Dreams Deferred

Law school debt is delaying plans for recent grads
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INSIDE

44 Dreams Deferred
Debt is delaying law grads’ plans: Six young attorneys share their stories.
BY STEPHANIE FRANCIS WARD AND LYLE MORAN

54 Aging Judges
Should there be a mandatory retirement age or cognitive testing for older members of the bench?
BY AMANDA ROBERT

62 Called to Arms
Lawyers on both sides of the gun issue say it’s time for the U.S. Supreme Court to weigh in.
BY MATT REYNOLDS
In This Issue

6 President’s Message
The ABA and more than 50 law schools join forces to address concerns about police practices.

14 RBG: A supreme ABA friend

18 Business of Law
18 LAW FIRMS The pandemic has forced firms to find ways to tighten their belts.
20 TECHNOLOGY In the midst of COVID-19, the contract review software business is booming.
22 TECHNOLOGY ABA Techshow 2021 will be all-virtual.

24 Legal Technology
24 LEGAL TECHNOLOGY What to take into account when creating an app for your legal business.

38 Practice Matters
38 ADVOCACY Be your best self by finding your “flow.”
40 WORDS The formula for precise, effective legal writing.
42 ETHICS Model rule change allows lawyers to provide more help to clients in need.

72 ABA Insider
72 MEMBERS WHO INSPIRE Meet a California-based community service stalwart whose path led her to the top of the Tournament of Roses Association.
74 ABA LEADERSHIP ABA President Patricia Lee Refo details plans for her tenure.
76 ABA EVENTS Check out these upcoming events and mark them on your calendar.
77 GOVERNMENTAL AFFAIRS Take part in the GAO’s Legislative Priorities Survey.

80 Precedents
After years of litigation, Orville and Wilbur Wright receive a patent for their flying machine on Jan. 13, 1914.

8 Letters From Our Readers
9 Inter Alia
9 INTERSECTION Hundreds of law firms form an alliance to fight racism.
11 MY PATH TO LAW A longtime BigLaw partner parleys that role to fulfill his original ambition to be a civil rights lawyer.
12 10 QUESTIONS The new chief public defender for Austin, Texas, explains the importance of community empowerment.

14 National Pulse
14 SUPREME COURT Ruth Bader Ginsburg had a long history with the ABA.
16 CRIMINAL JUSTICE Is the use of reverse location warrants unconstitutional?
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Equal Justice Under Law

ABA joins with dozens of law schools to address issues in police practices

BY PATRICIA LEE REFO

America was founded on the principle that all men are created equal. Throughout our history, we have not always lived up to that self-evident truth. This has been especially true in our criminal justice system.

In 2020, inequities involving how Black people and other people of color are treated in our justice system have been the focus of nationwide protests and movements such as Black Lives Matter. The killing of George Floyd by a Minneapolis police officer ignited a national debate about police tactics and accountability.

Injustices in our system are not new and are all too common. But we are long overdue for addressing and correcting them.

This should draw the attention of all lawyers. A system that is unfair for some must be unacceptable to all.

The American Bar Association stands for equal justice and has long worked to eliminate bias in our justice system. We always must encourage innovative and proactive approaches that promote justice for all.

To help accomplish this, the ABA, in collaboration with 52 founding ABA-accredited law schools, recently launched the ABA Legal Education Police Practices Consortium. The group, which continues to accept new member law schools, is examining and addressing legal issues in policing and public safety, including conduct, oversight and the evolving nature of police work.

The ABA’s expertise in developing model police practices and collaborating on projects will aid in implementing needed reforms throughout the United States.

The consortium will initiate projects designed to support effective policing, promote racial equity in the criminal justice system and eliminate tactics that are racially motivated or have a disparate impact based on race. Each community has different needs and adopts different solutions. The consortium’s wide-ranging approach and geographic diversity will help address the issues at a more local level.

The consortium will have input from and access to the ABA Criminal Justice Section and the full range of the American Bar Association’s expertise and influence. Each participating law school will develop opportunities for one or more of its law students to engage in assignments that will include promoting existing ABA policies at the local, state and national levels as well as developing new policy proposals for consideration by the ABA House of Delegates. They will conduct research, provide advocacy and develop model curricula for law schools. The students will also engage with police departments and local, state and national leaders on police practices.

ABA’s stances on policing

This effort is an important step toward producing a more equitable system for all, but it is far from the ABA’s first or only effort. The Criminal Justice Section, which recently celebrated its 100th anniversary, published its first edition of the Criminal Justice Standards in 1974, and it included a section on standards for the Urban Police Function.

At the annual meeting in 2020, the ABA House of Delegates passed several resolutions dealing with policing, including policies that urge governments to enact legislation to eliminate or substantially curtail qualified immunity for law enforcement agents in civil actions. Another resolution called for legislation to encourage the collection of records and data on the use of deadly or excessive force by law enforcement.

In his speech accepting the Nobel Peace Prize in 1964, the Rev. Martin Luther King Jr. said, “I refuse to accept the view that mankind is so tragically bound to the starless midnight of racism and war that the bright daybreak of peace and brotherhood can never become a reality.”

We can achieve, as is etched in the frieze of the Supreme Court building, “Equal Justice Under Law.” We, as lawyers, cannot accept anything less.

As we continue to experience a time of accelerated change and disruption, the American Bar Association and leading legal software provider Clio have joined forces as strategic partners to assist legal professionals in navigating the significant and unique challenges ahead.
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Justice fighter
Kudos to Liane Jackson for her interview sketch of Bill Robinson in “Moment or Movement?” October-November, page 34. Her brief reference to Bill’s pursuit of racial justice in the American workplace is an understatement—no doubt due to Bill’s modesty—that needs punctuation.

Perhaps just as important, Bill Robinson’s value as a mentor to younger lawyers should be underscored. Indeed, I was one of those lucky lawyers who worked in the late 1960s as a brand-new associate at a Wall Street firm. Bill’s oversight of volunteers who helped draft briefs for the “Inc. Fund”—the NAACP Legal Defense and Education Fund—was a lasting inspiration for those of us who have since practiced and taught employment and civil rights law across the nation.

Jonathan R. Harkavy
Greensboro, North Carolina

Lawyers and George Floyd
I am a new member of the American Bar Association and recently got around to reading my first ABA Journal. I wanted to reach out and express how much I enjoyed reading “America’s Tipping Point,” by Liane Jackson, August-September, page 9. It so concisely pinpointed the issue and steps we need to take in our legal community and in the country as a whole. It was also explained in a way that couldn’t be denied and was accessible to various demographics. The sentence, “What this means is, if you are in a position of authority or a gatekeeper, then silence is complicity and inaction is collusion,” is particularly memorable and has been echoing in my head since I first read it.

Thank you, and I look forward to reading future articles.
Edward W. Wimp
Tampa, Florida

I just read “America’s Tipping Point.” Had I read it prior to renewing my ABA subscription two weeks ago, I likely would not have renewed. The ABA Journal should have content related to making its members better attorneys. This was riddled with the writer’s own incendiary and unfounded opinions portrayed as fact. As an American, an attorney and a minority, I’m offended by this content. Everyone will agree that the death of George Floyd was tragic, but we don’t really know that what happened to him happened because he was Black. We haven’t heard the testimony of Derek Chauvin to know what was in his mind when he stood on Mr. Floyd’s neck. Is it possible Chauvin would have done the exact same thing if Floyd were white, Hispanic or Asian? Is it possible that Chauvin is just a bad cop and not racist? As attorneys, we need to ask these questions. The ABA should provide content that engages the kind of analysis we are obligated to undertake as attorneys.

Veronica Chavez
Fort Worth, Texas

Election interference?
The opening sentence of “Blocking the Vote,” August-September, page 52, by Darlene Ricker, presupposes that “Russian interference in the 2016 election” is within the realm of fact instead of the evidence-void political narrative it has been proven to be, concocted by Democrat supporters who used it to sabotage the peaceful transition of power in the United States following the 2016 presidential election. How ironic that the purported subject of the article is preserving the right to vote!

Unfortunately, the political bias dripping throughout the article is typical of the political bias on prominent display in the ABA Journal every time it publishes. Were it not for the great insurance available through the endowment, I would immediately cease supporting this political organization falsely passing itself off as a politically neutral bar association.

Laura Cooper Fenimore
Eugene, Oregon

Go to ABAJournal.com/letters for more letters from our readers.

Correction
“Lawyers Tackle Maternal Mortality,” October-November, page 18, should have correctly identified the governor of New York as Andrew Cuomo.

The Journal regrets the error.

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.
MANY LAW FIRMS have been doing open soul-searching in response to the widespread acknowledgment of systemic racism that followed George Floyd’s brutal killing by a Minneapolis police officer in May, with regular announcements of redoubled diversity efforts intended to move the recruitment and retention needle for lawyers of color.

Focus on diversity and inclusion is nothing new—it’s more like an annual rite of passage when the ABA, the National Association for Law Placement, et al., publish reports reflecting the dismal percentage of lawyers of color in the profession. Over the decades, firms have invested in diversity and inclusion programs that sound good on paper but have been ineffective in practice. Why? Because of entrenched firm culture, the compensation business model, and the social construct that creates barriers to entry, wealth and advancement for marginalized groups across the spectrum.

With enough willpower, the problem isn’t insurmountable. But the arguably criminal lack of diversity in law over the course of decades indicates either specific intent to exclude or a recklessness that is equally culpable.

On a positive note, some brilliant legal minds are now hyperfocused on the problem. In this issue’s Intersection space, writer Cynthia L. Cooper describes how a collaboration of hundreds of law firms is working to change the paradigm. It’s one of many new efforts to keep an eye on.

—Liane Jackson

INTERSECTION

Strength in Numbers

Firms team up to tackle systemic race issues

BY CYNTHIA L. COOPER

A t the virtual summit of the recently formed Law Firm Antiracism Alliance this fall, Louisiana lawyer Jamila Johnson walked through the ways that post-Reconstruction and Jim Crow laws inscribed white supremacist beliefs into criminal law—and how the effects are still felt in practical and painful ways.

This is not a new conversation for Johnson, managing attorney for the Promise of Justice Initiative’s Unanimous Jury Project, an initiative that fought against a Louisiana law giving divided juries the ability to convict people of serious crimes, disproportionately sending African Americans to prison. Although the Louisiana law was overturned by the U.S. Supreme Court in April, prior cases were not vacated, and Johnson wants to line up lawyers to develop challenges to 1,600 past convictions.

“We have a responsibility as lawyers to fix this. As we take down monuments to the Confederacy in public squares, we also need to take down the statutes that really celebrate the Confederacy,” Johnson says. Speaking at the LFAA summit, Johnson had an audience of hundreds of lawyers open to doing their part.

This was the second summit for LFAA, a group that formed in June as a collaboration of law firms interested in combining efforts to address long-standing systemic racism. At the beginning of October, 280 firms from every state had signed on to the organization, bringing a combined total of more than 161,700 lawyers into the fold, according to Brenna K. DeVane, the Chicago-based director of pro bono programs at Skadden, Arps, Slate, Meagher & Flom. The firms, including a full contingency from BigLaw, range in size from the two-person Tenenbaum Law Group in Washington, D.C., to Dentons, which has more than 10,000 lawyers worldwide.

An uncharted path

LFAA was organized after national protests against systemic racism after the killings of George Floyd and other African Americans by law enforcement. Many firms issued Black Lives Matter statements; others held town halls, sponsored book discussions on racism or declared a holiday for Juneteenth, a traditional day of celebration of African Americans’ freedom from slavery. Past and present leaders from the Association of Pro Bono Counsel, a group of 200 individuals who run pro bono programs at more than 100 law firms, brainstormed about how to go further and shape an effective response that would have staying power.
The idea for a collaborative project, which was first raised by DeVaney, is dual. At one level, firms that normally compete on the business side would work together to tackle systemic race issues and expand the pro bono capacities of their firms. At another level, LFAA members would partner with existing legal advocacy organizations on 15 to 20 areas of law, including criminal, education, housing, public benefits, immigration, reproductive justice, health care, environmental justice, employment and access to justice.

The purpose of LFAA is “to amplify the voices of communities and individuals oppressed by racism, to better use the law as a vehicle for change that benefits communities of color and to promote racial equity in the law,” its one-page charter states. At the end of July, the group held its first summit to discuss racial inequity; in August, it began to incorporate as a nonprofit organization.

“We chose the word ‘anti-racism’ intentionally because it is an action word. It means we are going to do something,” DeVaney says. But she sees the action in terms of years, not months.

Multiple fronts
The LFAA plan has three prongs that converge to make a kind of giant clearinghouse for law firms and legal advocacy organizations to identify systemic racism and strategize about legal tools to dismantle it. First, research will build an inventory of laws that result in negative outcomes for people of color. A second aspect will be a bulletin board where advocacy groups can post potential projects—for example, challenging discriminatory housing policies in a particular city—and gather teams to help. Third will be a project committee that identifies an issue and proposes actions that can drive change.

“We are doing something different. It would be nice to have a playbook. We don’t have a model,” says Steven H. Schulman, the Washington, D.C.-based pro bono partner for Akin Gump Strauss Hauer and Feld, who has been active in LFAA planning. A theme throughout is that the guidance for action will come from the racial justice advocacy organizations. “We are coming with humility. We know that people have been working on these issues for years. We’re trying to reinforce their work,” Schulman says.

Early on, the organizers sought counsel from Kimberly Merchant, director of the Chicago-based Shriver Center on Poverty Law’s Racial Justice Institute and its advocacy network. The institute conducts a seven-month training on racial injustice and has a network of 240-plus advocates who work on related issues.

“To me, when I hear law firms say ‘anti-racism alliance,’ that’s powerful. To be anti-racist is to speak up, to actually speak out against racism,” says Merchant, who works remotely from Mississippi. “I think they are being thoughtful about ‘Where do we fit in?’” she says, adding that they bring resources anti-racism organizations need—people power, financial support, knowledge in developing legislation or litigation. “The more elusive component is the power that they have in relationships—they know people. A phone call can make all the difference in the world. They are in rooms that we don’t have access to.”

Merchant admits that some racial justice advocates question the commitment of firms to their internal diversity and inclusion. And whether the project will succeed, she says, is an unknown.

But Merchant remains hopeful: “We’ll have to see what it is like when the rubber meets the road. One thing I’m sure of is that to be successful, folks are going to have to be patient. Real change around race equity takes time. But we’re happy to get any help that we can.”


MY PATH TO LAW

BigLaw, Big Difference

Using my platform to help move America toward justice

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

BY MICHAEL D. JONES

In law school, my plan was this: Spend two to three years at a large law firm and then return to my hometown of Shreveport, Louisiana, to practice civil rights law and run for public office. But life doesn’t always go exactly as planned, and my trajectory turned into an improbable 34-year journey in BigLaw, where I found my path and have made the kind of difference I always hoped for.

This journey really began in the summer of 1986 as my clerkship for Judge Elbert Tuttle at the 11th U.S. Circuit Court of Appeals was coming to an end. Judge Tuttle was a legal giant whose tenure as chief judge of the 5th U.S. Circuit Court of Appeals from 1960 to 1967 was critical to enforcing desegregation decrees. I recall the reverence with which the late U.S. Rep. John Lewis spoke about Judge Tuttle on the occasions that we met.

The path to my clerkship for Judge Tuttle and journey at Kirkland & Ellis started in an improbable way, through my legal research and writing instructor at Georgetown, who was a third-year law student from South Carolina. The class was small, and I was the only Black student. Our first one-on-one meeting to review my paper was somewhat awkward. He asked what my parents did for a living. My father had been a construction worker after serving in World War II, restricted by the circumstances of his birth in 1910 to a third-grade education. My mother left college in her final year due to illness. She worked as a substitute teacher for a time and then as a day care worker. So the answer was no to his subsequent questions as to whether I had attended private school or had private tutors.

What followed next was something to the effect of, “Well, I’ve not seen anybody write as well as you.”

From that rocky start, we became great friends. He recommended me for my clerkship with Judge Tuttle and recruited me to Kirkland. I became a good writer in much the same way that Michael Jordan or Steph Curry honed their skills on the basketball court: practice.

Michael D. Jones: “I became a good writer in much the same way that Michael Jordan or Steph Curry honed their skills on the basketball court: practice.”

What worked and what did not work. I studied the masters: Clarence Darrow, Louis Nizer and others.

Best of both worlds

So much of my litigation was in courts across the country where I was the “visiting team,” and I would inevitably hear: “Mr. Jones is a big-firm lawyer from Washington.” I have seen many instances of the appeal to prejudice against Northerners. It is what prompted me once in a closing argument in federal court in Mississippi to recount stories from my childhood, when my brothers, cousins and I regularly worked on my grandparents’ and uncle’s farm picking cucumbers and cotton. The judge later asked if I was too young to have actually picked cotton. I told him I was not too young. Over the course of two long days, we could earn enough to buy two pairs of bell-bottom pants and shirts like those worn by the Jackson 5 on Soul Train. That was our motivation.

In this way, we helped my uncle in his quest to produce the year’s first bale of cotton, which paid a premium over regular prices. The Sept. 28, 1973, Shreveport Journal noted he had produced Caddo Parish’s first bale in six of the last seven years, a feat accomplished not by mechanization but a large family of eight children and a host of nieces and nephews, myself included. This background came in handy when I spoke to reporters on behalf of a large company in the crop protection business. Reporters from the Wall Street Journal to small farming publications in Iowa had preconceived notions about large-firm lawyers that I have been able to break through.

Photo courtesy of Kirkland & Ellis
As for my plan to stay at Kirkland for two or three years and then move to Shreveport to practice civil rights law and run for public office? Those plans dissolved as the years passed and the practice became more and more rewarding. For the past 11 years, along with my partner Karen Walker, I have represented students, faculty and alumni at Maryland’s four historically Black colleges and universities in a civil rights lawsuit against the state aimed at providing additional funding for academic programs. We have had two long trials, an appeal, two legislative hearings, countless rallies and four mediated. I have spoken to reporters from most of the national news outlets and appeared on radio and TV. The pandemic has stalled proceedings, but I believe ultimately we will prevail.

The past as prelude
In some ways, it seems inevitable that this case would be a part of my legacy.

One of Maryland’s most famous figures is Frederick Douglass, who escaped slavery to become a famous orator and abolitionist. His autobiography sits on my office shelf. In urging free Black men to join the Union army, Douglass and other notable free Black men cited the heroic fighting of my great-grandfather’s unit, the 76th Regiment, United States Colored Infantry. My great-grandfather, Floyd Washington, was born enslaved in Alabama and made it to Louisiana to join the Union army, fighting at Port Hudson and Fort Blakely, where a colonel described them engaging confederate units, “charging ‘like mad.’”

Douglass and others noted in recruiting posters: “We have seen what valor and heroism our brothers displayed at Port Hudson and Milliken’s Bend, though they are just from the galling poisonous grasp of slavery. They startled the world by most exalted heroism. If they could prove themselves heroes, cannot we prove ourselves men?”

After the battle of Port Hudson in Louisiana, Floyd Washington returned to Alabama, where he had been enslaved, to fight in the battle of Fort Blakely, one of the last major battles. As recounted in Freedom by the Sword: The U.S. Colored Troops, 1862-1867: “All witnesses agreed that the attack of the Colored Troops Division thoroughly broke the Confederates’ will to resist.”

For my great-grandfather and the other colored troops, too much was at stake; retreat was not an option. The same is true in today’s fight for racial justice—a fight I realized I could take up anywhere, whether at a BigLaw firm or back home in Louisiana.

Michael D. Jones is a litigation partner in the Washington, D.C., office of Kirkland & Ellis. He is an access to justice fellow with the American College of Trial Lawyers and an executive committee member for the Lawyers’ Committee for Civil Rights Under Law.

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10 QUESTIONS

Pattern Recognition

The new chief public defender for Austin, Texas, works to empower communities and end criminal justice disparities

BY JENNY B. DAVIS

As a public defender in the Bronx, New York, for almost a decade, Adeola Ogunkeyede saw firsthand how patterns of institutional racism and systemic inequality impacted her clients even before they entered the criminal justice system.

She started to wonder: Was there a way to break those destructive cycles? Could legal aid unite with local leaders to identify the most problematic points of contact between directly impacted communities and the criminal justice system—then fix them?

The answer, she discovered, was yes.

In 2017, Ogunkeyede joined the Legal Aid Justice Center in Charlottesville, Virginia, to help launch the Civil Rights & Racial Justice Program. The purpose was exactly what she had envisioned: Legal aid lawyers supported community-led efforts to promote criminal justice reform across the region. Working together with community advocates, the program helped repeal Virginia’s “habitual drunkard” law, which disproportionately affected people experiencing homelessness. They also got the state to stop automatically suspending driver’s licenses for unpaid court debt. Their efforts also resulted in the creation of a police civilian review board in Charlottesville, only the third such organization in the state.

Ogunkeyede is now training her efforts toward Texas. This spring, she moved to the Lone Star State to establish the first-ever public defender’s office serving Travis County, which includes Austin, the state capital. Travis County had been the largest jurisdiction in the country without a PD’s office.

You started a challenging position in the middle of a pandemic and during one of the most far-reaching racial justice movements in recent history. You also began the Civil Rights & Racial Justice Program in Virginia the summer that the Ku Klux Klan held rallies in Charlottesville and a young woman was murdered while marching for racial equality.

And my first week of law school was also when Katrina happened.

Oh, wow! You were at Tulane law school at the time, right? It was definitely not what I had envisioned for law school. I was lucky because another law student was kind enough to let me ride with her that Sunday night to Baton Rouge. We had
no idea that we were part of one of the largest mass evacuations in U.S. history. When I got back, the city was fundamentally changed, and the sense of loss was pervasive.

Are you following the sociologists and researchers drawing connections between Katrina and the crises we’re facing today?
Yes. It’s fascinating from an academic standpoint, but it’s frustrating when you’re living in it—when it’s your life. Crises like these all share the same throughline when it comes to the people who are most vulnerable. It leads you to question, “What are we, as a society, doing?” Where we see a crack in our societal structure, our first thought should be, “Who will fall through first?” It’s not a coincidence that the people who are falling through the cracks during the pandemic bear a striking resemblance to those who fall through the legal system. The connection is structural racism and poverty.

How did you first get involved with the criminal justice movement?
For me, this movement is bigger than criminal justice. As a Black girl whose mother is a descendant of slaves and whose father is an immigrant, my experiences tell me we have to do better as a country. My training is as a lawyer, and the criminal justice system has always been particularly vicious to people who share my background because of that background. But if I weren’t a public defender, I would be doing this work in some other way.

What inspired you to become a lawyer in the first place? Did you did you grow up around lawyers?
There are no lawyers in my family. My dad came to the country in 1974 from Nigeria and had a typical immigrant experience where he worked several jobs to put himself through school. My mom was born in the Jim Crow South in 1950, and her family migrated to New York City on the back half of the Great Migration. I will say this: My father was born in 1949, when Nigeria was still a colony. It didn’t have democratic elections until 1999. He’s always been someone who has turned his eye toward the country he was born in and said, “We have to do better.” He was very active in advocating for democracy. It was not lost on me that this is what you do: You turn your gaze to your country and ask, “Can we do better?”

You specialize in harnessing the power of community-led advocacy to effect change. How do you establish trust with the communities you’re trying to help?
I think the way you build that connection is by showing up. If you want to be community-led, you have to show up where the community is. Lawyers love to be in court and in the office, but a lot of the work I did was going to where the people were. I held meetings everywhere from the local library to community centers. I put close to 40,000 miles on my car the first year I was in Virginia! It’s also about building trust as an advocate. You want to be a partner to them—to work alongside them to shape the policies and advocate for change. I am not coming in to tell you what to think; I am coming in to ask you what you want and to learn what you want and what you need and to help you advocate for that.

Let’s talk about the new PD’s office. Are you taking cases yet?
We don’t expect to be taking cases until January 2021. First, we had to operationalize the office—buy computers, buy desks, hire an office manager. Then, we’ll start to staff up. By September 2021, we expect to build out our staff by 17; by 2024, we expect to be a staff of 67, including 30 to 40 lawyers.

Your initial grant term is four years. If you had no barriers to achieving your goals, what would you like to accomplish during that time?
What we want to accomplish is cultural change in a very narrow sense: That the role of the public defender—standing together with their client in defense of their client—be given its rightful place in Travis County.

What does that look like in practice?
It’s the job of the public defender to challenge the system and question the processes on behalf of their client. We do that by ensuring we are heard on the record about every issue that may violate or compromise our clients’ rights. That may be uncomfortable, that may seem like the public defender is trying to challenge the status quo, but that’s good.

Ultimately, you’ll have clients who will go to jail, who will have outcomes they are not happy about. What do you want your experience with the Travis County Public Defender’s Office to be like?
At the end of the day, I hope clients can say they feel like their lawyers fought to bring them closer toward justice. Even when outcomes are not just and don’t feel right, clients should be able to feel like there’s a champion on their side, fighting to make the process—which is punishing all by itself—not so painful. And that is no small feat.
Supreme Friend

Remembering Justice Ruth Bader Ginsburg and her longtime association with the ABA

BY STEPHANIE FRANCIS WARD

In 1978, Ruth Bader Ginsburg was part of a 12-member American Bar Association delegation that visited China. The country was starting to emerge from the Cultural Revolution and was in the process of implementing vast economic reforms, including opening up to foreign businesses.

Other delegation members included William B. Spann Jr., a big-firm Atlanta lawyer who was president of the ABA; and Chesterfield H. Smith, a former ABA president who on behalf of the organization called out President Richard M. Nixon during the Watergate scandal for firing special prosecutor Archibald Cox. The delegation received briefings from members of Peking University’s law department and the vice president of the Supreme People’s Court, the country’s court of last resort, and also observed a criminal trial.

Then a professor at Columbia Law School and an active member of various ABA entities, Ginsburg was her “customary decorous self” on the trip, Stanley Lubman, the delegation’s secretary general, told the ABA Journal. “She allowed some of those who were self-important to express themselves where she observed,” Lubman wrote in an email. A professor who has taught Chinese law at various Ivy League universities, he also recalled the group going to a rural village where a local official explained that the country’s one-child policy was implemented by monitoring and posting women’s menstrual cycles.

“She enlightened his mind’

Just prior to her death, Ginsburg, 87, had been a 2019-20 special adviser to the ABA’s Rule of Law Initiative board. And when she won the Berggruen Prize for Philosophy & Culture in October 2019, she donated all of her $1 million award to various groups, including the American Bar Foundation.

“She never forgot where she began,” says Llewelyn Pritchard, a current ROLI board member and previous chair of both the ABA Board of Governors and the IRR.

Ginsburg and Spann, who died in 1981, became friends through the IRR, says Thomas Fitzpatrick, who worked as Spann’s ABA special assistant. Spann

“I was struck by the expression of shock and disgust on her face and have never forgotten it. She was incredulous that the women’s privacy was so invaded. She said nothing to the Chinese, as she was well aware that we were there to observe the Chinese version of their facts,” he wrote.

Ginsburg, the second woman confirmed to the U.S. Supreme Court, died in September from complications related to metastatic pancreatic cancer. As a pioneering litigator, she argued—and won—several landmark gender discrimination cases before the Supreme Court.

Her ABA work included serving as a council member of the Section of Individual Rights and Responsibilities (now known as the Section of Civil Rights and Social Justice) in the 1970s, and she was on the Standing Committee on Amicus Curiae Briefs. In the 1980s, she was a council member of the American Law Institute before it separated from the ABA, and she was a member of the American Bar Foundation’s board of directors. Additionally, she was a member of the ABA Journal’s board of editors from 1972 to 1978 and even wrote an account of the China trip for the magazine.
was receptive to women’s rights when he met Ginsburg, but she got him to see that laws thought to protect women actually limited their options.

“I wouldn’t say she changed his mind, I would say she enlightened his mind. That’s the same role she played in public life and on the court,” adds Fitzpatrick, a Seattle lawyer who served on the board of the ABA’s Center for Professional Responsibility.

Marna Tucker, a domestic relations attorney who chaired the ABA’s Standing Committee on the Federal Judiciary and was the first woman to serve as president of the District of Columbia Bar, posits that Ginsburg probably joined the ABA to help educate members about equal justice issues.

The two met through the IRR in the early 1970s when Tucker worked as a consultant for a project that encouraged pro bono work at private law firms.

“It’s totally different now,” says Tucker, noting that many more women are involved with the ABA today.

“People knew it was an important pathway. And for those of us who were active early on, it was tremendously important. When there were fewer of us, we stood out. Although we may have taken a lot of slings and arrows, we were also remembered, and good things happened to us,” she adds.

Years later, Tucker was appointed to the D.C. Judicial Nominating Commission.

“I remember when Ruth’s name came up and someone said, ‘She’s in New York; she should be on the 2nd Circuit,’” Tucker says.

The 2nd Circuit panel of the U.S. Circuit Judge Nominating Commission took a pass, Tucker adds. So the D.C. commission recommended Ginsburg for the U.S. Court of Appeals for the District of Columbia Circuit, and she was appointed to that court in 1980.

ABA accolades

Over the years, Ginsburg received various ABA honors, including the Margaret Brent Award in 1993. In June of that year, President Bill Clinton announced her nomination to the Supreme Court.

That was important, says Roberta Cooper Ramo, a New Mexico lawyer who in 1995-96 was the first woman to serve as president of the ABA.

“It’s not only helpful for our members, but it offers a great opportunity for those on the court that wanted this experience to talk to regular American lawyers and judges and see what life was like,” she says.

ABA President Patricia Lee Refo in a statement described Ginsburg as “a groundbreaking jurist” and “a special friend of the ABA.”

In February, Ginsburg was part of a public conversation centered on the 19th Amendment that was co-sponsored by the ABA and Georgetown Law. Judge M. Margaret McKeown, who sits on the San Francisco-based 9th U.S. Circuit Court of Appeals and chairs the ABA’s Commission on the 19th Amendment, interviewed Ginsburg.

“The interview was supposed to be an hour, but her mother campaigned for the 19th Amendment, so she was all geared up to talk about the 19th Amendment, which the justice saw as the first step toward equal citizenship. The interview went much longer than we had anticipated. She just had such a generous spirit,” McKeown says.

Ginsburg’s late husband, Martin Ginsburg, was a noted tax lawyer, cook and great supporter of his wife who often accompanied her to ABA events. Ginsburg submitted two of his recipes—for ratatouille and a veal dish known as vitello tonnato—for a recently published digital cookbook by the commission titled The Nineteenth Amendment Centennial Cookbook: 100 Recipes for 100 Years.

“When Ruth came on, she attended all our meetings; sometimes Marty would come with her. They participated in everything that went on and some of the social events,” says Pritchard, who remembered going to Walt Disney World in the 1970s with one of his daughters and the Ginsburgs and their son, James, during an ABA meeting in Florida.

“We had a wonderful time. She was a warm and wonderful person,” Pritchard says.
CRIMINAL JUSTICE

Warranted Intrusion?

Law enforcement is using location tracking on mobile devices to identify suspects, and some say it’s unconstitutional

BY WENDY DAVIS

On May 20, 2019, a man wearing sunglasses, jeans and a reflective vest entered the Call Federal Credit Union in Midlothian, Virginia, brandished a gun and demanded cash. He made off with $195,000.

Four months later, the U.S. Department of Justice indicted 24-year-old Okello Chatrie for the robbery. Authorities arrested Chatrie after presenting Google with a “reverse location”—or geofence—warrant for information on account holders whose mobile devices were near the scene of the crime.

Google can gather location data from people who use Google Maps and other services on their mobile devices. The company says it stores this data only for account holders who have opted into the “location history” feature.

But people who have opted in can manually delete this data. In June, Google said it would automatically delete location history data after 18 months.

The use of reverse location warrants with Google and other companies tracking location data has exploded since that type of warrant first was used by federal authorities in 2016. By late 2019, Google says it was receiving up to 180 such requests for warrants each week, reflecting a 1,500% increase between 2017 and 2018 and a 500% increase from 2018 to 2019.

As the use of geofence warrants has grown, so have controversies surrounding them. Defense attorneys argue they’re unconstitutional, and prosecutors say their use is a valid and valuable crime-solving technique. Litigation questioning the constitutionality of geofence warrants is now surfacing.

“Unnecessary surveillance leads to police stops, false arrests, false convictions and police violence,” says Albert Fox Cahn, founder and executive director of the Surveillance Technology Oversight Project.

“We are in a moment where it has never been clearer how deadly every police encounter can potentially be, especially for Black Americans and communities of color more broadly, Cahn adds.”

Privacy and civil rights advocates also say the geographic scope of these warrants gives police information about people in private locales, such as their homes or doctors’ offices.

“The technology doesn’t differentiate between inside and outside. It is, by definition, going to locate people inside of constitutionally protected spaces,” says Michael Price, who is senior litigation counsel for the Fourth Amendment Center at the National Association of Criminal Defense Lawyers and one of Chatrie’s attorneys.

But prosecutors say these warrants help authorities catch criminals.

“These warrants have proven to be helpful in solving crimes such as pattern burglaries, arsons and sexual assaults,” Sandra Doorley, president of the District Attorneys Association of the State of New York and district attorney of Monroe County, said in a written statement.

Building a defense

In Chatrie’s case, the police served Google with a warrant for information about account holders within 150 meters of the bank between 3:50 p.m. and 5:50 p.m. on the date of the robbery.

Google then provided police with one hour of location information for 19 anonymized accounts. Authorities then sought additional data from Google for nine people, then further narrowed their request to three people—obtaining those individuals’ names, email addresses, subscriber information and phone numbers. Chatrie was arrested.

Chatrie is now asking a federal judge in Richmond, Virginia, to suppress evidence uncovered as a result of the warrant. His lawyers argue the warrant is unconstitutional, characterizing it as “a general warrant purporting to authorize
a classic dragnet search of every Google user who happened to be near a bank in suburban Richmond during rush hour on a Monday evening.”

The government counters the warrant was “narrowly constrained based on location, dates, and times.” It says the limited geographic and time scopes make the warrant “particular”—lingo from the Fourth Amendment that states warrants must “particularly” describe the place to be searched and the persons or things to be seized. At press time, a hearing on the motion to suppress evidence was scheduled for Nov. 17.

Privacy advocates reject the idea that geographic and time limits render these warrants “particular.”

“Judges may know the size of an area being tracked and the duration, but it’s impossible for them to know how many people were in that area,” Cahn says.

He adds that a reverse location warrant for even a short time at a crowded spot—such as Times Square in Manhattan—could uncover data for thousands.

Jody Westby, chair of the ABA Science & Technology Law Section’s Privacy and Computer Crime Committee, compares geofence warrants to “putting a net in the ocean, then inspecting every single fish that comes up.”

But some criminal procedure experts say they can envision circumstances under which geofence warrants would be constitutional.

Stephen Smith, a retired federal judge and director of Fourth Amendment & Open Courts at Stanford’s Center for Internet and Society, says determining whether a geofence warrant is “particularly” could come down to evaluating whether it’s likely to yield information only about suspects.

### Defining ‘particularity’

To date, three judges have issued written opinions about geofence warrants; one judge issued the warrant, and two others refused.

The rejected requests were both part of the same drug theft and trafficking probe in the Northern District of Illinois, Eastern Division. Most details remain under seal, but the opinions say the government had sought three reverse location information warrants from Google.

One warrant sought data about people within a 100-meter radius in “a densely populated city,” in an area with restaurants, businesses and at least one “large residential complex,” for a 45-minute period on a specific date, according to a ruling issued in July by U.S. Magistrate Judge David Weisman.

Weisman rejected the government’s application. “The vast majority of cellular telephones likely to be identified in this geofence will have nothing whatsoever to do with the offenses under investigation,” he wrote.

But he also gave the authorities a road map. “If the government had constrained the geographic size of the geofence and limited the cellular telephone numbers for which agents could seek additional information to those numbers that appear in all three defined geofences, the government would have solved the issues of overbreadth and lack of particularity,” Weisman wrote.

In August, U.S. Magistrate Judge Gabriel Fuentes rejected an amended request for a warrant in the same matter. The amendments apparently did not incorporate Weisman’s suggestion. “The potential to use Google’s capabilities to identify a wrongdoer by identifying everyone (or nearly everyone) at the time and place of a crime may be tempting,” Fuentes wrote. “But if the government can identify that wrongdoer only by sifting through the identities of unknown innocent persons ... a federal court in the United States of America should not permit the intrusion.”

In late October, U.S. Magistrate Judge Sunil R. Harjani, also in the Northern District of Illinois, granted the government’s request for six geofence warrants sought as part of an investigation into 10 arsons in the Chicago area. The details are under seal.

The warrants directed Google to provide data that could identify people near the locations of two of the fires (including nearby streets), for time periods ranging from 15 to 30 minutes.

Harjani found the warrants sufficiently limited in time and location to be constitutional. “It is nearly impossible to pinpoint a search where only the perpetrator’s privacy interests are impacted,” he wrote. “The proper line of inquiry is not whether a search of location data could impact even one uninvolved person’s privacy interest, but rather the reasonableness of the search.”

### Warrants gone awry

At least one innocent person already has been arrested after the police obtained a geofence warrant.

Arizona resident Jorge Molina spent six days in jail as a result of a reverse location warrant obtained by Avondale police who were investigating a shooting death. Google information showed a device that Molina had signed into was at the crime scene at the time of the killing, and security footage showed the shooter in a car like Molina’s. But Molina said he had signed into the phone of his mother’s ex-boyfriend, Marcos Cruz Gaeta, who also used to borrow his car.

The police later arrested Gaeta, and Molina is now suing the city and the police for defamation and other claims.

In April, New York state Sen. Zellnor Myrie and Assemblymember Dan Quart introduced the Reverse Location Search Prohibition Act, which would ban geofencing warrants and require judges to suppress any evidence garnered as a result of reverse location search. “For hundreds of years, law enforcement has been solving crimes of this nature without the use of warrants,” Quart says.

Quart says information about people he represents on the Upper East Side of Manhattan may have been seized via a geofence warrant obtained by New York District Attorney Cy Vance.

Vance’s office sought the data as part of an investigation into an October 2018 fight between members of the far-right group the Proud Boys and protesters. It did not lead to any new arrests.

“It’s easy to see how a geofence warrant could be specifically targeted towards those engaging in a lawful protest,” he adds. “I have great concerns—especially in this day and age.”
LAW FIRMS

Trimming the Fat

COVID-19 and a slow economy have forced law firms of all sizes to cut costs

BY DANIELLE BRAFF

It’s not easy being an attorney right now.

Law firms throughout the United States—and the rest of the world—are dealing with the effects of the COVID-19 pandemic and a sluggish economy. According to a survey from practice management company Clio, responding law firms have billed less in every month since March compared to the corresponding month of the prior year, cratering with a 23% drop in May when compared to May 2019. Additionally, there have been multiple press reports about law firms furloughing and laying off staffers and lawyers while cutting pay and implementing austerity measures.

“In every prior crisis, law firms never shared in the economic pain,” says Raj Goyle, CEO and co-founder of Bodhala, a New York City-based legal tech firm. “This is the first time we’re seeing that beginning to happen.” Law firm profits were even up amid the financial crisis, Goyle says.

Although it’s clear that firms need to focus on cost-saving measures, what’s not so transparent is where the costs should be cut. Various law firms have tried different options with mixed measures of success.

Tim Baxter, global head of communications for Allen & Overy, an international law firm with offices in 30 countries, says his firm took prompt action at the end of March by reducing profit distributions to partners in addition to increasing partner capital contributions.

“Certain investments have been deferred until market conditions become more certain, and we have stopped most recruitment,” Baxter says.

Salary reviews normally take place in the first quarter of each financial year, but Baxter’s firm decided not to undertake them. The firm has managed not to furlough any staff or reduce staff hours, introduce redundancy programs or actively seek support from the government. “As a firm, we remain in a strong cash position with no debt,” Baxter says.

Other firms have taken a different approach.

Andrew Jezic, founding partner of Jezic & Moyse in Maryland, says his firm cut hours across the board
and furloughed a few of its noncritical workers. He says one of the most telling signals of the crisis within so many firms is in the reduction of equity draws being allowed. “Many partners had been using equity draws in place of receiving a salary, and firms are limiting the amount allowed, sometimes by as much as 25%,” Jezic says.

But it’s important to keep in mind that the biggest assets to law firms are the clients and the staff—and cutting costs has to be done in a way that’s consistent with keeping those groups of people content, says Todd Spodek, managing partner of the Spodek Law Group in New York City.

Spodek says he saved money by negotiating concessions with landlords for five of his six offices in exchange for renewing his leases long-term. He’s also saved on travel and entertaining, instead engaging with his clients in other ways, such as meeting in the park for walks.

“The most effective cuts are generally the ones firms knew they needed to make before the downturn and are now making,” says Chicago-based Kent Zimmermann, a principal with Zeughauser Group, a strategic advising company for law firms.

These often include getting rid of the lawyers who chronically underperform.

“This kills two birds with one stone: It can yield substantial cost savings, and it also helps the firm pivot to a higher-performance culture, which helps firms attract and retain more high-performing lawyers,” Zimmermann says.

### Going virtual?

Real estate is also a big expense that some firms are cutting. The pandemic will be a bridge for many firms to a future with fewer dedicated offices, particularly for associates, Zimmermann says. Many firms were already going in this direction before the crisis. Because real estate is the second-largest expense for most firms, this will help increase profitability, which is generally an advantage in recruiting and retaining sought-after immigrant clients starting new businesses (Visa Business Plans), for career consultants (Athena Consultants, Inc.), and for paralegals to assemble client packages with correspondence and online filings. “Doing so actually saves more time than money, but time of course translates into money,” says Ricci, who states that with the extra time available, she’s taken more CLEs than she normally would.

Even making smaller changes could yield huge dividends, says California-based Brent Daub, senior founding partner and trial attorney with Gilson Daub, a firm with 17 offices nationally. Daub says overhead costs associated with facilities, tools, technology and staff are a good place to start. Although it can be a substantial time investment to transfer to a paperless case management system, this will also significantly reduce overall operating costs. Gilson Daub switched to the paperless case management system Casefriend before the pandemic, which also helped when the attorneys started working virtually.

The pandemic also has shed light on the cost-saving capabilities to connect virtually, and Daub’s firm has taken advantage of virtual court hearings, depositions, client interactions and more. “Those will remain a viable choice even after we are long past the COVID-19 era,” Daub says.
Since the pandemic started, contract review software providers have raked in millions in funding

BY ELLEN ROSEN

The partners at Osage Venture Partners, a Philadelphia-area venture capital firm, had scheduled a March 15 meeting with the founders of Malbek, a cloud-based platform for contract management, to discuss funding. But there was one hiccup: Osage had begun to work remotely three days earlier because of the pandemic and wouldn’t be able to meet them face to face.

The firm could have postponed the investment and focused only on its current portfolio companies, but it pushed forward virtually. “It was the first time we have done a deal where we hadn’t met face to face. But we spent more time on Zoom and did more reference calls than we normally do and got comfortable that we knew what we were investing in,” says Nate Lentz, one of two managing partners. Osage led the $3 million round.

Malbek, based in Somerset, New Jersey, wasn’t the only contracts-focused legal technology company that secured funding during the pandemic. Two contract review companies also closed rounds: LexCheck, a New York City-based startup, raised $3 million in a seed round; and LawGeex, with headquarters in Tel Aviv, Israel, raised $20 million in its Series C round. In June, Chicago-based Litera announced its acquisition of Bestpractix for an undisclosed price. In September, London-based ThoughtRiver announced a $10 million Series A round of funding led by Octopus Ventures.

LawGeex, which has been in the space for six years, had begun speaking to investors in January and finalized its $20 million round at the end of March. The company, which focuses on contract review automation, had received funding of $12 million just two years ago. Although some of the investors wanted to slow it down to “see how things played out,” CEO Noory Bechor says it was ultimately a positive. “We identified those investors who were in it for the long term, that were really looking to build something big and understand that there are ups and downs,” he says. Corner Ventures of Palo Alto, California, a new investor, led the most recent round.

Meeting a need

The need for a more consistent approach to corporate contracts has emerged because of the pandemic. With agreements often distributed among different divisions, terms can prove incongruent or inconsistent with not just corporate goals but other executed contracts. It’s not just about negotiation; it’s understanding the company’s existing contracts, including key clauses, maturity dates and automatic renewal.

And, of course, terms that directly bear on performance, such as force majeure clauses, are no longer considered boilerplate language.

“These are all concepts that our customers are now paying more attention to,” Bechor says. “Before the pandemic,
Moving the Legal Industry Toward a Better Normal
By Jack Newton

As the new year begins, the legal industry has an opportunity like no other. Against the backdrop of the COVID-19 pandemic and nation-wide protests against racial injustice that defined 2020, we enter 2021 with a set of significant challenges coupled with an opportunity to address those challenges at a foundational level. Amidst so much discussion of a “new normal,” it’s clear we should be aiming higher: there is a unique opportunity to envision and realize a better normal. Every lawyer and legal professional has a part to play in realizing this better normal, and we can work toward it in an incremental, systematic fashion.

One of my favorite concepts is the idea of the aggregation of marginal gains, most recently popularized by James Clear in his book, Atomic Habits. He talks about processes, such as document automation or document processes, such as document automation or document automation or document processes, such as document automation or document processes, such as document automation or collections.

I spoke about the idea of the aggregation of marginal gains, and about the 1% improvements successful firms are actually making right now, at the most recent Clio Cloud Conference. This is just one of the many incredible findings included in the 2020 Legal Trends Report, which you can read at clio.com/ltr.

Going beyond 1% gains, many law firms are also looking at adding new service offerings or even new practice areas to adapt to our new world. With this strategy, it’s imperative that law firms first test their ideas before putting them in motion. In Designing Your Law Firm’s New Normal, author and legal industry expert Mike Whelan, Jr. lays out a clear and actionable framework to enable law firms to quickly model and test their ideas. It’s extremely helpful for law firms looking to adapt and create their own future.

The important thing, as always, is to take a client-centered approach. Looking for 1% gains in improving both the client experience and your law firm’s performance will yield success, and may even yield unforeseen opportunities to improve access to justice and the industry beyond individual law firms. In 2021 and beyond, the world will continue to change, and lawyers and legal professionals must continue to adapt. Together, by taking small steps, looking for incremental gains, and staying committed and persistent, we as an industry can forge a better normal.
they might have said, ‘Force majeure isn’t a big deal,’ but now it is, and they want to make sure that their flavor of force majeure is the one that is accepted.” Clients essentially want to make sure they know how to get out of their contractual obligations if necessary.

Litera’s acquisition of Bestpractix is just the latest of the company’s deals intended to aggregate different aspects of transactional and contractual work. In 2019, Litera acquired Workshare and Doxly because those companies focused on transaction management. The Doxly deal was very, well, meta, Litera CEO Avaneesh Marwaha says. “When we bought Doxly last summer, we used the [Doxly] platform as the basis of the transaction. We still needed deal lawyers, but we could collaborate and share data on the platform.”

Daniel Linna, a senior lecturer at Northwestern University Pritzker School of Law, says the technology meets a need. “There is a lot of pressure on corporate legal departments in terms of containing costs,” he says. But there’s more than just expense. “We need to be more holistic as lawyers as we negotiate commercial agreements. To assess the quality and the value of legal work, we need to have a broader lens to think about how long it takes to negotiate a contract, because it affects how soon revenue will be affected,” adds Linna, who maintains databases tracking legal services innovations at law firms and law schools.

Legal tech’s evolution, not surprisingly, evolves apace with other industries. As a result, Lentz expects new generations of products will emerge with more embedded intelligence. Linna says tools for natural language generation are catching attention, “but understanding how they will improve quality is still an open question.”

To be sure, this is a crowded space. Tech companies as well as some law firms are creating software for both contractual review and lifecycle work. In an approach of “If you can’t beat them, join them,” law firms have created subsidiaries to develop technology themselves, such as Wilson Sonsini Goodrich & Rosati and its Utah-based SixFifty.

Rather than taking jobs or diminishing work, the use of these technologies can free up attorneys for more strategic work.

As Lentz says, the platforms focus on routine and repetitive work and can prevent “lawyers getting blamed for being the bottleneck in the process.”

**TECHNOLOGY**

**Virtual Reality**

Planners hope Techshow 2021, which will be all-virtual thanks to the coronavirus, will attract a wider audience

**BY LYLE MORAN**

While attendees of ABA Techshow 2021 won’t get to walk through a bustling exhibit hall or dine together at one of Chicago’s many pizzerias or steakhouses, organizers of what will now be an all-virtual gathering because of the coronavirus say they still hope to foster a strong sense of community.

They plan to do so by providing opportunities for tech aficionados to gather online to discuss topics of interest and through offering a mix of digital social activities during the March gathering with the theme “Technically Together.”

The co-chairs of the event’s planning board are hopeful that members of the legal industry who have not been able to travel to Chicago previously for Techshow because of financial or time constraints, among other reasons, will join the fold virtually.

“While saddening that we are not going to sit and chow down on deep-dish pizza—at least, together—we are going to be opening the experience to people who have never had the opportunity before,” says co-chair Allan Mackenzie, founding partner of an Arizona-based legal technology consulting firm.

“This is a great opportunity for our audience to expand to the folks we have been trying to reach forever,” adds co-chair Roberta Tepper, director of the...
State Bar of Arizona’s lawyer assistance programs.

Additionally, the organizers are optimistic that hosting the event virtually will allow them to attract a larger number and more diverse slate of speakers. (They had yet to announce a keynote speaker at press time.)

Despite the new format, the co-chairs say the gathering will feature plenty of elements familiar to regular attendees, including a broad array of continuing legal education sessions. Such programming will include tracks covering core technology concepts, litigation, the future of the profession and marketing, among others.

“We are working very hard to make sure our educational offerings are as robust and diverse as they have ever been,” Tepper says.

Attendees will also have an opportunity to interact with Techshow vendors digitally. The Startup Alley competition that has kicked off the festivities in recent years and features legal innovators showcasing their companies will be part of the virtual event as well.

The conference is slated to run for six days—from March 8-13—which is longer than previous years, but the programming hours will be shorter.

Mackenzie says the schedule was revised in recognition that attendees will be in different time zones and would not want the programming to start too early on the West Coast or end too late on the East Coast.

Beyond not having the expenses of airfare, lodging and meals for an in-person conference, attendees also will benefit from registration rates expected to be less than half of those of prior years, organizers say. They are hopeful this will boost registration for the event, which drew about 2,000 people, both attendees and vendors, to Chicago in each of last two years.

“It is going to be a much more affordable show,” says Mackenzie, who encourages law firm leaders to have their associates, paralegals and interns attend as well.

The organizers acknowledge there are many challenges involved with a virtual gathering, particularly trying to re-create the social aspects that are so prized and ensuring the necessary technical elements function smoothly. But they say they have been gathering best practices from other virtual conferences held this year, such as the ABA’s 2020 Annual Meeting in August, and they are excited about pioneering a new kind of Techshow.

Tepper and Mackenzie also say the continued spread and rising death toll from COVID-19 in recent months has left them feeling they made the right call to go virtual, a move that was announced publicly in July.

Illinois Gov. J.B. Pritzker released a reopening plan earlier this year indicating that for an in-person event the size of Techshow to take place, there would need to be a widely available vaccine and the spread of COVID-19 curtailed for a sustained period. The organizers say it became clear that under those circumstances, Techshow could not go forward as usual in early 2021.

“We couldn’t take the risk of putting anyone in a situation where either they place themselves in jeopardy to attend live or they felt like they couldn’t attend Techshow because there was no safe alternative,” Tepper says. “This was our safest, our most secure and our most thoughtful alternative.”
Legal Technology

Should I Build an App for That?

What law firms and legal organizations should consider before creating their own apps

BY DANIELLE BRAFF

When it comes to law firms and legal organizations, perhaps the question isn’t “Is there an app for that?” but “Should there be an app for that?”

We spoke with firms that decided to build their own apps, as well as with law analysts, to dig into their purpose and profitability.

Eric Goldman, professor at the Santa Clara University School of Law and co-director of its High Tech Law Institute, says law firms considering their own apps should answer two main questions. First, who is the target audience for the app? Is it existing clients? Prospective clients? The world at large? Or some other community?

By clearly identifying the app’s audience, the law firm can then figure out how to measure the return on investment,” Goldman says. Additionally, it will be much harder to measure the return on investment for an app designed to build the firm’s long-term brand than it will be to measure the returns for apps designed to convert prospective clients into actual clients, he says.

The second question: How much will it cost to maintain the app over time? This includes the costs of fixing bugs, keeping up with changes in technology and updating the content, where applicable. According to Goldman, firms must also determine who is going to own responsibility for that supervision, what the costs of that supervision
are—both out-of-pocket and opportunity costs—and how those ongoing costs affect the return on investment.

For many law firms, apps don’t make any sense because their audiences don’t need them—or because the returns will be terrible.

“Most likely, the most successful apps will provide existing clients with better service or help to get more business from them. But even then, the apps should be driven by what clients want and should be evaluated carefully for ROI,” Goldman says.

That’s the goal for Triangle Investigations’ app, which was launched and developed in 2019, says Kia Roberts, a lawyer and the founder and principal of Triangle Investigations.

The firm—which consists of lawyers and expert investigators performing misconduct investigations within workplaces, schools and other organizations—developed its own app called Telli, which is offered as an enhancement to clients.

“When we have concluded an investigation into allegations of misconduct within a client organization, many of our clients are worried about future misconduct and how they can keep their finger on the pulse of misconduct in real time,” Roberts says.

To create Telli, Roberts vetted and phone-screened many developers before landing on the one she felt could make the app she needed. Telli was designed to be a mechanism for employees to report misconduct, and Roberts says it eases anxiety for employers who wouldn’t otherwise know what’s going on within their companies.

“The outcome of the app has been great,” she says. “Our clients immediately recognize the value of the app from a risk management perspective and feel that it offers some protection against them getting hit with a sexual harassment lawsuit unaware.”

But Roberts also says creating an app is expensive, so she had to justify the cost of making it. Before creating an app, she suggests thoroughly researching the usefulness of it for your clients and crunching the numbers.

Other firms have created apps for public use.

Gabriel Cheong, partner and owner of Infinity Law Group in Quincy, Massachusetts, says his firm has an app that calculates child support payments. The original iteration of the app was a partnership between Cheong and an app developer. But several years later, Cheong overhauled the app with the help of an app development company from India.

“Overall, it was a very collaborative process, and we had a lot of input into the design and functionality of the app itself,” he says.

Cheong decided to make the app because of the way Massachusetts child support payments are calculated: They involve many multiplications, percentages and conditional statements. While they built the app for themselves to use when they’re in court, it’s also available for the public. “Since we’ve built the app and released it to the public, most divorce lawyers in Massachusetts have it, pro se clients have downloaded it and even judges use it,” Cheong says.

The app also has helped with business. Cheong says his firm has received calls from potential clients who have used the app but realized they need extra help.

According to Cheong, the app has been successful because it helps with a concept that can’t easily be found elsewhere. “Put yourself in your client’s shoes,” Cheong says. “If your app doesn’t add to a functionality that already exists on a smartphone, then it’s useless.”

It’s also key to make an app that people will actually use, says Alex Hargrove, chief technology officer of NetLaw Group, a company that allows users to generate their own estate planning documents. Customer acquisition is the biggest cost of getting a new app to market: The iterations you have to go through to find that product market fit can quickly drain your business, he says.

Hargrove worked with his firm to create NetLaw Draft, which is expected to come to market in early 2021. Similar to the LegalZoom app, it will allow attorneys to connect to users by offering them an app to draft their own wills. “Ultimately, we hope to create a large market of potential clients who have all completed a free will in our system and are virtually prequalified as needing additional services,” Hargrove says.

He adds that while do-it-yourself has limitations, “by connecting attorneys with a burgeoning pool of DIY users and then providing the attorneys with a turnkey way to deliver bite-size add-on services, we hope to bring about a world where it’s not a choice between do-it-myself or pay for a full-service lawyer.”
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BY DAN BERLIN

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Dan Berlin is the President and CEO of Software Technology, LLC, maker of Tabs3 Software. He has been at the forefront of legal technology for over 35 years. In addition, he is a member of several national legal industry advisory boards and has been a speaker and panelist at national and regional conferences.

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• Hospital Money: 33 percent of premiums due and paid for the period November 1, 2018, through October 31, 2019.
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The pandemic has disrupted our work lives in many ways, but dare I say that some interventions have been positive? Of course, working at home, juggling stressful job responsibilities with family life and adjusting to different technology all have, at times, left us feeling like we are drinking from a fire hose.

But let’s take a moment to survey the positive work moments we have experienced over the past nine months. Do you remember a stint of researching or writing in which the world seemed to disappear and you became happily lost in your project? Do you recall an instant in which you were exercising and a creative solution to a legal problem popped into your head? Do you recollect a period in which you enjoyed working in an unusual location or at an odd time of day and you hit a surprising new stride of productivity?

The pandemic prompts us to set aside business-as-usual practices and consider: What are the optimal working conditions that help us achieve the state that psychologist Mihaly Csikszentmihalyi calls “flow”?

Csikszentmihalyi defines flow as “the state in which people are so involved in an activity that nothing else seems to matter.” He says we can achieve flow when “our body or mind is stretched to its limits in a voluntary effort to accomplish something difficult and worthwhile.”

Flow is not just for elite athletes, creative singer-songwriters or influential artists. We, as members of the legal profession, can also achieve flow. And it’s a triumphant feeling when we do.

How lawyers can find flow
Have you ever been knee-deep in drafting a contract or a brief and been so engrossed in the writing project that you forget what time it is? The pandemic temporarily disappears from your psyche, you hit a groove and the words tumble into the right order on the page. And when you emerge from the writing bubble, you feel like a gladiator. That’s flow.

We don’t need to wait for external forces such as a lightning bolt of inspiration, the invention of a vaccine or the arrival of a long weekend to facilitate
flow in our lives. We simply need to understand what flow is and how it works. Then we start noticing situations in which we feel like we are in our “flow zone.” Ultimately, we can cultivate circumstances in which we enter a state of flow more often.

Csikszentmihalyi says flow requires a proper balance between challenge and skill. The project or task needs to be sufficiently difficult, prompting us to stretch our intellectual muscles to achieve its attendant goals, but it can’t be impossible or unrealistic. If we lack the concrete skills to execute the activity, we won’t achieve flow; high challenges met with insufficient skills foster anxiety. In contrast, if we have the skills but the project is too easy, we’ll cultivate boredom or apathy.

Csikszentmihalyi emphasizes that flow is possible when our brains and bodies have the freedom to invest full attention in achieving the task’s purpose, because we are not grappling with internal disorder or defending against threats.

To learn how to facilitate a flow state for ourselves and others, let’s ask ourselves: Do I feel internal disorder right now? Why? Am I sensing a threat? From whom or what? Is this challenge impossible or unrealistic, or is the end goal reachable? Do I have the skill set to execute this task?

Let’s consider this calibration, for example, when assigning projects to junior attorneys. They can achieve flow if the assignment is difficult but not impossible—substantively, logistically or deadline-wise—and they have had proper training to perform the task. Conversely, if we pile work onto junior lawyers that has unattainable end goals or deadlines or we expect them to magically complete the work without sufficient training or experience, a flow state is impossible.

If we are responsible for delegating work to others in our organization, are we setting up those employees for success? If not, can we provide better training? Is it possible for us to enhance productivity, motivation and happiness for individuals and within institutions by reorganizing and restructuring work lives to foster flow? It’s worth a try.

I most often achieve flow when tackling a writing project. I remember many episodes in my law firm life in which I would finally look up from my computer after hours of crafting a complicated brief. I’d feel dizzy and disoriented yet gratified and almost euphoric. Grumpy law firm partners and snippy opposing counsel temporarily ceased to exist. The challenge-skill balance enabled flow. The tricky task of articulating logical and persuasive arguments inspired rather than intimidated me. I had developed sufficient writing chops to rise to the challenge if my deadline was reasonable and the task did not feel impossible or unrealistic. Most often, this flow state occurred at odd hours as I sat in comfortable sweatpants on my couch at home, surrounded by printouts of cases and client fact documents.

As an introvert, my concentration is easily derailed by the normal office soundtrack of phones ringing, colleagues chatting and doors opening; I rarely hit my peak flow state at my office desk. Over the past year, the opportunity to set up my work-at-home life during the pandemic has fostered rather than thwarted flow.

Tools for success

Csikszentmihalyi’s advised balance between challenge and skill reminds me of another approach to well-being called self-determination theory, developed by psychologists Edward L. Deci and Richard M. Ryan. Deci and Ryan say human motivation derives from three psychological needs:

- Autonomy: having a sense of control over our lives and being able to act in a way that dovetails with our individual interests, values and beliefs.
- Competence: feeling capable of handling daily interactions, experiences, tasks and responsibilities.
- Relatedness: connecting with other people.

In assessing how we can motivate ourselves and others—especially as the pandemic trudges on—we should consider whether and how we are cultivating autonomy, a sense of competence and relatedness.

When I was a law firm associate, it wasn’t the workload that fueled my anxiety; in fact, I loved the substantive work. It was the complete absence of autonomy. I never knew if the senior partner was going to saunter into my office with another assignment one minute before I finally planned to go home for the night, or if he would decide—on a Friday evening—that a memorandum needed to be written by Monday or if he would assign me a new case on the eve of a long-awaited vacation planned with other people who depended on me. My life was controlled—or at least I believed it was—by the whims of the
partners, opposing counsel or clients. Gripped with self-doubt, I also grappled with the fear that I lacked the competence to handle unfamiliar arenas. A “never show fear, never show weakness” ethos often stands in the way of lawyers’ ability to ask for guidance or additional training.

As we hopefully inch toward emerging from this pandemic, let’s consider how we can enhance motivational autonomy. We will not sacrifice rigor, high standards or billable hours by affording employees a sense of control over their lives in a world that feels completely out of control.

If an individual is more likely to achieve a flow state by working from home, let’s figure out a way to make that happen. If an employee needs to feel able to step away from email and electronic notifications on a reasonable basis, let’s make that happen. Further, as we hire new attorneys and staff members (who already are living and existing in a protracted state of unease), let’s provide adequate training on new tasks to build a sense of competence. As we edge across the finish line of a traumatic year and start a fresh one, let’s generate a sense of relatedness and belonging.

We’ve all done the work to become legal professionals. We’ve sheltered in place, adjusted our daily interactions, adapted to new technology and endured grief, loss and staggering bewilderment over the past year. We are in this together. Let’s reach out and make sure all members of our profession know they deserve to be here. Now more than ever. Let’s nurture individual and collective flow states and define this next year by good health, hope for the future and awe at what we survived and achieved together.

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

**WORDS**

**A Case of Exposition**

There’s a formula for effectively explaining caselaw

**BY BRYAN A. GARNER**

Legal writers are constantly called on to explain things: how an invention works, how a statute’s wording affects its application, why certain people’s actions do or don’t amount to a conspiracy, why a state statute violates the federal constitution and so on. Among the most difficult and predictably recurrent types of explanation is why a legal precedent bears on a point to be decided. Although every lawyer must be prepared to do this, it’s surprisingly tricky.

Just as you know people in your daily life who can’t explain things in an orderly way—their discourse is often jumbled—there are legal writers who can’t explain effectively. In their defense, we might acknowledge that it’s challenging. When you’re explaining a piece of litigation, you’re telling three stories: 1) what happened out in the world to give rise to the dispute; 2) what happened procedurally in the trial court with the witnesses, the lawyers and the judge; and 3) what the outcome was on appeal. We know that No. 3 is a crucial part of the story because only appellate decisions serve as precedents.

But No. 3 is rarely pertinent on its own. Typically, some degree of No. 1 or No. 2 (or both) will be essential steps to understanding No. 3.

Expositions of caselaw have two common weaknesses. First, you’ll often find acontextual statements about a case abruptly introduced without a predicate necessary for understanding. That can happen through excessive buildup: The whole thing fizzles because the account is too taxing on the reader. (Too much time is spent on No. 1.) Sec-

**Analogy: Three accounts of a grocery store accident**

Let’s say you’re at a supermarket with a friend who suffers a fall when you’re not present. He comes up to you disheveled, limping and rubbing his elbow.

“What happened?” you ask.

Answer A: “I was in aisle 3, looking for some diced tomatoes. All I could find was some tomato sauce and tomato paste. It was so frustrating. The woman beside me said she didn’t know. So I asked an employee for help. ‘Do you know where the diced tomatoes are?’ I said. And he said to follow him down the aisle. But then I saw a can of diced tomatoes and thought he’d gone too far . . .”

This answer seems to be taking forever, and the details don’t clearly matter. But some people do talk this way—putting everything in chronological order, with excessive buildup. When you ask for the bottom line from such a person, you’ll often be told, “I’m getting there!”

Answer B: “My elbow is killing me, and I think I’ve hurt my knee. It was horrible, just horrible. And such a shock. Two of them hit me directly and knocked me to the ground. I may need to see a doctor.”

This response isn’t answering the question of what happened. Granted, it probably qualifies as an excited
utterance, and people who’ve just been injured can’t be expected to be coolly rational. Being a lawyer, you might be able to elicit what happened with a few skillful questions, but it’s going to come out piecemeal.

Answer C: “A stack of cans fell on me. I pulled down a can of diced tomatoes, and the rest fell down on me. They hit my leg, and I think I hurt my elbow when I fell.”

Now that’s an economical and informative answer. Some of your friends will talk this way even after such a frightful occurrence. It’s a habit of mind. These are three very different answers, and they’re analogous to the ways in which lawyers try to explain cases.

**Explanation A: a welter of acontextual detail**

Let’s say you have a leading case that’s on point. It’s the only California case that discusses an insurer’s liability for costs to stabilize property after heavy rains. Some legal writers launch into a new paragraph by immediately bringing up a case name and then plunging into facts. Stay with me here:

In *City of Laguna Beach v. Mead Reinsurance Corp.*, indemnity was found not to be available when municipal actions were taken after a landslide occurred in the wake of heavy rains that damaged the foundations of two homes, which partially collapsed and became temporarily uninhabitable. According to the appellate court, the city was faced with the threat of further hillside activity. The evidence marshaled at trial showed that the city engaged a team of five engineers who supervised city workers in stabilization and reconstruction. Characterizing these costs as “voluntarily incurred prophylactic expenditures,” the court [which one?] held that they were not covered because an insured loss must exist before “mitigation costs” can arise. There was no showing at trial that any damage had yet occurred on the newly stabilized parts of the hillside. Accordingly, there was no showing, the appellate court held, that the city bore any prior liability imposed by law for property damage.

The sense of the passage is discernible, no doubt—if you try. But it requires a fair amount of readerly exertion. And no reader appreciates having to work harder than the writer has worked to make things clear. Look again at that passage, noting the intermixture of parts No. 1 (outside world), No. 2 (trial court) and No. 3 (appellate court).

**Explanation B: the breathless result**

Some writers skimp on all the facts and go straight for an acontextual result:

In *City of Laguna Beach v. Mead Reinsurance Corp.*, the court held that a city has no recourse to insurance indemnity absent an insured loss. Such a loss is not entailed when a city takes prophylactic measures to prevent further landslides, as opposed to taking steps in mitigation of prior landslides.

If that’s the full account of the leading case, it’s too abstract and too inscrutable to be really convincing. Some writers would put that passage into a parenthetical that trails the case citation—and some, sadly, would treat almost every case that way. That’s certainly not what you should do with a leading case.

**Explanation C: a clear expository account**

You’ll typically benefit from having a good topic sentence first and then using the case to support it, as opposed to making the abrupt introduction of a newly mentioned case into a faux topic sentence.

Notice how much more easily this version reads:

When assessing insured losses in cases involving earth movement, California courts distinguish between mitigation and prevention. Mitigation costs (which are recoverable) involve losses actually incurred; prevention costs (which are not recoverable) involve forestalling a loss. The leading case is *City of Laguna Beach v. Mead Reinsurance Corp.*, in which heavy rains caused landslides that seriously damaged two houses. The city quickly hired engineers to stabilize yet-unaffected parts of the hillside. When the insurer refused to cover the stabilization and reconstruction costs for those unaffected areas, the city sued. The appellate court held that the insurance policy covered only expenditures to mitigate existing losses, not to prevent future ones. Where no damage had yet occurred, the city had no liability to mitigate.

Note the pattern there: Begin with the legal principle in your own words, identify the case, briefly state what happened to give rise to the dispute and then explain the result together with the reason for it. It’s a pattern you’ll want to adapt to many a discussion.

Bryan A. Garner is the co-author of *The Law of Judicial Precedent* (2016), *editor-in-chief* of Black’s Law Dictionary, and *president* of LawProse Inc. in Dallas. Twitter: @BryanAGarner
‘Humanitarian Exception’

Model rule revision allows attorneys to help pro bono clients in need

BY AMANDA ROBERT

Daniel Greenberg became interested in amending ABA Model Rule 1.8(e) when he realized he’d been in violation of it his entire career.

“It literally did not occur to me that it could be unethical to, when you were in court waiting for a case to be heard, take an indigent client to lunch with her kids or give her carfare to get home or, in some cases, help her with food and some necessities,” says Greenberg, the special counsel for pro bono initiatives at Schulte Roth & Zabel in New York City.

“And when I found out that one wasn’t supposed to do it, it was almost like I laughed out loud. It felt so bizarre to me, that of all things, we couldn’t do this as an ethical matter.”

Greenberg, who was at the time on the ABA Standing Committee on Legal Aid and Indigent Defense, worked with other members for several years to research and recommend changes to the rule, which bars financial support for litigation clients. After SCLAID and the Standing Committee on Ethics and Professional Responsibility approved their proposal, it was submitted to the House of Delegates at the ABA Annual Meeting in August.

The association’s official policy-making body adopted Resolution 107, which amends Model Rule 1.8(e) by adding a narrow exception that will improve access to justice for the most vulnerable populations. Under this exception, lawyers who represent indigent clients pro bono through a nonprofit legal services organization or law school clinical program are permitted to provide them with modest gifts for food, rent, transportation, medicine and other basic living expenses.

The amendment also states lawyers may not promise gifts to clients in exchange for their retention or a continued relationship after retention; seek or accept reimbursement for gifts from clients or anyone affiliated with them; or advertise the availability of gifts to potential clients.

Lawyers can, however, give gifts to clients they represent on a contingency-fee basis under the change in the rule.

Clients who are hurting

Philip Schrag, in his role as co-director of Georgetown Law’s Center for Applied Legal Studies, an asylum law clinic, has encountered a series of low-income clients who were in desperate situations.
One was living in his wrecked car, and another started sleeping on the street while she was working with the center. A third could no longer afford antipsychotic medication and became suicidal. In all these cases, Schrag says, his students were able to provide some financial assistance because the District of Columbia had adopted a more lenient version of Model Rule 1.8(e).

That changed in 2007, when the District of Columbia began requiring its attorneys to obey the ethics rule of any tribunal in which they had a litigation matter. Since the immigration courts were in Maryland and Virginia, Schrag says his law students had to follow their rules.

“Those two states had adopted the ABA’s version of 1.8(e),” he says. “It was very prohibitive, and we were not able to help clients [going forward].”

Schrag, who also teaches professional responsibility, wrote about the problem in an article published in the Georgetown Journal of Legal Ethics in 2015. He shared copies of it with members of the ABA and began working with Greenberg and Don Saunders, the senior vice president for policy at the National Legal Aid & Defender Association, on proposed changes to the rule.

According to the report that accompanied Resolution 107, Model Rule 1.8(e) was adopted in 1983. It allowed lawyers to provide clients with payments or loans for litigation expenses and court costs but prohibited any other financial assistance for two reasons.

Comment 10 to the rule explains that if lawyers provided loans to clients for living expenses, it would both “encourage clients to pursue lawsuits that might not otherwise be brought” and “give lawyers too great a financial stake in the litigation.”

Schrag contends the ABA has “drafted around that problem” by allowing lawyers to give gifts but not loans to indigent clients for basic necessities.

“That overcame the argument that it would allow lawyers to take advantage of clients and keep them in their pockets for a long time because they would become creditors of the clients,” Schrag says.

When Barbara Gillers, the immediate-past chair of the Standing Committee on Ethics and Professional Responsibility, introduced Resolution 107 to the House of Delegates, she pointed out that any ethical concerns with the exception, which is commonly known as the “humanitarian exception,” were satisfied.

“The assistance cannot be loaned, so there is no conflict and no effect on the lawyer’s judgment, and the lawyer cannot offer the assistance until after retention and cannot use the prospect of assistance to induce retention,” Gillers, an adjunct professor at New York University School of Law, explained to delegates at the 2020 ABA Annual Meeting. “Having addressed the ethical concerns of the rule,” Gillers added that the proposal to amend Model Rule 1.8(e) was particularly meaningful “to the lawyers and individuals fighting for social justice at this time of pandemic and economic fallout.”

Making a big difference with small assistance

Past ABA President Robert Grey Jr., also spoke in support of Resolution 107, telling the House of Delegates that it addresses the “recognizable difficulties and impediments brought on by poverty in representing indigent defendants.”

“This does not create an obligation or an expectation, and in most instances, these are very short matters in terms of their duration, and so the likelihood of any problems that might come up as a result of this financial assistance are minuscule and nonexistent in all respects,” said Grey, senior counsel in the Richmond, Virginia, office of Hunton Andrews Kurth.

In the United States, all but 11 jurisdictions have adopted a rule that is identical or similar to Model Rule 1.8(e), according to the report accompanying Resolution 107.

The ABA will notify each state supreme court chief justice about its amendment to the rule. Schrag says state courts and bar associations will review the change, but he doesn’t expect them to delay adopting it in their own rules.

“I think the main reason most states stuck with the ABA rule was that it was the ABA rule, and they didn’t see a need to change it,” he says. “The fact that the ABA has now changed its rule will give a significant impetus to reform in the states.”

Greenberg agrees, crediting the ABA for taking the lead at an opportune moment in the country’s history. “Lawyers who care deeply about their clients are now free to manifest that concern in a more tangible way, where small amounts of aid can be life-changing for people,” he says.
Law school debt is delaying plans for recent grads, and here's how 6 are adapting

By Stephanie Francis Ward and Lyle Moran
ome new attorneys delay buying a home or a new car. Others reluctantly postpone marriage and having children while altering the career plans they had going into law school. These are among the personal and professional sacrifices young lawyers often make due to their sizable student loan debt, according to a survey conducted this spring by the ABA’s Young Lawyers Division and the ABA Media Relations and Strategic Communications Division. Many survey respondents also provided open-ended comments indicating their student loans have contributed to mental health issues, including anxiety and depression.

The survey results were highlighted in the ABA’s second annual Profile of the Legal Profession—a data-driven deep dive into issues facing attorneys and the legal industry. The section on student debt was among the new additions, as was information about the country’s legal deserts. (See “2020 state of the profession report shows dearth of lawyers in rural areas, attorney debt struggles” at ABAJournal.com/2020profession.)

According to the YLD survey of 1,084 attorneys, whose median age was 32, the costs of legal education are skyrocketing. Participating attorneys reported carrying a median cumulative student debt of $160,000, with roughly 40% stating that their debt load is higher now than when they graduated from law school.

Additionally, U.S. Department of Education data referenced in the Profile of the Legal Profession indicates the average cumulative student debt for law school graduates rose from $82,400 in 2000 to $145,500 in 2016, the most recent year for which such federal data is available.

“That should bring a renewed focus for the legal profession on the cost of legal education,” says Christopher Brown, chair of the YLD.

The YLD tapped AccessLex Institute to delve even deeper into the student debt information gathered from the survey of newer lawyers. The YLD/AccessLex Institute report, which was released Oct. 26, found that over 95% of respondents took out loans to attend law school, and that debt affected men and women almost equally. (See ambar.org/debt for more.)

Brown is particularly hopeful the survey data will lead to a larger number of more experienced attorneys realizing law school debt is a “systemic problem” that they should devote energy toward addressing.

Meanwhile, he says the YLD’s Student Loan Debt and Financial Wellness Team is working with the American Bar Endowment to provide resources to young lawyers to help them successfully overcome their financial challenges.

The YLD also recently established a holistic Wellness Team to assist members grappling with mental health and substance abuse issues, including those brought on by student debt.

“We wish that the stress of our financial lives could stay in our bank accounts, but it doesn’t,” says Brown, deputy law director for the city of Mansfield, Ohio.

In recent months, the ABA Journal interviewed six young lawyers about how their debt burdens influenced their personal and professional journeys.

They described a fair amount of stress related to student loans. But they also showed a lot of resilience, with narratives about how they are making do and advancing professionally, even amid a global health pandemic.

These are their stories.
Katrina Castillo

Katrina Castillo, a 2013 graduate of Indiana’s Valparaiso University Law School, told her boyfriend about her law school debt about a year after they began dating.

“We started talking about how much I had left, so I logged into my account and it was $325,000,” says Castillo, who also has an LLM from American University Washington College of Law. “He almost had a heart attack.”

He calmed down after she explained that she was enrolled in the Public Service Loan Forgiveness program.

“It was bad, but not as bad as it sounded,” explains Castillo, who is Latina. Hispanic, Black, Asian and multiracial law school graduates take on far higher debt loads than their white counterparts, according to the ABA YLD survey.

She is also enrolled in an income-based repayment plan, and all of her school debt is from law school and the LLM program. Castillo’s boyfriend is now her fiancé, and the couple recently moved from Arlington, Virginia, to New Delhi for his State Department job as a foreign service officer. Castillo, who had been a decision writer with the Social Security Administration, now works as a political associate with the U.S. Embassy.

She grew up in a military family, and says joining her fiancé in India was not a hard decision to make.

“At this point, everywhere in the world is up in the air,” she adds.

Having a government job will keep her in the PSLF program. But for now, she has no student loan payments because the federal government in March suspended them for everyone until the end of 2020. The administrative forbearance is part of the Coronavirus Aid, Relief and Economic Security Act, and in August, President Donald Trump directed the U.S. Department of Education to continue loan forbearance until Dec. 31.

Castillo expects to have her student debt discharged in about five years through the PSLF program.

“I am going to throw a party, it’s going to make me feel better, just the fact I will be done,” she says.

But the future of PSLF still remains a worry for Castillo and others. Since it was introduced as part of the 2007 College Cost Reduction and Access Act, the program has faced various defunding threats, and there have been problems for people who thought they qualified for it but did not.

In 2016, the American Bar Association sued the U.S. Department of Education after it changed its interpretation of PSLF regulations. Four lawyers, two of whom had worked at the ABA, were also plaintiffs in the U.S. District Court for the District of Columbia action. In 2019, a federal judge found that the department rule changes were arbitrary and capricious, and the action settled in 2020 after the agency agreed to recognize ABA employees as public service workers who are eligible for student loan forgiveness.

“We started talking about how much [law school debt] I had left ... and it was $325,000. He almost had a heart attack.”

Every time a story comes out about it, I definitely get a little bit of anxiety,” Castillo says.

She now lives in an apartment paid for by the State Department and says the cost of living is cheaper in New Delhi than it was in the Washington, D.C., area.

“It’s definitely a weight off because we don’t have some of the same bills we did,” adds Castillo, who is also enrolled in an income-based repayment plan. Before she left her Social Security Administration job, her monthly student loan payment was roughly $500 per month. If she weren’t in an income-based repayment plan, it would have been $3,000, which was more than her take-home pay.

“I would be in a ball crying every day if I didn’t have it,” Castillo says.
Kaitlin E. Preston

While attending Thomas Jefferson School of Law in San Diego, Kaitlin E. Preston thought of working in the nonprofit sector once she became a licensed lawyer, she says.

But after graduating in 2016 with roughly $240,000 in student debt, Preston decided she would need to work at a law firm to help pay down her loans.

Amid the competitive legal market in Southern California, Preston says she was fortunate to secure a job handling real estate issues at McCarthy & Holtus in San Diego with a starting salary of approximately $65,000.

Nonetheless, Preston and her husband determined they wouldn’t be able to buy a home as soon as they wanted given their financial circumstances. They also put off having kids.

“In the beginning of your legal career, you kind of have all these ideas of ‘I’m finally where I wanted to be, and I’ll be able to do so many things,’ without the later realization that ‘I need to pay down some of the student loan debt so that I can afford to do these things,’” says Preston, 30.

She also says hearing about the cost of day care in San Diego played a role in the decision she and her husband made to delay having children.

They are hardly alone on that front; the ABA survey found that nearly 50% of respondents decided to postpone or not have children due to their loan debts. Additionally, the U.S. birth rate in 2019 was the lowest in 33 years, according to the Centers for Disease Control and Prevention.

Preston says postponing the home purchase was much more difficult than delaying having children with her husband, who works in the hotel industry. The couple enjoys hosting family and friends,

but they find it difficult to do so in a one-bedroom apartment.

“At a certain point in your life, you want to buy a home and enjoy that space,” Preston says.

As for her legal work, Preston has practiced civil defense litigation in San Diego at two other firms since her first gig. Her second legal job was at Selman Breitman, where her starting salary was $115,000. She currently works as an attorney at Haight Brown & Bonesteel and declined to provide her starting salary there.
Jay R. Thakkar

After graduating from the University of Florida Levin College of Law in 2010, Jay R. Thakkar secured a job in the Sunshine State with the Office of the Public Defender for the 18th Judicial Circuit.

Though he was thrilled to land a legal position amid a tough economic climate, Thakkar’s starting salary as an assistant public defender was $42,000. Meanwhile, he had finished law school with roughly $130,000 of student loan debt.

As a result, Thakkar says he could not afford to get his own place to live and made the tough decision to move back in with his parents in Melbourne, Florida.

“I just graduated law school, and I’m basically back in the room I went to high school in,” he says. “It felt like I didn’t progress much.”

According to a 2019 report from Zillow, 21.9% of millennials live with their parents—10.2 percentage points higher than those in the same age group in 2001.

Thakkar also had wanted to purchase a new car soon after law school but says he had to delay doing so to pay down his loans. Instead, he kept his Scion tC that he had driven since his undergraduate days.

“I didn’t want to live on credit card debt because I already had debt,” says Thakkar, who is of Indian descent.

According to the ABA survey, 46% of respondents said they postponed or decided not to buy a car as a result of their student loan debt. Additionally, 33% of respondents said they had to settle for a less expensive car than the one they originally wanted.

Thakkar lived very frugally during his time working for the public defender’s office from late 2010 to early 2012 while attempting to quickly pay off his loans.

He was then hired to work at the Cantwell & Goldman law firm in Cocoa, Florida.

The position came with a significantly higher salary and allowed him to handle both criminal defense work and civil litigation.

Several months into his new job, he was in a financial position to get his own apartment, Thakkar says.

“I just graduated law school, and I’m basically back in the room I went to high school in.”

He later was named a partner at his firm, got married and bought a home.

He also purchased a new car after logging more than 150,000 miles on his Scion.

“I got a luxury car, but it was a used luxury car,” says Thakkar, who serves on the Florida Bar Young Lawyers Division’s board of governors.

The 35-year-old says he and his wife, who works in marketing/communications, are expecting their first child early in 2021.
Cheyenne N. Chambers

Cheyenne N. Chambers' student debt is slightly less than $200,000, but she says it doesn’t control her life. She’s a homeowner with three savings accounts: one she uses to fund self-care and day-to-day expenses; another is for retirement, which is separate from her 401(k); and a third has six months’ worth of emergency funds.

The Ohio native graduated in 2014 from Ohio State University Moritz College of Law, and some of her money also goes back to the institution via an annual $750 merit scholarship she gives to Black students.

Budgeting, the North Carolina-based appellate lawyer says, is part of her goal-setting, and she religiously tracks every dollar she spends or saves in a notebook.

“Some people may feel really down or disappointed about their circumstances, but I look at it as a challenge,” says Chambers, 31. “I look at the notebook, and I really try to figure out ways to get another $25 in my savings account. That’s just how I am as a person.”

After graduating from law school, Chambers moved with her parents to North Carolina. She lived with them while working as a first-year associate at the Charlotte office of Moore & Van Allen so she could save money for living expenses the next year, when she moved to Pasadena, California, and clerked for 9th U.S. Circuit Court of Appeals Judge Paul Watford. The monthly rent for her one-bedroom Pasadena apartment was $2,000, and her clerk salary was in the high five figures.

Large law firms solicit federal clerks for associate jobs, and Chambers initially thought she’d take that path so she could pay off her student debt quicker. But the firms she spoke with seemed more interested in hiring her for their trial groups rather than appellate practices. Also, as a Black woman, she noticed there were few people who looked like her in the appellate practices.

So Chambers is now an associate with Tin Fulton Walker & Owen in Charlotte. She is enrolled in an income-based repayment plan for her student loans. She would not share her annual salary or the amount of her monthly loan payment.

Working at a smaller firm offers more opportunities to pursue the career she wants, says Chambers, who also serves as co-chair of the ABA’s Section of Litigation Appellate Practice Young Lawyers, Membership and Diversity subcommittee.

“I wouldn’t say my student debt has tremendously influenced my life decisions,” she says, “but I’ve thought about my choices a lot longer and more carefully because of my student debt.”

<table>
<thead>
<tr>
<th>Loans at Graduation</th>
<th>Under 100K</th>
<th>100K-200K</th>
<th>Over 200K</th>
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</thead>
<tbody>
<tr>
<td>Asian or Pacific Islander</td>
<td>25%</td>
<td>35%</td>
<td>40%</td>
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<tr>
<td>Black or African American</td>
<td>13.5%</td>
<td>50%</td>
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<td>Hispanic or Latinx</td>
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<tr>
<td>White</td>
<td>25.6%</td>
<td>49.5%</td>
<td>24.9%</td>
</tr>
</tbody>
</table>

Source: YLD Survey
Samuel A. Segal

Samuel A. Segal vividly recalls a student loan exit interview after graduating from law school at which he was told he had accumulated $105,000 of educational debt. “I remember looking at the final number and thinking, ‘This must be some sort of error in the math,’” the 2010 Northeastern University School of Law grad says. “I was going to have a $1,000-a-month payment on my loans. It was a pretty harrowing time.” Segal also remembers thinking he would make upwards of $150,000 in his first legal job after graduation. Instead, his starting salary at a small firm in Boston was $55,000.

In light of his much-less-than-anticipated salary and sizable monthly loan payment, Segal says he could not afford to buy his own place and decided to remain in the apartment he rented during law school. While doing so, he ate a lot of pasta dinners and limited how often he went out.

“I had to keep living like a student for four years out of law school,” Segal says. “I put basically every spare cent I had toward those loans.”

Segal’s decision to delay purchasing a place is not an outlier; 56% of ABA YLD survey respondents said they postponed or decided not to buy a house because of their debts. Lawyers have made these choices amid rising home prices, and the National Association of Realtors reported that September’s national housing price increase marked 103 straight months of year-over-year gains.

“I remember looking at the final number and thinking, ‘This must be some sort of error in the math.’”

Additionally, he closed on a new office purchase in late September. “I’m working on the expansion plan,” Segal says.

Impact of debt on purchase decisions
Source: YLD Survey

Segal, a past chair of the Massachusetts Bar Association’s Young Lawyers Division and a district representative to the ABA YLD in recent years, says he also had to put off purchasing a car while working to pay off his loans. If his boss needed him to go to court, he would use a Zipcar.

“My parents kept asking me, ‘When are you going to get a car?’” Segal says. “A car was luxury I could not afford.” It was nearly five years after graduating from law school when Segal says he paid off his student loans and progressed to a financial position where he could start making major purchases. That led to Segal buying his own place to live and purchasing a car. Segal, a 35-year-old who specializes in personal injury cases, also started his own law practice roughly five years ago. He says his income has steadily grown from $60,000 in his first year to $267,000 last year.
Victoria B. Finlinson

Victoria B. Finlinson graduated from law school with $70,000 in student loan debt and an $800 monthly payment.

It was a 10-year loan, but the 2014 graduate of the University of Utah’s S.J. Quinney College of Law paid off the debt in half the time by making larger-than-required payments.

It was a big sacrifice—but worth it, she explains. Finlinson is a member of the Church of Jesus Christ of Latter-day Saints and says part of the faith’s culture is not having debt.

“This was something I thought about and said, ‘I can get this done,’” Finlinson says. “I wanted to be more secure.”

The past president of the Utah Bar’s Young Lawyers Division is an associate at Clyde Snow & Sessions in Salt Lake City. She says her annual salary is in the mid-six-figure range, and she is a litigator who handles employment matters.

Finlinson, 31, grew up in Modesto, California, and she chose her law school because it was top-50 ranked with low tuition. She stayed in Salt Lake City because she liked her law firm, and the cost of living was low.

It’s also where she met her husband, a digital marketing specialist who just started an MBA program at Brigham Young University. They pay his tuition out of pocket and own a home about five minutes away from her downtown law office.

The couple has a 2-year-old son and pays $1,400 a month for daycare at a facility that’s one block from Clyde Snow. Daycare would be cheaper outside the city, Finlinson says, but the convenience makes the extra cost worth it.

Work, she adds, has been even busier than usual during the coronavirus pandemic.

She thinks today’s young lawyers have more stress factors than their predecessors because technology keeps them constantly tied to work.

Also, making partner is harder than it once was.

“I’m worried that firms will be less likely to advance associates because they’re concerned about the financial impact of the pandemic,” Finlinson says.

Impact of debt on family and career decisions

Source: YLD Survey

- Chose a job that pays more instead of a job they really wanted
- Postponed or decided not to get married
- Chose a job qualifying for loan forgiveness instead of one they really wanted

37%

29%

17%
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Phyllis Hamilton suffers from back pain and carries a lumbar cushion everywhere. She makes sure that no matter where she sits, she’s ready with the right kind of ergonomics.

“If you have a physical problem, you are going to take care of it so you can continue to do your job,” the Oakland-based chief judge of the U.S. District Court for the Northern District of California says. “You are going to get the assistance that you need.”

Judges have a responsibility to the public to function to the best of their ability. To Hamilton, that means not only protecting their physical well-being but also their cognitive health, which the National Institute on Aging defines as being able to think, learn and remember clearly.

Hamilton, 68, has been on the bench for 20 years as a district judge and
was a magistrate judge for nine years before that. Since becoming chair of the Ninth Circuit Wellness Committee in 2010, she has taken the lead in promoting healthy aging and recommending that judges consider voluntary cognitive examinations to review their brain function.

“If I started feeling that I had cognitive issues, I would want to know about them,” Hamilton says. “I would want to see what the problem is and if I could delay it.”

She adds that many judges from the San Francisco-based 9th U.S. Circuit Court of Appeals are forward-thinking in this area, as shown by their willingness to participate in the University of California San Francisco Memory and Aging Center’s longitudinal study on the effects of aging on older adults’ cognition.

From July 2018 to June 2019, the Ninth Circuit Wellness Committee helped recruit 36 judges who completed several hours of neuropsychological tests assessing their attention, memory, orientation and other skills. Participants included circuit judges; active and senior district judges; active magistrate and bankruptcy judges; and several retired judges. Their average age was around 67, but a few were in their 50s, and the oldest was 87.

Dr. Bruce Miller, the director of the UCSF Memory and Aging Center, oversees the study. His team has evaluated more than 1,000 people, and he says by including the cohort of federal judges, they will gain insight into strengths that emerge as they age, as well as how they compare to engineers, doctors and other professionals.

“I shouldn’t say this has never been done before, but I don’t know of something quite like this, where we are looking at a particular occupation so comprehensively,” he says.

The 9th Circuit’s novel efforts come during a national conversation about aging Americans, who are continuing to live and work longer. According to the Administration for Community Living’s latest report, the population of people in this country who are 65 and older increased from 38.8 million in 2008 to 52.4 million in 2018. It estimates that total will reach 94.7 million in 2060.

The federal judiciary has not been immune to the upward trajectory: The average age of active and senior judges now approaches 69. According to additional data provided by the Federal Judicial Center, about 66% of all judges will be 65 or older by the end of 2020. Its data also shows 33% will be 75 or older by the end of the year, while just over 11% will be 85 or older.

Reactions to this trend are mixed. Lawyers, law professors and even members of the judiciary voice concerns that judges are serving too much time on the bench without ensuring their cognitive skills stay sharp.

They have called for mandatory retirement and cognitive testing as well as a more consistent approach to addressing cognitive decline.
But members of the legal community who have experience with neuroscience argue that the question of when a judge should step down is complex.

In attempting to reframe the conversation, they say studies such as the one led by Miller show that judges shouldn’t face doubts over their cognition once they reach a certain age.

Rather, they want to focus more attention on normal aging and the support that can be provided to judges as they grow older.

Miller plans to recruit at least 75 judges before they publish the study. He confirms that initial results show their cohort tests high on executive function, which includes the ability to organize, plan and handle multiple tasks simultaneously.

Hamilton, who participated alongside her colleagues, adds that the judges’ test scores will establish their baseline in the study, because many have agreed to be reevaluated every one to two years.

The scores can also be shared with the judges’ personal physicians.

“We go into our annual examinations, and our hearts are checked, our cardiovascular systems are checked, the doctor checks our lungs—but nobody really checks our brain,” Hamilton says. “So we’re trying to raise awareness of the ability to have some impact on your overall brain health.”

“I don’t know of something quite like this, where we are looking at a particular occupation so comprehensively.”

—Dr. Bruce Miller

Setting the scene
The debate over federal judges and their lengthy tenures often involves the U.S. Constitution.

According to Article III, U.S. Supreme Court justices and federal circuit and district judges “shall hold their offices during good behavior” with no cutoff for age. They could be removed from office, but only through impeachment by the House of Representatives and conviction by the Senate.

Federal judges also have the option of taking senior status once they meet certain age and service requirements. That happens when a judge turns 65 and has served at least 15 years on the bench or reaches any other combina-
tion of age and years of service that equals 80.

Judge Richard Posner, who served on the Chicago-based 7th U.S. Circuit Court of Appeals for 36 years, wrote in his book *Divergent Paths* that “not being subject to compulsory retirement and able to delegate much of their work to staff, federal judges sometimes fail to retire even when old age and its related ills have greatly impaired their judicial performance.”

Before Posner retired at 78, he called for a mandatory retirement age of 80 for federal judges.

President Donald Trump’s administration has prioritized putting young conservative judges on the federal bench, in part because they serve lifetime appointments and can shape the nation’s laws for many years. According to the American Constitution Society, the Republican-controlled Senate had confirmed 220 Article III judges under this administration by early November.

Among the judges confirmed were Supreme Court Justices Neil M. Gorsuch, Brett M. Kavanaugh and Amy Coney Barrett. Progressive legal groups, such as the Center for American Progress, argue that the Supreme Court confirmation process has become too political and support term limits for justices.

Justice Stephen G. Breyer, who was nominated by President Bill Clinton and confirmed in 1994, said during an event in 2019 that he wouldn’t oppose an 18-year term limit. He said then it would “make life easier” since he wouldn’t need to worry about when to retire.

Arthur Hellman, a law professor at the University of Pittsburgh who studies the federal courts, argues that even if there were sound policy arguments for mandatory retirement for federal judges, the issue is a nonstarter. It would require a constitutional amendment, something he doesn’t see support for in today’s political climate.

“I don’t see any possibility of getting the constitutional amendment through the very elaborate process that it requires, even though on this particular issue, there may be a large degree of consensus,” Hellman says.

**Matters of state**

State courts are another matter, and many states have taken different approaches to judicial retirement. According to the National Center for State Courts, 32 states and the District of Columbia require appellate or general jurisdiction court judges to retire at a specific age. Although 70 is the most common, some set retirement at 72, 74 or 75.

William Raftery, a NCSC senior analyst, says proposals to raise the mandatory judicial retirement age from 70 to 75 succeeded in Pennsylvania and Florida in 2016 and 2018, respectively, but similar efforts in Oregon, Hawaii, Louisiana, New York, Arizona and Ohio all have failed.

“It’s a tricky situation,” Raftery says. “As judges get older, as we have an older population, why can’t someone work until 74 or 76 on the bench, especially if they keep getting reelected? The counterpoint is, the voters simply don’t want to do it.”

In the early 2000s, a joint committee of the ABA’s Judicial Division and Senior Lawyers Division recommended 75 as an appropriate retirement age for judges, says Ruth Kleinfeld, who chaired that committee and retired in 2015 after 24 years as a U.S. administrative law judge.

“We looked at what point one’s age would interfere with the ability to maintain a proper judicial function, and now that I am 80, I see there are a lot of people who are in very good shape at least until 75,” says Kleinfeld, who is also a past chair of the SLD. “At that point, some people can even take senior status, as federal judges do, and still maintain a good working capability.”

It’s often challenging for federal judges with life tenure to determine when exactly to retire.

Francis Shen is a professor at the University of Minnesota Law School and executive director of education and outreach for the MacArthur Foundation Research Network on Law and Neuroscience. In studying law and neu-
Science, he observes that individuals experience aging differently.

“Age is not destiny,” he says. “You could be at 80, 82, 85 or older and still have tremendous cognitive faculties. You combine that with the fact that there are things that come with age, namely wisdom, that you want in a judge, and it becomes difficult to know in any particular case if this is someone who should no longer be on the bench.”

An additional challenge, Shen says, is that symptoms of cognitive decline are not always apparent.

They can include memory loss and impairment and changes in emotional and social control and regulation, but those can be subtle or gradually appear over time.

According to the Alzheimer’s Association, about 5.8 million Americans age 65 or older now live with Alzheimer’s disease, the most common form of dementia. This number is projected to increase to nearly 14 million by 2050.

The extent of mild cognitive impairment or dementia in the judiciary remains largely unknown. Hellman says lawyers and court staff are often reluctant to report judges who may be experiencing problems. And if an issue is reported, it is usually handled by a chief judge before an official complaint is filed.

“Disability is best handled behind the scenes, typically by the chief judge of the circuit,” Hellman says.

“The key problem is getting the information to the people who have the responsibility and are in the position to do something about it.”

Robert Tembeckjian, administrator and counsel for the New York State Commission on Judicial Conduct, also finds it difficult to uncover problems at the state level.

“When a judge goes off the bench for medical assistance, the tendency is for that judge’s colleagues to cover for a while and not reveal to the judicial conduct commission that there is a problem,” he says. “And almost invariably, when we become involved, the judge, usually in consultation with his or her family, agrees to retire.”

Tembeckjian refers to a recent case involving Kings County Supreme Court Justice ShawnDya Simpson.

The commission began investigating reports in October 2019 that Simpson’s “demeanor toward litigants, lawyers and others had become erratic and at times intemperate,” and “she was frequently absent from court, arriving very late or leaving very early, or not arriving at all, despite the fact that she was scheduled to preside,” according to an August news release announcing Simpson’s retirement.

In the wake of these incidents, Simpson was diagnosed with Alzheimer’s disease. She is in her mid-50s.

In the news release, Tembeckjian and Simpson’s attorneys said in a joint statement that they hope “her legacy will be burnished by her fortitude in revealing her condition and the degree to which this action might destigmatize Alzheimer’s disease and inspire others...
to learn more about how to recognize and cope with it.”

Focus on wellness
Before engaging in what may be the first study of its kind, the 9th Circuit was the first to establish a committee that provides programs and resources related to judicial wellness and disability.

Hamilton, a member since 2008, says it has succeeded in encouraging judges to think about their physical, mental and brain health and take better care of themselves.

“We are ubiquitous,” Hamilton says. “At every conference, there is a wellness table. We always have programs. Even though some people might have heard of us many times in the past, there are always new judges coming on board.”

The committee started in 1999 as the Ninth Circuit Task Force on Judicial Disability. After a formal charter was adopted, the task force recommended several initiatives, including a confidential telephone counseling service that judges could use if they had concerns about themselves or their colleagues.

The Judicial Disability Committee, which later changed its name to the Judicial Wellness Committee and then to the Ninth Circuit Wellness Committee, was created in October 2000 and established the 9th Circuit’s Private Assistance Line Service in 2001.

Richard Carlton has been a consultant to the circuit on cognitive issues since that time. He also staffs the PALS program, which receives about four calls each year from chief judges or other judges who are worried about a colleague who is struggling to process information or issue decisions.

Carlton offers guidance on how callers can handle the situation. He also provides resources and referrals.

“We strategize on whether there is someone on the court that the judge is close to, a friend or colleague, who might be in a better position to approach the judge in a way that is not as threatening,” he says.

In addition to its other initiatives, the wellness committee hosts a biennial conference at which judges who are approaching eligibility for senior or recall status or retirement learn about benefits and talk to judges who have transitioned. It also offers a biennial training that brings medical professionals in to present chief judges with new research on cognitive impairment.

David Sellers, the spokesperson for the Administrative Office of the U.S. Courts, confirms that many courts have their own wellness committees, programs or services.

“While all courts share an interest in the health and well-being of judges, each circuit has its own needs and other considerations and variables that are reflected in its approach to physical and mental wellness,” he says.

The Judicial Conference of the United States, the federal judiciary’s
policymaking body, agreed in 2011 to encourage circuit judicial councils to consider establishing wellness committees that would both promote health and wellness and provide information on retirement issues.

Chief Judge Priscilla Owen says the 5th U.S. Circuit Court of Appeals at New Orleans “has given considerable thought and attention to issues that may arise if and when a judge is, or may be, disabled or impaired.”

The 5th Circuit Judicial Council appointed a committee to make recommendations, and as a result, directed each district to implement a judicial impairment protocol. While protocols vary, Owen says they provide chief judges with informal mechanisms to address judicial disability or impairment “in a confidential, nonadversarial manner.”

She adds that members of the public or bar cannot use these protocols to file a complaint about a judge. Those procedures are available under the Judicial Conduct and Disability Act, and she says each of those complaints is reviewed thoroughly.

According to Fix the Court, a nonpartisan court transparency group, the 10th U.S. Circuit Court of Appeals at Denver created a wellness committee based on the 9th Circuit’s model in 2009.

The Boston-based 1st U.S. Circuit Court of Appeals and Philadelphia-based 3rd U.S. Circuit Court of Appeals also have committees.

Gabe Roth, Fix the Court’s executive director, says the federal judiciary should establish a nationwide program to address cognitive impairment.

“If you are the head of the committee, you can set the policy for all 13 circuits,” Roth says. “It’s better if there is a national policy, because an aging judge in Missouri and an aging judge in Idaho could benefit from the same policy.”

Hamilton sees it differently. She says courts that create their own procedures can be more proactive and avoid the federal disability statute’s often-cumbersome process. As an example, she says, the Northern District of California has implemented a protocol for age-related disability.

It features a “buddy system,” in which all judges designate someone the chief judge can contact if doubts arise about their physical or mental ability.

“The judges in my court were willing to agree to having a protocol because we like the idea of people we know and work with resolving our issues as opposed to judges on the Judicial Council or Judicial Conference who don’t know us personally,” Hamilton says.

**Changing the conversation**

As shown by the 9th Circuit, the question of whether judges should submit to regular cognitive exams is receiving more attention.

Shen, who in addition to his work in Minnesota serves as the executive director of the Massachusetts General Hospital Center for Law, Brain & Behavior, focused on this issue in a recent article in the *Ohio State Law Journal*.

He suggests that if federal judges undergo mandatory—but confidential—cognitive assessments every five years...
after joining the bench, they will gain valuable information that helps guide decisions about their future. He contends this solution is “palatable politically,” since it prioritizes privacy—not even a chief judge would see results.

“It might have made sense 50 years ago, maybe even 30 years ago, to say we’re just going to let judges figure it out on their own,” Shen says. “But medicine and science have advanced so much over the past few decades, and although we have multiple tools for detecting dementia, we’re not harnessing that in the law.”

Judith Edersheim works with Shen at the MGH Center for Law, Brain & Behavior. As its co-founder and co-director, she also studies aging judges and warns that cognitive testing might not tell the whole story.

While judges may see improvements in such metrics as language, vocabulary and general knowledge as they age, she says they will see the same declines in attention, working memory and information processing as others in their age groups.

And these declines don’t necessarily correlate to impairments in activity, Edersheim notes.

“Normal aging shouldn’t be so stigmatizing,” says Edersheim, who is also an assistant clinical professor of psychiatry at Harvard Medical School. “Just because you can’t find your keys doesn’t mean you’re suffering from dementia. Everyone is afraid, and no one wants to be pigeonholed or characterized based on impressions.”

She encourages the legal profession to consider supporting aging judges in the same way the medical profession supports aging physicians. As an example, she says, judges could transition into policymaking or teaching roles where they can use their skills in different ways.

Shen agrees, saying the conversation too often focuses on whether judges should continue working or leave the bench entirely.

They have other options, including moving to another docket or hearing different cases.

“It starts with reframing the question to: What are the key judicial functions you need to carry out?” he says. “And what are the cognitive skills and abilities you need to carry out those functions?”

**Staying sharp**
As a former member of the ABA Commission on Lawyer Assistance Programs and former chair of its Judicial Assistance Initiative, David Shaheed has done his fair share of research on aging. He has found older adults enhance their well-being by engaging in physical and mental activity and social interactions.

Now 73, Shaheed retired from the Marion County Superior Court in Indiana in 2014 but continues to work as a senior judge to stay sharp.

“We have been talking for years about the whole concept of wellness, and it’s a slightly different take on the traditional notion that you work for 25 years, get a gold watch and then play golf or go fishing,” Shaheed says.

“From what I understand, it’s not really healthy to stop doing stuff,” he adds. “One of the things that I love about being a judge is the interaction with people, and quite honestly the mental challenge of figuring things out.”

By evaluating healthy older adults, Miller, the head of the study involving the 9th Circuit, also hopes to better understand when underlying neurodegenerative diseases begin to emerge and if they could be treated in the next few years.

He has worked closely with Hamilton and other judges but was still surprised by how many agreed to participate in the study. He views the chief judge’s leadership as the impetus.

“This has influenced massively the 9th Circuit, but it’s also beginning to influence other judges across the country,” Miller says. “Because so many of them are older, thinking about brain wellness is just absolutely critical.”

Hamilton understands that many judges don’t like to discuss cognitive decline for the same reason they don’t like to talk about advance directives. But it’s a worthwhile topic that she will continue to put before them.

“I think it’s hard for people because it does make them face their own mortality,” Hamilton says. “It’s personal. It’s sensitive. But it’s important for judges to talk about it.

“To hear that other people in your own cohort, people who are your colleagues, are having the same kinds of challenges, it inures to a more open conversation.”

Modern technology can help judges with mobility issues. “You don’t have to be in a physical space to do the job,” Senior Judge David Shaheed says.
It was a Tuesday night in late August when Kyle Rittenhouse stood outside of a vehicle dealership on the dark streets of Kenosha, Wisconsin. The armed Illinois teenager was dressed in a baggy green T-shirt that hung over his blue jeans. He had crisscrossed the straps of his Smith & Wesson AR-15-style rifle and a “medical kit” across his chest.

“People are getting injured, and our job is to protect this business, and part of my job is to also help people,” the 17-year-old told the conservative news website the Daily Caller.

The police shooting of Jacob Blake on Sunday, Aug. 23, sparked a wave of peaceful demonstrations but also rioting, arson and looting. It was the third night of protests. Rittenhouse was among a group of self-described militia members who said they were on the streets to protect demonstrators and property.

Rittenhouse was later involved in a violent confrontation that left two men dead and a third injured. Prosecutors say he first opened fire in a parking lot and shot and killed protester Joseph Rosenbaum, fracturing his pelvis, perforating his right lung and liver and grazing the right side of his forehead.
He was seen later running down a street with several protesters in pursuit. Rittenhouse fell to the ground, shooting Anthony Huber and Gaige Grosskreutz, who appeared to be holding a handgun, prosecutors say. Huber died from his wounds, and Grosskreutz was injured. Rittenhouse faces six charges, including first-degree intentional homicide, in connection with the shootings.

The scenes in Wisconsin illustrated a tension between the Second Amendment right to bear arms and the First Amendment right to peacefully protest. Moreover, they are a snapshot of the state of gun laws in America. Rittenhouse, 17, is too young to legally carry a firearm in the state. Indeed, prosecutors also charged him with underage possession of a dangerous weapon; however, under Wisconsin law, it is not illegal for adults to visibly carry firearms during protests.

Armed protesters have appeared elsewhere. In April, hundreds of demonstrators descended on the Michigan State Capitol in Lansing in defiance of stay-at-home orders to flatten the curve of COVID-19.

Masked militiamen wearing tactical vests and holding military-style weapons were among the protesters, unnerving lawmakers and prompting some to come to work that day in bulletproof vests.

The U.S. Supreme Court has yet to rule conclusively whether openly carrying a gun in public falls within the scope of the Second Amendment; however, eight circuits have split three ways on the issue. It’s a lingering question that has preoccupied lawyers on all sides of the gun debate, leaving them in a state of legal uncertainty.

This year, the Supreme Court sent strong signals that it could end the suspense—and failed to do so. Lawyers say it’s only a matter of time until the court finally tackles the matter.

First, the court took on New York State Rifle and Pistol Association Inc. v. City of New York, New York, but it dismissed the case as moot in April after city officials amended an ordinance that barred gun owners from transporting guns through the city to a second home or to shooting ranges outside of city bounds. Many observers expected the conservative bloc on the court to choose from one of the 10 gun cases on its docket. It didn’t happen. In June, the court declined to take on any of them.

Arnold & Porter attorney and gun control advocate Roberta Horton said the decision came as a surprise because only
four votes are needed to grant certiorari. Those votes seemed to be among Justices Samuel Alito, Clarence Thomas, Brett Kavanaugh and Neil M. Gorsuch.

The confirmation of Amy Coney Barrett to the court in October has raised the stakes again. Speaking shortly after the death of Justice Ruth Bader Ginsburg, Horton said Barrett was among the potential nominees who could expand gun rights. Barrett offered few clues on how she would rule in a gun case during her confirmation hearings, but as an appeals court judge, she dissented in a case upholding a ban on convicted felons possessing firearms.

“I think there’s also a higher likelihood that one or more of the cases that raise issues of the reach of the Second Amendment are going to be heard,” Horton said.

Bob Levy is chairman of the board of directors at the Cato Institute, a libertarian think tank. He was co-counsel for Dick Anthony Heller in the landmark Second Amendment case District of Columbia v. Heller and bankrolled it. He says that after the New York gun case, some of the conservative justices suggested, “We’ve been played, and we know we’ve been played, but we’re not going to be played forever.

“There are going to be a lot of cases coming up through the circuits that are likely to raise these same issues, and at one time or another, they’re going to take one of those cases.”

10 years of silence

On June 26, 2008, attorney Alan Gura, the young gun rights lawyer arguing Heller, picked up the phone and dialed David Sigale’s number. It was a call that Sigale was waiting for.

The soft-spoken Chicago lawyer with a wide smile and shock of wavy brown hair had been preparing for this day. Now, it had finally come.
Months earlier, Sigale had met Otis McDonald, the South Side gun owner who would become the lead plaintiff in a second landmark Supreme Court gun rights case, *McDonald v. City of Chicago*. At this moment, however, the attorney’s mind was on how the court would decide *Heller*.

Sigale knew if the court ruled against *Heller*, a wiry, gray-haired security guard fighting a Washington, D.C., law stopping him from possessing a handgun at home, all his work for McDonald would be for nothing. From May to June, he would sit at his computer each morning waiting for a ruling. Then, Gura’s call came.

“File it,” Gura said.

“It got filed 10 minutes later,” Sigale recalls.

*Heller* established a Second Amendment right to use a gun for self-defense in the home in the federal enclave of Washington, D.C., laying the groundwork for *McDonald*, which expanded that right to the states. Sigale remembers Otis McDonald as defying gun-toting stereotypes. The African American man in his 70s said he needed the gun for protection in his Morgan Park neighborhood. McDonald won, and the court struck down Chicago’s handgun ban.

*Heller and McDonald* shocked gun control advocates, says professor Gregory Magarian of Washington University School of Law in St. Louis, even though the public supported expanding Second Amendment rights. Lawyers on the gun control side have been in a “state of legal stasis” since, he says.

“We’re still in limbo, where we know that there’s a Second Amendment right, but we don’t know what that Second Amendment right means,” Magarian says.

As fatal police shootings and gun violence ravage Black communities, and mass shootings and active shooter drills have become ingrained in the American experience, local and state governments have countered the threat by creating more gun laws.

As gun rights groups have fought those laws in the courts, it’s become a common refrain that trial judges are flouting the court’s ruling in *Heller* and undermining Second Amendment rights.

Some of the conservative justices on the court share that opinion. Justice Thomas called the Second Amendment a “constitutional orphan.” And when the court ended 10 years of silence after *McDonald* by taking on the New York gun case, Kavanaugh—who as a federal appeals court judge said D.C.’s ban on semi-automatic rifles and its gun registration requirement are unconstitutional under *Heller*—wrote in his concurring opinion that state and federal court judges “may not be properly applying *Heller* and *McDonald*.”

A 2018 study by Duke University School of Law professor Joseph Blocher and Eric Ruben, now a professor at Southern
Methodist University’s Dedman School of Law, suggests that _Heller_ has not been as consequential as gun control advocates feared. The study found that in 60% of nearly 1,000 gun cases through Feb. 1, 2016, the courts relied on Justice Antonin Scalia’s opinion in _Heller_ when testing the limits of the Second Amendment. But the researchers also concluded that in Second Amendment claims fail more often than not. “If you focus in on public carry cases, and you focus in on cases where the parties are represented, and so it’s not pro se, and you focus on appellate decisions, you see a higher success rate,” Blocher says.

Public carry cases were among the 10 the court considered after the New York case. Lawsuits from Illinois and Massachusetts challenged bans on large-capacity magazines and military-style rifles. Another complaint opposed interstate handgun sales. In the San Francisco-based 9th U.S. Circuit Court of Appeals, there are several pending cases, including ones on background checks for purchasers of ammunition and restrictions on military-style rifles. In August, a three-judge panel overturned California’s ban on magazines that hold more than 10 rounds of ammunition.

In another closely watched open-carry case at the appeals court, Vietnam War veteran George Young challenged the denial of a permit to visibly carry a firearm. A trial court in Hawaii upheld the law, but the 9th Circuit overturned the ruling 2-1. The court heard the case en banc in September. At the time of writing, the court had not issued a decision. _Young v. Hawaii_ could be the Supreme Court’s next big Second Amendment case.

Gun rights attorney David Jensen remembers the _Wall Street Journal_ interviewing him after the 7th U.S. Circuit Court of Appeals in Chicago ruled in the concealed carry case _Moore v. Madigan_.

“What I said was that the issue isn’t going to be resolved until the Supreme Court weighs in on it,” Jensen said. “That was 7½ years ago.”

Two coalitions
Monte Frank, an attorney with Pullman & Comley and a member of the ABA House of Delegates, was living in Newtown, Connecticut, when Adam Lanza opened fire at the Sandy Hook Elementary School and killed 26 people, including 20 first-graders.

His daughter graduated from the school 18 months before the massacre. Lanza killed her third-grade teacher. “I saw firsthand the devastation that gun violence can bring to a community.”

—I MONTE FRANK
nity,” says Frank, who went on to represent Newtown against families who sued for negligence.

However, Sigale remembers listening on the phone as a woman told him how she had fled from her husband, a violent felon, who had been convicted of murder. She was living in public housing when a man attacked and raped her while her children were in the house. “The only thing that saved her was when her kid got the gun out of the safe and pointed and yelled,” Sigale says. The woman said in a 2018 lawsuit Sigale filed on her behalf that the East St. Louis Housing Authority threatened to evict her from her home if she kept a gun.

Covington & Burling lawyer Simon Frankel’s 12-year-old brother was visiting with their grandmother in Wyoming and was playing with another boy at a friend’s ranch. “One of them thought it would be fun to go get one of the parents’ guns. And they got the gun, and they thought it wasn’t loaded. But it was, and it went off, and my brother was killed.”

Whatever drives the attorneys involved in gun cases—a family tragedy, a desire to protect the vulnerable, curiosity in a new and evolving area of constitutional law—they are fighting cases that can be deeply divisive.

There is a perception that the gun lobby is louder. That could just be a function of how gun cases play out in the courts. After a series of devastating mass shootings, the perception is changing.

Kirkland & Ellis’ Paul Clement and Cooper & Kirk attorney David Thompson are among the most high-profile lawyers on the gun rights side. (Both declined requests for interviews.) They are often challenging local or state gun laws.

That means they will face local or state attorneys in court, says Joshu Harris, chair of the ABA’s Standing Committee on Gun Violence.

“As with the gun litigation, you have a core group unified by relationships with organizations and industry. On the other side, it’s a looser coalition,” Harris says.

Amy Swearer, a legal fellow in the Meese Center for Legal and Judicial Studies at the Heritage Foundation, says gun control advocates, including former New York City Mayor Michael Bloomberg and the group Brady: United Against Gun Violence, have been a part of the national conversation for years. She has noted a recent consolidation effort on the gun control side.

The Firearms Accountability Counsel Taskforce is part of the strategy to bolster the gun control movement. In 2016, shortly after the election of President Donald Trump, Brady, the Giffords Law Center to Prevent Gun Violence and the Brennan Center for Justice formed FACT by partnering with some of the country’s leading corporate law firms, including Paul Weiss, Rifkind, Wharton & Garrison; Covington & Burling; and Arnold & Porter. The coalition has litigated Second Amendment issues and looked for cracks in the Protection of Lawful Commerce in Arms Act, a law that shields gun manufacturers from liability for the actions of those who use their products. In 2005, President George W. Bush signed PLCAA into law after lobbying by the NRA.

Paul Weiss partner and FACT member H. Christopher Boehning says the legal landscape has shifted.

“It’s no longer the case where we have isolated gun prevention organizations that have modest financial support and thin staffs going up against the NRA or gun manufacturers and their hired lawyers,” Boehning says.

During the 2018 midterm election, gun control groups outspent the NRA, and gun control advocates are gaining as the NRA is in turmoil. New York Attorney General Letitia James...
sued to dissolve the NRA in August, accusing its leadership of looting the group to fund their lavish lifestyles. James said NRA CEO Wayne LaPierre used the group’s funds for extravagant trips to the Bahamas and to enrich friends and family members. Lawyers who represented the gun group have been fired, including Charles Cooper of Cooper & Kirk. Meanwhile, LaPierre batted off a leadership challenge that revealed bitter infighting. The NRA is still a powerful force in Washington. After the lawsuit was filed, Trump defended the group. “That’s a very terrible thing that just happened,” he said, suggesting the group leave New York and move to Texas.

Swearer expects to see more grassroots activism at the state and local levels and anticipates other groups will come to the fore. “It’s not just the NRA anymore,” Swearer says.

**Space in the middle**

Darin Scheer is a general commercial litigation attorney in rural Casper, Wyoming, where he lives on a small cattle farm with his wife. As a volunteer firefighter, he has responded to suicides and accidental shootings.

He is an ABA delegate for his state. At the 2020 midyear meeting in Austin, Texas, he objected to a resolution in favor of stricter rules for gun permits.

“I don’t think that the ABA should be in the business of recommending one-size-fits-all, top-down requirements for an issue like this that is constitutional,” Scheer said before the House passed the resolution.

What’s often lost in the decades-long fight over gun rights and laws is that Americans’ relationship to guns differs depending on where they live, Scheer says. He says people in his community do not buy guns just for self-defense. There is a tradition of fathers passing rifles down to their sons and teaching them how to hunt. Scheer says it sometimes appears to gun owners that constitutional rights are trampled because of the “irresponsible behavior of the few.”

“That irresponsible use leads to horrible tragedy. I’m not blind to that, and that’s wrenching. And I think anybody that ignores that side of the debate is being close-minded as well,” Scheer says.

Is there space in the middle to meet? J. Adam Skaggs, a special adviser to the ABA’s Standing Committee on Gun Violence and chief counsel and policy director at the Giffords Law Center to Prevent Gun Violence, says it is hard to find common ground when the gun rights side is pushing “an extremist agenda in the courts.” On the other hand, he says gun control advocates have much in common with Americans who support reasonable regulations.

“I think the central argument is that like all other rights, the Second Amendment is not unlimited and has always coexisted with strong regulations and laws,” Skaggs says. “That’s no different today than it was at any other point in history.”

In 2019, the Pew Research Center found that 60% of Americans supported more restrictions, while 28% were happy with the status quo; only 11% thought the laws should be less strict. Regardless of party affiliation, majorities supported measures preventing people with mental illness from obtaining a gun, running background checks at gun shows and before private sales, prohibiting high-capacity magazines and banning military-style weapons.

Even Levy, who turned the tide for the gun rights movement when he won *Heller*, says the Second Amendment is not an “absolute right.” He would support background checks on the mentally ill and object to bans of military-style weapons “based on lethality,” bans on magazines of 20 to 30 rounds, and some background checks.

“I don’t think any of this would be very effective, but I think that we ought to find out,” Levy says.

Mass shootings, “which as horrible as they are” are “insignificant in terms of the overall level of gun violence,” he adds. He blames the war on drugs for worsening gun violence within cities, calling it an “unmitigated disaster.”

“If you legalize drugs and get rid of that criminal incentive, I think you’d have a huge effect on inner-city gun violence,” Levy says.

Black Americans are 10 times more likely to be murdered with a firearm, according to the Giffords Law Center. More than half of gun homicide victims are Black men, even though they make up less than 7% of the population. In cities, gun violence often is concentrated in neighborhoods segregated by race. In Boston, according to the Giffords Law Center, 53% of gun violence happens in parts of the city that make up less than 3% of its streets and intersections. Blocher from Duke University School of Law says lawyers who are defending gun laws should also do more “to articulate the government’s interest in regulating guns,” and the wider impact on society.

He says that in constitutional cases, judges will ask what the government’s interest is and how a gun law can serve that interest. Blocher says that preventing deaths or injuries from gun violence is the “highest interest,” but it can be hard to produce tangible evidence that a gun law will save lives.

“If you think about the government’s interest is a little more broadly or creatively, like preserving the sanctity of public spaces and people’s ability to learn and assemble peaceably and vote, or for that matter [allowing] legislators in Michigan to do their jobs without fear, then you can understand gun laws do a little more,” Blocher says. “They don’t just keep people safe. They keep them from being intimidated.”
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» Michael L. McCluggage
» William G. Paul
» William Phelan
» Richard A. Soden
» Ronald J. Tabak
» Mary T. Torres
» Frank Valadez
» Michael J. Van Zandt

$1,000-$2,499
» Anonymous (4)
» Martha C. Adams
» Warren E. Agin
» Mark D. Agrast and David M. Hollis
» Gerald Aksen
» Mark H. Alcott
» Duncan E. Alford
» Dennis W. Archer
» Ruthe Catolico Ashley
» T. Maxfield Bahner
» The Hon. Rosemary Barkett
» Arlena M. Barnes
» Helaine M. Barnett
» Martha W. Barnett
» Hilarie F. Bass
» Michelle and Darrell Behnke
» Prudence Beidler Carr
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» Pamela A. Bresnahan
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» Kenneth Chin
» Michael A. Clark
» Mark D. Colley
» Holly O’Grady Cook
» N. Lee Cooper
» Karol Corbin Walker
» Barry A. Currier
» Eamon and Kay Daly
» Marvin S.C. Dang
» Howard A. Davidson
» Racquelle de la Rocha

$500-$999
» The Hon. Rebecca J. Westerfield
» Angel R. Zimmerman
» Kathleen L. DeBruhl
» Stacie and Michael Devitt
» Michelle and Bob Diffenderfer
» James Dimos (Dec.)
» Julie A. Divola
» Susan and Paul Drake
» M. Douglas Dunn
» Carmel B. Dyer
» The Hon. Lee S. Edmon and The Hon. Richard J. Burdge
» Keith Fogg
» Mary Foster
» Lawrence J. Fox
» Koji F. Fukumura
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» David Lansner and Carolyn Kubitschek
» Katherine Larkin-Wong and Jonathon Wong
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» Steven B. Lesser
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» Lora J. Livingstone
» Orlando Lucero
» Michael P. Lynn
» James R. Malone, Jr.
» Ronald L. Marmer
» Jason C. Marsili
» Daniel Marson
» Lorelie S. Masters
$50,000 OR MORE

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- AARP
- AIDS Law Project of Pennsylvania
- The Annie Casey Foundation
- Bank of America Charitable Foundation
- Carnegie Corporation
- Casey Family Programs
- Center for Children and Family Futures
- Diakson-SWANN, LLC
- Houston Endowment Inc.
- James Bell Associates, Inc.
- Jones Day Foundation
- Judicial Service Commission of Republic of the Maldives
- Justice in Aging
- Kirkland & Ellis LLP
- Northwestern Pritzker School of Law
- Oakwood Foundation Charitable Trust
- Oregon Office of Public Defense Services
- The Pew Charitable Trusts
- Price Philanthropies
- Prince Sultan University
- Robert Wood Johnson Foundation
- Sarah Scaife Foundation
- Charles and Lynn Schusterman Family Foundation
- Texas Bar Foundation
- US Agency for Int'l Development/Freedom House
- US Agency for Int'l Development/Pact Building Local Promise
- US Department of Homeland Security
- US Department of Justice/Vera Institute of Justice
- US Department of State
- US Department of State/National Democratic Institute
- US Department of Transportation/National Highway & Traffic Safety
- US Department of State/Strategic Capacity Group
- Zero to Three

$25,000-$49,999

- Anonymous
- American Arbitration Association, Inc.
- DLA Piper LLP
- Jewish Family Services of San Diego
- Joseph H. Flom Foundation
- Landry Family Foundation
- Legal Aid Society of Greater Cincinnati
- NEO Philanthropy-Refugee Action Fund
- Redlich Horwitz Foundation
- San Diego Women's Foundation
- Share Our Strength
- Sidley Austin Foundation
- The Tan Family Education Foundation
- Welfare Research Inc.
- Wells Fargo Foundation
- The World Justice Project

$10,000-$24,999

- ABA Section of Business Law
- Accenture, LLP
- Albert & Elaine Borchard Foundation Inc.
- American Arbitration Association - ICDR Foundation
- Arnold & Porter Kaye Scholer LLP
- AT&T Inc.
- BAE Systems Shared Services Inc.
- Baker & McKenzie LLP
- Baker Donelson Bearman Caldwell & Berkowitz, PC
- The California Wellness Foundation
- Cerberus Capital Management: Legal and Compliance Department
- Cooley LLP
- Cravath Swaine & Moore LLP
- Crowell & Moring LLP
- Faegre Drinker Biddle & Reath LLP
- FedEx Ground Package System, Inc.
- Galena-Yorktown Foundation
- Generations United
- Goodwin Procter LLP
- Haynes and Boone, LLP
- Hispanics in Philanthropy
- Hogan Lovells US LLP
- Holland & Knight LLP
- Huntington National Bank
- International Paper Company
- Jenner & Block LLP
- K&L Gates LLP
- Kirkland & Ellis Foundation
- Latham & Watkins LLP
- Lief Cabraser Heimann & Bernstein LLP
- Lincoln Heritage Life Insurance Company
- Littler Mendelson P.C.
- Locke Lord LLP
- Morgan, Lewis & Bockius LLP
- The Morrison & Foerster Foundation
- Munger Tolles & Olson Foundation
- North Dakota Supreme Court
- Outten & Golden LLP
- Pilot Travel Centers LLC
- Refugee and Immigrant Center for Education and Legal Services
- Seldin/Haring-Smith Foundation
- Silicon Valley Community Foundation
- State Farm Insurance Companies
- Troutman Pepper Hamilton Sanders LLP
- Verizon Communications Inc.
- Walmart, Inc.
- WilmerHale
- Winston & Strawn
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Laura Farber’s parents always told her that education is more than something received in a classroom. “You need to be integrated into your community, and you learn both by giving and by listening and by participating and engaging,” Farber says. “That has always driven me.”

Farber, a partner in the litigation and employment practices at Hahn & Hahn in Pasadena, California, can’t imagine her world without community service. She says it has shaped her life, making her both a well-rounded lawyer and a more fulfilled person.

Early in her career, she was encouraged by her firm to join the Pasadena Tournament of Roses Association, the nonprofit organization that produces the Rose Parade and Rose Bowl game on New Year’s Day each year.

After more than 25 years of service, Farber became the first Latina and third woman to serve as president of the Tournament of Roses. She selected the theme, “The Power of Hope,” for the 2020 celebration, which she says was based on her own life story but still resonates amid the COVID-19 pandemic and divisiveness in the country.

Farber, who also became the co-chair of the ABA Coordinating Group on Practice Forward in May, stays busy and says the key to success is giving her all. “If I say I’m going to do something, I’m going to do it and do it the best that I can,” she says. “So I treat my bar work and my tournament work and treat my client work all the same.”

They are all important to me, and I treat them with the respect they deserve.”

Path to Pasadena
Farber was born in Buenos Aires, Argentina. Her parents were students at the city’s university before the Dirty War, a campaign waged by Argentina’s military dictatorship against supposed left-wing opponents that started in the 1970s.

One day, her father attended a gathering on campus where he saw military forces spray students with tear gas and beat them with billy clubs.

“He said that was the day they decided as soon as they could, they were going to leave everyone and everything they knew to start a new life,” Farber says.

A professor at the University of Buenos Aires connected her parents to a professor at the University of California.
at Santa Barbara, and they moved to the Golden State on student visas. They eventually settled in Monterey Park, a city just east of Los Angeles.

Farber graduated from the University of California at Los Angeles with a bachelor’s degree in political science in 1987 and then attended the Georgetown University Law Center. She returned home after law school and started as an associate at Dewey Ballantine in Los Angeles.

After two years, she decided she needed more time to volunteer in her community and with the bar and to raise a family. She talked to her mentor in the Women Lawyers Association of Los Angeles, who had previously worked with the hiring partner at Hahn & Hahn, a smaller firm in Pasadena.

That hiring partner was R. Scott Jenkins. He called Farber and invited her to interview.

“Frankly, the rest is history,” he says. “She was a perfect fit for us.”

Jenkins remembers telling Farber that as an attorney with Hahn & Hahn, she should consider joining the Tournament of Roses Association. He was a member and later became its president.

“There are about 1,000 volunteers who put on the parade and the game, and I told her leaders in our community get involved,” he says.

On parade

Farber attended the Rose Parade with her husband, Tómas Lopez, and children Christopher and Jessica.

Laura Farber attended the 2020 Rose Parade with her husband, Tómas Lopez, and children Christopher and Jessica.

The 2020 Rose Parade was canceled because of COVID-19, but the Rose Bowl game was still scheduled for Jan. 1 at press time. Farber, now the immediate-past president of the Pasadena Tournament of Roses Association, is also the chair of the Rose Bowl Management Committee, which determines ticket prices and other game policies.

“That’s a five-year gig, and I’m really excited about it because I love college football,” she says.

Moving the practice forward

Farber has been a member of the ABA for 30 years. She joined and eventually chaired the Young Lawyers Division from 2001-02. She later served as chair of the Commission on Youth at Risk; the Solo, Small Firm and General Practice Division; and the Latin America and Caribbean Law Initiative Council.

Along with her many other leadership roles, she has been a member of the Board of Governors and served two terms on ABA Journal Board of Editors from 2006-12. She currently is serving as a California state delegate to the ABA House of Delegates.

Linda Klein, a former ABA president and senior managing shareholder at Baker Donelson in Atlanta, has worked often with Farber through the years. She describes her enthusiasm as “infectious” and commends her for finding ways to “make everyone that she touches better.”

“One thing that we often don’t see in bar service is the whole person,” Klein says. “But you meet Laura, and you do see the whole person. Her personality, her enthusiasm, her celebration of others, it just shines through.”

Farber joined the ABA Coordinating Group on Practice Forward because she wanted to help the ABA focus on what members need during this uncertain time.

She co-chairs the group, which complements the Task Force on Legal Needs Arising Out of the 2020 Pandemic, with former House of Delegates Chair William Bay.

The steering committee of the Coordinating Group on Practice Forward began meeting and sent out its first survey to members in September. Farber says it included questions about practicing law during the pandemic and the impact of the pandemic on diversity, racial justice and inclusion.

The group also launched a website that offers members resources in the areas of law practice management, the practice of law and professional development.

Farber says the survey results will help determine what other content, policy, thought leadership and resources are needed.

“I want the ABA to lead in this space, and I want to be part of that,” Farber says. “This is something that is going to mean something to so many people. It can change their lives, and it can impact the profession in a huge way.”
Our ‘Profession Is Changing’

A Q&A with ABA President Patricia Lee Refo

BY AMANDA ROBERT

Patricia Lee Refo became president of the ABA in August at the close of the first virtual annual meeting in the association’s history.

Refo is a partner at Snell & Wilmer in Phoenix and has served as chair of the House of Delegates and Section of Litigation. She also chaired the Standing Committee on Membership, the American Jury Project and ABA Day in Washington, D.C., and she was a member of the Commission on Civic Education and the Separation of Powers.

She spoke in September with the ABA Journal about plans for her term as president.

It’s been just about a month since you became the ABA’s president. What are your primary objectives as you get started?

We’re still smack in the middle of this pandemic, and so the primary focus right now is helping the profession and the justice system manage our way through this public health crisis. In addition, we are laser-focused on the other pandemic that our nation is experiencing, which is a health issue that is attacking our nation’s soul, that is around questions of racial equity and racial justice. We have a number of new initiatives designed to address racial equity in our criminal and civil justice system.

How do you hope to help the ABA combat these two pandemics?

One of the advantages the ABA has is the breadth and depth of our expertise and the helping hands we can put to work to solve a problem.

We are the largest voluntary association of lawyers in the world. When you put that organization to work, it can make important, meaningful change.

We have asked every single entity in the American Bar Association to move anti-racism and racial equity to the very top of their agenda for this year.

And again, the scope and breadth of the work that is being done is, candidly, very difficult to summarize. It ranges from continuing legal education programming to webinars, to programming that is available to the general public, to policies and procedures around policing and police practices, to helping our court systems address racial equity and racial justice.

The legal profession itself looks a lot different than it did a year ago. What do you see as the most significant changes, and do you expect any to remain in place as we move into the new normal?

I expect a number of changes to the profession will stay with us.

We have learned that lawyers can do their work without being physically together at a downtown high-rise office building.

We have learned that lawyers and judges can effectively conduct much of the business of the court without being together in person. That’s one example where the long-term implications may be very positive for clients.

So if a lawyer and a client are in a remote part of the state, for example, and the appellate court is not easy to get to, a remote hearing saves a lot of time and energy and potentially money for the client. It becomes an access-to-justice issue as well by reducing legal costs.

At the same time, we have to continue our work to be sure that these changes do not disproportionately impact our underserved communities. We have to be certain that as we make changes to our justice system, they serve all of the public.

For example, a remote hearing is only useful if you have the means to connect to that remote hearing.

If you live in a place that doesn’t have broadband, that may be a serious problem.
The ABA has made increasing membership and revenue a priority in recent years. How do you plan to help the association address these issues, particularly now, given our country’s changes and challenges?

For lawyers and judges, the American Bar Association is more important and more relevant today than maybe it’s ever been, precisely because our world is changing and in flux. We just finished last year the most significant revamp of our membership model in a very long time, and the benefits that we offer now are even more significant and even more useful to lawyers in every possible practice setting. I personally intend to be an evangelist for ABA membership because I know the difference that it has made in my career.

I joined the American Bar Association as a young lawyer because the senior partner in my law firm told me that’s what you did if you were a lawyer. I never looked back. I started at the lowest rung of the ladder and kept saying yes to new assignments. Pretty soon, I was a committee chair and went on from there. It has over the course of my career not only made me a better lawyer, but it has introduced me to a network of people who I would never have had the chance to know and work with professionally. And I met my husband [Don Bivens] at an ABA meeting, so I really know how the ABA can change your life.

How did you know you wanted to be president of the ABA?

Being president of the ABA is the most extraordinary opportunity to serve the legal profession that I can imagine. It’s entirely a service job, but it’s an opportunity to help make change, particularly in this moment when so much about our future as a profession is changing. The good news, as I find myself grounded here in Phoenix, is that I did not pursue this job for all the travel opportunities. Ordinarily, the American Bar Association president is on the road literally hundreds of nights a year doing the business of the ABA. I, along with my predecessor Judy Perry Martinez, am learning how to do it from my dining room.

Looking back, what was most memorable from your year as president-elect?

We started the year in Harlingen, Texas, with the ABA team at ProBAR, who spend all their time, all their days working with persons who are detained on the U.S.-Mexico border. That was an eye-opening and extraordinary experience for me, to have the opportunity to work with persons being held in detention centers and to work side-by-side with the extraordinary lawyers at ProBAR.

I would say a second extraordinary experience for me as president-elect was the opportunity to visit with our colleagues in the organized bar in Australia. That was right before the pandemic. I literally got home from Australia on Sunday, and my law firm shut down on Friday in March. I was in Australia for about a week attending the Australian Bar Association annual meeting and meeting with bar leaders and law school deans ... It was a remarkable opportunity to learn from our colleagues in Australia and to be reminded how much we have in common.

What are some of your other highlights with the association?

Serving as chair of the House of Delegates was among the most fun jobs I’ll ever have. It is an exciting chance to preside over a deliberative body that is busy at work on some of the major issues that affect our legal profession. That was a terrific, exciting and sometimes harrowing—when you’re standing up there at that podium—experience. I had the chance to serve as the chair of the pro bono committee for the Section of Litigation. That, too, was a deeply meaningful opportunity to work on enhancing our profession’s pro bono service to our underserved communities. I went on from there to eventually serve as chair of the Section of Litigation, which was at the time the largest constituent part of the ABA.

What else would you like to accomplish during the next year?

I would like to see an increase in membership. I would like to see the ABA continue to expand its role in access-to-justice issues. One of the things that the ABA can do that not many others can in our space is convene conversations and opportunities to exchange ideas and dialogue. As you know, there are many states right now deploying changes to the rules governing the practice of law in an effort to try to improve access to justice. Arizona, my state, is certainly one of those. I hope the American Bar Association will be part of studying the results of those changes as they are deployed so that we can answer the question of which of these changes actually improved access to justice. Our Center for Innovation will be looking at precisely that issue in the coming year.

There will also be significant work done around changes in legal education because law schools are changing, just as law practice is changing. And the folks at the ABA who are involved in the accreditation work will be deeply involved in discussing and addressing those changes.

Honestly, that is the kind of question that I could talk for a couple hours about, especially when you have [more than] 3,500 entities.

Have you been surprised by anything yet?

The breadth of the issues that come across the desk of the ABA president is extraordinary. I guess I knew that in the abstract, but it’s different when you’re the one at the desk. It’s challenging every day. Whether it’s an international issue or something arising in a particular state or a member who flags for you a particular concern, it is a tremendously broad portfolio of issues that you get to touch.

That is a statement about the breadth of the American Bar Association and the vitality of the ABA—that we have so many things that people inside this association are working on any given day. It’s never dull.
ABA Notices

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

2021 REGULAR STATE DELEGATE ELECTION

Pursuant to Section 6.3(a) of the ABA’s constitution, 17 states will elect state delegates for three-year terms beginning at the adjournment of the 2021 annual meeting. The deadline for nomination petitions is Dec. 8. Go to ambar.org/2021-statedel to find the states conducting elections as well as rules and procedures.

2021 BOARD OF GOVERNORS ELECTION

The secretary hereby gives notice that at the 2021 midyear meeting, the nominating committee will announce nominations for district and at-large positions on the ABA Board of Governors for three-year terms beginning at the conclusion of the 2021 annual meeting. The deadline for nomination petitions is Jan. 12. To find a list of all of the district and at-large positions conducting elections as well as all of the election rules and procedures, please visit ambar.org/2021-BOGdel.

AMENDMENTS TO THE CONSTITUTION AND BYLAWS

The constitution and bylaws of the American Bar Association may be amended only at the ABA Annual Meeting upon action of the House of Delegates. The next annual meeting of the House of Delegates will be Aug. 9-10 in Toronto. Proposals to amend either the constitution or bylaws may be submitted by any ABA member. It is preferable that proposals be submitted in the form of a memorandum that details the purpose and effect of the proposal. To be considered at the 2021 annual meeting, a proposed amendment must be received by the policy and planning division at the American Bar Association on or before March 5. Go to ambar.org/cbamendments for the full text of this notice.

—Pauline A. Weaver, ABA Secretary

ABA Events

SAVE THE DATE

Winter 2020-21

For the latest info, go to americanbar.org and click “Events” or “CLE.”

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dec. 3</td>
<td>Artificial Intelligence and Facial Recognition Technology: Part 1</td>
</tr>
<tr>
<td></td>
<td>Judicial Division • CLE • Webinar</td>
</tr>
<tr>
<td>Dec. 10</td>
<td>Data &amp; Privacy: Emerging Issues During COVID-19</td>
</tr>
<tr>
<td></td>
<td>Government and Public Sector Lawyers Division, Standing Committee on</td>
</tr>
<tr>
<td></td>
<td>Law and National Security • CLE • Webinar</td>
</tr>
<tr>
<td></td>
<td>Section of Civil Rights and Social Justice, Center for Human Rights,</td>
</tr>
<tr>
<td></td>
<td>Coalition on Racial and Ethnic Justice, Commission on Immigration,</td>
</tr>
<tr>
<td></td>
<td>Standing Committee on Gun Violence • Webinar</td>
</tr>
<tr>
<td>Feb. 17-22</td>
<td>2021 ABA Virtual Midyear Meeting</td>
</tr>
<tr>
<td></td>
<td>American Bar Association</td>
</tr>
</tbody>
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As we enter 2021, monumental challenges remain. The pandemic persists, and its devastating economic impact continues to overwhelm businesses and individuals across the country, especially minorities and the poor. Small businesses are permanently closing, unable to survive months of closures. People are experiencing health care, housing and financial problems unseen in decades. Schools at all levels are struggling to educate students under extraordinary circumstances. And issues of racial injustice remain in communities around the country.

The legislative agenda for this past year has essentially been placed on hold, so there is a plethora of unfinished business confronting the soon-to-be-organized new Congress: criminal justice, immigration, election security, gun violence, infrastructure, appropriations, health care, national security and more.

Congressional action in the upcoming 117th Congress will have long-lasting consequences for lawyers, our clients and the nation. Where do we start? How does the ABA decide what issues should take priority with our governmental affairs advocacy efforts? The short answer: with your input.

Use your voice

The Legislative Priorities Survey from the ABA Governmental Affairs Office is your opportunity to offer your voice on what issues in the new Congress are most important to you.

At the end of each Congress, we survey the entire ABA membership by email to learn what policy issues the ABA should focus on as the voice of the legal profession.

The survey takes less than 10 minutes to complete, and the input provided is indispensable to informing the ABA’s advocacy priorities, especially during these fraught times.

The survey results will be presented to the Board of Governors at the ABA Midyear Meeting in February. The board will consider your input, along with the following criteria to determine whether an issue should be made a priority:

- Breadth and strength of the ABA interest.
- Importance to the practice of law.
- Public perception of the profession.
- Opportunity for impact.
- Potential for achievement.
- Timeliness of the issue.
- Expertise of lawyers on the issue.
- Importance to society.
- Importance to the administration of justice.

Once the board approves the association’s legislative priorities for the upcoming Congress, GAO will publish the information on its website. These priorities will guide ABA leadership, the GAO’s team of lobbyists and our grassroots outreach supporting our advocacy efforts for the next two years. GAO launched the Legislative Priorities Survey for the 117th Congress right after the 2020 elections results were known. Members received emails asking for input, but any member of the legal profession can also access the survey here: bit.ly/3n2QD2s. Or point your cellphone camera at the QR code below. We are keeping the survey open until Dec. 31.

The ABA values its members’ input and encourages everyone to participate. This feedback plays a critical role in setting our legislative agenda for the new Congress—a Congress faced with mountains of challenges and unfinished business. Respond to the survey, and volunteer to participate in our advocacy efforts. We need your help to ensure the voice of the American legal profession is heard on Capitol Hill.

This report is written by the ABA’s Governmental Affairs Office and discusses advocacy efforts by the ABA.
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(Not the) Same Old Story: Invisible Reasons for Rejecting Invisible Wounds
Jessica Lynn Wherry
Hendiadys in the Language of the Law:
What Part of “and” Don’t you Understand?
Elizabeth Fajans and Mary R. Falk

INDEX TO ADVERTISERS

<table>
<thead>
<tr>
<th>ADVERTISER</th>
<th>WEB ADDRESS</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABA ADVANTAGE</td>
<td>ambar.org/advantage</td>
<td>52-53</td>
</tr>
<tr>
<td>ABA COMMISSION ON WOMEN</td>
<td>ambar.org/worldforum</td>
<td>IBC</td>
</tr>
<tr>
<td>ABA FUND FOR JUSTICE AND EDUCATION</td>
<td>ambar.org/fje</td>
<td>70-71</td>
</tr>
<tr>
<td>ABA MARKETING</td>
<td>ambar.org/careerforward</td>
<td>7</td>
</tr>
<tr>
<td>ABA TECHNOLOGY SUPPLEMENT</td>
<td></td>
<td>24-36</td>
</tr>
<tr>
<td>AMERICAN BAR ENDOWMENT</td>
<td>abendowment.org/abe-news</td>
<td>37</td>
</tr>
<tr>
<td>CLIO</td>
<td>clio.com/ltr</td>
<td>BC</td>
</tr>
<tr>
<td>CLIO SPONSORED COLUMN</td>
<td>clio.com</td>
<td>21</td>
</tr>
<tr>
<td>LAWPAY</td>
<td>lawpay.com/aba</td>
<td>5</td>
</tr>
<tr>
<td>LEGAL TALK NETWORK</td>
<td>legaltalknetwork.com</td>
<td>IFC</td>
</tr>
<tr>
<td>SOCIETY OF CORPORATE COMPLIANCE AND ETHICS</td>
<td>corporatecompliance.org/membership</td>
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<table>
<thead>
<tr>
<th>ADVERTISER</th>
<th>WEB ADDRESS</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
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<td>ABA ADVANTAGE</td>
<td>ambar.org/advantage</td>
<td>52-53</td>
</tr>
<tr>
<td>ABA COMMISSION ON WOMEN</td>
<td>ambar.org/worldforum</td>
<td>IBC</td>
</tr>
<tr>
<td>ABA FUND FOR JUSTICE AND EDUCATION</td>
<td>ambar.org/fje</td>
<td>70-71</td>
</tr>
<tr>
<td>ABA MARKETING</td>
<td>ambar.org/careerforward</td>
<td>7</td>
</tr>
<tr>
<td>ABA TECHNOLOGY SUPPLEMENT</td>
<td></td>
<td>24-36</td>
</tr>
<tr>
<td>AMERICAN BAR ENDOWMENT</td>
<td>abendowment.org/abe-news</td>
<td>37</td>
</tr>
<tr>
<td>CLIO</td>
<td>clio.com/ltr</td>
<td>BC</td>
</tr>
<tr>
<td>CLIO SPONSORED COLUMN</td>
<td>clio.com</td>
<td>21</td>
</tr>
<tr>
<td>LAWPAY</td>
<td>lawpay.com/aba</td>
<td>5</td>
</tr>
<tr>
<td>LEGAL TALK NETWORK</td>
<td>legaltalknetwork.com</td>
<td>IFC</td>
</tr>
<tr>
<td>SOCIETY OF CORPORATE COMPLIANCE AND ETHICS</td>
<td>corporatecompliance.org/membership</td>
<td>3</td>
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</tbody>
</table>
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JOHN O’BRIEN
Editor and Publisher
Wright Brothers Awarded Patent on Flying Machine

BY ALLEN PUSEY

On Dec. 17, 1903, beginning at 10:35 a.m., the Wright brothers, Orville and Wilbur, piloted four motorized flights ranging from 120 to 852 feet across a stretch of beach near the town of Kitty Hawk, North Carolina. Reports of their accomplishment raised only mild public interest, but the brothers seemed not to mind. They returned to their native Dayton, Ohio, continued their experiments there without fanfare—100 flights in 1904, Wilbur later testified—and worked toward securing patents.

In Europe, the news was received with equal parts enthusiasm and skepticism. Octave Chanute, a retired civil engineer and aviation historian who had occasionally advised the Wrights, used a lecture tour across Europe to recount the Kitty Hawk flights and their pioneering nature.

By the end of 1904, with patents in Britain and France and pending in Germany, the Wrights barnstormed Europe. They sold licenses to manufacturing firms, lobbied governments to purchase planes and arranged fee structures for aviation exhibitions.

It wasn’t until 1906, after several rejections, that the Wrights were awarded a U.S. patent for their controlled heavier-than-air “flying machine.” Patent No. 821,393, issued May 22, 1906, outlined 18 innovations to control pitch, yaw and roll—hitherto obstacles to propeller-driven flight.

But even with patented technology, the U.S. reception for the Wrights and their invention remained underwhelming. Over the next two years, investors, government officials and even the press showed only nominal interest.

Enter Glenn Curtiss, motorsports racer and manufacturer of motorcycle engines. In 1907, the Aerial Experiment Association, an organization formed by Alexander Graham Bell, recruited Curtiss to help pursue a cash prize for extended flight that was offered by Scientific American. In an aircraft built with the Wrights’ consent, Curtiss won the prize. But in the process, he decided to enter the business of building flying machines himself.

In March 1909, Curtiss formed the Herring-Curtiss Company with Augustus Herring, an aviation enthusiast who claimed to hold aeronautic patents that predated the Wrights’. But by August 1909, Herring-Curtiss was facing a patent infringement lawsuit filed by the Wright Co. in a New York federal court.

In defending himself, Curtiss directly challenged the Wright brothers’ patent, arguing their breakthrough had depended on the earlier work of others—work later described by a Wright expert witness as “a scrap-pile of failures.” Judge John Hazel wasn’t buying it. In January 1910, he granted an injunction against Herring-Curtiss. Although the injunction was lifted a few months later, the appellate opinion appeared to endorse Hazel’s initial conclusion: that the Wright brothers’ flying machine was a “pioneering” invention.

Despite their early win, their aggressive use of litigation tainted the Wrights’ reputation. Allies such as Chanute, disappointed that their patent wasn’t placed in the public domain, became openly critical. In January 1910, Wilbur wrote Chanute that “jealousy and envy” had precluded monetization of their invention: “You apparently concede to us no right to compensation for a solution of a problem ages old except as granted to persons who had no part in the invention.”

For three years, Curtiss and the Wrights slogged through the trial court before Judge Hazel reiterated his original judgment. The Wrights, he concluded, were “pioneer inventors in the aeroplane art.” And when the New York City-based 2nd U.S. Circuit Court of Appeals affirmed Hazel’s judgment on Jan. 13, 1914, the Wrights’ invention became a matter of fact.

The litigation, however, had taken a toll on both sides. Wilbur died of typhoid in 1912 at age 45, his health undermined by the stress. Curtiss discovered Herring had lied about holding prior patents. And on the cusp of war, European advances in aviation all but ignored the Wright patent interest.

In 1917, as the U.S. entered World War I, Congress pressured the Wright and Curtiss companies to join the Manufacturer’s Aircraft Association as part of an aviation patent pool that endured long after the war. By then, Orville had sold his interest in the Wright Co., and Curtiss had continued manufacturing as the Curtiss Aeroplane and Motor Co. In 1929, the two companies merged as the Curtiss-Wright Corp.
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