 1970s British TV show *Upstairs, Downstairs*. The cast of characters was lifted whole cloth from PBS’ more recent television blockbuster *Downton Abbey*. The audience was already intimately enmeshed with the lives of the characters inhabiting the abbey, both the upstairs gentry and the faithful downstairs staff who live to serve them. Every character had one clear inner problem or major contradiction that, just like the screenwriting manuals suggest, was neatly resolved at the end of the movie. There was also some high drama thrown in along the way—the foiled plot to assassinate the visiting King George V.

It made me think about the importance of settings in place and time, and the importance of imagery framing scenes in legal storytelling practice. The simplifications of narrative elements (especially of plot and character) allowed the true star of the movie, the vaunted *Downton Abbey* itself, to fully emerge. The movie was about a place—a setting—evoking nostalgia for a return to a simpler time when the tight bonds within an imagined community called forth the highly structured social order of a world where everyone knew and accepted their places and purposes.

Some moviegoers wore vintage 1920s dinner costumes, as if they were attending a celebration. At the end of the film, the usually sedate Hanover, New Hampshire, audience erupted into spontaneous applause. The movie, like the television series, embraced themes such as the longing for lasting community, the affirmation of family and a desire for the return to an idealized time. *Downton Abbey* also suggests nostalgic longing for the hierarchical social order of the British aristocracy and the monarchy, themes clearly at odds with the egalitarian beliefs most Americans purportedly hold so dear.

**STORYTELLING**

**The Power of Settings in Place and Time**

Lawyers are the directors and set designers of their courtroom dramas.

BY PHILIP N. MEYER

*Photo illustration by Brenna Sharp/ABA Journal; HAL GARB/AFP via Getty Images; Bettmann/Contributor; Shutterstock*
When I returned home, I tuned in to television screenings of classic films from 1939 on Turner Classic Movies. I caught the middle of Gone With the Wind and saw the horrific, dreamlike panorama of the wounded and dying soldiers spreading out endlessly across the streets of Atlanta. I was drawn into the story about Scarlett O’Hara’s longing for a return to her plantation and her own idealized pre-Civil War dream state. After, I was equally absorbed by the scenic designs of Dorothy’s magnificent Technicolor dreamworld in The Wizard of Oz as she sought to return to her more prosaic family in the black-and-white Kansas farmland.

The plots of Gone With the Wind and The Wizard of Oz both anticipated the historical seismic dislocations of a world soon to be torn apart by the coming of World War II in a way that Hollywood’s classical cinematic dreams can uniquely do.

Much of the imaginative power of all three movies resides in their set designs and the imagery framing their scenes and complementing their plots.

**Burke’s pentad**

Narrative theorist Kenneth Burke proposed his famous narrative pentad—act, scene, agent, agency and purpose. The components of the pentad were famously recognized and developed for lawyers by Anthony G. Amsterdam, now a university professor emeritus at New York University School of Law. Amsterdam identifies the five primary components of dramatism as setting and scene, cast and character, plot, time frame and human plight.

Both Amsterdam and Burke concluded that all five components of the pentad must be in symmetry fitting the story—tweaking one component impacts all the other components of the story.

This balance is not so difficult to determine and visualize when the medium is plot-driven and time-limited; Hollywood movies typically feature tightly constructed linear plots emphasizing conflict and depicting events presented in clear causal sequences.

Unlike courtroom storytelling, cinematic stories unfold through the montage of images (and sounds) rather than primarily in words (testimony) and through presentation of tangible evidence.

In the movies, images (shots) are shaped into scenes that are developed into sequences that become the acts or movements that build toward climax and denouement. Set design—the imagery depicting settings and framing the actions in scenes—is crucial to the effectiveness of the story told.

And while legal stories are also plot-driven, time-limited and tightly ordered, the centrality of plot in most legal stories would seem to put the squeeze on other elements of Burke’s pentad, especially the settings I thought crucial to the movies I had just seen.

Are legal stories inherently out of balance, then? Is there something gone missing from our storytelling craft? Perhaps not.

**Places that matter**

Litigation unfolds upon a stage in the theater of the courtroom. And while combative, compulsive and closed litigation stories are constrained and shaped by evidentiary and legal rules and the meticulous presentation of factual evidence, lawyers are nevertheless the producers, directors and set designers of their own theatrical courtroom dramas.

Lawyers also employ imagery to define the landscapes of their cases and enhance the stories they tell; settings, scenes and imagery are powerful litigation tools when artfully crafted together.

**Mitigation stories**

How much does the depiction of setting and scene matter in litigation storytelling? As Burke suggested, the balance of elements may be largely predetermined by the genre of the story being told.

In some types of legal stories, the scenes and settings are foregrounded. For example, in death penalty cases, lawyers often present mitigation stories during the sentencing phase, stories that are meant to fully explore the defendant’s world, including social history—all with the intent of fostering an expansive and contextual understanding of how and why the defendant came to commit the crime. The jury may then be more open to the possibility of imposing a sentence less severe than death.

Typically, settings and situations in mitigation stories are reshaped into environments or ecologies presented in sequences of scenes that may, for example, emphasize the horrors of a convicted defendant’s brutalization in childhood, suggesting a tragic inevitability to the story’s outcome.

In other types of plot-driven legal stories, however, the settings merely anchor or frame the story in a specific time and place and are not crucial to the outcome.

**Settings can be both literal and metaphoric**

Stories are sometimes set in metaphoric rather than literal places, plotted on imaginative landscapes.

The plots of films such as Downton Abbey, Gone With the Wind and The Wizard of Oz are all set on imaginative landscapes created by the director and set designer—fitting the story and matching the expectations of the audience.

Do lawyers perform similar imaginative transformations when depicting real-world settings in the courtroom? The simple answer is yes. For example, in his defense of O.J. Simpson, Johnnie Cochran reset his trial story on a James Ellroy-like landscape peopled by brutal L.A. cops, corrupt politicians and nefarious underworld characters—as unpredictable, violent and shadowy an underworld as anything manufactured in Hollywood.

Simultaneously, Cochran’s scenes evoked discrete historical moments with well-placed cross-references in time: to the racial politics of the mid-1960s, to Hitler and the Holocaust, and to the Los Angeles race disturbances of the early 1990s.

Likewise, Gerry Spence’s closing argument in his successful defense of survivalist Randy Weaver, accused of...
the murder of a federal officer in 1992, implicitly reset the drama on a Jeffersonian landscape of a rural post-revolutionary America where a frontier family holds out against an overreaching federal authority.

And in 1979, Spence won a suit against Kerr-McGee Corp. on behalf of the estate of Karen Silkwood, a worker poisoned by plutonium from a plant that manufactured fuel rods for nuclear power plants. Spence even provided the jury with a cinematic title for his closing argument, calling it The Cimarron Syndrome. Silkwood had been an employee at the Kerr-McGee Cimarron Fuel Fabrication Site in Oklahoma. Spence’s title cleverly cross-references the then-popular movie The China Syndrome, a fictional story about a California nuclear power plant disaster.

Spence’s trial story and closing argument in the Silkwood case are both set on a mythic Western landscape on the edge of civilization, in a frontier town that had been taken over by a villainous outlaw gang. Even Spence’s cowboy trial outfit purposefully evoked a dreamscape from a previous century.

The novelist Joyce Carol Oates once observed that her stories could not exist without the settings in which they were imagined, and that she is a storyteller “mesmerized by places” where the settings the characters inhabit are as crucial ... as the characters themselves.” Likewise, the depictions of settings and the imagery framing scenes are important tools in the legal storyteller’s toolkit in some genres of legal storytelling.

Philip N. Meyer, a professor at Vermont Law School, is the author of Storytelling for Lawyers.

Attorneys who receive negative online reviews may feel compelled to respond, especially if the reviews are unfair or inaccurate. Formal and informal ethics opinions issued throughout the country consistently agree that attorneys are permitted to respond to negative reviews. But how it’s done is a matter of ethics and professionalism.

When an attorney receives a bad review, Michael Kennedy, who serves as Vermont’s bar counsel, recommends: “Think, and breathe deep before responding. In my view, it’s not as much an ethics thing—the law is clear that a negative online review doesn’t fall within the self-defense exception—as it is good business sense. ... As bar counsel, my job is risk management. There’s no ethical risk in not responding.”

One critical boundary for attorney response is set by Model Rule 1.6 of the ABA Model Rules of Professional Conduct, which prohibits revealing confidential information acquired during the professional relationship with a client unless an exception, such as the self-defense exception, is satisfied.

As the Los Angeles County Bar Association explained in Ethics Opinion No. 525, a response is allowed as long as no confidential information is disclosed, the response does not injure the former client with regard to the prior representation, and the response is “proportionate and restrained.” Similar standards have been adopted in San Francisco, Texas, Colorado, Florida and Pennsylvania.

“With a little ingenuity, a lawyer can respond to a bad review without disclosing confidences,” says Stephen Gillers, a New York University School of Law professor and the author of Regulation of Lawyers: Problems of Law and Ethics.

“She can, for example, expressly label an allegation as false and say that her ethical duties prevent her from responding in detail. She should keep the tone respectful,” Gillers adds.

Claiming an aggressive response to a negative post is self-defense is not a viable option. As the North Carolina State Bar notes in a Jan. 23 proposed opinion, “the ‘self-defense’ exception applies to legal claims and disciplinary charges arising in civil, criminal, disciplinary or other proceedings,” and it concludes that a negative online review does not rise to this threshold.
Instead of a pugnacious approach, Thomas Wilkinson Jr., a member of the ABA Standing Committee on Professionalism, suggests the following sample response to a negative review: “Lawyer confidentiality obligations prevent us from correcting the factual background in this post. We are very proud of our track record of client satisfaction and favorable results.”

What not to do
State ethics opinions provide useful examples of how not to respond to a negative review. Disclosure of confidential information has been the basis of disciplinary action taken against a number of attorneys for responses found to cross ethical lines. For example:

• In a 2014 Georgia matter, counsel posted a matrimonial client’s name, employer, amount paid in legal fees and further stated online that her former client had a boyfriend.
• The attorney in a 2015 Colorado case revealed “highly sensitive and confidential information,” publicly shaming clients in response to their online complaints.
• In responding to an adverse review, the lawyer in a 2014 Illinois case stated the client’s “own actions in beating up a female co-worker are what caused the consequences he is now so upset about.”
• After being found to have violated the duty of confidentiality in disclosing specific information about a client, a Washington, D.C., attorney got into deeper trouble in 2016 by making a subsequent false post, claiming he had been cleared by the District of Columbia’s office of disciplinary counsel.

Common sense and restraint should be exercised, even when emotions make that difficult.

Counterbalance instead of counterpunch
Micah Buchdahl, whose ethics practice is focused solely on law marketing and advertising compliance issues, acknowledges the imbalance practitioners often face.

“Perhaps most frustrating for many attorneys is that they don’t get to choose whether to engage in online reviews at all,” Buchdahl notes. “The client can unilaterally decide to make it a part of your online profile.”

Experts agree that the best counterweight to a negative review is a positive one. Attorneys can seek out five-star reviews not only to boost the firm’s online reputation but also to minimize or eliminate the impact of negative posts.

Although most states permit testimonials from clients, some require that a disclaimer or qualifying language be included. For example, New York requires the following disclaimer: “Prior results do not guarantee a similar outcome.” A decision to solicit positive reviews should be preceded by determining the mandates of the appropriate jurisdiction.

The North Carolina State Bar chimed in on the ethical implications of engaging a vendor who automates the online review process by soliciting and posting reviews on behalf of the law firm. In 2018 Formal Ethics Opinion 7, the green light was given to the practice so long as full disclosure of the process of the third-party vendor is made and the lawyer obtains the client’s informed consent. Under the arrangement described in the opinion, the client’s contact information is provided to the third-party vendor, and reviews of three of a possible five stars or less are not posted.

If you’re planning to hire a vendor to automate the process, “be careful to only use businesses that understand the law and attorney ethics requirements,” cautions law firm practice management consultant and ethics attorney Jennifer Ellis. “It is your obligation to check out such companies and their policies before you retain them.”

Astroturfing, a practice used by some lawyers, involves the dissemination of fake online reviews, typically in exchange for compensation. In these cases, lawyers may ask family and staff members to fabricate glowing reviews, or they may pay for posts. Attorneys caught engaging in this behavior may be found in direct violation of ABA Model Rule 7.2(b), which states, “A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer’s services.”

Attorneys are subject not only to the jurisdiction of the state’s ethics committee but also to scrutiny by the Federal Trade Commission. Astroturfing is prohibited by the FTC in its regulation of endorsements and testimonials in advertising. Under 16 CFR § 255.1(C), if a reviewer is not “a bona fide user of [the product or service] at the time the endorsement was given,” the review is deemed deceptive. In early 2019, the FTC flexed its enforcement arm, assessing $12.8 million in fines against a weight-loss company for causing fake reviews to be posted.

Clients who hire law firms based on false reviews may have a viable cause of action against them. In 2019, a Pittsburgh firm settled a case brought by a former client who alleged the firm had committed fraud by directing staff members to ask friends and family to post five-star reviews of the firm.

There may be a strong compulsion and good business reasons to counter negative online reviews as well as to solicit positive reviews, but lawyers need to walk careful ethical lines to avoid making bad matters worse.

Business development strategist and veteran attorney Cynthia Sharp of Philadelphia works with lawyers seeking to generate additional revenue for their law firms. She is the recipient of the 2019 ABA Solo and Small Firm Trainer Award.

Cynthia Sharp
Standard English: Good or Bad?

‘Good English’ always has been a path to the legal profession

BY BRYAN A. GARNER

Should schoolchildren be taught standard English grammar? The traditional view, of course, is yes. The standard form of the language—sometimes referred to as standard written English—has been thought to have a leveling influence on society. In any English-speaking country, it characterizes what it is to be educated. It’s what lawyers learn. It’s available to everyone who cares to learn it, and it prevents people from being condemned to speak only the regional or class dialect into which they’re born. Most of us are born into some type of dialect.

The contrary position is we shouldn’t insist people learn standard written English. Instead, we should teach everyone to be tolerant of regional and class dialects—not just accents but dialects. An accent has to do with how you pronounce words. Dialect has to do with word choice and sentence construction. Saying schedule in the British as opposed to the American way is a question of accent. Saying it don’t make no difference is a question of dialect, the standard form being it doesn’t make any difference.

Historically, the standard form of any language involves questions of political might: The dialect of the powerful people in a given country becomes the standard form, whether we’re talking about English, French, Mandarin, Swahili, Thai or Vietnamese. The standard form of a language is always a "prestige dialect," and most people don’t think of it as dialect at all (even though it really is one of several varieties). Literature grows up around the standard, and it becomes a sophisticated, nuanced means of communication.

Grammar is acquired from birth as an innate part of natural language and that “learning about grammar is about acquiring abstract terminology and a set of nitpicking (and occasionally outdated or simply invented) rules about ‘correct’ grammar.” All this, she says, discourages children’s interest in English.

Such arguments have been on the rise since the 1950s, but now they’re really taking hold. Hodson attacked the 18th-century grammarian Robert Lowth for introducing “the idea that incorrect grammar was a terrible social stigma” when he wrote in his preface to Short Introduction to English Grammar, “The principal design of a grammar of any language is to teach us to express ourselves with propriety in that language.”

Lowth’s statement seems pretty anodyne, on the whole, especially for aspiring lawyers who seek to do well on the LSAT. That test requires analytical reasoning, reading comprehension and puzzle-solving skills—but it also has a writing section. It’s still thought to be a good predictor of success in law school on the whole, and so there’s no realistic replacement in sight.

But the basic debate is an important one for us all to consider, and maybe society is moving toward a middle position. On the one hand, we’re more tolerant than ever of linguistic differences, and people on the whole seem to accept dialectal differences. We hear them on television, and today (unlike decades ago), a TV debate in which someone overtly corrects another’s language is all but unthinkable. On the other hand, “good English” is something we admire upon encountering it. One telling point is that even the defenders of dialect mount their defenses in the pristine form of standard English.

Should we insist children learn standard English? As someone who has spent most of his career writing about standard English and what it entails, I think so—as you might well predict. It’s a pathway to the professions, and it always has been. I say that as someone who grew up speaking the regional dialect of the Texas Panhandle. But by
age 16, I had learned standard English. Justice Clarence Thomas surmounted a greater obstacle: In an interview some years ago, he told me he hadn’t become comfortable with standard English until he was 21.

The perennial question is how to teach standard English without denigrating the speech of children’s parents. That demands of teachers a knowledge of language and dialect, a humane attitude toward young pupils and an ability to correct children in a way that doesn’t humiliate. It also demands a great deal of persistence and time.

Remember, though, that the lawyers of tomorrow are kids today.

The last time national standards were suggested for English grammar or usage was 1974. A University of Wisconsin linguist, Robert C. Pooley, had the backing of the National Council of Teachers of English when he wrote The Teaching of English Usage. He recommended a gradual approach to having students learn standard English.

In elementary school, children were to be taught to avoid ain’t; I don’t have no; improper uses of past-tense verbs (not be begun, be seen, be come, be drunk); improper uses of past participles (not have began, have saw, have went, have wrote); disagreement between subject and verb (not we was, you was, they was); improper uses of pronouns in the subject position (not him and me went, Jane and me saw); and nonstandard possessive pronouns (not hisself, theirselves). Teachers were to abstain from teaching nuances beyond these types of things.

In middle school, children were to be taught to avoid those same things but also improper pronouns in the object position (not please give it to Sarah or I or let him or I do it); nonstandard inflections or lack of inflections (not be ask me to do it); slightly nuanced problems in subject-verb agreement (not one of the books are lost); and double negatives (not I don’t have nothing to do).

In high school, the level of difficulty was to increase. Students were to learn a mastery of pronouns (I and we as subjects, me and us as objects); the correct use of common irregular verbs such as buy–bought–bought, drink–drank–drunk, see–saw–seen, sink–sank–sunk, take–took–taken; correct use of there is and there are according to whether the complement is singular or plural; the omission of at after where (never where is it at?); the distinction between good as adjective and well as adverb, as well as that of their antonyms (I played well, never I played good; I feel bad for him, never I feel badly for him).

The idea was that whatever the child might hear at home, school might be the means for inculcating standard English. Professor Pooley was sophisticated, though: He understood the best way to teach a child standard English is to arouse an ambition—a desire to be influential in the world. Without that desire, the teaching would never take root.

Did Pooley’s standards ever become established in American education? It’s hard to say they did. Since the book was published in 1974, the trend has been toward toleration and acceptance—and therefore discomfort with normative teaching of English. Whether this attitude amounts to progress or retrogression is a matter of debate. Whether it helps people along or hinders them is a matter yet to be known. ■

Plaintiffs attorneys suing cruise lines must navigate a boatload of challenges unique to the industry

BY JENNY B. DAVIS
nestled between a colorful tangle of waterslide tubes and a wave-generating surfing simulator, the enormous yellow orb of the Sky Pad rose from the deck of Royal Caribbean’s Mariner of the Seas cruise ship like a “go” button waiting to be pressed.

The Sky Pad combined trampoline bouncing with bungee jumping, allowing those who entered its cavernous circular structure to defy gravity with every bounce. Optional virtual reality headsets let guests smash and speed through simulated candy landscapes and futuristic city streets while they jumped. The Sky Pad was just one of many high-octane attractions Royal Caribbean added to its 3,800-plus passenger Mariner of the Seas ocean liner during its $120 million makeover in 2018.

Casey Holladay remembers seeing a Royal Caribbean TV commercial promoting the new Sky Pad ride. An avid outdoorsman and sports enthusiast, Holladay, then age 25, recalled to an NBC 6 Miami news team that seeing the commercial made him excited to try this “awesome experience in the sky” during an upcoming Royal Caribbean cruise to the Bahamas with his girlfriend. And that’s exactly what he set out to do after they boarded the Mariner of the Seas in February 2019.

Holladay’s Sky Pad experience started off just as awesome as he had imagined. With his girlfriend recording him on her phone from the deck, Holladay bounced, twisted and soared against a background of clear blue sky. Suddenly, however, the unthinkable happened: The bungee cords holding Holladay snapped and spiraled away from him, sending him into a 20-foot free fall to the deck below.

“I just felt the momentum release from my body that I wasn’t being held by anything anymore,” he told the news reporter. “All I really remember was the hit, and the noise, and then the fear.”

The fall caused Holladay to shatter his pelvis, and he sustained other injuries. He was hospitalized for nine days, had surgery and sustained permanent injuries that will require follow-up care for years, says his lawyer, Miami’s Brett Rivkind of Rivkind Margulies & Rivkind.

Holladay is suing Royal Caribbean for $10 million. Royal Caribbean did not return an email for comment, but in its answer to the lawsuit, the company denied liability and has requested a jury trial.

Holladay isn’t the only cruise ship passenger to have a dream vacation turn into a nightmare. In 2019 alone, heart-wrenching news reports involving cruise ships included the death of a toddler who fell out of an open ship window to the concrete dock below during a family cruise to Puerto
Caribbean Cruises and Norwegian Cruise Line Holdings—carried nearly 80% of all ocean cruise passengers, according to a 2018 report. Plaintiffs lawyers say these cases are highly specific and highly specialized, governed by myriad legal standards and subject to investigative challenges. It’s an area so unique, they say, that it’s easy for a novice lawyer to make an honest mistake that can permanently sink an otherwise meritorious case.

“There are different standards of proof, shorter statutes of limitations and more opportunities to get yourself in trouble.” —Deborah J. Gander

Rico; an alcohol-fueled brawl on a cruise of Norwegian fjords that caused multiple injuries; the alleged rape of a 17-year-old British girl during a Mediterranean cruise; and the death of an Australian man who went overboard during a Caribbean cruise with his family.

But tragedies don’t just happen on board. Cruise ship passengers can be injured, attacked or killed on land, too, during shore excursions sold by the cruise lines that take place while the cruise ship is docked in a port.

Excursions can range from exclusive parties and island bus tours to extreme adventures such as parasailing, hang gliding and bungee jumping. Cruise ships have been sued in connection with a party held at a local bar that left a cruise ship passenger a tetraplegic, a deadly crash involving a tour bus filled with cruise ship passengers, and a fatal midair zip line collision between a husband and wife on their honeymoon cruise.

But when a cruise ship departs from a U.S. port, federal maritime law generally applies. Under maritime law, tort liability for injuries, illnesses and death is anchored by basic principles of negligence law requiring a duty to protect against a particular harm, a breach of that duty, proximate cause between the breach and the harm, and actual harm. But that’s where plaintiffs lawyers say the basic legal theories end and the complications begin.

Bringing a case against an ocean cruise line is challenging. Together, the industry’s big three—Carnival Corp., Royal Caribbean Cruises and Norwegian Cruise Line Holdings—carried nearly 80% of all ocean cruise passengers, according to a 2018 report. Plaintiffs lawyers say these cases are highly specific and highly specialized, governed by myriad legal standards and subject to investigative challenges. It’s an area so unique, they say, that it’s easy for a novice lawyer to make an honest mistake that can permanently sink an otherwise meritorious case.

“There are different standards of proof, shorter statutes of limitations and more opportunities to get yourself in trouble,” says Deborah J. Gander, a partner at Colson Hicks Eidson in Coral Gables, Florida.

Tonya J. Meister of Meister Law Firm in Miami agrees. “If you don’t know what you’re doing,” warns Meister, who is board-certified by the Florida Bar in maritime law, “you’re going to harm your client and make bad law.”

Carnival, Royal Caribbean, Norwegian and Princess Cruises (acquired in 2003 by Carnival) did not respond to repeated requests for comment on this story.

LAWS AND LIMITATIONS

The cruise industry is international. Ships are registered under flags of foreign countries and operated by companies incorporated in other foreign countries. Passengers and crew hail from points around the world and travel together to all points in between. So how do plaintiffs lawyers know where to file
a lawsuit involving a cruise ship departing from an American port? It’s actually pretty simple: They look at the passenger’s cruise ticket.

All ocean cruise passenger tickets contain pages of fine print making up an extensive contract limiting the cruise line’s liability for everything from lost luggage to class action lawsuits. Included in this extensive laundry list of restrictions and responsibilities is a forum selection clause requiring all civil suits against the cruise line to be brought in a particular court. Booking the cruise and paying for the ticket is considered the passenger’s consent to the terms of the contract.

Tickets issued by Carnival, Royal Caribbean and Norwegian require passengers to file any civil case in the Southern District of Florida, a venue that encompasses Miami-Dade County. The reason, Gander says, is obvious: “While the major cruise lines are incorporated outside of the country, every executive of every major cruise line is headquartered in Miami, so it’s really a home-field advantage for these corporations.”

It may seem unfair to require plaintiffs to bring their lawsuits in a forum chosen by the defendant, especially when the forum choice was clearly made for the convenience of a defendant corporation rather than the convenience of an aggrieved person, who most likely lives far away. Nevertheless, the U.S. Supreme Court has upheld cruise line forum selection clauses, most recently in the 1991 case Carnival Cruise Lines Inc. v. Shute. In that case, the high court ruled that the choice of Florida as a forum is not fundamentally unfair, and that the chosen Florida forum would neither deter passengers from pursuing a legitimate claim nor deprive them of access to a competent court.

The cruise passenger ticket also imposes its own statute of limitations on passenger claims. Maritime law generally provides a three-year statute of limitations for tort actions. When the tort involves a cruise ship, however, the passenger ticket terminology typically reduces the statute of limitations to just one year, with a notice requirement set at six months. As with the forum selection clause, courts have consistently upheld the validity of such restrictions where they are clearly stated and passengers have had the opportunity to read them, regardless of whether they have actually done so.

Plaintiffs lawyers say the law doesn’t make their job easy. Michael Winkleman of Miami’s Lipcon, Margulies, Alsina & Winkleman says the requirement to file within one year can complicate damages calculations such as determining the total amount of medical bills or assessing the extent of lasting injury. “Sometimes, we just have to file the case while the plaintiff is still undergoing medical treatment or recovering,” he says.

Meister says she’s even seen instances where the shortened statute of limitations has precluded cases entirely. The most common scenario is a passenger who’s injured on a cruise ship and decides to consult a local personal injury lawyer back home who doesn’t know about the shortened filing window. “I get a lot of phone calls from unfortunate souls who thought they had a regular injury claim and didn’t know they needed to give written notice within six months and file a suit in federal court within a year,” she says. “There’s nothing I can do to help them—they’ve blown it.”

**BUILDING A CASE**

When bringing a cruise ship personal injury case, lawyers say it’s not just the law that’s different, it’s the investigative approach, too.

“When you have a car accident or a fall in a supermarket, you can easily just go down and investigate the scene,” Winkleman says. “But I can’t just go walk onto a cruise ship: I have to get clearance to have access, and generally that doesn’t happen unless I have already filed the lawsuit.”

Although Winkleman is based in Miami, it doesn’t necessarily mean the cruise ships he wants to inspect are there, too. Which means he must go wherever the ship is currently docked to be able to conduct his onboard investigation.

Interviewing witnesses poses additional challenges, especially if the witnesses also happen to be crew members, Winkleman says. “The dynamic is, you have a lot of crew members from Third World countries where they would be making $1 a day, but on a cruise ship, they make $100 a day, so they are going to say whatever they have to in order to keep their jobs. Even the security guards have an interest in protecting the company—it’s an immediate adversarial relationship.”

But the challenges don’t disappear even when crew members cooperate, Rivkind says. Scheduling depositions of cruise ship employees can be especially challenging, he says, “because they’re on cruise ships that are moving from port to port.”

While the hurdles are many, Ira H. Leesfeld, a partner at Miami’s Leesfeld Scolero, points out one significant advantage

> “Sometimes, we just have to file the case while the plaintiff is still undergoing medical treatment or recovering.”

> —Michael Winkleman
who plied her with alcohol served by ship bartenders. She became “obviously drunk, disoriented” and “unstable” in full view of crew members and those monitoring security cameras. The July 2019 opinion by the Atlanta-based 11th U.S. Circuit Court of Appeals, written by Chief Judge Ed Carnes for a three-judge panel, reversed the lower court’s dismissal of the case for failure to state a claim for negligence in failing to warn cruise ship passengers of the danger of sexual assault and failing to take action to prevent the assault.

But Carnes didn’t stop there. He also wrote a special concurrence to his own concurrence where he took judicial notice of the Department of Transportation cruise line incident reports compiled pursuant to the Cruise Vessel Safety and Security Act of 2010 that included incidents that occurred on past Royal Caribbean cruises. “It would be absurd to suggest that a multibillion-dollar business like Royal Caribbean was not aware of congressional reports about the problem of sexual assault aboard its cruise ships,” he wrote.

Winkleman, who represents K.T., believes the opinion “provides a critical clarification of the law that cruise ships do have a duty to warn passengers of the risk of rape.”

Royal Caribbean did not respond to a request for comment on the case.

**Restrictions on Recovery**

When it comes to damages for deaths, plaintiffs lawyers are united in their frustration with the Death on the High Seas Act, an admiralty law that governs the who, the how and the how much when a death occurs during a cruise beyond U.S. territorial waters.

Signed into law by President Woodrow Wilson in 1920, DOHSA was originally intended to benefit widows and dependents of seamen who died while working on ships in international waters as a result of negligence, a wrongful act or unseaworthiness.

DOHSA applies to transportation passenger deaths that occur 3 or more nautical miles from the shore of the United States or in a foreign country. For cruise ship passengers, it is the exclusive applicable law, preempting both state law and maritime common law.

But DOHSA significantly restricts the amount and type of recovery that a decedent’s family can receive, no matter the amount of pain or suffering or the level of negligence or egregious conduct that caused the death. DOHSA only allows a family to recover pecuniary losses like funeral expenses, medical expenses and loss of inheritance.

Nonpecuniary losses such as the loss of care, comfort and companionship are specifically prohibited. That means there is no opportunity to recover for emotional distress, mental anguish, grief or the loss of consortium. DOHSA also prohibits any compensation for pain and suffering the decedent experienced before dying.

“One would think a death case would be a high-value case, but if it’s a death on the high seas, the claim can be worth peanuts,” Meister says.
But DOHSA is even more restrictive in its application to pecuniary recovery, Meister explains, because it calls for a different calculation for the value of life than is common in death cases on land and in territorial waters. Instead of simply calculating the loss of earnings, DOHSA calculations are based on the loss of net accumulation.

“It’s not what the total of what you were expected to earn over your estimated lifespan; it’s what you would have had left after you spent down your earnings,” she says.

If the passenger who dies is an older retired person who does not happen to be financially supporting anyone, Winkleman says that recovery could very well be limited to just funeral expenses.

Meister points out that it is possible to recover for emotional distress under DOHSA if the decedent’s spouse, child or parent was in the “zone of danger” when the death occurred. Merely witnessing a loved one die is not enough, she says, even if the situation is horrific, such as in the case of a medical emergency or an accident during an excursion. Rather, the claimant must be imperiled by the same danger or the same situation that causes the death of the loved one. “If you don’t have that, you don’t have a case,” she says.

In 2000, Congress acknowledged that DOHSA’s pre-World War II-era compensation model was outdated and amended it to allow for nonpecuniary recovery and to extend the jurisdiction from 3 to 12 miles off the country’s shore. Unfortunately for cruise ship passengers, however, the amendment applies only to commercial aviation passengers—a direct result, many plaintiffs say, of cruise industry influence.

“Any time there’s an effort to provide any fix, the pocketbook opens up,” Winkleman says. “They spend millions trying to keep DOHSA on the books, which, in my opinion, is money very well spent.”

In April 2019, U.S. Sen. Deb Fischer (R-Neb.) introduced a bill called Hammer’s Law to extend DOHSA’s updated provisions to cruise ship passengers.

The name is in honor of Christy and Larry Hammer, who died in a fire that broke out in their cabin during a riverboat cruise in Peru. A subsequent report from the Peruvian navy found multiple incidents of negligence by the cruise company, according to the senator’s press release.

The bill has a long road to becoming law, but precedent does not bode well for its success. The proposed Cruise Passenger Protection Act of 2017, which would have provided similar relief by requiring a uniform application of DOHSA, died in subcommittee at the close of 2018.

“If I think it’s likely that it will be amended? I’m not holding my breath waiting,” Davies says. “The cruise lines are a powerful lobbying group against change, and the lobby group for change—the families of deceased passengers—is less organized and less powerful.”

As a result of DOHSA’s rigid restrictions, plaintiffs lawyers say they’ve been forced to turn away meritorious cases because the recovery wouldn’t be enough to justify the time and resources necessary to bring a claim.

“The genesis of this law was to promote American maritime commerce, not to give a ‘get out of jail card’ to the cruise lines,” Winkleman says. “This law is a nightmare, and it shouldn’t be on the books anymore.”

Despite the restrictions, plaintiffs lawyers say they’re willing to rise to the challenge on behalf of their clients, and that’s what makes it worth it.

“The cruise lines fight very hard, they have very smart lawyers both in-house and as outside counsel, and they don’t pay money to get rid of cases,” Meister says. “We try a lot of cases, and we settle a lot of cases; it just depends on the circumstances. In my experience, most cases settle, but I am always 100% ready for trial.”

Jenny B. Davis, a former practicing lawyer, is a freelance writer based in Fort Worth, Texas.
Florida plaintiffs lawyer Debi F. Chalik remembers the moment she decided to file suit against Princess Cruises for negligence arising from the COVID-19 outbreak on the Grand Princess ship.

It was March 6, and she was home watching Vice President Mike Pence deliver a televised briefing that included an update on the status of the Grand Princess.

The 2,600-passenger vessel had just returned from Hawaii, and was being held off the coast of Oakland, California, after the disease was detected on board.

Officials believed the virus that had gripped the Grand Princess originated with a passenger from the ship’s previous voyage to Mexico.

A 71-year-old man had gone to the ship’s doctor the day before disembarking to complain about symptoms of respiratory illness; he later died in a California hospital, becoming the state’s first-known victim of the new disease.

Most of the crew that had been on the previous voyage with the sick man remained on the ship for the Hawaiian cruise, as did 68 passengers, according to a report by the Centers for Disease Control and Prevention.

Pence was announcing that 21 people on board the Grand Princess had tested positive for the virus, and 19 of them were crew members.

Over the coming weeks, that number would rise to 103, and two passengers would die.

“I was so angry because those crew members were clearly on the previous voyage, and they were all mixing and mingling,” Chalik says. “I remember looking at my husband, and I said, ‘I am going to the office right now and drafting a lawsuit.’”

Chalik already had two clients in mind: Her parents, Eva and Ronald Weissberger, were on that ship.

When the Weissbergers boarded the Grand Princess on Feb. 21, the world was already aware of the connection between cruise ships and COVID-19. The Diamond Princess, also a Princess Cruises

Accompanied by a police escort, the Grand Princess heads to the outer harbor of California’s Port of Oakland on March 9.
vessel, had been quarantined off the coast of Japan since Feb. 3 because of an outbreak.

According to a CDC report, the Diamond Princess was quarantined after a passenger who had been on the ship tested positive for the disease. On Feb. 5, all passengers were restricted to their cabins; by Feb. 23, nearly 1,000 people had been repatriated to their home countries, including 329 Americans. Of the 3,711 passengers and crew members on the boat, nearly 20% tested positive, and nine people died. At the time, the CDC determined the ship was the site of “the largest cluster of COVID-19 cases outside mainland China.”

“After what happened on the Diamond Princess three weeks earlier, you would think you wouldn’t sail or that you’d disinfect the ship,” says Chalik, whose firm, Chalik & Chalik, has multiple locations in Florida. “At the very least, they should have warned my parents and everyone else on the ship.”

The 3,500-plus passengers and crew on board the Grand Princess at the time of the March quarantine were taken off the ship and sent either to the hospital for treatment or to state centers and military bases to wait out an additional quarantine period.

Chalik’s lawsuit, filed March 9 on behalf of her parents, alleges negligence and gross negligence and requests relief in excess of $1 million.

In the complaint, Chalik claims Princess Cruises failed to adequately screen, test or warn Grand Princess passengers. Princess Cruises had not answered the complaint as of press time and did not respond to a request for comment.

THAT’S THE TICKET

Ultimately, cruise line liability—to the Weissbergers or to any other plaintiff seeking redress for COVID-19-related injuries—will hinge on the type of harm they experienced, plaintiffs lawyers say.

“Matters such as delay in quarantine and cancellation of cruises will most likely be governed by the terms and conditions of the passenger ticket, which are fairly extensive and generally protect the carrier from liability,” says maritime and admiralty law professor Martin Davies, director of Tulane University Law School’s Maritime Law Center. “Liability for passengers or crew contracting the virus is a little more difficult, as the carrier’s obligation in both cases is to exercise reasonable care, and what constitutes reasonable care will depend very much on the circumstances—what the cruise lines knew at the time, what precautions it took, etc.”

While it can be tempting to compare COVID-19 to other highly contagious diseases such as norovirus or Legionnaires’ disease, Brett Rivkind of Miami’s Rivkind Margulies & Rivkind stresses that conditions alone don’t equal legal liability.

Rivkind points out that cruise ships bring together thousands of people in a contained area who are in contact with both each other and with surfaces such as dining room tables and doorknobs. “The potential to spread germs and a virus is definitely there, even on the best of days,” he says. To win a case, “you have to have some negligence you can point to—proof that negligence caused the whole problem.”

On March 12, Princess Cruises announced a “voluntary and temporary pause of global operations” for 60 days. The CDC also issued a “No Sail Order” for cruise ships on March 14 that was renewed April 9.

What has not stopped, however, is calls from cruise ship passengers curious to know if they have a legal claim. Rivkind says he’s gotten calls but has yet to accept a case. Chalik says she’s also getting calls and is representing multiple plaintiffs from the Grand Princess.

“There were 2,500 passengers on that ship,” she says. “As they get settled in and as the tests come back, I think we’ll get more calls. I am sure we’ll get more calls.”
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Millions have been invested in the emerging field of neurolaw. Where is it leading?

Robert Hauser, a criminal defense attorney in suburban Chicago, was hired by a man charged with shooting his wife after she berated him for leaving a coffeepot on all day. After firing four shots from a revolver, Larry Lotz called 911 and told the dispatcher what he’d done. His wife, Karen, 59, died later at the hospital.

The criminal case against Lotz came down to two fundamental questions: Was he mentally stable when he shot her, and to what extent should he be held accountable under the law?

Lotz, a retired information technology professional and Vietnam vet who lived in Barrington, Illinois, was 65 years old at the time of his arrest in 2016. His friends and family could not believe Lotz would intentionally kill the woman he loved so dearly. Hauser says his client was not in his right mind, and he planned to argue that Lotz...
was temporarily insane, suffering from PTSD as well as showing early signs of Alzheimer’s disease.

“Why would someone shoot someone they adored?” Hauser asks. “You dig into the man’s background, and you can see no reason why. People thought it must be some kind of mistake. There had not been one instance of abuse in 40 years of marriage.”

Hauser says he consulted with expert witnesses, including a doctor who ordered a positron emitted tomography—or PET—scan to measure activity in Lotz’s brain. Hauser says the images showed signs of dysfunction and evidence of Alzheimer’s. That brain scan, Hauser reasoned, could support his insanity defense.

The case raised a host of legal questions both old and new: How do courts determine a person’s mental state and apply that in deciding guilt or innocence? How do judges and juries weigh evidence related to brain functioning? And what do lawyers and judges need to know to effectively evaluate such questions?

With a $4.85 million grant to Vanderbilt University in 2011, the Chicago-based MacArthur Foundation launched the Research Network on Law and Neuroscience with the mission to design and conduct brain-scanning experiments relevant to key topics in criminal justice, focusing on three themes: mental states, adolescent development and evidence. This funding amplified the foundation’s preliminary investment in an earlier exploratory initiative called the Law and Neuroscience Project.

“What’s going on in a person’s brain is relevant to so many domains of law,” says Owen Jones, director of the research network and the Glenn M. Weaver, M.D., and Mary Ellen Weaver Chair in Law, Brain and Behavior at Vanderbilt Law School.

“Historically, there’s been no way to make those assessments,” Jones adds. “When you’re trying to understand the multiple causes of a person’s behavior, you want to try to understand what’s giving rise to their mental states.”

Between 2005 and 2015, there were more than 2,800 judicial opinions in which criminal defense lawyers used or cited neuroscience to help mitigate or explain their clients’ behavior, according to a review co-authored by Duke University law professor Nita Farahany and Stanford Law School professor Henry T. Greely.

Given this growing use of neuroscience, Laurie Garduque, director of criminal justice with the MacArthur Foundation, says the foundation wanted to take a deeper look at how neuroscience might have an impact on criminal law. “Part of the underpinnings of the network was to figure out what’s relevant to the rule of law and the practice of law,” she explains. “We felt that it was really important, given the impact of the criminal justice system on society.”

With MacArthur Foundation support ultimately reaching $7.6 million, the network—whose members include judges and academics in various fields—has produced scores of papers, books and articles, and it has hosted educational seminars...
around the country that have shed light on this burgeoning field known as neurolaw, Jones says.

Responsibility and culpability
The lawyer representing Lotz contended his client lacked the capacity to appreciate the criminality of his actions and suffered from a mental disease or defect at the time. “You could see there was something definitely wrong,” Hauser says.

His argument points to a crucial element of criminal law: The accused must have knowledge and intent to commit a crime to be considered responsible. But the law assigns varying degrees of culpability based on a person’s mental state—distinguishing whether a person acted intentionally, recklessly or even negligently. Such distinctions may be difficult for judges and juries to discern, which makes assigning guilt and punishment even trickier.

Among the studies designed by the MacArthur group was one examining whether brain scans could reveal when someone was acting knowledgeably or recklessly. Researchers from Yale University and Virginia Tech asked 40 study participants to imagine they were carrying a suitcase through a security checkpoint. In some cases, the participants were told the suitcase they were carrying contained contraband. Others did not know what was inside but knew there was a risk the suitcase might contain something illegal. They also were told they’d be financially rewarded for successfully Sneaking in contraband but punished with a fine if caught.

The study participants made these choices while lying inside an fMRI (functional magnetic resonance imaging) scanner, which measures changes in blood flow and oxygenation in the brain. This allows researchers to see which areas are active at specific times. On the basis of the scan results, which were run through a machine-learning program, the researchers could predict which subjects knew they were carrying contraband through security (knowledgeably) and which were aware only of a risk (recklessly) when they carried the suitcase through.

The study, published in 2017, showed the researchers could identify certain patterns of brain activity associated with making knowledgeable choices about criminal activity as opposed to reckless ones. The findings lend scientific support to the law’s distinction between these two mental states, which determine how a person is charged and sentenced for a crime.

Although the initial study offers some insights, it’s much more difficult to assess knowledge or recklessness in the real world, says Gideon Yaffe, a professor of jurisprudence, of psychology and of philosophy at Yale Law School and one of the study’s authors.

“Fact-finders probably don’t make those distinctions as cleanly as they should, and they have very little by way of expert, useful advice about how various conditions, such as mental disorders, affect those boundaries,” Yaffe says. “You can’t always infer what their mental states are from their behavior when their mental states are shaped and conditioned by mental illness.”

How might such research translate in the criminal justice system? “There is a question of whether we have the right boxes, the right categories for responsibility,” Yaffe says. “And I think neuroscience can help us get confidence in the categories we have or reason to revise the categories we have.”

Scanning for memories
Lotz’s account of shooting his wife would be key in how attorneys would argue over his culpability. How accurate were his memories about the shooting, and was he telling the truth?

Memory plays a vital part in the law, whether it relates to the reliability of eyewitness testimony or how defendants describe their state of mind. The MacArthur group has been investigating whether neuroscience can detect brain activity connected to memories—whether it’s possible to distinguish between real and false memories and between truth and deception.

While private companies have promoted fMRI technology for lie detection, and some lawyers have attempted to present it, courts have not admitted such evidence, noting the technology has not achieved general acceptance in the scientific community.

Anthony Wagner, a professor of psychology and neuroscience and director of the Memory Lab at Stanford University, was among members of the MacArthur group who reviewed the literature on fMRI lie detection. Although he concluded it’s not ready for the courtroom, Wagner and his colleagues have been investigating whether it’s possible through brain scanning to detect when someone is experiencing a memory, a concept that someday might serve as another way to determine truthfulness.
While detecting the presence of memories from cooperative test subjects has proved possible, Wagner and his colleagues wanted to know whether someone could intentionally hide a memory. A 2015 study found that with some coaching, people could obscure brain patterns associated with memory, leading to a failure to detect the presence of actual memories.

The upshot is that fMRI-based memory detection has limitations. “When someone has a false memory, the patterns are pretty similar to those of a true memory,” Wagner says. “So in the lab, if people mistakenly believe they have seen a face before, the patterns are so similar to true memories that the ability to distinguish the two is barely above chance.”

Theoretically, lawyers or law enforcement officers might someday employ fMRI scanners while having defendants look at photos of crime scenes or crime victims to see whether they trigger brain activity associated with memories.

Wagner notes the research is still in its nascent stage, far from being used in legal settings. “I’m very cautious when it comes to application where the stakes really matter. In a legal setting, the freedom and liberty of a defendant might be at stake; similarly, reaching a just outcome for a victim is important, and it would be a travesty if unproven brain technology were to lead to an unjust outcome,” he says.

“The juvenile brain
Although detecting memories and lies through brain scanning is still a long way from reaching the courtroom, neuroscience

“When someone has a false memory, the patterns are pretty similar to those of a true memory.”

—Anthony Wagner
act more like teens in the activation in their brains and their performance than they do adults.

Casey has spent years researching what triggers young people and young adults to make poor decisions. It turns out that stress and pressure are among the biggest factors. “When you’re under threat and under stress, it’s like taking your whole prefrontal cortex offline,” she says. “So you can imagine engaging in behaviors that you otherwise might not be engaged in.”

However, young people can make smart decisions in many situations.

“Individuals can have a lot of self-control, but in certain contexts, they don’t,” Casey says. That’s why “no one treatment or sentence fits all” in the criminal justice system.

The problem, Casey—who also serves as the director of Yale’s Fundamentals of the Adolescent Brain lab—argues, is that much of the discussion about brain maturity has been oversimplified. Brain development isn’t linear, and it involves many dynamic changes and variables that confound easy explanations of behavior, impulsivity and recklessness among young people.

For example, the conventional wisdom is that juveniles are reckless and impulsive because their brains are not fully developed, particularly the prefrontal cortex. But Casey has found that younger children don’t act as recklessly as adolescents, and that adolescents, even those around 12 to 13 years old, can be quite good at making decisions.

“It’s not like you magically have the brain of an adult on your 18th birthday,” Casey says. “The old model assumes that at age 18, we have full adult capacity. But what we show is that in emotional situations, young people—those 18 to 21—

has offered a better understanding of the adolescent brain. The research has been used to support juvenile justice reform efforts, including raising the age at which children can be tried as adults and in determining the severity of sentencing them for murder convictions.

BJ Casey, a professor of psychology at Yale and a member of the MacArthur research group, is among the foremost experts on juvenile brain development. Her research was included in amicus briefs submitted to the U.S. Supreme Court to bolster arguments that the immature brains of juveniles are reason to exempt them from the death penalty (Roper v. Simmons, 2005) and mandatory life in prison (Graham v. Florida, 2010; and Miller v. Alabama, 2012). Although the court did not specifically cite neuroscientific research in its decisions, the justices did put an end to such penalties and sparked discussions about when a person should be considered an adult under the law.

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That means judges must carefully weigh the options. “Young adults still should be held accountable. We may not want to put them in a juvenile facility, but we may want to consider that in terms of how they’re held accountable and how they get back into the community, because we’re still trying to set up their identity,” Casey says.
“We have to show some victories to show that neuroscience matters to law in a meaningful way.”
—Francis Shen

The essence of neuroscience and law, Shen says, is that deep human interpersonal connections define us and define what we care about. “These are the things the legal system is ultimately protecting: protecting privacy, wanting to ensure safety and security and liberty,” he says.

In addition to teaching law at Minnesota and working with MacArthur, Shen is executive director of the Center for Law, Brain & Behavior at Massachusetts General Hospital in Boston, where he continues to promote the responsible and well-informed use of neuroscience. He believes such work can, and will, be relevant to lawyers. “It can play a role that aids justice and produces a better world for having considered neuroscience,” he says.

Progress and caution
One of the most challenging questions is how lawyers can responsibly use neuroscience in the courtroom. Scientists conduct studies using groups of people to measure phenomena, while trials are focused on individuals and their behavior. Can the results of a study that demonstrates, for example, people with brain injuries often lose impulse control be applied to one person? In many cases, they can’t, because not all people with brain injuries commit crimes.

“Our work tried to move away from focusing on individual defendants to try to find things that are more broadly true...
about the promise and limitations of this technology in understanding how human brains work,” Jones says.

Stephen Morse, a professor of law and of psychology and law in psychiatry at the University of Pennsylvania, has devoted considerable scholarship to the melding of law and neuroscience. Morse has been among the most renowned cautious voices in the field, arguing that neuroscientific research and imaging techniques are not poised to change the law in any significant way, and he is doubtful it can—at least in the near future.

“Neuroscience doesn’t answer life’s questions. Life’s questions are normative,” he says, adding that it’s highly unlikely any neuroscience finding would reach normative conclusions that would apply to the law.

Moreover, Morse says neuroscience hasn’t moved the needle much in offering legally relevant evidence about human behavior. He says lawyers should not make inferences about behavior that the science does not support. For example, mental disorders are not defined by brain scans but by observable behavior and clinical testing. “The problem is translation. Law is about reason-giving,” Morse says.

Still, Morse says he was impressed with the findings of the knowledge and recklessness study because it shows promise. “It made modest but serious progress,” he says. “We showed, as a proof of concept, that you might be able to find neuro correlates that would distinguish between two folk psychological states of mind, namely knowledge and recklessness.”

Shen is also encouraged by that study and echoes Morse’s caution. “We have to show some victories to show that neuroscience matters to law in a meaningful way,” Shen says. “If the claim is that advances in the understanding of our brain should lead to better outcomes in the law, then we have to show that it’s demonstrably true. As a field, we haven’t done that yet. The challenge is that neuroscience, in a lot of places, isn’t ready.”

Level of guilt
At Lotz’s murder trial, his state of mind was central to his defense. Dr. Geeta Bansal, a psychiatrist, testified that Lotz had post-traumatic stress disorder caused by childhood abuse and his service in Vietnam. She also said he had cognitive degeneration of his brain, a diagnosis that was bolstered by the images she found in a PET scan of his brain. Bansal concluded Lotz lacked the capacity to understand his actions at the time he shot his wife and fit the criteria for insanity.

Under cross-examination, however, Bansal noted that Lotz had the presence of mind to call 911, tell the dispatcher how many times he shot his wife and offer a detailed confession of the incident. Assistant State’s Attorney Scott Hoffert called Lotz’s insanity defense “ludicrous” and described the case as an intentional, deliberate act fueled by anger.

Lotz had waived a trial by jury, preferring the case rest in the hands of Lake County Circuit Judge Daniel Shanes. The judge rejected Lotz’s insanity defense, calling the killing of his wife an act of blind rage, and found him guilty of second-de-

gree murder. Hanes, who said he considered Lotz’s mental health issues and remorse, sentenced him to 16 years in prison.

Although disappointed with the verdict, defense attorney Hauser says he hopes his client can receive the mental health treatment he needs. “I’m happy he was found guilty of second-degree murder. He will only serve 50% of the sentence, and with other credits, he should be released in approximately seven years,” Hauser says. “With the second-degree finding, his life is not over.”

Looking forward
While neuroscience did not play a central role in Lotz’s trial, the issues raised in his case will continue to fuel future research as lawyers, scholars and scientists seek to better understand the connections among our brains, behavior and mental states.

Jones says although great mysteries about the brain remain, neuroscience has opened a window that already is having an impact on the law and legal scholarship. “We’ve long been comfortable thinking that the brain’s operations are unknowable, but in fact, they’re increasingly knowable, and lawyers on both sides will often want to pay more attention to this because there can be information available that is relevant to our clients,” he says.

Lawyers interested in learning more can visit the network’s website, which offers a portal to research articles and online resources. Jones is one of the authors of the pioneering textbook Law and Neuroscience, the second edition of which is scheduled for publication this year. Law and neuroscience classes are taught in at least 20 schools, Jones says.

The ABA Section of Science & Technology Law has been watching these developments, and it partnered with the MacArthur Foundation to sponsor The Future of Law and Neuroscience conference in Chicago in 2013. Eric Drogin and Carol Williams, co-chairs of the section’s Committee on Behavioral and Neuroscience Law, agree that while the research is exciting, it’s far from solving age-old legal problems. “They’re not there yet,” Drogin says. “There is much to discuss, but at this point a lot of it is merely speculative.”

Jones agrees the science is not ready for the courtroom, but he believes the research has been valuable. “Despite all the progress that’s been made, it still feels very much like a frontier,” he says. “I think the lawyers that are coming up through training right now, some of whom will or will not be learning about this, at least will be entering a world in which it is considered entirely unshocking that brain evidence is being offered.”

Garduque believes the network has made great strides, notably its work on adolescent brain development and in educating the legal community about how neuroscience can be misunderstood and misused. “We’re quite proud of how it has helped and contributed to establishing a field,” she says. “There is still a great deal of work that needs to be done.”

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Do the Right Thing

How to avoid 10 common ethics pitfalls

By David L. Hudson Jr.
Lawyers are stewards of their clients’ most sensitive and personal information. They serve as officers of the court and are in positions of public trust. But these high standards can lead to steep falls, and a lawyer who doesn’t carefully mind ethics obligations can quickly run afoul of the rules of professional responsibility.

Most states require ethics training as part of continuing legal education requirements. But a quick scan of disciplinary records reveals lawyers behaving badly on a spectrum of issues—from improper advertising to mishandling private information and everything in between.

Whether intentionally flouting ethics rules or unwittingly succumbing to the many pitfalls that can appear, lawyers regularly face discipline for crossing the line. Being hauled in front of a disciplinary board can cause professional embarrassment, suspension of a law license and even disbarment.

We asked legal ethics experts for a primer on the most pressing and pernicious ethics traps out there for the modern lawyer, along with best practices to avoid problems on the front end.

The lesson is to not only beware, but be aware.
Competency

Problem: Understanding technology and protecting client data
Arguably, a lawyer’s foremost duty is the duty of competency, outlined in Rule 1.1 of the ABA Model Rules of Professional Conduct. In 2012, Comment 8 to Rule 1.1 included the so-called technology clause, which 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.”

In this age of hacking in a rapidly changing digital world, protecting client data and cybersecurity are among the key reasons lawyers must stay current on technology.

“On the technology front ... some lawyers remain relatively in the dark and risk breaching client confidentiality not only from a traditional cybersecurity breach but also from other ‘smaller’ misuses of technology,” says Jan Jacobowitz, an ethics expert who teaches at the University of Miami School of Law. She cites the examples of lawyers working on public Wi-Fi or not realizing they have pocket-dialed an opposing counsel who may then overhear a privileged or confidential conversation.

Best steps:
Lawyers can avail themselves of the many CLEs, books and vendor trainings in this area. Attorneys must take proactive steps to learn more about technology and understand the ethics breaches related to client data or privacy. “Regarding technology, although it may be a steep learning curve for some, there are many articles and books available to enlighten oneself, as well as an entire cottage industry of tech consultants that has emerged to assist the legal profession,” Jacobowitz says. “The old adage ‘know what you don’t know and seek assistance’ applies to technology and the law.”

Problem: Client neglect
“Neglect is one of the two most common reasons for discipline complaints,” says professor Leslie C. Levin, who teaches professional responsibility at the University of Connecticut School of Law. Attorneys can stretch themselves thin and take on overwhelming caseloads that can cause their client matters to suffer.

“Neglect often occurs due to our cognitive biases, including overoptimism and overconfidence,” Levin says. “Lawyers—like all people—tend to overoptimistically believe they can do more in a day than they can actually accomplish. ... This leads to ethical violations. Some lawyers will take on more work than they can handle, thinking that they can get it all done on time and in a competent fashion when they cannot.”

Best steps:
The best way to avoid this competency trap is to be aware of the danger of taking on too much.

“Lawyers need to be mindful of these cognitive biases, which distort our ability to accurately assess how long it takes to complete our work,” Levin says. “Lawyers should mentally add in some extra time for unexpected events that may cause delays,” she says. “They should ask for help from colleagues when they begin to feel overwhelmed. If they find themselves lying to a client about work they should have done, they should acknowledge to themselves that they have a problem and that they need to take immediate steps to address it.”

Billing

Problem: Fee shenanigans
Many ethics problems arise from overcharging for legal services or other billing matters. Model Rule 1.5 prohibits lawyers from charging unreasonable fees, and attempting to modify a fee arrangement with a client can pose an even bigger ethics issue.

“Many lawyers unwittingly fall into the ethics trap of fee modifications,” says professor Susan Saab Fortney, who teaches ethics at Texas A&M School of Law. “Some courts have treated modifications as business transactions subject to the strict requirements of Model Rule 1.8(a),” which covers the conditions under which a lawyer can enter a transaction adverse to a client’s interest. “The modification may also be subject to the presumption of voidability, meaning that the lawyer must show that the contract and circumstances of its formation were fair and reasonable to the client. In some cases, a client may assert that the modification was a breach of fiduciary duty.”

Best steps:
Lawyers should anticipate the possibility of a fee modification in the initial retainer agreement or fee schedule. In other words: Plan ahead.
“For example, the engagement agreement could spell out a formula for a performance bonus,” Fortney says. “Second, lawyers should specifically define the scope of work to be handled under flat fees. Third, if the original agreement does not account for increases or changes, special care should be taken to comply with ethics rules and fiduciary principles.”

Fortney explains that in law firms, the proposed modifications should be handled by someone in the firm unrelated to the representation. “Above all, lawyers should not quit doing work and try to pressure clients to pay higher fees when work is necessary to protect client interests,” she says. “The prudent course is to take steps to withdraw from representation when allowed for under applicable ethics rules and fiduciary principles.”

“Defense counsel should avoid being alone with foreseeably hostile witnesses.”

—Bruce A. Green

**Lawyer-client relationship**

**Problem: Creating an accidental client**

When lawyers communicate with people on webpages or other modes of communication, there is the potential for ethics problems if they’re not careful. While the lawyer assumes no lawyer-client relationship has been created, Keith Swisher, a legal ethics professor at the University of Arizona James E. Rogers College of Law, warns that some might believe otherwise. An individual might assume the lawyer, by answering their question online or conversing with them in another manner, might have agreed to representation because the lawyer is dispensing legal advice.

**Best steps:**

Swisher says lawyers “should generally consult only with plausible clients, i.e., persons or entities with whom the lawyers are actually considering an attorney-client relationship.” He also recommends “well-written and well-placed disclaimers on websites” to avoid the problem of what he terms “accidental clients.” He also cautions that lawyers should “avoid the proverbial cocktail conversation or random phone call.”

**Criminal law**

**Problem: Potentially hostile witnesses**

There are some potentially thorny ethics traps for lawyers practicing criminal law. Bruce A. Green, a professor at Fordham University School of Law who writes regularly on ethics issues in criminal law, points to the problem of a lawyer interviewing a witness who later turns out to be hostile. “Criminal defense lawyers have a duty to investigate, which typically includes making an effort to interview witnesses.”

Lawyers sometimes do these interviews alone, but Green says that can create problems if the witness later testifies differently in court. “The lawyer might like to elicit or introduce the witness’s prior statements,” he says. “But the lawyer will bump up against the rules that say a lawyer may not be both an advocate and a witness at trial.”

**Best steps:**

Green points to the language of ABA Criminal Justice Standard for the Defense Function 4-4.3(f), which reads: “When the need for corroboration of an interview is reasonably anticipated, counsel should be accompanied by another trusted and credible person during the interview. Defense counsel should avoid being alone with foreseeably hostile witnesses.”

“Many lawyers unwittingly fall into the ethics trap of fee modifications.”

—Susan Saab Fortney
Communication

Problem: Exaggerating credentials

Some lawyers, in an effort to increase business, engage in puffery. A lawyer claims he has 20 years of experience, when in reality, he has had a law license for only seven years. A lawyer advertises himself as a seasoned courtroom litigator when he settles all his personal injury cases instead of taking them to trial. These exaggerations can run afoul of Model Rule 7.1, which prohibits lawyers from engaging in false and misleading communications. The rule is designed to protect consumers from attorneys who engage in deceptive advertising practices.

“Lawyers have an obvious interest in inflating their credentials and performance, which often borders on fraud and sometimes crosses the line,” says Stanford Law School professor Deborah Rhode, author of Cheating: Ethics in Everyday Life. “They are not alone. As I note in my recent book on cheating, one study on résumé fraud found that two-fifths included information that was inconsistent with educational records.

“Other communications may seem more like puffing than outright lies but may be misleading to unsophisticated clients,” Rhode says. “The more that lawyers see others fudge the facts, the less they are to view their own conduct as problematic. The result is what psychologists call ‘ethical numbing,’ and it is not as costless as is often assumed. Such small deceptions often
pave the way for greater misconduct and create a corrosive culture. Much of legal practice depends on a sense of honesty and trust, and when lawyers erode that perception, we all suffer.”

**Best steps:**
Lawyers shouldn’t exaggerate their credentials or engage in false statements about their qualifications or record. Such statements may cause clients to have unjustified expectations and can lead to other problems. As always, honesty is the best policy.

**Problem: Managing negative reviews**
No one likes to read negative reviews about themselves—whether it is a poor teaching evaluation, a bad review of a business or a one-star rating for professional legal services. But lawyers need to think twice before firing back with responses to negative reviews. It can create an ethics problem if the lawyer goes too far and reveals confidential client information. (See “Trashed by a Client Online?” page 30.)

“As the tide has turned in recent years, and the internet and social media have become the leading sources for people to search for and comment on legal services, it’s become more important than ever for lawyers to have a good online presence and practice good ‘digital hygiene,’” says John G. Browning, an expert on social media and the law. “But when a lawyer sees a negative review of his/her services on either a consumer review site like Yelp or an attorney-specific site like Avvo.com, too many lawyers have a knee-jerk reaction of rushing to defend themselves, often revealing confidential client information in the process.”

Browning says several state ethics opinions note that “a negative online review does not merit the ‘self-defense’ approach of a disciplinary action or a legal malpractice suit, where a lawyer may reveal client confidential information in his/her own defense.”

A related problem can arise when a lawyer files a defamation lawsuit against a former client. That lawsuit could be considered a strategic lawsuit against public participation—a SLAPP suit.

Browning says the client might file a special motion to dismiss under a state anti-SLAPP law and could recover attorney fees from the suing attorney.

**Best steps:**
“I counsel lawyers to respond emphatically and professionally in responding online, inviting an offline conversation and keeping in mind that their response is being read not just by the ex-client to whom it’s being directed but to an online audience of countless potential clients,” Browning says.
Confidentiality

Problem: Big data and confidentiality
Arguably, the most sacrosanct ethics principle in law is confidentiality—preserving inviolate attorney-client dialogue and work product. This becomes more complicated in the digital age and the era of big data. Sarah Lamdan, a professor at the City University of New York School of Law who writes about these issues, says: “One has to wonder whether lawyers violate their confidentiality mandate when they use research programs, document-sharing systems and other workplace products that record lawyers’ research and writing.”

She says this is particularly true when companies sell data to law enforcement and other entities. She warns that “ethical issues … may arise when we use Westlaw and Lexis products, whose parent companies—RELX Group and Thomson Reuters—are major data brokers to law enforcement, credit rating and employment background companies, and others who may be able to gather information about lawyers’ cases through data collected by their legal research systems.”

Best steps:
Lamdan says lawyers can “push back on vendor practices that violate our ethics and … ask for assurances that these products don’t intermingle our work product or sensitive client data into their big data sales and collection services.” She provides the example of “asking Westlaw and Lexis to provide statements to lawyers promising that they will wall off their legal products from their data-brokering activities.” She notes that other services could expunge lawyer work-product data and take steps to ensure the data they do collect is encrypted and protected from data-gathering operations.

Lawyer well-being

Problem: Personal life affects professional life
There are numerous ways a lawyer’s personal life might create problems. Lawyers sometimes face increased pressure to make more money, whether it’s to keep up with the Joneses or take care of family members.

Practitioners facing financial stress may fall prey to addictive behaviors such as gambling or substance abuse. Such an addiction can then come to dominate a lawyer’s life.

San Francisco Bay Area-based attorney Carol Langford, who represents lawyers in disciplinary matters, describes it as “lawyers doing things in their personal lives that allow trouble to slowly creep in and reside.”

She explains: “They buy big houses and then struggle in a recession to pay for their living costs, making them susceptible to foisting excessive fees on clients or taking advantage of them.” This can lead to the temptation to commingle client funds, charge excessive fees or bilk clients.

Best steps:
Langford says the solution is to “live smaller, lighter and ultimately happier lives.” This requires what she calls “real humility—face your mortality and eventual decline. Plan for it.” She describes it as “not a popular way of life these days, but a path to true happiness.”

Lawyers also should take greater advantage of the resources offered by lawyer assistance programs, which can provide a needed lifeline to attorneys whose personal challenges are negatively affecting their professional responsibilities.
Conflicts of Interest

Problem: Lateral moves

Perhaps the ultimate duty a lawyer owes a client is the duty of loyalty. That loyalty can be tested when lawyers switch firms.

A lawyer from Firm A moves to Firm B. Firms A and B have lawyers on opposite sides of a very contentious case. The possibility exists that a conflict of interest can develop if there is not a sufficient screening system in place to determine whether the newly hired lawyer had access to confidential client information.

There is also the appearance of impropriety or conflict, even if none exists.

“There is increasing lawyer mobility with lawyers moving from one firm to another, and the hiring of lateral partners and associates can trigger conflicts of interest if not done right,” says professor Peter A. Joy, who teaches ethics at Washington University School of Law. “Some hiring firms overlook or ignore the steps they need to take, often resulting in being disqualified from representing a longtime client and sometimes triggering a malpractice claim.”

Best steps:

“Before hiring a lateral, the hiring firm has to do its due diligence to identify conflicts with existing clients and then determine if the jurisdiction permits ethical screening as a solution,” Joy says. “In some instances, such as a potential lateral partner or associate who has been representing a client in a matter adverse to the hiring firm’s client, only informed consent of the client adverse to the hiring firm’s client will waive the conflict, and the lateral will not be able to bring that client to the hiring firm.”

David L. Hudson Jr., who teaches at Belmont University College of Law, is a regular contributor to the ABA Journal.
MEMBERS WHO INSPIRE

Making Waves

Attorney has worked for 30 years to improve well-being of animals

BY AMANDA ROBERT

James F. Gesualdi was only a year into his practice of law in 1989 when a trip to a dolphin sanctuary changed the course of his career—and his entire life.

Gesualdi’s mother, knowing of his fascination with dolphins, showed him information about the Dolphin Research Center in the Florida Keys. A group was about to take a weeklong visit to the center, and he asked if he could join them—even though it turned out to be a group of cancer patients and survivors. They agreed.

As the only male and only person who wasn’t a family member, he says the group taught him “what strength, courage and dignity were all about and put the so-called stresses of a young lawyer in perspective.”

Gesualdi also met Little Bit, one of the dolphins who starred in the television series *Flipper*, which he loved as a child. He was moved by her beauty and grace and remembers that all he wanted to do was sit on the shoreline and watch her.

“I absolutely fell in love with her,” he says. “She inspired me, and that was for me a very transformative experience. That’s what started me on my animal law practice.”

James F. Gesualdi: “The practice of animal law, like life itself, is all about raising consciousness.”

*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.

Photo courtesy of James F. Gesualdi
At the time, Gesualdi was an associate at White & Case in New York City and Washington, D.C. He began helping the Dolphin Research Center with federal regulatory work on a pro bono basis. He became active in marine mammal law, representing clients such as the Alliance of Marine Mammal Parks and Aquariums, an international association and accrediting body for marine parks, aquariums, zoos and research facilities.

In the mid-1990s, he also provided legal counsel to the marine mammal community’s Working Group on the Reintroduction of Marine Mammals to the Wild and commentary on the U.S. Department of Agriculture Animal and Plant Health Inspection Service’s negotiated rule-making and update to marine mammal regulations.

These early experiences inspired Gesualdi to not only pursue a broader career focused on animal welfare, primarily as it relates to zoos and aquariums, but to also try to build consensus between all of the groups that have concerns about the well-being of animals.

“One of the things I have tried to do throughout my entire career is be a good listener and understand different perspectives,” says Gesualdi, who is now a sole practitioner in Islip on Long Island in New York. “It has made me a better lawyer, and I’d like to think it has made me a better person. That is equally important.”

Calling for change

Through the 1990s and into the 2000s, Gesualdi split his practice between animal law and land use and municipal law. He decided to focus on the former in 2006, after the unexpected death of his brother-in-law and the realization that the two practices kept him traveling and working into the evenings.

Gesualdi concentrates on legal, regulatory and strategic matters related to animal welfare and wildlife conservation, and he works extensively with matters related to the U.S. Animal Welfare Act, “the only federal law that regulates the treatment of animals in research, exhibition, transport and by dealers.”

He also calls for continuous advancements in animal welfare, and in 2014, he published the book Excellence Beyond Compliance: Enhancing Animal Welfare Through the Constructive Use of the Animal Welfare Act. He combines lessons he learned throughout his career to outline a model nonregulatory program for zoological organizations that want to implement higher standards than those required by the federal law.

“What my philosophy is about is when we look at the law, particularly as it relates to animals and the act, that’s the starting point of our responsibility,” Gesualdi says. “If we are fortunate enough to have animals entrusted to our care, we also commit to continuously improving ourselves and their well-being every day.”

While Gesualdi continues to provide proactive advice to zoological associations, he also receives calls from organizations dealing with tragedies. They often need help figuring out what happened and how to make changes for the future.

In July 2017, he received one of those calls from the South Florida Museum in Bradenton, Florida, after Snoopy, the world’s oldest-known manatee, went missing the day after his 69th birthday. Snoopy was found drowned in an underwater plumbing area in his habitat.

Gesualdi conducted a site review, interviewed staff and examined records and security footage. He also considered relevant laws, professional standards and internal policies, and the culture of the organization before providing a report on the factors that led to Snoopy’s death and recommendations on new procedures that could prevent similar accidents.

Martha Wells, the chief community engagement officer at the Bishop Museum of Science and Nature, as it’s now known, met Gesualdi early in his career and knew he would guide the museum’s board of trustees through the moral, ethical and legal work required of them in a way that no one else could.

“He had the expertise that I believe is truly unique and also the genuine personal mission of doing what is right for the animals, which is what we also wanted,” Wells says. “Jim was able to do that compassionately and honestly because he is a man of impeccable integrity. He helped us be the best we could be.”

While the recommendations Gesualdi made in Snoopy’s case have fueled much of his work with other organizations, he also aims to keep learning and improving his approach.

“Every situation is different, and over the years, I have made lots of recommendations, and changes have come from difficult situations,” he says. “A year or two later, I realize that some of these ideas I had were good ideas, but they weren’t good enough. I try to make them better.”

Raising awareness

Gesualdi became involved with the ABA after he graduated from Hofstra University School of Law in 1988 and served as vice-chair of the Young Lawyers Division’s Animal Protection Committee.

In his current role as a vice-chair of the Tort Trial & Insurance Practice
Reginald M. Turner believes that being a member of the American Bar Association is one of the most effective ways to fulfill the commitment lawyers make in their oath.

“In the oath, we pledge to support the constitutions of our nation and our state, to respect our courts and judges, to practice law with civility and integrity and to work to ensure that there are legal services available to people who cannot afford them,” he says.

This belief also motivated Turner, an executive committee member of Clark Hill in Detroit, to aspire to greater leadership within the ABA. Now the president-elect nominee, he has served in the ABA House of Delegates and as chair of its Rules and Calendar Committee from 2016 to 2018. His many other roles include being chair of the Commission on Racial and Ethnic Diversity in the Profession from 2011 to 2014.

When considering what he hopes to accomplish during his term, Turner contends it’s important for every officer of the ABA to be cognizant of the association’s mission to defend liberty and deliver justice as the national representative of the legal profession.

“I believe that our members want the ABA to continue to address public policy issues that are central to the administration of justice, not unduly divisive or political, and upon which the ABA can have significant impact,” he says.

Turner adds that the rule of law is an important component of the ABA’s work, as well as ensuring members receive high-quality continuing legal
education through methods that are convenient for them.

He also hopes during his term to continue to support the member value proposition and its aim to build a more engaged and financially stable association.

“The organization realized it needed to be more innovative in seeking and retaining members, and the progress is promising,” he says. “That initiative is bearing fruit, and that’s exciting news.”

Turner was nominated in February at the ABA Midyear Meeting in Austin, Texas. He will face a vote in August by the House of Delegates at the ABA Annual Meeting, after which he will become the president-elect.

Patricia Lee Refo is currently serving as president-elect and will assume her one-year term as president at the close of the annual meeting.

She will pass the gavel to Turner after the 2021 ABA Annual Meeting in Toronto.

The close of the 2020 ABA Annual Meeting will mark the end of Mary L. Smith’s three-year term as secretary and William R. Bay’s two-year term as chair of the House of Delegates.

Pauline A. Weaver, the owner of the Law Office of Pauline A. Weaver in Fremont, California, was nominated to assume Smith’s position.

She has previously served as a member of the Board of Governors and House of Delegates, and as the chair of the Government and Public Sector Lawyers Division.

Barbara J. Howard, principal at Barbara J. Howard Co. in Cincinnati, was nominated to succeed Bay as the next chair of the House of Delegates.

She has served as chair of its Committee on Issues of Concern to the Legal Profession, Select Committee and Committee on Credentials and Admissions.

Michelle A. Behnke’s three-year term as treasurer also will end after the annual meeting. Kevin L. Shepherd, a partner with Venable in Baltimore, was nominated to assume her position. He has been a member of the Board of Governors since 2016 and serves as chair of its Finance Committee.

We asked all of the candidates for leadership positions the same five questions: Why did you decide to serve the ABA in this new role? What would you like to accomplish during your term in office? Why did you become a member of the association and what changes have you seen since you joined? And finally, what positive experiences have you had with the association? For the candidates’ full responses, go to ABAJournal.com.

Reginald M. Turner
PRESIDENT-ELECT NOMINEE

Reason to serve:
“I had a number of mentors who suggested that I consider seeking more responsibility over time. I can truthfully say that, at least for the past 10 years, I have had really great relationships with our presidents of the American Bar Association.

“There are so many past presidents who have taken time to sit down with me, talk with me and encourage me with my work at the American Bar Association. They have been shining examples of the best in our profession.”
Barbara J. Howard  
HOUSE OF DELEGATES  
CHAIR-ELECT


Changes in the association:
“The world has changed. We’ve been through how many recessions, and who knows what’s going to happen with the coronavirus? I have seen the ABA go through lots of ups and downs. I have seen the organization take on some really important issues, both on the domestic front and international front; certainly, we have dealt with the issue of immigration. I have witnessed how we, as an association, have evolved over time to meet more of our members’ and potential members’ needs. It is important that we continue to evolve in a positive way.”

Pauline A. Weaver  
SECRETARY-ELECT


Plans for term:
“I would like to make the office of secretary more accessible. As I have said to everyone, I intend to remain available if they have problems, questions, comments, complaints or suggestions. Most people just see the secretary saying ‘second’ every time a motion is made, but it’s a whole lot more than that. I hope to do some education with the ABA general membership on what the secretary is and what the secretary does, to make myself more accessible to people in the House and those who serve on the committees of the association.”

Russell F. Hilliard  
DISTRICT 1


Positive experience with the ABA: “I’ve had the ability to get to know people from all areas of the country and appreciate their diverse challenges in the practice of law—challenges in the profession that might be different than they are in New Hampshire. The other thing I will say, and I have said this so many times: I enjoy being active in the ABA, the New England Bar Association and the New Hampshire Bar Association because I find that those who devote time to professional organizations are people who are much happier with their profession and their work.”

Kevin J. Curtin  
DISTRICT 2

Senior appellate counsel in the Middlesex County District Attorney’s Office in Woburn, Massachusetts. Member of the House of Delegates since 2018, serving currently on the Committee on Drafting Policies and Procedures. Vice-chair at large of the Criminal Justice Section Council and co-chair of the Appellate and Habeas Practice Committee, Immigration Committee and Specialized Practice Division. Member of the Working Group on Building Public Trust in the American Justice System and chair of the International Law Section Working Group on Turkey. Received JD in 1988 from Boston College Law School.

Reason to serve:
“I thought it was an opportunity for me to serve the ABA in a different way that would allow me to become intimately familiar with the operations and functioning of the association. I have something to offer, as I have an unusual background as a state prosecutor with a focus on state law issues. I have also been active in our state bar association, so that’s one of my interests—to see the ways in which we can reach out as an association to our state bar associations and work with them.”
John C. Cruden  
**DISTRICT 4**

Principal at Beveridge & Diamond in Washington, D.C. Prior to private practice, served with the U.S. Department of Justice Environment and Natural Resources Division, including as assistant attorney general, and in the U.S. Army Airborne, Ranger and Special Forces units and as a judge advocate. Chair of the Section of Environment, Energy and Resources (2009-2010), President of the District of Columbia Bar (2005-2006), American College of Environmental Lawyers (2016-2017) and Environmental Law Institute (2011-2014). Graduated from U.S. Military Academy at West Point in 1968 and received JD in 1974 from Santa Clara University School of Law.

Changes in the association:
“One change is that law firms are not routinely paying for ABA membership as they used to. Fortunately, my law firm does do that. I also see another change: What the ABA is doing nationally has become more important during times where we have clear divide in our government, and it’s harder for the government to do things. Having a bipartisan organization that is making pronouncements on policy and procedures and the rule of law has become more important rather than less important because government itself is struggling.”

Pamila J. Brown  
**DISTRICT 6**

Administrative judge in the Howard County District Court in Ellicott City, Maryland. Member of the House of Delegates since 2001 and chair of the Select Committee. Chair of the Standing Committee on Bar Activities and Services. Member of the National Conference of Specialized Court Judges Executive Committee. Chair of the Commission on Domestic & Sexual Violence (2007-2010) and Government and Public Sector Lawyers Division (1993-1994), President of the Maryland State Bar Association (2015-2016) and Bar Association of Baltimore City (1997-1998). Received JD in 1979 from University of Baltimore School of Law.

Positive experience with ABA:
“My young lawyer experience was that it was a melting pot of innovative and creative ideas with a bent toward making the world a better place through all of the pro bono and civic outreach efforts. That laid the groundwork for my continued activities: being engaged in the community and trying to make a difference one day at a time, one meeting at a time and reaching out to one person at a time. As a more senior person, it is a sense of pride for me to see the association and how it has made its mark with respect to legislation and being a voice of reason dealing with really critical issues facing the legal profession.”

Linda S. Parks  
**DISTRICT 12**


President of the Kansas Bar Association (2007-2008) and founding member and first president of the Kansas Women Attorneys Association (1994-1996). Life fellow of the American Bar Foundation.

Received JD in 1983 from Washburn University School of Law.

Plans for term:
“I would like to be a person who helps the association flourish and grow. I would like to be able to educate people, particularly in Kansas, about the many things the organization does to help the profession. I don’t think that’s any particular task. It’s an ongoing obligation of all of us, and if I can help in some larger way, I would sure like to get that done.”

Andrew M. Schpak  
**DISTRICT 19**


Plans for term: “My hope during my term is that I can bring a helpful perspective to the conversation. Being a Board of Governors member doesn’t mean you come in with an agenda. It’s more about recognizing that, for instance, we’re probably going to deal with the impact of COVID-19 on budgets, entities, as well as the association as a whole. It’s trying to strike a balance between looking at what we’ve done in the past while trying to be innovative in what we need to do in order to maintain relevance and make it through the storms that might come.”

Changes in the association: “I saw the legal economy at its worst, at least in recent history, and then saw it come back and be pretty thriving over these last five to 10 years.”
Lucian E. Dervan
CRIMINAL JUSTICE SECTION

Law professor and
director of crimi-
nal justice studies
at Belmont Uni-
versity College of
Law in Nashville,
Tennessee. Chair
of the Commission
on the American Jury. Immediate-past
chair of the Criminal Justice Section
and member of the Executive Commit-
tee. Co-chair of its Plea Bargaining Task
Force, founder and chair of the Glob-
White Collar Crime Institute and
member of the Book Board. Member of
the American Bar Foundation. Received
JD in 2002 from Emory University
School of Law.

Reason to serve:
“I really enjoyed the opportunity
to be in the leadership of the Criminal
Justice Section and learn so much about
the day-to-day work that makes that
such a successful section. As I moved
out of that position and had the opport-
unity to take a role with the Commis-
sion on the American Jury, I was able
to see so many of the different things
the association is engaged in. It seemed
like the next natural step to try to move
into a position where I have an opport-
unity to contribute to and work on
some of the issues that affect the entire
association.”

Sheila Slocum Hollis
SECTION OF ENVIRONMENT, ENERGY,
AND RESOURCES

Founding manag-
ing partner and of
counsel at Duane
Morris in Wash-
ington, D.C., and
former member of
the firm’s executive
committee. Former
director of the Federal Energy Regu-
latory Commission Office of Enforce-
ment. Member of the House of Dele-
gates since 1995. Chair of the Standing
Committee on the Law Library of
Congress and vice-chair of the Senior
Lawyers Division. Chair of the Section
of Environment, Energy, and Resources
(2000-2001); Standing Committee on
Environmental Law (1997-2000); ABA
Journal Board of Editors (2007-2010);
Fund for Justice and Education Council
(2006-2009) and Standing Committee
on Gavel Awards (2009-2012). First
female president of the Energy Bar As-
sociation (1991-1992). Received JD in
1973 from University of Denver Sturm
College of Law.

Reason to serve:
“It changes the life
of people. We need
to continue to be a
strong national voice on these
important issues.”

Koji F. Fukumura
SECTION OF LITIGATION

Partner and
management
committee member
at Cooley in San
Diego. Member
of the Standing
Committee on the
Federal Judicia-
ry and Commission on the American
Jury. Chair of the Section of Litigation
(2017-2018). Member of the Standing
Committee on Technology and Informa-
tion Systems (2014-2016) and Standing
Committee on Strategic Communications
(2006-2008). Member of the Law-
yers’ Committee for Civil Rights Under
Law Board of Directors. National
Asian Pacific American Bar Association
Executive Committee member (2005)
Received JD in 1991 from Boston University
School of Law.

Reason to serve:
“We’ve taken steps that I think and
hope will stabilize membership and
increase membership. We’re at a really
critical time right now in making sure
the steps that we take are going to reen-
gage with lawyers in the United States
and really capture the sustained loyalty
of younger lawyers so they can under-
istand the benefits and the importance
of membership. And in the last couple
of years, we have seen the ABA lead on
important issues like the rule of law and
attacks on the judiciary, and on access
to justice at a time when funding for
legal services organizations and other
organizations that serve vulnerable pop-
ulations are being cut at the local, state
and federal levels. We need to continue
to serve so many years.
I’ve had good experiences on the inter-
national front and the opportunity to
participate, speak and meet other people
involved in areas that I was terribly
interested in, many times cutting-edge
national and international issues. It has
enhanced my relationships, my practice,
my friendships and my family’s life. It
opened up different opportunities in dif-
ferent parts of the world and expanded
the horizons tremendously.”

Shayda Z. Le
YOUNG LAWYERS DIVISION

Partner at Bar-
ran Liebman in
Portland, Oregon.
Member of the
Young Lawyers
Division Executive
Committee. Mem-
er of the Legal
Opportunity Scholarship Fundraising
Committee. Immediate-past president of
the Multnomah Bar Association
Young Lawyers Section. Member of the
Campaign for Equal Justice Advi-
sory Committee. Fellow of the Amer-
ican Bar Foundation. President of the
Andisheh Center (2017-2018). Received
JD in 2011 from Boston University
School of Law.

Reason to serve:
“I am on the Legal Opportunity
Scholarship Fundraising Committee, which
raises money to provide diver-
sity-related scholarships to students
in law school. I was appointed to that
committee even though I didn’t apply
for it, and I’m still doing it even though
that year has passed. I found that
came a platform to not just encour-
age other people to be giving toward
the association but elevated my own
perspective about what the ABA does.
Giving money to diverse and deserving
law students is one of the most out-
wardly impactful things that the ABA
does for people who are not already
association members. It changes the life
of a law student potentially or provides
them a trajectory where they can go into service or make contributions.”

**Marvin S. C. Dang**

**GOAL III MINORITY MEMBER-AT-LARGE**
Managing member of the Law Offices of Marvin S. C. Dang in Honolulu. Former member of the Hawaii House of Representatives. Member of the House of Delegates since 2018. Immediate-past chair of the Senior Lawyers Division; vice-chair of the Diversity & Inclusion Committee; and liaison to the Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, and Diversity and Inclusion Advisory Council. Member of the Fund for Justice and Education. Former member-at-large of the Solo, Small Firm and General Practice Division Council. Member of the National Asian Pacific American Bar Association-Hawaii Board of Directors. Received JD in 1978 from George Washington University Law School.

**Plans for term:**
“When I was chair of the Senior Lawyers Division, I used the acronym ‘WISE.’ That is what I would like to use as my goal for service on the board. The ‘W’ stands for well-being, and that involves the financial well-being of the ABA and also the physical, financial and mental well-being of our members. ‘I’ is innovative. We need as an organization to think outside of the box as we plan and implement programs and projects. ‘S’ is service. The ABA needs to be of service to our members. We need to make sure that our members receive benefits and value. And ‘E’ is experience. We are fortunate to have many experienced attorneys, and it’s important for them to share their knowledge with other ABA members.”

**Vickie Yates Brown Glisson**

**GOAL III WOMAN MEMBER-AT-LARGE**
President of VYBG Consulting in Louisville, Kentucky. Former candidate for Congress in 2018 and secretary of the Kentucky Cabinet for Health and Family Services (2015-2018). Member of the Youth at Risk Advisory Commission since 2017. Chair of the Health Law Section (2008-2009). Received JD in 1979 from the University of Kentucky J. David Rosenberg College of Law.

**Plans for term:**
“There are initiatives that I want to help support that are within the Diversity and Inclusion Center. The Grit Project, for instance, is a wonderful initiative. I live on a farm, where you better be gritty and have the mindset that you are tenacious and will rise to the occasion.

“So many times, women have not been called upon to dig down into themselves. I am that representative for women, and I want to be able to represent their interests and continue the growth we see in diversity and acceptance. I also want to work with the other Goal III entities to help them have that inclusion and diversity.”

**Reason to serve:**
“I really believe in the American Bar Association. I believe in its mission and its overarching ability to support our profession.”

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**ABA ANNUAL MEETING**

**Adapting Annual**

In light of the COVID-19 pandemic, this year’s ABA Annual Meeting will take place virtually

**BY AMANDA ROBERT AND LEE RAWLES**

In response to the evolving COVID-19 pandemic, the ABA Board of Governors decided in April that this year’s annual meeting will be entirely virtual.

The 2020 ABA Annual Meeting is scheduled for July 29 to Aug. 4. In addition to nearly 300 meetings and events, it includes the convening of the board to discuss the association’s business matters and the House of Delegates to consider a number of policy proposals.

“We will not meet in person this summer in Chicago, I am pleased that we will nonetheless gather together to continue our important work,” ABA President Judy Perry Martinez said. “The ABA will present our annual meeting this year with a fresh new approach to our always-informative and inspiring event that so many of us and our families look forward to.”

The virtual meeting will be free to ABA members.

“The health and safety of attendees and staff remains the primary concern of the ABA,” ABA Executive Director Jack Rives says. “The decision to go virtual will allow us to give our members the best possible meeting experience while guaranteeing everyone’s well-being. We also expect that many of the innovations incorporated into this year’s meeting will be added to future in-person meetings.”

The ABA already has canceled the in-person portions of dozens of events, including ABA Day in April. Changing the association’s main lobbying day into a virtual event actually led to more participation, says Rives, and that success will influence planning for the annual meeting.

“We had bigger numbers that were able to communicate with their representatives on Capitol Hill than we did in the past, when you had to be here to really be heard,” Rives says. “We will learn some lessons from that and apply them to the future.”

**Making the call**
Rives says a working group of both staff and members studied options for
the annual meeting and recommended to the board that the association conduct an all-online event. The working group considered several factors, including the safety of staff, members and affiliate groups, along with current economic conditions.

Rives says that the restrictions on group gatherings, air travel limitations and social distancing practices in place at hotels also contributed to the decision.

“The hotels and the establishments at which we had booked our reservations have all been extremely understanding of our need to cancel and appreciate that we did it in advance,” Rives tells the ABA Journal. “And since it is our home base of Chicago where we have a lot of meetings, we will be able to do makeups for the groups where we had to cancel. We haven’t firmed up everything, but we are confident we can work with the entities who were expecting us to be there in July and early August.”

The ABA Annual Meeting is also one of the two gatherings each year of the House of Delegates, which votes on policy issues.

Rives says ABA staff expects to create an electronic voting system and teleconference capacity so that House members can debate resolutions and vote remotely.

The White House began encouraging Americans to avoid gathering in groups of more than 10 people and to limit discretionary travel in March.

According to Forbes, as of April 22, more than 83 million people worldwide had been affected as hundreds of conferences, sports events and music festivals had been canceled or restructured to help slow the spread of the coronavirus.

More information on the virtual 2020 ABA Annual Meeting will be available at ambar.org/annual. For updated information on all other ABA events, go to ambar.org/events.

**ABA Notices**

For more official ABA notices, visit ABAJournal.com in July.

**NOTICE BY THE SECRETARY: NOMINATING COMMITTEE MEETINGS**

The Secretary hereby gives notice that the Nominating Committee will meet in conjunction with the 2020 Annual Meeting on Sunday, Aug. 2, beginning with the Business Session at 9 a.m. Immediately following the Business Session, the Nominating Committee will hear from candidates seeking nomination at the 2021 Midyear Meeting. This portion of the meeting is open to Association members. Contact Leticia Spencer at leticia.spencer@americanbar.org for more information.

**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 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 2020 Annual Meeting. Go to ambar.org/amendments for the full text of this notice.
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Mark Cooney

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In June 1799, two years after he said farewell to the nation’s first presidential administration, George Washington was approached by Jonathan Trumbull Jr., a close friend and a former speaker of the House of Representatives, about running for a third term as president. A year earlier, Washington’s successor, John Adams, had prevailed upon him to once again lead the nation’s army. The French Revolution was in a death spiral, and some, including Washington, feared the outbreak of a war with France. Because of that, Trumbull believed Washington would be receptive.

But Washington, having retired after two terms in office, remained faithful to the precedent he himself had set: that serving beyond two terms might suggest the office was intended for a ruler, not a democratically elected leader. Moreover, he didn’t care for the emerging political climate. Politicians of the day, he wrote Trumbull, “regard neither truth nor decency; attacking every character without respect to persons—public or private—who happen to differ from themselves in politics.”

Washington’s disinclination was reinforced when Thomas Jefferson refused to offer himself for a third term. Although no constitutional prohibition existed against it, the two-term limitation remained unchallenged until the Republican National Convention of 1880, when a cadre of Republicans known as the Stalwarts tried to nominate Ulysses S. Grant for an unprecedented third term as president.

Though Grant’s two-term tenure ending in 1877 had been plagued by scandal, Grant retained a personal popularity undiminished after he left office. By nominating him anew, the Stalwarts hoped to stave off federal civil service reforms that threatened traditional political patronage. Grant never publicly acknowledged the campaign, but he entered the Republican convention in Chicago as the front-runner. But after 36 ballots, the nomination ultimately went to James Garfield.

The two-term limitation was once again tested in 1912 by Theodore Roosevelt. Angered by the reversal of some of his progressive policies, Roosevelt reneged on an earlier promise not to seek a third presidential term to challenge his Republican successor, William Taft. But Roosevelt’s “inordinate ambition” became an important issue. Rejected by the Republicans, he ran an unsuccessful campaign as a candidate for the Progressive Party.

Roosevelt’s first term resulted from the assassination of William McKinley. Because he had already served more than three years, Roosevelt at first considered his election to a full term of office a second term. Though he later abandoned that view, his defeat mooted the third-term issue until Calvin Coolidge took office after the death of Warren Harding. Coolidge was elected in 1924 but famously refused to run four years later, and the “third-term issue” was once again moot.

But by 1940, after more than a decade of global economic depression, dramatic government reform and war metastasizing across Europe, the likely reelection of Democrat Franklin Delano Roosevelt to a once-unimaginable third elected term brought renewed vigor to the two-term issue. In deference to those concerns, Roosevelt declared his delegates free to vote their conscience at the nominating convention. But on July 18, he was nominated on the first ballot, the first president ever nominated by his party for a third term.

That violation of convention became a rallying point for his Republican opponent, Wendell Willkie. And even the Democrat-controlled Senate held 16 days of hearings on the third-term issue prior to the November election. Still, Willkie lost handily, no congressional action was taken, and U.S. entry into World War II in 1941 obviated any political concerns about Roosevelt’s election to a fourth term in 1944. By the time of Roosevelt’s death in April 1945, the issue had moved to the forefront of American politics. It became a regular question in Gallup polls, which showed considerable support for a constitutional amendment to codify a two-term precedent.

In 1947, Congress approved the 22nd Amendment. It was ratified by three-fourths of the 48 states in February 1951 after Minnesota became the 36th state to do so.
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