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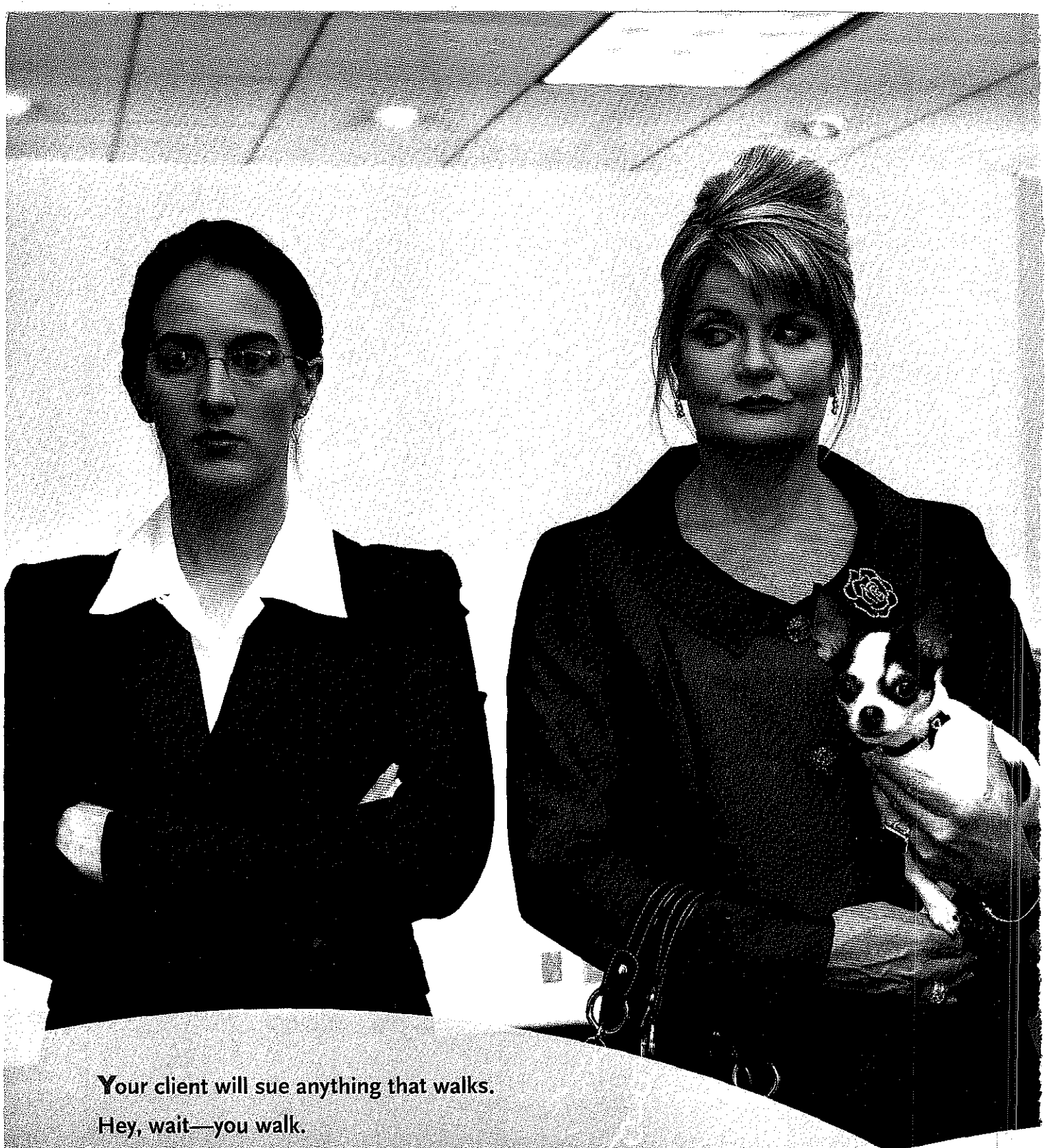

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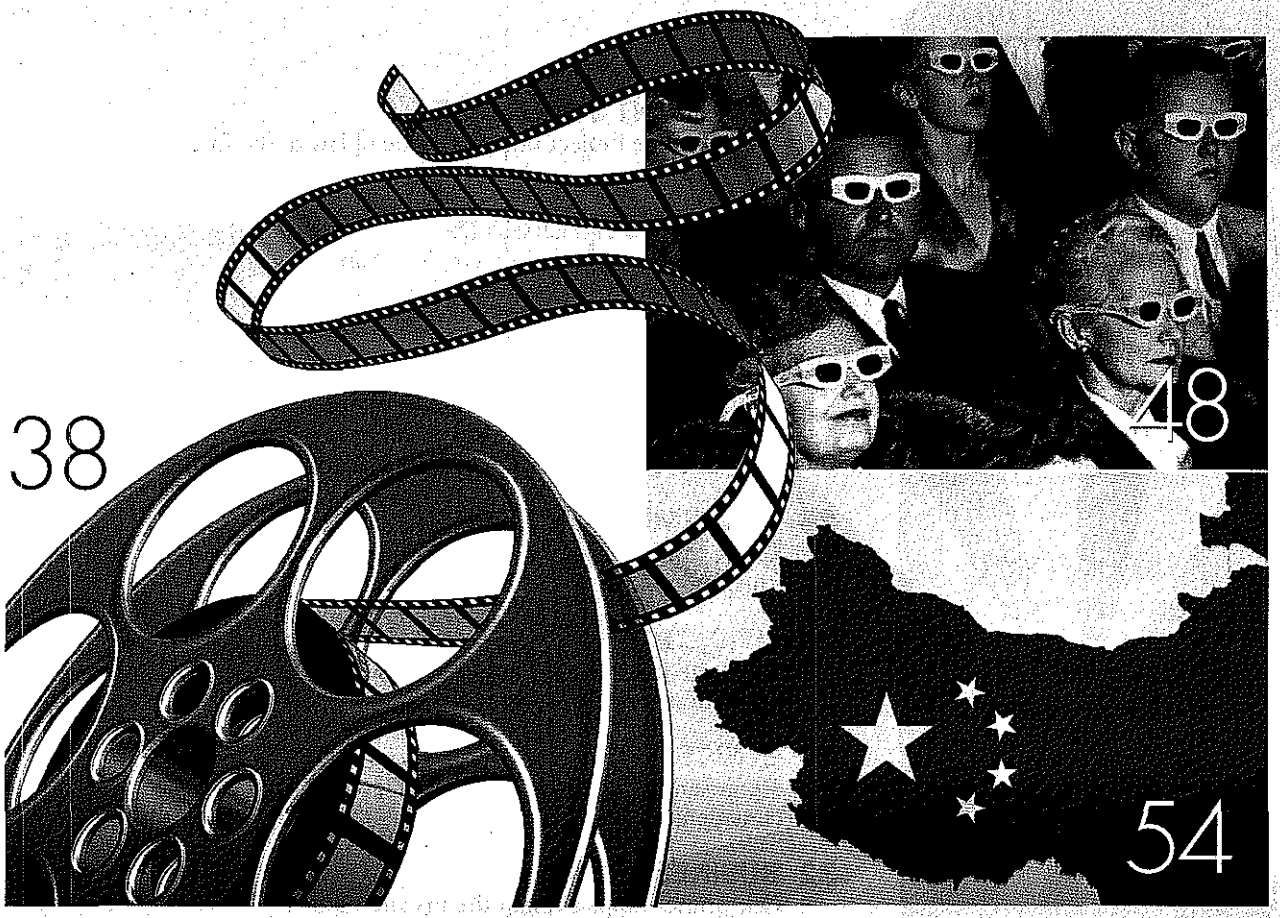

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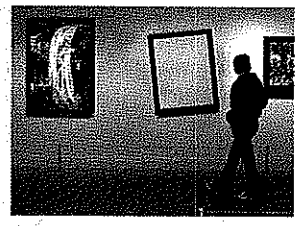

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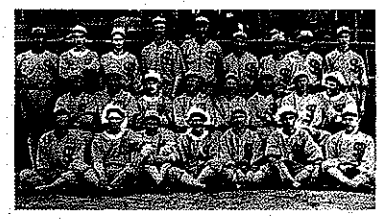



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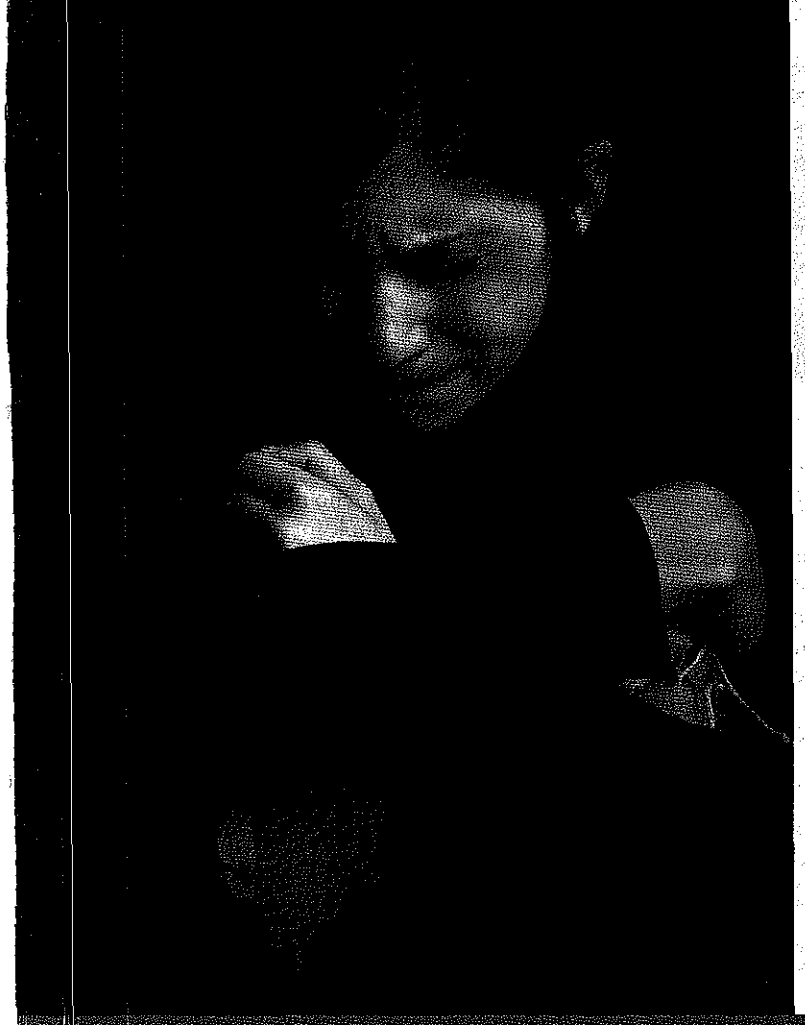

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QUALMS OVER THE COVER

YOUR JUNE COVER PHOTO IS, TO SAY the least, in very poor taste. No matter how one feels about the action (or inaction) of the other branches of the federal government regarding appointment of federal judges, your use of the milk carton to make any point does a disservice to those who suffer through situations where their relatives' or loved ones' pictures have ended up on milk cartons because they are missing. Shame on you for doing so, whether to make a point or as a weak attempt at humor.

Brad Rayle
Bloomfield Hills, Mich.



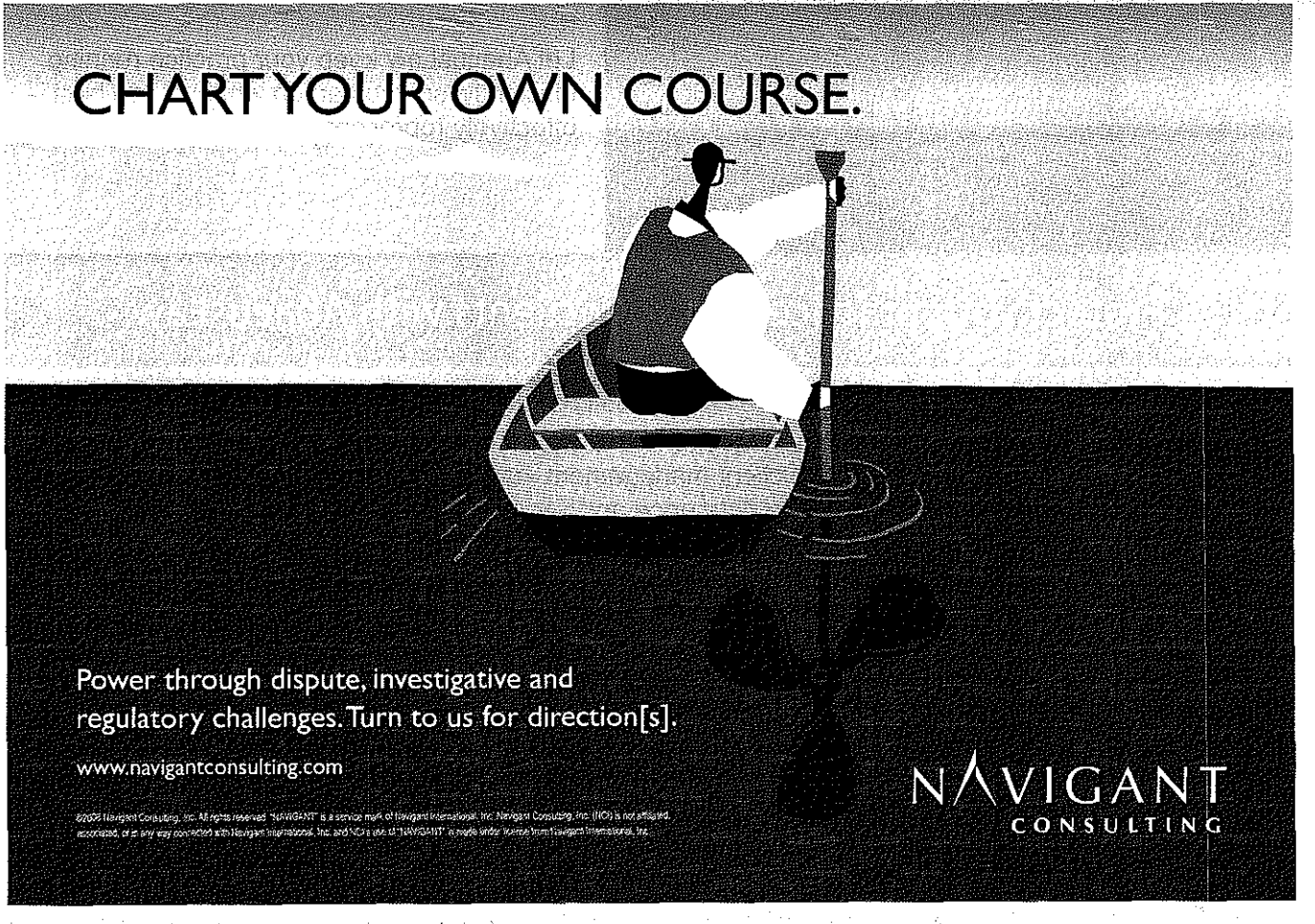
AVERAGE WON'T DO

REGARDING "JUDGES: THEY'RE JUST Like Us," June, page 12: In the movie *Jurassic Park*, when confronted with problems besetting the opening of the fictional amusement park, the owner and designer claimed that even Disneyland had bugs and problems at inception. The retort was, "Yeah, but if the Pirates of the Caribbean breaks down, the pirates don't eat the customers."

Likewise, when a judge makes mistakes, the geometric ripple effect is astounding. An innocent person loses liberty, a guilty one goes free, the families of both the innocent and the victims suffer, and society is deprived of the justice it cherishes and deserves.

Incorrect answers on MIT's cognitive reflection test provide a perfect example of a lack of concentration and attention to detail. Those I gave the test to immediately saw their errors, shrugged their shoulders and put palm to forehead. They oversimplified, answered too quickly or looked for a nonexistent trick. Likewise, judges who oversimplify, rush to judge or look for a nonexistent conspiracy are doomed to convict all too often.

If we accept judges to be like the average person, why not the brain surgeon, rocket scientist or cancer



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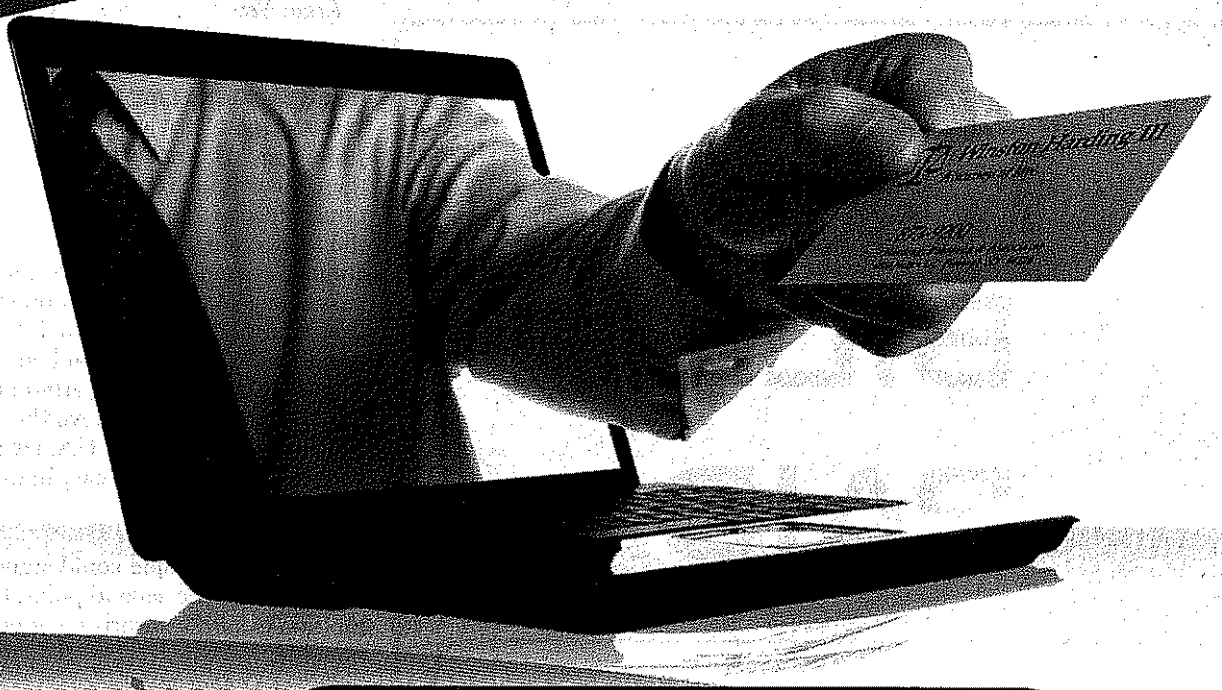

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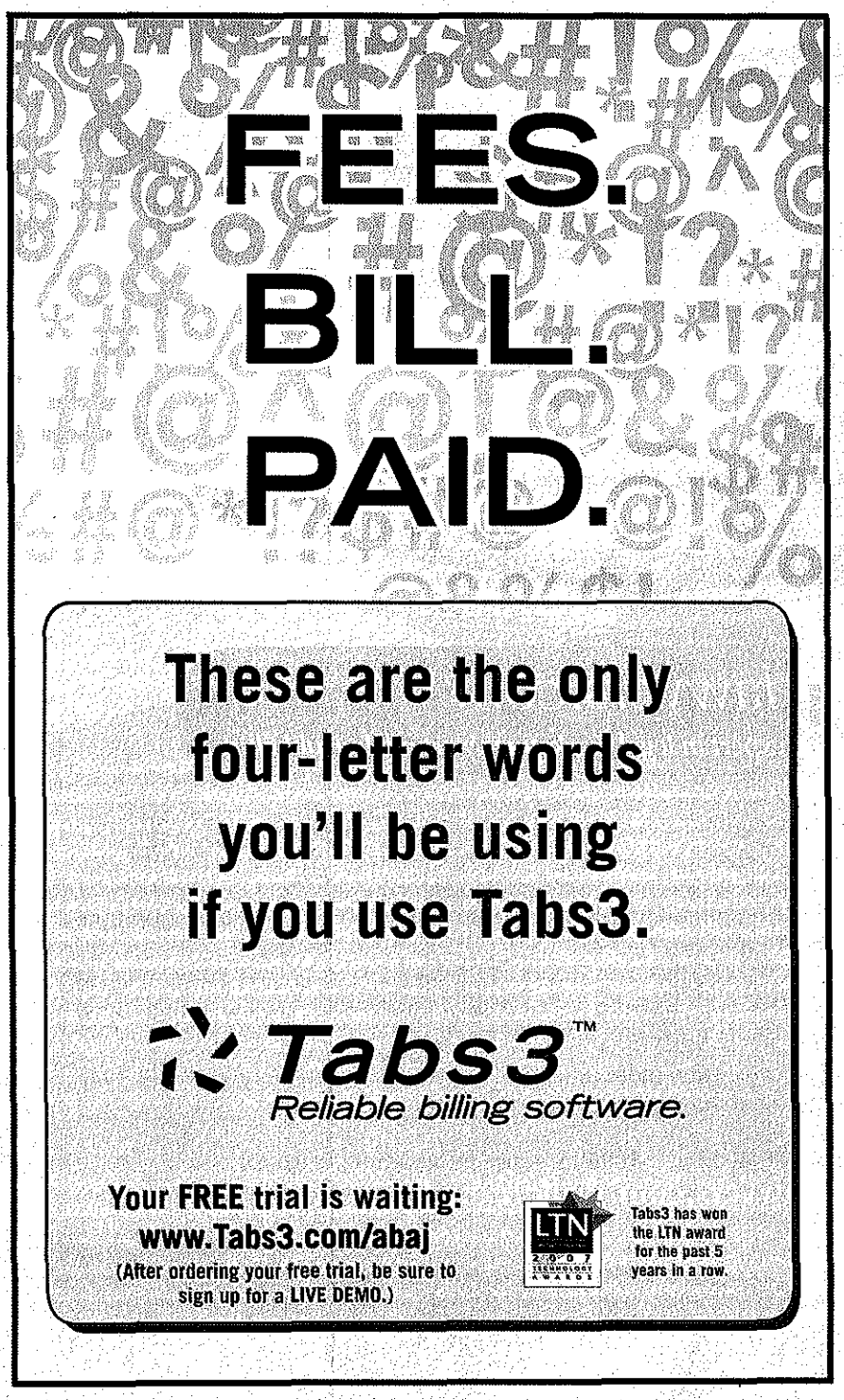
researcher? Judges hold the life and liberty of the community in each decision. We shouldn't accept the mindset that it's OK to have them be just like us. We need—no, we demand—them to be better.

Prosecutors and defense counsel are advocates for their respective clients. The judge has but one master—justice. The judge is the trustee of our liberty, a fiduciary—not to any political agenda or to rid society of who they deem bad people, but solely as a holder of the legal estate. We accept all too often that justice doesn't enter the courtroom.

I'm not worried about the bad judge who goes astray; I'm worried about the judicial decisions we don't hear about—those that affect so many lives on a daily basis, bad decisions that don't rise to the level of appeal. We accept commonplace in our courtrooms, but not on the football field. What's wrong with that picture?

Mark Nissenbaum
Reno, Nev.



INTERNATIONAL LAW IN QUESTION

THE ARTICLE "ADVICE OF CONSUL," June, page 24, misses the mark. As the Constitution requires, international treaties are indeed the law of the land, except to the extent they are inconsistent with a subsequently passed statute. The U.S. Supreme Court simply held: First, that it, rather than a supranational body outside the U.S., is the final arbiter of the interpretation of the words and provisions of a treaty as U.S. law; and, second, that the treaty in question does not provide a right of action to individuals.

Reasonable people could argue either side of the second point, but the first is hardly surprising or objectionable.

Robert Kantowitz
Lawrence, N.Y.

MATTERS OF OPINION

THANKS FOR THE BACK-PAGE TRIBUTE to Flag Day using the *Barnette* ruling ("Precedents," June, page 72). Given the political climate in the U.S. today, we all need to be reminded often of Justice Robert H. Jackson's warning against orthodoxy in matters of opinion; and, by implication, that religion, nationalism and politics are matters of opinion.

Janet C. Cook
Arlington, Va.

CORRECTION

IN "STILL NO BED OF ROSES," JUNE, page 58, a Tampa, Fla., divorce lawyer who is a partner at Harris & Hunt was mistakenly identified as Nancy Hunt. Her name is Nancy Harris.

The *Journal* regrets the error.

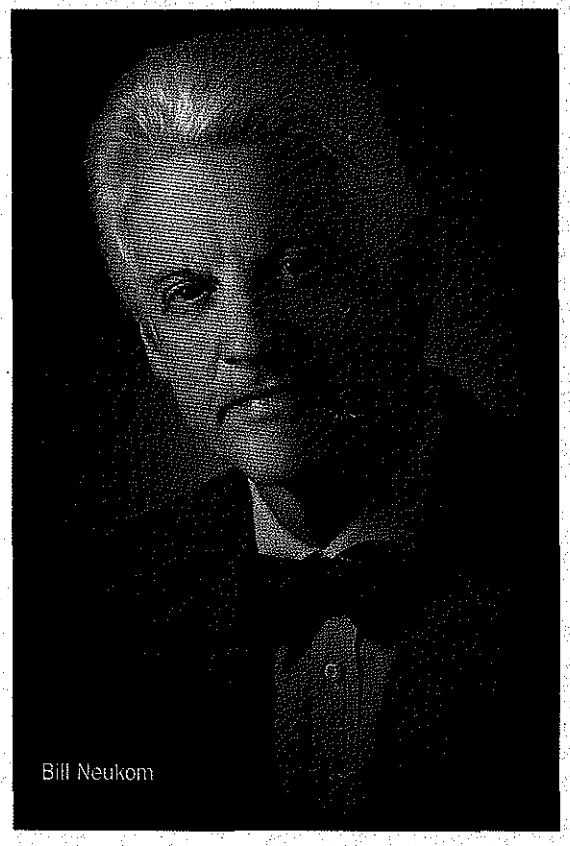
Sharpening Our Focus

World Justice Project brings rule of law to the fore as the highest priority for all

BY WILLIAM H. NEUKOM

NEARLY ALL OF THE AMERICAN BAR ASSOCIation's substantive goals contribute to advancing the rule of law in some way. From improving the justice system, expanding access to justice and preserving judicial independence to assuring lawyers' competence, ethics and professionalism, the association works on many fronts to strengthen the rule of law.

This year, we have sharpened our focus. By launching the World Justice Project we have made the rule of law the highest priority not only for American lawyers, but for members of various disciplines from around the world. Everybody in our communities is a stakeholder in the rule of law. Leaders of various disciplines cannot accomplish as much in capricious, lawless communities. Multiple disciplines working together can do far more for justice than lawyers and judges can alone.


Bill Neukom

By bringing people together—as we did in July at the World Justice Forum in Vienna, Austria (see "A Vienna Convergence," page 63), where more than 500 people from 15 disciplines and 95 countries gathered to create regional, multidisciplinary programs to advance the rule of law—we have demonstrated the value of a multilateral, multidisciplinary approach.

At the forum, we unveiled the project's Rule of Law Index, which has the potential to revolutionize the way governments and civil society around the world approach rule of law reform. This year we implemented a pilot test of the index in Argentina, Australia, Chile, Columbia, India, Nigeria, Spain, Sweden and the United States, and the project plans to run the index in 100 countries within the next three years.

A COMPREHENSIVE ASSESSMENT

DOZENS OF OTHER INDICES MEASURE ASPECTS OF THE rule of law—competitiveness or human rights, for example—but the Rule of Law Index is the first to assess comprehensively the extent to which countries adhere to the rule of law. The index examines, for example, whether a nation's laws are fairly and efficiently enforced, whether they protect the security of people and property, and whether they provide an effective remedy for violations of fundamental rights.

The breadth and detail of the Rule of Law Index will allow leaders in government and civil society to make informed decisions about where and how to invest scarce resources to advance the rule of law in their communities.

Forum participants designed collaborative programs to strengthen aspects of the rule of law in their communities, and the project will provide seed money to launch the programs.

At the next World Justice Forum, participants will report on their programs, review fresh data about rule of law adherence in a larger group of countries (as many as 50), and propose programs for the next year. Some programs from the first round will be terminated, some will be extended and some new programs will be launched.

The project has harnessed the power of multidisciplinary collaboration and comprehensive data collection to advance the rule of law in more strategic and creative ways by means of concrete programs with measurable results.

We still have much work to do to realize the project's full potential, but our first forum and index report show that our approach is sound. In the coming year, we will strengthen our relationships with organizations representing other disciplines by inviting them to participate in the governance of the project as an independent entity.

The ABA and the legal profession can be proud that we founded the project—and even prouder that, as a result, leaders from a variety of disciplines have made strengthening the rule of law a top priority. ■

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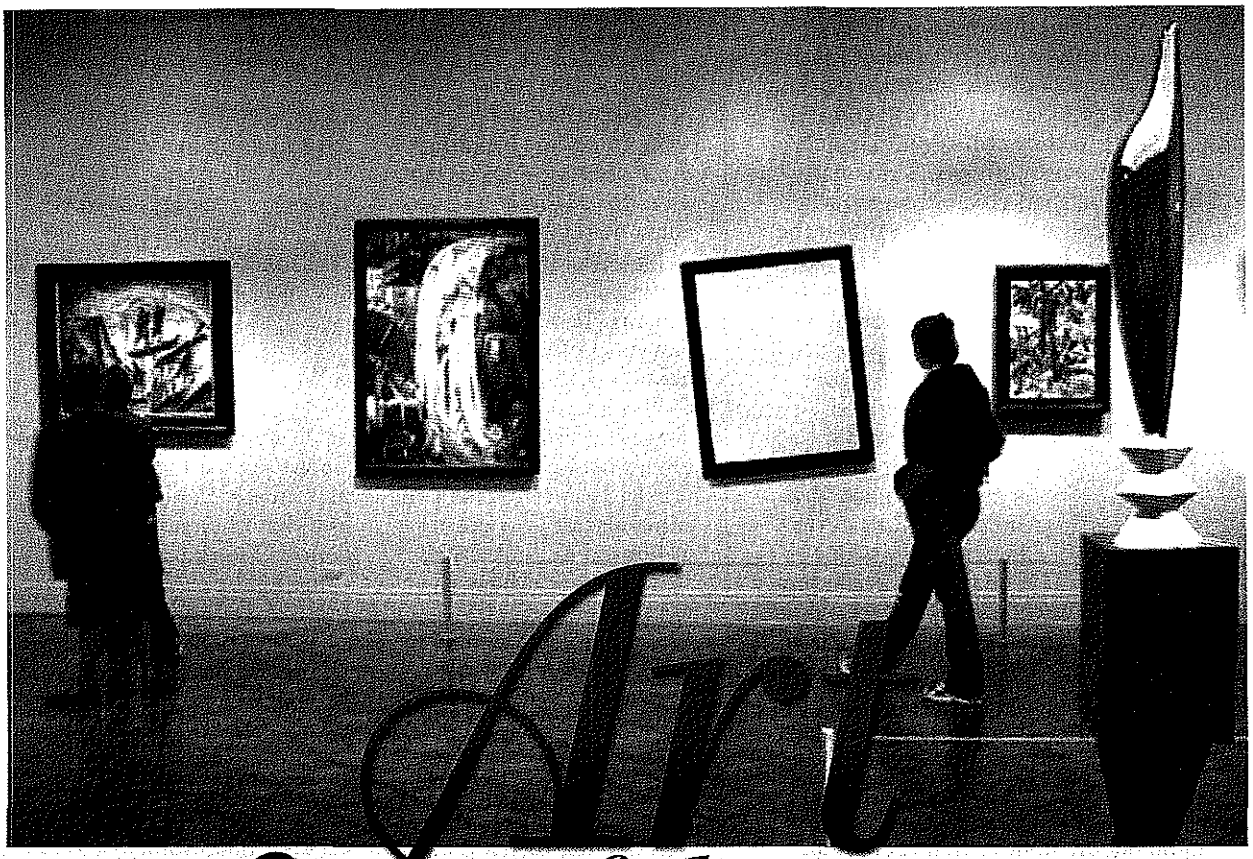


Art of the Sale

When members of the board of trustees of Randolph College needed to shore up the school's endowment last fall, they turned to the school's Maier Museum of Art.

The on-campus museum at the Lynchburg, Va., school is renowned for its collection of 19th and 20th century American art that includes works by George Bellows, Edward Hicks and Ernest Martin Hennings. But the school's trustees saw the collection as simply too precious to keep.

As at a growing number of colleges and universities, Randolph's trustees decided to capitalize on soaring art prices by selling several pieces from the Maier collection, including Bellows' *Men of the Docks* and Hennings' *Through the Arroyo*. By some estimates the sale could have brought the school as much as $50 million.

Instead, the school—until last year known as Randolph-Macon Woman's College—was hit with a lawsuit claiming the sale violated the wishes of the donors of the art, as well as the school's charitable trust with the community.

"The question one has to ask is when is it appropriate to sell art to fund nonart endeavors," says Philadelphia lawyer Sharon Erwin. While the trustees of the university also have a fiduciary obligation to their organization, "at what point do they say it's in the best interest of the institution to sell this art asset for nonart purposes?"

So far that question does not appear to be answered. But the issue has raised the ire of art lovers and university administrators nationwide.

Take the case of Fisk University. In 2005, the Nashville, Tenn., school announced plans to sell two pieces from its famed Alfred Stieglitz Collection to help the school's dire finances. Each of the works was valued at $8.5 million, according to documents associated with a lawsuit over the sale.

The works of art, 101 of them, had been donated by Stieglitz's widow, artist Georgia O'Keeffe, whose estate intervened, claiming the donation was made with the intent that the entire collection stay intact.

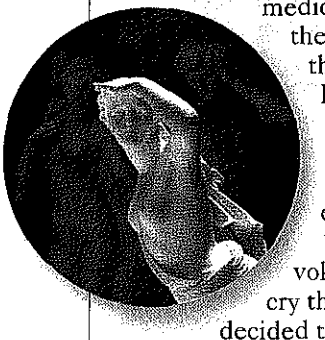
Though Fisk planned to settle the suit with the

PHOTOGRAPH BY KRISTINE STROM, PHOTO ILLUSTRATION BY JAMIE JACKSON

O'Keeffe Foundation, the parties eventually agreed to an art-sharing arrangement worth $30 million with the Crystal Bridges Museum of American Art in Bentonville, Ark., which is slated to open in 2010.

Given the outcry over the sale of precious art gifts, some schools are beginning to see the value of negotiating with the community—as long as they still get their price.

In 2006, Thomas Jefferson University in Philadelphia sparked controversy when trustees decided to sell for $68 million the famed Thomas Eakins painting *The Gross Clinic* to the National Gallery of Art and the Crystal Bridges Museum. The medical school had purchased the piece for $200 after the 1876 Centennial Exhibition; it said it needed the proceeds for capital projects that would help further its educational mission.



The proposed sale provoked such a huge local outcry that the school's trustees decided to allow community institutions a chance to match the $68 million offer. Philadelphia civic leaders eventually raised the money, but the incident left open questions raised about the relationship of a community to its art.

"Some people believe that there is an obligation to the community," says Patty Gerstenblith, a cultural heritage law professor at DePaul University. "But it's a little bit difficult to find a legal source for that obligation unless we go back to the donor's intent.

"Did the donor intend to benefit a particular community?" she asks. "If so, then perhaps there is an obligation to keep the work of art within the community—though not necessarily at that particular institution but maybe to sell it within the community."

Perhaps the real lesson for these institutions of higher learning is to be wary of donors bearing art.

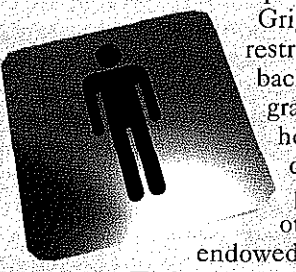
Schools "need to be careful about what gifts they accept in the first place and what restrictions they are willing to accept when they take a donation because those are exactly the kind of things that lead to trouble," Gerstenblith says.

—Siobhan Morrissey

FLUSHING WITH PRIDE

Some lawyers like to endow buildings or classrooms or law libraries at their alma maters.

Not Dicky Grigg. The Austin, Texas, lawyer prefers restrooms.



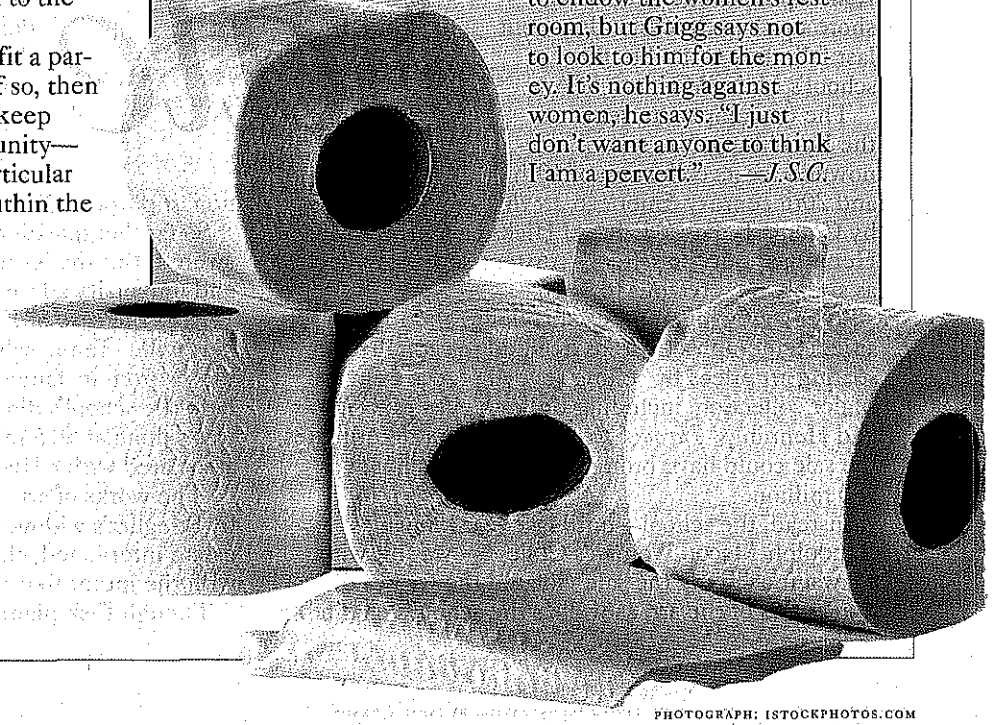
Grigg has thus far endowed three men's rooms at Texas Tech University, his alma mater. The latest loo is housed in Tech Law's new Mark and Becky Lanier Professional Development Center in Lubbock.

"When members of the public come into the law school, some will attend classes or seminars or meetings, but they only use some of the rooms there. Everyone has to use a restroom. So this way I can fund a room that is helpful to everyone. Well, every male," wisecracks Grigg. "It's helping me to serve the public."

Grigg's newest restroom set him back only five grand, which he says is cheap compared to the others he has endowed at Texas Tech—one at the school's alumni association offices and the other at its athletic center. Those, Grigg says, came with five-figure price tags.

And that's another reason Grigg says he likes to endow bathrooms. He doesn't feel like he's flushing his money ... well, you know. Unlike naming rights for buildings or classrooms, "there's no bidding wars over restrooms," he quips.

Meanwhile, the newly opened Lanier Center is still looking for someone to endow the women's restroom, but Grigg says not to look to him for the money. It's nothing against women, he says. "I just don't want anyone to think I am a pervert." *—J.S.C.*



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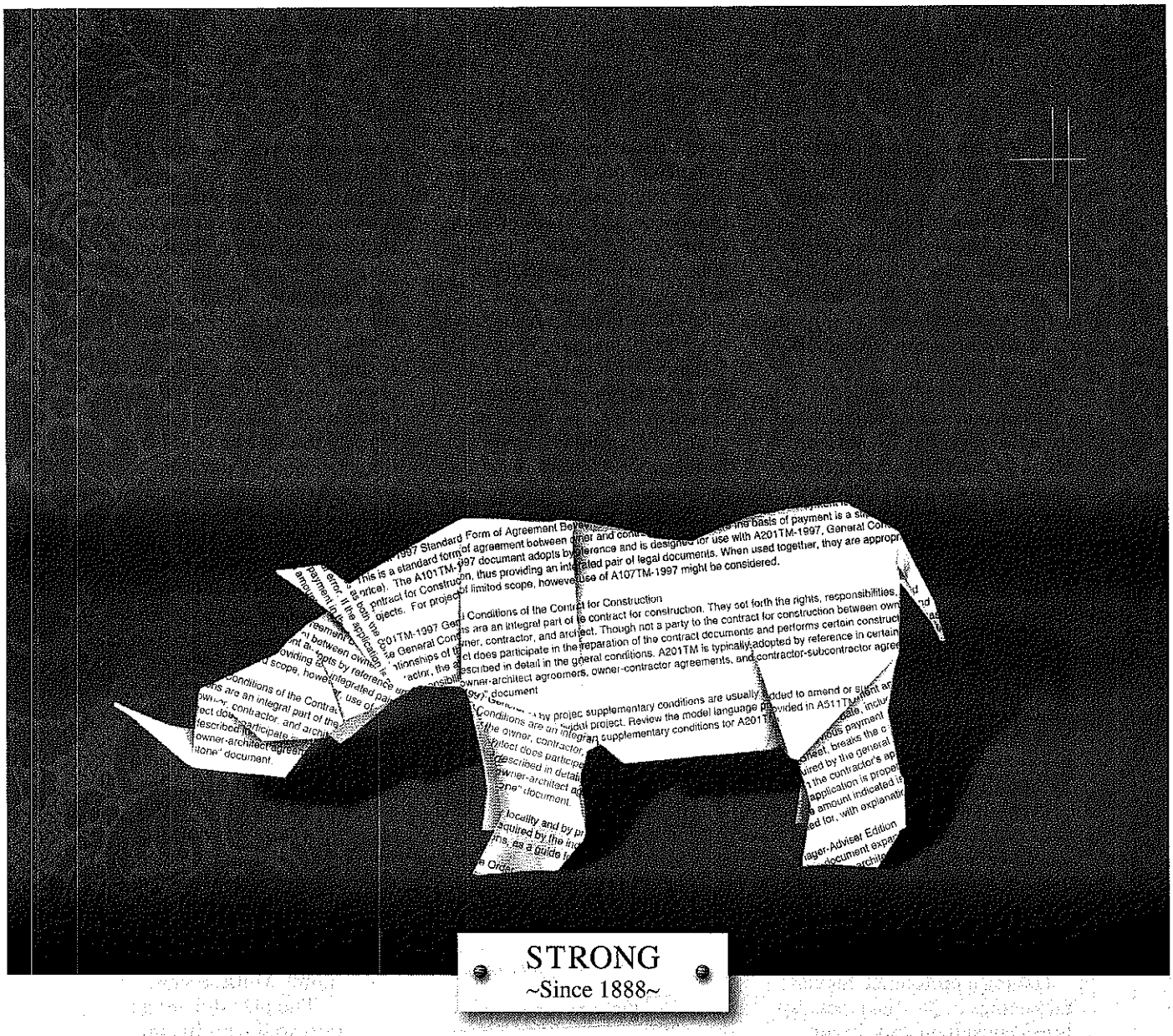

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2007 Update

What's in a Name? Lots

Various bar associations found Michael B. Hyman "highly qualified" when he ran for judge in Cook County, Ill., and the former appellate lawyer—who also had numerous jury trials under his belt—had only recently served as president of the Chicago Bar Association.

But he was still worried. Hyman, currently sitting by appointment on the Cook County Circuit Court bench, was listed last on the February 2008 primary election ballot, and it had been 12 years since someone with a Jewish surname won a countywide election.

"He was extremely well-qualified and had all this on paper," says Philip Molfese, a Chicago political consultant who worked on Hyman's campaign. "I told him that all that was great, but his last name was going to be an extremely hard sell."

If Hyman had a last name that sounded Irish, getting elected would be easier, says Molfese, explaining that surnames associated with the Emerald Isle usually go over well among Cook County voters.

Having a preference for certain names in judicial races, political consultants say, is not unique to Cook County. People often vote for candidates they think are like them.

"In New York City women tend to do exceptionally well, and Jewish women have a higher probability of being elected judge in Manhattan," says Hank Sheinkopf, a political consultant there. "But in Brooklyn, black women do well."

Los Angeles County voters often prefer candidates whose last names appear to be Hispanic or white Anglo-Saxon Protestant, says Fred Huebscher, a Hermosa Beach, Calif., political consultant. In 2006 he worked on a judicial campaign for Lynn Olson, an attorney who had left the law to run a bagel and sandwich shop.

Olson ran against Dzintra Janavs, a sitting judge who received an "exceptionally well-qualified" rating from the Los Angeles County Bar Association.

"People couldn't pronounce that name, they didn't know what [ethnicity] she was, and they didn't know if she was a man or a woman," Huebscher says. "You couldn't come up with a worse name if you tried. I knew we could win that race."

And they did. Olson, who was found "not qualified" by the Los Angeles County Bar Association, won 54 percent of the vote.

Names are so important in judicial races, Huebscher says, that he sometimes advises candidates to tweak theirs. Hyman says some told him he should run as "Michael O'Hyman."

"I wouldn't do that," he says. Instead, he devised an association strategy. While his surname might lose him votes, Hyman thought he could win if he got enough votes in the county's traditionally black wards. He hired Wallace "Gator" Bradley, a black political consultant who is well-known in Cook County for both his community outreach work and his association with the Gangster Disciples, one of Chicago's largest street gangs.

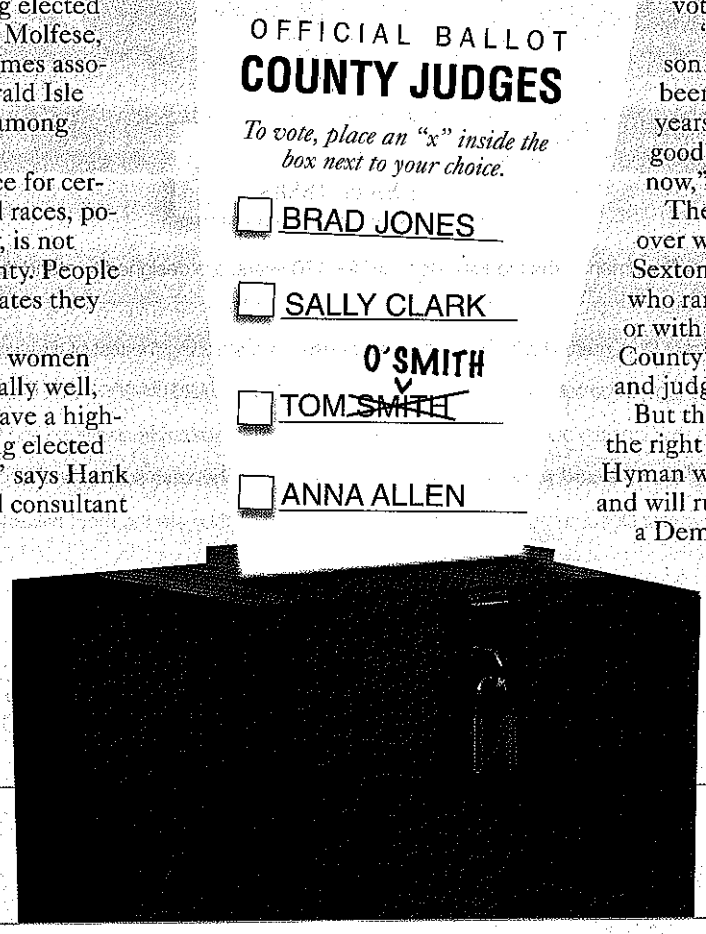
A convicted felon, Bradley claims to have turned his life around. Hyman took Bradley at his word, and that went over well with the voters he courted.

"He hired this person knowing he had been in trouble 20 years ago, who was good at what he did now," Molfese says.

The plan did not go over well with Bryan Sexton, a gang prosecutor who ran against Hyman, or with some of Cook County's black lawyers and judges.

But the strategy hit the right note with voters. Hyman won the primary and will run unopposed, as a Democrat, in the November 2008 general election.

—Stephanie Francis Ward



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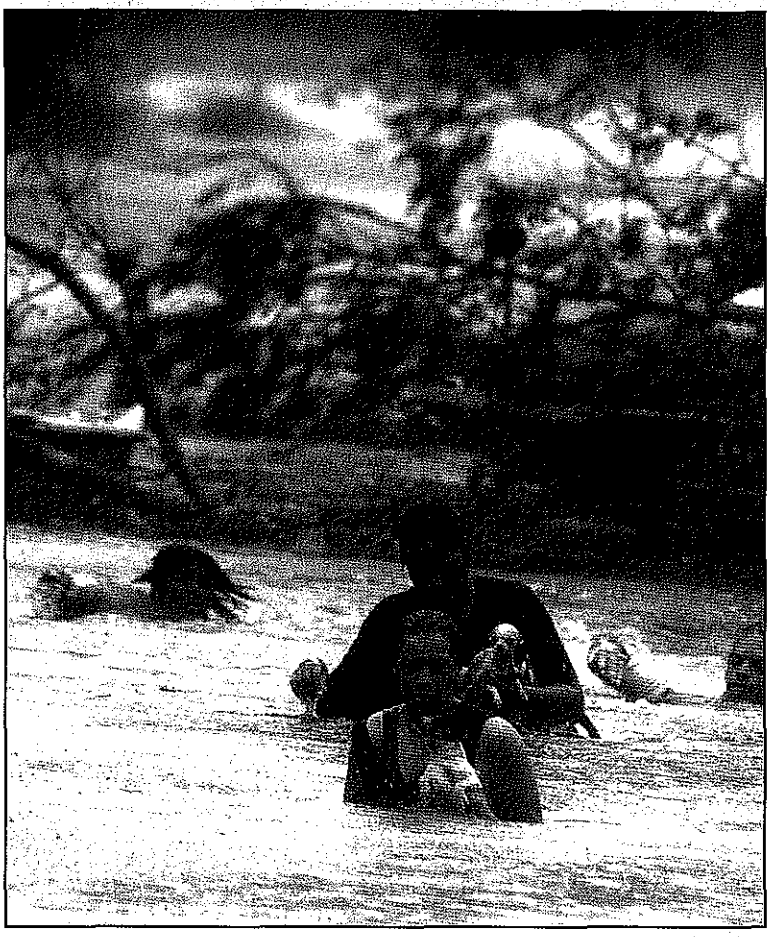

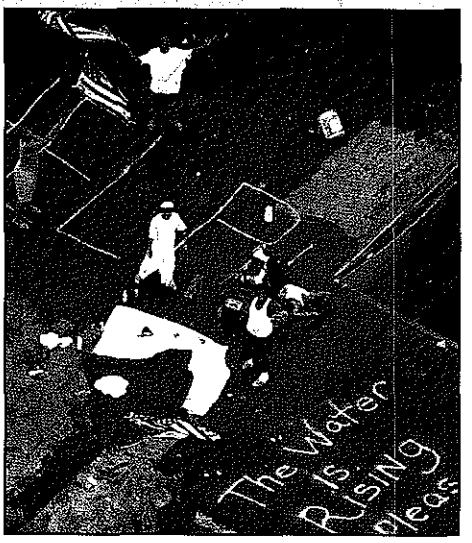



DISASTER'S DISCIPLES

About a week after Rob Verchick began teaching his fall 2005 environmental law course at Loyola University New Orleans, Hurricane Katrina hit.

Before he knew it, he found himself relocated and on the cutting edge of a new legal field.

"We went through the environmental law book but talked every week about Katrina," say Verchick, who, along with his class, had been moved to Houston. "There was a lot to talk about."

Their talk touched upon the numerous and varied post-Katrina legal issues that had affected all of their lives but that none of them had thought to connect: insurance, public benefits, civil rights, domestic relations, probate, indigence. But the more Verchick and his class talked, the more he realized they had inadvertently put themselves on the leading edge of the burgeoning area of disaster law.

In the three years after Katrina, a handful of law schools around the country have begun offering disaster law courses and clinics, studying the ways people are harmed by—and the ways the legal system addresses—natural disasters. The publication of several new legal texts in the field is spurring even more interest.

Laurie Morin, who has taught disaster law at the University of the District of Columbia's David A. Clarke School of Law, likens post-Katrina awareness to that of the Vietnam War era, when she and her peers were inspired to become politically active by the social unrest that surrounded them.

"There really hasn't been a period like that since," she says. "No movements, no mass demonstrations. Hurricane Katrina came along and changed all that."

Before Katrina, Morin says, most students hadn't been exposed to discrimination and hadn't realized that civil rights work was still relevant and necessary. Katrina was the "disorienting moment" that threw the students' previous ideas about the world out of whack, she says, and allowed them to view starkly how disasters can affect vulnerable populations. Many also came to realize that Katrina brought to light the dire circumstances these communities were already facing before the storm.

Morin and Verchick have seen no letup in student interest in disaster law. And while neither is hoping for another Katrina anytime soon, both say they would like to see their students take what they learn in the classroom and put it to good use in the real world.

—Arin Greenwood

PHOTOGRAPH: AP IMAGES

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Defending Liberty Pursuing Justice

Acquitting Time

After *Apprendi*, new challenges to sentencing enhancements emerge

BY MARK HANSEN

THIS TIME AROUND, THE U.S. SUPREME Court took a pass when it was tossed the latest hot potato in federal sentencing cases. The court declined in March to take *U.S. v. Hurn*, in which the 7th U.S. Circuit Court of Appeals at Chicago upheld a lower court's decision to add time to a defendant's sentence for possessing crack cocaine—even though the jury acquitted him of the charge.

But as with almost all federal sentencing issues since *Apprendi v. New Jersey*, the watershed 2000 sentencing decision, it's only a matter of time before the high court opts to take on the issue of sentences increased on the basis of acquitted conduct, experts say.

"Somehow, some way, the Supreme Court is going to have to deal with this issue," says Ohio State University law professor Douglas Berman, an expert on sentencing law and policy. "It's inevitable," adds Berman, who helped to draft the cert petition in *Hurn*.

That an individual could be punished for a crime for which he or she was acquitted may surprise many. But it is an established practice codified into the miscellaneous sentencing provisions of the U.S. Code of Criminal Procedure that "no limitation" shall be placed on the information a judge may consider at sentencing.

In the case of Mark Hurn, police executed a search warrant at his Madison, Wis., home in June 2005, seizing 450 grams of crack cocaine, 50 grams of powdered cocaine and more than $38,000 in cash. At the time, Hurn admitted to being a drug dealer. He even showed police where some of the money and drugs were hidden.

CONFLICTING TALE UNFOLDS

AT TRIAL, HOWEVER, HURN TOLD A DIFFERENT STORY. He said the drugs found at his home weren't his; they belonged to others who lived there and used it to store their stash. He said he claimed ownership of the drugs at the search because he was afraid the real owners would hurt him if he didn't.

The jury bought part of his story, but not all. Hurn was convicted of possessing with the intent to distribute the powdered cocaine, the lesser of the two charges, punishable by a 27- to 33-month prison term under federal sentencing guidelines.

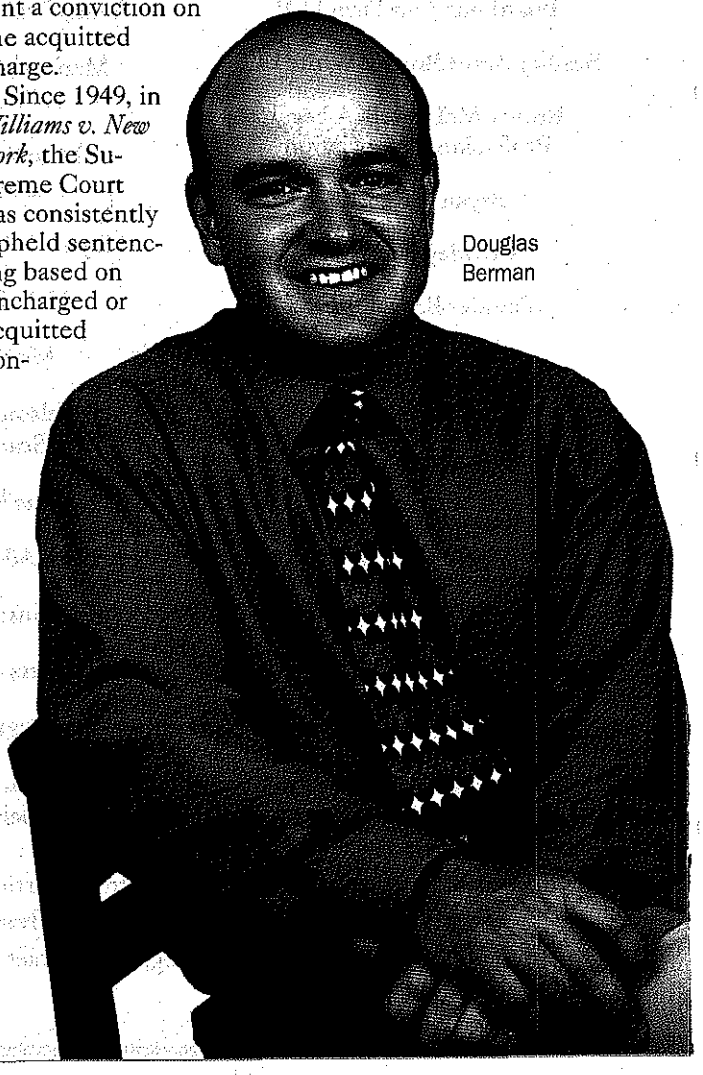
But he was acquitted of the far more serious charge of possessing crack cocaine with intent to distribute, which carries a guideline sentence of 16 to 20 years.

At sentencing, Hurn sought leniency but prosecutors asked for 20 years, citing, among other things, evidence in the trial suggesting he was probably guilty of crack possession, even though he was acquitted of it.

U.S. District Judge John C. Shabaz sided with the prosecution, saying that despite the jury's verdict, the government had proved by "clear and convincing evidence" that Hurn was guilty of possessing crack cocaine. He sentenced Hurn to 17½ years in prison, just below the midpoint of the guidelines range for a conviction on both charges.

The 7th Circuit affirmed, even while acknowledging that the sentence was based "almost entirely" on acquitted conduct. It said the evidence "amply supported" the trial court's finding that Hurn was guilty of the crack possession charge, even without Hurn's acknowledgement that the drugs were his at the time of his arrest. It said Hurn's admission that he allowed others to store drugs at his home was evidence enough to warrant a conviction on the acquitted charge.

Since 1949, in *Williams v. New York*, the Supreme Court has consistently upheld sentencing based on uncharged or acquitted con-



Douglas Berman

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duct. The court reiterated the principle in 1997, when it held in *U.S. v. Watts* that a convicted drug dealer could be subjected to an enhanced sentence for possessing a firearm in connection with the drug offense, even though the defendant had been acquitted on the weapons possession charge.

The court said a sentencing judge may consider conduct for which a defendant has been acquitted, so long as the conduct has been proved by a preponderance of the evidence.

It's not known how often acquitted conduct is factored into a defendant's sentence. But after *Watts*, some experts say, enhanced prison sentences based on acquitted conduct have become almost routine. Particularly in high-profile cases, prosecutors will typically overcharge a defendant, knowing that a jury is likely to return a split verdict. Then, if the defendant is convicted on some of the charges, prosecutors will seek an enhanced sentence based on the acquitted conduct, and judges will often agree.

While a few trial judges have declined to include acquitted conduct in their sentencing decisions, experts say, no federal appeals court has affirmed a constitutional challenge to the practice in the 11 years since *Watts*.

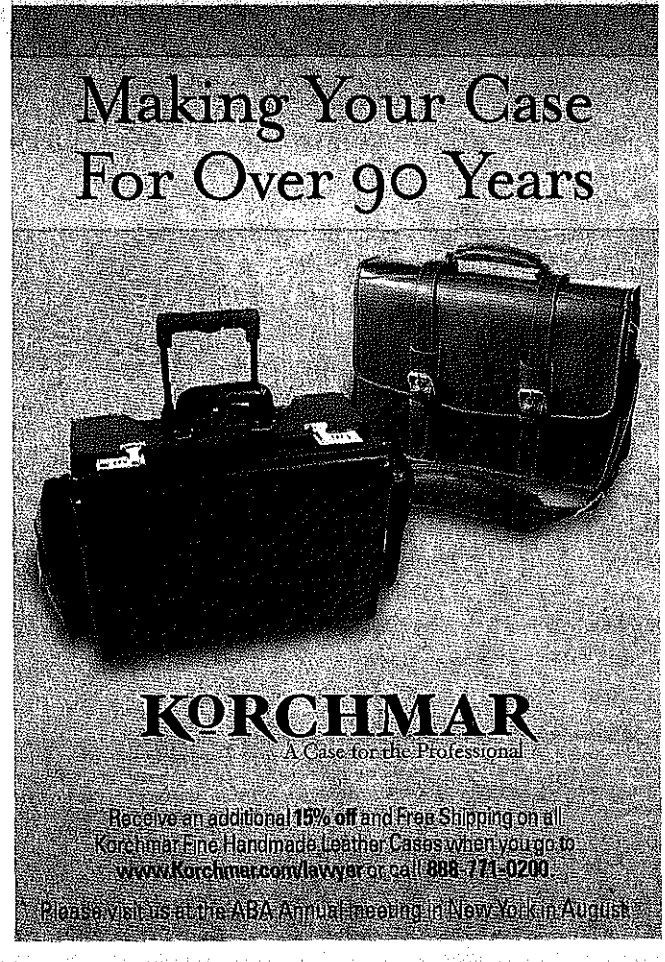
In fact, one appeals court has recently gone so far as to hold that a judge may not categorically exclude consideration of acquitted conduct at sentencing. In an unpublished April 1 per curiam opinion, the Richmond, Va.-based 4th U.S. Circuit Court of Appeals vacated the 4½-year sentence given a Virginia man convicted of conspiring to launder money. The court said in *U.S. v. Ibanga* that the sentence failed to reflect additional prison time for drug trafficking charges the jury had acquitted him of.

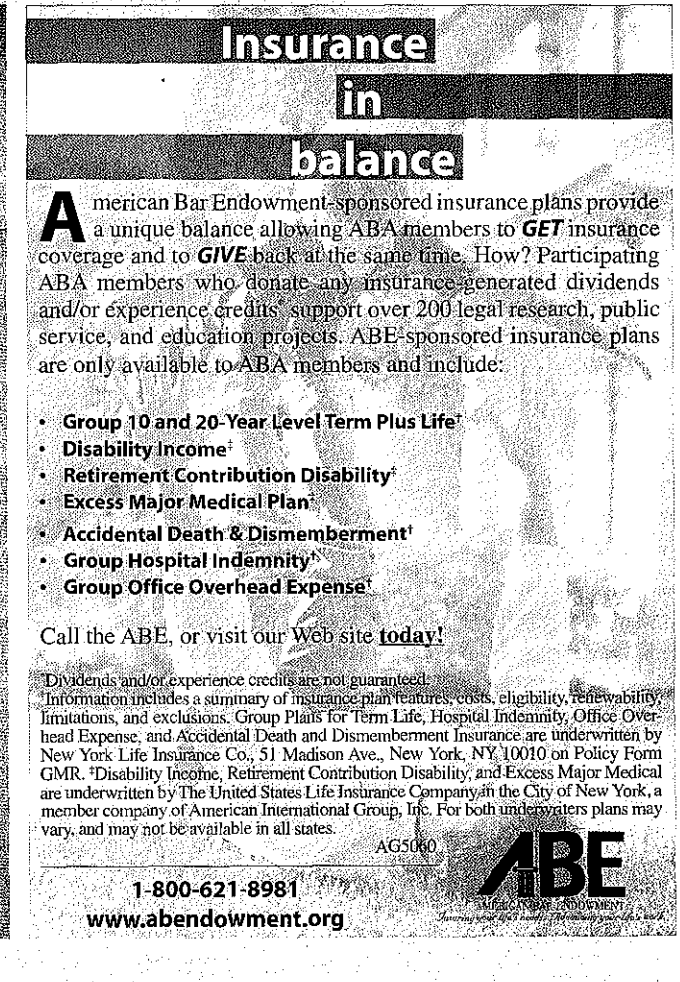
Some experts say the use of acquitted conduct to enhance a sentence violates the spirit—if not the letter—of the double jeopardy clause, which prohibits trying a defendant twice for the same crime.

"When someone is acquitted of an offense, for whatever reason, that offense ought not to be usable against that person to increase his or her sentence," says Georgetown University law professor Paul Rothstein.

But others have no problem with the practice, as long as the crime for which a defendant has been convicted has been proved beyond a reasonable doubt and the sentence doesn't exceed the statutory maximum for the convicted offense—which was the case in *Hurn*.

Judges should have broad discre-





tion to consider a variety of factors at sentencing, including information about a defendant's background, character and conduct—even criminal charges for which a defendant may have been acquitted, says Vanderbilt University law professor Nancy King, a former state prosecutor who specializes in sentencing issues.

STANDARD OF PROOF AT ISSUE

IF THERE'S A PROBLEM, SHE AND other experts say, it rests with the preponderance of evidence standard governing the use of such conduct or the draconian penalties that accompany certain drug offenses under the federal sentencing guidelines.

University of Florida law professor Michael L. Seigel, a former federal prosecutor who specializes in criminal law and white-collar crime, says he's not alone among academics and former prosecutors in thinking that the standard of proof for considering acquitted conduct at sentencing should be raised, the penalties for most drug-related offenses should be reduced, and all mandatory minimum sentences for nonviolent drug offenders should be eliminated.

Some experts, including Berman, say the constitutionality of the practice has been called into question by the court's most recent pronouncements on the right to a trial by jury and the limits of the federal sentencing guidelines, beginning with *Apprendi*. The ruling held that a defendant's sentence cannot ordinarily be increased beyond the statutory maximum without a finding of fact by a jury. In 2005, in *U.S. v. Booker*, the court held that the once rigid federal sentencing guidelines are only advisory.

That the practice continues despite these recent decisions regarding the importance of jury determinations in sentencing troubles Berman. And some appellate judges are showing signs of misgivings as well.

Last October, a three-judge panel of the Cincinnati-based 6th U.S. Circuit Court of Appeals was about to reverse an enhanced sentence based on acquitted conduct in *U.S. v. White*, when another panel of the same court did just the opposite in a different case. The first panel then agreed to affirm the sentence it was about to reverse in *White*, but invited the defendant to seek en banc review on the question of acquitted conduct as a sentencing enhancement in view of *Booker*.

The defendant took the panel up on its invitation, and the full 6th Circuit agreed to rehear it. The case was argued in early June.

If the full 6th Circuit breaks with other circuits and finds constitutional problems with the practice, the Supreme Court will almost certainly have to settle the matter, once and for all. ■

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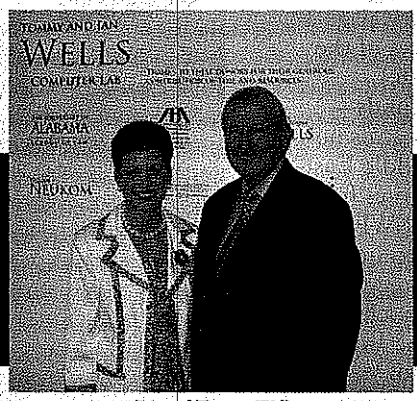

Jan and Tommy Wells

In addition to his countless contributions to the ABA and the legal profession, Tommy Wells served for three years as Chair of the Board of the Metropolitan Birmingham YMCA. In honor of his service, UA Law partnered with the ABA to refurbish San Francisco's Embarcadero YMCA computer lab, installing new computers, software, and equipment. The lab serves as a classroom for Youth Chance High School, a non-tuition private school for at-risk and troubled youth.

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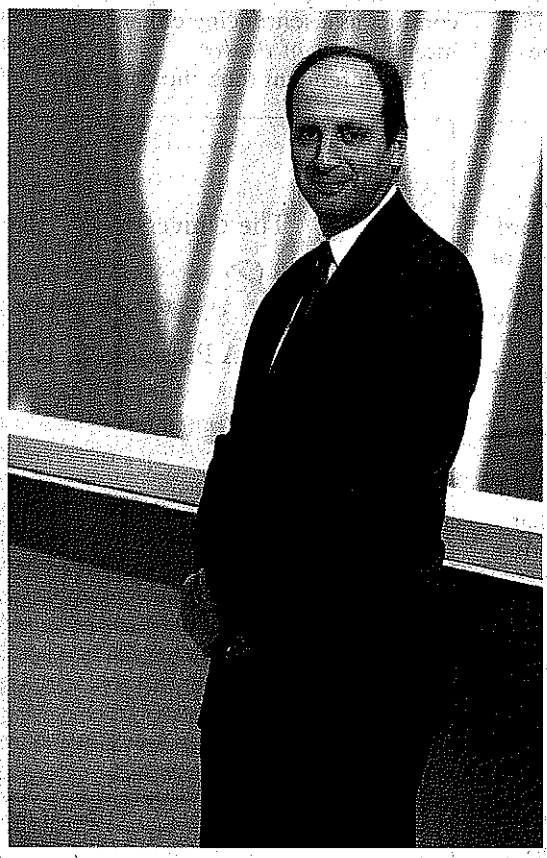
Sovereign investment boom keeps lawyers busy with more complex compliance

BY DEBORAH L. COHEN



WHERE THE WORLD economy goes, American law firms follow. These days, much of the action in global finance is coming from oil-rich and developing countries in Asia and the Middle East that are pouring their bountiful equities into U.S. and Western European businesses. (See "Going for Gold in the Gulf," February, page 18; and "Wise in the Ways of the World," June, page 16.)

Sovereign wealth funds—state-run investment arms now flourishing in the Middle East—are bloated with reserves from oil wealth and industry. SWFs control an estimated $3 trillion in investments and are projected to be worth five times as much in 10 years, according to the International Monetary Fund.

In burgeoning economies such as China's, large state-backed companies have been scrambling to take advantage of the cheap U.S. dollar by attempting to acquire U.S. concerns such as energy corporations and investment banks.

As those state-run funds keep purchasing stakes in Western businesses, officials in the United States and the European Union worry about the national security risks of buyers so closely tied to foreign governments—especially in the aftermath of the Sept. 11 terrorism attacks in the U.S. and similar attacks in Europe.

Those concerns prompted Congress last year to expand and fortify the Committee on Foreign Investment in the United States—an interagency panel that reviews foreign investment and national security implications. And that, in turn, has fueled a surge in compliance work for law practices specializing in foreign investment.

Sept. 11 changed the process "from an obscure activity frequently associated with defense to a multi-industry, multisector focus," says Mark E. Plotkin, a Washington, D.C.-based partner at Covington & Burling who runs the firm's foreign investment compliance practice.

Paul O. Gagnier, a partner with the D.C. office of Bingham McCutchen who specializes in telecommunications deals, says roughly a fourth of his time is spent on such compliance work, compared with just 5 percent five years ago.

"Today, savvy acquirers think about this stuff up front and engage national security counsel earlier in the game," says Gagnier. "The worst thing is not to think about it at all, sign a merger agreement and have to play catch-up."

The CFIUS process was established in 1975 to assess the risks of foreign acquisitions to national security. In 1988, President Reagan brought the panel under presidential oversight.

CFIUS was at first primarily concerned with defense-related transactions, such as a foreign buyer attempting to acquire a stake in a U.S. conglomerate with a weapons subsidiary.

But CFIUS, which is chaired by the Treasury Department, now includes representatives from 12 agencies, among them the departments of State, Defense and Commerce. In February 2003, the Department of Homeland Security was given a seat.

Last October, Congress passed the Foreign Investment and National Security Act, which added Energy and Labor department representatives to CFIUS and mandated the designation of a lead agency for each covered transaction. FINSA also broadened the definition of "critical infrastructure deals" that would fall under CFIUS review. The committee now reviews invest-

AFTER 9/11, THE WORK WENT FROM AN OBSCURE ACTIVITY ASSOCIATED WITH DEFENSE TO A MULTISECTOR FOCUS. —MARK PLOTKIN

PHOTOGRAPH BY RON AIRA

ments in a variety of industries, including those concerned with telecommunications, transportation networks and cyber security.

Legislation similar to FINSA is also being considered in parts of Western Europe. Late last year, for instance, the German government introduced a proposal to amend the German Foreign Trade Act to establish a control mechanism to restrict the influence of foreign investors.

A TURNING POINT

AFTER 9/11, THE FIRST TRANSACTION that raised security concerns was an aborted deal to buy Global Crossing, the U.S. telecom giant that filed for bankruptcy in early 2002. Global Crossing filed a letter of intent to sell control to a joint venture of Hong Kong-based Hutchison Whampoa and Singapore Technologies Telemedia.

CFIUS made clear it would not give the deal the green light and Hutchison Whampoa withdrew its bid. In 2003, Singapore Technologies purchased the company on its own out of bankruptcy.

"It was a turning point because up to that point, foreign investment in telecoms had been kind of sleepy," says Plotkin, who represented Global Crossing. "You had a real concern within CFIUS. There was an entirely new view."

In June 2005, the state-backed Chinese conglomerate China National Offshore Oil Corp. bid $18.5 billion for the American oil company Unocal. But the deal was killed by bipartisan opposition in Congress, partly due to concerns over national security. Despite the Chinese firm's willingness to submit to a CFIUS review, Unocal was ultimately purchased by rival bidder Chevron.

Then in March 2006, Dubai Ports World—a holding company owned by the government of Dubai in the United Arab Emirates—acquired U.K.-based Peninsular & Oriental Steam Navigation Co. in a highly publicized deal valued at about $7 billion.

Because Peninsular & Oriental operated ports in U.S. cities such as New York and Miami, it came under CFIUS review. Despite the committee's nod of approval, Congress latched on to the issue. Worried over the UAE's reported financial links to the al-Qaida terrorist network, it publicly questioned the review process. DP World responded by divesting its U.S. port holdings, but politicians on both sides of the aisle remained dissatisfied. The controversy led to the passage of FINSA.

"The genie of congressional intervention was let out of the bottle," says George Kleinfeld, who specializes in CFIUS work as counsel in the Washington, D.C., office

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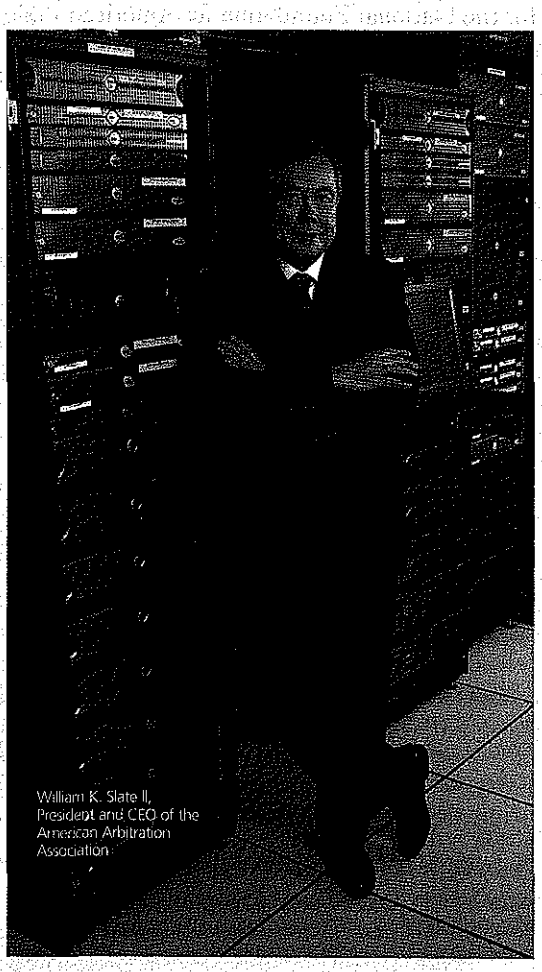
William K. Slate II, President and CEO of the American Arbitration Association

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LENGTHIER REVIEWS, NEW REGULATIONS

REVIEWS THEMSELVES HAVE BECOME LONGER AND MITigation agreements negotiated as a condition for approval have grown, according to David Marchick, a managing partner with the Carlyle Group, a D.C.-based global private equity firm. Marchick, a former CFIUS attorney with Covington & Burling and an ex-member of the Clinton administration, co-authored the book *U.S. National Security and Foreign Direct Investment.*

Filings rose dramatically in the wake of DP World, according to a January 2007 study Marchick conducted for the National Foundation for American Policy, a nonpartisan public policy research group.

In 2006, those filings numbered 113, up 73 percent from the year before, the study found.

"The more politicized environment surrounding CFIUS has created uncertainty for companies as to whether they should file a transaction with CFIUS," the report states. "If a company does not file, then it risks CFIUS initiating its own review or opening a review after a deal has been finalized."

To help codify the process, the Treasury Department introduced a new set of regulations in April that will lend clarity to the procedures. They include guidelines allowing greater interaction between law firms and the committee prior to a notice being filed, as well as clear definitions as to what exactly constitutes a controlling stake by a foreign acquirer—an issue at the heart of CFIUS concern. A controlling stake gives the buyer certain privileges, such as voting rights or influence over management, compared to a passive investment, which is strictly hands-off.

On ABAJournal.com
A link to the National Foundation for American Policy study

"The proposed regulations increase clarity and make additional improvements based on experience," said the Treasury Department's Clay Lowery, assistant secretary for international affairs, in a statement when the proposed regulations were released.

Nancy McLernon, senior vice president for the Organization for International Investment, which represents U.S. subsidiaries of firms based abroad, welcomes the new rules.

"We see it ... as a hopeful roadmap to foreign investors in terms of the types of information that needs to be supplied to CFIUS and the types of transactions that need to go before CFIUS," she says.

Still, lawyers say more time is now spent on front-end due diligence, often to determine whether a filing should be made at all. This includes reaching out to the CFIUS agencies that might have concerns over a deal in a particular sector, as well as seeking opinions from legislators on Capitol Hill.

"We try to do that with any transaction of merit," says Covington & Burling's Plotkin.

In fact, many law firms are touting their CFIUS expertise. A brochure on the CFIUS practice at DLA Piper, for example, features former House Majority Leader Dick Armey—a Republican who specialized in matters of homeland security—as a lead member of its CFIUS team.

"There's a much broader awareness in the venture [capital] community, especially, about this," says Bingham McCutchen's Gagnier. "A decent amount of my practice is really talking investors off the ledge." ■



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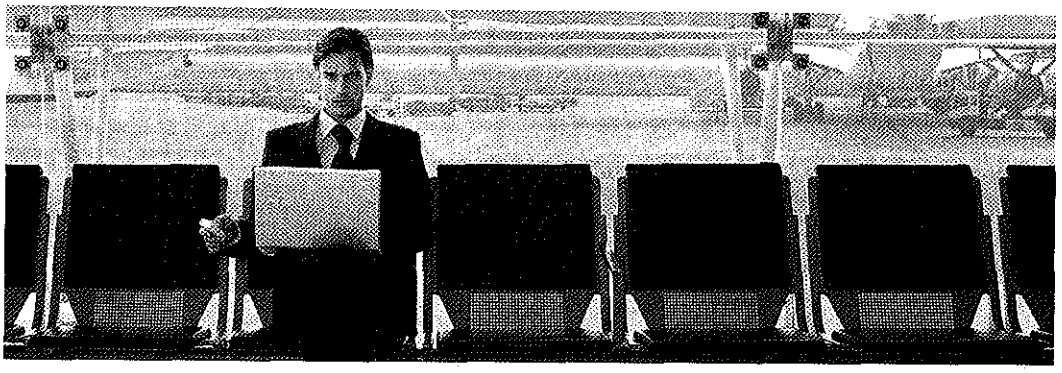

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The History Boys

In the term's biggest cases, the justices offer lessons on English kings and courts

BY DAVID G. SAVAGE

A FOREIGN VISITOR WHO CAME TO SEE THE U.S. Supreme Court during the final days of this year's term might have walked away thinking the U.S. Constitution was written by Englishmen in the 17th century and carried to this country on a sailing ship.

In the term's two most momentous decisions—on the reach of habeas corpus and on the meaning of the Second Amendment—the justices delved deeply into English history, determined to show how those legal concepts were originally understood.

Speaking from the bench, as well as in their written opinions, they quoted English precedents and writings from the time. History proved an uncertain guide, however. While all the justices said they relied on the original understanding, they split 5-4 in both cases on how to interpret it.



The clerk of the crown reads the newly adopted Bill of Rights to English monarchs William and Mary.

THE REACH OF HABEAS

IN THE HABEAS CORPUS CASE, *Boumediene v. Bush,* Justice Anthony M. Kennedy cited English cases involving Spanish sailors and African slaves who sought their freedom through a writ of habeas corpus. This suggests the right to habeas corpus was not limited to English subjects or to the sovereign territory of England.

Kennedy said the "privilege of the writ of habeas corpus" was one of the fundamental protections for liberty written into the Constitution. And since Congress had not suspended it, he said it extended to the prisoners who have been held as long as six years at the U.S. Navy base at Guantanamo Bay.

In dissent, Justice Antonin Scalia said there were no early English cases showing that the right to habeas corpus extended beyond the sovereign territory of the crown, and it certainly did not extend to prisoners who were captured and held by soldiers.

In the Second Amendment case, *District of Columbia v. Heller,* Scalia devoted most of his 64-page opinion to the origins of the right to keep and bear arms. He talked of the Stuart kings and how they used their militias to confiscate the weapons of the populace. That experience, in turn, led to the Glorious Revolution and the adoption of the English Bill of Rights in 1689.

"By the time of the founding [of this country], the right to have arms had become fundamental for English subjects," Scalia said. The Second Amendment protected "the inherent right to self-defense," he said, and that means it is unconstitutional for the District of Columbia to forbid homeowners from keeping a handgun.

Dissenting, Justice John Paul Stevens said Scalia's history was flat wrong, and his opinion ignored the text of the Second Amendment. Its intent was to preserve "a well-regulated militia" in each state; it did not extend to firearms for personal use, he said.

Northwestern University law professor Steven Calabresi has insisted the court should rely on history as well as text in deciding constitutional issues.

"Originalism does not resolve all the issues conclusively, but it does narrow the range of disputable issues," says Calabresi, a former Scalia clerk and a cofounder of the conservative Federalist Society.

The court left much undecided about the scope of the constitutional right to keep a gun. "The big question is: Is this like the First Amendment and the freedom of speech?" says John Eastman, dean of Chapman University School of Law. The First Amendment prevents government from requiring authors or publishers to register and obtain a license before publishing. If the Second Amendment right to a gun is akin to the First Amendment right to free speech, National Rifle Association lawyers could claim that licensing and registration laws for firearms are unconstitutional.

Justice Stephen G. Breyer said in dissent that the decision "throws into doubt the constitutionality of gun laws throughout the nation."

PHOTOGRAPH: BETTMANN/CORBIS

Scalia tried to allay this concern. The right to self-defense is "not a right to keep and carry any weapons whatsoever in any manner whatsoever for whatever purpose," he said. Felons and the mentally ill may be denied guns, he said, and weapons may be prohibited in "sensitive places such as schools and government buildings."

A threshold question remains unresolved. The court's decision did not extend the Second Amendment to states and cities. Since the District of Columbia is not a state, the court had no need to decide whether the Second Amendment was incorporated to the states by the 14th Amendment, as they have done with other amendments in the Bill of Rights.

But the answer should not be long in coming, since NRA lawyers quickly filed suits to challenge handgun bans in San Francisco and in Chicago and its suburbs.

"That's the next case to come up, but I think it's a foregone conclusion" the Second Amendment will be extended to states and cities, says Washington lawyer Alan Morrison, who worked on D.C.'s appeal in *Heller* before he left after a reported disagreement with the city government. "The bottom line is this looks like a full-employment decision for lots of gun lawyers and state, federal and municipal lawyers—but not including me."

"ORIGINALISM DOES NOT RESOLVE ALL THE ISSUES CONCLUSIVELY, BUT IT DOES NARROW THE RANGE OF DISPUTABLE ISSUES." —STEVEN CALABRESI

SURPRISE RULINGS FOR EMPLOYEES

THERE WERE OTHER NOTABLE DEVELOPMENTS COMING toward the end of this past term. In something of a surprise, employees won nearly all the job discrimination cases. In *Meacham v. Knolls Atomic Power*, the court bolstered the rights of older workers, ruling employers bear the burden of proving they relied on "reasonable factors other than age" if layoffs disproportionately affect employees who are over age 40.

In *Gomez-Perez v. Potter*, federal employees, like those in the private sector, were told that they could sue if they were demoted or otherwise retaliated against after complaining of discrimination.

The court strengthened the law against racial bias in the workplace in *CBOCS West Inc. v. Humphries*. The court cleared the way for a black assistant manager of a Cracker Barrel restaurant near Chicago to sue for retaliation. Hedrick Humphries alleged he was fired after complaining of the mistreatment of other black employees. The restaurant chain argued the suit should be tossed out because the Civil Rights Act of 1866 made no mention of "retaliation."

But business also had its share of wins. In *Exxon Shipping Co. v. Baker*, the justices moved again to rein in punitive damages. Justice David H. Souter agreed Exxon was guilty of reckless conduct for permitting a known alcoholic to pilot a supertanker in treacherous waters. But the 1989 oil spill in Alaska's Prince William Sound was an accident, he said, not a malicious or deliberate act. The 5-3 majority ruled punitive damages in maritime cases should be limited to the actual economic losses. That translated to a punitive award of $507 million, about one-tenth of the jury's verdict more than a decade ago.

Justice Samuel A. Alito Jr., an Exxon stockholder, sat out the case. His absence may have cost the company dearly. The court said it split 4-4 on whether a shipper can be held liable for the wrongful acts of its captain. Had Alito participated, the court might well have overturned the punitive damages entirely.

Criminal defense lawyers also won two important rulings—one that attracted much notice and one that may well be well heard from in the future. In *Kennedy v. Louisiana*, a 5-4 decision barred the death penalty for the rape of a child. The court's opinion drew a line that had been implied but not clearly stated before. Capital punishment must be reserved for murder, the court said, except in cases of crimes against the state, such as treason or espionage.

In the less-noticed ruling, the court in *Giles v. California* extended the Sixth Amendment's confrontation right to those who are on trial for killing the witness against them. This may be one of the sleeper decisions of the term. The 6-3 decision overturned the murder conviction of a Los Angeles man who shot and killed his girlfriend. Dwayne Giles claimed he acted in self-defense, but prosecutors had put on the witness stand a police officer who said he had spoken to Brenda Avie three weeks before, and she said Giles was threatening to kill her.

Scalia said the police officer's statement must be excluded because this testimony violated Giles' right under the Sixth Amendment to confront the witnesses against him. Such out-of-court statements may not be used in a trial, Scalia said, unless prosecutors show the defendant killed the witness in order to prevent her testimony.

Experts in domestic violence fear the ruling will make it very hard to prosecute cases where a spouse or partner is found dead and the strongest evidence of murder is contained in the victim's earlier reports to the police. ■

David G. Savage covers the U.S. Supreme Court for the Los Angeles Times *and writes regularly for the* ABA Journal.

Character Matters

What the jury thinks of your client will affect how it decides the case

BY JIM McELHANEY

McELHANEY AT HIS BEST

The ABA Journal *occasionally reprints some of Jim McElhaney's most popular columns from past years. This one first appeared in the March 2001 issue under the headline "Character Studies."*

NICK WHEELER OF RANDOLPH AND WHEELER came into the First Federal Soup and Sandwich Shop. Without a word, he walked over and sat down at the table where Angus and I were having lunch. Then he said, "Mind if I join you?"

I was a little surprised to see Wheeler where the combat troops eat. He usually hangs out with the brass from the other large firms (and captains of industry) at places like the Purple Artichoke, the Dow or the MizzenMast.

"What brings you here?" said Angus.

"I want to ask you a question," said Wheeler. "What's the most dangerous evidence in a trial?"

Angus smiled. "I assume your question involves more than just intellectual curiosity," he said.

"Seventeen million dollars more," said Wheeler. "That's what the jury gave Karl Neeseman, the 59-year-old man who brought an age discrimination case against our client, Pencraft Builders. We took a real hit. Fortunately, Judge Mudrock made a mistake in the jury instructions, so he had to grant our motion for a new trial.

"Now, I don't think the instructions actually had anything to do with the verdict—which is outrageously excessive—but since we've got a second bite at the apple, I want to make sure we don't make the same mistakes twice."

"So the question," said Angus, "is what would make a jury mad enough to return a $17 million verdict against Pencraft Builders?"

"Exactly," said Wheeler.

PICKING OUT THE BAD GUYS

"WHILE I'D HAVE TO KNOW A LOT MORE ABOUT THE CASE to get specific, the quick answer is easy," Angus said. "Character evidence."

"Excuse me," said Wheeler. "Character evidence? I'm afraid you don't get it. Character had nothing to do with this case. This is a civil action. You can't use character evidence in a civil trial. Nobody in the trial said anything about the kind of people on either side, much less gave their personal opinions about anybody or testified to their reputations."

Angus put up his hand. "Hold on a second," he said. "Did you actually try this case?"

"No," said Wheeler. "Pat Reilly from our office. But after that verdict, I went through the entire transcript, looking for anything I could find."

"So you read what happened at trial," said Angus, "but you weren't there. And when I said character evidence, you instantly had the picture of someone charged with murder whose only hope was that the jury would believe his friends when they said he's not a killer."

"Well, yeah," said Wheeler.

"I'm not talking about the form of testimony or the rules of evidence, which admit all kinds of character evidence in civil trials," said Angus, "but the way the judge and jury use what they see and hear during the trial.

"The jury obviously thought your firm was representing the bad guys. Not just some company technically responsible for what happened to Mr. Neeseman, but an organization that needed to be taught a serious lesson.

"Judges and juries believe that lots of people—sometimes even whole corporations—have character traits that lead them to deliberately trash other people, use them up and throw them out, or are so inherently dishonest that they try to lie and cheat their way through trial.

"Evidence showing those kinds of character traits can be devastating. And even though nobody actually puts character in issue, that's what the judge and jury are looking for. They are trying to figure out what kind of people are in the case. Sometimes it's obvious by the way the parties and their witnesses act on the stand, or from what they did that landed them in court. Lots of times all the judge and jury have to go on are little bits and pieces that seem to reveal the real story.

"By the way," said Angus. "Character is not a one-way street. It doesn't just hurt defendants. The sense that the plaintiff provoked the situation, is lying or exaggerating, is driven by greed, or is trying to blame someone else for what he did himself can result in an otherwise solid case actually getting a zero liability verdict.

"And don't forget the lawyers. People figure that sneaky, tricky clients hire sneaky, tricky lawyers," said Angus. "Everybody knows we're hired guns, and they're sure we know a lot more than what we tell them. So they watch us like hawks for anything we might let slip.

"A trial is a moral arena in which the character of the players is powerful medicine. It is typically the most important thing to think about while planning how to put the 'focus of judgment' on your opponent."

"Focus of judgment?" said Wheeler.

"Right. In virtually any kind of case, you want to put the other side 'on trial.' So tell me about your case."

ILLUSTRATION BY JOHN SCHMELZER

"Neeseman started working for my client back when it was called Cromwell Developers," said Wheeler. "That was 26 years ago, when Neeseman was 33. Now he's a widower whose kids are out of school and on their own. He's a bookkeeper who worked in Cromwell's accounting department. That's all he wanted to do. Never tried to move up. His evaluations were always quite good. Reliable, dependable, not exciting—but he was a bookkeeper. After more than 20 years with the company, his salary was at the top of the scale for his job description.

"Then, two years ago, Cromwell was bought by Pencraft—the big California developer that makes whole gated communities up and down the West Coast and now is starting the same thing in the Midwest.

"After Cromwell became part of Pencraft, an independent accounting firm took over the entire department, and all the bookkeepers were let go. It had nothing to do with anyone's age—it had to do with efficiency, corporate reorganization and maximizing the return to the shareholders."

FINDING THE CRITICAL DIFFERENCE

I HAD TO INTERRUPT. "EXCUSE ME," I SAID, "BUT IS THAT a quote from one of Pencraft's witnesses?"

"Exactly," said Wheeler. "It's what the CEO said on direct examination."

"And you say the plaintiff wasn't treated any differently from anyone else in his department?" said Angus.

"Nope," said Wheeler. "The department was gone. No more bookkeepers."

"Anyone older than Mr. Neeseman get phased out?"

"No, he was the oldest in the department by 10 or 12 years," said Wheeler.

"Any of the bookkeepers offered different jobs so they could stay with the company?"

"Five of the six moved to different departments."

"So the only one who wasn't offered a new job was Neeseman," said Angus. "Did they tell him why?"

"All the other jobs required skills he didn't have."

"Did they offer him a trial period to see if he could do the work?" said Angus.

"No."

"Did he ask if he could stay on in a different job?"

"Yes, but that wouldn't have been appropriate."

"So after 26 years, the company told Mr. Neeseman that it had no place for him and wouldn't even let him try a different job," said Angus.

"If you want to put it that way," said Wheeler.

"What kind of severance package did he get?"

"Thirty days' termination pay," said Wheeler.

Angus leaned back and looked at Wheeler. "What kind of corporate character do you think is shown by the story you've told about Pencraft Builders?"

"Oh, I don't know," said Wheeler. "Tough, hard-nosed, fair, impartial. Gave their employee exactly what his employment contract called for. No more, no less."

"Jimmy," said Angus, "what do you think?"

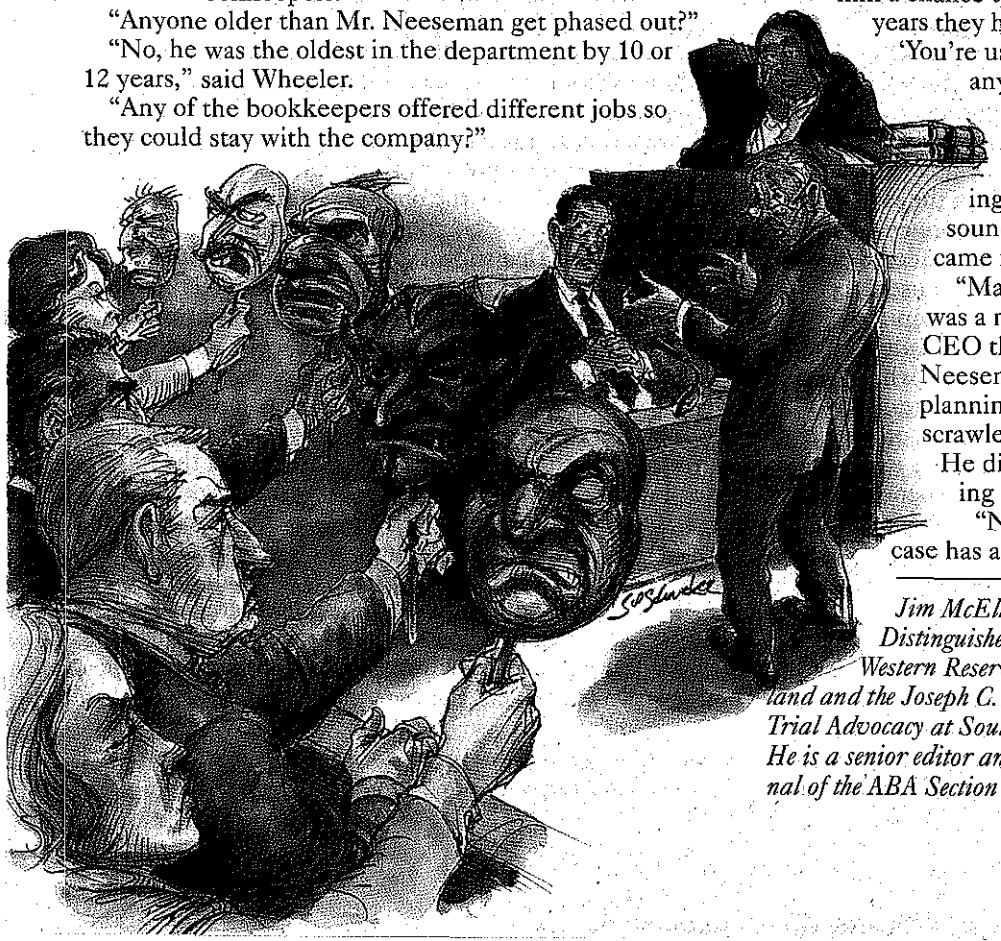
"Hardly warm and fuzzy," I said. "They didn't just let Neeseman go. They threw him away and kept the rest. It's one thing to close down a department. It's different when you find another job for everyone but the one who just happens to make the most money—the oldest one who's going to have the hardest time getting a new job.

But the biggest affront is that they didn't even give him a chance to learn a new job and stay. After 26 years they handed him a month's pay and said, 'You're useless to us, Karl. We don't have anything for you.' It doesn't leave him a lot of dignity."

Then Angus said, "Nick, this 'not appropriate' excuse for refusing to give Neeseman a chance to stay sounds pretty lame. Is that a word that came from the trial?"

"Matter of fact," said Wheeler, "there was a memo from the head of HR to the CEO that said, 'Maybe we could use Neeseman to work with numbers in the planning department,' and the CEO scrawled 'inappropriate' over the memo. He didn't do a very good job of justifying his reaction on cross-examination."

"Nick," said Angus, "I'd say your case has a character problem." ■

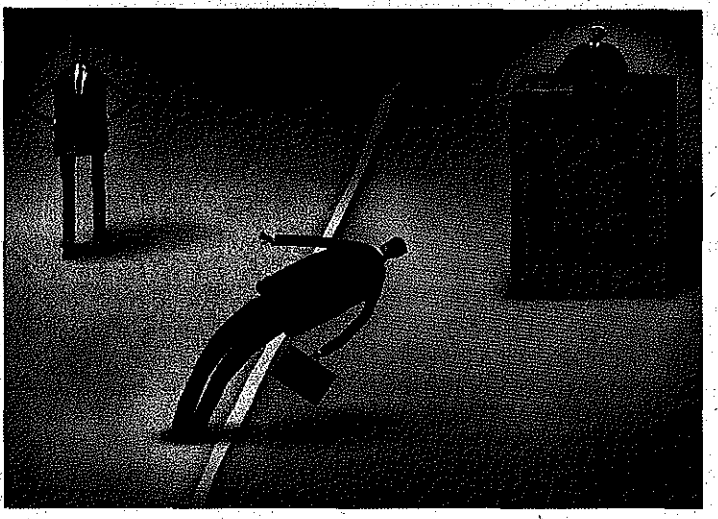


Jim McElhaney is the Baker and Hostetler Distinguished Scholar in Trial Practice at Case Western Reserve University School of Law in Cleveland and the Joseph C. Hutcheson Distinguished Lecturer in Trial Advocacy at South Texas College of Law in Houston. He is a senior editor and columnist for Litigation, *the journal of the ABA Section of Litigation.*

Judges Are Clients, Too

But representing them raises unique ethics considerations for lawyers

BY EILEEN LIBBY



A JUDGE INVOLVED in a motor vehicle collision, or any number of other legal matters, is entitled to legal representation just like anyone else. But suppose the lawyer who is retained by the judge is then asked to represent someone else in, say, a medical-malpractice lawsuit that happens to be on the judge's docket. Is it ethically possible for the lawyer to represent the judge in one case and appear before the judge in another matter?

The answer is maybe, says the ABA Standing Committee on Ethics and Professional Responsibility in Formal Opinion 07-449 (Aug. 9, 2007). But the committee cautions that those circumstances contain potential pitfalls for both the lawyer and the judge.

Under Rule 1.7 of the ABA Model Rules of Professional Conduct, the lawyer must determine whether there is a significant risk that representing either client would be materially limited by his or her obligations to the other client. "If so, the lawyer may proceed with the representation under Rule 1.7(b) only if the lawyer reasonably believes that he will be able to provide competent and diligent representation to each affected client, and each affected client gives informed consent, confirmed in writing," states the committee's opinion.

The judge, meanwhile, is governed by Rule 2.11 of the ABA Model Code of Judicial Conduct, which states that a judge must disqualify herself from presiding over any proceeding if she has a personal bias or prejudice concerning a party or a party's lawyer. "The existence or nonexistence of such bias or prejudice depends on the facts of any particular situation," notes the opinion.

On ABAJournal.com
Read the full opinion and the model rules for lawyers and judges

Even if the judge concludes that she is not personally biased or prejudiced toward her lawyer, she may continue to preside over the case only if she discloses on the record that she is being represented in the other matter by the lawyer (or another member of the lawyer's firm), and the parties and their lawyers all agree to waive the judge's disqualification after considering the disclosure out of the presence of the judge and court personnel.

(Most state conduct codes and rules for lawyers and judges are based on the Model Rules and the Model Code.)

PRUDENT THING TO DO

FOR A LAWYER, THE SITUATION becomes most problematic if the judge fails to comply with the disclosure requirements, set forth in Rule 2.11 of the judicial code.

The ethics committee concluded that a lawyer who continues to participate in a case presided over by the judge is violating Rule 8.4 of the Model Rules, which prohibits lawyers from knowingly assisting misconduct by a judicial officer. But the lawyer's options on how to proceed are limited. Under Model Rule 1.6, the lawyer's representation of the judge is confidential information that the lawyer generally may not disclose without the judge's consent.

The necessary—or at least prudent—action is to withdraw from at least one, and probably both, of the representations, under Model Rule 1.16 (Declining or Terminating Representations). "The committee believes that, at least presumptively, the representation begun later in time is the one from which withdrawal would be required," says the opinion, because that is the representation that triggered the violation of Rule 8.4.

After withdrawing, the lawyer still would be prohibited from disclosing information about representing the judge, says the committee, which also concluded that the obligation of confidentiality trumps any duty to report the judge to appropriate disciplinary authorities.

A lawyer can avoid the whole sticky wicket, says the ethics committee, by including a provision in the engagement letter to represent a judge stating that, in the event the lawyer or a member of his firm appears before the judge during the representation, the judge will either disqualify herself entirely or make appropriate disclosures on the record as required by the judicial code. An alternative: Include an advance waiver of confidentiality in the engagement letter. ■

Eileen Libby is associate ethics counsel for the ABA Center for Professional Responsibility.

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TECHNOLOGY

LEARNING 3G-SPEAK

Primer helps explain all that cellular talk

By Dennis Kennedy

WILL YOUR CELLULAR PHONE OR OTHER WIRELESS DEVICE UNTETHER you and become the main platform from which you access the Internet? Could be, and in the very near future. New devices, wireless standards and availability of anytime-anywhere access are becoming commonplace.

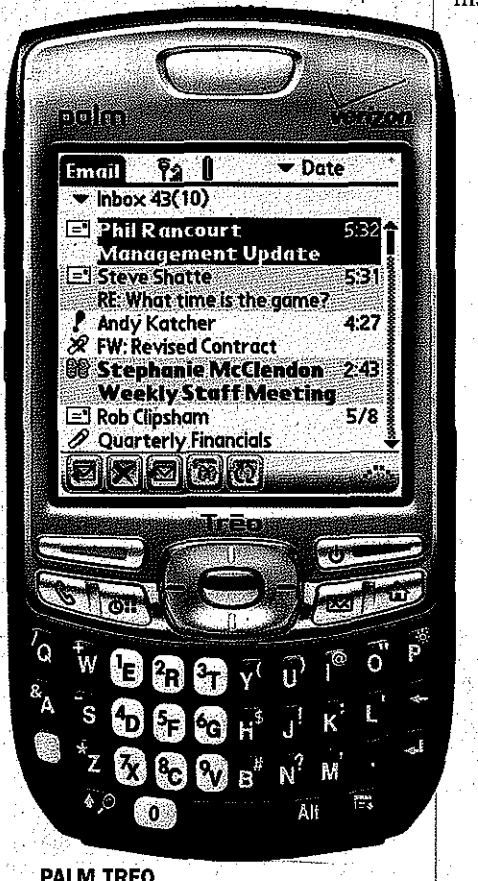
Apple's new 3G iPhone has generated a great deal of excitement and raised awareness about high-speed wireless data access through cell phones and other mobile devices. Lawyers are increasingly using BlackBerrys, Treos and wireless modems for mobile Internet access, yet there are many questions. Yes, there is potentially faster access, but the wireless world—and its ever-changing array of standards—is a confusing place populated by acronyms, vendor-specific services and availability questions.

I want to give you a primer to help you navigate through this confusing world. Note that wireless is a worldwide phenomenon, but this column will largely focus on the U.S., with some notes about global issues.

Let's start with the G's.

In wireless, G stands for generation. 3G means third generation; 2G is second generation (and *so* last year), and 4G is, of course, fourth generation. We are well along in the process of moving from 2G to 3G, with some aspects of 4G just around the corner. The 2G to 3G transition has been a lengthy one and you'll often see references to 2.5G and even 2.75G as transitional phases, and as debates arise over which generation a technology should be assigned.

The key lesson is that the different generations co-exist, and your cell phone might well be moving seamlessly among the technologies in different generations. It also means that in some service areas, you might be in a 2G environment because the 3G platform is not available.



PALM TREO

HUH?

IN THE 2G WORLD, THE VAST MAJORITY of wireless phones fall into two categories: GSM and CDMA. Perhaps 80-85 percent of the cell phones in the world use the GSM standard. GSM stands for Global System for Mobile communications. Phones with GSM services use tiny SIM cards that contain user identity information as well as names and phone numbers from the user's address book. It's easy to move between carriers by simply placing the card into a new phone.

For data, the GSM world uses GPRS and a standard known as EDGE. GPRS stands for General Packet Radio Services. GPRS is the standard used in GSM to deliver dial-up modem data speeds. EDGE is the acronym for Enhanced Data rates for GSM Evolution.

Some refer to this as a 2.75G technology. Early iPhone adopters were disappointed with the iPhone's availability only on AT&T because of the lackluster speed of EDGE, about three times that of a dial-up modem. A BlackBerry Curve, for instance, on AT&T would use EDGE.

The other 15-20 percent of wireless phones—almost all in the United States—use the CDMA standard. CDMA means Code Division Multiple Access. Sprint and Verizon use this technology. In the U.S., the terms CDMAOne and IS-95 are used in connection with this standard.

The CDMA world, which is largely moving to a 3G standard known as EV-DO, uses a 2G data standard known as 1xRTT—One times Radio Transmission Technology—which increases network voice capacity and offers much faster data speeds. The CDMA and GSM standards are incompatible and use the available bandwidth in different ways.

These technologies are transitional as 3G is a standard designed to handle both voice and data simultaneously. While 3G will make our lives as users much easier, the acronyms actually get more confusing.

In the 3G era, we see more movement toward the GSM

PHOTOGRAPH COURTESY VERIZON

world. In fact, some analysts suggest the recent Verizon purchase of Alltel might well leave Sprint as the only major U.S. carrier still in the CDMA world. The key development for 3G is high-speed (think of DSL levels of speed) wireless data access.



iPHONE: It will give you 3G access only in 3G areas.

AGAIN—HUH?

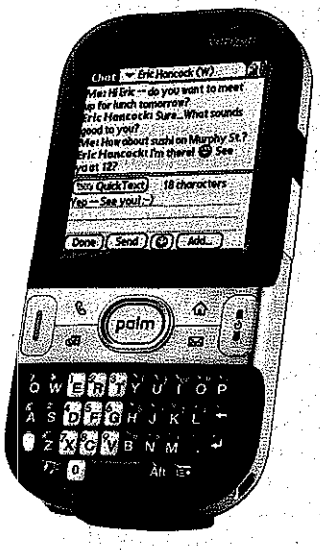
HERE'S THE CONFUSING PART: 3G systems in both the GSM and CDMA world have names that include the letters CDMA, even though they use different technologies. The good news is that there is some optimism the technologies will be able to talk to each other, giving us the potential of being able to use the same cell phones or mobile devices no matter where we are.

In the GSM world, the standard is known as UMTS, which stands for Universal Mobile Telecommunications System, also known as W-CDMA, with the W signifying wideband. Thankfully, people are starting to call this 3GSM. A Samsung Blackjack II on AT&T would use UMTS.

In the CDMA world, the 3G standard is CDMA2000. The data standard for CDMA2000 is EV-DO (EVolution Data Only). EV-DO is a high-speed wireless data standard, now in its second revision. Speeds like 4.9 megabits per second are possible.

Wireless cards like the Verizon Wireless Aircard 595 and V740 ExpressCard have become popular choices for travelers, giving them high-speed Internet access on their laptop computers from almost anywhere. Also see the new Palm Centro.

The data standard for W-CDMA/UMTS is HSPA, which stands for High Speed Packet Access.



PALM CENTRO: This smartphone has high-speed Internet access.

This is a high-speed data access technology used in connection with UMTS and the one chosen by AT&T and Apple for the iPhone.

We're almost done, so hang on if you are feeling dizzy.

Let's take a quick look at 4G. This fourth-generation technology expects a convergence with the Internet protocol standards and speeds equivalent to wired technologies with high levels of security and Internet data and voice access from nearly anywhere. The name being bandied about for 4G is LTE (Long-Term Evolution) and technologies like WiMax and iBurst are considered examples of pre-4G technologies.



SAMSUNG BLACKJACK II: This one uses UMTS.

It's also important to mention one more form of wireless Internet access.

That's Wi-Fi, the short-distance networking technology we use in home networking and for wireless access at hotels, restaurants and the like. The main issue with Wi-Fi is that you must be very close (within 100 feet or so) of a Wi-Fi access point. The speed is great, but the trade-off is limited access and a limited number of public access points.

The interesting development is that a mobile device like an iPhone can move invisibly between 2G and 3G voice and data systems and even access the Internet through Wi-Fi. It's a new era for widespread and almost-always-available Internet access.

On ABAJournal.com
Check out the Web info on new phones

WHAT WE'VE LEARNED

WHAT ARE THE KEY LESSONS to take away from all this?

1. These technologies are carrier-driven. You'll want to understand enough to know what your carrier provides.

2. Capability is very different from availability. Your new 3G iPhone will only be able to give you 3G levels of access in areas where 3G technologies are available. That's not necessarily a bad thing, but it's something that you'll want to know ahead of time.

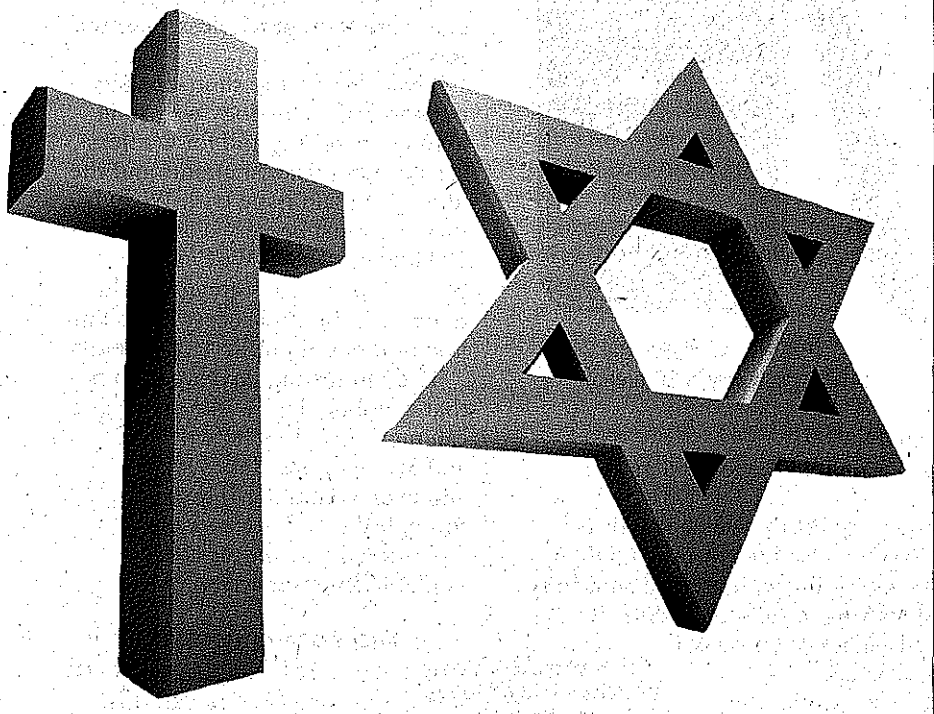
3. The convergence of voice and data is gradually happening and we are getting much closer to a world where a phone, especially a "smartphone" or other mobile device, can be a platform for both Internet and computing.

4. You'll need robust data plans, so expect your cell phone bills to increase.

With a little effort, you can speak knowledgeably about the mobile phone and data world, and navigate your way into this next generation of mobile access. ■

Dennis Kennedy, a St. Louis-based computer lawyer and legal technology consultant, is a regular contributor to the ABA Journal. *DennisKennedy.com, his website, is the home of his blog. Contact him at dmk@denniskennedy.com.*

PHOTOGRAPHS (T-B): COURTESY APPLE, VERIZON, SAMSUNG



SOLO AND SMALL FIRMS

FAITH'S REWARDS

Some lawyers find religion a righteous marketing tool

By Stephanie Francis Ward

ATTORNEY W. MARK LANIER HOPES THAT PEOPLE WHO VISIT HIS WEBSITE will see him as a talented trial lawyer who is considered one of the best among his peers. And if they decide to attend his Sunday school classes, that's OK with him too.

Among the mentions on his firm site are the numerous mass tort cases that he handles, the multimillion-dollar settlements or verdicts he has won for clients and the Bible literacy classes, with a link, that he teaches at Champion Forest Baptist Church. The community page also mentions the Christian Trial Lawyers Association, which Lanier founded. Both his firm's website and the association's site mention Lanier's faith and his profession.

"There are a lot of people who visit the website that has my teaching on it, so there's crossover to my law firm site and vice versa," says Lanier of Houston. "For me, religion is not an offensive thing and it's not an exclusive club."

Many lawyers may agree, but it seems that Lanier's approach is unique. Promoting faith might attract potential clients, some say, but what if it pushes others away?

Lanier says that religion is part of who he is, which his business webpage tries to portray. "I've tried cases all over the country," he says. "I think for some it's probably helpful [to get their business] but you just never know. For some, it might be really disgusting."

Lanier didn't say that sharing his faith—and perhaps attracting others to it—is part of his religion, but that is true for some, says D. Don Welch, who is a professor and associate dean at Vanderbilt University Law School in Nashville, Tenn.

Also, mentioning your faith could be a sort of screening process for lawyers.

"I think clearly the intention in using that is not simply to profess their faith, but also to attract the kinds of clients they would prefer to work with," says Welch, who also teaches graduate classes in the university's department of religion.

"My guess is there may be attorneys who have defined a niche market, where they might decide that this is useful," Welch adds.

LOOKING OUT FOR NO. 1

MICHAEL SHEIN, A CRIMINAL DEfense lawyer whose webpage includes a Hebrew icon that reads "It's God's will," doesn't know whether the phrase's placement gets him business.

"But I do know that if I make God happy, I'll get clients," says Shein, who practices in Fort Lauderdale, Fla.

A self-described "observant Jewish person," Shein became more religious after a rabbi used his office for a prayer group. Today Shein regularly wears a yarmulke, and he grew out his facial hair in accordance with his beliefs. Shein says he's not trying to convert people to his religion, and he represents clients from a variety of faiths.

"It's against Jewish law to try and make someone be Jewish," he says. "But I do believe that I'm supposed to be a promoter for God and let the whole world know that they do have certain rules they have to adhere to, no matter what religion they are."

He also lets potential clients know that he doesn't work on the Jewish Sabbath, from sundown Friday to Saturday evening. "I don't think a client has ever been turned off by this," Shein says.

For Lanier, he's unsure whether the religious references help or hurt his business.

"I am who I am," he says. "I'll take cases that have merit, where clients want me. I'm not out for only the Christian clients; I'm out for somebody who needs my help. I'm going to try to help them, if it's a good opportunity for them and us." ■

ILLUSTRATION BY ISTOCKPHOTO.COM

LAW FIRM MANAGEMENT

NEW TECH, OLD PROBLEM

Software buy often needs a softer buy-in

By David Gialanella

INTRODUCING NEW TECHNOLOGY TO A LAW FIRM, SAYS VICTORIA GREGORY, is 5 percent about the software and 95 percent about personnel. It's no surprise then that the software often doesn't have a chance.

Gregory, manager of customer relations management at Reed Smith's Chicago office, says most people, if given the choice to do something the old way or a new way, will pick the old way.

"Especially lawyers," she jokes.

Tech innovations like CRM (to allow sharing of client contact information) or restrictions on e-mail (to prevent system crashes) may seem essential. But they don't get universal approval, especially from partners who've become used to one way of working and bringing in new billables.

Gregory has moved from firm to firm, overseeing CRM implementation. The implementation process for new software should be the same everywhere: It must be mandatory, and it must be gradual, according to Gregory.

That's often easier said than done—and sometimes not even easily said. In fact, though several law firms that have recently installed CRM systems were contacted for this article, few wanted to talk on the record about their implementation processes.

A GENTLE INTRODUCTION

BUT ALL IS NOT LOST IN THE WAR BETWEEN THE NEW WAYS AND THE OLD. Hogan & Hartson, for instance, has begun taking a kinder, gentler approach to the introduction of new technology. H. Deen Kaplan, a partner in Washington, D.C., who co-chairs the firm's technology committee, says sometimes it is best to "treat employees as customers" and cater to their needs. Many of the firm's technologies sell themselves by making life easier for attorneys.

"The technology is there to serve attorneys and the staff—not vice versa," Kaplan says. "We don't press people to use things. We try to have a light touch."



H. DEEN KAPLAN: "Treat employees as customers."

PHOTOGRAPH COURTESY OF HOGAN & HARTSON

Gregory doesn't disagree: "The key is to make sure to focus on the benefit, not just the technical side. Tailoring communication—that's what gets a greater buy-in."

Gregory says Reed Smith had an open-contacts policy before she arrived, but the firm is now introducing its new system gradually to a few attorneys from each of its 24 offices worldwide. At two previous firms, she says, implementation was a "daily, ongoing battle." Those firms had open contact lists "in name only," she says, and the top brass did not enforce their use.

Vedia Jones-Richardson, chair of the ABA Law Practice Management Section, says letting attorneys pick and choose which programs they will use is key. "I think whenever you try to drag everybody into new technology, you're raising the bar too high," says the partner with Olive & Olive in Durham, N.C. "To the extent the system allows for flexible usage—that's where you get your highest buy-in." ■

BRIEFLY

FREE LAWS

DELAWARE IS STILL THE GO-TO JURISDICTION for many businesses to incorporate themselves, but lawyers there don't take that position for granted. That's why Scott Waxman, a partner at Potter Anderson & Corroon in Wilmington, Del., decided to get his law firm into the business of mobile computing.

"We want to make sure Delaware is the jurisdiction businesses and lawyers want to come to," he says. "If we want more business to come here, we need to be convenient to work with."

For today's lawyers, convenient information must be accessible on mobile devices. Potter Anderson spent about a year developing a free mobile service that puts the full text of Delaware statutes and case summaries produced by the firm on mobile BlackBerry devices.

The service, called eDelaware, is updated nightly and is stored on a BlackBerry's memory, so even lawyers stuck on a plane or without Internet access can search the Delaware statutes. Waxman says the content has been compressed so that any BlackBerry less than 5 years old should be able to easily carry the information in its built-in memory.

The firm is also planning to introduce more services, like Delaware bankruptcy codes and more searchable case summaries. Waxman says that while it might not make sense for every law firm to become a software provider, it is a great way to impress clients and interested parties.

"I wanted to make a tool that I would want to have on the road," he says. "We've already got users in 22 states, so I think it's clearly not just me who finds it useful."

—Jason Krause

TECHNOLOGY

ACROBAT 9 MAY NOT FLIP YOU

Features don't add lots to program's attorney appeal

By Jason Krause

WHEN ADOBE ACROBAT 8 CAME OUT LAST YEAR, IT SEEMED IMPROBABLE that the software, a standard document handling tool for many lawyers, could be made more lawyer friendly. Version 8 had new redaction tools, Bates numbering functions and metadata removal—all of which are important to attorneys who need to create secure legal documents.

The newly released Adobe Acrobat 9 does, in fact, pack in even more functions that will appeal to many attorneys. In fact, the venerable program may be getting bloated.

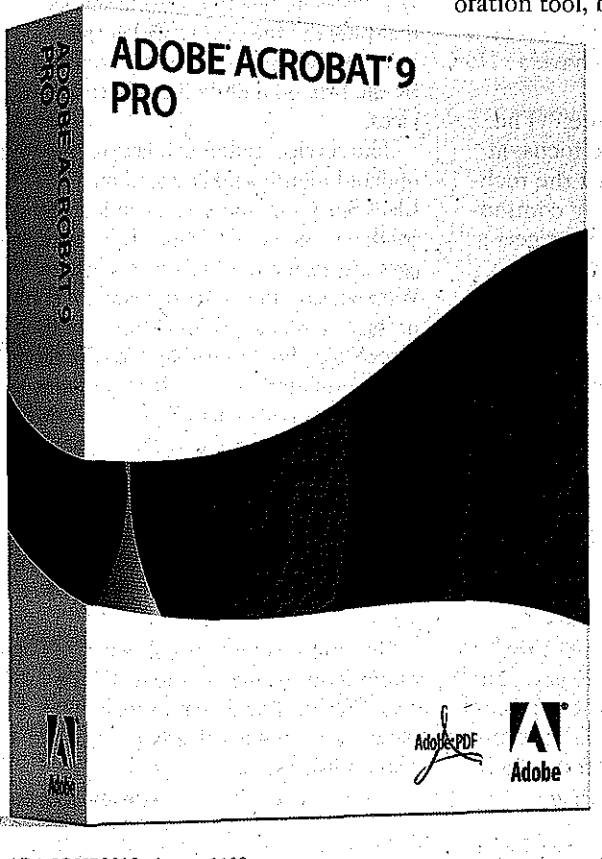
Unlike Acrobat 8, which offered up wholesale changes and new tools for lawyers, most of what is in version 9 is an upgrade of old features. Most lawyers won't need all these features, but Acrobat power users are likely to enjoy the new release.

The flashiest addition, quite literally, is fully integrated Flash video, making it possible to add videos like those found on YouTube and other websites into a PDF file. But anyone with only the free Adobe Reader can still access the content.

"One of the things we're trying to do is make sure that users with no IT staff, or people who work with people who don't have the full version of Acrobat, can still take advantage of all the features we're offering," says Rick Borstein, business development manager of the legal market for Adobe Systems.

For lawyers who just need to create and manage documents, the most interesting feature is called PDF Portfolio. It lets users choose from several layouts to create documents and presentations. PDF Portfolio documents can be converted into other programs like Microsoft Word or Excel.

Acrobat 8 offered the Acrobat Connect online collaboration tool, but users had to pay to set up a session. Now Adobe is letting users have free collaboration for up to three people through Acrobat.com. The current release offers 2GB of shared space, so users can share and edit documents online, and even users who only have the free Adobe Reader software can participate. Some nice features include the ability to save the chat comments made by participants and the ability to compare two versions of a PDF in case anyone gets confused about what changes have been made.



CHOCK-FULL: The venerable program may be getting bloated.

BETTER BATES-ING

FOR LAWYERS, THE BATES NUMBERING tool has been made more flexible. It is now possible to renumber documents or to continue to use numbers already assigned to a file when they are imported into Acrobat, which wasn't always possible in past versions. And to redact items, users don't have to manually scroll through a document to find items to be blacked out; just search by patterns and redact data types, such as phone numbers or Social Security information, and automatically blot out such information.

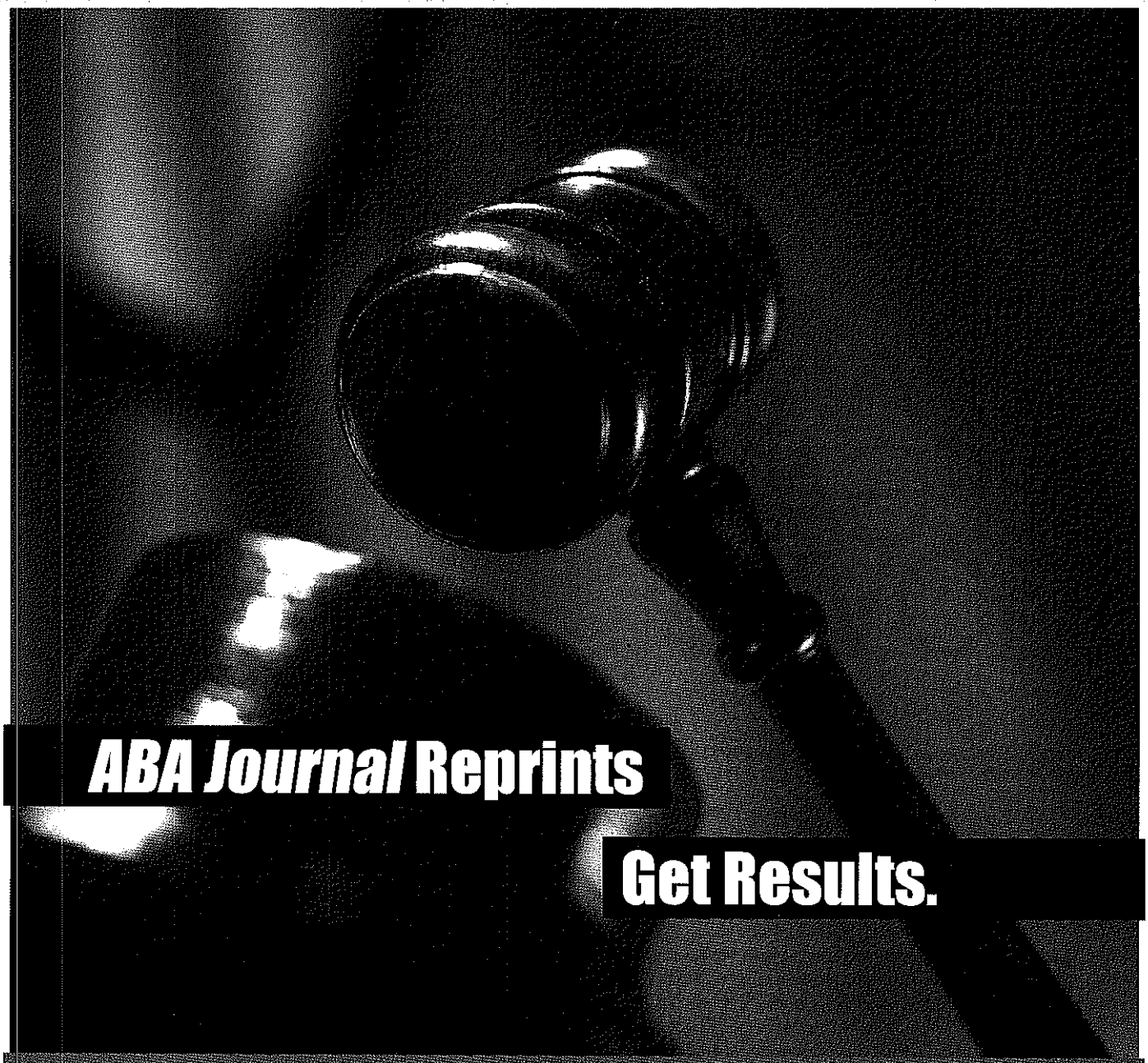
Thanks to a new optical scanning program, Acrobat can process scanned batches of documents more effectively. It also features improved compression technology, so that even documents with video or high-resolution images do not become too big.

Still, it's not clear lawyers are clamoring for all of these upgrades. According to the *2008 ABA Legal Technology Survey Report*, only 38 percent of lawyers use metadata removal software, although Adobe Acrobat was the most commonly used tool.

Similarly, less than a quarter of those surveyed use encryption software, though Adobe is the second most commonly used encryption tool for lawyers, behind Microsoft Outlook.

And as Adobe includes more features, some lawyers may begin to shift to other, less full-featured (and less expensive) products. Nuance Communications' PDF Create ($50) and Bluebeam Software's PDF Revu ($149) can create PDF files from most common software programs. Adobe Acrobat 9 Standard starts at $299, while the Acrobat 9 Pro with more document creation features costs $499. The Pro Extended version—including Adobe Presenter for presentations, which used to be a separate $500 application—costs $699. ■

PHOTOGRAPH COURTESY OF ADOBE



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THE 25 GREATEST LEGAL MOVIES

TALES OF LAWYERS WE'VE LOVED AND LOATHED

BY RICHARD BRUST

WHAT WOULD HOLLYWOOD DO without lawyers? In a town built on copyrights and cosmetic surgery, lawyers have done far more than pen the small print in studio contracts or post bail for hollow-eyed stars on the way to and from rehab. From the incisive Henry Drummond and the droll Mr. Lincoln to the callow Danny Kaffee and the regal Atticus Finch, lawyers have provided some of Hollywood's most memorable cinematic heroes and some of its most honorable and thoughtful films.

Earlier this year, the *ABA Journal* asked 12 prominent lawyers who teach film or are connected to the business to choose what they regard as the best movies ever made about lawyers and the law. We've collated their various nominees to produce our jury's top picks.

Together these films represent 31 Oscar wins and another 85 nominations as befits the best work of some of the greatest actors, writers and directors of their time.

So quiet, please. A rap of the gavel, a pull of the curtain, and 'Hear ye! Hear ye!' for the 25 greatest law films ever made.

brustr@staff.abanet.org



PHOTOGRAPH: UNIVERSAL/ THE KOBAL COLLECTION



TO KILL A MOCKINGBIRD (1962)

Gregory Peck lends his legendary dignity to the role of Atticus Finch, Harper Lee's iconic small-town attorney. Penned for the screen by Horton Foote, the movie was an instant classic, as lawyer Finch rises above the naked racism of Depression-era Alabama to defend a crippled black man (Brock Peters) falsely accused of rape by a lonely, young white woman. Finch's quiet courage is seen through the eyes of Scout (Mary Badham), his 6-year-old daughter, and embraced by an emerging generation of lawyers as the epitome of both moral certainty and unyielding trust in the rule of law. When the accuser's drunken, incredulous father glares and asks Atticus, "What kind of man are you?" the unspoken answer is easy: both the self-assured lawyer and upright human being we all hope to be.

TRIVIA: THREE OSCAR WINS. FINCH WAS LEE'S MOTHER'S MAIDEN NAME.



2 *12 ANGRY MEN* (1957) Henry Fonda produced and starred in this faithful adaptation of Reginald Rose's critically acclaimed stage play chronicling the hostile deliberations of a jury in a death penalty case. A lone juror (Fonda) expresses his doubts about what seems at first an open-and-shut prosecution. What tumbles out of the ensuing discussion is a gut-wrenching examination of the prejudices, prejudgments and personal psychological baggage these assembled citizens have brought to a life-or-death debate over the fate of the young Puerto Rican defendant. Based on Rose's own experience as a juror in a manslaughter trial, the play was first adapted for TV by Sidney Lumet, who went on to direct the movie version, his first feature film.

TRIVIA: LOST ALL THREE OSCAR NOMINATIONS TO *THE BRIDGE ON THE RIVER KWAI.*

3 *MY COUSIN VINNY* (1992) Vincent "Vinny" Gambini (Joe Pesci) is a brash Brooklyn lawyer who only recently managed to pass the bar exam on his sixth try. He's representing his cousin and a friend—two California-bound college students who are arrested for capital murder after a short stop at a convenience store in rural Alabama. Still, the rule of law prevails in the courtroom of Judge Chamberlain Haller (Fred Gwynne). The movie packs in cinema's briefest opening argument ("Everything that guy just said is bullshit."), its best-ever introduction to the rules of criminal procedure, and a case that hinges on properly introduced expert testimony regarding tire marks left by a 1964 Skylark and the optimal boiling time of grits.

TRIVIA: MARISA TOMEI WON THE OSCAR FOR BEST SUPPORTING ACTRESS.

PHOTOGRAPH: UNITED ARTISTS/THE KOBAL COLLECTION

4 *ANATOMY OF A MURDER* (1959) Otto Preminger directs this realistic study of an Army lieutenant accused of murdering a bartender who allegedly raped his coquettish wife. An A-list cast is headed by James Stewart as the defense attorney, George C. Scott as prosecutor, Ben Gazzara as the defendant and Lee Remick as his wife. The surprise, though, is the stupendous performance in the role of the judge by real-life lawyer Joseph Welch, who represented the Army in the McCarthy hearings. The plot skips nimbly through a thicket of ethical dilemmas involved in representing a murder defendant. It was inspired by an actual case and adapted from a novel written by a Michigan supreme court judge. The original score is by Duke Ellington, who makes a cameo.

TRIVIA: NOMINATED FOR SEVEN OSCARS, LOST FOR BEST PICTURE TO *BEN-HUR*.

5 *INHERIT THE WIND* (1960) Two grand old lions of the screen, Spencer Tracy and Fredric March, play two grand old lions of the law, Clarence Darrow and William Jennings Bryan, as they grapple in the historic 1925 Scopes "monkey trial" in backwoods Dayton, Tenn. The film, adapted from a 1955 play by Jerome Lawrence and Robert E. Lee, is a fictionalized account, and the characters' names are changed, however slightly (Tracy's Darrow is Henry Drummond, and March's Bryan is Matthew Harrison Brady). But much of the courtroom testimony was taken straight from the trial transcript. Nor have Americans evolved much; 80 years later a federal judge in Pennsylvania was forced to rule on "intelligent design."

TRIVIA: "HE THAT TROUBLETH HIS OWN HOUSE SHALL INHERIT THE WIND." PROVERBS 11:29

6 *WITNESS FOR THE PROSECUTION* (1957) The legendary Billy Wilder (*Some Like It Hot, The Apartment*) directs from a script by the legendary mystery writer Agatha Christie. But it's the legendary Charles Laughton who fills the screen as the pompous barrister who is supposed to be retired after recovering from an illness but can't resist taking a puzzling murder case. Real-life wife Elsa Lanchester is his sharp-tongued nurse, and the two sparkle as they verbally spar. Tyrone Power is the playboy defendant; Marlene Dietrich is his wife and, surprisingly, the witness in question. It's not the only surprise, as befits a Dame Agatha story. Watch for yourself.

TRIVIA: NOMINATED FOR SIX OSCARS. DIETRICH WAS CRUSHED NOT TO BE AMONG THOSE NOMINATED.

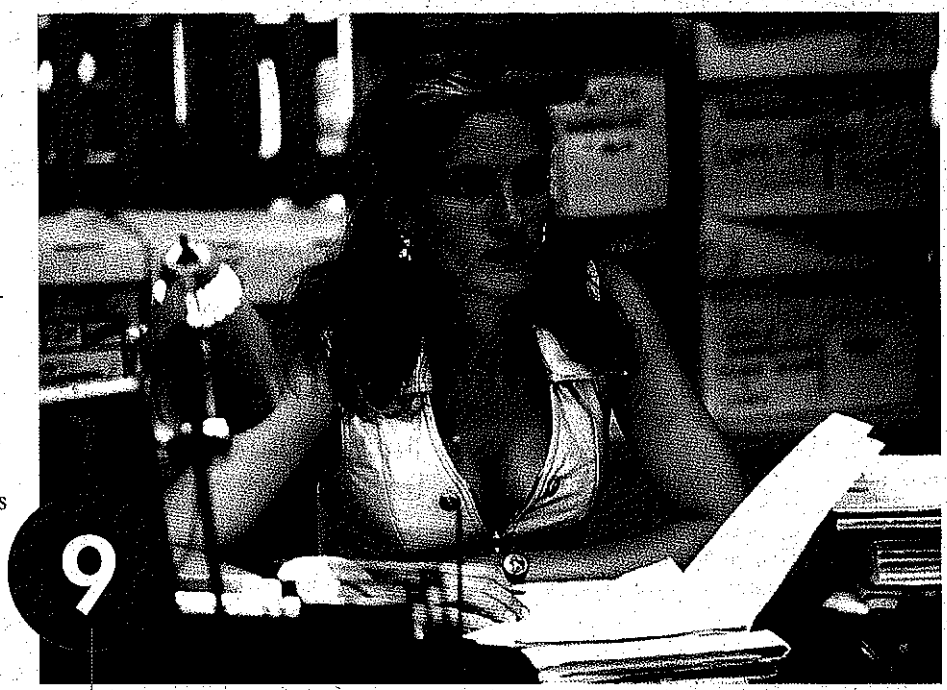
7 *BREAKER MORANT* (1980) Australian director Bruce Beresford adapts the story of three fellow countrymen who fight for the British Empire in the colonial Boer War in South Africa and are tried and convicted of war crimes. The issues raised in the 1901 guerrilla-war trial echo through decades of 20th century wars: Which orders to follow, which civilians are the enemy, etc. Includes outstanding performances, especially by Edward Woodward and Bryan Brown as the Australian officers and by Jack Thompson as their disheveled defense attorney.

TRIVIA: OSCAR-NOMINATED FOR BEST ADAPTED SCREENPLAY. *ORDINARY PEOPLE* TOOK THE TROPHY.

8 *PHILADELPHIA* (1993) Tom Hanks won an Oscar as an Ivy-educated gay attorney who claims his big-time law firm fired him after discovering he contracted AIDS. The somewhat dated and self-righteous script is saved by Denzel Washington's vibrant and nuanced performance as the solo personal injury lawyer who takes the case when everyone else turns Hanks' character down, and who comes to terms with his own homophobia. Bruce Springsteen fans will enjoy the Boss's Oscar-winning title song.



TRIVIA: THAT THE FILM IS "INSPIRED IN PART" BY THE LIFE AND LITIGATION OF GEOFFREY BOWERS, AN ATTORNEY WHO DIED OF AIDS, IS THE RESULT OF A REAL-LIFE LAWSUIT.



9 *ERIN BROCKOVICH* (2000) Julia Roberts does an Academy Award-winning turn as the real-life paralegal and sassy single mom whose dogged investigation into a suspicious real estate case turns up a pattern of illegal dumping of highly toxic hexavalent chromium and one of the heftiest class action suits in U.S. history. Albert Finney portrays her boss, Ed Masry. Lawyer line of the movie, she to him: "Do they teach lawyers to apologize? 'Cause you suck at it."

TRIVIA: THE REAL BROCKOVICH AND THE REAL MASRY MAKE CAMEO APPEARANCES IN A RESTAURANT.

PHOTOGRAPHS: (L-R) UNIVERSAL; COLUMBIA/THE KOBAL COLLECTION

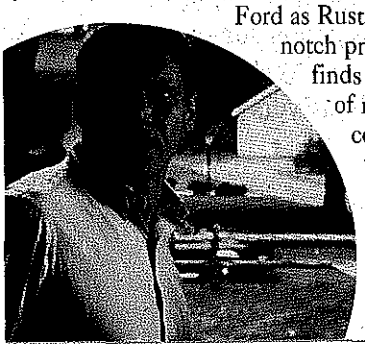


12

10 *THE VERDICT* (1982) Paul Newman is a washed-up, alcoholic lawyer who gets handed a medical-malpractice case and sees it as one last chance to get his career right. James Mason is diabolical as his courtroom opponent who cavorts with the judge, played by Milo O'Shea. Charlotte Rampling is the love interest—whose interests may not be those of Newman's character. Tight and tense direction by Sidney Lumet (*12 Angry Men*, *Dog Day Afternoon*).

TRIVIA: NOMINATED FOR FIVE OSCARS IN THE YEAR OF *GANDHI*.

11 *PRESUMED INNOCENT* (1990) Lawyer-novelist Scott Turow's best-seller features Harrison Ford as Rusty Sabich, a top-notch prosecutor who finds himself accused of murdering a colleague with whom he's had an affair.



JUDGMENT AT NUREMBERG (1961) Stanley Kramer directed this searing portrayal of the Nazi war crimes trials set in 1948. The Abby Mann script focuses, in particular, on charges brought against four German judges who are accused of allowing their courts to become accomplices to Nazi atrocities. An American judge, Dan Haywood (Spencer Tracy), finds himself trying to understand how these once-esteemed colleagues allowed themselves to be used. He gets little or no help from average Germans, who are busy distancing themselves from Germany's Nazi past. When one of the judges, Ernst Janning (Burt Lancaster), breaks from the others and confesses, it becomes clear that—whatever their original intentions—these judges have chosen political obligations over their personal senses of right and wrong.

TRIVIA: WON TWO OSCARS. MARLENE DIETRICH, WHO PERSONALLY EXPERIENCED THE NAZI REGIME, WAS ALLOWED TO WRITE MANY OF HER OWN LINES.

PHOTOGRAPHS: (T-B) UNITED ARTISTS; WARNER BROS/THE KOBAL COLLECTION

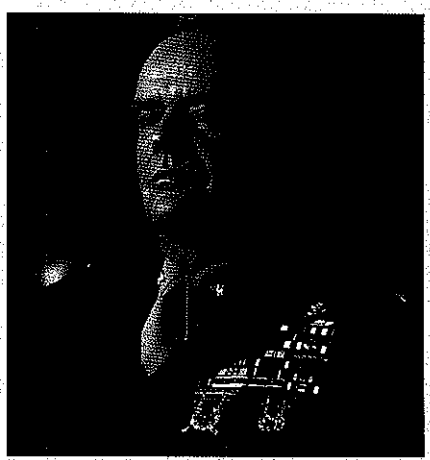
Through his lawyer, Sandy Stern (Raul Julia), Sabich discovers the seamy side of himself and the criminal law—a view that both offends and saves him. The well-constructed plot includes a dark twist at the end that Sabich will have to learn to live with.

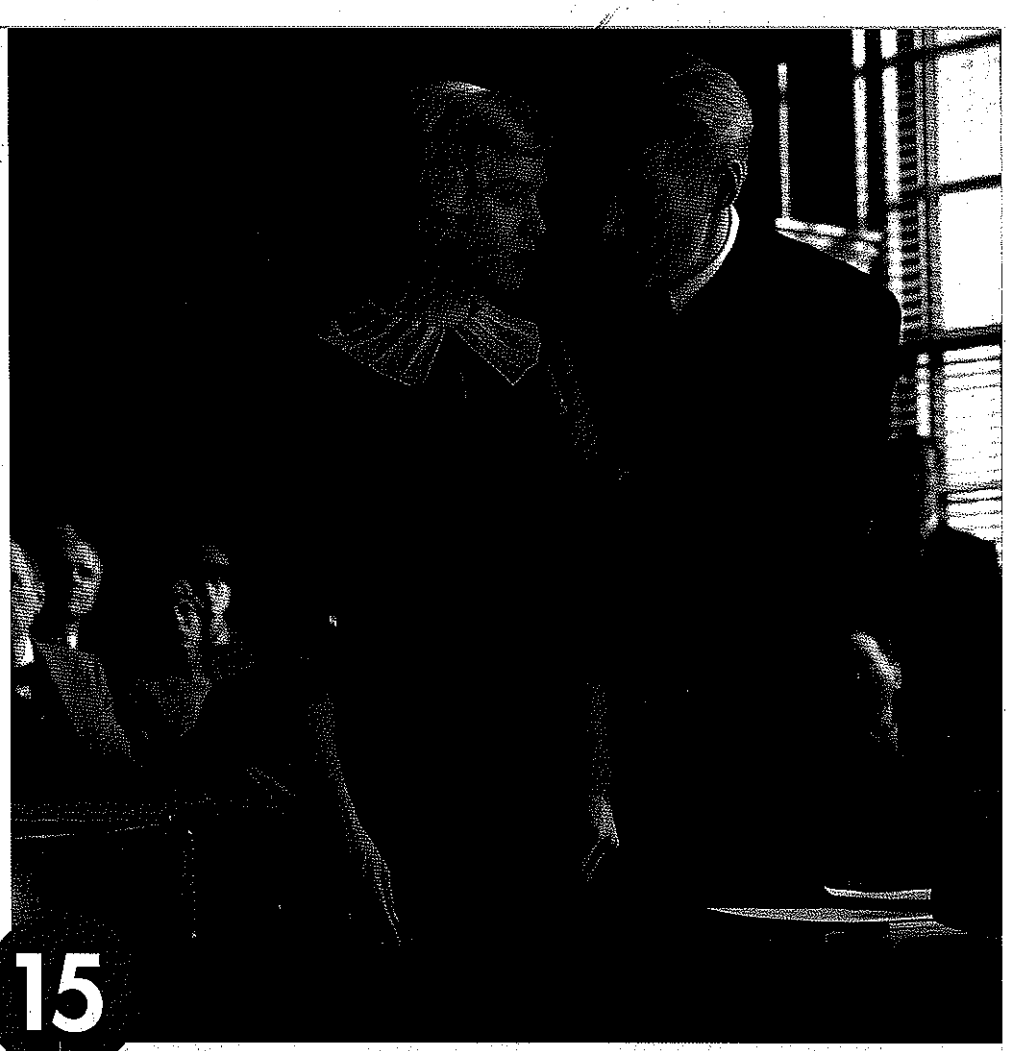
TRIVIA: PRODUCED BY ALAN J. PAKULA, WHO EARLY IN HIS CAREER PRODUCED *TO KILL A MOCKINGBIRD*.

13 *A MAN FOR ALL SEASONS* (1966) Paul Scofield's Oscar-winning performance as Sir Thomas More, the Tudor-era judge made chancellor of England. He is caught in the political struggle involving Henry VIII's decision to defy the Roman Catholic Church and divorce his wife to wed Anne Boleyn. Lines from playwright Robert Bolt's stirring script are frequently quoted in U.S. court opinions: "I know what's legal, not what's right. And I'll stick to what's legal." And: "This country is planted thick with laws, from coast to coast—man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then?"

TRIVIA: WON SIX OSCARS, INCLUDING BEST PICTURE AND BEST DIRECTOR (FRED ZINNEMANN).

14 *A FEW GOOD MEN* (1992) Say what you will about Tom Cruise, but he is high-octane as a reluctant Navy JAG litigator in Rob Reiner's suspenseful film iteration of this military courtroom drama by Aaron Sorkin (creator of *The West Wing*). Two low-ranking Marines from the





15

CHICAGO (2002) Lawyers tap-dance all the time, but Richard Gere does so pretty darn well as sleazeball attorney Billy Flynn in the film adaptation of the highly successful Bob Fosse musical. Catherine Zeta-Jones and Renee Zellweger play celebrity murderers who cynically parlay their Jazz Age notoriety into a vaudeville act. Maurine Dallas Watkins' original play, *Chicago, or Play Ball*, produced as a silent film by Cecil B. DeMille in 1927 (and later, the 1942 Ginger Rogers vehicle *Roxie Hart*), is based on two actual murder trials she covered as a reporter for the *Chicago Tribune*.

TRIVIA: WON SIX OSCARS. IN THE ORIGINAL BROADWAY PRODUCTION, FLYNN WAS PLAYED BY THE LATE JERRY ORBACH OF *LAW & ORDER* TV FAME.

PHOTOGRAPHS: (L-R) COLUMBIA/TRI-STAR; MIRAMAX/THE KOBAL COLLECTION

Guantanamo Bay naval base are being court-martialed for the death of another, allegedly part of an unofficial punishment known as a "code red." The Marines say they were following orders. Their unapologetic commander, Col. Nathan Jessep (an absolutely electric Jack Nicholson) says they acted on their own. The truth, if you can handle it, turns out to be something more complicated than a sense of duty—but sometimes, exactly that.

TRIVIA: SORKIN BASED HIS ORIGINAL PLAY ON A MILITARY CASE PROSECUTED BY DAVID IGLESIAS, LATER U.S. ATTORNEY FOR NEW MEXICO.

16 *KRAMER VS. KRAMER* (1979) Dustin Hoffman and Meryl Streep both won Oscars as Ted and Joanna Kramer, an estranged couple fighting over custody of their son. Ted deals with real fatherhood for the first time as a sin-



gle dad when Joanna leaves him. But he must also face his own failures when Joanna resurfaces demanding to gain custody of their son. An all-too-painful reminder of the human toll that is possible when domestic relations litigation takes a nasty turn.

TRIVIA: WON FIVE OSCARS. FOR SOME OF THE MOST COMPLEX SCENES, HOFFMAN LEANED ON HIS OWN RECENT EXPERIENCE WITH DIVORCE.

17 *THE PAPER CHASE* (1973) James T. Hart (Timothy Bottoms) is a first-year law student desperately seeking the approval of Harvard's sternest professor, Charles W. Kingsfield Jr. (John Houseman). He begins to get the respect that he's earned, only to discover that the young woman he's involved with (Lindsay Wagner) is the professor's daughter. The real drama, however, is the demanding milieu of Harvard Law School, where reputations can be made and broken in a single, grueling class.

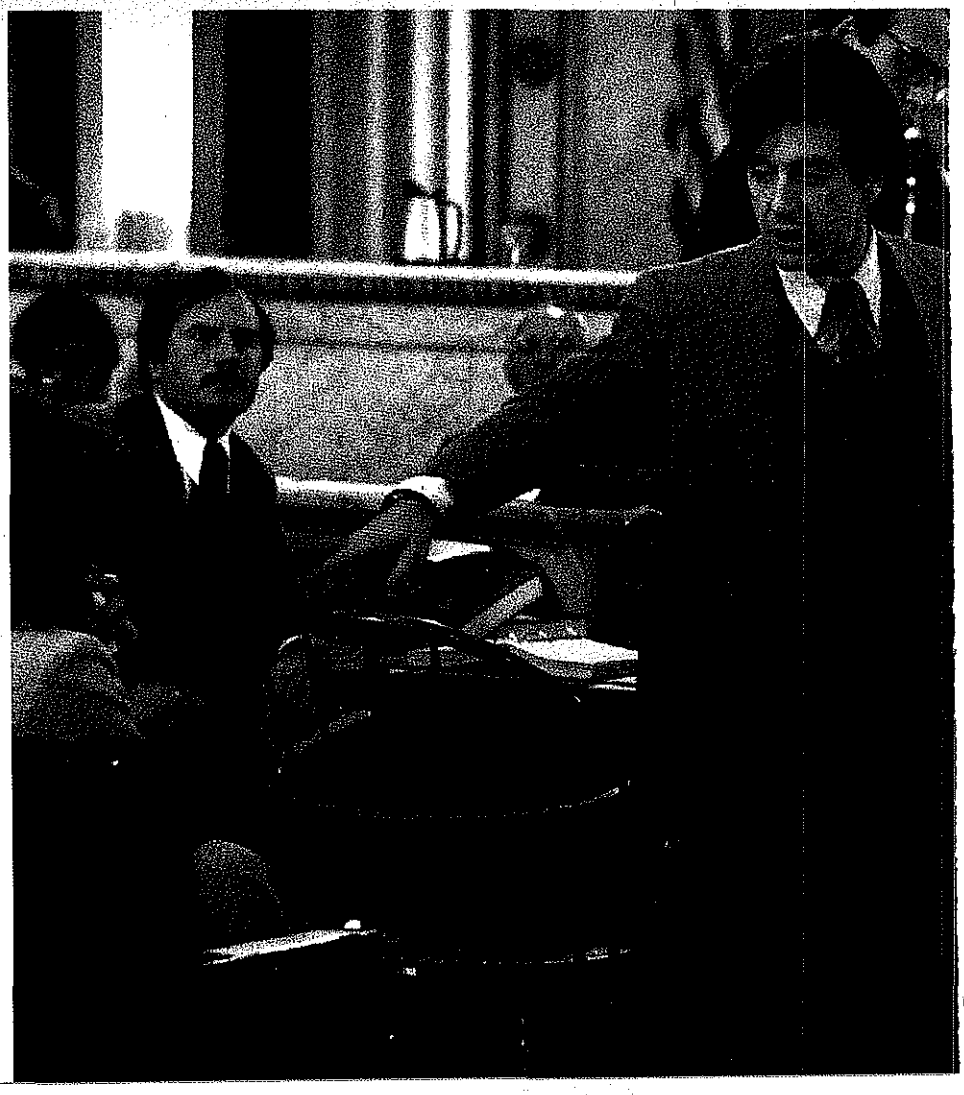
TRIVIA: HOUSEMAN REPRISED HIS OSCAR-WINNING ROLE AS KINGSFIELD FOR FOUR SEASONS ON TELEVISION.

18 *REVERSAL OF FORTUNE* (1990) Before there was an O.J. to help confuse us about the difference between innocent and not guilty, there was Claus von Bulow. Jeremy Irons won an Oscar for his portrayal of the feckless von Bulow, crassly dependent husband of Newport, R.I., socialite Sunny von Bulow, who lapsed into a coma when she was allegedly injected with an overdose of insulin. Tried and convicted of attempted murder in 1982, largely on privately gathered evidence, von Bulow hires Alan Dershowitz, the now ubiquitous Harvard law professor, whose account of the case is the basis for this movie. The law line of the movie occurs when von Bulow is attempting to explain to Dershowitz (Ron Silver) what actually happened: "No," shrugs Dershowitz. "Never let defendants explain; puts most of them in an awkward position." "How do you mean?" asks von Bulow. "Lying," says Dershowitz.

TRIVIA: DERSHOWITZ APPEARS IN CAMEO AS A JUDGE ON THE APPELLATE COURT.

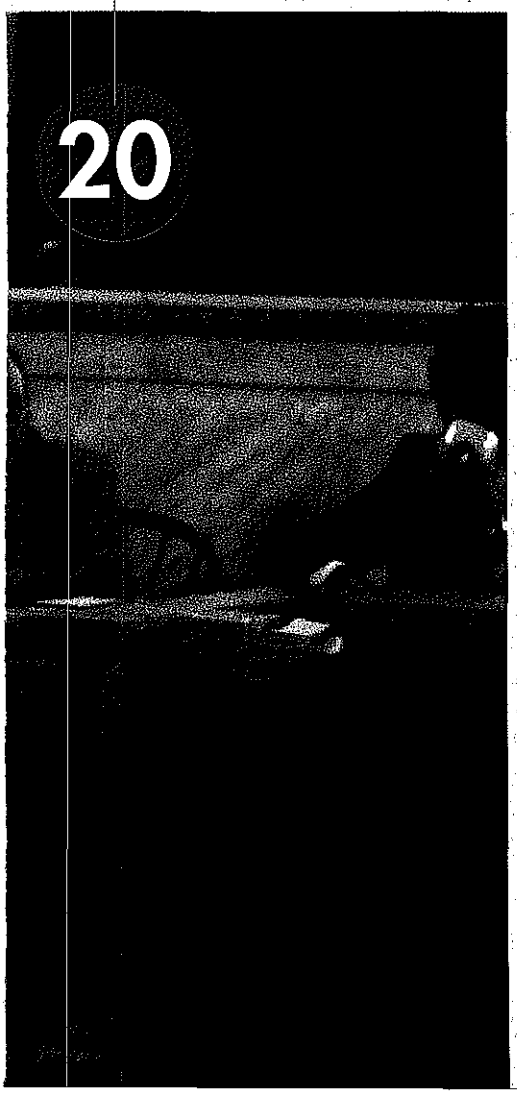
19 *COMPULSION* (1959) In 1924, Chicago is rocked by a spectacular murder, apparently committed by two brilliant teenagers from wealthy families who have sought to plot and execute the perfect crime. An aging legendary lawyer, Jonathan Wilk (Orson Welles), is hired to defend the young men with the modest hope of sparing them from the gallows. The film is based on Clarence Darrow's actual defense of Nathan Leopold and Richard Loeb. Director Richard Fleischer turns the sordid details of their vicious crime into a passionate attack on the death penalty.

TRIVIA: WHEN STUDIO PUBLICISTS ADVERTISED THE FILM'S CONNECTION TO THE LEOPOLD AND LOEB CASE, LEOPOLD SUED FOR INVASION OF PRIVACY. HE LOST.

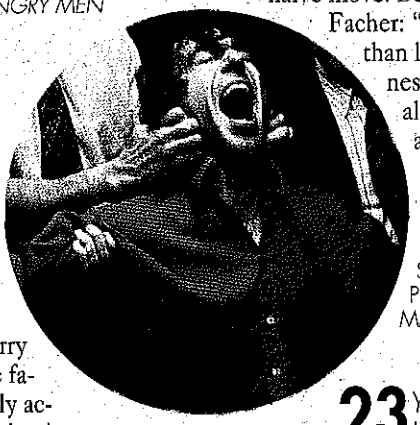


AND JUSTICE FOR ALL (1979) An angry Al Pacino (is there any other kind?) plays Arthur Kirkland, the very best lawyer he knows in Baltimore. His client is losing his marbles; his girlfriend is losing her patience; the senior judge plots suicidal fantasies. Moreover, he is trapped into representing a judge accused of rape—a judge who is gleefully ignoring the incarceration of a very innocent and distressed Kirkland client. All of this is thrown together in a final courtroom harangue that makes Pacino's bank robber mugging in *Dog Day Afternoon* sound like Trappist prayer. You think I'm outta order? Hey, courtroom or not, it's Pacino.

TRIVIA: JACK WARDEN, WHO PLAYS A SUICIDAL JUDGE, APPEARS IN TWO OTHER FILMS ON THE *ABA JOURNAL'S* TOP 25, *12 ANGRY MEN* AND *THE VERDICT*.



21 *IN THE NAME OF THE FATHER* (1993) Pete Postlethwaite and Daniel Day-Lewis play Giuseppe and Gerry Conlon, a real-life father and son falsely accused of participating in two separate IRA bombing sprees outside London. The film chronicles their struggle to convince British courts of their innocence. After 15 years, human rights lawyer Gareth Peirce (Emma Thompson) is able to prove that police had altered records of their interrogations, forcing a British court to release the younger Conlon and his three alleged co-conspirators. Six others were exonerated after serving their sentences. A seventh, Giuseppe Conlon, died in prison.



TRIVIA: NOMINATED FOR SEVEN OSCARS. NO WINS.

22 *A CIVIL ACTION* (1998) On its surface, this is a David vs. Goliath: Small-firm Boston plaintiffs lawyers up against two conglomerates whose tannery, they've decided, is responsible for the leukemia-related deaths of eight children. At its core, however, this is a grown-up thriller about the perilous practical consequences of demanding moral outcomes from a legal action better suited to risk-and-reward. John Travolta is earnest as Jan Schlichtmann, the firm's senior partner whose outrage drives the firm into a war of attrition against a better-funded foe. Robert Duvall is adroit as the quirky Jerome Facher, a corporate lawyer whose experience predicts Schlichtmann's every naive move. Best lawyer line goes to Facher: "Pride has lost more cases than lousy evidence, idiot witnesses and a hanging judge all put together. There is absolutely no place in a courtroom for pride."

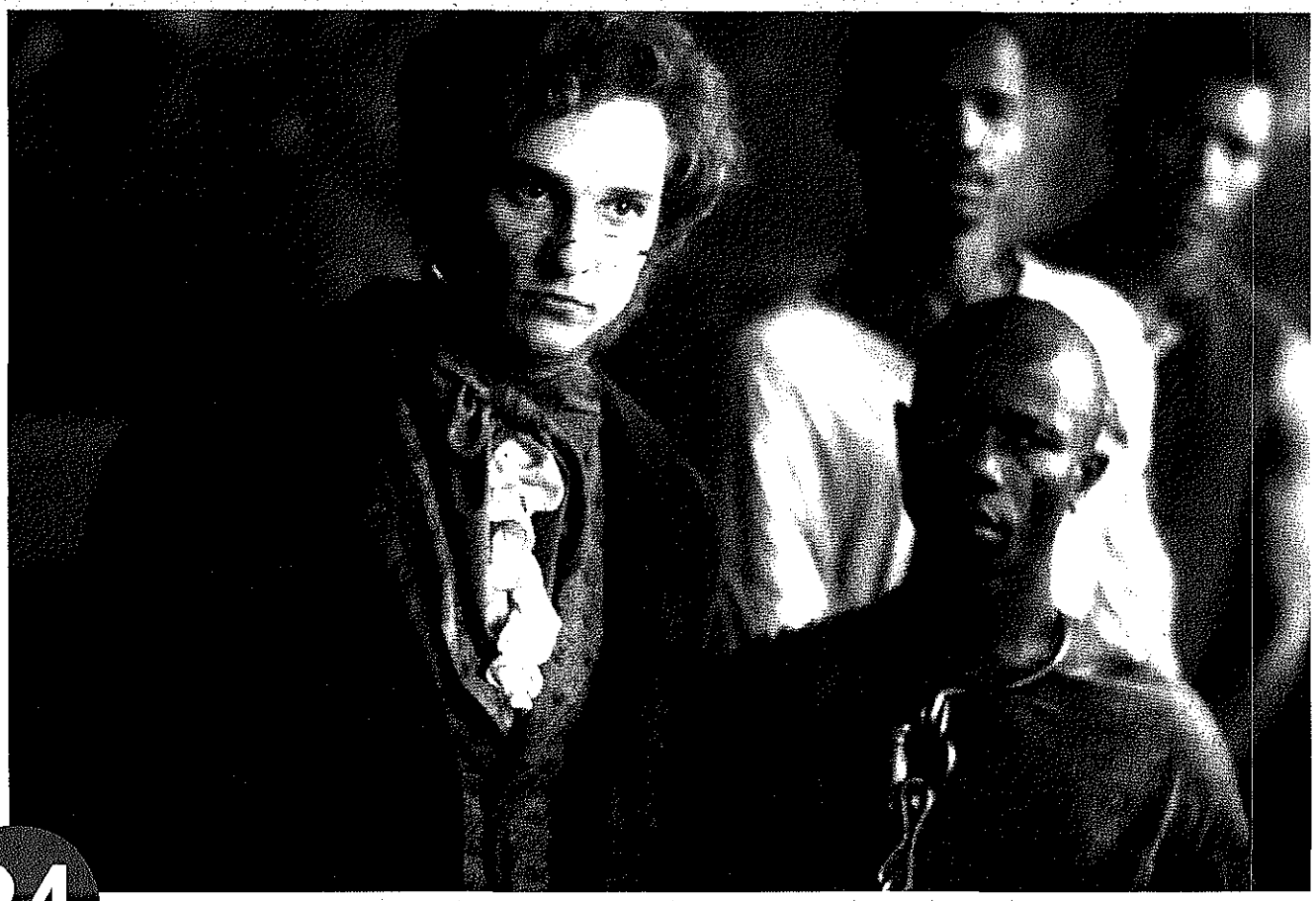


TRIVIA: NOMINATED FOR TWO OSCARS. SCHLICHTMANN STILL PRACTICES LAW IN BEVERLY, MASS.

23 *YOUNG MR. LINCOLN* (1939) Henry Fonda makes an engaging, beardless and believable Abraham Lincoln in John Ford's fictionalized account of Lincoln's early adult years from New Salem to Springfield, and—this being Hollywood—from the lovely and doomed Ann Rutledge to the ambitious and manipulative Mary Todd. The key plot point revolves around a killing that takes place during a July 4 brawl. As a newly minted lawyer, the young Lincoln manages to quell a lynch mob by telling them he needs the two brothers accused in the murder to be his first real clients. The film won an Academy Award for its screenplay and has been named to the National Film Registry.

TRIVIA: OSCAR-NOMINATED FOR BEST WRITING, ORIGINAL STORY. THE ACADEMY AWARD WENT TO *MR. SMITH GOES TO WASHINGTON*.

PHOTOGRAPHS: (L-R) COLUMBIA; COLUMBIA; DREAMWORKS LLC; TOUCHSTONE/THE KOBAL COLLECTION



24

AMISTAD (1997) Steven Spielberg directed this historic drama of the famous 1839 slave ship uprising. An all-star cast includes Matthew McConaughey, Morgan Freeman and Anthony Hopkins as former President John Quincy Adams, who argues the case to the U.S. Supreme Court. Justice Harry Blackmun reads the court's opinion in a cameo role as Justice Joseph Story. The film was criticized for taking liberties with the facts, but it succeeds as a portrayal of antebellum America coming to grips with slavery—and how the law was employed both for and against.

TRIVIA: NOMINATED FOR FOUR OSCARS.

25

MIRACLE ON 34TH STREET (1947) The holiday classic has one of the most improbable courtroom scenes ever. But then, how would you go about proving that your client is the real Santa Claus? John Payne portrays the eager young attorney whose client, one Kris Kringle (played by Edmund Gwenn), calmly insists he's St. Nick. Maureen O'Hara is the cynical businesswoman who finally believes. Her daughter, a young Natalie Wood, eventually does too. Treacle, to be sure, but with a humorous edge that has kept it going for Christmases past, present and future.



TRIVIA: WON THREE OSCARS AND RANKED NO. 9 AMONG THE AMERICAN FILM INSTITUTE'S "MOST INSPIRING FILMS OF ALL TIME."

PHOTOGRAPHS: (T-B) DREAMWORKS LLC; 20TH CENTURY FOX/THE KOBAL COLLECTION

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RICHARD BRUST is an *ABA Journal* assistant managing editor who has been a film geek since childhood. Since he compiled the jury of lawyer film experts, he audaciously decided to include himself.

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ELIOT EPHRAIM is an attorney and agent representing media personalities in Chicago, where his clients include film critic Roger Ebert.

DAVID M. HUNDLEY is a Chicago litigator and author of the blog Cinema Mishmash, an eloquently written series of reviews and criticisms. He is a member of the Gene Siskel Film Center advisory board.

HAROLD HONGJU KOH, a widely known expert on international law, is dean of Yale Law School, where he presents clips from films on the law to his civil procedure class.

DAVID R. PAPKE is a law professor at Marquette University in Milwaukee. He has written extensively on the influence of film and popular culture on law.

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RICHARD K. SHERWIN is a professor at New York Law School and author of *Popular Culture and Law and When Law Goes Pop: The Vanishing Line Between Law and Popular Culture*. He is director of the law school's Visual Persuasion Project and a frequent commentator on TV and radio.

LYNNE SPIGELMIRE VITI is a Wellesley, Mass., solo practitioner and writer who teaches Law, Literature and Film at Wellesley College.

JAMES B. ZAGEL is a veteran federal judge in Chicago and former director of the Illinois state police. A member of the Screen Actors Guild, Zagel has appeared in two films (as J.S. Block)—1989's *The Music Box*, directed by Constantin Costa-Gavras, and 1991's *Homicide*, written and directed by David Mamet.

HONORABLE MENTIONS

AMONG THE OTHER LEGAL FILMS OUR JURY CITED (IN ALPHABETICAL ORDER):

THE ACCUSED (1988) Jodie Foster is a woman who is gang-raped in a bar and, when the rapists go free, goads a reluctant prosecutor to pursue the patrons who urged them on.

ADAM'S RIB (1949) George Cukor's mannered comedy, with Spencer Tracy and Katharine Hepburn as married lawyers who oppose each other in court.

BEYOND A REASONABLE DOUBT (1956) Dana Andrews is a writer who sets himself up on a murder rap to reveal the shortcomings of circumstantial evidence.

THE CAINE MUTINY (1954) Humphrey Bogart is riveting in this adaptation of Herman Wouk's complex novel about military authority and moral duty.

CLASS ACTION (1991) A father and daughter clash in and outside the courtroom as they square off in a volatile product liability case.

THE CLIENT (1994) Susan Sarandon is an underwhelming lawyer who finds herself representing a young boy who has witnessed a Mafia hit.

COUNSELLOR AT LAW (1933) John Barrymore is a workaholic lawyer who is in danger of losing his family in this William Wyler film.

THE COURT-MARTIAL OF BILLY MITCHELL (1955) Otto Preminger directs Gary Cooper in this tale of the real-life maverick general who thinks an airplane can sink a ship—and is court-martialed for proving it.

THE DEVIL'S ADVOCATE (1997) A new attorney introduced into the world's most powerful law firm discovers that its managing partner is morally challenged.

THE FIRM (1993) Tom Cruise is recruited by a prestigious law firm that he gradually learns has a very sinister background.

THE FORTUNE COOKIE (1966) Walter Matthau and Jack Lemmon romp in this Billy Wilder comedy about a sleazy lawyer who talks a relative into feigning injury for the sake of a lawsuit.

GHOSTS OF MISSISSIPPI (1996) The true story of efforts to bring to justice Byron De La Beckwith for the 30-year-old murder of civil rights activist Medgar Evers.

INTOLERABLE CRUELTY (2003) The Coen brothers reveal their take on divorce law. George Clooney is at his toothy best.

JAGGED EDGE (1985) Defense attorney Glenn Close gets close to a client, played by Jeff Bridges, who is on trial for the murder of his heiress wife.

JFK (1991) Oliver Stone takes on New Orleans District Attorney Jim Garrison's efforts to solve the Kennedy assassination. History yields to riveting storytelling.

LEGALLY BLONDE (2001) Reese Witherspoon became one of the most sought-after actresses in Hollywood after ridiculing the elitism of Harvard Law.

LIAR, LIAR (1997) A hilarious vehicle for Jim Carrey, who plays a lawyer who finds he is physically incapable of telling a fib.

MICHAEL CLAYTON (2007) George Clooney shines in this look at the dark underbelly of big-firm law.

MUSIC BOX (1989) Hungarian immigrant Mike Laszlo, accused of being a war criminal, asks his daughter (Jessica Lange) to defend him in court. She learns more about him than she wants to know.

NORTH COUNTRY (2005) It's one woman against the system: The extraordinary Charlize Theron plays a miner who sues the company.

THE PELICAN BRIEF (1993) A law student discovers a plot to assassinate U.S. Supreme Court justices in this John Grisham adaptation.

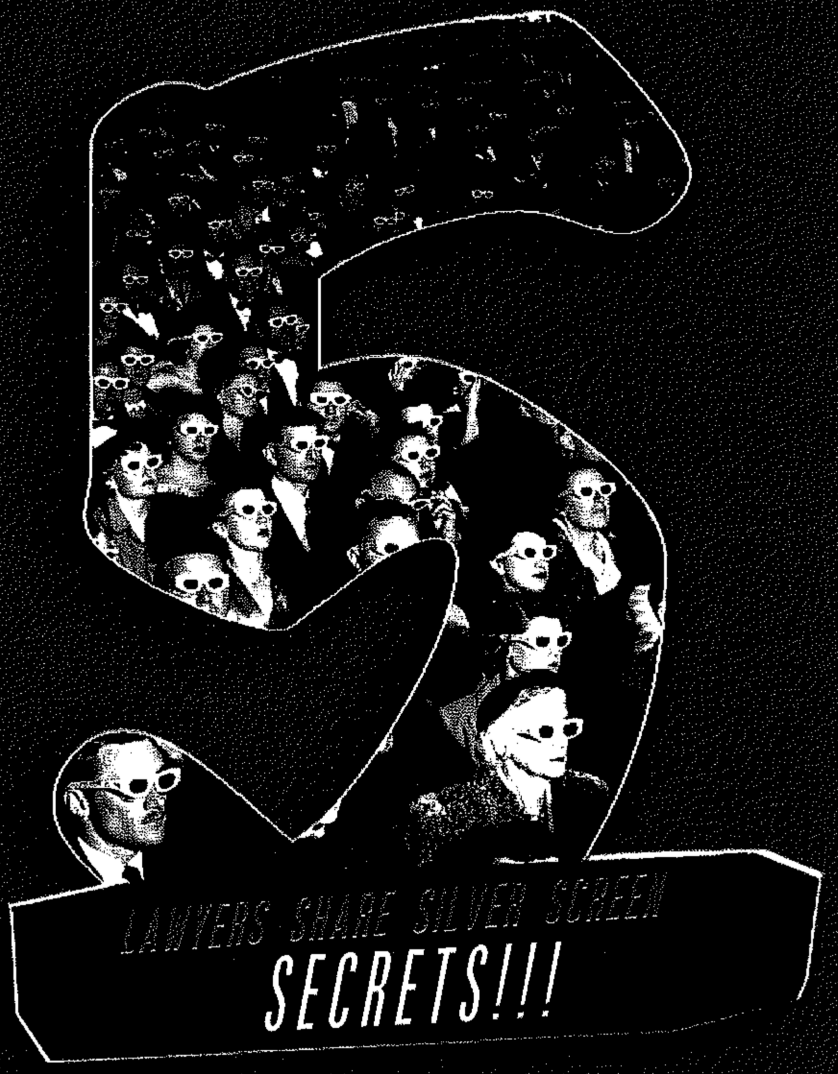
THE PEOPLE VS. LARRY FLYNT (1996) Cameos abound in this portrayal of the trial of the renowned porn publisher.

PRIMAL FEAR (1996) Richard Gere is the attorney and Edward Norton a young altar boy accused of killing a priest in a story whose plot twists and turns.

THE RAINMAKER (1997) Another John Grisham lawyer fights the system, this time with Matt Damon starring and Francis Ford Coppola directing.

A TIME TO KILL (1996) An earnest retelling of the Grisham novel about a racially charged killing in the Deep South. Matthew McConaughey and Sandra Bullock spark.

"HOW I LEARNED TO LITIGATE



ABA JOURNAL PICTURES PRESENTS AN ABA CONNECTION PRODUCTION

"HOW I LEARNED TO LITIGATE AT THE MOVIES" MICHAEL ASIMOW STEVEN O. ROSEN PAUL BERGMAN M.J. TOCCI AND MICHAEL E. TIGAR

PRODUCTION DESIGNERS ROBERT FERNANDEZ & JAMIE JACKSON DIRECTORY OF PHOTOGRAPHY KRISTINE STROM ASC EDITED BY CHRIS ZOMBORY & BRIAN SULLIVAN

PG-13 PARENTS STRONGLY CAUTIONED
MOVIEGOING MAY LEAD TO A LIFE OF LITIGATION

PRODUCED BY EDWARD ADAMS & ALLEN PUSEY DIRECTED BY JAMES PODGERS ABAJOURNAL

BY MICHAEL ASIMOW

WE SWIM IN A SEA OF POPULAR CULTURE. Whether it comes at us in the form of television, movies, radio, novels or music, pop culture is everywhere, and most of us enjoy it.

But pop culture is no longer just the fluff of modern society. Even though it's intended to be consumed and quickly forgotten, we need to take pop culture seriously, particularly because a great deal of it concerns law and lawyers.

Lawyers must realize that pop culture teaches the general public most of what it knows—or thinks it knows—about the legal system. And even though many of those lessons are wrong, what the public believes about the legal system has a significant effect on how lawyers and the courts do their work.

Studies show that people who watch *Judge Judy* think it's the judge who asks the questions at trial. *L.A. Law* gave law practice such a glamorous veneer that it sparked a boom in law school applications. In surveys, regular viewers thought of lawyers as wealthy and good-looking more often than people who didn't watch the show. The "*C.S.I.* effect" has created a new and often unreasonable influence for forensic evidence: Without it, prosecutors have trouble getting past reasonable doubt; and where it does exist, jurors perceive absolute proof of guilt.

People who have learned their law from TV expect that opening and closing arguments will be short and punchy and based on a strong, media-inspired storyline. They want you to use demonstrations, visual aids and simulations, and it will help if you can pull a rabbit out of a hat on cross.

Pop culture attests that good lawyers find out and reveal the truth about what happened, and breach the attorney-client privilege to protect the public from vicious criminals.

But lawyers aren't immune from the effects of how they're portrayed by popular culture. We also take lessons from movies and TV.

Just like everyone else, some of what we learn is wrong. In Germany, young lawyers make motions in court that are unknown to German law because they saw them on American TV shows. A new law firm in Washington, D.C., conducted meetings every morning in which the lawyers reported on their cases. It was a total waste of time, but they got the idea from *L.A. Law*.

Films also remind us how lawyers and law firms can go terribly wrong. *Michael Clayton*, for example, portrays a pack of greedy and unethical attorneys who specialize in dirty tricks, struggle with substance abuse and betray their clients. Then there are the films that teach and inspire us about how we should advocate on behalf of clients in real life.

To Kill a Mockingbird made many of us want to become lawyers in the first place—it had that effect on me. Films like *Inherit the Wind*, *Philadelphia* and *In the Name of the Father* show lawyers at their very best, standing up for clients who are despised.

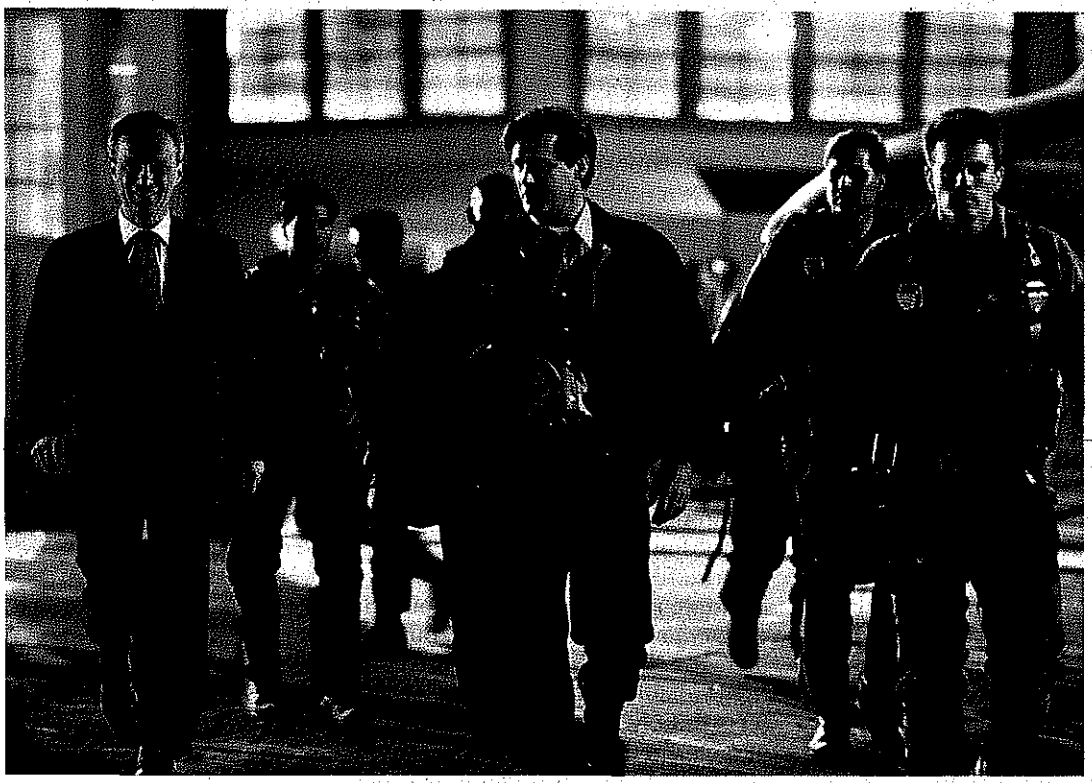
We can even take practical lessons from what we see on the big (or little) screen. In the essays that follow, four top litigation experts use some of their favorite films—not all of them about lawyers—to illustrate important lessons about trial technique.

So enjoy legal pop culture, but don't forget that no matter how trashy, inaccurate and even downright ridiculous it often appears to be, it always affects those who consume it. Whether we like it or not, we must take that impact into account in the way we conduct ourselves as lawyers.



MICHAEL ASIMOW, sitting at right, ponders the finer points of the legal argument put forth by Atticus Finch (Gregory Peck) in this photo illustration from *To Kill a Mockingbird*. Asimow teaches courses in popular culture and administrative law at the UCLA School of Law in Los Angeles. He is co-author with Paul Bergman of *Reel Justice: The Courtroom Goes to the Movies* and co-author with Shannon Mader of *Law and Popular Culture: A Course Book*. He chairs the ABA Section of Administrative Law and Regulatory Practice.

PHOTOGRAPH: GETTY IMAGES; PHOTO ILLUSTRATION: JAMIE JACKSON; PHOTOGRAPH: UNIVERSAL/THE KOBAL COLLECTION
PHOTO ILLUSTRATION: KRISTINE STROM



STEVEN ROSEN, at far left, answers the call with Bill Pullman, center, as President Whitmore in this scene from *Independence Day*. Rosen is owner of the Rosen Law Firm in Portland, Ore., which focuses on civil litigation. He has presented his CLE program, titled "Movie Magic: How the Masters Try Cases," throughout the United States. He is a co-chair of the Distance CLE Committee in the ABA Section of Litigation.

THE FILM: INDEPENDENCE DAY
THE LESSON: YOU'LL MAKE THE MOST IMPACT WITH A BIG BANG APPROACH.
BY STEVEN O. ROSEN

AN ALIEN SPACESHIP GLIDES TOWARD EARTH, SO HUGE that it casts a shadow over the entire moon. So begins *Independence Day*, Hollywood's big summer blockbuster of 1996.

The alien ship quickly launches smaller craft that hover above major cities around the world before destroying them.

As the movie approaches its climax, U.S. President Thomas Whitmore is holed up at what's left of an Air Force base in New Mexico's legendary Area 51, where he addresses a crowd of survivors as a motley assortment of pilots—himself included—prepare for a last-ditch attack against the alien mother ship:

"In less than an hour, aircraft from here will join others from around the world. Perhaps it's fate that today is the Fourth of July, and you will once again be fighting for our freedom. Not from tyranny, oppression or persecution, but from annihilation. And should we win the day, the Fourth of July will no longer be known as an American holiday, but as the day the world declared in one voice: 'We will not go quietly into the night! We will not vanish without a fight! We're going to live on! We're going to survive!' "

Amid the special effects excitement and a rousing climactic battle—the aliens lose again!—the writer and director of *Independence Day* give us an important lesson about how to tell a story and how to persuade: Start big and end big. To borrow a term from astrophysics, it's the big-bang approach.

This is a winning approach for lawyers, whether structuring negotiations with opposing counsel, delivering an opening statement or closing argument, writing a brief in support of a motion, or setting the order of witnesses at trial. If you want to be effective, the movies teach, don't bury the best stuff in the middle.

That lesson also is demonstrated in films with legal themes.

Class Action (1991), applies the big-bang approach to arguing motions. A plaintiffs personal injury lawyer played by Gene Hackman starts oral argument of his motion to compel as follows:

"Your honor, the court has before it a discovery motion compelling the defendant to supply the names, job descriptions, current addresses of all Argo employees involved in the design of the Meridian model between 1980 and 1985."

Those 37 words launch the oral argument with a bang by stating exactly what the plaintiff seeks. Not necessary, you think? Then perhaps you might reflect on how often you've heard a client, opposing counsel, judge, arbitrator or mediator at some point say to you, "OK, but tell me just what is it that you want."

DELIVER THE FIREWORKS

A THIRD EXAMPLE OF THE BIG-BANG APPROACH IS GIVEN in *Judgment at Nuremberg*, the 1961 film based on the trials of doctors, judges and other professionals charged with committing war crimes under the Nazi regime in World War II. The movie focuses on the prosecution of Ernst Janning, one of four fictional judges on trial. The American prosecutor, played by Richard Widmark, concludes his direct examination of friendly witness Karl Wieck, a former German judge as follows.

Q: Was it necessary for judges to wear any distinctive mark on their robes in 1935?

A: The so-called führer's decree required judges to wear the insignia of the swastika on their robes.

Q: Did you wear such an insignia?

A: No. I would have been ashamed to wear it.

Q: Did you resign in 1935?

A: Yes, sir.

Q: Did Ernst Janning wear a swastika on his robe?

A: Yes.

PHOTOGRAPH: UNIVERSAL/THE KOBAL COLLECTION
PHOTO ILLUSTRATION: KRISTINE STROM

The prosecutor's direct exam was not linear, asking about events in chronological order. Rather, and deliberately, it was set up to end with a bang, and that made the chances of a successful cross-exam by opposing counsel less likely.

Start big. End big. Start with a bang. End with a bang. As Will Smith's Air Force Capt. Hiller says at the end of *Independence Day* to a young boy whom he's befriended: "Didn't I promise you fireworks?"

"Yeah."

THE FILM: ANATOMY OF A MURDER
THE LESSON: CHRONOLOGY CAN BE THE KEY TO BREAKING DOWN A WITNESS' STORY ON CROSS
BY PAUL BERGMAN

IF THERE WERE A MUSEUM OF COURTROOM DISASTERS, prosecutor Claude Dancer's cross-examination of Mary Pilant in *Anatomy of a Murder* (1959) surely would be one of the top exhibits. Watching Dancer, museum visitors would see in excruciating detail some of the worst mistakes you can make on cross.

Even allowing for dramatic license, *Anatomy of a Murder* is the grittiest and most realistic courtroom film ever made. Director Otto Preminger defied the Production Code and local censorship boards by focusing the plot on an alleged rape and a pair of women's panties. (The stellar cast includes attorney Joseph N. Welch as the judge. Just a few years earlier, Welch helped bring down Sen. Joseph McCarthy with his dramatic rebuke, "Have you no sense of decency, sir?")

Posted to an Army base in Michigan's remote Upper Peninsula, Lt. Frederick Manion (played by Ben Gazzara) is charged with murdering Barney Quill, the owner of a local inn. After listening to an ethically questionable lecture from defense attorney Paul Biegler (James Stewart) on possible defenses to murder, Manion claims that he became temporarily insane after his wife Laura (Lee Remick) told him that Quill had brutally raped her. He was acting on an "irresistible impulse" when he walked to the inn and shot Quill.

Prosecutor Dancer (George C. Scott) counters that Laura and Quill were having an affair, and that Manion was perfectly sane when he beat Laura and shot Quill after learning about it.

At the trial, surprise defense witness Pilant fills a huge gap in Manion's dubious rape story by producing Laura's torn panties. Biegler displays the panties—quite modest by current fashions—for all to see. Pilant, who manages Quill's inn, testifies that the day after he was killed, she was, as usual, sorting the inn's laundry when she found the panties at the bottom of his laundry chute. Pilant had tossed the panties into the rag bin, but brought them to court when she realized their significance to the case.

FATAL BLUNDER

DANCER CROSS-EXAMINES PILANT FEROCIOUSLY. HADN'T she been Quill's lover? Isn't she lying about finding the panties to get back at him for cheating on her with Laura? Tormented by Dancer's repeated accusations that she and Quill were lovers, Pilant stammers, "It's not true. Barney Quill was my ... ." When she hesitates, Dancer

PAUL BERGMAN, second from right, has a front-row view of the defense table in *Anatomy of a Murder*. Bergman teaches trial advocacy and evidence at UCLA School of Law in Los Angeles. He also directs the school's Street Law Clinic. He is co-author with Michael Asimow of *Reel Justice: The Courtroom Goes to the Movies*.



PHOTOGRAPH: 20TH CENTURY FOX/THE KOBAL COLLECTION
PHOTO ILLUSTRATION: KRISTINE STROM

goes in for the kill: "Barney Quill was what, Miss Pilant?"

Finally, Pilant blurts out her secret: "Barney Quill was my father!"

Dancer slinks meekly back to the prosecutor's table, pausing only to say, "No more questions."

Dancer's first problem, of course, is that he asks Mary Pilant a key question without knowing for sure what her answer will be, and the bomb she drops on him shatters his "jealous lover" theory.

But Dancer also is intent on using bullying tactics to make Pilant out to be a perjurer. As a result, he never stops to consider that the chronology of events should cast doubt on her story.

Given the fact that her father was viciously murdered, is it likely that the very next day she would be tending to mundane chores, such as sorting the inn's laundry? Wouldn't she take time off to grieve, plan a funeral and tend to her father's business affairs? So might she be mistaken about when she found the panties? Might she have found them some days after her father was killed, when she returned to work? And if so, wouldn't Laura—who was terrified of her husband—have had ample time to dump the torn undies into Barney's laundry chute?

Often, lawyers are all too ready to imitate Claude Dancer by going for home runs when conducting cross-exams. A more effective, if less dramatic, strategy would be to undermine inferences adverse to your client by bringing the implausible aspects of the witness' story to the surface. And organizing events chronologically often is an effective way to carry out that strategy.

THE FILM: *A FEW GOOD MEN*
THE LESSON: JURORS GIVE THEIR OWN MEANING TO THE DIFFERENT WAYS THAT MEN AND WOMEN EXPRESS THEMSELVES
BY M.J. TOCCI

CONSIDER THE CONTRASTING COMMUNICATION STYLES of two key characters in *A Few Good Men*, the 1992 film about a trio of military lawyers who must prove a cover-up by a base commander to save two Marines charged with murdering another soldier.

At one end of the spectrum is Marine Col. Nathan Jessep, the base commander. When Jessep, memorably played by Jack Nicholson, is called to testify, he enters the courtroom with the fanfare befitting his rank. His demeanor is confident—bordering on arrogant. His manner of speech is direct, unequivocal and delivered with volume, emotion and authority. He is an instantly compelling and authoritative witness.

Contrast Jessep with Lt. Cmdr. JoAnne Galloway (Demi Moore) as she seeks to oversee the defense in the high-profile murder case. Even as she tries to convince the Navy brass that she has the knowledge, expertise and commitment necessary to tackle this politically sensitive case, she comes across as equivocal, indirect and halting. Her statements sound more like questions because of the rising inflection in her voice. She doesn't ask directly or energetically for what she wants and instead speaks softly, with minimal eye contact and little show of emotion. The assignment instead goes to a lower-ranking colleague, Lt. Daniel Kaffee (Tom Cruise), who has practically no actual trial experience.

Is it just a case of movie stereotypes? Probably not. After studying jury trials in North Carolina over a three-month period, anthropologist William M. O'Barr concluded in *Linguistic Evidence* that jurors have different perceptions of what he termed powerful and powerless language. O'Barr determined that male and female witnesses with a powerful



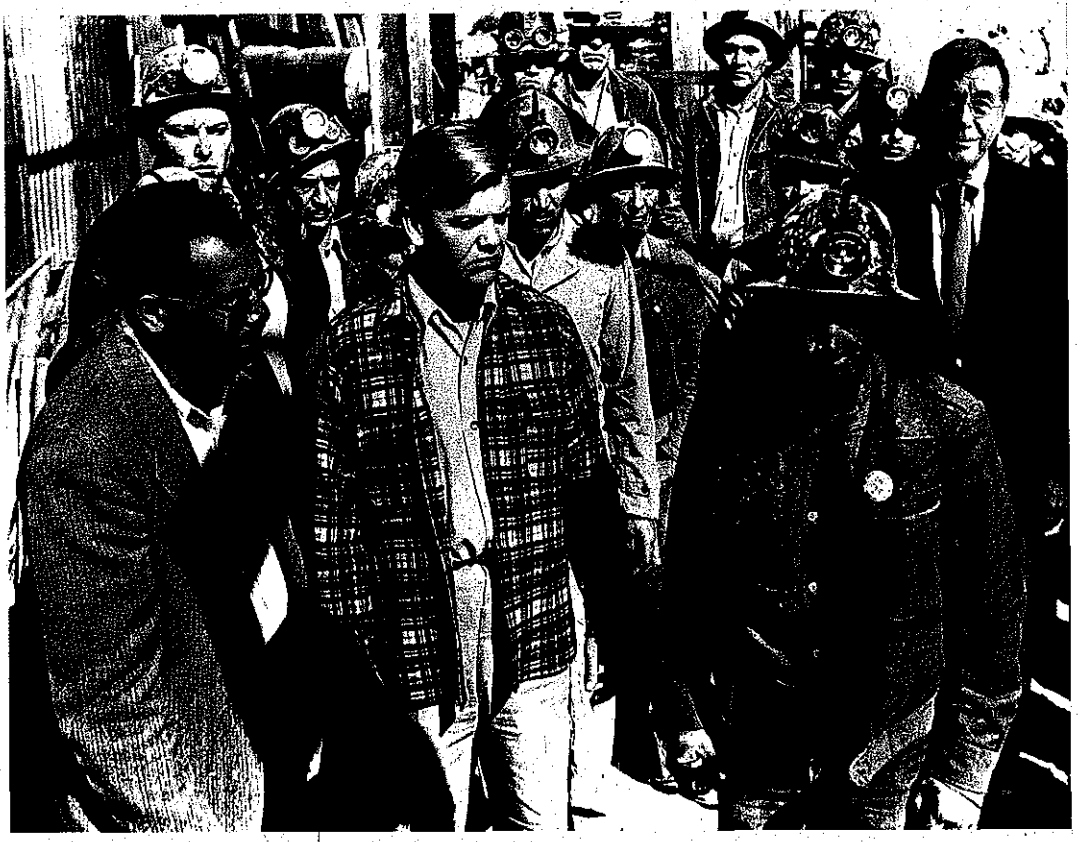
M.J. TOCCI, standing at right, watches Lt. Daniel Kaffee (Tom Cruise) explain the case to two soldiers in trouble in *A Few Good Men*. Tocci is a principal in the Pittsburgh office of Trial Run Inc., a litigation training and consulting firm, and president of Fulcrum Advisors, a multidisciplinary consulting company that counsels firms on ways to retain and advance women.

PHOTOGRAPH: COLUMBIA/TRI-STAR/THE KOBAL COLLECTION
PHOTO ILLUSTRATION: KRISTINE STROM

speech style elicited a significantly more favorable response from jurors, but that women tended to speak less powerfully than men. Women using powerless speech styles were seen as generally less credible, especially by female jurors.

And yet simply "acting like men" isn't the answer for women. Research indicates that women are perceived to be less likable as they become more powerful and confident, but if they appear to be less confident they are viewed as more likable. At the same time, gender is fundamental to our sense of who we are.

Galloway embodies that conflict. Substance and style converge as she—like so many women in the real world—seeks a communication approach that is both authentic and effective.



MICHAEL TIGAR, top right, joins a group of striking miners in *Salt of the Earth*. Tigar is a professor at Duke University School of Law in Durham, N.C., and emeritus professor at American University in Washington, D.C. He is a past chair of the ABA Section of Litigation. He has written several books published by the ABA, including *Fighting Injustice, Examining Witnesses, Thinking About Terrorism* and *Persuasion: The Litigator's Art*.

A MANNER OF SPEAKING

SO NOW YOUR OWN WITNESS RAISES HER RIGHT HAND and takes the oath, and you begin your direct examination with the usual preliminary questions. Because you have not yet covered anything substantive, it appears that nothing significant has happened. Research shows, however, that multitasking jurors are making instantaneous judgments about her competence, her trustworthiness and even her likability. These judgments are based on a number of factors—most of which are invisible and subconscious. If it is indeed true that we never have a second chance to make a first impression, we should understand how that first impression is made.

One important factor is conversational style. In his 2007 bestseller *Blink: The Power of Thinking Without Thinking*, Malcolm Gladwell argues that we form first impressions in the blink of an eye. Jurors are "thin slicing" when they simultaneously evaluate the witness's eye contact, gestures, speech, appearance and testimony. Conversational style is one of the thin slices that enhance or diminish the witness's credibility.

Sociolinguist Deborah Tannen tells us in *Talking from 9 to 5: Women and Men at Work* (1995) that, rather than recognize different conversational styles as the cause of confusion and misunderstanding, we challenge the speaker's intentions ("she thinks she's so smart") or her abilities ("she doesn't sound very sure") or her character ("she is evasive in answering questions").

The possibility that conversational style will affect your witness's credibility should influence your preparation of the witness, your direct examination strategy, and how you use closing argument to address possible misunderstandings by the jury of your witness's testimony.

THE FILM: *SALT OF THE EARTH*
THE LESSON: YOUR CASE IS ABOUT REAL PEOPLE TELLING THEIR STORIES
BY MICHAEL E. TIGAR

WE ALL KNOW THAT AT TRIAL WE MUST PRESENT JURORS with a coherent story of the case. But we often forget that a story is told by people, to other people. The story is built up from testimony of witnesses, who bring their version of what happened, and their sense of the justice or injustice of it. With our guidance, these witnesses speak to the jurors, each of whom brings his or her own set of attitudes and personal experiences to the process.

To tell the story of our case simply and persuasively, we must learn to share vicariously the lives and experiences of our clients. After all, Clarence Darrow had never walked the corridors of madness as had Leopold and Loeb, nor ever braved a white mob while trying to move a black family into their new home, nor lived among union organizers in the mines, mills and forests. Yet, more eloquently than any other lawyer of his time, Darrow was able to summon up images of those experiences for judges and jurors.

Salt of the Earth is not a movie about lawyers, and it's hardly even about the law. But it is a film about seeking

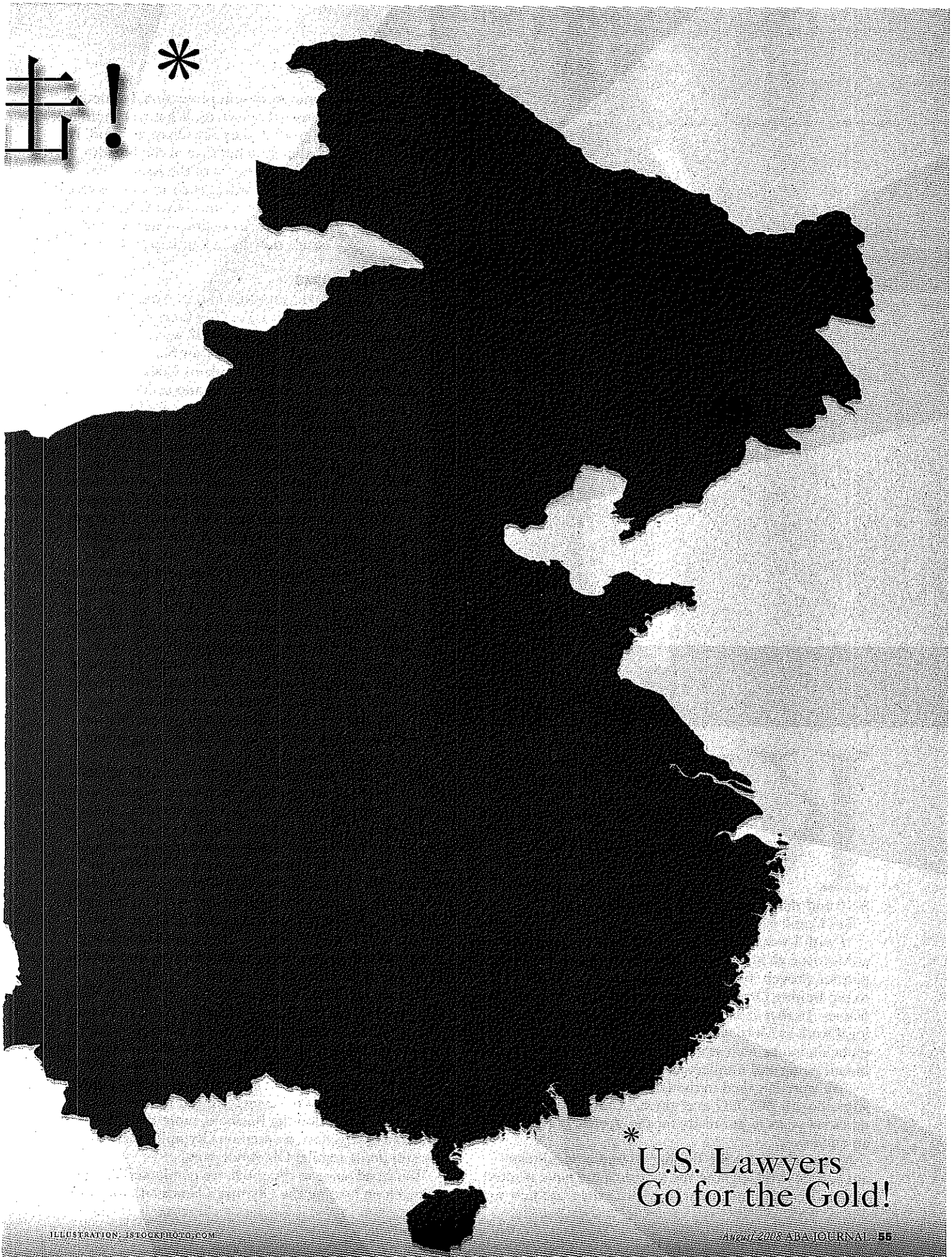
Continued on page 62

PHOTOGRAPH: INTERNATIONAL UNION OF MINE, MILL & SMELTER WORKERS/THE KOBAL COLLECTION
PHOTO ILLUSTRATION: KRISTINE STROM

美国律师向金牌冲



BY G. M. FILISKO



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* U.S. Lawyers Go for the Gold!

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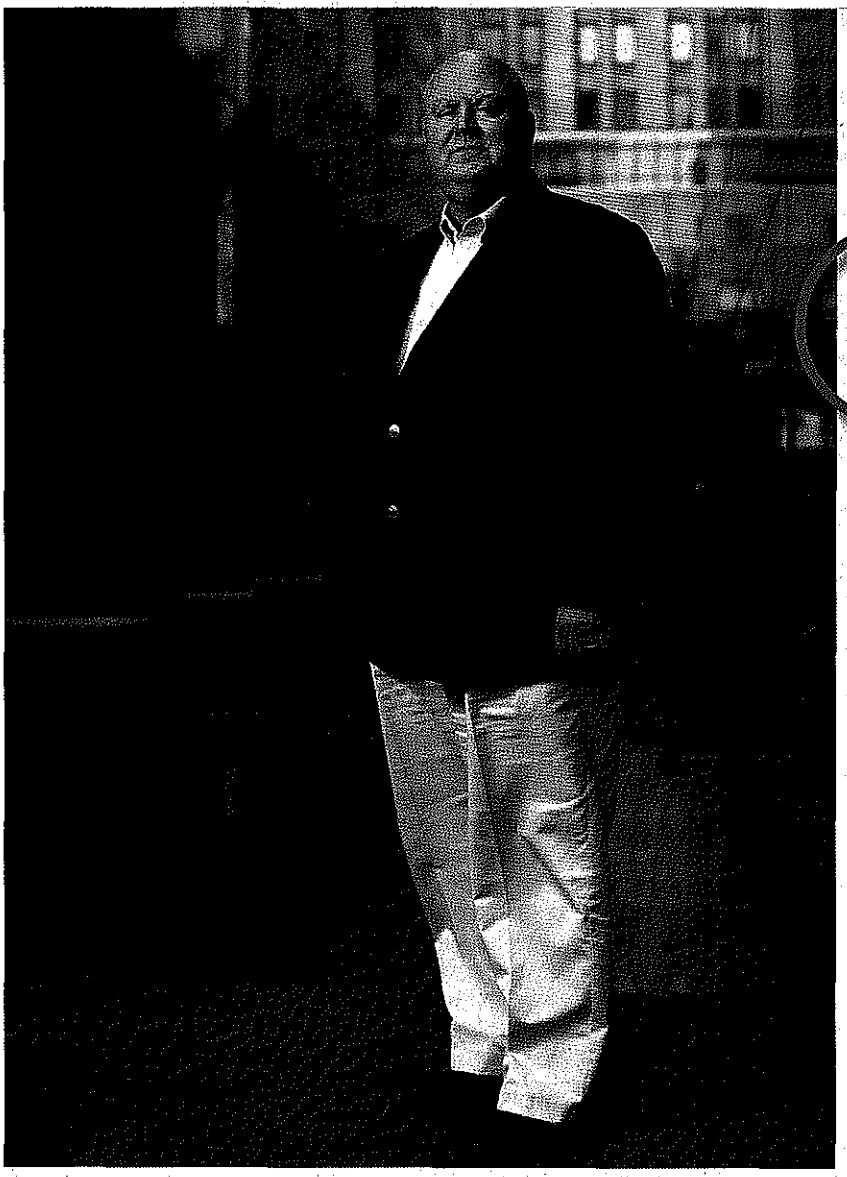


KELLY CRABB

KELLY CRABB MADE HIS FIRST OLYMpics at the 2002 Salt Lake City winter games. Now he's a member of the 2008 Beijing Summer Olympics team. And though he has no shot at making Vancouver in 2010, he's pushing to be a part of the Youth Olympic Games in Singapore in 2010 and the London summer team in 2012.

But Crabb isn't an athlete.

"I wish I was," laughs the Los Angeles-based partner at Morrison & Foerster. Crabb and his Beijing-based partner, Steven Toronto, act as international counsel to the Beijing Organizing Committee for the Olympic Games. In that capacity, Crabb and Toronto oversee legal work at Morrison & Foerster offices around the globe on issues such as venue construction, ticketing, broadcasting and intellectual property protection.

"We were engaged in the fall of 2002 and have worked with BOCOG ever since," Crabb says. "It takes six years to get ready for the games. It's quite an endeavor."

Joining Crabb on the Beijing Olympics legal team are attorneys throughout the world. Some have worked in the Olympic movement for years; others are new to the games. Some were semiprofessional athletes—even Olympians—themselves. Whatever their background, they say Olympics work is challenging because of the breadth and complexity of the issues.

And, wording their responses carefully, they contend that Chinese culture—not its politics—has created issues they hadn't anticipated.

SCHOOL CHUMS

CRABB'S OLYMPIC JOURNEY BEGAN WHEN HE LANDed work for the Salt Lake City Organizing Committee, which handled the 2002 winter games. "My classmate at Columbia Law School was general counsel of SLOC," explains Crabb. "He had a question about an agreement and called me, and I did that and several other projects for SLOC."

That pinch-hit engagement served as an introduction to the Beijing gig. While at the Salt Lake City games, Crabb made a presentation to the Beijing Olympics legal team, which he believes was instrumental in getting the BOCOG contract.

"One of the big moments for us was when we were given the opportunity to host a member of BOCOG's legal department," Crabb says. "He didn't see us doing a lot of work at the games, but we did our very best to impress him. We arranged meetings with our client, the SLOC, which rolled out the red carpet and hosted seminars. One seminar by SLOC was 'things we wish we'd have known when we were in your shoes.' That made a lasting impression because it came from people who'd just gone through the experience."

(Crabb says he would have to get permission from his client before naming the Beijing representative to whom they pitched.)

Still, Crabb's firm had to "apply" for the BOCOG duties, detailing its expertise in matters relevant to the games. "We had to go through a very involved process," he explains. "But we thought we had a good shot. The one advantage we had was that we had done work on the Salt Lake City games, plus we had an office in Beijing. But if I recall correctly, there were more than 100 law firms that wanted to do this work on the international side. Our competitors were from the United States, the United Kingdom, China and Hong Kong."

About nine months after submitting its application, Morrison & Foerster clinched the BOCOG deal.

Heading BOCOG's domestic team in China is Wang Rui, a partner in the Beijing offices of King & Wood. Her firm, which also has an office in San Jose, Calif., competed with about 70 China-based and foreign firms for the work, Wang states. (She requested that questions be sent in advance via e-mail and sought permission from her client to be interviewed for this article.) Since being awarded the business, more than 100 of the firm's attorneys have worked on Olympics matters; 30 are still doing regular Olympics work.

"Far in advance to the pitch, we conducted extensive research on hosting the Olympic Games and the corre-

PHOTOGRAPH BY MAX DOLBERG

sponding legal issues," says Wang, who is also a sports agent in China. "Based on this, the pitch documents prepared by the firm provided a detailed blueprint of the legal services that BOCOG may require." Other pluses, according to Wang, were the language skills of attorneys at her firm and the firm's experience representing large-scale state-owned corporations such as Bank of China and People's Insurance Co. of China, as well as foreign firms like AT&T and Wal-Mart.

Thousands of miles away in Lausanne, Switzerland, is Howard Stupp, director of legal affairs for the International Olympic Committee.

This isn't Stupp's first Olympic Games. That was in 1976, when the Canadian and two-time Pan American Games champion competed in both freestyle and Greco-Roman wrestling for Canada at the Montreal games—after suffering a bout of appendicitis only two months before. "I didn't do well," he admits. "My first match was against the eventual gold medalist, and he thumped me."

Stupp again made Canada's team four years later, but the country boycotted the 1980 Moscow games to protest the Soviet invasion of Afghanistan in 1979. "I remember thinking that if me not going could save one life, I shouldn't go," explains Stupp. "I was very altruistic."

But Stupp's athletic efforts did lead to a different sort of win. It was through his wrestling contacts that he learned of an opening in the IOC's legal department. "I thought I'd be here two to four years and then I'd go back to Canada," he says. "Now I've been here 24 years."

SPORTS FRANCHISE

IN ADDITION TO THE BEIJING ORGANIZING committee for the Olympic Games and the International Olympic Committee, other Olympic entities have been fielding their own legal issues. "You have to understand how the Olympic world is organized," says Crabb. "It's essentially a franchise organization."

On ABAJournal.com
Details on the AAA ruling on the U.S. rowing team, the Beijing Organizing Committee's "behavior guide"

Heading the franchise is the IOC, which owns all the Olympic trademarks and symbols, including the five-ring, five-color emblem recognized throughout the world. "All rights extend from the IOC," Crabb says.

Growing off the IOC like arms on an octopus are the city organizing committees and the national Olympic committees from 205 nations, territories, commonwealths, protectorates and geographical areas. The IOC also recognizes international and national federations for each sport in the games. (See chart, titled "McOlympics," page 59.)

All those Olympic-related organizations have distinct functions, making the potential for legal work for each Olympic Games mind-boggling, and the complexity of each issue even more so.

For example, the creation of each Olympic Games logo is straightforward enough. However, once created, the logo must be registered and protected in more than 200 legal jurisdictions, and some of that work Crabb has helped oversee.

"There are certain centralized filing procedures, such as the Madrid Protocol, which will allow for the registration in more than one country," he says. "These registrations, starting with Beijing, are done by the IOC. As a firm we answered questions and provided our analysis, but the filings were actually prosecuted by a Swiss law firm hired by the IOC."

"The IOC has been taking more and more of the registrations in-house," says Crabb. "In the future, the IOC might just do it all."

And here's another deceptively complex issue: "You'd think the tickets would be fairly simple, but they're not," says Crabb. "There's a master contract with the worldwide ticket sales organization, and there are lots of issues—like when you create a database of private information of the people who buy tickets, you have to comply with government mandates on privacy, and that's a lot of work. There are 200 nations, and they all have different laws."

Because attorneys in Morrison & Foerster's New York City office have grappled with those issues for other clients, including banks and credit card companies, Crabb leaned on their expertise. "Work related to equestrian events has been done out of our Hong Kong office," he says. "Construction work was done out of our Tokyo office. It would be very difficult for a small firm to do this work."

All told, about 35 lawyers from Morrison & Foerster have done BOCOG-related work in the last six years. "As many as nine of our 18 offices were involved," says Crabb, though he declined to disclose the amount of fees his firm has collected from its Beijing Olympics engagement.

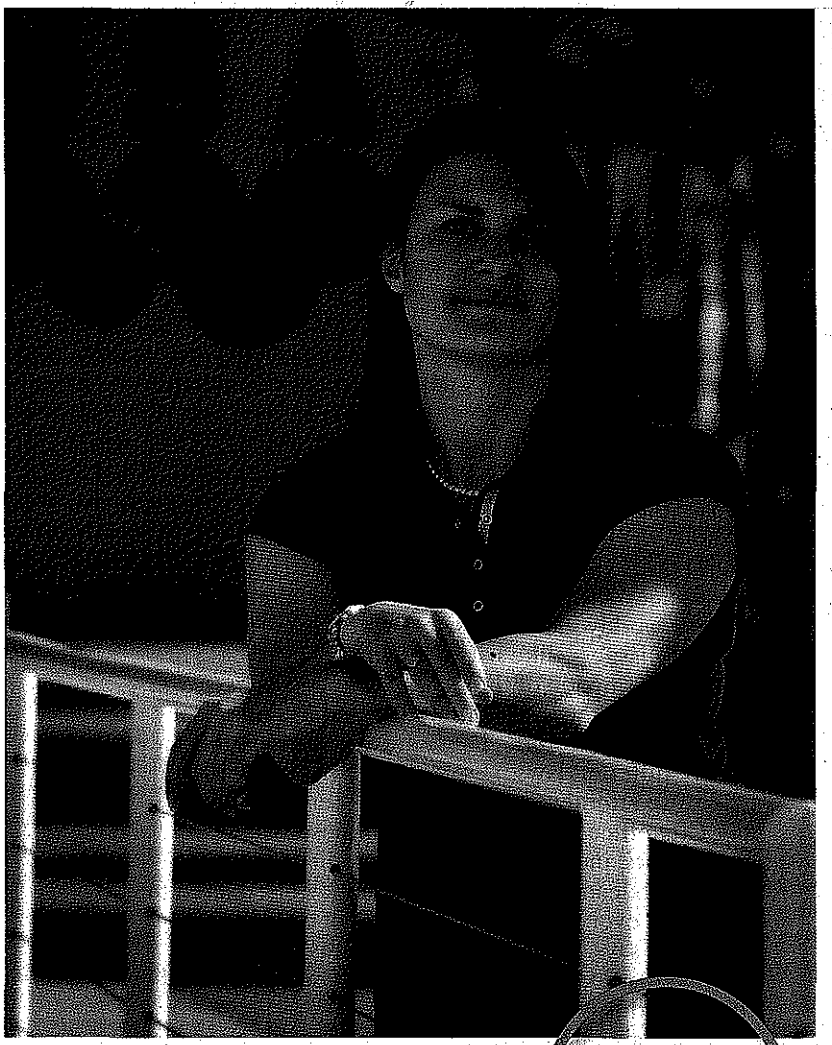
NEW PLAYER

BACK STATESIDE, RANA DERSHOWITZ IS AN Olympic team rookie. In 2007, she joined the U.S. Olympic Committee and is now general counsel and chief of legal and governmental affairs at the Colorado Springs, Colo., organization. A former college skier and now a triathlete, she will attend her first Olympic Games in Beijing.

Before that, however, she's got her hands full with legal issues related to the U.S. Olympic team. Her workload "varies depending on the day," she says, in part because the USOC is charged not only with overseeing the country's involvement in each Olympic Games, but also with its involvement in the U.S. Paralympics and the Pan American Games.

A common issue for Dershowitz is team selection. "We're charged with overseeing selection procedures by which athletes are chosen," she explains. "We're not the subject matter experts on how to best select a team or individual in any particular sport, but we make sure sports federations' guidelines are clear. If disputes arise, we have a role in resolving them before they go to arbitration."

"IT TAKES SIX YEARS TO GET READY FOR THE GAMES. IT'S QUITE AN ENDEAVOR." —KELLY CRABB



RANA DERSHOWITZ

In one case, an athlete whose name the USOC has kept private, disputed the process for choosing crews on the U.S. rowing team, arguing that a subjective process based on a combination of factors was improper, and that the selection process should have been based strictly on speed.

"USRowing believes that you need coordination among the athletes and that it could figure out who the best four athletes were through its selection camp," explains Dershowitz. "The athlete challenged that process, arguing the only way to pick team members was in a race-off." In March, a ruling by the American Arbitration Association upheld the USRowing selection process.

"The USOC isn't usually involved in arbitration over athlete selection procedures," she says. "In this case, we were a party because the athlete claimed the selection camps were inappropriate, and we felt very strongly there needed to be recognition that there may be times that subjective criteria are important to selecting a team."

Other than team selection, the USOC's role in the Olympic Games is preparatory, says Dershowitz. "It's to have a foundation in place should something happen and to ensure our athletes are educated on the rules at the games, how things will play out and what will be expected of them on and off the field, so they're prepared for the spotlight they'll find themselves in," she says. "A lot [of the work] isn't legal, but it's where legal and business planning come together."

Once she gets to Beijing, Dershowitz expects to be troubleshooting on-site. "If there are concerns about the contracts we've entered into, we'll need to address those on the ground," she says. "It's really about being prepared for any and all contingencies, but not expecting them."

CULTURE CLASH

BUT MONTHS BEFORE THE OPENING CEREMONIES on Aug. 8, attorneys working on the Beijing games say they've run into challenges they've never before encountered. Some are the result of Chinese law; others are due to matters of Chinese culture.

The most complex, and most lucrative, legal issue in any Olympics may be broadcasting. "The broadcasting agreements are the single largest source of revenue for the games, and it took about two years to negotiate a draft," says Crabb. "There are about 22 official broadcasters worldwide, and the largest is the United States—which is NBC this time. So that contract is probably the most important.

"There's competition among the broadcasters for various things, such as whether they can have their own footage and what they can and can't broadcast," explains Crabb. "There's also a facilities component. Every games has to have a broadcasting center that houses press and broadcasters. In Beijing, BOCOG anticipates serving 17,000 in that facility. For 17 days, it'll be the largest broadcasting center in the world."

One particularly thorny point required a workaround of Chinese law barring foreigners from owning broadcasting entities. Many nations, including the United States, have similar laws.

"Manolo Romero has been responsible for the broadcast of the last 15 games," says Crabb. President of International Sports Broadcasting, Romero is a television executive who oversees the Olympic broadcast feeds to the world. "Everybody wants him to be in charge because he really knows what he's doing, including the IOC and the rights holders who pay for the broadcast rights. But he's a Spaniard." After some legal maneuvering, Romero will now head the broadcast through a Chinese-foreign joint venture called Beijing Olympic Broadcasting.

Partnership and sponsorship agreements are also creating tensions before the Beijing games. The Olympic Partner Program allows companies to be worldwide exclusive partners with the IOC; Olympic partners have a more prominent marketing position and are distinct from BOCOG partners, Olympic sponsors and exclusive suppliers. They typically contract for four or eight years, covering two Olympics—the winter and summer games—or four Olympics. The cost of such partnerships is confidential.

Beijing Olympic partners include Coca-Cola, McDonald's and Omega, none of which responded to repeated requests for contact for this article; Johnson

PHOTOGRAPH BY ALLISON EARNEST

& Johnson, which declined to be interviewed, stating that it has been involved in little legal work surrounding its partnership; and Kodak, Samsung and Visa, which also declined to be interviewed.

AMBUSH MARKETING

MEANWHILE, KEEPING A LID ON AMBUSH MARKETING—IN which companies attempt to capitalize on the Olympics in ways they haven't paid for—is a job overseen by Stupp, his four-lawyer staff and three lawyers at the IOC Television and Marketing Services SA in Atlanta, a wholly owned subsidiary that's responsible for all IOC revenue-generating activity.

"We're seeing a fairly higher than normal level of ambush marketing, not just by third parties but also by sponsors," says Adam Mersereau, senior marketing counsel and head of business affairs at IOC Television and Marketing Services.

For example, if a bank sponsor were to use its Olympic marketing rights to promote its payment cards, whether they're credit or debit cards, the bank would be committing sponsor-on-sponsor ambush marketing against another payment card sponsor that has purchased those rights.

"Sponsor-on-sponsor ambush is more common right now than in any games," says Mersereau. It hasn't been such a problem in the past because sponsors usually stay in their lanes."

This will be Mersereau's third Olympic Games, and he fell into Olympics work by chance when he was a fifth-year associate. "I got a call out of the blue from a guy who worked for the IOC who used to work at the law firm where my wife worked," he says. "He was looking for someone he could trust to teach the strange Olympic framework to. I couldn't resist the temptation. That was in 2003, right before the Athens games."

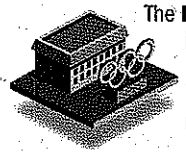
Mersereau spends time educating sponsors on their rights. "When you get to technology companies like Lenovo and Samsung, that sector can get crowded, and we help them define the categories they can sell and how to run their [advertising] program."

That, however, hasn't kept sponsors from swerving into others' paths. "You might have a sponsor who's been sold the rights to one category of products also selling products in another category that's been sold to another sponsor," he says.

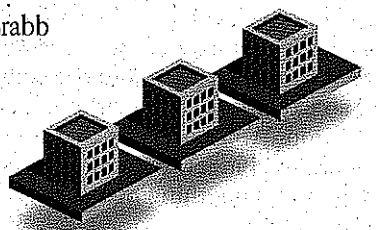
And resolving the problem has been more difficult than in past games. "Although the Chinese have shown sophistication in Western contract procedures, there's still a higher level of relational engagement that's re-

McOlympics

"You have to understand how the Olympic world is organized," explains Kelly Crabb of Morrison & Foerster. "It's essentially a franchise organization."

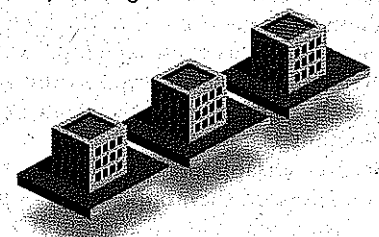


The **International Olympic Committee**, based in Lausanne, Switzerland, owns all the Olympic trademarks and symbols, such as the five-ring, five-color emblem recognized throughout the world.



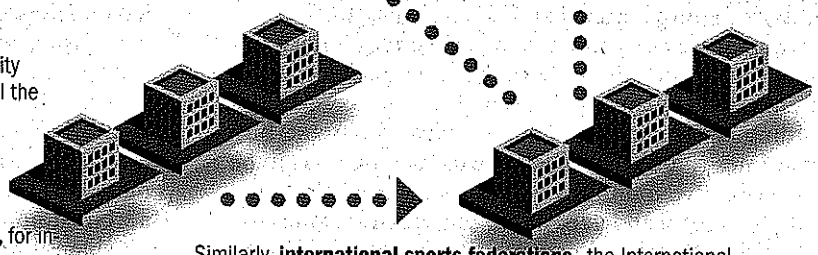
Below the IOC are **national Olympic committees**—the U.S. Olympic Committee, the British Olympic Association, the Chinese Olympic Committee—that own or license Olympic symbols and marketing rights within their nations.

The **IOC** recognizes entities that agree to abide by the Olympic Charter and any specific contracts drawn up for the games.



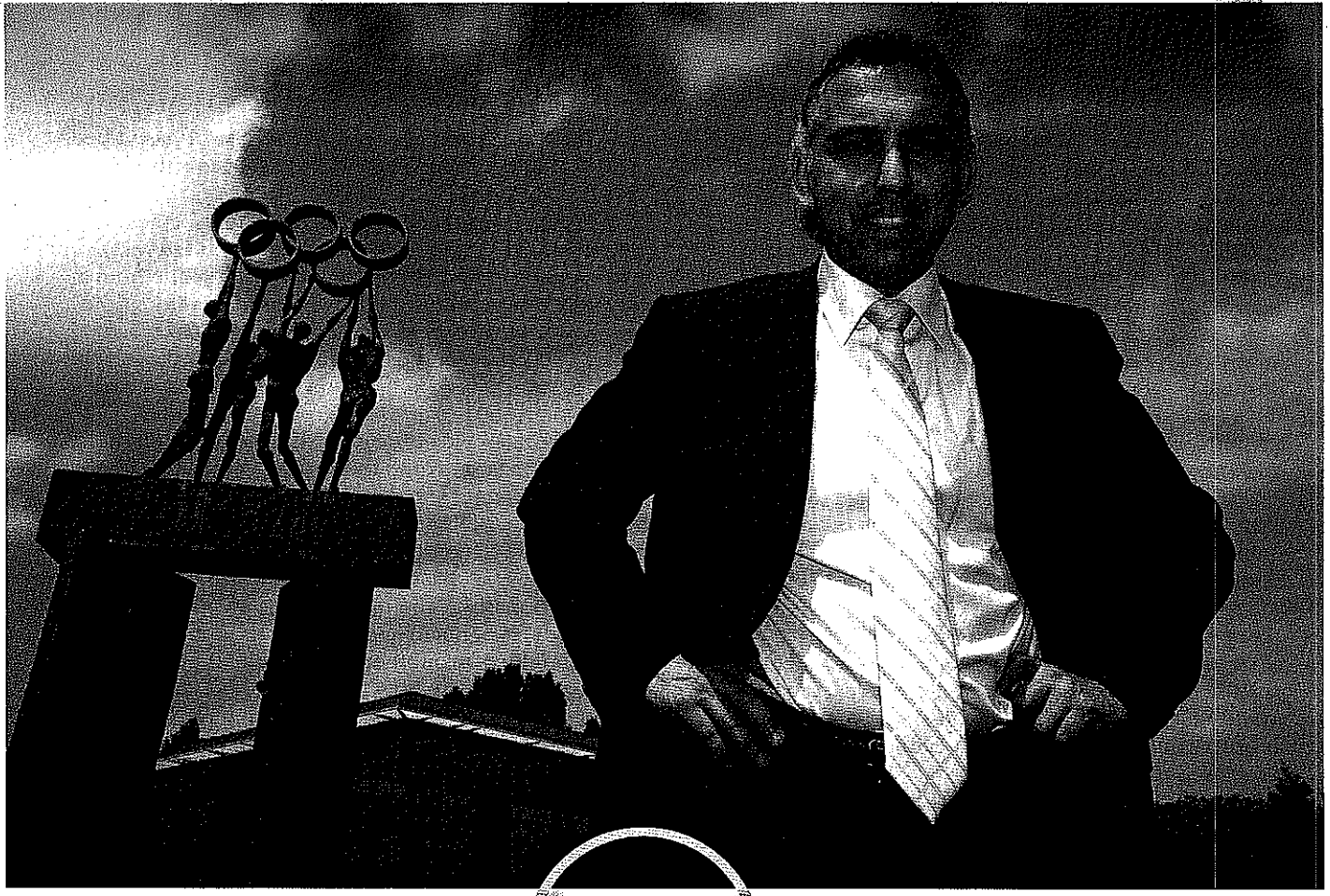
Olympic organizing committees in each host city contract with the IOC to prepare the venues, sell the tickets and pay the bills for their games, or with NOCs for marketing rights and other issues.

National sports federations—USRowing, USA Track and Field and USA Gymnastics in the U.S., for instance—are recognized and affiliated, but not governed by, the NOCs or the IOC.



Similarly, **international sports federations**—the International Association of Athletics Federations (which covers track and field events), the International Swimming Federation and the International Basketball Federation—are recognized by the IOC and may set international rules and agendas for the national federations.

CHART ILLUSTRATION BY JEFF DIONISE



HOWARD STUPP

quired to solve problems," says Mersereau. "With a Western company, you could quickly write a letter, quote the contract, send an example of the marketing, and it would stop. We're noticing that there are usually high-level meetings and negotiations required to stop even something that seems completely clear-cut to us."

Mersereau, however, is careful not to overstate the problem. "Most people have predicted chaos when it comes to intellectual property rights in China," he says. "That's not been the case. The Chinese have shown an ability and a desire to learn and conform to the normal sponsorship and IP rights process. There are still frustrations, and sponsors are facing them regularly, but they haven't materially detracted from the value of the sponsorship. Given the fact that China is a developing country in many ways and has had a bad history with IP rights, it's going better than I'd have thought."

Stupp agrees that these games have required personal and formal interactions. "Personal relationships can play an important role in contracts in Asia," he says. "The wording in contracts is, of course, very important, but sometimes there's a certain bureaucracy that has to be respected. I've found my counterparts in BOCOG extremely helpful and very open, but when it comes to formalities, they have a certain process they wish to respect. You have to be sensitive to who at which level of the IOC is writing to whom at BOCOG. Sometimes it may take a little longer, but the job gets done."

None of the attorneys report Chinese government control or interference in their activities. In fact, Stupp says the games may be pushing the nation's leadership toward more flexibility.

"The Chinese government has been a little more open with, for example, freedom of the press, with respect to the reporting and broadcasting of the games," he says. "I'd like to think having the games in China has helped matters progress in a way that there's less bureaucracy."

As for human rights concerns, attorneys say they respect people's right to protest the China games, but that not all criticism is fair. "Most of [the Olympic partners] enter long-term sponsorship agreements, and a majority of them were committed to the 2008 Olympic Games before China was even selected," says Mersereau. "They don't choose to support the games because of where they are. They chose to support the Olympic movement as a whole."

Stupp is disappointed in the way some protesters have expressed their opposition. "I understand people have issues with China, and the IOC appreciates and fully accepts that these people can make their points," he says. "The torch relay provided a good platform for some of them to make their points. Where they went too far was when they forcibly interfered with the running of the torch. I saw one scene when they attacked a woman holding the torch in a wheelchair. That was a bit shameful."

Dershowitz adds, "We're certainly aware of the human rights issues, and we understand the concerns addressed. But it's important to remember that the Olympic movement isn't just about sports. It really is about bringing the world together and understanding

PHOTOGRAPH BY AP IMAGES/RHOUMELA CABANBAN

and respecting cross-cultural viewpoints. That's got lost in the press, and I hope we'll get back to those issues."

Now that he's in the final stretch, Crabb is trying to leverage his experience on the Beijing Olympics into future work.

"In 2005, London was awarded the 2012 games, and I'd like to get some of that business," he says. "It's very political, and there are lots of great lawyers in the United Kingdom, but we have a London office and a lot of experience. I'm optimistic they might tap us on the shoulder."

BEYOND BEIJING

THE 2010 VANCOUVER OLYMPIC COMMITTEE HAS ALREADY said it won't hire non-Canadian firms, so Crabb has moved on to the first-ever Youth Olympic Games, which are set for Singapore in 2010. "They only have two years to prepare, where everybody else gets six," he says. "The point we're trying to make is that they need somebody to hit the ground running."

Crabb has also been contacted about the 2010 Commonwealth Games. "We've been invited to join an Indian law firm to go through a tender process," he says. "The games will be in New Delhi in 2010, and organizers are just getting around to hiring international lawyers. I'm always looking for opportunities to get my name in front of other organizing committees."

Looking at Crabb's itinerary, you might think that one sweet perk of work in this area is the ability to travel the world and to witness—in person—athletes making history. But many attorneys involved in the games either don't get perks or are rather subdued about those they do receive.

"It's a great honor for the firm to be granted the unique opportunity of providing legal services to BOCOG as its only Chinese legal counsel," says Wang. "However, the firm is not regarded as an official sponsor for the Beijing 2008 Olympic Games, thus it is not entitled to any privileges or rights enjoyed by such sponsors. Attorneys who wish to attend the games will have to follow the ticketing procedures and rules made by BOCOG to the general public."

Morrison & Foerster attorneys don't get any special privileges, either. "They don't have any expectations of getting anything," explains Crabb, and that's fine with him. "I go to Beijing about five times a year, and I've been to Lausanne. Don't worry about me. I've been around."

As for the games themselves, he adds: "I'm probably going to be at the games, but I'm not sure. If I'm required to be there, I'll be there, but my work is related to the preparation of the games—and I have no delusions that the best seat is in front of your TV."

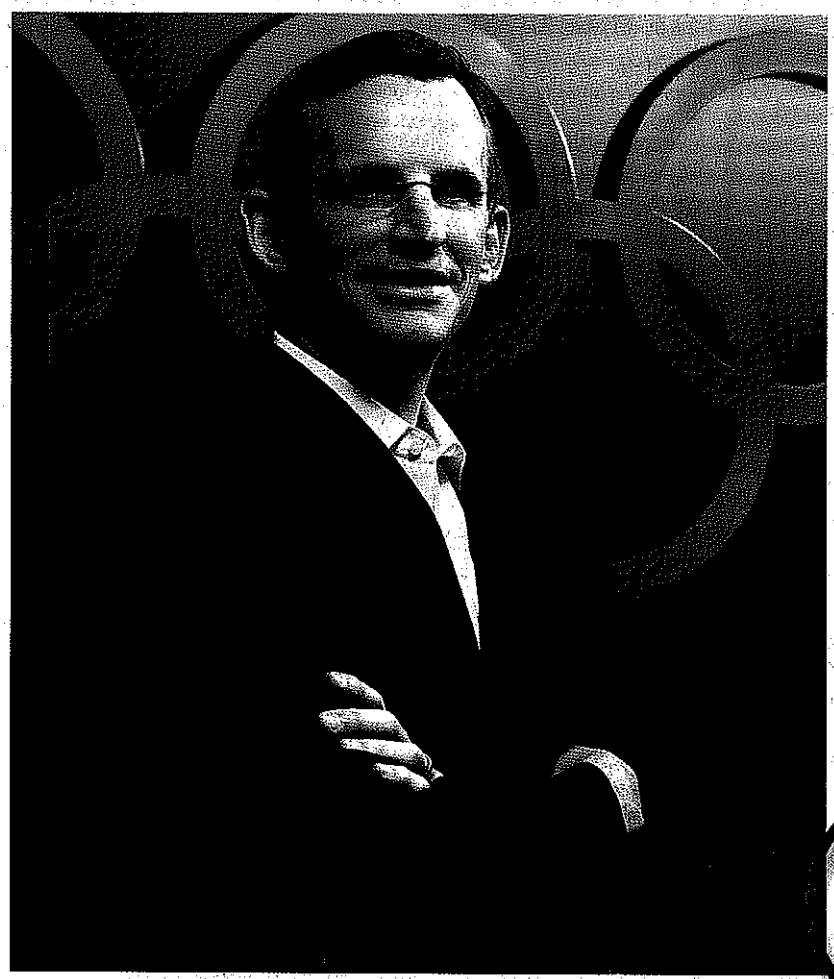
Mersereau is excited but knows he'll be working hard in China. "I'm at every Olympics for the entire time," he says. "We'll be in China for a month, and we can take our families. It's quite an experience."

The first two to three weeks are hectic with early morning to late-night work schedules, but then the craziness subsides, leaving Mersereau more time to soak up the Olympic experience.

"In many ways, it's been a dream job," he says. "It's got travel, a unique subject matter, and the size and scope of the deals is large. There aren't many jobs like it. I'm very grateful. I almost can't believe it sometimes."

Dershowitz is also enthusiastic about heading to the games: "I get to go—as in I *get* to—but I'm also there because if there's a dispute about a medal or an issue that arises, we need to be prepared to respond."

"From a personal perspective," she says, "it's been amazing to participate in, even just the lead-up. I don't think I appreciated prior to joining the USOC how much of a peace movement the Olympics is and how it brings change and brings people together. I'm very excited to be a part of it." ■



ADAM MERSEREAU

G.M. Filisko is a lawyer and freelance journalist in Chicago.

PHOTOGRAPH BY CHRISTOPHER MARTIN

"HOW I LEARNED TO LITIGATE AT THE MOVIES"

Continued from page 53

justice, and it can teach us how to listen to people's grievances and then tell their stories.

Salt of the Earth was produced in 1954. It depicts an actual Mine, Mill & Smelter Workers strike against a zinc mining company in New Mexico. The striking local was predominantly Hispanic, and the demands included equal pay with Anglo workers, decent living conditions in the company town and a safe working environment.

The company refused to negotiate. It closed off access to the company-owned food store. It tried to bring in scab labor. Eventually, the company obtained a Taft-Hartley injunction that forbade the striking miners to picket. At that point, the miners' wives asserted themselves and took up the picket duties. Eventually, the company agreed to most of the miners' demands.

A film like this, especially told from the perspective of the workers, was not easy to make in the heart of the McCarthy era. Union leaders were targets of red-baiting. Director Herbert J. Biberman and his co-writer, Michael Wilson, were members of the Hollywood 10 blacklist. The producers had trouble getting financing, there were efforts to disrupt the filming, and their principal actress—Rosaura Revueltas, one of the few professionals in the cast—was arrested and deported to Mexico. The film did not have a general release in the United States until 1965.

But 54 years after it was made, *Salt of the Earth* treats themes that still are volatile in U.S. society: workers' rights; health care; the struggle for gender equality; and efforts to divide people based on their race, ethnicity or immigration status.

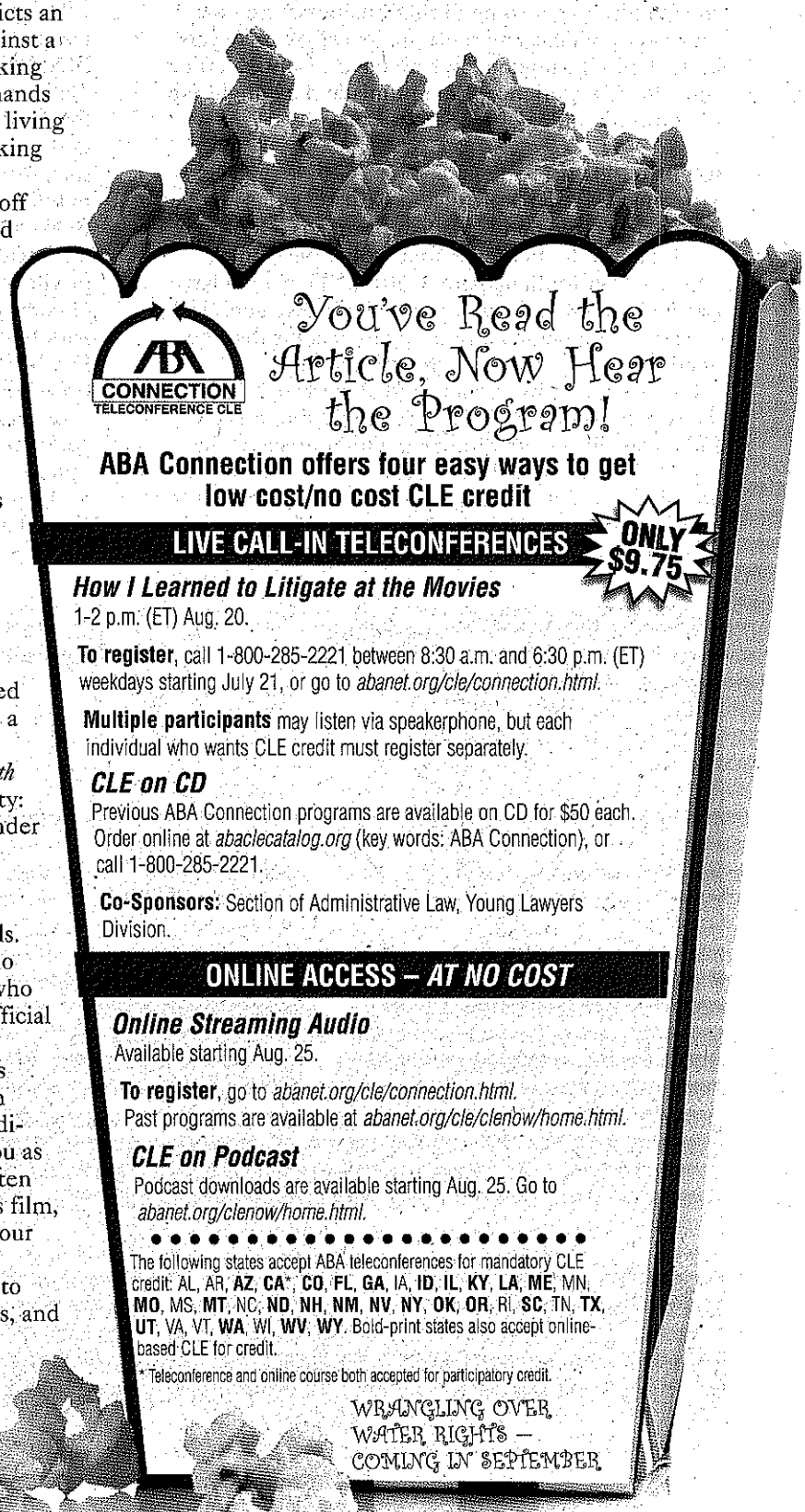
These are the film's lessons for trial lawyers:

First, most of the actors were nonprofessionals. They included Juan Chacón, the male lead, who was a union local president, and Clint Jencks, who essentially appeared in his real-life role as an official of the international union.

These people are witnesses—they are miners and miners' families, telling their own stories in compelling fashion. If a Hollywood writer and director can encourage performances like that, you as a trial lawyer can do it as well. But you must listen and care as deeply as the people who made this film, and think as creatively as they did about how your witnesses present themselves.

Second, the film teaches us to look deeply into the human situations that our clients bring to us, and to search for causes rather than litigate the effects.

Third, the film reinforces our sense that we can—as citizens and as trial lawyers—dare to talk about fundamental issues of justice and injustice, knowing that we must awaken in jurors the desire to reaffirm what is right and change what is not. ■



PHOTOGRAPH: JUPITER IMAGES INC.
PHOTO ILLUSTRATION: JAMIE JACKSON

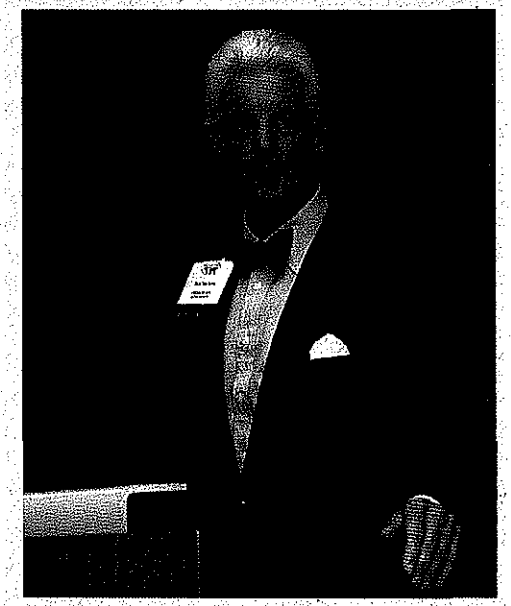
A VIENNA CONVERGENCE

World Justice Forum raises rule of law issues

BY JAMES PODGERS

IT IS FAR TOO SOON TO DIVINE the ultimate legacy of the three-day World Justice Forum that wrapped up July 5 in Vienna, Austria. But ABA President William H. Neukom, founder of the World Justice Project that conducted the forum, assured some 500 attendees that their short-term accomplishments were impressive.

"We achieved a great deal during these three days," said Neukom, "starting with the fact that this number of people came to Vienna because they believe in the premise that we can do so much more if we create communities committed to the rule law as a way to create societies of opportunity and equity."



William Neukom: "We achieved a great deal during these three days."

Neukom, a partner at K&L Gates in Seattle, cited other important gains made by the gathering of representatives from 95 countries and 15 professional disciplines.

TAKING STOCK OF WHAT WAS ACCOMPLISHED

FIRST, NEUKOM SAID, WAS THE CONSENSUS REACHED on key principles that express the meaning of the rule of law.

Second, he said, was a shared understanding that the purpose of the rule of law is to help create communities of equity and opportunity for their citizens.

Third, research papers produced by two teams of scholars—released in draft versions at the forum—illustrated how the rule of law contributes to political, economic and social development, and explored the access-to-justice issues facing marginalized groups in various societies.

Neukom also cited more than 30 specific project goals presented on the last day of the gathering; they had been developed in breakout sessions by regional teams of forum participants. The projects, which will be carried out by groups in each region, may seek financial support from a $240,000 fund created by the Oak Foundation in London.

Another key development at the forum was the release of an initial report affirming the viability of the Rule of Law Index as a process for measuring how effectively countries adhere to rule of law principles in a number of key areas. A full report on the findings will be released later this year, said Mark D. Agrast, who coordinated development of the index.

Agrast said that within three years, the project is expected to cover some 100 nations. But he cautioned against any temptation to treat the index as a vehicle for rating countries on their adherence to the rule of law. "This is a diagnostic tool; it's not a grading system," said Agrast, a senior fellow at the Center for American Progress in Washington, D.C.

There were notes of caution, however, that achieving the forum's goals won't be quick or easy. Session participants often struggled to reconcile rule of law principles in the context of different cultures and power structures likely to resist change.

Other participants emphasized that advancing the rule of law ultimately involves changing equations of political and economic power.

"The system in which wealth is created and distributed—after all, that's what this is all about," said John Bohn of San Francisco, a member of the California Public Utilities Commission who has a background in international economic development. The reality is, he said, "the poor always get screwed."

Despite concerns, however, the forum received high grades from attendees.

"My background is not in the legal profession, and this conference opened my eyes to the importance of the rule of law," said Moses Kachima, executive secretary of the Southern Africa Trade Union Coordination Council in Gaborone, Botswana. "But the task now is for all of us to take the message of its importance home to our constituencies."

A statement of the rule of law principles is on the project's website: worldjusticeproject.org. ■

PHOTOGRAPH: STARS AND PICTURES GMBH/ CURT THEMESSL

ADVOCATE FOR THE COURTS

Judiciary issues top agenda of incoming ABA President Wells

BY JAMES PODGERS

INCOMING ABA PRESIDENT H. Thomas Wells Jr. says he got the message in talks with other bar leaders over the past year or so.

There is widespread concern, he says, about "potential threats to judicial independence, and to fair and impartial courts" at the state level.

Wells and other bar leaders also have expressed frustration with the partisanship that is hampering the nomination and confirmation process for federal judges.

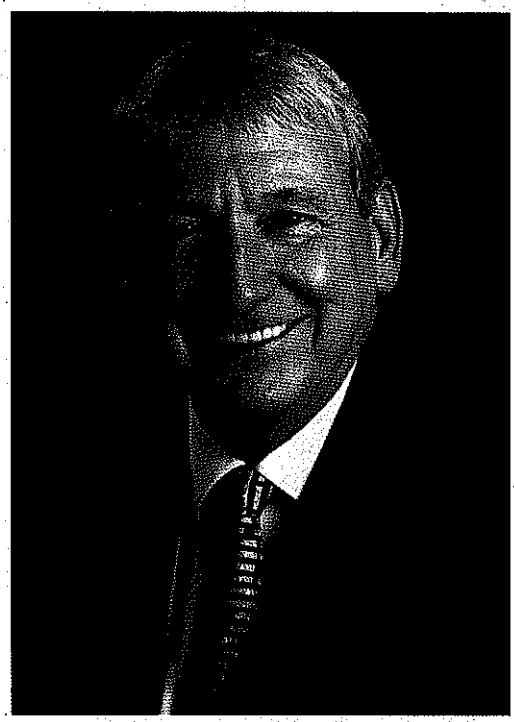
Wells says those issues will be among his priorities as ABA president. Wells, a shareholder in Maynard Cooper & Gale in Birmingham, Ala., will begin his one-year term in August at the close of the association's 2008 annual meeting in New York City.

Wells has started the planning process for a conference in 2009 that will focus on how to maintain fair and impartial courts. A planning committee will be co-chaired by Justice Mark D. Martin of the North Carolina Supreme Court and Edward W. Madeira Jr. of Philadelphia, a special adviser to the ABA Standing Committee on Judicial Independence.

Meanwhile, the selection process for federal judges is on the agenda for the ABA's policy-making House of Delegates when it convenes during the annual meeting.

The Standing Committee on Federal Judicial Improvements (along with 13 co-sponsors) is recommending the House endorse use of bipartisan commissions to consider and recommend nominees to fill vacancies in the federal district courts and the U.S. Court of Appeals. The recommendation also urges more cooperation between the president and the U.S. Senate in the judicial selection process.

The commission concept is not new. In 1977 President Carter's executive order established a committee to assist in selecting federal judicial officers other than circuit and district court judges. That committee didn't survive, but senators from eight states—including California, Florida and Hawaii—rely on commissions to identify district court candidates who can then be recommended to the president.



H. THOMAS WELLS: We'll be wherever "the new administration sees our role as most valuable."

(A 1977 House resolution proposing a nominating commission for circuit court judges technically would be superseded by the recommendation that delegates will consider in New York.)

"You almost never see battles over nominees who come through the commission process," says Wells, who asked the judicial improvements committee to develop a recommendation. But without them, he says, the process often becomes "very partisan and not very civil. I wanted to think about what we could do in efforts to tone down that process."

Widespread use of nominating commissions wouldn't be a cure-all for the deep-seated conflicts over selection of federal judges, says Harvey I. Saferstein, the committee member who will introduce the recommendation in the House. But, he says, "it would result in a less contentious process."

CLIMATE CHANGE

AND WITH A NEW ADMINISTRATION assured of occupying the White House come January, now is a good time to float the commission proposal, says Saferstein, managing member of the Los Angeles office of Mintz Levin Cohn Ferris Glovsky and Popeo. "Maybe the candidates will get behind it," he says. "Everybody with a stake in the system believes it's breaking down and that some compromise is necessary."

(Committee chair M. Margaret McKeown, a judge on the San Francisco-based 9th U.S. Circuit Court of Appeals, recused herself from deliberations on the recommendation.)

Another question is whether a new administration also might reconsider the ABA's role in evaluating federal bench nominees, including those to the U.S. Supreme Court. From the 1950s until the end of the Clinton administration, the Standing Committee on Federal Judiciary vetted candidates before the president formally nominated them. In early 2001 President Bush ended that practice, although the ABA has continued to evaluate candidates once the president names them.

While not planning to press this issue, Wells says, "we're open to any participation at whatever level will be most helpful in the selection of federal judges. We'll be in the process, and however the new administration sees our role as most valuable, that's where we'll be." ■

PHOTOGRAPH BY MATTHEW FACE

THE ABA's NEW SCORECARD

Impact of association policies will be posted online

BY RHONDA McMILLION

This column is written by the ABA Governmental Affairs Office and discusses advocacy efforts by the ABA relating to issues being addressed by Congress and the executive branch of the federal government.

THE ABA'S LITTLE GREEN BOOK ISN'T SO little anymore. *The Policy and Procedures Handbook*—familiar to members of the House of Delegates because of its distinctive forest-green cover—has grown from a 6-by-9-inch booklet that could easily be tucked into a briefcase into a larger version that's more like a telephone directory. The part of the book that compiles current ABA policies—those adopted by the House within the past decade—now runs more than 150 pages.

But the size of the now-big green book wasn't what bothered Laurel G. Bellows in August 2006 when she became chair of the House, the ABA's policy-making body. Her concern was that there was so little awareness of the impact the resolutions summarized in the book have had on lawyers and government policies and on how the justice system serves the public.



C. ELISIA FRAZIER: "The process opened our eyes."

So Bellows created the Resolution and Impact Review Committee to develop a process for tracking the dissemination and implementation of House resolutions—and for making that information available to ABA members and others outside the association.

SPREADING THE PRIDE

"I TAKE TREMENDOUS PRIDE IN THE WORK OF THE House of Delegates and the legal expertise and commitment of the lawyers who serve there," says Bellows of Chicago. "As a member of the Illinois delegation, it became clear to me that even current delegates are unaware of the results of their work. I sensed an urgent need to inform members and the public about the effect that ABA policies have on the practice of law, on legislation and on our way of life.

"In establishing this new committee," Bellows adds, "my hope was to gather facts supporting the implementation of House resolutions so that delegates involved in drafting and advocating policy change could measure the impact of their efforts."

And now, as Bellows nears the end of her two-year term in the ABA's second-highest office, the committee is preparing to post impact assessments of House resolutions on the ABA website, at abanet.org/leadership/rirc.html.

Faced with the daunting task of compiling that information, the 14-member committee—headed by chair C. Elisia Frazier of Fort Lauderdale, Fla., and vice-chair L. Jonathan Ross of Manchester, N.H.—focused its initial review on resolutions adopted between 2001 and 2005, some 280 measures sponsored by 74 different entities, as well as recently added resolutions from '06.

"The process opened our eyes to the tremendous reach of the policies and the amount of work done by the various ABA entities," Frazier says. The committee found that ABA policies influence legislation at both the federal and state levels, serve as starting points for amicus curiae briefs filed with the U.S. Supreme Court and other tribunals, and provide the bases for standards and model rules relating to the legal profession.

The committee website will include information on the entities that sponsored resolutions before the House.

Thomas M. Susman, the new director of the ABA Governmental Affairs Office, says impact assessments on House resolutions will be useful to his staffers who lobby before Congress and with the executive branch in support of ABA policies. "ABA policy resolutions matter," he says, "and the work of the impact review committee should prove valuable for both the House of Delegates and the Governmental Affairs Office."

No decision has been reached on whether to make the review process permanent, but Bellows says the committee's initial efforts have important benefits.

"Without the work of the committee," she says, "ABA members, the public, members of our government and lawyers who are not yet members of our association would be unable to measure the extraordinary success of the ABA in turning words into action to accomplish its mission of defending liberty, and pursuing and delivering justice." ■

Rhonda McMillion is editor of Washington Letter, *an ABA Governmental Affairs Office publication.*

PHOTOGRAPH BY MICHAEL DEHOOG

WHY?

A father's question spurs exploration of our profession

This essay was selected by the ABA Journal *Board of Editors as the winner of the 2008 Ross Essay Contest. The prize is $5,000. The contest drew 193 entries on the topic: "Why do you believe the legal profession is the greatest profession in the world?" The contest is supported by a trust established in the 1930s by the late Judge Erskine M. Ross of Los Angeles. The contest is administered by the* ABA Journal.

BY MARJORIE FLORESTAL

I REMEMBER THE MOMENT I told my father I wanted to be a lawyer. It was a typically humid June day in New York City, and through the open window of our apartment could be heard all the sounds of summer: the gush of water escaping from an open fire hydrant, the blaring horns of ever-impatient motorists, and the occasional snippet of conversation from the old men gathered on the stoop outside. But in our tiny, cramped kitchen there was only silence.

"Why?" my father finally asked.

Family legend has it that I responded, "Because I want to be the international Thurgood Marshall."

Perhaps. My career has been a (modest) homage to the late, great justice in that I, too, focus on issues of fairness and equity in my work as a trade and development specialist. As I grow older, I find myself less concerned with my answer, however, and more fascinated with my father's question: Why?

At the time, I did not fully comprehend what he was asking—I was only 9 years old. Like a Zen koan, more is revealed each time I explore the question.



MARJORIE FLORESTAL: Lawyers risk scorn for good reasons.

EXTREME ODDS

MY FATHER CAME OF AGE DURING the "Papa Doc" Duvalier regime in Haiti, a time in which lawyers faced persecution, kidnapping and even death. Why would I aspire to a profession that pitted a single individual against the all-powerful state? Why would I contemplate membership in an organization whose ethics call for representation of the accused, the unpopular, the poor and the dissident? Why would I participate in a system that either corrupts or kills?

My father's experience of law, lawyers and the legal profession is vastly different from my own. As an American attorney whose closest bout with danger was a pulse-pounding (but ultimately uneventful) trip to Algeria, I am not often called upon to risk life or limb in service to my profession.

Like so many others, I recoiled in horror last November as Pakistani lawyers faced down batons, tear gas, barbed wire and other implements of autocratic rule to protest the government's manipulation of the judiciary. My first uncensored thought was "Why?" Why would these lawyers stage protests at local courthouses knowing they would be clubbed, beaten and jailed? Why would they risk their safety, their families and their careers to object to the firing of a single judge?

As I contemplated the actions of my comrades in law, I finally came to understand the true nature of my father's question: Why choose a profession that eschews security in favor of a life lived holding authority figures accountable under the law?

It is a task that will often prove risky—and not just in "exotic" locales across the world. The lawyer who forces the prosecutor to prove her case when society has already found a murder suspect guilty faces public scorn. The lawyer who battles the U.S. government all the way to the Supreme Court to ensure those charged with terrorist acts have access to courts and justice risks public opprobrium. But we the lawyers do these things anyway.

I sometimes wish I could go back in time—back to that summer day in June in New York City. If I could face my father's question all over again, here is what I would say: "Why? Because the legal profession is the greatest profession in the world. In the process of doing our jobs, we secure freedom for everyone else." ■

Marjorie Florestal is an associate professor at the University of the Pacific McGeorge School of Law in Sacramento, Calif.

PHOTOGRAPH BY MELISSA BARNES

NOTICE BY THE BOARD OF ELECTIONS

Pursuant to § 6.3(e) of the ABA's Constitution, the District of Columbia will elect a State Delegate to fill a vacancy due to the nomination of Carolyn B. Lamm as President-Elect. The term commences immediately upon certification by the Board of Elections and expires at the conclusion of the 2011 Annual Meeting. For further instructions, visit ABAJournal.com/magazine.

NOTICE BY THE BOARD OF ELECTIONS

Pursuant to § 6.3(e) of the ABA's Constitution, the state of Tennessee will elect a State Delegate to fill a vacancy due to the nomination of Howard H. Vogel to the Board of Governors. The term commences immediately upon certification by the Board of Elections and expires at the conclusion of the 2010 Annual Meeting. For further instructions, visit ABAJournal.com/magazine.

AMERICAN BAR ENDOWMENT ANNUAL MEETING OF MEMBERS

The Annual Meeting of Members of the ABE will be held in conjunction with the ABA Annual Meeting on Monday, August 11, 2008 at 8:45 a.m. in the Grand Ballroom of the Hilton New York. Several proposed amendments to the ABE Bylaws will be voted on by the membership at this meeting. These amendments address the composition of the Board of Directors (Article II, Directors, § 1); the role of the ex officio Directors (Article II, Directors, § 2 and 4); the composition of the Executive Committee (Article II, Directors, § 5); and the composition of the Nominating Committee (Article II, Directors, § 6). (See the full text of this notice and the Bylaw amendment at ABEndowment.org.)

PROPOSED AMENDMENTS TO THE CONSTITUTION AND BYLAWS

Proposed amendments to the Constitution and Bylaws of the American Bar Association summarized below have been duly filed with the Secretary of the Association by the indicated sponsoring members of the Association for consideration by the House of Delegates at the 2008 Annual Meeting in New York, New York. Copies of the full text of these proposals will be published in the book of reports to the House of Delegates and are also available on the ABA's Website on the House of Delegates Leadership Page @http://www.abanet.org/leadership/house/home.html (*click on 2008 New York Annual Meeting*). These proposals are also available to any member upon request to the Division for Policy Administration at the American Bar Center, 321 N. Clark Street; Chicago, IL 60610, 312/988-5230.

I

Notice is hereby given that Edward Haskins Jacobs proposes to amend § 1.2 of the Constitution to include the following language as one of the purposes of the Association: "to defend the right to life of all innocent human beings, including all those conceived but not yet born."

II

Notice is hereby given that Jeffrey B. Golden (Principal Sponsor), Michael Asimov, Walter T. Burke, Kathleen Martin, Charles E. McCallum, and Larry Mills propose to amend § 21.12 of the Bylaws to add a Student Associates category of membership.

III

Notice is hereby given that Llewelyn G. Pritchard (Principal Sponsor), Deborah Enix-Ross, Paula J. Frederick, Rosemary E. Giuliano, Hon. Christel E. Marquardt, Roderick B. Mathews, Mitchell A. Orpett and Jeffrey J. Snell propose to amend § 31.7 of the Bylaws to discontinue the Standing Committee on Lawyers' Title Guaranty Funds at the conclusion of the 2008 Annual Meeting.

IV

Notice is hereby given that John C. Cruden (Principal Sponsor), Cory M. Amron, Martha W. Barnett, Marguerite L. Carr, David W. Clark, Patrick Thomas Clendenen, Michael S. Greco, William S. Harwood, Tammy Elizabeth Henderson, Robert E. Hirshon, R. William Ide III, Edward E. Kallgren, Robert MacCrate, Karen J. Mathis, Kenneth B. Nunn, David J. Pasternak, William G. Paul and Sayre Weaver propose to amend § 31.7 of the Bylaws to create a Standing Committee on Gun Violence.

VI

Notice is hereby given that James R. Silkenat (Principal Sponsor), Sara A. Austin, Gerald T. Giaimo, Shawn D. Guse, Ernestine S. Sapp, Peter M. Suzuki, David C. Weiner, Armando Lasa-Ferrer and Hon. Bernice B. Donald propose to amend various sections of the Constitution and Bylaws as housekeeping amendments.

Respectfully submitted,
Armando Lasa-Ferrer
Secretary

CLE PROGRAMS IN SEPTEMBER

For information, contact the ABA Service Center at 800-285-2221 or service@abanet.org, or visit abanet.org/cle.

ABA MEETING DATES

2008—annual meeting: Aug. 7-12, New York City.

2009—midyear meeting: Feb. 11-17, Boston; annual meeting: July 30-Aug. 4, Chicago.

2010—midyear meeting: Feb. 3-9, Orlando; annual meeting: Aug. 5-10, San Francisco.

2011—midyear meeting: Feb. 9-15, Atlanta; annual meeting: Aug. 4-9, Toronto.

2012—midyear meeting: Feb. 8-14, New Orleans; annual meeting: Aug. 2-7, Chicago.

2013—midyear meeting: Feb. 6-12, Dallas; annual meeting: Aug. 8-13, San Francisco.

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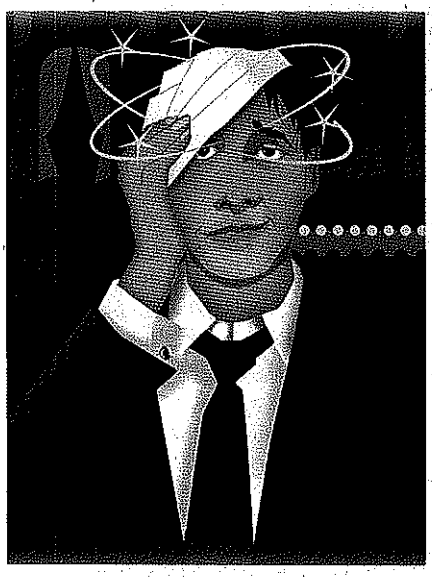
BY BRIAN SULLIVAN

UNHAPPY ENDING

Spirited Performance, Poorly Aimed Heel Ensure That Patron Pays for Lap Dance in More Ways than One

The Hot Lap Dance Club in New York City is, as the name implies, an establishment where a man can pay for a close encounter with a female employee. This type of encounter involves activity on the lap of the clothed person paying for the service. The service provider wears considerably less than the patron.



Regardless of the seamy details, it's meant to be a painless dalliance for both parties. Unfortunately for Stephen Chang, it didn't turn out that way.

New York City resident and securities trader Chang—according to a personal injury lawsuit filed in March at the Supreme Court of the State of New York, County of New York—was the recipient of an unintended heel to his eye when the frisky female "suddenly swung around."

The lawsuit claims that Chang, described in one account of the incident as married and in his early 30s, suffered unspecified "serious personal injuries." The suit demands damages "in excess of the jurisdictional limits of all lower courts."

Neither Chang's attorney nor the club's attorney returned calls seeking comment.

There was no indication that Chang notified club personnel of the injury he says he sustained.

A club manager was quoted as saying, "We didn't have any reported accidents. We have a first aid kit and we would have treated the guy or called an ambulance."

THONG OR SLINGSHOT?

Woman Sues Maker of Sexy Apparel, Claiming Skimpy Undergarment Was an Unintended Eyeful

It's a dangerous world we live in. From wars to street gangs to drivers using cell phones, sometimes it feels like disaster can strike just by putting on your underwear in the morning. Macrida Patterson, in fact, says it happened to her.

Patterson, 52, a Los Angeles traffic officer, claimed in an interview on NBC's *Today Show* in June that she seriously injured an eye while attempting to put on a thong she purchased from Victoria's Secret.

The garment bears a heart-shaped rhinestone connected to the fabric by metal links. Patterson said that when she stretched the thong to step into it, one of the metal links broke loose and flew into her eye.

"It happened really quickly. I was in excruciating pain," Patterson said.

The garment was defective "in its design and its manufacture," said Patterson's attorney, Jason Buccat of Culver City. "Macrida suffered three actual cuts to her cornea," he said. "It left some severe damage, to the point where in order for it to heal, she had to take some topical steroid."

When pressed by host Meredith Vieira for a dollar figure being sought in the lawsuit, Buccat said the suit was not about money, but that Patterson was seeking more than $25,000.

A representative of Victoria's Secret issued the following e-mail statement: "It would be really inappropriate for us to comment at this point since we have not even been served with that lawsuit yet." ■

ILLUSTRATION BY JUVENAL MARTINEZ

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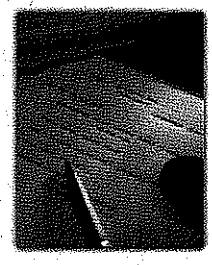

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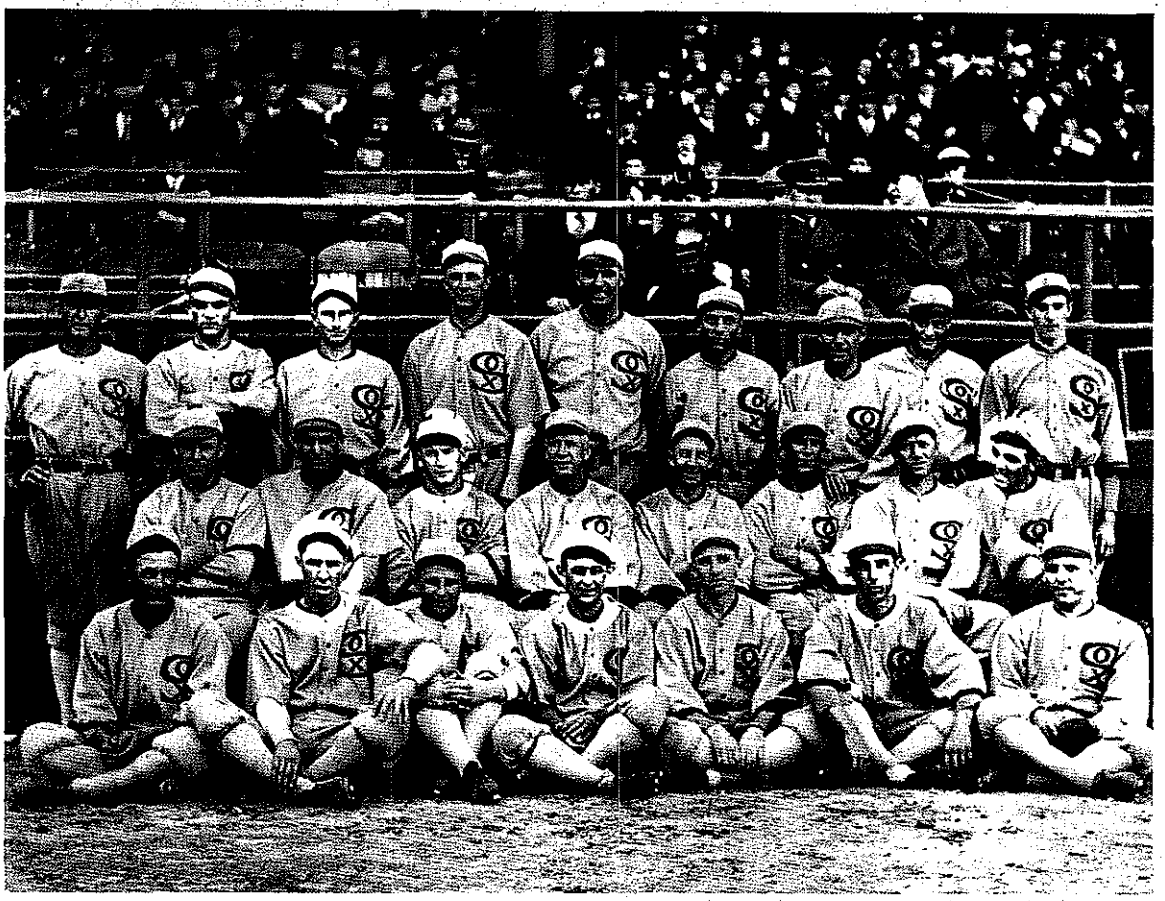

Baseball's 'Black Sox' Acquitted

It was rumored that the 1919 World Series between the Chicago White Sox and the Cincinnati Reds hadn't been played squarely. • A year later, grand jury testimony in Chicago confirmed that several White Sox players, driven by resentment toward tightfisted team owner Charlie Comiskey, had conspired with gamblers to hand the best-of-nine series to the underdog Reds. • Eight players (highlighted above) were indicted with five gamblers on charges of conspiracy to defraud the public. After a two-week trial marked by the revelation of several missing confessions, all eight were acquitted. • In an effort to shore up baseball's credibility, owners persuaded Kenesaw Mountain Landis, a federal judge in Chicago, to become the game's first commissioner. In his first act, Landis banished the eight from baseball, leaving them forever known as the "Black Sox." —*George Hodak*

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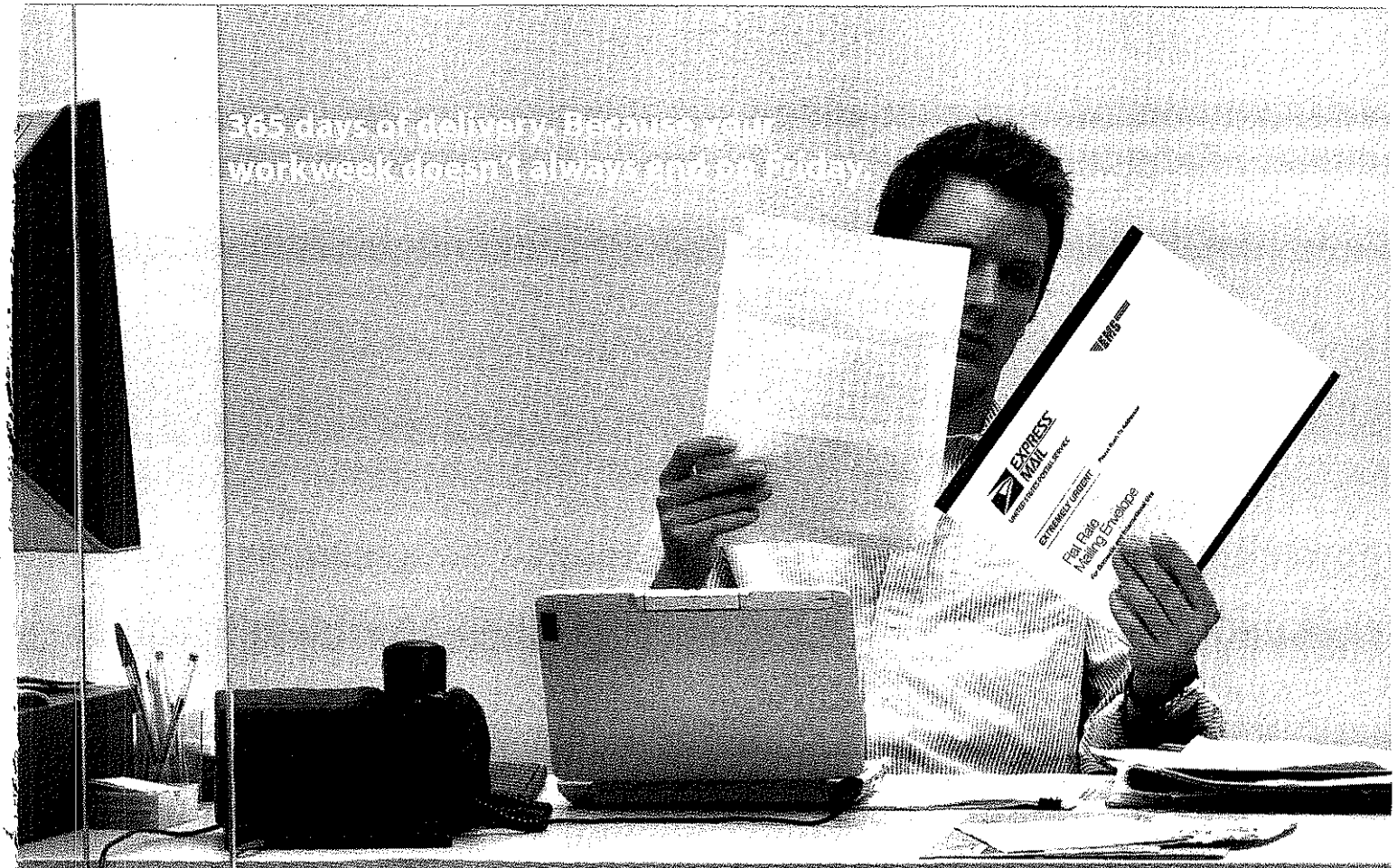

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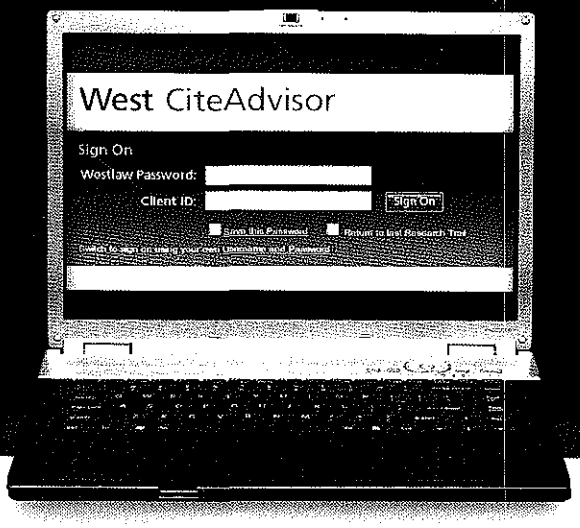

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