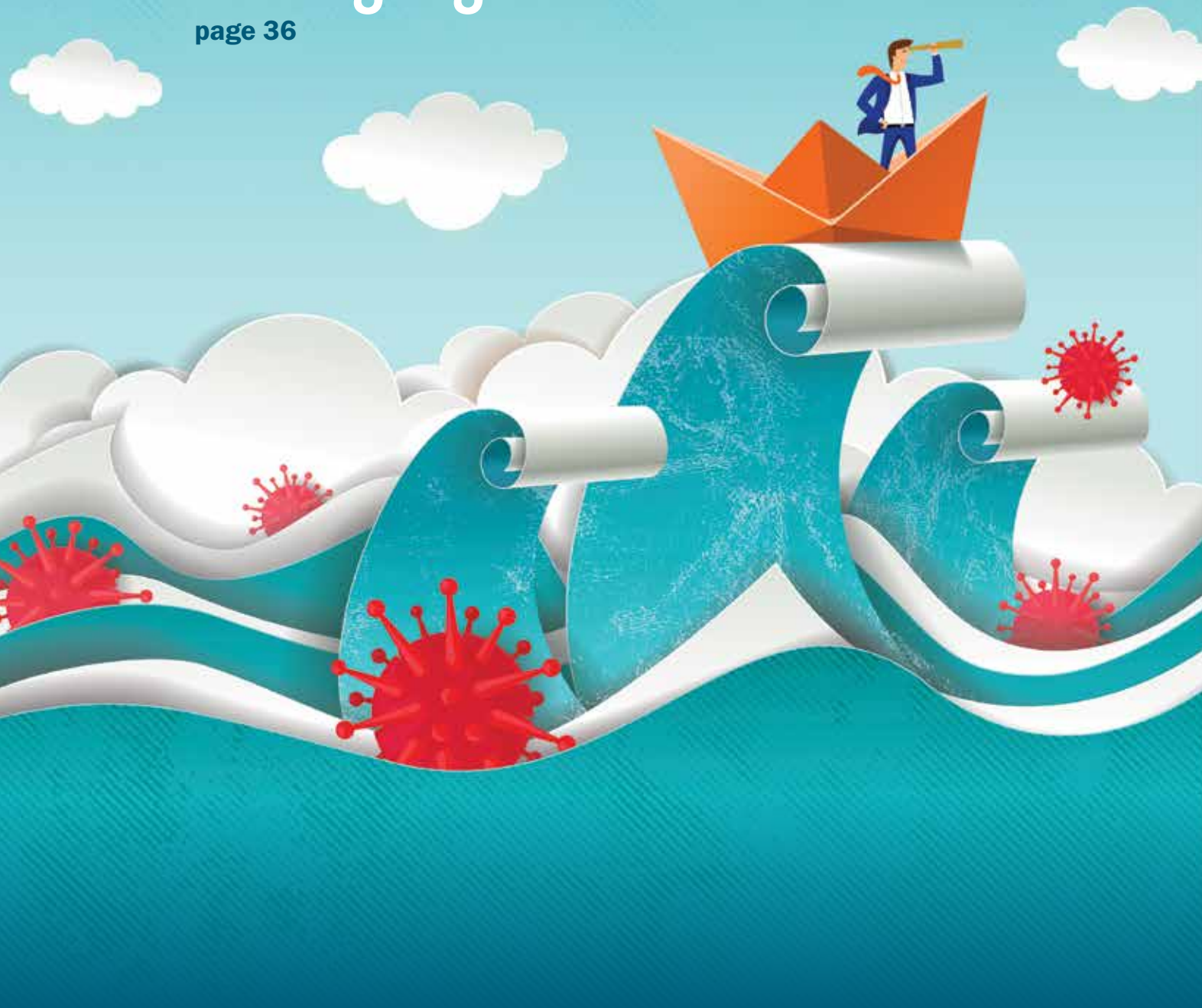
THE FEDERAL LAWYER

Volume 69, Issue 1

The Magazine of the Federal Bar Association

The Implications of COVID-19 for Incarcerated Individuals Seeking Legal Redress

page 36



Notice of Elections for FY2023

The Nominations and Elections Committee (Committee) hereby gives notice that there will be an election for the following officers of the association for the fiscal year beginning October 1, 2022: President-elect; Treasurer; three Directors; and one Vice President for the following circuits: Second, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Please review specific qualifications for each position at Bylaw 6B. www.fedbar.org/about-us/governance-and-organizational-structure/fba-bylaws/#6

2022 Nominations and Elections Committee

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Pursuant to Bylaw 8, Sec. A1, the Nominations and Elections Committee is responsible for administering the procedures applicable to nomination and election of national officers of the Association during the annual election as prescribed in Article V, Section 3, of the Constitution and Bylaw 6. The Committee shall be composed of the President, who shall chair the Committee; President-elect; immediate past-President; two Vice Presidents for the Circuit designated by the President; a Section or Division chairperson designated by the President- elect; and one Professional Chapter representative designated by the President-elect.

All officers will assume their elected position on October 1, 2022, and serve the following terms: President-elect and Treasurer, one year; three Directors, two years; and Vice Presidents for the Circuits, two years. The incumbent President-elect will automatically succeed the incumbent President on October 1, 2022.

Under Article V, Section 3 of the FBA Constitution, there are two ways for members to be listed on the ballot:

- By nomination of the Nominations and Elections Committee; or
- By petition: (1) a candidate for national office must be endorsed by not less than fifty members in good standing; and (2) a candidate for Vice President for the Circuit must be endorsed by not less than twenty members in good standing of chapters and/or members at large in that particular circuit.

Under Article V, Section 2 of the FBA Constitution, all members of the association at the time of nomination, whose dues are paid for the current fiscal year and who otherwise are in good standing, and meet all other qualifications, as may be required by the Constitution, Bylaws, and policies of the Association, shall be eligible as candidates for any elective office. The FBA welcomes and encourages diverse individuals to apply for leadership positions.

Nominations

Members interested in being nominated for office by the Committee shall complete and submit the FBA Application for National Office along with an electronic resume and photo to Anh Le Kremer, Chair of the Nominations and Elections Committee, at elections@fedbar.org, to be received by February 1, 2022. The Committee shall require, at a minimum, that each candidate provide their name; place of professional practice (firm, office, court, agency or other); preferred mailing address; contact telephone number; facsimile number; e-mail address; date of FBA membership; and the title of the office sought. Also, the Application shall provide space for a candidate to provide a biographical sketch of their qualifications for the office that should include 1) why the candidate is seeking national office (2) a description of the candidate's FBA activities and leadership positions; (3) professional experience and awards received; (4) other volunteer activities; (5) what is one significant issue facing the FBA and, as a leader, how would you address the issue? The biographical statement is limited to one page electronic document no larger than 8.5"X11" using 12-point font.

By March 1, 2022, the Committee shall nominate one or more members in good standing for each of the elective offices becoming vacant for the coming term. By March 10, 2022, the Committee shall cause to be transmitted to each member in good standing notice of the upcoming annual election and of the offices to be filled therein; of the Committee's nominations for those offices; and the manner and time by which nominations of candidates may be made by petition as provided in Article V, Section 3.b. of the Constitution and Bylaw 6(C).

Petitions

Members who have not been nominated for office by the Committee, but who wish to be placed on the ballot for national office, may do so by delivering to Anh Le Kremer, Chair of the Nominations and Elections Committee, at elections@fedbar.org, a petition, including an Application, specifying the office being sought and bearing the required number of signatures indicated previously. Petitions must be received by May 15, 2022.

Election

In accordance with Bylaw 6(D), by June 1, 2022, the Committee shall cause a Notice of Election to be sent to each member of the Association in good standing. The notice shall list the names of all nominated candidates and candidates by petition in alphabetical order under each elective office. The notice also shall contain such instructions as necessary for members to cast their votes as prescribed by policy adopted by the Board of Directors.

Completed ballots shall be received by the Chair of the Committee or by such person as designated by the Chair no later than June 15, 2022. The Committee shall review and certify the tabulated votes and report as elected the candidate for each office who has received a plurality of the votes cast for that office by the next business day following June 15.

In the event that any deadline herein specified is a Saturday, Sunday, or legal federal holiday, the next succeeding business day shall substitute for that specific deadline.

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January/February 2022: COVID and Beyond

COLUMNS

PROFILES

BOOK REVIEWS

FBA MEMBER NEWS

COVID and Beyond

By Anh Le Kremer

Anh Le Kremer is a former business litigator at Stinson, LLP. She is currently the chief operating officer and general counsel for Nystrom & Associates, a behavioral health organization headquartered in Minnesota.

The COVID-19 pandemic has changed all of us. It has redefined how we work and how we live. Though it has brought its share of challenges, one positive trend has emerged from it: increased awareness as a society around the importance of mental health and our overall willingness to discuss it.

I work in the healthcare sector—specifically in the behavioral health field. I am passionate about the topic of mental health and well-being and ensuring adequate access to these needed services. We're facing a shortage of mental health professionals, and the need for mental health services has surged since the start of the pandemic. Anxiety and depression are on the rise. The American Psychological Association published a survey recently of nearly 1,800 psychologists, 74 percent of whom reported seeing more patients with anxiety disorders than before the pandemic, and 60 percent reported seeing patients with more depressive disorders.

Prior to the pandemic, mental health was an underdiscussed topic. We didn't talk about mental health because of the stigma associated with it. Although the stigma has by no means disappeared, we do seem to be more open today to discussing it and educating ourselves on the topic. The pandemic has normalized discussions around mental health and wellness, and it is my hope that this trend continues, particularly regarding the legal field.

Mental illness affects a significant portion of the general population. According to the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services, 21 percent of adults in the United States experienced mental illness in 2020. The legal profession is not immune to these staggering statistics. An ALM Mental Health and Substance Abuse Survey in 2021 found that 31.2 percent of their 3,800 respondents feel depressed, 64 percent feel they have anxiety, and 10.1 percent feel they have an alcohol problem.

Mental illnesses such as depression and anxiety are real, common, and treatable illnesses. However, an illness can't be treated unless the individual seeks treatment. Lawyers and judges have been trained to appear resolute and unflappable in the face of stress. It starts from the first day of law school with the Socratic Method of teaching and continues throughout one's legal career, where high-performance is demanded and long work hours are rewarded. But we're all human, with very human conditions. We can't help our clients or serve the public effectively if we're not taking care of ourselves first.

Prior to the pandemic, mental health was an underdiscussed topic. We didn't talk about mental health because of the stigma associated with it. Although the stigma has by no means disappeared, we do seem to be more open today to discussing it and educating ourselves on the topic. The pandemic has normalized discussions around mental health and wellness, and it is my hope that this trend continues, particularly regarding the legal field.

If you are struggling with a mental health issue or know of a colleague, friend, or family member who is struggling, please know that there are resources and please seek treatment options. The National Alliance of Mental Illness (NAMI) is a national organization that can connect you to needed resources. You can visit NAMI's website at www.nami.org or call the HelpLine at (800) 950-6264. In a crisis, you can also text "NAMI" to 741741 for 24/7 free confidential counseling. ☉

President Biden's First-Year Judicial Appointments

By Dan Renberg and Cissy Jackson

A former senior Senate staff member and presidential appointee, Dan Renberg has helped numerous clients since joining Arent Fox as a partner in 2003. Recognized as a top federal lobbyist, one of Renberg's advocacy efforts was included as one of the "Top 10 Lobbying Triumphs of 2009" by *The Hill*, and he has been listed annually since 2014 in *The Best Lawyers in America*. Before joining Arent Fox, Cissy Jackson served as counsel and national security adviser to Sen. Doug Jones, D-Ala. Jackson also has extensive experience in the private practice of law, handling white collar, False Claims Act, grand jury investigation, and commercial property tax appeal matters. She has represented multinational corporations, small businesses, and individuals in high-stakes civil and criminal litigation.

One of the most anticipated—and sometimes most controversial—opportunities for a new president is filling vacancies on the federal bench under the appointments clause authority set forth in Article II, Section 2, Clause 2 of the Constitution. The Senate's advice and consent role in confirming presidential appointments has, in recent years, contributed to the politicization of the process. It has also hindered efforts to authorize new judgeships despite overwhelming caseloads in many courts, as we noted in our November/December "Beltway Bulletin."

As the foremost national bar association devoted to the practice of federal law and the vitality of the federal court system, the FBA closely monitors the nomination and confirmation process as part of its mission to keep its members informed. The FBA maintains a neutral political stance, simply urging each president and congress to act promptly and responsibly in nominating and confirming nominees to the federal appellate and district courts.

When President Biden took office, there were 46 vacancies on the federal bench. Since that time, additional vacancies have opened, and President Biden is filling them at a record pace. As of November 18, the full Senate has confirmed 28 of President Biden's Article III nominees—more than any of his six predecessors saw confirmed in the same period of time. Senate Judiciary Committee Chairman Dick Durbin, D-Ill., has kept up with the administration's aggressive pace of nominations, having already held hearings for 20 of the 34 pending nominees. With 73 current vacancies as of November 18 and 35 future vacancies announced, we can expect to continue to see multiple confirmations each week the Senate is in session, though the pace of naming and confirming nominees may slow as the White House moves to fill vacancies in states with one or both Republican senators.

Although it has been sometimes disregarded in recent years, the Senate's blue slip tradition affords individual senators the opportunity to singlehandedly block a nominee. According to the tradition, the Senate Judiciary Committee chairman sends a blue slip of paper to each home-state senator before scheduling a hearing for a nominee from his or her state. The senators indicate their support or opposition to the nominee on the blue slips and return them to the chairman. Some chairmen will not schedule a hearing on a nominee until both blue slips are returned. Thus, if a senator refuses to return a blue slip, that nominee's confirmation process can be indefinitely stalled. The tradition does not require senators to explain the refusal to return a blue slip; thus, the real or perceived reason for doing so may depend on the eye of the beholder. In a *New York Times* interview in March 2021, Chairman Durbin said he intends to follow the blue slip tradition for district court nominees but warned that he will "keep an open mind" about revisiting it to prevent blue slips from being used "to perpetuate prejudice."

Sen. Durbin's views on the importance of the blue slip tradition and its appropriate use may be tested in the coming months, as President Biden's nominees are a historically diverse group. With his first slate of nominees, the president emphasized his belief that those who sit on the federal bench should reflect the diversity of our country in terms of both personal and professional backgrounds, and the president's selections to date reflect a commitment to fulfilling that vision. Three-quarters of the nominees confirmed under President Biden are women; 28 percent are Black; 11 percent are Asian American; 11 percent are Latinx; and 3 percent are Native American. In addition, President Biden has appointed the first two openly LGBT women to circuit court seats.

The Democratic majority in the Senate and the 2013 rules change that allows a simple majority vote to end debate on judicial nominations have been critical to the success of the president's nominees, as 20 of the 28 nominees confirmed so far received 40 or more votes in opposition. Previously, where there was effectively a 60-vote requirement under the Senate's cloture rules, these judges might not have been confirmed by the Senate at all, or at least not nearly as quickly. As the White House seeks to fill vacancies in states where Republican senators have the opportunity to block the president's choices by withholding blue slips, and

continued on page 10

Federal Bar Association

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In Praise of Cooperation and Collaboration

By Stewart M. Young

Stewart M. Young is a member of the editorial board of *The Federal Lawyer* and currently serves as the president of the Utah Chapter of the FBA. He serves as an assistant U.S. attorney (AUSA) in the District of Utah. He previously served as an AUSA in the Southern District of California and as a tenure-track law professor at the University of Wyoming College of Law. He is a two-time federal law clerk and a graduate of both Stanford Law School and Princeton University. Young writes in his personal capacity; the views expressed are not necessarily those of the Department of Justice or the U.S. Attorney's Office for the District of Utah.

In 2005, Utah had a problem. The state's homeless population had risen dramatically, and myriad issues arose along with that increase in homelessness. Rather than admire the problem and spout platitudes regarding it, Utah created a state homelessness task force (the State Homeless Coordinating Committee) to provide creative solutions. The task force included many stakeholders as well as several lawyers, all of whom worked tirelessly toward solving the homeless crisis in the state. The end result was a 91-percent drop in chronic homelessness through 2015, as the task force touted a "Housing First" policy that "focused on getting people into housing, regardless of mental illness or substance abuse problems that could be treated after accommodation was secured."[1] Several years later, Utah had been lauded as "a leader among U.S. cities struggling to relieve homelessness," although the model ushered into practice by Utah fizzled out without the requisite programmatic funding.[2] While Utah has struggled with its homelessness program over the past several years, this original program, and the Homeless Coordinating Committee that created the program back in 2005, was a clear success for almost a decade.

An NPR story outlined one central component of success for that task force: "[M]ost of the advocates and agencies in Utah know each other and work well with each other."[3] These disparate groups came together, in cooperation and collaboration, for a common good and solved an issue (albeit, temporarily) that concerned the community. These groups and stakeholders, through their cooperation and collaboration, made a difference in the community.

Alas, lawyers are not well known for cooperation and collaboration. Our profession is known for its adversarial nature rather than its collaborative endeavors. Indeed, not many lawyers are publicly praised for being "the most cooperative lawyer" around. Bar associations around the country, and other important attorney organizations, bestow honors for the "Trial Attorney of the Year," which, by its very nature, demonstrates the adversarial nature of our profession. In my 18 years of practice, I have yet to see an attorney awarded for "Collaborator of the Year." One could say that our profession almost punishes cooperation and rewards antagonism.

Of course, thoughts on cooperation and collaboration by lawyers (or the lack thereof) are nothing new. In 1850, for instance, Abraham Lincoln remarked, "Discourage litigation .... As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough."[4] Over the past 170 years, one could argue that this statement has not necessarily made a dent in our collective practices.

In the past decade, cooperation and collaboration among disparate groups, and in our legal profession, is more in vogue, however. Task forces, implemented to solve problems, have become a buzzword and an important facilitator of change in our community and among legal groups, often with lawyers leading the way. The American Bar Association has an entire webpage devoted to the 10 task forces it has created to solve criminal justice issues as varied as Campus Sexual Misconduct to Women in Criminal Justice.[5] The FBA has its own task forces as well. A recent gander at the FBA website reveals several of these devoted to important legal issues, including the Veteran's Assistance Task Force[6] and the Access to Justice Task Force.[7] And, the Legal Services Corporation, established to promote equal access to justice and to fund civil legal aid for low-income Americans, counts at least five of their own, including the Rural Justice Task Force, the Opioid Task Force, and the Disaster Task Force.[8] These important task forces, across a spectrum of legal organizations, seek to better our communities and provide solutions to a number of problems within the criminal justice system. This collaboration and cooperation among lawyers and members of the community is critical to helping to solve dire problems in our society.

Even the Department of Justice (DOJ) itself (my current employer) has jumped onto the collaboration bandwagon for several of its prosecutorial priorities. There are several federal law enforcement agencies that don't always work closely together, such as the Drug Enforcement Administration (DEA), the Federal Bureau of Investigation (FBI), the Bureau of Alcohol,

Tobacco, Firearms & Explosives, Homeland Security Investigations (HSI), and others. While all these agencies conduct excellent investigations and do their part to ensure the safety of the public, they don't always mesh well enough together to maximize their output. As noted above, cooperation and collaboration are vital to better outcomes, whether one is dealing with inherent issues in criminal justice or grappling with new methods by which criminals commit crimes. And, these federal law enforcement agencies have demonstrated much greater cooperation and collaboration on a number of investigative priorities, fostering more open communication and greater prosecutorial successes.

One example of better cooperation and collaboration leading to impressive results in the federal investigative and prosecutorial sphere is the Organized Crime and Drug Enforcement Task Force (OCDETF) program. The OCDETF program combines federal and state/local partnerships with an eye toward better cooperation and collaboration in the investigation of large-scale criminal organizations and drug trafficking. The successes of OCDETF partnerships are legion, and federal law enforcement agencies see the added value of such collaborations and cooperation. The OCDETF program also sponsors OCDETF strike forces in several parts of the country that promote "permanent, multi-agency, prosecutor-led teams" to "foster communication and collaboration."[9] These strike forces are a paradigmatic example of how cooperation (for law enforcement groups) can make a difference in certain areas.

Even more recently, the DOJ has added more task forces to its roster, given the value that it sees with cooperation and collaboration among law enforcement agencies. The newest DOJ group is Joint Task Force Alpha, which targets human smuggling and trafficking, along with corruption in Central America.[10] Joining with the Department of Homeland Security (DHS), this task force includes federal prosecutors from several border states (along with the Criminal Division and Civil Right Division) and agents from the FBI, DEA, and several DHS components. Joint Task Force Alpha follows in the footsteps of DOJ's previously established task force, Joint Task Force Vulcan, which was "launched in 2019 [and] aimed at disrupting, dismantling, and ultimately, destroying MS-13."[11] Joint Task Force Vulcan brought together numerous federal agencies to implement a "whole-of-government approach to law enforcement relating to MS-13," including prosecutors from different districts.[12] Last year, due to the cooperation and collaboration of those disparate agencies (FBI, DEA, HSI, and others), that task force "charg[ed] 14 of the highest-ranking MS-13 leaders ... which operated as the Organization's Board of Directors, and directed MS-13's violence and criminal activity around the world for almost two decades."[13] Clearly, DOJ and its federal agency partners see the value of cooperation and collaboration, as it allows stakeholders to better shepherd resources toward more effective results.

On a local level in Utah, our federal lawyers are actively seeking engagement through cooperation and collaboration with their counterparts. One of the capstone programs within the District of Utah is the "Utah Alternatives to Conviction Track (UACT)," which is "an innovative, post-guilty plea diversion program."[14] This is a voluntary program established by the District Court, the U.S. Attorney's Office, the Federal Public Defender's Office, and the U.S. Probation Office, to give participating defendants "a creative blend of treatment, sanction alternatives, judicial involvement and unique incentives to effectively address offender behavior" and to promote rehabilitation, reduce recidivism, and promote the safety of the community.[15] While limited in the number of defendants the UACT program can accept, it offers participants robust access to a district and magistrate judge, two federal prosecutors, two federal public defenders and two probation officers every week, with opportunities to engage in various programming, homework assignments, and beneficial projects. Successful UACT graduates either receive probationary sentences or have their charges dismissed, which is relatively rare in the federal criminal arena. Our local FBA chapter has provided support to the UACT program (and other federal court initiatives), so even some of our civil attorneys have gotten in on the action! I can almost think of no better example of cooperation and collaboration among various stakeholders in the federal criminal arena, as this program has demonstrated profound success over a several year period.

Except that I can. A number of years ago, former Chief Magistrate Judge Paul Warner conceived of one of "the first federal veterans court[s] in the nation," which has continued in the District of Utah to this day.[16] Judge Warner, a friend and idol of mine, is proud of this creation and explained several keys to successfully starting a federal veterans court: A judge that is interested and committed, a partner with the local Department of Veterans Affairs (VA) hospital, and "buy in from the US Attorney's Office and the Federal Defender, as they provide the prosecution and defense counsel."[17] Indeed, without this cooperation and collaboration by the prosecution and defense, a veterans court is merely a dream and a wish. But more importantly, with this collaboration and cooperation, numerous veterans have been served, for the good of both the VA and the community. Both the UACT program and the Veterans Court are terrific examples of how attorneys—on both sides of the aisle—can work together for higher end results in federal court and in the community.

While our country continues to struggle with the pandemic and partisan strife of varying degrees, the attorneys in our communities have the opportunity to cooperate and collaborate to make important and lasting changes that benefit everyone. May we seek out opportunities for this cooperation, whether through community groups, court programs, task forces, and other vehicles. Let Abraham Lincoln's thoughts resonate with us in this New Year: That as a peacemaker, a lawyer has a superior opportunity of being a good person. ⊙

Endnotes

[1]*See* Clay Clifford, *Utah Reduced Chronic Homelessness By 91 Percent; Here's How*, NPR.org (Dec. 10, 2015), https://www.npr.org/2015/12/10/459100751/utah-reduced-chronic-homelessness-by-91-percent-heres-how; Philip Stadler, *Housing First: Utah Ends Homelessness and Provides Shelter for All* (July 8, 2020), https://www.scoop.co.nz/stories/HL2007/S00052/housing-first-utah-ends-homelessness-and-provides-shelter-for-all.htm.

[2]Gregory Scruggs, *Once a national model, Utah struggles with homelessness*, Reuters.com (Jan. 10, 2019), https://www.reuters.com/article/us-usa-homelessness-housing/once-a-national-model-utah-struggles-with-homelessness-idUSKCN1P41EQ; Bethany Rodgers, *Utah was one lauded for solving homelessness – the reality was far more complicated*, SL Trib. (May 11, 2020), https://www.sltrib.com/news/politics/2020/05/11/utah-was-once-lauded/ (May 11, 2020).

[3]Clifford, *supra* note 1.

[4]Abraham Lincoln, *Notes for a Law Lecture*, in The Life and Writings

continued on page 16

The Paradox of Diversity, Equity, and Inclusion Work

By Pamela Yaacoub

Pamela Yaacoub is an associate at MoloLamken LLP. She previously clerked for Hon. Jane Kelly on the U.S. Court of Appeals for the Eighth Circuit and for Hon. Edmond E. Chang on the U.S. District Court for the Northern District of Illinois.

Over the past few years, we have seen heightened recognition of the need for diversity in the legal profession. Law firms and other legal employers have undertaken a variety of different initiatives to demonstrate their commitment to diversity, equity, and inclusion (DEI), such as organizing panels to reach out to law students from underrepresented communities, setting up resumé workshops for first generation professionals, providing financial support for law school affinity groups, and establishing task forces to investigate internal barriers. This is undoubtedly a step in the right direction—but it also raises important questions. Who is doing the work to develop and implement DEI initiatives? And at what cost?

Invisible labor—a term rooted in the research of sociologists Arlene Daniels and Arlie Hochschild in the 1980s[1]—describes work that is often unacknowledged and unpaid. In academia, for example, it "has been used to describe the unrecognized work underrepresented faculty members are called on to do by virtue of that status: mentoring students who see aspects of themselves in their professors ... or otherwise engaging in inclusion and diversity work."[2] Research suggests that academic institutions often fail to tangibly value and compensate DEI work, and that minority faculty disproportionately shoulder the responsibility of such work at the expense of activities that might better serve their own career development.[3] Significantly, the disparity in who performs DEI work—and the resulting inequity between minority and nonminority individuals—is not unique to academia. It has also been observed in tech, law, and other industries.[4] Attorneys of color, especially, can frequently be expected to speak on diversity panels, serve on diversity committees, meet separately with "diverse" candidates during the recruitment process, appear in pitches to prospective clients (including on matters they are not ultimately staffed on), and organize resumé workshops, book discussions, implicit bias trainings, and other DEI-related events. They are, in other words, unfairly expected to solve a problem they did not create.

To be sure, this is often a necessary burden—and at times even a welcome one. Minority attorneys may be motivated to engage in DEI work because they "seek[] a community that reflects their experiences"—and because they are more likely to notice and understand problems like racism and to be "aware of the institutional stumbling blocks to meaningful inclusion and equity."[5] As an Arab-American woman and immigrant, just a few months out of law school, I remember feeling that I had more in common with the clients I represented in asylum cases than with my colleagues. I felt honored and privileged to be able to help my community and to provide empathetic representation, but I also felt isolated and alienated in my profession. This isolation—the lack of peers and mentors with similar experiences—makes it that much more difficult for minority attorneys to raise concerns and to challenge problematic workplace policies and practices. It is for these reasons that I have enthusiastically volunteered to organize and participate in DEI initiatives throughout my career. I try to be intentional about using my privilege to mentor students of color—to help them build a network that so many of their peers are already born into, and to share some of the lessons I have learned while navigating what is still a very white, male, and classist industry.[6] All this to say: many minority attorneys engage in DEI work not just because they are asked to (or because they are often more qualified to), but also because they themselves are passionate about rectifying the inequities within the legal profession. On the flipside, the lack of participation in DEI initiatives from nonminority attorneys may even stem from a well-intentioned desire to not take up more space—to allow minority attorneys to lead.[7] Nevertheless, and although minority attorneys *should* be empowered to lead and shape DEI work (if they want to), it remains the duty of nonminority attorneys—and legal institutions as a whole—to practice allyship: to educate themselves on issues of racism and inequality, to speak up against policies and practices that might be harmful (or even just counterproductive), to listen to diverse voices and be open to creative solutions, and to actively share in the responsibilities of creating a diverse and inclusive workplace.[8]

Moreover, as others have observed, allowing the expectation that minority attorneys will "shoulder

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the burden of identifying and solving issues relating to diversity" to become the default can "operate[] to the detriment of minority attorneys, particularly if law firms expect them to assist with diversity, equity, and inclusion efforts and to bill the same hours as their nonminority counterparts."[9] This means that, too often, minority attorneys are either getting paid the same—if not less[10]—than their white counterparts to do *more* work, or they are expected to perform DEI work at the expense of their own professional development. Neither scenario is acceptable. Employers must take concrete steps to ensure that DEI work is *actually* targeted at fostering diversity, equity, and inclusion, including by not harming the very people it is intended to serve. In academia, for example, some universities have mandated that "faculty contributions to diversity receive recognition and reward in the academic review process,"[11] while others have developed comprehensive strategic plans and working groups for improving DEI.[12] In the legal profession, employers could also participate in organizations like the Leadership Council on Legal Diversity (LCLD); sponsor minority attorneys for mentorship and professional development programs, such as LCLD's Fellows Program; support pipeline-focused initiatives, such as the ABA's Judicial Intern Opportunity Program; host implicit bias seminars and trainings; and, when choosing causes to support, select organizations that focus on issues of social inequality more broadly.[13]

Of course, there is no one-size-fits all, and a holistic, multifaceted approach is likely crucial—particularly given that true diversity, equity, and inclusion is about more than just statistics. It is also an environment in which minority attorneys can be their full selves, without having to hide parts of their culture, or change their hairstyles, or refrain from reacting to political events. It is an environment in which leadership makes an effort to get to know minority attorneys and establish rapport with them, even, and *especially*, if they come from different backgrounds. An environment that never assumes what people's families, obligations, or financial capabilities might look like. An environment that understands that working styles, productivity levels, and burnout thresholds can vary, including for attorneys with mental health issues or with neurodevelopmental conditions like ADHD. These things are not always tangible, nor are they easy to achieve. But progress in this area requires, at minimum, that the labor of minority attorneys in cultivating diversity, equity, and inclusion be recognized, valued, and compensated. ⊙

Endnotes

[1]Arlene Kaplan Daniels, *Invisible Work*, 34 Soc. Problems 403 (1987); Arlie Hochschild, The Managed Heart: The Commercialization of Human Feeling (1983).

[2]Colleen Flaherty, *Undue Burden*, InsideHigherEd (June 4, 2019), https://www.insidehighered.com/news/2019/06/04/whos-doing-heavy-lifting-terms-diversity-and-inclusion-work.

[3]*Id.*

[4]*See, e.g.*, Holly Corbett, *The New Unpaid Office Housework for Women: Being DEI Leaders*, Forbes (Sept. 28, 2021), https://www.forbes.com/sites/hollycorbett/2021/09/28/the-new-unpaid-office-housework-for-women-being-dei-leaders/?sh=67c01e2a56e8; Shilpa Coorg & David Ramírez-Gálvez, *Retention Is Key to Meaningful Diversity At Law Firms*, Law360 (Aug. 9, 2021), https://www.law360.com/articles/1411047/retention-is-key-to-meaningful-diversity-at-law-firms; Nitasha Tiku, *Tech companies are asking their black employee groups to fix Silicon Valley's race problem – often for free*, The Washington Post (June 26, 2020), https://www.washingtonpost.com/technology/2020/06/26/black-ergs-tech/.

[5]Flaherty, *supra* note 2.

[6]*See* American Bar Association, *Profile of the Legal Profession* 17-20 (July 2021), https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf; Hassan Kanu, *'Exclusionary and classist': Why the legal profession is getting whiter*, Reuters (Aug. 10, 2021), https://www.reuters.com/legal/legalindustry/exclusionary-classist-why-legal-profession-is-getting-whiter-2021-08-10/.

[7]Julia Carpenter, *Minority employees are often asked to work 'double duty'*, CNN Business (Nov. 30, 2018), https://www.cnn.com/2018/11/28/success/diversity-work-burden/index.html.

[8]*Id.*

[9]Coorg & Ramírez-Gálvez, *supra* note 4.

[10]*See, e.g.*, *Out of the Black Box: Highlighting Central Myths of Gender Pay Disparity in the Legal Profession in 2020*, Attorney at Law Magazine (Nov. 11, 2020), https://attorneyatlawmagazine.com/highlighting-central-myths-gender-pay-disparity-in-the-legal-profession-2020; Stephen Miller, *Black Workers Still Earn Less Than Their White Counterparts*, SHRM (June 11, 2020), https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/racial-wage-gaps-persistence-poses-challenge.aspx.

[11]UCOP Academic Personnel and Programs, *Evaluating Contributions to Diversity for Faculty Appointment and Promotion Under APM – 210*, University of California: Office of the President (Feb. 2017), https://www.ucop.edu/faculty-diversity/policies-guidelines/eval-contributions-diversity.pdf.

[12]*Strategic Plan*, UM Diversity, Equity, & Inclusion, https://diversity.umich.edu/strategic-plan/ (last visited Jan. 20, 2022).

[13]*See, e.g.*, *Diversity & Inclusion*, MoloLamken LLP, https://www.mololamken.com/firm-diversity.

Beltway Bulletin *continued from page 4*

as the 2022 midterm elections approach, bringing the possibility of a shift in control of the Senate, the tension between tradition and pragmatism will be in sharp focus.

The importance of promptly filling federal bench vacancies with qualified judges cannot be overstated. The FBA and its members can play an important, nonpartisan role in continuing to encourage the president and Senate to work expeditiously together in this process to support and preserve an independent judiciary for the fair and efficient functioning of our judicial system, for the benefit of all Americans. ⊙

Correction:

An error was noted in the "Beltway Bulletin" appearing on page 4 of the November/December issue of The Federal Lawyer *(Vol. 68, Issue 6). The first sentence of the second paragraph should read:*

"Article III, section 1 of the Constitution vests the judicial power in the Supreme Court and 'such inferior courts as the Congress may from time to time ordain and establish.'"

The online version of the publication has been corrected.

COVID in (the) House

By Chrissi Ross Nimmo

Chrissi Ross Nimmo is a citizen of and deputy attorney general for the Cherokee Nation, where she has practiced law for 13 years. She resides in Tahlequah, Okla., on the Cherokee Nation Reservation. You can find her Indian law, parenting, and political musings on Twitter as @mizhardcase.

I am the deputy attorney general for the Cherokee Nation, the largest federally recognized Indian tribe in the United States. I report to the attorney general, Sara Hill, who holds a position that is constitutionally created and appointed.[1] The Office of the Attorney General handles all legal matters for the Nation, including criminal and juvenile prosecution; civil litigation in tribal, state, and federal court; and in-house counsel duties for the departments, agencies, and commissions of the Nation. Between the government and business entities of the Nation, it directly employs approximately 12,000 people. I am the managing attorney for a staff of 15 attorneys and support staff, including probation and investigation. The last year has brought more change to the Cherokee Nation than any other in our modern history. In addition to a worldwide pandemic, we had a significant legal decision that changed the size and scale of our office and our entire tribe. The pandemic was only part of the challenges and opportunities we faced in the last year and a half.

First, I can't talk about the effect that COVID-19 had on my professional life without first talking about the effect it had on me as a mom. In March 2020, my three children—twins in kindergarten and a two-year-old in daycare—came home for spring break and would not return to in-person instruction until August 2021. Although my children's public school offered an in-person option for the 2020-2021 school year, due to previous medical issues with my son, we decided to keep them virtual in an effort to protect them from COVID. So, on top of managing a growing office of attorneys and support staff, I was a part-time first grade and pre-k teacher! My husband is a firefighter, so his job could obviously not be done remotely, and his direct, likely daily exposure to COVID kept us vigilant about protecting our family. (Although there were definitely some advantages to his 24-hour on/48-hour off work schedule when it came to child care). This past fall, all three of my children returned to in-person learning, and my 7-year-old twins both contracted COVID within the first two weeks of school. (I am also a school board member in a state where state law prohibits school boards from mandating masks, a law that is currently enjoined by the court, so I have also had to grapple with a minor but vocal contingent of the public who accuse us of child abuse for requiring students to wear masks in school).

As to the impact COVID has had on my professional life, the Cherokee Nation Office of the Attorney General, which includes legal services, juvenile justice services, and victim/witness services, is largely female (more than 80 percent), and the majority of our staff are also parents. Like in many other professions, females in our office were disproportionality tasked with childcare duties during this time. So, throughout the pandemic, we have had to be flexible with our employees due to both childcare issues and quarantines for exposure. When the "COVID shutdown" started in March 2020, our office went completely virtual. Cherokee Nation was able to equip everyone in our office with laptops and hot spots so that we could productively work from home (the Cherokee Nation is in rural areas in Northeastern Oklahoma and many of our employees have limited or no internet service at home). We spent three months completely virtual but continued our day-to-day work in the "new normal" legal environment, with all of our meetings and court appearances now conducted via video rather than in person. We returned to the office in staggered shifts toward the end of June 2020 and did not return full time with all staff until well into fall 2020. So, for months, we saw many of our co-workers on computer screens only, often with kids in the background.

Although many of Cherokee Nation's thousands of employees were able to work virtually, many were not. We operate the largest tribal health system in the country, including a full-service hospital with an emergency room and multiple outpatient health clinics. We have a police force, emergency medical services, and child care centers that were providing child care services to frontline workers who could not work from home. We also performed large-scale food and personal protective equipment distribution services for our citizens and members of our community. In addition to straining health and emergency response resources, COVID brought a new round of legal questions and challenges, including mask and vaccine requirements, analyses of spending requirements for COVID relief funds, and human resources policies regarding time off for quarantine. In addition, Indian tribes must continually determine which federal and/or state laws and

regulations may or may not apply to the tribe and its entities and employees. For example, even though my tribe decided to voluntarily close our casinos and associated entertainment options, we were not legally required to do so under state "nonessential business" closures.

Cherokee Nation as a government, led by Principal Chief Chuck Hoskin Jr., was very proactive on COVID mitigation. We worked hard to make sure at-risk employees were protected from COVID exposure, while still providing essential government services. We instituted mandatory masking and vaccine incentives and mandates long before other governments and private businesses in our area (which has led to 75 percent of our workforce being vaccinated) and even began a PPE manufacturing facility in the midst of the pandemic. Cherokee Nation has been a leader in our geographic area for COVID testing and vaccinations—for our entire community, not just tribal members. We have invested millions of dollars to ensure that our workspaces are safe for our employees and citizens.

While COVID was impacting the entire Cherokee Nation (including shuttering our revenue-producing casinos for months), the Supreme Court also handed down the most significant Indian law decision in decades. Although *McGirt v. Oklahoma*[2] specifically applied to the Muscogee Nation, the Cherokee Nation knew that a decision regarding our reservation was soon to follow. In the middle of a pandemic, with a largely remote work force, the Office of the Attorney General (along with our police force and judicial branch) began an unprecedented criminal prosecution expansion. Our office went from filing approximately 60 criminal cases in 2019 to filing more than 2,000 criminal cases in 2021. That expansion meant hiring additional employees, finding adequate and safe workspaces for them, and performing an extensive update to our criminal code.[3]

In addition to the direct impact on our workforce from COVID and the *McGirt*[4] decision, we have also had to deal with co-workers who have lost loved ones or been sick themselves. To say that the last year and a half has been a challenge is an understatement. But it has also been rewarding, both personally and professionally. Personally, I got to spend quality time with my children and husband that I would not have otherwise had in the hustle and bustle of a "normal" year. I baked bread, got outside more, read more, and simply slowed down. Professionally, I have been part of a complete transformation of the criminal justice system of the Cherokee Nation and am able to participate on the leading edge of the post-*McGirt* opportunities and challenges for the Cherokee Nation. I think one of the most important lessons that I have learned during this time is to be more flexible in both my personal and professional life. We are not out of the woods yet, and I want to encourage anyone who has not gotten the vaccine to do so and to please continue to mask up until we are safely through this pandemic. ☉

Endnotes

[1]Cherokee Nation Constitution, art. VII, § 13 (2003), https://www.cherokee.org/media/lsufapj1/constitution-of-the-cherokee-nation-1999-online.pdf.

[2]*McGirt v. Oklahoma,* 140 S. Ct. 2452, (2020), held that the Muscogee Nation Reservation had never been disestablished by Congress. The practical effect of that decision was that the state of Oklahoma lacked criminal jurisdiction over crimes committed by or against Indians on the Muscogee Reservation. Because the history of the Five Tribes (Cherokee, Muscogee, Chickasaw, Choctaw, and Seminole) are so similar, we expected a decision determining that the Cherokee Nation Reservation has never been disestablished. That decision came for Cherokee Nation on Mar. 11, 2021, in *Hogner v. State*, 2021 OK CR 4, 500 P. 3d. 629 (Okla. Crim. App. 2021).

[3]Additional information regarding the Cherokee Nation Reservation, including select briefs, our updated code, and maps, can be found at https://attorneygeneral.cherokee.org/legal-status-of-the-cherokee-nation-reservation/.

[4]In addition to briefing appeals in Cherokee Nation Reservation cases in Oklahoma state courts and cert. petitions pending before the U.S. Supreme Court in *McGirt*-related cases, the Cherokee Nation is a defendant in a federal case involving the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963, in which all parties have petitioned the U.S. Supreme Court for cert. *Brackeen v. Haaland,* 994 F. 3d 249 (5th Cir. 2021), petition for cert. filed, (No. 21-380).

The Rise of Mobile Health Triggers Increased FTC Enforcement

By Janice L. Sperow

Janice L. Sperow is a full-time neutral arbitrator, mediator, dispute prevention facilitator, and hearing officer specializing in mass claims, healthcare, technology, employment, and all commercial matters.

The pandemic changed how we work, shop, communicate, and meet. It changed our world's "normal." Most significantly, it changed the healthcare industry, but not only regarding new vaccines and protocols. It revolutionized the way we maintain our health and wellness, as healthcare app development now shapes the very future of medicine. Spurred by rapid significant advances in mobile technology, artificial intelligence, and the internet of things, medical apps have accelerated at an unprecedented rate. Even before the pandemic's uptick in the use of healthcare mobility tools, the *Physicians Practice* medical publication conducted a mobile health survey in 2018 and found that over 75 percent of respondents used some form of mobile health solutions on a weekly basis. Since the pandemic, the use of mobile applications in healthcare, MedTech, and eHealth has skyrocketed. A $21.3 billion market in 2017, the global mobile health market is anticipated to reach $151 billion by 2025.

The Food and Drug Administration defines a health app as mobile software that diagnoses, tracks, or treats disease. A wellness app uses mobile software to enhance or track overall user health. These apps can and do address every facet of life impacting wellness from mental, physical, social, environmental, nutritional, behavioral, to even spiritual factors. In response to the market's dramatic growth, the Federal Trade Commission (FTC) issued its "Statement on the Commission of Breaches by Health Apps and Other Connected Devices" ("the Statement") on Sept. 15, 2021. The Statement stresses the FTC's commitment to protecting private medical and health information inputted into these apps and devices and explains the FTC's Health Breach Notification Rule ("the Rule") in more detail. Importantly, the Statement unequivocally declares the Rule's scope and the FTC's intention to enforce the rule.

FTC's Health Breach Notification Rule

The Rule itself has been in effect since 2009, when the American Recovery and Reinvestment Act of 2009 became effective. The Rule addresses the security of personal health records (PHR), defined to include an electronic record of identifiable health information on an individual that can be drawn from multiple sources and that is managed, shared, and controlled by or primarily for the individual.[1] "PHR identifiable health information" includes "individually identifiable health information," as defined in section 1171(6) of the Social Security Act.[2] It also includes individual information provided by or on behalf of the individual that actually identifies or reasonably can be used to identify the individual.[3]

The Rule applies to (1) vendors of personal health records; (2) PHR-related entities who interact with vendors of PHRs or HIPAA-covered entities by offering products or services through their sites; (3) PHR-related entities who access information from or send information to a PHR; (4) PHR-related entities who process unsecured PHR identifiable health information as part of providing their services; and (5) third-party service providers for vendors of PHRs. The rule does not apply to HIPAA-covered entities or any other entity to the extent that it engages in activities as a business associate of a HIPAA-covered entity.

Under the Rule, vendors of PHRs and PHR-related entities must report a "breach of security" involving PHRs to the FTC, the consumers, and, in some cases, to the media. Service providers that process information for PHR vendors and PHR-related entities also have a duty to notify their business customers of a security breach. Typically, these service providers handle data storage or billing as a third-party provider. The Rule defines a "breach of security" as the acquisition of unsecured, PHR identifiable health information without the individual's authorization. Upon discovering a security breach, the entity must notify the required recipients within 60 days; but it must alert the FTC within 10 business days if the breach involves more than 500 individuals. Noncomplying entities face civil penalties of $43,792 per violation per day.

Rule Clarification

The FTC's new Statement clarifies the Rule's scope and application. It explains that the Rule covers ven-

continued on page 45

COVID-19 and the ADA: Pandemic Protections for Employees and Strategies for Employers Under Federal Law

By Kayla Robinson

Kayla Robinson is an associate in the Labor and Employment practice group at Polsinelli, PC in Washington, D.C. She assists employers in all aspects of employment law and litigation and helps employers implement preventative practices by drafting and reviewing employment policies. She also advises employers on how to stay in compliance with constantly changing local, state, and federal laws.

The COVID-19 pandemic has introduced several new workplace challenges, including the evolving landscape of COVID-19's effect on an employer's responsibilities under the Americans with Disabilities Act (ADA). Notably, as discussed in more detail below, the Equal Employment Opportunity Commission (EEOC) has recently determined that COVID-19 may qualify as an "actual disability" under the ADA, which triggers several obligations for employers. For example, if an employee with COVID-19 is considered to have an "actual disability," employers are required to provide reasonable accommodations to the employee upon request unless doing so would cause an undue hardship. This and other ADA protections apply to employees throughout the course of their employment, and job applicants are also entitled to protection under the ADA. Therefore, in light of the extensive scope of the ADA's protections, it is imperative that employers keep in mind the specific nuances of COVID-19's coverage as a disability under the ADA and develop strategies to reduce their liability under the law.

The Americans With Disabilities Act

The ADA prohibits discrimination against individuals with disabilities by private employers, among other protections.[1] With respect to private employers, individuals are protected from discrimination in hiring, employees are entitled to reasonable accommodation(s) for their disability at their request, and employers are prohibited from taking "adverse actions" against employees solely on the basis of their disability.[2] Adverse actions include (1) failing to hire an applicant because of their disability; (2) failing to promote an employee because of their disability; (3) failing to provide a disabled employee with a requested accommodation; (4) use of an employment standard that has the effect of discriminating against individuals with disabilities and (5) terminating an employee because of their disability.[3] The ADA is enforced by the EEOC and federal courts.

How COVID-19 Is Protected Under the ADA

Hiring

At the hiring stage, the ADA generally prohibits any disability-related inquiries or medical exams to help prevent discrimination.[4] Employers are able to screen applicants for symptoms of COVID-19 and take an applicant's temperature, but only after a conditional offer of employment has been made.[5] Additionally, an employer may not postpone a start date or withdraw a job offer simply because the prospective employee is at a higher risk for contracting COVID-19 (e.g., the individual is pregnant or over 65 years of age).[6] Conversely, however, an employer may also be able to rescind a job offer to an employee if there is a requirement that the employee start immediately and the individual has COVID-19 or symptoms of COVID-19 and cannot safely be in the workplace.[7]

Medical Inquiries

Unlike other disabilities protected by the ADA, employers have more flexibility with respect to medical inquiries about an employee's COVID-19 status. For example, an employer may request an employee who is out sick to confirm whether they are experiencing symptoms of COVID-19 in order to protect other employees.[8] Further, employers may also require an individual employee to take a COVID-19 screening or test, particularly if the employer is requiring the screening and/or test in accordance with Centers for Disease Control and Prevention (CDC) guidance.[9] However, as discussed below, results received from that screening or test must be maintained in a confidential medical file. There is a limit to this flexibility, however, as employers are not permitted to inquire about the COVID-19 status of an employee's family member.[10] Employers can, however, ask their employees whether they have had contact with anyone diagnosed with COVID-19 or who has experienced symptoms of COVID-19.[11]

Confidentiality of Medical Information

The ADA requires that employers maintain medical information provided to them as confidential medical records separate from the employee's personnel file.[12] In light of the COVID-19 pandemic, employers are handling more medical information than they likely have before, including results from COVID-19 tests that employees take on a frequent basis. Therefore, it is imperative that employers familiarize themselves with the ADA's requirements and set internal controls to ensure that the ADA's requirements are implemented. In addition to these confidentiality concerns, employers also have to balance their need to report cases of COVID-19 in their workplace in order to ensure the safety of their other workers.

The EEOC advises that when determining how to balance an employee's confidentiality under the ADA with the employer's need to report a positive COVID-19 case to ensure the safety of its workforce, that the employer keep all of the employee's COVID-19 information (e.g., diagnosis, symptoms) confidential and limit those who know the individual's name to as few people as possible.[13] Employers are still able to provide general descriptions of the affected employee (e.g., the employee's work location) and can notify specific employees who may have come into contact with the affected employee.[14]

Disability Status

On Dec. 14, 2021, the EEOC, in its guidance, clarified that COVID-19 can be, but is not always, an "actual disability" under the ADA.[15] An "actual disability" under the ADA is a medical condition that substantially limits one or more of an individual's major life activities. Specifically, the EEOC highlighted that COVID-19 affects major life activities, such as walking, breathing, and eating. However, determining whether an employee with COVID-19 has an "actual disability" protected by the ADA is an individualized analysis to determine whether their major life activities are affected. If an employee is found to have an actual disability, they are entitled to reasonable accommodations, unless providing the accommodation would result in an undue hardship for the employer.

The EEOC's guidance provides some helpful distinctions between individuals with COVID-19 symptoms that substantially limit major life activities and individuals with COVID-19 symptoms that do not substantially limit those activities. COVID-19 symptoms that are considered to substantially limit major life activities include the following:

- Intermittent multi-day headaches, dizziness, brain fog, and difficulty remembering or concentrating, which the employee's doctor determines is a symptom of COVID-19.
- Breathing difficulties and shortness of breath that requires supplemental oxygen and associated fatigue lasting, or expected to last, for several months.
- Heart palpitations, chest pain, and shortness of breath lasting, or expected to last, for several months.
- "Long COVID-19" and its associated symptoms, including intestinal pain, vomiting, and nausea lasting for many months, even if intermittently.[16]

Individuals who are asymptomatic or have symptoms such as congestion, sore throat, fever, headaches, and/or gastrointestinal discomfort that resolve within several weeks are not considered to have symptoms that substantially limit major life activities.[17] As to whether the disability status of an individual with COVID-19 can vary based on the symptoms they are experiencing, it is vital for employers to engage in an individualized disability status assessment when faced with a COVID-19 positive employee's disclosure of his or her medical condition or request for an accommodation.

Reasonable Accommodation

In addition to being required to provide reasonable accommodations for employees that have an actual disability due to COVID-19, the ADA also requires employers, if requested, to provide additional reasonable accommodations to employees whose medical conditions, such as anxiety disorders, were exacerbated by the COVID-19 pandemic. Nevertheless, the good news for employers is that pursuant to the EEOC's guidance, an employer's financial status (i.e., the employer's amount of discretionary funds available) will be given more weight when determining whether an employee's requested accommodation poses an undue hardship.

Prior to asserting that an accommodation poses an undue hardship, however, it is imperative for employers to ensure that they engage in the interactive process with the employee in order to avoid liability. In fact, failure to do so can be fatal to an employer's reasonable undue hardship argument. For example, last year, the District Court for the District of Massachusetts issued a preliminary injunction against an employer to prevent the firing of a manager who the employer would not permit to telework. In *Peebles v. Clinical Support Options, Inc.*, Peebles was a manager who suffered from asthma. Clinical Support Options ("Options") did not permit its managers to telework full time; however, Peebles argued that because his asthma put him at a greater risk of complications if he contracted the COVID-19 virus, he could not work safely in the workplace, and he requested to telework.[18] Options denied his request to telework pursuant to its practice that managers were not permitted to telework full time.[19] In granting Peebles' request for a preliminary injunction, the court found Options' failure to engage in an interactive process with Peebles regarding the accommodations he needed to be fatal with respect to the actions it took after receiving Peebles' request to telework.[20] Therefore, an important take-away for employers from this case is that an interactive process is crucial to reducing liability under the ADA, and that it is prudent to engage in that process, even when there is a clear work rule prohibiting the accommodation.

Vaccinations

As COVID-19 vaccinations have become widespread and some employers have elected to implement vaccination mandates, employers should also be mindful of employees' protections under the ADA with respect to COVID-19 vaccines. Generally, employers are permitted to have mandatory vaccination programs but are also required to provide reasonable accommodations to disabled employees who are unable to receive a COVID-19 vaccine due to their disability, unless doing so would cause an undue hardship.[21] However, in the case of mandatory vaccines, employers may invoke the "direct threat" defense. The direct threat defense can be used to justify an employer's refusal to accommodate an employee because doing so would result in the employee being a direct threat to the health and safety of others in the workplace.[22] The employer must also show that an accommodation would not reduce or eliminate the health and safety risk.[23]

In cases challenging employer vaccine mandates, public health arguments have been successful with respect to showing undue hardship in defense of an employer's vaccination mandate against reasonable accommodation claims—particularly in healthcare settings.

Indeed, in *Together Employees v. Mass General Brigham Incorporated,* the court found that providing the plaintiffs with an exemption from the vaccination mandate would impose an undue hardship in light of Mass General's mission to provide medical care to patients.[24] Moreover, even with the available accommodations of social distancing and testing, the court found that Mass General still demonstrated that accommodation would result in an undue hardship, as it still risked the health of its patients who were medically vulnerable to COVID-19.[25] Therefore, employers who frequently interact or provide services to populations who are "high risk" for COVID-19 complications (such as individuals over 65) should consider this defense when facing reasonable accommodation challenges against their vaccine mandates.

Courts have also recognized that there is a public interest in employers having the ability to take preventative measures against COVID-19, including requiring employees to receive vaccinations.[26] Further courts have also found that there is a public interest in a company's ability to retain a government contract and therefore continue to employ employees.[27] Courts' acknowledgment of these interests, therefore, may also assist employers in defense against requests for equitable relief (e.g., injunctive relief) against their vaccine mandates.

Moving Forward

COVID-19's impact on labor and employment laws, and the ADA in particular, is constantly evolving. Indeed, the EEOC's guidance clarifying that COVID-19 could qualify as an actual disability was issued just this month. It is therefore prudent for employers to continually monitor these developments and be vigilant in training their managers and supervisors to ensure they are apprised of the protections employees with COVID-19, and disabilities generally, have under the ADA. Finally, employers should also begin to arm themselves with strategies to defend against legal challenges to their COVID-19 protocols or actions taken against individuals with COVID-19, particularly in light of the EEOC's determination that COVID-19 can qualify for an "actual disability" under the ADA. ⊙

Endnotes

[1]*See generally* 42 U.S.C. §§ 12101-12213.
[2]*See* 42 U.S.C. § 12112.
[3]*Id.*
[4]*Id.*
[5]U.S. Equal Emp. Opportunity Comm'n, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws C.1 – C.2 (Oct. 25, 2021), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws..
[6]*Id.* at C.5.
[7]*Id.* at C.4.
[8]*Id.* at A.1.
[9]*Id.* at A.9.
[10]*Id.* at A.10.
[11]*Id.*
[12]29 C.F.R. § 1630.14(c)(1).
[13]EEOC, *supra* note 5, at B.5.
[14]*Id.*
[15]*Id.* at N.1.
[16]*Id.* at N.4.
[17]*Id.*
[18]*See Peeples v. Clinical Support Options, Inc.,* 467 F. Supp. 3d 56, 60-61 (D. Mass. 2020).
[19]*Id.*
[20]*Id.*
[21]EEOC, *supra* note 5, at K.5.
[22]29 C.F.R. § 1630.15.
[23]29 C.F.R. § 1630.2(r).
[24] *Together Emp. v. Mass Gen. Brigham Inc.,* No. 21-116 86, 2021 WL 5234394, at *11-12 (D. Mass. Nov. 10, 2021).
[25]*Id.* at *14.
[26]*See Creger v. United Launch All. LLC,* No. 21-1508, 2021 WL 5579171, at *9 (N.D. Ala. Nov. 30, 2021).
[27]*Id.*

At Sidebar *continued from page 7*

of Abraham Lincoln 328, 329 (Philip V.D. Stem ed., 1940).
[5]Task Forces, Am. Bar Ass'n, https://www.americanbar.org/groups/criminal_justice/committees/taskforces/ (last visited Jan. 21, 2022) (including task forces on Corporate Criminal Liability, Immigration, Forensic Ethics, and International Standards).
[6]Veterans Assistance Task Force, Fed. Bar Ass'n, https://www.fedbar.org/blog/tag/veterans-assistance-task-force/ (last visited Jan. 21, 2022).
[7]See President's Message, Fed. Bar Ass'n (June 6, 2017), https://www.fedbar.org/blog/presidents-message-federal-litigation-section-promoting-civics-and-service-to-others-creation-of-the-fbas-access-to-justice-task-force-civics-success-in-new-york-south-carolina-and/.
[8]*LSC Task Forces*, Legal Serv. Corp., https://www.lsc.gov/initiatives/lsc-task-forces (last visited Jan. 21, 2022).
[9]*OCDETF Strike Forces*, Dep't of Just. (July 21, 2020), https://www.justice.gov/ocdetf/ocdetf-strike-forces (noting 19 locations for these strike forces).
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The Price of Admission

By Hon. Sunil R. Harjani

Hon. Sunil R. Harjani is a U.S. magistrate judge in the Northern District of Illinois. He presides over pretrial matters in civil and criminal cases and also conducts multiple settlement conferences each week. Judge Harjani is also a trained and certified mediator.

The views and opinions expressed in this column are those of the author and do not necessarily reflect the views or positions of any entities he represents.

As a federal magistrate judge, I conduct multiple settlement conferences each week. Over time, I have learned that there is a perception among lawyers that an opening settlement offer should be as aggressive as possible to demonstrate to the opposing side a certain strength and resolve in their case. Thus, I will often get an opening offer that is way out of range, or an opening counteroffer that values the case at almost nothing. The intended idea, of course, is to demonstrate that the case is extremely valuable or worthless, depending on whether counsel represents the plaintiff or defendant. Attorneys often believe that an aggressive opening posture will set the tone for the conference and thus result in a more favorable settlement for the client.

In other circumstances, I have learned that lawyers make wildly out-of-range opening offers or responses because they do not trust the other side. In those cases, there is a fear that a reasonable settlement offer will result in an unreasonable response, and thus place the first party in a disadvantageous situation. Conversely, it is easy for an unreasonable counteroffer to be issued following an unreasonable opening offer—resulting in both opening positions being out of range. Hence, largely for these two reasons, I often see cases that should start at reasonable settlement ranges begin with outrageously out-of-range offers and responses.

From my perspective as a judge-mediator, I see almost no value in making extremely high or low offers in mediations. Rather than demonstrate strength to the judge-mediator, it demonstrates unreasonableness and immediately diminishes credibility. It shows the judge-mediator that the attorney has not properly valued the case by assessing the evidence, costs of litigation, time to resolution, and uncertainties surrounding anticipated dispositive motions or a jury trial. It also shows that counsel has not valued the case with the clients' real interest in mind, which may be ending a dispute with a current employer, needing funds to support living or business expenses, or moving past an emotionally difficult set of circumstances alleged in the lawsuit.

What really happens when one side makes an unreasonable offer or response? It actually puts the other side's guard up. An unreasonable opening offer from a plaintiff often results in an equally unreasonable response from a defendant. An unreasonable response from the defendant causes the plaintiff to feel like their claim is not being taken seriously. With both the judge-mediator and opposing counsel, it fails to develop credibility and trust, show an open mindset, and demonstrate good faith—all traits that are needed for a successful settlement conference.

So, what do I do when I get wildly unrealistic offers and responses?

The easy option is to cancel the settlement conference. Judges often have multiple settlement conferences each week, and it is certainly efficient to focus on those cases where the parties have demonstrated a true interest in settlement with their reasonable offers and responses. Another option is to require each party to revise their offers based on the judge's feedback, which may result in some decent movement, but more often results in a minuscule new move by each party. Still another option is to hold the settlement conference despite these opening numbers and let the negotiations play out. That, of course, is a tactic that many judges use, and they let the chips fall where they may at the conference.

A fourth option, and one that I sometimes use, is called the price of admission strategy.

Price of Admission Strategy

The price of admission strategy consists of processes and conditions that I deploy before setting a settlement conference. If my ultimate conditions are not met, I do not hold a settlement conference with the parties.

After receiving the parties' settlement letters, with the wildly out-of-range offers and responses, I schedule a phone call where I have both joint and private sessions with counsel for each side. In the private sessions, I ask a lot of questions about their (1) statement of facts; (2) responses to factual and legal challenges identified in their opponent's settlement letter; (3) itemization of damages; (4) methodology in reaching an opening settlement number; and (5) mindset and willingness to negotiate and compromise.

Also, in the private sessions, I ask counsel to confide in me and provide me a better sense of how the negotiations would proceed in a conference. For example, if the opening demand was $2 million and the response offer was $20,000, I would pose a hypothetical to the plaintiff's counsel as follows: "Can you envision a world in which your client settles in the six figures?" In other words, I am asking counsel if there is any possibility, that her client could live with a settlement between $100,000 and $999,999. To the defendant's counsel with the $20,000 offer, I might ask the same question, "Could you see a world in which your client settles in the seven figures?" I would then push further, depending on the answer, and ask about a six-figure settlement.

Another hypothetical I would ask plaintiff's counsel is the following: "If I told you that no matter what I do, I could not get the other side to offer above $1 million, would you suggest going forward with the conference or canceling?" I would then ask a similar question to the defendant using different numbers.

I employ the above process to obtain a better sense of the true negotiating range and the party's resolve to settle the case. I ask counsel the specific questions above in order to come to my own conclusions about what a reasonable settlement range should look like. I also ask hypotheticals to counsel to obtain intelligence about where they see the negotiations really heading, given that their opening offers were driven by bad strategy rather than a true settlement value of the case. To be clear, I do not ask for bottom-line numbers, and I also do not believe that any counsel or client should come to a settlement conference with a bottom line—those are pre-conference formulations without the input of the neutral judge-mediator and without any consideration of how the negotiations will play out. This is the reason I ask hypotheticals and phrase the question with broad terms that allow counsel to continue to advocate for the best result for their client while keeping an open mind as to where the negotiations might end. With these questions in a private session, I expect truthful responses. I warn counsel that if they can't be frank with me, they may do a disservice to their client because their client may not get a settlement conference with the court. And I consistently promise that I will keep their confidences and that my credibility and effectiveness as a mediator rests, in part, on my ability to keep those confidences.

Prior to or after those private sessions, I also conduct research on jury verdicts and reported settlement figures for similar cases to achieve a better sense of the settlement value of a case. In addition, I have my own set of experiences that inform settlement values from past cases that my colleagues or I have mediated and settled in our district. Those factors also help me determine a more reasonable range for settlement discussions.

Once I have probed and poked both sides for information and processed my own research, I formulate a settlement negotiating range. In a joint session on the phone with the lawyers, I present the price of admission to a settlement conference with me. In the earlier example, I would inform counsel that in order to go forward with a settlement conference, the plaintiff has to agree to start the negotiation at $700,000 and the defendant has to agree to start at $200,000. This means that those numbers will be the new preconference opening numbers and that I expect the parties to negotiate from those starting points and continue to move numbers from there during the conference. I also warn counsel that the plaintiff should not expect to settle at $690,000 and the defendant should not expect to settle at $210,000. Rather, each side should have room to move at the conference. I emphasize that they should not look at the midpoint between $700,000 and $200,000 as the target settlement number because there is much work that the parties and I need to do at a conference, including further discussion of the challenges in the case, the cost of litigation, the time and work left before the conclusion of the litigation, other needs and interests of the parties, and nonmonetary terms in settlement, in order to properly assess a fair and reasonable settlement value of the case.

In explaining the price of admission to a settlement conference, I explain my rationale for the range to both sides without revealing any information that was provided to me in confidence. I often tell counsel that, as a neutral with no stake in the conflict, I have provided an honest and balanced assessment of the case and its settlement value, which is partly why counsel often seek out a magistrate judge for a settlement conference in the first place. I also inform counsel that, if they wish, I am happy to have another call with their clients to explain my rationale on the price of admission.

As shown in the above example, I try not to set the range too narrow or too broad. Too broad of a range does not achieve the goal of this process, which is to get the parties into a realistic negotiating zone, and essentially provides too big a gap to make any significant progress at a settlement conference. If the range is too narrow, I run the risk of scaring away one side as well as hampering counsel's ability to negotiate a settlement and manage her client. So, I strive to find a range somewhere between those two extremes. Note, I also do not simply formulate a range around the midpoint between the two initial opening offers (which, in my example, would center a range around a $1.01 million midpoint [$2,000,000 + $20,000)/2]). That would be a disservice to the parties unless it was justified by the different criteria that I considered, as described above.

To ensure neither side is prejudiced, I ask each side to send me a private email, without copying opposing counsel, letting me know if they agree to my range. I tell each counsel that I will only reveal their responses if I receive affirmative answers from both sides. If one side declines, I do not reveal any information and simply state on a docket entry that the parties have not unanimously agreed to the conditions for having a settlement conference with the court. In other words, the price of admission has not been satisfied. This "blind" process has the advantage of ensuring that one side does not give up their prior opening position without the other side doing the same. I also expressly inform counsel that my range is not up for negotiation and they cannot propose new ranges to me. I simply want a "yes" or a "no" response, after consulting with their client, usually within one week.

Finally, informing the parties that the range is the price of admission for a conference with the court requires the parties to start taking a hard look in the mirror. No longer is the settlement conference a "let's see what happens" event. Nor does it allow the conference to become a series of small moves coupled with the usual venting about the other side's unreasonable position. Rather, counsel and their client now have to commit to a serious settlement process and ask themselves if they really want to resolve the case without further litigation. If they decline the range, they will no longer have a judge-mediator to assist with their negotiations, making a future settlement even more unlikely.

What Is the Result?

If I have asked the right questions and processed the information correctly, I have confidence that I have reached the appropriate range

and will get two affirmative responses. Two affirmative responses have now substantially increased the chances of reaching a settlement and narrowed an unreasonable preconference gap as follows:

	Plaintiff	Defendant	Gap
Initial Offers	$2,000,000	$20,000	$1,980,000
New "Price of Admission" Offers	$700,000	$200,000	$500,000

In my example, the gap has narrowed from $1.98 million to $500,000. Beginning negotiations with this range set prior to a conference is substantial progress and saves an enormous amount of time at a formal settlement conference. I have also firmly clarified that any settlement reached at a conference will be a six-figure settlement. The odds for reaching a settlement are now much higher.

If I get one declination, then there is no settlement conference and the parties go back to litigation. I realize that there is a certain momentum that can occur in negotiations and that by receiving a declination from at least one party, I have given up the option, as lawyers like to say, to use my "magic" to make something happen at a conference. In response, and in jest, I generally reply that my magical powers, if any, are limited and that the real magic will only happen within the price of admission range.

On a more serious note, a declination from one or both parties tells me that the odds of settlement at a conference are very low and that I have saved the parties (and myself) the time and cost of proceeding with a lengthy conference that will likely not result in a settlement. Certainly, there is some value that comes with an in-depth discussion of the case with the judge-mediator at a conference, as well as with the direct mediator-client conversations that occur at a conference. I recognize that, even if a conference is unsuccessful, those conversations can pave the groundwork for the parties to reach a settlement on their own or a successful settlement conference in the future. Thus, there are times when I opt not to deploy the "price of admission" strategy. However, I have found that it is a useful tool in the right case, where its benefits outweigh its drawbacks. I also find that, in the vast majority of cases where I do employ the strategy, the price of admission is accepted by both parties, and a settlement conference proceeds that results in a resolution of the litigation. Finally, I have also observed that, despite the assumption among counsel that a settlement will likely be at the midpoint of the new range, I have successfully settled cases materially higher and lower than the midpoint of the range.

Conclusion

Effective mediators have multiple tools in their toolbox and know when to correctly employ the right one to facilitate settlement. As a judge-mediator in a particularly difficult settlement conference, I often run down my mental list of different tools in my possession to break impasse or further promote movement by the parties. I recognize that many of the techniques I identified above are used by mediators standing alone or in some combination at a settlement conference. But using the combination of these techniques before the settlement conference may be a helpful tool to add to a mediator's repertoire. In the right circumstances, deploying a price of admission strategy can promote early and significant movement from the parties and lead to a more productive and efficient settlement conference. ☉

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Applying COVID-Prompted Changes to Our Advantage: The Potential for Improving Client Services

By Russell Turkel

Russell Turkel is a federal sentencing consultant and a criminal defense attorney at Scott H. Palmer, PC, in Addison, Tex. Prior to joining the law firm, Turkel worked for the U.S. Probation Office in the Eastern District of Texas, during which time he served as a presentence investigation officer, guideline specialist, and supervisor of a pretrial and presentence unit. He retired from the federal judiciary after a 20-year career. In addition to focusing on federal criminal defense law, he now provides federal sentencing consulting services for other attorneys, including assistance with plea negotiations, analyzing presentence reports, preparing objections to presentence reports, and drafting sentencing memoranda and departure/variance motions.

The views and opinions expressed in this column are those of the author and do not necessarily reflect the views or positions of any entities he represents.

Federal Rule of Criminal Procedure 32(b)(1) mandates courts to impose sentences without unnecessary delay; however, as we have heard time and time again, and perhaps have even advised our clients who have become impatient waiting for their day in court, the wheels of justice grind slowly. Yet, in 2020, when much of our society, including the federal courts, took aggressive steps to prevent the spread of COVID, the wheels of justice nearly ground to a halt due to the widespread health concerns related to holding in-person hearings. Uncertainty reigned throughout the judiciary, yet the resolve of the federal courts to find innovative ways to prevent a total shutdown and to continue business as usual was priority number one. In the early days of the pandemic, some courts took a cautious wait-and-see approach, whereas others attempted to continue in-person hearings by limiting attendance in the courtroom. Regardless of their initial stance and the impediments they all faced, the courts cleared many hurdles and ultimately adopted efficient practices that are now tools that defense attorneys, federal sentencing consultants, expert witnesses, and others can use to their advantage.

The Sixth Amendment guarantees an individual's rights to confront witnesses, to privately confer with counsel, and to have speedy and public trials.[1] Yet, with a never-before-seen health crisis at hand that effectively shut down in-person hearings, courts grappled with how to ensure the rights of defendants while enacting safety measures that could potentially interfere with witness confrontation, prevent (or at least severely limit) the public's ability to attend court hearings, and put strains on the ability to safeguard private attorney-client conversations. Adding to the constitutional protections afforded by the Sixth Amendment, federal defenders owe an ethical duty to zealously defend their clients. However, attorneys soon learned that even the basic function of meeting with clients at jails was significantly hampered due to safety protocols that prevented contact visits. Complicating matters was that, while both sentencing hearings and transfers from local jails to the Bureau of Prisons were being delayed, newly arrested people were being introduced to confined, sometimes already-overcrowded spaces, promoting the spread of COVID. The inmate population was, in turn, subject to COVID infection at a far greater rate than the general population. The effect of these infections led to clients being quarantined, unable to have regular, in-person visits with their attorneys until they received the all-clear from the jail medical staff. The statistic of how COVID attacked inmates as opposed to the general public is nothing short of staggering: coronavirus infection was significantly higher in prisons than in the general population, and inmates had more than a sixfold risk of becoming infected with COVID.[2]

Mark Twain perhaps said it best when he coined the phrase, "Necessity is the mother of taking chances." Although video conferencing had been used for decades, its use in the federal courtrooms, jails, federal holding facilities, detention centers, and prisons was limited due to various concerns, including bandwidth capabilities, potential technical malfunctions, cost and quality of the broadcasts, and security concerns. Yet, with the arrival of COVID and the health concerns it presented, the courts, in particular, were in the position where an indefinite suspension of all hearings until the pandemic simply passed was not an option. Faced with many uncertainties, not the least of which was the proper handling of criminal cases through virtual hearings, federal courts were forced to make changes on the fly, taking calculated chances on "e-hearing" practices almost immediately. As Northern District of Texas Chief Judge Barbara M.G. Lynn said soon after the pandemic erupted, "The ideals of justice and rule of law are vital to our country, and

those principles cannot stop. But we need to temper a desire to go full speed ahead with a focus on safety."[3]

One of the major obstacles in the way of the then-soon-to-be virtual hearings was how Federal Rule of Criminal Procedure 53 would apply in the COVID era. The rule, which prohibits courtroom photographing and broadcasting, explicitly states, "Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."[4] Recognizing how COVID could negatively affect the criminal justice system and identifying an urgent need for action, Congress passed the CARES Act, which included a provision authorizing the use of video teleconferencing or telephone conferencing during the emergency period, subject to consent of the defendant.[5] It also included provisions for video visitations in the Bureau of Prisons, authorizing free video teleconferencing and telephone calls for inmates during the covered emergency period.[6] The door was open for the federal courts to resume sentencing, albeit in a somewhat unconventional way, and for attorneys to effectively communicate with their clients, as ethically bound.

Although the Bureau of Prisons had modified its operations to suspend family visitations in response to COVID to protect the safety of inmates and correctional officers, the federal prison system soon recognized the need for increased access to counsel and legal material as courts, which had transitioned to routine video and telephone sentencing hearings, began conducting more criminal proceedings. As a result, the Bureau of Prisons followed suit by easing restrictions on telephone and video conferencing between inmates and outside counsel in an effort to accommodate legal communications.[7] The change prompted both easier access to inmate clients and facilitated attorney-client communications.

With change comes inevitable challenges; however, with the change to virtual jail/prison visits and virtual court hearings, what courts and defense attorneys have seen are opportunities for growth, for increased efficiency, and for improved services to criminal defendants. The once-dubious reputation of video calls and the concerns surrounding teleconferencing have been replaced by developments of password-protected security protocols, the advancements of protecting private attorney-client communications, and the ease of exchanging electronic documents between attorneys, between attorneys and their clients, and between attorneys and court personnel. Technology continues to improve, society at large has become more accepting of teleconferencing, and the practices of handling inmate interviews and conducting federal sentencing hearings have become more routine. The benefits are felt beyond the courtroom, as attorneys who can now participate in interviews with inmate clients via video from the comfort of their own office (or, if teleworking, from their home) are able to allot more time to their practice and less time both traveling to and from jails and sitting idle while awaiting the transport of inmates to interview rooms. The hiring of federal sentencing consultants has become much more feasible, as remote access to inmates for presentence interviews, review of presentence reports with attorneys and detained clients, and assistance with sentencing hearings facilitate their presence at key stages of the sentencing process, which improves the potential services criminal defendants can now receive. Through electronic file sharing, attorneys, expert witnesses, and federal sentencing consultants are now able to immediately access the entire cache of discovery from their desktop rather than fumbling through pages of documents in a high-pressure in-person hearing or inside a cramped contact room. While attorneys can and will continue to improve efficiency in time, effort, and costs, the true beneficiary of COVID-prompted changes will be the client, who will now be able to receive more effective counsel, higher quality services, and more expedient access to the courts than most could have envisioned at the onset of the pandemic. ⊙

Endnotes

[1]U.S. Const. amend. VI.

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Intersection of Intellectual Property and Privacy Rights

By Renata Lowenbraun and Hannah Shaw

Renata Lowenbraun is vice president of Legal at Prove, a leading provider of mobile authentication and ID solutions, where she is responsible for strategic technology transactions, intellectual property, privacy, and litigation. Hannah Shaw is a third-year law student at New York Law School and a legal intern at Prove, where she specializes in intellectual property.

The views and opinions expressed in this column are those of the authors and do not necessarily reflect the views or positions of any entities they represent.

While the changing legal landscape concerning the privacy rights of individuals has been a primary focus for most companies lately, we should also be paying attention to its impact on intellectual property and proprietary rights of companies. Legal ramifications concerning advancements in data procurement and organization, and current and future regulations of personally identifiable information (PII), are sometimes ambiguous and challenging to interpret.

Regulation of Personally Identifiable Information

United States

Currently in the United States, a plethora of separate laws regulate the treatment and security of PII, including the Federal Trade Commission Act, the Gramm-Leach-Bliley Act, the Health Insurance Portability and Accountability Act (HIPAA), the Telephone Consumer Protection Act, the Fair Credit Reporting Act, and others that are beyond the scope of this column.[1] Instead of having one controlling piece of legislation, the United States has these laws, with each regulating particular industries or uses of PII.

De-identification, pseudonymization, anonymization, and re-identification (along with other terms of art) are useful tools for companies to protect PII while also complying with the various rules and regulations. Generally speaking, although definitions vary by applicable law or regulation, "de-identification" is generally defined as "removing the association between a set of identifying data and the data subject."[2] Anonymization, on the other hand, refers to "remov[ing] the association between the identifying data set and the data subject."[3] Finally, pseudonymization means "remov[ing] the association with a data subject and add[ing] an association between a particular set of characteristics relating to the data subject and one or more pseudonyms."[4] Several regulations and acts of Congress have included statements that establish that if PII has gone through one of the above steps, the same level of compliance is not necessarily required. One example is a section within HIPAA that clarifies that when a piece of PII [or, as HIPAA refers to it, protected health information (PHI)] has been de-identified, it is no longer considered protected and therefore not afforded the same regulation and restrictions.[5] However, if PII is re-identified using a key, the PII that has been re-identified is once again considered protected PII.

Though Congress has taken no specific actions as of yet, several states have decided to enact their own stringent protections. One of these states is California, which passed the California Consumer Privacy Act (CCPA) in 2018. The CCPA allows for any California consumer to request to see all the information a company retains about them.[6] Additionally, Virginia passed the Consumer Data Protection Act (CDPA) in March 2021. The CDPA has essentially the same effects as the CCPA except for the fact that employee data is not included in the data that may be requested from a company.[7] Additionally, several states, including New York and Texas, are in the process of passing their own versions of the CCPA and CDPA.[8]

European Union

Within the European Union (EU) there exists a more centralized regulation of PII under the General Data Protection Regulation (GDPR).[9] The GDPR is often considered the strictest form of regulation of PII currently in existence that is not sector specific. However, unlike HIPAA in the United States that provides for specific methods for de-identification, the GDPR defines only the concept of "anonymization" and "pseudonymization." Where data is anonymized, the data is no longer subject to GDPR because personal identifiers have been removed and cannot be re-identified. When data is pseudonymized, such as where a company uses coded data that is no longer attributed to a specific data subject but links it to additional information kept separately, such data continues to be subject to the GDPR.[10] Since the creation of GDPR, various regulatory bodies charged with interpreting or regulating it have rendered opinions and decisions as well.

Copyright Protections and Sui Generis Protection for Data

Copyrightability of Databases and Sui Generis Protection for Databases

United States

Once a company has de-identified or pseudonymized the PII that was received and organized it into a usable database, legal interpretation concerning intellectual property or rights of companies in light of emerging privacy laws makes such analysis more challenging. Generally, data, which includes de-identified PII, is not copyright protectable. However, a database may be copyright protectable due to it being considered a "compilation," which is one of the categories in the Copyright Act of 1976.[11] The Copyright Act of 1976 (the "Act") defined "compilation" as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[12] Though it would appear that databases are entirely protected under the Act, there are some court-created requirements that have been established to meet the originality requirement pursuant to the act.

In *Feist Publications v. Rural Telephone Service Co.,*[13] the Supreme Court held that in order for a compilation to be protectable, there has to be some element of creative originality. *Feist* involved a dispute between two separate publishers of telephone books. Rural Telephone Service Co. ("Rural") was a local telephone company that published a telephone directory that covered its service area. Feist Publications ("Feist") was a publisher of telephone directories that covered several service areas. Feist sought a license to the listings included in Rural's directory, and when they were refused, they decided to copy Rural's listings and add them to their own directory, nonetheless. Rural brought suit against Feist for copyright infringement of its listings.

The court, in its holding, refined the Copyright Act of 1976's definition of compilation. The court clarified that Congress still specifically required originality with regard to the organization of the compilation instead of simply having copyright protection for any form of compilation. The elements of authorship creativity that are required were outlined by the court as the selection, coordination, and arrangement of the underlying material.[14] In *Feist*, the court found that there was no element of originality in the way that Rural was listing the directory and that therefore, it was not copyrightable. Due to the lack of copyrightability, Feist's copying of the database (directory) was not found to be infringement. Additionally, in *Feist*, the court found importantly that the underlying data that would be within the compilation is not copyrightable and that only the organization of the data is.

Additionally, in the United States, no sui generis protection for databases currently exists. Sui generis protection means the protection of the creation of the database versus the arrangement and organization of the database. There were several attempts by members of Congress to establish this protection; however, it was never passed.[15] The general concern with this type of protection was that it would stifle innovation and go against the U.S. Constitution's design of promoting progress in the arts and sciences.

European Union

In the EU, a Database Directive provides two separate rights for protection of a database,[16] with one—a copyright protection for the organization and structure of the database itself—being similar to that of the United States. Additional to copyright protection, however, the directive contains a separate sui generis protection for the database.

The concept behind sui generis protection is that, as a reward for an individual's or company's "substantial investment," the database that was created is afforded protection against acts of extraction or reutilization. This "substantial investment" is meant to provide for the safeguard of the data itself due to the lengths that the creator of the database went through to collect the data.[17] The protection against extraction or reutilization prevents individuals or companies from taking large parts of the database without the express consent of the originator of the database. As mentioned above, it prevents the reutilization, which means making the information in the database available to the public. Importantly, there is a very large exception to these rights: that "insubstantial parts" are excluded from protection. This section of the Database Directive means that the maker of the database cannot prevent a lawful user of the database from extracting or reutilizing insubstantial parts of the database for any reason. Additionally, the term for which the sui generis protection lasts is only 15 years as opposed to the term provided for copyright protection, which is, as a general rule, 70 years from the time of an author's death.[18]

Additionally, there are some developing concerns over the rights of data subjects under GDPR and whether they are entitled to the portability of their data contained in database tables of companies when such companies own sui generis or copyright interests in the database tables. Currently, there is no definitive answer from the regulatory bodies of the GDPR member states. However, in the coming years, an answer is very likely.[19]

Derivative Works and Data

Generally, the owner of the original copyright has an exclusive right to "derivative works." Derivative works means those that are based upon the original work. Examples of derivative works include movies based on books and new musical arrangements of an original composition. While database tables, and generally not the underlying data itself, are protectable as copyright, in *Feist*, the court also held that the protection for the organization of the data itself could be protectable as organized in the database table, but that such protection was "thin."[20] At first, the meaning of "thin" was unclear to courts applying *Feist;* however, lower courts have interpreted it to mean that only the specific arrangement of data in the database is protected, and it would be very difficult to enforce the copyright against derivative uses of the data by third parties when the same underlying data has been reorganized in a new and original way.

In interpreting *Feist*, subsequent lower court decisions have made clear that, although there is protection for the original database table, they have generally not found infringement to occur when data from the table is directly copied by third parties due to the thin nature of the copyright protection. These cases seem to suggest that generating a reorganized database table may be afforded its own intellectual property protection as an original work.

For example, in a second circuit case, *Key Publications, Inc. v. Chinatown Today Publishing Enterprises*,[21] derivative rights to the data in a yellow pages address book that Key Publications, Inc. ("Key") published was not enforceable against Chinatown Today Publishing Enterprises ("Chinatown Today") when Chinatown Today directly copied the data (the listings) into a new original database table. In

essence, the court determined that the data copied was not organized in the same manner as Key published it, and thus, there was no infringement. Additionally, it found that not only did Chinatown Today not infringe but that its organization of the data into its own original work entitled it to its own copyright protection.

Fair Use Doctrine

There is also case law that suggests that data in database tables may constitute fair use under the doctrine set forth in 17 U.S.C. § 107. In other words, if a copyrighted work is being used in a particular way—such as for criticism, commentary, teaching, research, and news reporting—it may qualify as fair use and would not be infringing upon the copyright. Such factors in determining fair use are the following: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use on the potential market.

In *Campbell v. Acuff-Rose Music, Inc.*,[22] a music group decided to make a parody of a copyrighted song without receiving permission from the owner of the copyright. The court held that parodies were covered under Section 107, but most importantly, the court held that not all the factors are weighted equally in determining fair use. They found that if the first factor weighed more in favor of fair use, then the other factors were less important.

More recently, in *Google LLC v. Oracle America Inc.*,[23] the court further expanded the fair use doctrine in the context of software and information. In *Google*, Google was writing a code to be used for its Android phones, and while writing this code, it was using calling functions that were Javascript, the copyright of which is owned by Oracle. Google used 11,500 lines of code to write a whole new program. The court ended up holding that Google's use of Oracle's code was fair use and therefore not copyright infringement.

While this particular case was not specifically about database tables, the future will see whether this holding will expand into the subject area considered in this column. The court put a heavy emphasis on the fact that Google's use of the code was to create a whole new program that would help many more individuals. In his opinion, Justice Breyer wrote that the fair use doctrine "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[24] In this excerpt, Justice Breyer makes clear that when a large amount of creativity and innovation is at stake, the copyright rules can be bent.

As data and information received and used by companies are becoming more valuable with new and emerging technologies, we should expect more caselaw expounding on privacy and intellectual property rights and how they interact. With the increasing willingness of countries to regulate PII and other forms of personal information, the landscape will likely change rapidly, and it is worth keeping up to date. Moreover, the expansion of regulations of PII may have a vast effect on the underlying intellectual property and proprietary rights in PII. ⊙

Endnotes

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Editorial Policy

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Hon. Graham C. Mullen

Senior U.S. District Court Judge, Western District of North Carolina

by J.P. Davis and Jennifer Braccia

J.P. Davis is the first assistant federal public defender for the Western District of North Carolina. He served as a law clerk to Judge Mullen from 2005–2006. Jennifer Braccia is a staff attorney at Moore & Van Allen, where she assists the firm and its clients in navigating the intricacies of federal court civil practice and procedure. She served as a law clerk to Judge Mullen from 2012–2013 and part time from 2009–2012. She was pro se law clerk in the Western District of North Carolina from 2005–2012. She also served as a law clerk to Magistrate Judge Ruben B. Brooks in the Southern District of California from 1995–1997 and as an assistant U.S. attorney in the Southern District of California from 1998–1999.

"I thought this might help you," Judge Mullen says, handing us a printed sheet of paper. At first glance, it looks like a standard bio, the type any speaker or writer might use, but for a few odd blanks—and the ominous word at the top. "It's a draft obituary I wrote for myself," he explains, giving voice to it as though it were the most normal thing in the world.

He shrugs, and we all laugh. Judge Mullen's autobiographical obituary is much like its subject: modest, infinitely pragmatic, wryly fatalistic, and with a wickedly dry sense of humor. It seems less like a catalogue of his accomplishments than an effort to avoid having them catalogued; less an attempt to write his own legacy than to save someone else the trouble of writing anything for him at all. The main mention of his more than 30 years of judicial service is a simple note at the bottom, allowing that "if" one of an elect group of respected friends and colleagues "think some appropriate remarks about judicial service are indicated, they go here."

Graham Calder Mullen was born in 1940, the oldest of four boys in a family with roots in the Western District of North Carolina going back before the Civil War. His father was a prominent lawyer in Gastonia, N.C. His mother "was a saint," in his words, in no small part for putting up with young Graham Mullen's brief foray into raising rabbits in their backyard.

Judge Mullen grew up in Gastonia and attended public schools. In high school, a former Sunday School teacher, Ms. Underwood, gave him information about a Navy scholarship that could pay his way through college. She encouraged him to apply, but after looking it over, the teenage Judge Mullen came back and told her he wasn't eligible. He had asthma, which he had read was a disqualifier for naval service.

Ms. Underwood would not have it: "You make *them* tell you no." Mullen took that advice to heart. He applied for the scholarship and got it.

"That was the only serious argument I ever had with my father," Judge Mullen says. The elder Mullen had served in World War II, and his experience was apparently "less than sanguine." Nevertheless, Judge Mullen prevailed. He took the scholarship and went to Duke University.

"It was a shock," he recalls of his first semester at Duke. It went poorly; he "almost flunked out," as he tells it. "Fortunately, my grades got better."

They improved quite significantly, in fact, because at the end of his undergraduate years, he applied and was admitted to Duke University School of Law, which he deferred for his naval service. He then went on to serve as communications, combat information center, and operations officer on the USS Hawkins from 1962 until 1965, including during the Cuban Missile Crisis.

"After a year and a half, I discovered I had made a bad choice," he laughs about his naval service. Nevertheless, he made good from it, including meeting the love of his life, his wife Judy. The two recently celebrated their 55th anniversary. They have two daughters, Kate and Jennifer, as well as two grandchildren, Kass and Harrison.

In 1966, Judge Mullen finished his active service and returned to Duke to complete law school. Apparently, the standards had changed during his deferment; he recalls an assistant dean of admissions looking at his records and remarking "how the hell did you get into this law school? We wouldn't let you darken the door today!"

He would go on to graduate Order of the Coif and seventh in his class, but this is the type of story Judge

Mullen is most likely to tell about himself: the ones that are self-deprecating. More often, he does not speak about himself at all. Instead, he lights up when discussing his cases, legal arcana, or politics as well as his goings-on with friends, colleagues, former law clerks, and family.

"For a man of his many gifts, he is very modest," notes U.S. Magistrate Judge David C. Keesler, who was first appointed under then-Chief Judge Mullen in 2004. "In a time in our society when we are surrounded by people who always think it's about them, Judge Mullen never thinks it's about him. He takes the work seriously, but not himself."

This comes across in how Judge Mullen describes his path to the bench. "We were local counsel for Duke Power Company, and I got to know the head of litigation," he recalls. "They were happy with our work," and when a judgeship came open in the district, "I got a call saying they wanted to put my name in. I said 'if you want to waste your time, go ahead.'" After interviewing with then-Senator Jesse Helms ("He said 'At least with your hair, you look like a judge,'" Mullen laughs), his name made the final list to be passed up to President George H.W. Bush.

"There were three names I would have picked over me," Judge Mullen opines. One of those names was Brent McKnight, who later became a federal magistrate judge and ultimately did become a district court judge and a colleague on the same bench as Judge Mullen. "I personally thought the only reason I was on the list was to placate the organized bar. Well, next I know, I'm nominated."

Judge Mullen's modesty is genuine, but it conceals a shrewd legal mind. Any of his approximately 36 former law clerks—or his career clerk, Debbie Coble—can recite a litany of stories where they wrestled with thorny legal problems for hours or days before bringing it Judge Mullen, only to have him give them an answer off the cuff that almost invariably was the right one.

"Judge Mullen is very smart," offers friend and former colleague Carl Horn III, a retired U.S. magistrate judge who worked with Judge Mullen for nearly two decades. "His intelligence and business acumen allow him to get to the heart of the matter quickly in his more complex civil cases. I've always admired him for that, and have tried to follow his example."

Fresh out of law school, Judge Mullen interviewed with several firms but got the same answer. "They all knew my dad, and they all said, 'we know you're going to go work with him.'" And that was exactly what happened; Judge Mullen practiced with his father, James Mullen, at the firm of Mullen, Holland & Harrell in Gastonia.

"My dad was one of the smartest men I ever knew, and one hell of a trial lawyer," Judge Mullen says. His admiration for his father is clear, and it is just as clear that he is haunted by his father's ultimate decline with Alzheimer's. "It was painful to watch." He leaves it at that.

In his first year of practice, Judge Mullen himself became very ill. He lost all energy and suffered brutal headaches, and his tall frame wasted down to just 150 lbs. After an extensive workup, he was diagnosed with Graves' disease. At the time, the major treatment was to take radioactive iodine. It stopped the disease but in the process disabled the thyroid entirely, leaving him dependent on thyroid medication for the rest of his life.

Judge Mullen in front of his wall of law clerk pictures in his chambers.

Judge Mullen's modesty is genuine, but it conceals a shrewd legal mind. Any of his approximately 36 former law clerks—or his career clerk, Debbie Coble—can recite a litany of stories where they wrestled with thorny legal problems for hours or days before bringing it Judge Mullen, only to have him give them an answer off the cuff that almost invariably was the right one.

Fortunately, this early setback was only a speed bump in his legal career. He went on to make a mark for himself, representing landowners, corporations like Duke Power and AT&T, hospitals, even the railroads. He was part of a breed of generalists that are increasingly scarce in today's market of legal specialization.

"We practiced the kind of law that does not exist in small town America anymore," Judge Mullen reflects. "We took anything that came in the front door where we thought we could get paid and not commit malpractice."

As a small-town attorney, Judge Mullen pioneered

litigation techniques that created new ways for his clients to do business. These included now-common practices that were unheard of at the time, such as deposing landowners about the value of their property in right-of-way cases or instructing his client in how to avoid those cases in the first place by simply buying the land where it needed the right-of-way and reselling it with the right-of-way established.

He is most proud of his work with the reorganization of Gaston Memorial Hospital (now CaroMont Regional Medical Center), where he navigated a complex web of regulations to have it declared North Carolina's largest independent hospital, something state legislators proclaimed at the time couldn't be done. This change laid the groundwork for CaroMont's continued independence and success today.

Judge Mullen lives this philosophy, building up the people around him even as he eschews the spotlight himself. Magistrate Judge Keesler recalls a game-changing conversation shortly after his own appointment, when he shared with Judge Mullen his fears about ensuring that decisions get made promptly and correctly. "Look, we picked you because you're really good," Judge Mullen told him. "Use your best judgment, we trust you."

His work for the hospital paid off in his nomination process as well. A "blue slip" hold was placed on his nomination, part of routine political games played with judgeships at the time. At one point, Judge Mullen spoke to David Hoyle, the former president of the hospital, about it. He recalls Hoyle getting on the phone right then with the office of the senator who had placed the hold.

"He was insulting and profane," Judge Mullen says calmly. "The next day, the blue slip came off." All told, Judge Mullen's nomination process took 11 months from start to finish. Finally, in October 1990, he was confirmed to replace Judge James B. McMillan on the bench of the Western District of North Carolina.

"The first thing you get is a name transplant—your first name becomes 'Judge,'" Mullen says. "But you do not have to be ugly to people."

Judge Mullen lives this philosophy, building up the people around him even as he eschews the spotlight himself. Magistrate Judge Keesler recalls a game-changing conversation shortly after his own appointment, when he shared with Judge Mullen his fears about ensuring that decisions get made promptly and correctly. "Look, we picked you because you're really good," Judge Mullen told him. "Use your best judgment, we trust you." Those words meant the world to Keesler. "I admire him a lot," he says. "He's been big for me; he is important to me. He is so much more than a colleague to me."

Likewise, Frank Johns, who has served as clerk of court in the Western District of North Carolina since 1994, thinks of Judge Mullen as a friend and mentor. Early in his tenure, Johns recalls then-Chief Judge Mullen telling him "'There is no mistake you can make that I can't fix with an Order—so relax and do your job.' That was so empowering." Indeed, this mantra made such an impact on Johns that he uses it himself to this day, with every new staff member who joins his office.

On the bench, "Judge Mullen has a deep passion for fairness and justice," Keesler relates. "Is this decision right? Is it fair to all the parties? Is this the right and just thing to do in this case? Judge Mullen has always shown courage in doing his job. Whether stating thoughtfully his heartfelt concerns over federal sentencing or making the tough calls in both civil and criminal cases, this has always been his way."

Horn agrees. "In his criminal cases, Judge Mullen has demonstrated reasonable concern about the Government's balance and the increasing severity of federal criminal punishment—concerns that I certainly share."

Judge Mullen's most memorable cases include the 1991 resentencing of renowned televangelist Jim Bakker and presiding over the first-in-the-U.S. trial for material support of terrorism in 2002. The latter involved illegal cigarette smuggling used to raise money for the Lebanese terrorist organization Hezbollah. In an interesting twist, the lead prosecutor in that case, Kenneth Bell, would ultimately join Mullen on the WDNC bench in 2019.

"That was a fascinating, fascinating case," Mullen recalls. It also required significant extra security for the presiding judge. "My neighbors weren't happy with me, because the [U.S.] Marshals were picking me up every morning. It had snipers on the roof and all that other good stuff."

In December 2005, Judge Mullen took senior status. Almost immediately, he stopped taking criminal cases. "I just became tired of doing them," he explains. He takes a breath. "If you want to say I was hardly a fan of the [U.S.] Sentencing Guidelines, that would be a true statement."

As a jurist, Judge Mullen is known for his efficiency and pragmatism. "Try not to BS me and get to the point," he advises lawyers appearing in front of him. "If you're doing cross examination and you start to repeat yourself, quit. If you know you are winning, graciously proceed." (This last bit is a more genial rephrasing of advice he has given one of us in the past: "If you're winning, sit down.") Advising both prudence and tenacity in litigation, he quotes Mark Twain: "A man who carries a cat by its tail learns something he can learn no other way."

Off the bench, Judge Mullen appreciates good food, wine, and cooking. He enjoys reading military history, entertaining friends, and traveling, which he greatly looks forward to doing again soon. In the meantime, he and Judy are enjoying their new puppy, Jojo.

On and off the bench, Judge Mullen is gracious about everyone around him. He calls his judicial colleagues "a very good bench. Very collegial group of people," and adds, "We all get along." He refers to the federal magis-

trates as "terrific and hard-working." And of his staff, he says, "I've enjoyed *all* of the people who have worked for me. I'm very fortunate with the people who have signed on to work as a law clerk with me. I know that whatever success I've had, the law clerks have been a major part of it."

The love and respect he feels for his law clerks is mutual. Judge Mullen's former clerks have gone down numerous career paths after their clerkships, to all parts of the bar and beyond, locally, nationally, and even internationally. Every one of us, though, would agree that working with him was a highlight of our legal careers. We all stay in touch with Judge Mullen, and those who can, gather in person every few years to spend time with him.

Although he might not want his legacy written, it already has been. The mark Judge Mullen has left on the people he encounters and the institution he loves is indelible; it will not fade. And we are all so much richer for it. ☉

Judicial Profile Writers Wanted

The Federal Lawyer is looking to recruit current law clerks, former law clerks, and other attorneys who would be interested in writing a judicial profile of a federal judicial officer in your jurisdiction. A judicial profile is approximately 1,500-2,000 words and is usually accompanied by a formal portrait and, when possible, personal photographs of the judge. Judicial profiles do not follow a standard formula, but each profile usually addresses personal topics such as the judge's reasons for becoming a lawyer, his/her commitment to justice, how he/she has mentored lawyers and law clerks, etc. If you are interested in writing a judicial profile, we would like to hear from you. Please send an email to Lynne Agoston, managing editor, at social@fedbar.org.

Hon. Richard J. Sullivan

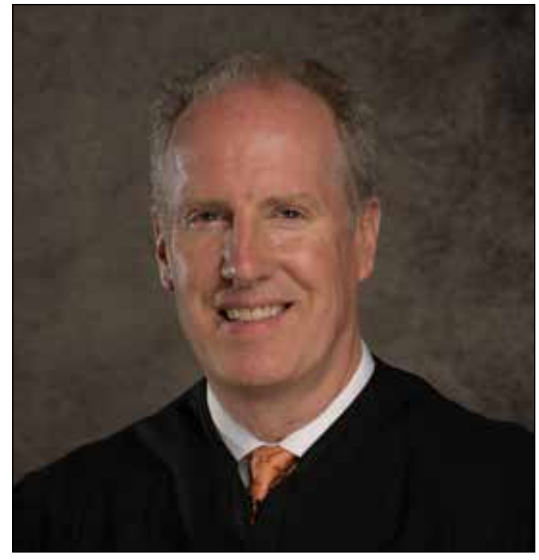
Judge, U.S. Court of Appeals for the Second Circuit

by Phil Schatz

Phil Schatz is a partner at the Manhattan litigation firm Wollmuth Maher & Deutsch LLP. He is a past president of the SDNY Chapter, past circuit vice president of the FBA, and the author of many prior profiles for *The Federal Lawyer*.

Hon. Richard J. ("Rich") Sullivan of the U.S. Court of Appeals for the Second Circuit "is witheringly funny—a legendary roaster, even by the exalted standards of the Manhattan U.S. Attorney's office,"[1] says Anirudh Bansal, a Cahill partner and former colleague at the U.S. Attorney's Office. "He has the quickest wit I ever saw, but humane, and without any mean spirit," says lifelong friend Eric Dinallo, chair of Debevoise & Plimpton's insurance regulatory practice. "He's a real mensch," says Magistrate Judge Stewart Aaron, a veteran of many bar association musicals, "with perfect comedic timing." Judge Sullivan's rendition of "If Lawyers Were More Civil" (sung to the tune of *Fiddler on the Roof*'s "If I Were a Rich Man") in the New York American Inn of Court's production of *The Civility Seder*[2] is legendary and made the cover of the *Wall Street Journal*—albeit as a hook for a polemic against lawyers behaving badly in discovery.[3]

Everyone has a favorite Rich Sullivan anecdote. Bansal broke up the crowd at Judge Sullivan's Second Circuit investiture with a story about the judge's short-lived, self-help tenure as chief of the Criminal Division. Some history: The Office of U.S. Attorney for the Southern District of New York (SDNY) dates back to the founding of the Republic, and its lawyers are the best in the land, later becoming judges, elected officials, attorneys general, cabinet officers, and ambassadors, as well as elite lawyers at elite firms. The Criminal Division is an elite division within the office, and the office of the chief of the Criminal Division is an exalted post within that division, carrying a long and honorable tradition. An array of photographs of current and former chiefs of the Criminal Division dating back to the 1920s lines the lengthy hallway of the 7th floor of the office. By tradition, the chief of the Criminal Division is never absent but is always present. If the actual chief is away, then the next person in seniority assumes the position of chief in their absence, and so on down the line of command. As recounted by Bansal, one lazy Friday in 2005, the sitting chief of the Criminal Division was away for the Memorial Day weekend, as were several others in the succession, making Judge Sullivan the next in line. He



framed a photograph of himself, added the caption "Acting Chief, May 27, 2005, 2:15 PM to 5:15 PM" and hung it on the wall with the rest of the portraits for everyone to see after the holiday. ("I had already given notice that I was leaving July 4, so I figured they wouldn't fire me," says Judge Sullivan). "The photograph is still there—one of the treasured artifacts of the office," says Bansal, "and whenever anyone mentions his three-hour tenure, Sullivan smiles and says, 'Ah, the golden age of the Criminal Division.'"

From Oyster Bay to Yale

Judge Sullivan grew up in the hamlet of Glen Head, N.Y., near Glen Cove, located in the town of Oyster Bay, an area that has given us rock star Billy Joel, reclusive novelist Thomas Pynchon, and Gambino crime boss John Gotti. He is a Mets fan. "It takes fortitude to be a Mets fan," sympathizes his colleague on the SDNY bench, P. Kevin Castel. He went to high school at Chaminade, a premier Catholic boys' school on Long Island, where he excelled in theater, speech, and debate. "Theater was my thing," he says, "but only because I couldn't make the basketball or baseball teams and was too bored by cross-country." He played Sky Masterson in *Guys & Dolls* his senior year. Noted criminal defense lawyer Bob Morvillo, the late found-

er of Morvillo Abramowitz, was in the audience and called him "Sky" from that day forward—even in court. Chaminade led to William & Mary in Williamsburg, Va., the second oldest college in the country, founded in 1693 by King William III and Queen Mary II. One of his classmates was future *Daily Show* host comedian Jon Stewart, who Judge Sullivan remembers as a "terrific athlete" and "very intense in intramural sports." Judge Sullivan graduated with a degree in government with a minor in English.

Contemplating a Ph.D. in philosophy, Judge Sullivan next served as an NYC Urban Fellow under Police Commissioner Ben Ward and his counsel, Susan Herman, working closely with future Police Commissioner Ray Kelly, and then as a speechwriter for the Virginia Governor's Office. These jobs made him think about law school. "I realized that anyone who has an interesting job in city or state government had a law degree." Commissioner Ward, himself a lawyer, wrote a letter of recommendation. "He warned me that law school would brainwash me. I think he was probably right."

Sullivan chose Yale Law School because of its philosophical and more theoretical approach to law. "I figured at Yale I wouldn't even have to study law. I could study philosophy and still get a law degree." His very first class in law school was taught by then-Dean (and now his colleague on the Second Circuit) Guido Calabresi. The next semester, he was taught securities regulation by Judge Ralph Winter. His philosophical bent caused him to create a reading group focusing on legal classics from Blackstone to the present. But he also got a taste of practical lawyering, which proved decisive. In his second year, he served as an intern with the Organized Crime Strike Force in Connecticut under John Durham, a career prosecutor and later U.S. attorney, and Bob Devlin, who later became a state judge in Connecticut. "They were so busy and so generous that they let me and my fellow intern, Michael Schwartz (who later became an AUSA in Philadelphia), stand up in court and do stuff, like taking pleas, arguing motions, and covering sentencings." He had a revelation: "I realized that I wanted to be a prosecutor. This was the turning point in my career." This revelation was cemented in his third year as an intern for Judge Jose Cabranes, then the chief judge on the district court in Connecticut and now Judge Sullivan's colleague on the Second Circuit, whom Judge Sullivan describes as "an incredibly generous mentor, then and still."

Appellate Law Clerk, Wachtell Boot Camp, and SDNY Prosecutor

After graduation, Judge Sullivan clerked for Hon. David M. Ebel of the U.S. Court of Appeals for the Tenth Circuit, who had been a law clerk to Byron White. "He is a great model for what a judge should be," says Judge Sullivan.[4] Judge Ebel returns the compliment: "He is fiercely independent, unequivocally committed to justice, and an enormous legal talent," adding, "no matter what issue, no matter what side of the issue, I would be pleased if I drew him as my judge." Judge Sullivan's co-clerk Eric Dinallo says he knew Sullivan was headed for the bench. "I never saw anyone so young work so hard to be principled. He was not satisfied until he was certain he found the right answer."

SDNY General Crimes Unit circa 1994.

Judge Sullivan's first job after his clerkship was as an associate at Wachtell, Lipton, Rosen & Katz LLP, primarily because it offered an opportunity to work with former AUSAs like Bernie Nussbaum, Larry Pedowitz, and John Savarese. "Wachtell changed my life," says Judge Sullivan. "It was really like boot camp. They whipped me into shape, and taught me that perfection was expected, always, even at 2:00 or 3:00 in the morning." That work ethic and attention to detail are things he took with him after he left the firm. In 1994, Judge Sullivan joined the U.S. Attorney's Office under Mary Jo White, who was his boss for seven years. He excelled at the job, focusing mostly on "blue collar crimes" involving narcotics, racketeering, and violence. After barely four years, White named him chief of the General Crimes Unit and then chief of the Narcotics Unit. Even as a chief, he continued to investigate and prosecute his own cases, including the Maisonet Organization out of Hunts Point and Mario Villanueva Madrid, a Mexican governor who safeguarded ton-quantity shipments of cocaine for the cartels in Colombia and Mexico. In 2002, James Comey succeeded White as U.S. attorney and tapped Judge Sullivan to be chief of the newly created International Narcotics Trafficking Unit and director of the New York/New Jersey Organized Crime Drug Enforcement Task Force. In 2003, he was awarded the City Bar's Henry L. Stimson Award, given annually "to outstanding Assistant U.S. Attorneys" in the Southern and Eastern Districts in honor of Henry L. Stimson, the U.S. attorney from 1906-1909 and the City Bar president from 1937-1939. The award is an impressive medal of cast bronze. Ever the prankster, Judge Sullivan "wore the medal at the office the next day," according to Bansal.

Judge Sullivan left the U.S. Attorney's Office to take a job as deputy general counsel for Litigation at Marsh &

McLennan Companies, Inc., and later as general counsel for Marsh, Inc. "I loved the people and the work was very challenging," says Judge Sullivan. "And after eleven years at the U.S. Attorney's Office, it wasn't bad to be making some decent money in the private sector." But it didn't last. One day he got a call from Preet Bharara, a former assistant U.S. attorney (whom Sullivan had supervised in Narcotics) who was then serving as chief counsel to Senator Schumer on the Judiciary Committee, asking, "Have you ever thought about being a judge?"

U.S. District Court Judge for the Southern District of New York

Although it had never occurred to Judge Sullivan, he expressed interest and was appointed by George W. Bush to fill the seat vacated by Judge Michael Mukasey, who had retired the year before. Judge Sullivan was confirmed unanimously in 2007 by a Senate that included Barack Obama, Hillary Clinton, Joe Biden, John McCain, and Bernie Sanders. Two years later, Judge Sullivan had the privilege of swearing in Bharara as the U.S. attorney for the SDNY, where he served until 2017.

On the SDNY bench, Judge Sullivan worked long hours. Bansal says Judge Sullivan is "exacting and meticulous," and he "expects the same level of diligence and expertise that he demands of himself." Katie Matsoukas, his first law clerk at the district court, now a partner at the Indianapolis-based Barnes & Thornburg LLP, says "we all worked hard, but no one worked as hard as he did." Still, she adds, "he always keeps things in perspective and isn't afraid to laugh at himself." Matsoukas fondly remembers her hectic first day on the job, within a week of her interview. "We had a big box of files of current cases to review for that day's conferences, and we just sat down at the table and got to work," she says. Everyone hit the job running, not least Judge Sullivan, who didn't yet have a robe and had to borrow one from another judge.[5]

Judge Sullivan "wanted the right result, not the popular one," says Matsoukas. Despite his background as prosecutor at the Manhattan U.S. Attorney's Office, one of his first decisions on the bench suppressed incriminating statements due to speedy presentment and Miranda violations.[6] "He is so proud of our justice system," says Bansal. "He truly believes that the pen is mightier than the sword," says Matsoukas, "and he often quoted Washington's statement (emblazoned on the 60 Centre courthouse) that 'the true administration of justice is the firmest pillar of good government.'"[7] "He was our friend," says Matsoukas, "he had us call him 'Rich,'[8] he cared about our families, he remembers our birthdays. He fostered a sense of camaraderie in all of us." Judge Sullivan gave Matsoukas a pen as a parting gift when her clerkship ended. "I keep it with me all the time," she says.

Judge Sullivan loved being a district court judge. "I loved the humanity of the job and the opportunity it provided to interact with the many participants in the legal process—lawyers, litigants, court reporters, interpreters, marshals, and especially the jurors." He says, "I have great respect for jurors, who unlike life-tenured judges come from the community and serve just temporarily before resuming their lives." He describes the jury as "the most democratic institution in America" and notes that they are particularly good at finding facts and assessing credibility; "they usually get it right."[9] Sullivan is equally fond of his fellow judges, and they of him. Former Chief Judge Loretta A. Preska recalls that Judge Sullivan was a wonderful colleague who was "always generous, and always willing to undertake any task, however onerous."

Shortly before he took the bench in 2007, former Chief Judge Charles Brieant told him, "If you're going to be a district court judge, you better like lawyers." Judge Sullivan does. "At the risk of overgeneralizing, I think lawyers are, on the whole, smarter, funnier, and more interesting than your average bear. And I think they take their responsibilities seriously." Sullivan spends a lot of time hanging out with lawyers. "He participates in bar activities with enthusiasm and good humor," says Vince Chang, president of the New York County Lawyers and a partner at Wollmuth Maher & Deutsch LLP, "and stays to the end—sometimes even longer." "He has been a great supporter of the FBA's National Outreach Project and our chapter," says Nancy Morisseau, president of the New York chapter. "He spent an entire morning sharing his experiences with Harlem students who had aged out of the traditional school setting. He personally shook everyone's hand, and then stayed to join us for a pizza lunch," she adds. "It was a memorable moment for everyone involved." Judge Sullivan is on the executive board of the New York American Inn of Court; the Center for Law and Religion at St. John's University School of Law; an adjunct professor at Columbia Law School, where he teaches sentencing and jurisprudence; and a member and frequent lecturer for the Federalist Society. He is considered a "feeder" judge because many of his clerks have gone on to clerk at the Supreme Court.

Judge for the Second Circuit Court of Appeals

Judge Sullivan was elevated to the Second Circuit in 2017 by a vote of 79-16 upon the recommendation of Senators Schumer and Gillibrand—not quite unanimous (as had been his 2007 approval as a district court judge), but as near unanimity as one can get in these turbulent times. These qualities are what led Tony Ricco, a prominent New York defense lawyer, to write a glowing letter in support of the nomination, noting that every appearance before Judge Sullivan "was a valuable and challenging learning experience," that Judge Sullivan is "welcoming to attorneys ... defendants and their family members alike," taking "extra care" to provide a fair proceeding and a reasoned decision." Although Judge Sullivan kept a large part of his district court docket after moving to the Second Circuit, he is no less enthusiastic about his new responsibilities. "If a trial judge needs to love lawyers, an appellate judge better love the law," he says, "and I really do." Judge Sullivan has especially enjoyed the collaborative nature of appellate work. "I have terrific colleagues

who never fail to amaze me with their intellect and commitment to getting it right."

Endnotes

[1]The Manhattan U.S. Attorney's Office is like *Second City*; everybody there is funny, and the funniest are at a whole other level. Sullivan was at the top of that other level.

[2]And available on YouTube. *See* CVIIRecordings, *Bruce Turkle's 12/12/12 Civility Seder directed by Rita Warner - 2 Camera Edit*, YouTube (Dec. 23, 2012), https://www.youtube.com/watch?v=O3VlSgrSgWs.

[3]Jennifer Smith, *Lawyers Behaving Badly Get a Dressing Down from Civility Cops,* Wall Street Journal, Jan. 28, 2013. As an aside, because most lawyers are ethical and responsible, most disputes are difficult to police from the bench. "It's like when kids misbehave in the back of the station wagon," Sullivan says, "you don't know who started it, and usually you can't do much more than tell them to stop it and threaten to turn the car around"—an obviously hollow threat.

[4]Judge Ebel's April 2012 lecture, "Things I Wish I Had Known When I Was a New Lawyer," is available online and well worth the listen. OCU School of Law, *Jurist in Residence April 2012: Judge David Ebel – "Things I Wish I Had Known When I Was A New Lawyer,"* Vimeo (Feb. 25, 2013), https://vimeo.com/60470994.

[5]The late SDNY judge Harold Baer Jr. had a similar problem when he was named to the New York Supreme Court. Fortunately, he was assigned to the same chambers as his father and was delighted to find several robes in the closet bearing the initials "H.B."

[6]*United States v. Pena Ontiveros*, 547 F. Supp. 2d 323 (S.D.N.Y. 2008).

[7]Funny aside about that quote: In the 1930s, John W. Davis of Davis Polk & Wardwell sent his then-associate S. Hazard Gillespie (later a revered DPW partner) to the Library of Congress to confirm his suspicion that Washington actually said "*due* administration of justice." After a leisurely train ride to Washington and several days at the Hay-Adams hotel, Gillespie confirmed that Davis was right. Nowadays, you can find the actual quote in a few minutes of internet sleuthing.

[8]That tradition didn't last long, laughs Judge Sullivan. "The clerks were uncomfortable calling me Rich," he says, "and over time they stopped calling me anything at all." So later clerks stuck with "Judge." Judge Ebel had the same experience; Sullivan and Dinallo called him "David," but later clerks reverted to "Judge."

[9]Because of the close bond between the trial judge and jury, a lawyer should avoid fighting with the judge. "Anybody who tangles with a judge in front of a jury is committing malpractice, because juries invariably side with the judge," advises Judge Sullivan. ☉

The Implications of COVID-19 for Incarcerated Individuals Seeking Legal Redress

BREANTA BOSS

"It has long been said that a society's worth can be judged by taking stock of its prisons. That is all the truer in this pandemic, where inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm. May we hope that our country's facilities serve as models rather than cautionary tales."[1] *— Justice Sonia Sotomayor*

This article explores the obstacles that incarcerated individuals face pursuing litigation against prison officials for their responses to the novel coronavirus. The bar is high: litigants must show that officials' response reflects deliberate indifference "to a substantial risk of serious harm."[2] While courts recognize that the novel coronavirus presents a substantial risk of serious harm—especially to vulnerable populations like the elderly and those with severe medical conditions—courts may feel inclined to defer to how prison officials choose to combat the pandemic in the interest of federalism; consequently, this leaves prisoners without satisfactory avenues for legal redress.

Unprecedented Challenges

COVID-19 has introduced an unprecedented challenge to public healthcare, the global work force, education, and other routine activities in our personal lives.[3] The misfortunes of the pandemic have also befallen an often disregarded population: incarcerated individuals. In jails already plagued with systemic issues like overcrowding, low staff levels, uncleanliness, and poor accommodations, the risk of incarcerated inmates encountering COVID-19 is high.[4] Dozens of lawsuits have been filed challenging everything, including COVID-19 vaccine mandates, outbreaks resulting in death, and demands to release the elderly and those suffering with severe medical conditions.[5] One such federal lawsuit poignantly states, "Plaintiffs, many of whom are medically vulnerable because of their age or serious medical conditions, must not be forced to sit helpless, hoping that chance favors them while Defendants' combined inaction and defective practices roll the dice with their lives."[6]

The Legal Remedy

A conditions of confinement claim is one legal theory in which individuals can sue for violations of their constitutional rights by prison officials. The Eighth Amendment requires prison officials to provide "humane conditions of confinement" with due regard for inmate health and safety.[7] This duty encompasses proving "adequate ... medical care" and "taking reasonable measures to guarantee the safety of inmates."[8] The Supreme Court held in *Farmer v. Brennan* that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety, and the official must both be aware of facts from which the inference could be drawn that substantial risk of serious harm exists and he must also draw the inference."[9] The Court stressed that the deliberate indifference standard entails more than mere negligence

by prison officials.[10] Additionally, deliberate indifference is a question of fact often made out by "inference from circumstantial evidence."[11]

The Valentine Case Study

In *Valentine,* inmates in a Texas geriatric prison (the Pack Unit) sued the Texas Department of Criminal Justice (TDCJ), its executive director, and the Pack Unit warden over its response to coronavirus.[12] Inmates alleged violations of the Eighth Amendment, specifically, that the defendants had been deliberately indifferent to their medical needs by recklessly disregarding obvious and known risks to their health and safety, the Americans with Disabilities Act, and the Rehabilitation Act.[13] The toll that coronavirus had on the Pack Unit was palpable since the Court acknowledged, as the suit was progressing, that the virus was spreading, infecting over 500 inmates, 20 of whom had died. [14] After hearing live testimony from witnesses from the Pack Unit and prison experts, the district court determined that the incarcerated litigants would likely succeed on their Eighth Amendment claim.[15] The district court concluded that the Pack Unit did not follow its own policies.[16] Subsequently, the district court issued a preliminary injunction, imposing a detailed protocol to stop the spread of COVID-19 in the Pack Unit.[17]

However, the Fifth Circuit granted TDCJ's motion to stay permanent injunction pending appeal.[18] First, the incarcerated litigant's claims were disposed of because of the Prison Litigation Reform Act's (PLRA's) mandatory and jurisdictional exhaustion requirement.[19] The PLRA's exhaustion requirement mandates that prisoners fully exhaust any administrative remedies available to them before filing a civil rights lawsuit against prison officials.[20] Usually, prisoners can satisfy this requirement by filing a grievance or complaint with their facility.[21] The Court determined that the prison grievance process to obtain COVID-19 relief was available within the meaning of the PLRA and that therefore, prisoners were required to exhaust it.[22] Further, the inmates' failure to exhaust their administrative remedies foreclosed success on their Americans with Disabilities Act and Rehabilitation Act claims.[23]

Separate from the litigant's failure to exhaust administrative remedies, the Court determined that their constitutional claim also failed on the merits.[24] The Court noted:

> As judges, our conscribed role is not to assess whether prison officials could have done more to contain the virus—no doubt they could have. Nor is it to micromanage prison operations—that is left to the governor-appointed Board of Criminal Justice and to the Texas Legislature. Our limited role is thus to determine whether TDCJ has made the requisite showing that its efforts to combat COVID-19 satisfied the constitutionally required minimum. And we must do so within strict procedural bounds mandated by Congress. We are forbidden to do more.[25]

Here, the Court appears to invoke principles of federalism to explain why it had to give deference to TDCJ.[26] The Court expressed concern that an injunction would prevent TDCJ from responding flexibly to the rapidly changing response needed to combat the coronavirus.[27] Moreover, since TDCJ presented evidence that it had taken and continued to take measures to confront the spread of the virus, the Court could not find any wanton disregard for any serious medical needs.[28] This in stark contrast to how the district court addressed federalism concerns. While recognizing that "states have a strong interest in the administration of their prisons," the district court determined the principles of federalism, however, did "not erode the core tenant that prison walls do not form a barrier separating prison inmates from the protections of the Constitution."[29]

The Supreme Court denied the application to vacate the Fifth Circuit's stay of injunction. While the claims in this case were analyzed under the Eighth Amendment as opposed to the Fourteenth Amendment, there is a strong case to be made that the Fifth Circuit's ruling in *Valentine* will set the precedent for Fourteenth Amendment analysis as well. Regardless, because of this legal precedent, it may be difficult to proceed with conditions of confinement claims concerning the novel coronavirus as long as prison officials have taken affirmative steps to combat the virus.

Conclusion

The Constitution gives state and local governments broad police powers to protect the health and safety of citizens. According to the Tenth Amendment, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[30] The COVID-19 pandemic certainly implicates the health and safety of citizenry. Customarily, this type of public health crisis has been led primarily by governors, mayors, and local health departments, as they are equipped to flexibly respond to unique features of local populations. As federal judges hear more of these cases, they must balance federalism principles with ensuring that the constitutional rights of incarcerated individuals are protected.

It is clear that COVID-19 is a dangerous virus leaving many elderly and medically compromised prisoners particularly vulnerable to outbreaks. However, the exacting standards of a conditions of confinement claim and the PLRA present unique challenges to litigants seeking legal redress against prison officials. The Fifth Circuit's reluctance to decide cases in this area appears to be based in core principles of federalism. As stated in *Valentine* by the Fifth Circuit, "but federal judges are not policymakers. The Constitution charges federal judges with deciding cases and controversies and not with running state prisons."[31] ⊙

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Endnotes

[1]*Valentine v. Collier*, 140 S. Ct. 1598, 1599 (2020) (denying application to vacate stay).

[2]*Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

[3] ILO, FAO, IFAD, and WHO, *Joint Statement on Impact on COVID-19 on People's Livelihoods, Their Health, and Our Food System* (Oct. 13, 2020), https://www.who.int/news/item/13-10-2020-impact-of-covid-19-on-people's-livelihoods-their-health-and-our-food-systems.

[4]The Marshall Project, *A State-By-State Look at 15 Months of*

continued on page 49

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COVID-19 in the Law Clinic

LAUREN E. GODSHALL AND HECTOR LINARES

Of all the law clinic programs in the country, perhaps none were better equipped to deal with the extended disruptions to legal education caused by the COVID-19 pandemic than those at Tulane Law School and Loyola University New Orleans College of Law, due to their unique experiences with Hurricane Katrina. The hard lessons learned from that disaster meant that both of these clinics, as well as the law schools and universities as a whole, had their own detailed contingency plans for the continuity of operations in the face of new disasters or emergencies. The schools' continuity of operations plans had even been regularly updated to take advantage of the advances in technology over the past 15 years. Yet the unprecedented effects of the COVID-19 pandemic that gripped the nation in spring 2020 posed new challenges that left both institutions navigating the same unknown territory as other law school clinics. This article recounts some of those experiences and shares the lessons learned in the sincere but dim hope that they will not be needed as the building blocks for responses to future disasters.

The two authors are clinic professors at Tulane and Loyola Law Schools in New Orleans. Hector Linares leads the Youth Justice section of the Loyola Law Clinic.[1] Student attorneys in this section represent parents of special education students as well as children in the juvenile justice system at all stages of those proceedings. Lauren Godshall is an instructor and supervisor at the Tulane Environmental Law Clinic, which represents individuals and groups in an array of environmental-law-related issues, including litigation and appeals against industry and agencies, public comments on pending permits and issues, and a variety of other forms of advocacy.[2] Both of these clinics—and their corresponding law schools—had to react quickly to ensure that the dual missions of providing legal education and free legal representation to the Louisiana community remained intact.

Clinic Education in Law Schools

Clinics vary greatly but typically involve the free representation of low-income individuals or groups by students or teams of students that are supervised and taught by clinic professors, who serve as both "senior partner" and "instructor" to the students. In Louisiana, student practice is permitted by the state supreme court as well as the individual federal district courts, which permits students to appear as counsel, subject to certain rules and limitations.[3] Students are required to work on their cases for a certain number of hours, attend a clinic class or seminar, and attend supervision meetings specifically on their cases. As attorneys, students take an oath and are treated as full members of the legal team, able to work directly with clients, appear or argue in court, and negotiate settlements and plea deals. Clinics are an important bridge between pure classroom learning and the actual practice of law, and the ABA now requires that students complete at least six credit hours of experiential learning—which includes clinics—in order to graduate.[4]

Clinics are intense and in "normal times" can involve traveling far and wide for client interviews and court appearances, late nights in the clinic space drafting motions to meet court deadlines, and long weekends of mooting and other in-person preparation for hearings. Cases are often handled by a small team of students and one or more instructor, and the time spent working together is supposed to be an important part of the learning experience, demonstrating the professionalism and zealous advocacy needed for success in the workplace.

Then came COVID-19.

How Clinics Adapted—Education and Student Practice

The Tulane and Loyola law schools reacted extremely quickly to the onset of the pandemic, taking the spread of the disease seriously from the start. No one was quite sure whether institutions of higher learning were overreacting in those early days, shutting down campuses and directing students to leave campus housing. As the understanding of the virus's contagiousness and severity evolved, however, the early responses of both universities appear fully vindicated. After a short shutdown, classes resumed online. Clinic cases, however, are not classes: they are real cases, with real clients, real problems, and real deadlines. It was a scramble in those early days to find students, ensure their continuing commitments to the clients, and maintain regular communication between team members when absolutely nothing else was "regular."

So, while other students collected their belongings and studied in their homes, clinic students had to move quickly to find good internet connections and troubleshoot any issues with remote document access to clinic files. Finding—and keeping—the balance between ensuring students' own continued physical and mental health and working on their clinic cases was tricky. Frankly, it continues to be tricky. The students can be powerful self-advocates, however, letting their professors know when that balance has been lost, and those reminders are appreciated every time.

Early on, the most commonly encountered problems involved: (1) cancellations and continuances in litigation and for trials, motions, and all other related deadlines, which significantly slowed down cases for clients and eliminated important student educational opportunities; (2) technology issues on all sides as work went entirely remote for students, professors and staff, courts and agencies, and the clinic's clients. Students and professors had to figure out where to get decent Wi-Fi, where to store and share confidential documents, and how to hold effective meetings and hearings—none of which was unusual for the pandemic but all of which involved growing pains as everyone adapted; and (3) physical illness, as well as fear and disbelief, all of which took a toll on the students.

In a sense, these two clinics were extremely well-prepared for the first two common problems, or at least knew to expect these types of issues. Although it had been more than 15 years since Hurricane Katrina, other storms and named hurricanes were passing through with increasing frequency and ferocity, and both clinic programs had navigated shuttered courthouses, inaccessible offices, and intermittent internet in the past. The third issue—illness and fear—was new, and the combination of all three factors hitting not just the Gulf South region but the entire globe all at once did sometimes make even the simplest tasks seem utterly overwhelming. Still, cases, along with the corresponding ethical and professional obligations to the clients, continued on.

So the clinics had to adapt and keep going. Networking with other clinicians in law schools around the country immediately increased through list-serves and opportunities set up by the American Association of Law Schools and the Clinical Legal Educational Association as clinicians traded both ideas, early successes, and sometimes simply plain words of encouragement. Students learned along with their professors how to attend court conferences by Zoom, and how to move past the frustration of preparing for a complicated hearing and then suddenly having the courts shut down.

Many of the lessons learned were valuable to both professors and the students as they transitioned from students to post-pandemic practitioners. For example, Louisiana's governor issued a series of orders extending some, but not all, statutory deadlines, while the state supreme court and federal courts issued their own orders, all of which had to be carefully read and re-read to tease out whether the changes applied to clinic cases. Calendaring deadlines—an important but typically dull task—increased in difficulty as deadlines shifted and dockets quickly became inaccurate.

At one point, in a summary judgment hearing on Zoom, the judge appeared from a bedroom, causing a client in attendance to fail to realize that this was the judge and to start casually using the judge's first name—a great lesson in preparing clients for Zoom court. Likewise, when an oft-rescheduled deposition was finally held over Zoom, with the student and professor sitting together in one room while masked, using separate laptops to make appearances, the need to test out volume and echo issues before depositions actually begin became clear.

In team meetings, when working on pleadings or discovery, having the Zoom share-screen function available meant student and instructor teams could, as a group, make line-by-line changes and discuss word choices and strategy in real time; a practice that has been maintained even as team meetings return to in-person.

The routine recording of classes, made necessary due to illnesses and technological issues, had unexpected benefits. Recordings were posted to the online course page for later reference, allowing students to review specific lessons when they became important to their individual cases. The idea of an online class also meant that guest speakers from anywhere in the nation were now available for in-class discussions; another huge benefit that will survive the pandemic years. And Zoom's polling features made quick anonymous feedback possible, allowing for better focus on issues critical to the class.

There were also drawbacks of course. The Zoom classroom did make engaging in organic in-class discussions extremely difficult. The more spontaneous discussions and back-and-forth conversations that occur in live classrooms were lost. Zoom classes meant relying on cold calling more than ever, which is not the norm for clinic courses. For the Tulane Environmental Law Clinic, which is a larger clinic with over 20 participants, the professors eventually adapted to breaking the room into small groups in order to facilitate student discussion about their cases, but that also meant they did not hear all the discussions and could not course-correct or add information where needed. Clinics also lost the benefits of lengthy in-person meetings with students, both planned and unplanned. As explained by Professor Timothy Casey in his post-COVID-19 reflections, "Clinicians engage with students more frequently and for longer periods of time than professors in other courses ... These individual interactions provide much of the special character of the clinical experience."[5] When professors became reliant on prescheduled Zoom meetings, less formal opportunities for both teaching and informal mentorship were lost: "The absence of the quick, brief and contemporaneous interactions between student and teacher transformed the clinical experience in ways that are difficult to quantify, but are nonetheless very real."[6]

The Zoom world also created an odd combination of isolating everyone from each other while constantly inviting others into students' homes, meeting pets, plants, and children. Privacy and confidentiality became more of a challenge, and professors had to continually reiterate and reinforce the importance of (and limits of) attorney-client privilege and attorney work product. This was not

always easy with roommates and home-schooled children wandering in and out of the Zoom background.

What would have been private personal medical issues also became less private, as students felt compelled to reveal personal health issues that made them more risk adverse and less able to return to campus. While the universities were careful about explaining medical privacy issues to keep everyone on the right side of the law, there is an automatic loss of some previously private condition when a student must tell his or her team that they cannot return to campus just yet, even without further justification.

Overall, the quick retreat from campus and the widespread adoption of online and remote work offered opportunities for both students and teachers to confront in real time the accessibility challenges posed by trying to both learn law and practice law online. This meant that clinic students were figuring out how to be online and remote lawyers at the same time as the nation's judges, clerks, staff, and attorneys. Clinic students are graduating out of their clinic programs well prepared for a legal world that knows physical presence is no longer considered strictly necessary or even desirable, on near equal footing as the already-barred attorneys who had to struggle through these same changes with them. These pandemic-era students are a cohort of new and upcoming lawyers prepared for virtual practice.

But there is a major drawback that should not be ignored, and it applies to all of the law students affected by the pandemic: these students were kept physically and socially isolated. They are joining a profession, yet they may feel untethered and disconnected from that larger profession all around them. The authors of this article attended law school together, sat next to each other on the first day of classes back in August 2000, and ended up married to each other—so they deeply understand that a large value of attending law school is going through it with a cohort and gaining the sense of "we're all in this together." The in-school support and the post-school networking provide incalculable benefits. That sense was lost or greatly diminished for the pandemic-era students. One student, at his last clinic team meeting, summed up his law school experience as having made "lots of acquaintances that might have been actual friends."[7]

That sense of isolationism may ultimately bond the COVID classes together in the long run, but it is something practicing lawyers will need to look for; the support system of classmates will not be as robust. As students have returned to campus, clinic professors have increased face-to-face team meetings and client visits to attempt to make up for some of those lost opportunities. Students are also being encouraged to seek out mentors (as several states now provide for new practitioners, either automatically or voluntarily) and to get active in bar associations and affinity groups as early as possible to try to build out that support network now. That may or may not be enough; only time will tell.

How COVID-19 Impacted Clinic Cases and Representation

Clinic practice varies greatly depending on the legal focus and clientele. Procedural changes involving remote work were reflected across the board for all types of practice, but substantive impacts were felt differently. Many clinics that focused on housing rights and unemployment claims, for example, reported immediate changes to their practices, and some clinics reorganized in order to address immediate community needs.[8]

Loyola Youth Justice Clinic: The Loyola Law Clinic inaugurated its Youth Justice section in fall 2020, meaning that the clinic was still being designed over the preceding spring and summer as the implications of the rapidly developing pandemic were still playing out in real time. The plan was for the fall semester of the yearlong clinic to focus on special education advocacy, but it was not clear at all what this would look like or if it would even be possible, as public schools struggled to develop virtual instruction programs of their own. Ultimately, the type of advocacy the clinic offers was more needed than ever, as students with disabilities were among the groups most negatively impacted by the limitations of distance learning. Clinic students were able to engage in a meaningful and rewarding experience, dedicating themselves to creative advocacy to ensure that public schools delivered appropriate special education services and accommodations in a remote learning environment.

The pandemic also created a unique opportunity for the clinic to file a systemic administrative complaint against a local parish school board for failing to develop adequate procedures for compensating special education students for services lost during the pandemic-related school shutdown. The school system in question had over 7,000 students who did not receive any of the individualized instruction and services they were owed once schools closed for the remainder of the school year in March 2020. Under state and federal law, schools were supposed to ensure that those lost hours were made up. When it became clear that few students were being offered any compensatory education and that what was being offered was insufficient, the clinic filed a systemic complaint with the state department of education that led to a favorable settlement. Under the far-reaching agreement, the school district was required to conduct a new review for all of the special education students in the district that ultimately led to thousands of additional students being awarded compensatory education.

On the juvenile delinquency representation side of the practice, the nature of the representation remained unchanged, but students encountered many difficulties related to the loss of in-person contact with clients. The initial face-to-face meetings and ensuing personal contact opportunities were for the most part gone and replaced with impersonal video conferences and phone calls with less than reliable connections. It became much more difficult to conduct effective interviews with detained clients and to develop client rapport and trust.

But there were also positive things about the changes that the clinic was forced into—things that will hopefully be kept alive even as the pandemic moves into different stages and restrictions ease. The virtual settlement conferences had many advantages over in-person negotiations, particularly for special education meetings when clients were physically present at the clinic and opposing parties were remote. Pre-COVID-19, it was not uncommon to experience difficulty finding private physical spaces in which to caucus with a client, with broom closets, hallways, or stairwells sometimes being the only options. The ability to caucus comfortably with a client to evaluate settlement offers or simply take a moment to calm down emotions by muting, logging on and off, or going to a virtual breakout room is both convenient and efficient.

The closures also forced some courts, agencies, and schools to modernize at a pace no one expected. There were many schools and districts that refused to send electronic records and required someone to pick up hard copies of records personally. Now more of these schools are using emails and secured online drop box systems to deliver records. The local juvenile court also at least temporarily

accepted the filing of motions through email. These changes will hopefully last and will ease practice for everyone, not just clinicians and students.

Tulane Environmental Law Clinic: In the environmental law clinic, casework continued to focus primarily on Louisiana environmental justice communities. Air pollution challenges are more significant than ever, given the relationship between exposure to particulate matter and the propensity for respiratory disease. With a respiratory pandemic sweeping the nation, the local communities that were already facing disproportionate particulate matter loads in the air were particularly vulnerable.[9] This does not necessarily change the types of cases accepted and pursued by the clinic, but it does change nature and the urgency of the arguments raised in both litigation and public comments.

One frustration was that much of the Environmental Clinic's work involves developing fact patterns and research through Freedom of Information Act (FOIA) requests to federal agencies and Public Records Act requests to state and local agencies or government bodies. When the clinic submitted such requests following the onset of COVID-19, much of the time the response involved "sorry, we can search online but anything in the building itself is inaccessible to us." Response times in certain agencies also slowed due to loss of personnel. At one point months into the pandemic, the clinic submitted a FOIA request to the Environmental Protection Agency (EPA) for a copy of a permit application and immediately received a phone call back from a EPA employee who described at length his frustrations with being barred from his physical office and mailbox, which by this time were certainly overflowing with a mountain of unopened yet important and potentially time-sensitive mail.

The pandemic and shutdown did have unanticipated impacts on clients, both directly and indirectly. For example, the clinic has long represented a group of residents in the Gordon Plaza subdivision in New Orleans.[10] The Gordon Plaza homes are built on top of a landfill declared a Superfund site, and years ago a settlement between the EPA and the landfill owner was reached that limited the ability to dig under the homes and roads in the area. When schools shut down and students were instructed to attend online, Gordon Plaza residents realized that the high-speed internet necessary for constant video conferencing was unavailable to them due to the digging restrictions. That Superfund-related settlement was reached long before high-speed internet was commonly used, and the parties to that settlement, of course, never considered that the inability to dig underground would have potentially led to problems for clients who suddenly needed high-speed internet to access online classrooms.

In short, the pandemic had incidental effects on the substance of the clinic's existing cases, as it did not immediately cause changes to the substantive environmental laws and policies already implicated in these cases. Environmental law professors have traced the major disruptions caused by COVID-19, particularly in the energy sector and with the climate justice movement,[11] which may mean that future clinic cases will reflect the pandemic's legacy in the environmental arena as laws and regulations are developed to address those disruptions.

Post-Script: Hurricane Ida

As vaccinations became available and the rest of the nation began to cautiously re-emerge, turning off the Zoom screens and re-opening classrooms, the New Orleans area, including Tulane and Loyola, were struck by Hurricane Ida. Tulane's law school suffered significant physical damage, and both schools experienced problems with power and internet that affected the entire area, causing unexpected long-term closures and necessitating yet another rapid return to online school and remote legal practice.

In many ways, the response to the pandemic made it possible for the clinics to quickly pivot back to online learning and clinic work. At the same time, it showed that each disaster is unique and will pose distinct challenges. With Ida, having developed technology and protocols for virtual instruction and remote casework meant little while courts were closed and the students, schools, and clients all struggled with the loss of electricity, internet, and safe housing. Once again, clinicians had to maximize their flexibility as teachers and lawyers.

Climate change will inevitably increase the frequency and intensity of weather-related disasters, not only in the Gulf South. And as the omicron variant gains a foothold in the United States, it is possible that new iterations of pandemics will also interfere with attempts to return to the pre-pandemic era of both learning and practice. As concluded in an Association of American Law Schools/Clinical Legal Education Association survey of clinicians, "The stark reality is that another pandemic or emergency is possible and clinical faculty and law schools must be prepared for this prospect."[12] This is not a gloomy prediction but a pragmatic one: clinic education has had to face and overcome difficulties in the last several years, and, in doing so, clinics have hopefully contributed to the education and training of a new set of lawyers who are well equipped to practice in shifting times and adapt to change without becoming overwhelmed by it. ⊙

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Resolution Resources *continued from page 13*

dors of PHRs that contain individually identifiable health information created or received by healthcare providers. The Statement then specifies that health app and connected device developers qualify as "health care providers" under the Rule because they "furnish health care services or supplies." Consequently, the Rule's protections encompass any personally identifiable information developers create or receive that relates to the past, present, or future physical or mental condition of an individual; the provision of healthcare to an individual; or the past, present, or future payment for healthcare to an individual.

The statement also emphasized that an electronic health record must draw information from multiple sources and be managed, shared, or controlled by or primarily for the individual before the FTC will consider it to be a PHR under the Rule. The Statement, however, interprets multiple sources liberally to include other non-health-related information. An electronic health record can draw information "from multiple sources" in the context of a health app, for example, through a combination of consumer inputs and application programming interfaces. Hence, the Rule would apply to an app if it collects information directly from consumers and can technically draw information through an application programming interface that enables syncing with a consumer's fitness tracker or phone, even if only one source provided the health information. For example, the Rule would cover a blood sugar monitoring app that collects health information only from the user's blood sugar levels if it then uses non-health information from the user's phone, such as date, time, or percentage figures.

The Statement also warns entities that the Rule does not limit a "breach of security" to cybersecurity intrusions, illegal behavior, or ill-intentioned activities. Rather, any unauthorized access will trigger the Rule's notification duties, much like under HIPAA. Thus, a health app developer faces a reportable breach of security if it accidentally discloses private health information to a third party without the individual's consent.

Rule Enforcement Change

In addition to clarifying the Rule's scope, the FTC's new Statement also signaled an enforcement sea change. Even though the Rule was enacted more than a decade ago, the FTC has not enforced it once since 2009. The FTC admitted that it has not used the Rule. The Statement cautioned, however, that the FTC considers the Rule's notification duties critical now in light of the surge in health apps and connected devices. The Statement explicitly declares the FTC's intent to notify entities of their ongoing obligation to publicize breaches under the Rule. The Statement's message is unequivocal: the FTC will enforce the Rule and its notice requirements from now on.

A Dispute Prevention Opportunity

Instead of in the "more bad news" category, healthcare managers should file the FTC's Statement as a new opportunity to prevent future disputes. The FTC Statement serves as a warning, affording the healthcare industry some time to implement strategies to protect itself from class actions, mass claims arbitration, and other costly disputes. By taking the warning seriously, the industry can assess and then minimize its risk. Bottom line: healthcare and wellness app developers should assess the Rule's application to their services and the adequacy of their current security measures in order to prevent triggering the Rule's notification requirements or even the possibility of a noncompliance finding. Then, they can breathe a sigh of relief if the current measures adequately protect the business or implement new measures now to upgrade them until they do. Either way, the FTC handed the healthcare industry an opportunity to prevent costly future risks.

Endnotes

[1]*See* 16 C.F.R. § 318.2(d).
[2]*See* 42 U.S.C. § 1320d(6).
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I Was Crazy Enough to Start Law School in the Middle of a Pandemic

BY MIKAYLA J. LEWISON[1]

When COVID-19 hit in March 2020, it seemed as though the world shut down.[2] It was at once terrifying and, in some ways, inspiring to see communities come together and support one another.[3] During this unprecedented time, many students like myself were accepted to law school. We knew law school would be both nerve-racking and enthralling. But we were also faced with the challenging decision of whether to begin this journey now, during the pandemic, or to perhaps wait until a later date. Many of us decided to embrace the challenge despite the pandemic, which, by all accounts did not appear to be going away anytime soon.[4]

I began Saint Louis University School of Law (SLU) in August 2020, and I am currently a second-year student. Like other law students before the pandemic, incoming first-years, and especially those of us who are first-generation law students, had no idea what to expect when entering law school. What was different for the incoming class of 2023 was the uncharted territory of virtual learning.[5] Although I had never attended law school pre-COVID-19, I knew my experience was going to be quite different.

New protocols for the novel pandemic and public health crisis were specifically designed for our safety, but they also created many unknowns regarding how classes would be held. When the pandemic erupted in spring 2020, nearly every educational institution abruptly shifted to online learning.[6] Many existing law students adjusted to attending classes online on a pass/no-pass graded basis.[7] By the time we started our first year in fall 2020, most law schools were online only, even though the American Bar Association (ABA) "seemingly loathes online learning."[8] Until virtual learning became a necessity due to the pandemic, the ABA only permitted up to one-third of a law student's credits to be taught online.[9] To provide the most authentic law school experience, SLU was one of the few law schools to opportunely offer first-year students the option to attend classes either in person, virtually, or through a hybrid method.[10] Seeking the best possible learning environment, I chose in-person courses, while many of my colleagues learned remotely; however, two of my six first-year classes were strictly online. In those two classes, classrooms were reserved for the in-person students to sit together and participate online, with appropriate social distancing, to mimic the in-person learning experience. I remain grateful that I had the opportunity to attend classes in-person during my first year, as some of my friends attending other law schools were not provided the same in-person learning opportunity.[11]

From the very beginning, I strongly suspected my law school class was an experiment, and recently, my Evidence professor advanced the same thought. While lawyers shall maintain competency by keeping up with modern technology,[12] the sudden digital reconstruction of the legal profession was immediate. For many, this abrupt shift to working remotely was a challenge.[13]

For students beginning law school in fall 2020, the digital switch began even before the pandemic, when the LSAT was administered on tablets for the first time in fall 2019.[14] Then, the pandemic hit, canceling the March 2020 LSAT for aspiring law students[15] and chaotically condensing the traditional law school classrooms into digital computer screens for current and many future fall 2020 students. The first question was whether the law could be taught effectively

using the online platform Zoom. The second question was whether students can effectively learn law remotely.

Having no prior legal education experience, first-year students had nothing with which to compare the quality of the education they were receiving. Second- and third-year students were better positioned to evaluate virtual learning, and 56 percent reported their education was "less effective" than their in-person learning experience.[16] The professors and seasoned students also knew that certain aspects of legal education, such as legal research using books from the law library, simply cannot be administered and learned online. Although various online legal research platforms are preferred and most commonly used, learning how to conduct legal research using the traditional book method is still an essential law school lesson. Many first-year students did not enter a traditional law library their entire first year.

The joke circulating among most law students about attending online law school at "Zoom School of Law" genuinely became real.[17] Professors kept students engaged online by utilizing various teaching methods, such as live lectures, the Socratic Method, breakout room discussions, and quizzes on game-based learning platforms.[18] After a few weeks, many law students realized how difficult online learning was. Before COVID-19, in-person learning and office hours allowed professors to engage with students by recognizing nonverbal cues, but this essential aspect of communication became nearly impossible over Zoom.

For some students, it was disappointing and dissatisfying to miss out on learning in the traditional classroom setting, where there is a natural exchange between professors and students.[19] Today, it is still difficult. Although law schools are back to in-person learning, professors are limited to assessing students' understanding through their eyes since our faces remain partially covered behind masks.[20] As second-year students, we missed out on the so-called "law school interaction etiquette" we would have learned during our first year.

Unsurprisingly, starting law school in the middle of a pandemic came with its own set of personal challenges.[21] Many students only "knew" other students' faces from behind a screen. We missed out on mingling with classmates before and after class. Since we were split into multiple sections, with not all sections having classes together, most people attending online experienced the unfortunate reality of not knowing many of the students in their class. Now, second-year students are starting to meet each other for the first time, and friendships that would have been made in Torts, Contracts, and Civil Procedure are being made in Business Associations, Legal Ethics, and Evidence. There were opportunities to socialize via Zoom, but it was rare to meet another student in person during our first year. Some Zoom friendships flourished, yet it was still stressful for students to form study groups. Some students molded the Zoom friendships they made into study groups; some created study groups with other in-person students; and others were still seeking to find the right study group for themselves. It seemed extremely peculiar creating and placing trust in a virtual study group made up of students you had never met in person, but it was a necessary tool for success during the first year.

Thankfully, due to the widespread availability of the COVID-19 vaccine for the 2021-2022 school year, law schools are back to holding nearly all classes in person.[22] As a condition to in-person attendance, many schools, including SLU, require students and faculty to upload proof of vaccination status to a portal.[23] Like most businesses and institutions, law schools implemented specific safety protocols for the in-person settings. Protocols are still in place and are continuing to keep students safe today.[24]

Many educational institutions kept students informed with COVID-19 updates and protocols. In the higher education context, the spread of the virus was likely tied to students being maskless while socializing outside of class, such as trips home to see family, eating together, riding in cars together, attending parties, and studying together.[25] The schools encouraged students to be vigilant in wearing masks and maintaining at least 6 feet of distance. For some students, including myself, it became difficult to balance an overwhelming sense of loneliness along with an obligation to comply with public-health safety measures.

By the second year, law students are typically cultured and well-informed on law school formalities. However, the class of 2023's knowledge on certain matters is nearly parallel to the new first-year class of 2024. While they experience the first "semi-true" year of law school, the issue weighing on the minds of all first-year and second-year students is the reality of taking traditional exams in person. During our first year, students took exams from home. We were able to use our individualized setups, which might have included dual monitors and access to printers. It was advantageous taking exams alone in a completely silent room, without hearing other students furiously typing and riffling through papers or creating some other type of distraction. Further, students were able to use outlines, the textbook, and other in-class materials during their take-home exams. Now that law schools are back to in-person learning, these privileges are being "returned" to the unfamiliar yet traditional territory of closed-book and closed-outline in-person exams. This is a significant change for the seasoned second- and third-year law students who have established and perfected testing environments at home.

As current second-year students approach the end of our first in-person and "semi-true" semester of law school with classmates, many of us do so with the anxiety of taking traditional law school exams and working to establish relationships with fellow students. Despite these anxieties, we only have one and a half years left of law school, and the majority of us would love the opportunity to truly experience what law school was like pre-COVID-19. Hopefully, we will get the chance ... stay tuned. ☉

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[9]*Id.* at 837.

[10]*Id.* at 827.

[11]*Id.* at 842.

[12]*Valentine v. Collier*, 455 F. Supp. 3d 308 (S.D. Tex. 2020).

[13]*Id.* at 312.

[14]*See Valentine v. Collier*, 978 F.3d 154, 158 (5th Cir. 2020) (staying district court's preliminary injunction requiring officials immediately to implement additional COVID-19 prevention efforts and noting that "even assuming there is a substantial risk of serious harm, the Plaintiffs lack evidence of the Defendants' subjective deliberate indifference to that risk").

[15]*Valentine*, 455 F. Supp. 3d at 313.

[16]*Id*. at 323.

[17]*Id.* at 325.

[18]*See Valentine*, 978 F.3d at 154.

[19]*Id*. at 158-62.

[20]*Id.*

[21]*Id.*

[22]*Id.*

[23]*Id.*

[24]*Id.* at 162.

[25]*Id.* at 158.

[26]*Id.* at 166 (stating "In any event, the public interest favors having politically accountable officials—not federal judges—determine how to allocate resources." (citing *Swain*, 961 F.3d 1276, 1293 (11th Cir. 2020); *Lewis v. Casey*, 518 U.S. 343, 363 (Thomas, J., concurring) ("Principles of federalism and separation of powers dictate that exclusive responsibility for administering state prisons resides with the State and its officials.")).

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What Have We Learned About Federalism and Public Health Emergencies Since 2001?

VICTORIA SUTTON

I wrote an article for *The Federal Lawyer* in 2002[1] about the legal framework surrounding the anthrax attacks of 2001. In it, I discussed where we stood to make improvements to prepare for a future bioterrorism attack. Some of those improvements could also be useful in preparing for a naturally occurring pandemic. But because bioterrorism is squarely in the scope of federal authority with its focus on national security, most of the federal improvements occurred in areas concerning biological crimes, biosafety, and biosecurity but not critical responsibilities for a response to a pandemic. Thus, federalism, with preparations for bioterrorism and maybe a public health emergency in a few states at a time, directed the federal government's preparations since the 2001 experience with the anthrax attacks followed by the 2003 SARS epidemic, urgent bird flu planning in 2007, and the 2013 Ebola epidemic.

Among the preparations that the federal government made, various federal agencies shifted authority and responsibilities among them. The Department of Health and Human Services retained all control of the federal aspects of public health by creating an Office of Public Health Preparedness. The Centers for Disease Control's (CDC's) consultancy role did not give up any of its functions, and the Food and Drug Administration (FDA) tried to reform the speed of its drug approval processes for emergency drugs and vaccines without modest success. The newly created Department of Homeland Security (DHS) acquired negligible authority for human health, but it did establish a small office of public health preparedness, which meant they participated in the preparations but lacked real authority or interest in public health.

A quick review of the legislation that followed the biological events of 2001 shows some incremental shifts of authority to the federal government, with several significant statutory changes.

- The USA PATRIOT Act[2] criminalized more behaviors around the handling of dangerous biological agents.
- The Public Health Security and Bioterrorism Preparedness and Response Act[3] provided for preparation of federal, state, and local governments for public health emergencies.
- The Public Readiness and Emergency Preparedness Act[4] provided for medical professionals to cross state lines and share information about their state licensing in response to public health emergencies, among other features.
- The SAFETY Act[5] also provided for procurement of equipment for responses, such as masks and respirators, with liability protections for manufacturers.

Negligent handling of biological agents was criminalized with the USA PATRIOT Act, inspired by the alleged perpetrator of the anthrax attacks—a government scientist working in a biodefense

laboratory. Some effort was made to federalize the response to public health needs by creating a national stockpile to supply states during a biodisaster, now called the Strategic National Stockpile (SNS)[6] legislation. However, the stockpile was not intended to address more than one or two states' needs nor to be a solution to preparing for a national biodefense.

Constitutional Federalism Re-Examined

Constitutional federalism makes the federal government responsible for international health issues that affect national security and international relations, while the states have authority for their respective public health issues, with the exception of those in federal jurisdiction, because those issues have been found to have a substantial effect on interstate commerce or otherwise preempt state law (e.g., food and drug law). Perhaps it is now prudent to examine whether this segregated approach is suitable for pandemics and national security interests. The COVID-19 pandemic has led us to re-examine centuries old cases, traditional federalism responsibilities, and what national security means in the 21st century. Examining the federalism questions raised during the COVID-19 pandemic should make us better prepared for the next public health emergency.

States retain public health authority just as they did in earliest days of our republic. The Supreme Court confirmed this in *Gibbons v. Ogden* in 1822. Since 1822, we have developed the technological means to travel around the world in hours, taking our pathogens with us. Local control is not so exclusive anymore, and our federalism model should incorporate this new reality. The creation of the United Nations World Health Organization after World War II confirmed that public health is a global matter.

An argument exists that we have successfully allowed the states to be the "laboratories of democracy" during the COVID-19 pandemic, choosing the pandemic responses that fit the political philosophy of the majority of its constituents. News of states that reject the public health measures that other states embrace has become daily fodder for conflict among our collective views of what success in ending the pandemic means.

When we needed more respirators to respond to COVID-19, despite warnings that we might face a pandemic with respiratory impacts, most states and cities chose not to invest in this critical infrastructure. Even the federal government had few in the SNS, and the Trump administration took drastic steps under the Defense Production Act[7] to require three automobile manufacturers to shift their manufacturing from cars to respirators.[8] Fortunately, this mechanism proved to be sufficient, but it took weeks to address the shortage.

One of the most important changes after 9/11 was the bill to support vaccine companies in developing emergency vaccines. In addition, the SAFETY Act provided for federal procurement of countermeasures that were important to public safety during a national emergency. Through an executive order by President George H.W. Bush, the Department of Health and Human Services was added to the list of agencies that could procure countermeasures and personal protective gear that would enjoy the protections of the SAFETY Act. The SAFETY Act allowed the United States to commandeer a patent for the purposes of national defense and that was considered during the acquisition of the antibiotic Ciprofloxacin® in 2001 was ultimately not used.

Few of these legal provisions or lessons from the anthrax attacks became relevant during the COVID-19 pandemic. Most companies seemed willing to negotiate for a fair price, and the United States was prepared to pay that cost and for the costs associated with the accelerated development of the vaccines. Under these terms, the president launched Operation Warp Speed, May 15, 2020, to build a vaccine for the COVID-19 virus. Building on existing vaccine technology, the United States was able to develop and procure enough vaccine to begin protecting the public within a record 18 months at the Emergency Use Authorization level.

The United States was fortunate in 2003 to mostly avoid SARS. While the United States avoided more than a few cases of that highly transmissible coronavirus, Canada experienced high caseloads and had to implement quarantines and paid leave to limit the spread. In response to this outbreak, Canada established a Department of Public Health to implement a coordinated federal approach to public health crises. Recall that the Canadian constitution is the inverse of the U.S. Constitution, in that power is held by the federal government unless delegated to the provinces. The Canadian structure made establishing a federal coordinating mechanism easier. By contrast, the enabling legislation for CDC allows it to be involved in state public health only upon invitation by a state, and then the CDC plays only an advisory role. There are just a few communicable diseases listed by statute that are allowed to be tracked by the federal government with compulsory state reporting. Everything else falls under voluntary reporting, with state sovereignty over its data.

Learning from Canada, it is not enough to simply establish a federal agency to respond to public health emergencies. Admittedly, Canada did not learn from the SARS pandemic, which they called a dress rehearsal for COVID-19. They hesitated when they should have acted with the "precautionary principle" by failing to provide personal protective equipment for healthcare providers, stopping international travel into the country, and generally acting without waiting for more complete scientific information.[9]

During the early days of the pandemic, many thought the federal government should be doing more because COVID-19 was obviously a national issue. An outbreak of disease is not so clearly a national security threat when it happens in a few states, but when the outbreak occurs in all states and threatens the nation's economy, productivity, and safety, then the national consequences are clear. Those scenarios are not clearly ones that require a shift to federal government control, but perhaps there should be some threshold in a pandemic that calls for a federal response instead of leaving our national defense to the widely varying strategies and resources of individual states, each reinventing the wheel as the biodisaster unfolds.

The federal government exercised its authority where it had exclusive jurisdiction, such as closing international travel from countries that might pose a risk of spreading the disease to the United States. It also controlled the regulation of vaccines. But vaccines must be developed and are rarely an initial or immediate response to a new pathogen. Of course, the FDA also regulated pharmaceuticals and other therapeutics to treat the sick, so immediately the FDA had to address approval processes for recommended therapeutics for COVID-19. Advocates for leaving public health to the states would argue that the federal government's recent limitation of federal distribution of immunotherapies to states they consider to be less committed to vaccination mandates demonstrates why the federal government should not be involved in public health powers. Some would consider this an equitable way of distributing a scarce resource.

Lessons Learned: When There Should Be Federal Constitutional Responses

It would serve us well to consider some experiences from our COVID-19 response that might inform analyses of whether we have a federal national-security issue due to a pandemic. If the pandemic was due to the gross negligence of a release from a laboratory, it would certainly reach the standard.[10] But should intentional versus unintentional be the test for a national security threat in the context of public health?

We can examine the lessons from COVID-19 to determine whether criteria exist for when the federal government should exercise its constitutional responsibility to respond to a national security threat.

One clear area of federal jurisdiction is the statutory authority[11] of the president to declare a national public health emergency. The secretary of health and human services made this declaration on behalf of the president in response to the COVID-19 risk on Jan. 31, 2020, issuing Proclamation 9994 declaring a national emergency on March 1, 2020.[12] Once a national public health emergency is recognized, emergency powers can be exercised within this scope by the executive branch.

In the context of the COVID-19 federal health emergency, the federal government has the authority to control the international borders for foreign visitors who may be entering the United States from countries with higher rates of COVID-19, and the executive branch can exercise that authority as needed.

The federal government also has authority to regulate when there is a "significant effect on interstate commerce." In early 2020, when one state (Rhode Island) prohibited residents from another state (New York) from fleeing to their state, the issue of burdening the flow of interstate commerce was evident, but what would the consequences have been?[13] Would Gov. Cuomo of New York have succeeded in his threatened lawsuit against Rhode Island?[14] Is it "significant" enough to trigger federal involvement to prevent a burden on interstate commerce? Can the president with Article II authority, identify "hot spots" to regulate ingress and egress, regulating interstate commerce in a national public health emergency?[15]

Vaccine development, clinical trials, national rollout of availability, and vaccine incident reporting are all well within the jurisdiction of the federal government through the Food, Drug and Cosmetic Act. This also includes therapeutics approval and deployment. For example, during the pandemic, the Executive Branch made the therapeutic Remdesivir as well as other COVID-19 therapeutics free to anyone.[16]

The federal government can also use the power of the Department of Justice to employ federal criminal statutes to protect the public from crimes that may be committed during the public health emergency. During the COVID pandemic the DOJ circulated special memoranda to U.S. attorneys' offices outlining the federal crimes statutes that could be used to enforce safety measures and guard against threats to public safety.[17]

Vaccination Implementation: Where Federalism Was Clear

The CDC released guidance for the phased allocation of the COVID-19 vaccine, making recommendations to states about vaccination priorities[18] (one area of state authority is the vaccination process). States then had the flexibility to make their own plans and set their own priorities, but given the limited supply of vaccines early on, most states had to implement some prioritization of administration. By the time the second dose and boosters were available, most states had more flexibility, and the vaccines were generally available, regardless of the CDC recommendations. However, the guidance for vaccine safety from the FDA through the CDC was strictly followed, for example when additional age groups[19] were added to the emergency use authorization.

Vaccination Implementation: Where Federalism Was Controversial and Unclear

Vaccine implementation, including setting up clinics and ensuring that medical professionals are credentialed and qualified for public safety, is squarely a responsibility of the states. But when states do not mandate vaccines for schools, which is among the lowest of the thresholds for constitutionality for a vaccine requirement, can the federal government mandate them instead? Because jurisdiction over schools and education is clearly a state power, and all states mandate other vaccines for school, it would require a significant emergency need for the federal government to attempt such a policy. A declared national public health emergency signals that authority.

However, the federal government has jurisdiction regarding safety in the workplace through the Occupational Safety and Health Administration (OSHA). So, promulgating a regulation for workplace safety is within the scope of authority of OSHA. But whether this is an ultra vires action on the part of OSHA has been challenged under judicial review, as well as whether it exceeds the power and reach of OSHA and infringes on state sovereignty and authority in public health matters. Similar questions arise with regard to laboratory safety where leaks of biological agents could threaten the public health. Should that be a state regulatory matter, or should laboratory safety be regulated by the federal government? With little controversy, after the anthrax attacks, Congress directed the CDC to promulgate biosafety and biosecurity regulations for biological laboratories with federal contracts and not leave it to the states.[20] The U.S. Court of Appeals for the Fifth Circuit, on Nov. 12, 2021, issued a nationwide injunction, stopping OSHA from implementing the vaccine mandate emergency temporary standard.[21]

The federal government attempted to shift the enforcement responsibility to the private sector by mandating that private companies require their employees to get vaccinated. The ruling on *Burton v. Wilmington Parking Authority*[22] says that the federal government cannot do through a third party what would be unconstitutional for it to do alone. So, using the private sector to mandate that adults be vaccinated avoids the question of whether the federal government can mandate a vaccine as the states can, as established in *Jacobson v. Massachusetts*[23] Childhood vaccinations are actually recommended by the federal government and mandated by state governments, making this question of federal mandates a new one. In a national emergency that is a threat to national security, the answer would be "yes"; however, as the pandemic subsides, the sense of emergency decreases and the balancing test of this constitutional burden on privacy begins to weigh more in favor of privacy, and we may never get to see the outcome of a court's opinion.

Future pandemics will likely involve similar questions with vaccines if we are fortunate enough to be able to develop an efficacious one in a timely manner.

Masks

Setting aside the mixed messages from the federal government about the use of masks as a public health measure to reduce the spread of COVID-19, there are important federalism issues to consider. Mask mandates can be ordered by state and local governments for compelling government interests when the mandates are balanced against the infringement on a fundamental right like privacy, which we might argue is at stake with wearing a mask. That is, the benefit to the public health (a compelling governmental purpose) outweighs the relatively small burden of wearing a mask in public. State and local governments differ on whether they believe this balancing test is satisfied. The federal government can also institute mask mandates, but only in areas where they have jurisdiction (e.g., in modes of public transportation such as cars for hire, trains, buses, airlines, and ships). Federal buildings and grounds are also clearly areas where federal jurisdiction can be exercised. Beyond these clear areas of jurisdiction, the CDC can make recommendations for states and even attach incentives or grant conditions.[24] For example, a federal mask mandate for schools was less successful on the part of the federal government, and it began to offer grants to those schools that complied with federal mask guidelines but lost funding from their state for violating a contradictory state prohibition against masks.[25] Using the *Dole*[26] model, funding has been upheld as a discretionary tool of the federal government to meet national policy objectives, where it is a reasonable means to further a policy for the "general welfare,"[27] stopping short of coercion and commandeering states, which is prohibited by the Constitution. Governance by conditions of aid has been a frequently used tool to achieve federal policy goals.

State Laws and Price-Gouging Statutes

In Tennessee, state authorities settled in a case with the Colvin brothers, who had stockpiled hand sanitizer by canvasing Dollar Stores and other outlets, then reselling it for $8 to $70 on Ebay, constituting a price-gouging crime.[28] Instead, the state negotiated a restitution scheme whereby the brothers distributed the stockpile without profiting.

Between March and April 2020, a licensed pharmacist, Richard Schirripa, also known as "the Mask Man," allegedly "violated the Defense Production Act by hoarding and price gouging scarce N95 masks; making two false statements to law enforcement ...."[29]

Pharmacist criminal behavior, where licensing and professional conduct are at issue, fall within state jurisdiction; but there are federal crimes that resulted in at least one indictment of a pharmacist[30] for illegally selling vaccination cards in violation of the federal crime of embezzlement and stealing and distributing within the state and beyond for more than $1,000.[31]

Another pharmacist was sentenced to three years in prison for a federal crime of destroying COVID-19 vaccine during a national public health emergency. Steven R. Brandenburg intentionally left 570 doses of COVID-19 vaccine out of the refrigerator, rendering them potentially useless because he feared the vaccine was harmful. Acting Assistant Attorney General Brian Boynton, U.S. Department of Justice, Civil Division, is quoted as saying, "The purposeful attempt to spoil vaccine doses during a national public health emergency is a serious crime."[32] Brandenburg reached a plea agreement on Feb. 9, 2021, for two counts of the federal crime of "attempting to tamper with consumer products with reckless disregard for the risk that another person would be placed in danger of death or bodily injury."[33] He was sentenced to three years of supervised release and restitution.[34] This occurred in December, when the vaccine was still in short supply.[35]

Employment and Economic Stability Federalism—Not a Clear Delegation of Authority

The American Rescue Plan Act of 2021 is COVID-19-related legislation intended to stimulate the economy,[36] clearly a constitutional function of the legislative branch. The executive branch policy in its execution left states with worker shortages, stalling the economic recovery from the pandemic. The federal policy to pay workers to stay in place at home during the pandemic[37] led some states in more advanced stages of its economic recovery to see the state labor shortage as an affront to state sovereignty. This led to governors from states such as such as Montana, South Carolina, Arkansas, Texas, and Florida to refuse this federal aid in order to get the workforce back into the market.[38] There is some federal jurisdiction over worker wages, such as minimum wage controls; federal control over state economies likely exceeded this jurisdiction, making it discretionary for states to accept or reject the aid. This is an instance where our constitutional federalism model worked well, although it was controversial.

Sovereignty and Federalism—Tribal Nations in a Public Health Emergency

Where Native Nations used their jurisdictional authority over their reservation lands to screen ingress of cars to limit the spread to the hard-hit Native Nation citizens, a couple of states (i.e., Arizona and New Mexico) adjacent to the Navajo Nation understood this process,[39] whereas the Cheyenne River Sioux, also exercising their sovereign authority to control their borders to protect their citizens from the pandemic, were challenged by the governor of South Dakota for what seemed to be a political statement rather than a public health policy.[40]

Whether it was an uninformed view of state sovereignty in relation to tribal sovereignty or a political strategy for other purposes, valuable time and resources were expended unnecessarily in South Dakota[41] at a time where resources could be better spent on safeguarding exposures for vulnerable populations[42] and recognizing tribal sovereignty to protect its citizens. Clarifying these authorities before a disaster would be a better way of using limited resources during a pandemic.

Concluding Thoughts for Our Next Pandemic

The nations of the world are ill prepared for the next pandemic, even with the experience of COVID-19. The Global Health Security Index reports that no country scored in the upper quartile of criteria for preparedness or responsiveness to another pandemic.[43] Legal preparedness and the rule of law, while not a part of this analysis, correlates with nations with a strong rule of law tradition, which creates crucial confidence in public health emergencies. The strength of the rule of law should be a criterion for also judging the readiness of a country for the next pandemic.

We have not made progress in knowing when a public health threat becomes a national security issue, and the public health jurisdiction exclusively in states established in *Gibbons v. Ogden*[44] was solidly in play. There was never a constitutional shift of authority to the federal government. However, at any point, had it been determined that the pandemic originated as an intentional attack rather than a consequence of Mother Nature, it is clearly established that

this would have been a national security issue and authority would have shifted to the federal government. This was outlined in the Clinton executive order and provided that the FBI (not the Department of Health and Human Services) would be the lead in such a circumstance, and that executive order has never been withdrawn.

We were faced with the possibility of a situation somewhere between a naturally occurring pandemic and an intentional biological attack, where the possibility of a lab release was considered. Would an intentional human-triggered pandemic be analyzed differently under our current federalism model than an accidental human-triggered pandemic? The answer must be "yes" where our definition of bioterrorism involves intent, yet gross negligence may result in an act of bioterrorism under our domestic statutory definition. No one is asking that question.

So, as we see the light at the end of the tunnel of the pandemic, has our federalism jurisdiction involving national security threats posed by pandemics changed? There are two possibilities: the first is that the pandemic was not a threat to national security, and thus, there was no need to shift authority to the federal government; and the second (and the more likely conclusion) is that we have seen a collaborative form of federalism with shared authorities that could benefit from forward thinking before the next pandemic based on lessons learned.

The next pandemic will present a different set of challenges. The 1918 influenza pandemic, the 2001 bioterrorism anthrax attack, the 2003 SARS pandemic, the 2007 bird flu scare, the 2013 threat of an Ebola epidemic, and then the 2019 COVID-19 pandemic have the potential to help us be better prepared.

Three different public health emergency scenarios we have experienced as a nation—unintentionally evolved pandemics, gross negligence in biological laboratories, and intentional bioterrorism—led to different allocations of power among state and federal governments. Regardless of their source, all are threats to national security, so a federalism model that allocates responsibility to states and the federal government based on the source of the threat (e.g., diseases call for a state response; bioterrorism using a disease calls for a federal response) rather than the threat itself ceases to be rational. The critical failure here is that the federal government cannot wait for a call from the states for public health assistance based on our current federalism relationship, but it must act immediately and decisively. As the initial response to the national security threat is undertaken, states will continue with their traditional role in managing the public health response.

If more federal preparedness and response is called for (and I argue here that it is), the current model of the CDC and its enabling legislation should be reviewed and reconsidered as a more accountable agency for its advice and regulatory actions.

Slow responses in pandemics are death multipliers, and our Constitution provides for fast action in response to national security threats within the Article II powers of the president, as in responses to threats of war. The term "outbreak" applies both to war and pandemics. In the words of President Obama, using Article II powers to respond to the Ebola epidemic in West Africa:

> If the outbreak is not stopped now, we could be looking at hundreds of thousands of people infected, with profound political and economic and security implications for all of us ... So this is an epidemic that is not just a threat to regional security—it's a potential threat to global security if these countries break down, if their economies break down, if people panic. That has profound effects on all of us, even if we are not directly contracting the disease.[45]

Finally, President Lincoln also recognized the balance of federalism at the heart of the Civil War in his remarks following the outbreak of the American Civil War: "Must a government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?"[46]

The key lesson of the pandemic is that a rapid response as early as possible, as if we are facing a threat to national security (because we are), is required. We will inevitably need to use this lesson again in the future. ⊙

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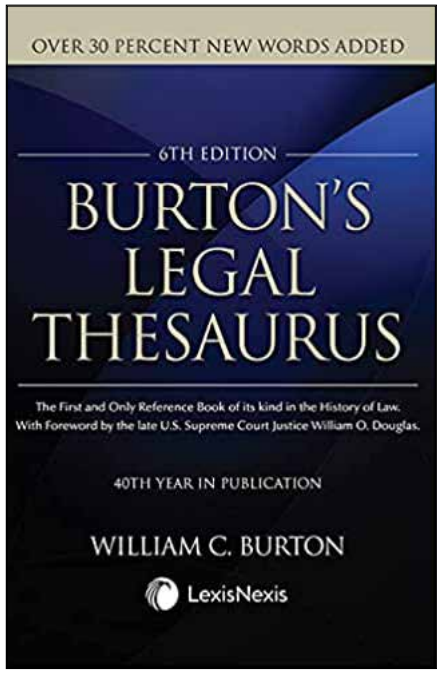

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Reviewed by Brian Craig

While lawyers and judges have relied on *Black's Law Dictionary* as the preeminent legal dictionary for generations, every lawyer in America should also utilize *Burton's Legal Thesaurus*. Released in July 2021 and now in its sixth edition, *Burton's Legal Thesaurus*, remains the preeminent thesaurus in the legal field.

As Justice William O. Douglas penned in his 1979 foreword to *Burton's Legal Thesaurus*, "[t]he root of all language is individual word. Often, it is the use of a specific word or term upon which a case or controversy may hinge. It is through the use of such a tool as the *Legal Thesaurus* that one may find the precise term to fit the nuances of a particular situation."

Now in its 40th year of publication, the latest edition of *Burton's Legal Thesaurus* includes 3,000 newly added full entries, including "nuclear option," "false narrative," and "catch kill." At 2,181 pages, the new edition packs a punch and features the latest developments in the lexicon of the legal profession. While many different types of thesauri exist, including various versions of *Roget's Thesaurus*, *Burton's Legal Thesaurus* remains the only reference book ever of its kind written for the legal profession specifically for lawyers and judges.

In finding the right word or meaning of a word, lawyers, judges, and legal professionals may consider looking at *Burton's Legal Thesaurus*. As one federal judge declared, "[w]ords are the tools of the lawyer's craft."[1] Courts often rely on *Burton's Legal Thesaurus*, in conjunction with other reference books, such as *Black's Law Dictionary,* to find the meaning of a word. For example, in construing the word "disposition" in the context of regulations authorizing the Board of Immigration Appeals (BIA) and immigration judges (IJ) to temporarily pause removal proceedings, the U.S. Court of Appeals for the Third Circuit recently cited *Black's Law Dictionary*, English language dictionaries, and *Burton's Legal Thesaurus*. The Third Circuit quoted *Burton's Legal Thesaurus* that synonyms for "disposition" include "conclusion, decision, ... final settlement of a matter, finding, order, pronouncement, ... resolution, settlement, [and] solution."

In recent years, the highest courts in the states of Washington, California, and Kansas have cited *Burton's Legal Thesaurus* to construe the meaning of words. For example, the California Supreme Court cited *Burton's Legal Thesaurus* to construe "administer" as being synonymous with "carry out," "control," and "direct." Likewise, the Kansas Supreme Court cited *Burton's Legal Thesaurus,* construing the word "comparable."[2]. And the Washington Supreme Court cited *Burton's Legal Thesaurus,* recognizing that the word "just" is cross-referenced under "fair" to interpret the word "just."[3] Whether drafting a motion in limine to exclude reference to a particular word or phrase at trial, such as a "patent troll," or writing a brief, lawyers should consult *Burton's Legal Thesaurus* to find the definition of terms and related terms.

Burton's Legal Thesaurus is not just helpful for litigators. Transactional lawyers who draft contracts will also find using *Burton's Legal Thesaurus* helpful. In addition, legal researchers can utilize the thesaurus to find related terms to find the right case on point.

Besides the print version with the striking blue soft cover, the new edition of *Burton's Legal Thesaurus* is also available in ebook format on both Lexis and Amazon's Kindle. One regret is that *Burton's Legal Thesaurus* is not available in full-text search on Westlaw. But the electronic version available through Amazon's Kindle should work for a variety of electronic devices. In a modern law library, reference books need not take up voluminous space on a shelf—although law books in print still possess an aesthetic value as décor.

Authored and edited by William C. Burton, a partner with a prestigious law firm in New York, the latest edition of *Burton's Legal Thesaurus* continues the standard set four decades ago. Burton, who also established the nonprofit Burton Foundation and the Burton Awards administered in association with the Library of Congress to recognize excellence in the legal profession, has left a legacy to the legal profession that will continue for years. Like Bryan Garner, editor of *Black's Law Dictionary*, William Burton has dedicated countless hours to create an essential legal reference book.

Legal professionals should consider the value of thesauri as helpful and persuasive secondary sources, in conjunction with dictionaries, to ascertain the plain and ordinary meaning of particular words found in statutes, regulations, and contracts.

The word "thesaurus" comes from the word "treasure" in Latin. Indeed, the latest edition of *Burton's Legal Thesaurus* embodies that origin—it is truly a treasure. ⊙

Endnotes

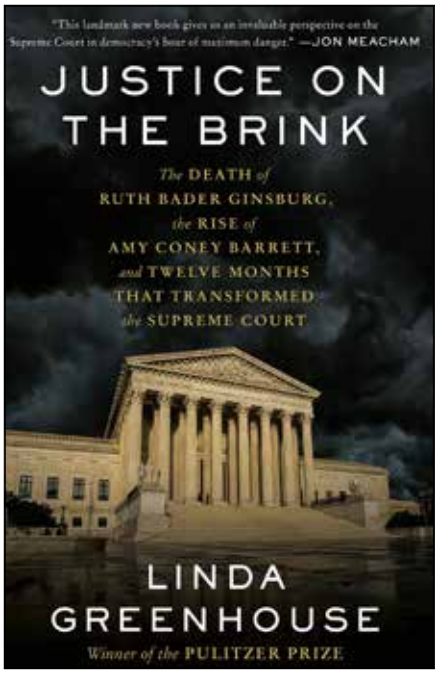
[1]*See Hollcroft v. Dep't of Treasury, I.R.S.*, 687 F. Supp. 510, 517 (E.D. Cal. 1988).

[2]*See State v. Wetrich*, 412 P.3d 984, 990 (2018).

[3]*See Wash. Trucking Ass'ns v. State Emp. Sec. Dep't*, 393 P.3d 761, 775 (2017).

Brian Craig is a solo attorney in Logan, Utah, and a full-time adjunct instructor at Purdue University

Global, where he teaches online undergraduate legal courses. He also serves as a prelitigation panel chairperson for medical malpractice cases for the Utah Division of Occupational and Professional Licensing. He is the author of Cyberlaw: The Law of the Internet and Information Technology *(Pearson) and* Stringfellow Acid Pits: The Toxic and Legal Legacy *(University of Michigan Press).*



Justice on the Brink: The Death of Ruth Bader Ginsburg, The Rise of Amy Coney Barrett, and Twelve Months That Transformed the Supreme Court

By Linda Greenhouse

Random House

$19.45 (hardcover); $13.99 (Kindle)

336 pp.

Reviewed by Elizabeth Kelley

In the Author's Note and Acknowledgments at the end of *Justice on the Brink: The Death of Ruth Bader Ginsburg, The Rise of Amy Coney Barrett, and Twelve Months that Transformed the Supreme Court*, Linda Greenhouse describes how both her agent and editor at Random House contacted her during the dawn of the pandemic and proposed a book about the Supreme Court's 2020-2021 term. Thus, while quarantining at her home in the Berkshires, Greenhouse began writing.

Greenhouse earned her law degree from Yale and covered the Supreme Court for the *New York Times* for approximately 30 years. For this, she received the Pulitzer Prize in 1998. *Justice on the Brink* focuses on the time period between July 2020 and July 2021. But to focus on that discrete period necessarily requires historical context, which Greenhouse expertly provides.

The book opens like a legal thriller, with an almost surreal description of then-President Trump's introduction of Justice Amy Coney Barrett to the world from the Truman Balcony following her whirlwind approval by the Senate, shepherded by Majority Leader Mitch McConnell. But after this, *Justice on the Brink* reflects the tight, penetrating reporting for which Greenhouse was known during her tenure at the *Times*. There are a few zingers, like the following description of Justice Thomas:

> While surprises from Justice Thomas were nothing new, they almost invariably came from the opposite direction: not from his agreement with others, but from staking out a fringe position that no one had thought of, or at least no one had thought to articulate, for many decades. (p. 207).

In other words, anyone looking for a light read or something that is tastefully gossipy *a la* Jeffrey Toobin's *The Nine* or *The Oath* will be disappointed. *Justice on the Brink* is a serious work that reflects the gravity of the time through which Greenhouse believes we are living.

There's a lot going on in *Justice on the Brink*, as the three subtitles indicate: the death of Justice Ginsburg, the appointment of Justice Barrett to the Court, and the working of the Court during the year of pandemic. But Greenhouse ably weaves two other themes throughout the book: what some point to as the growing politicization of the Court and the role the justices' personal beliefs play in rendering decisions.

Chief Justice John Roberts, who appears as a beleaguered figure, had insisted in November 2018 that "We do not have Obama judges or Trump judges, Bush judges or Clinton judges." His colleagues have echoed a similar theme. In April 2021, Justice Stephen Breyer cautioned against the danger of judges appearing "as politicians in robes." And in September 2021, Justice Barrett tried to assure Americans that the Court is "not comprised of a bunch of partisan hacks." But as far back as 2007, Greenhouse cites a dissent from Justice Ginsburg—"truth teller that she was" (p. 232)—that describes "the broken fourth wall," the title of the book's epilogue, which refers to the role of *stare decisis* in Supreme Court jurisprudence:

> [T]he Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of "the rule of law" and 'the principles of stare decisis. (p. 232).

In the context of these statements, Greenhouse describes the pleas for Justice Ginsburg to retire so that Obama can appoint her successor, similar pleas for Justice Breyer so that Biden can appoint his successor, and the formation in April 2021 of a 36-member commission to study the formation and workings of the Court—a commission formed on the heels of Justice Barrett's breathtakingly swift confirmation and Trump's public statements that he expected his judges to perform for him following the 2020 election.

Greenhouse traces the role of social conservatives in shaping the Court and specifically, the influence of the conservative branch of the Catholic Church. Although the power of the Federalist Society and the Catholic roots of at least five of the justices are well known, Greenhouse points to recent decisions, such as upholding the Trump Justice Department's wave of executions in late 2020 and scaling back of the Voting Rights Act. Supreme Court nominees have long been questioned about their views on *Roe v. Wade*, all doing their best to dispel the notion that they have any views while satisfying their supporters. But the new composition of the Court and more restrictive abortion laws in states such as Texas and Mississippi will call to question the future of *Roe*, sooner rather than later. Greenhouse notes the irony of vaccine opponents who cite "bodily integrity and autonomy" who also oppose a woman's right to choose. "This truly was a world turned upside down." (p. 237). Greenhouse does not criticize social conservatism or religious views per se, but rather, points to the danger of those views impacting judicial independence and objectivity, which ultimately endangers the tradition of *stare decisis*.

Notwithstanding a new composition of justices and a global pandemic, does it make sense to devote an entire book to a 12-month period, a relatively brief moment in time of an institution almost 250 years old? Greenspan acknowledges the limitation of her enterprise:

> It's tempting to think of a single term as a snapshot of a fixed period in the Supreme Court's life. A more accurate image is that of a series of frames in a moving picture in which members of the court continually navigate among past, present, and future, deciding cases they accepted during the previous term and adding new cases for decision in the next. The end of a term is in no real sense an ending just a pause in a steady flow. (p. 239).

If, then, the 2020-2021 term was just "a pause in a steady flow," was justice truly on the brink as the title suggests? Greenhouse concludes that "it was not quite the term conservatives had hoped for, not the term that liberals had most feared." (p. 239).

We await the 2021-2022 term. ☉

Elizabeth Kelley is a criminal defense lawyer based in Spokane, Wash., with a nationwide practice specializing in representing people with mental disabilities. She is the editor of three books published by the American Bar Association (ABA): Representing People with Mental Disabilities: A Practical Guide for Criminal Defense Lawyers; Representing People with Autism Spectrum Disorders: A Practical Guide for Criminal Defense Lawyers; *and* Suicide and Its Impact on the Criminal Justice System (with Francesca Flood). *She chairs The Arc's National Center for Criminal Justice and Disability Advisory Board and also serves on the ABA's Commission on Disability Rights and the Criminal Justice Council.*

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Mississippi Chapter: (Left to right) Ellen Robb (Career Services), Norman Comeaux (FBI), Bert Carraway (U.S. Attorney's Office), Princess Abby (Federal Public Defender Office), Scott Gilbert (Watkins & Eager), Gabrielle Wells (BLSA President), McKenna Cloud (Federal Bar President), and Dean Emeritus Jim Rosenblatt (MC Law Faculty Advisor).

FIRST CIRCUIT

Former National FBA President (2013-2014) Hon. Gustavo A. Gelpi was sworn into the U.S. Court of Appeals for the First Circuit on Oct. 20, 2021, in Boston. Prior to his elevation to the First Circuit, Judge Gelpi served as chief judge of the U.S. District Court for the District of Puerto Rico. Congratulations Judge Gelpi! ☉

FIFTH CIRCUIT

Mississippi Chapter

The student chapter of the FBA at Mississippi College School of Law (MC Law) hosted a panel discussion of Federal Criminal Practice in cooperation with the Black Law Student Association (BLSA), MC Law Career Services, and the Litigation and Dispute Resolution Center of MC Law. Representatives of the U.S. Attorney, Federal Public Defender, FBI, and private bar spoke about their role in the federal criminal process. ☉

Hon. Gustavo A. Gelpi was sworn into the U.S. Court of Appeals for the First Circuit on Oct. 20, 2021.

TENTH CIRCUIT

Northern/Eastern Oklahoma Chapter

The Northern/Eastern Oklahoma Chapter recently hosted two educational outreach programs for law students and high school students in our area.

On Nov. 12, 2021, students from the University of Tulsa College of Law visited the Page Belcher Federal Building in Tulsa, Okla., for an event led by chapter president and Northern District Magistrate Judge Susan Huntsman and chapter president-elect Hope Forsyth, a judicial law clerk for both the Northern and Eastern Districts of Oklahoma. Tour attendees included students in all three years of law school, many of whom started their legal education remotely during the pandemic without opportunity for court observation. Students participated in sessions with district judge and chair of the Executive Committee of the Judicial Conference of the United States Claire V. Eagan and her career law clerk; clerk of court Mark C. McCartt; and the U.S. Marshals Service. Students also met with

Northern/Eastern District of Oklahoma Chapter: Law students and Professor Caroline Guerra Wolf at the Page Belcher Federal Building in Tulsa, Okla., during the Northern/Eastern Oklahoma Chapter's Nov. 12, 2021, event.

chapter board member and Northern District Magistrate Judge Jodi F. Jayne ahead of observing the district's daily criminal arraignment docket, where the effects of the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), are seen every day.

On Nov. 16, 2021, Judge Jayne led a virtual Civil Discourse program with a class of high schoolers from Tulsa's Street School, an alternative education and counseling program. Judge Jayne was joined by Professor Caroline Guerra Wolf and Student Bar Association president Trevion Freeman of the University of Tulsa College of Law. The three facilitators explained what led them to go to law school and guided the students in candid conversations about civility in everyday life. The students came prepared with excellent questions on topics ranging from the high rate of female incarceration in Oklahoma to the difficulties in representing yourself at trial. Although our chapter hopes to reinstate the in-person Civil Discourse program this academic year, we believe this virtual program was highly effective and will help us connect with a larger number of classrooms in our community. ⊙

NINTH CIRCUIT

COVID and Criminal Justice

On Oct. 14, 2021, the Northern District of California Chapter hosted a panel discussion with four judges to discuss the impact of COVID on criminal proceedings. The panelists were Chief Magistrate Judge Joseph Spero (San Francisco Division), Magistrate Judge Nathanael Cousins (San Jose Division), District Judge Beth Freeman (San Jose Division), and District Judge Haywood Gilliam (Oakland Division). The panel was moderated by Assistant U.S. Attorney Susan Knight (FBA VP San Jose) and Criminal Defense Attorney Randy Sue Pollock (FBA VP Oakland). The panel discussion focused on criminal proceedings in magistrate and district court and what the future looks like for both forums.

How the Magistrate Courts Responded in March 2020

Chief Judge Spero explained that when COVID shut down the courts in March 2020, the court started a "Santa Rita Taskforce," which includes the court, the marshals, federal probation, pretrial services, the U.S. Attorney's Office, federal public defenders, and the sheriff. The taskforce quickly enacted technical arrangements to allow defendants to appear in a special room at the jail by Zoom for virtual hearings with the court. Hearings for San Francisco magistrates are calendared separately from the Oakland/San Jose magistrates. Judge Spero explained that because of manpower limitations and limited jail cell space for housing defendants safely with COVID protocols at the courthouses, this procedure is expected to last for the foreseeable future.

The only anticipated change is that starting in January 2022, each division will calendar its own hearings. This will be more efficient and will make the calendars shorter. Judges Cousins and Spero both agreed that bail hearings have been difficult and that all the parties must cooperate to make it work. While some other districts are permitting defendants to appear in person if they request, this is not possible in the Northern District because of transportation and housing restrictions as well as Alameda County Health Department requirements that limit the number of defendants in a van to two.

Both magistrate judges said that the vaccination status of defendants is one of many factors they consider in determining a release. While the court has no statutory

authority to order a defendant to get vaccinated, this criterion may apply to releasing someone to a halfway house. Judge Cousins noted that not being vaccinated means that the public would be at a greater risk if a person is released.

Updates on District Court Proceedings

Judge Freeman stated that all the judges have backlogs, citing that trials for her civil cases are being set for 2024. The priority for trials is in-custody criminal cases, then out-of-custody criminal cases, and then civil cases.

The courthouses currently have capacity for three trials at a time, but the key limitation is having sufficient jurors. Presently, each division can only select one jury at a time. Initially, the jury commissioner would receive about 200 responses from 1,000 summons issued every two weeks. Now, with vaccination rates going up, the response rate is up to about 80 percent. Judge Gilliam explained that each division has a two-week interval for jury selection. During that time, the court will have several cases on standby to go to trial when there is an adequate number of jurors.

The jury selection process is up to each judge, but current health guidance in each county at the time the case is called determines social distancing/spacing requirements, so the procedures may have to be varied to comply with county health department requirements.

On the question of masks in the courtroom, Judge Freeman said that each judge makes the decision for each individual case. Judge Freeman has had four trials; three were fully masked and one was unmasked. She said that talking all day with a mask on is very difficult and exhausting.

The judges talk among themselves about the use of masks, and there is a wide variety of opinions. The judges also follow CDC guidance, so there are factors that are beyond the decision of the court. When the judges were asked if there could be standardized rules for all courtrooms, Judge Spero said there are no standard rules that apply to what judges do in their own courtrooms.

Judge Gilliam explained that while he would like more in-person hearings, any in-custody defendant proceeding takes complicated coordination. He expects it will get easier with time, but the court must study what is possible given all the parties involved and make appropriate accommodations for safety.

In discussing the use of Zoom, Judge Freeman remarked that some attorneys are not very good on Zoom. She commented that it is the responsibility of the attorneys to "appear" in court, whether on Zoom or not. They need to be dressed appropriately, be prepared, and be engaged in the proceeding.

The Future of Virtual Hearings

All the judges agreed that in-person court appearances are irreplaceable. Networking associations and lawyering happen in the courtroom when people meet one another, including the court staff. However, Judge Cousins remarked that Zoom does allow more access for witnesses and victims to be present and participate in court proceedings and doesn't present the travel and expense factors that in-person proceedings require, so there is a place to continue with using Zoom. While important proceedings will be in-person, some proceedings may stay on Zoom. ⊙

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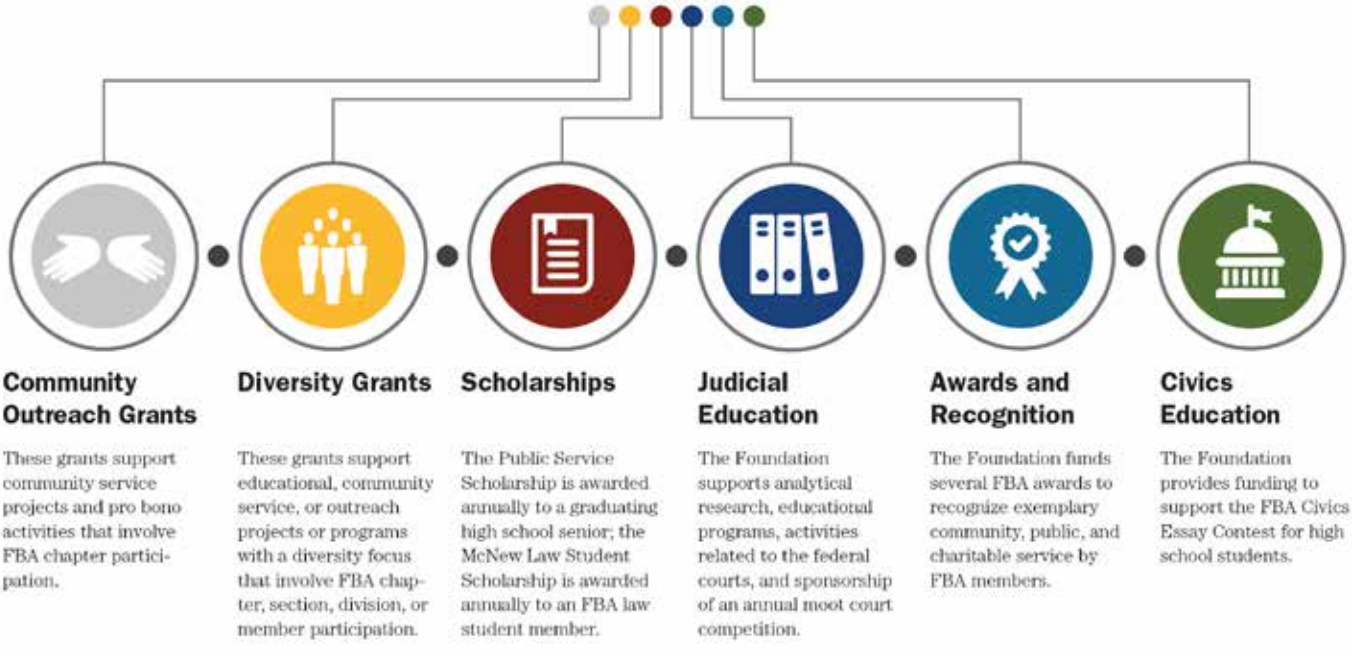

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These grants support educational, community service, or outreach projects or programs with a diversity focus that involve FBA chapter, section, division, or member participation.

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The Foundation provides funding to support the FBA Civics Essay Contest for high school students.

The work of the Foundation of the Federal Bar Association is made possible by charitable gifts from FBA members like you. Help the Foundation serve the legal community by making a gift today.

FBA Bankruptcy Committee Executive Committee members (clockwise from top left) Jon Lieberman, Angela Abreu, Judge Elizabeth Gunn, Secretary Meena Hughes, Marc Taubenfeld, Judge Alan Trust, Sally McDonald Henry, and Andrew Ballentine.

BANKRUPTCY SECTION

At its Dec. 20, 2021, leadership meeting, the FBA's Bankruptcy Section welcomed two new members to its Executive Committee—Jon Lieberman, partner at Sottile & Barile LLC in Cincinnati, and Andrew Ballentine, associate at DSK Law in Orlando, Fla. Lieberman currently serves on the editorial boards of both *The Federal Lawyer* and the *American Bankruptcy Institute Journal*. Ballentine currently serves as vice president of programming for the Orlando Chapter of the FBA. Other Executive Committee members in attendance were section chair Angela Abreu, chair-elect Sally McDonald Henry, section treasurer Judge Elizabeth Gunn, Judge Alan Trust, section secretary Meena Hughes, and Marc Taubenfeld. The committee discussed its Circuit Writer initiative, whereby section members craft summaries and analyses of compelling recent bankruptcy decisions from around the country. In addition, the committee announced plans for quarterly section newsletters as well as the section's upcoming webinar, which will be held on May 4, 2022. More details will follow. ☉

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Applicant Information ***(Please print legibly and complete both sides of the application)***

First Name M.I. Last Name Suffix (e.g. Jr.) Title (e.g. Attorney At Law, Partner, Assistant U.S. Attorney)

❍ Male ❍ Female Have you been an FBA member in the past? ❍ yes ❍ no Is this your business or home address? ❍ business ❍ home

Firm/Company/Agency Number of Attorneys

Address Suite/Floor

Phone Email Address

City State Zip Country

Bar Admission and Law School Information (required)

U.S.
*Court of Record: _____
State/District: _____ Original Admission: / /

Clerk
Court _____
State: _____

Tribal
*Court of Record: _____
State: _____ Original Admission: / /

Students
Law School: _____
State/District: _____ Expected Graduation: / /

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*Court/Tribunal of Record: _____
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Date of Birth (mm/dd/yyyy)
/ /

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Authorization Statement

By signing this application, I hereby apply for membership in the Federal Bar Association and agree to conform to its Constitution and Bylaws and to the rules and regulations prescribed by its Board of Directors. I declare that the information contained herein is true and complete. I understand that any false statements made on this application will lead to rejection of my application or the immediate termination of my membership. I also understand that by providing my fax number and e-mail address, I hereby consent to receive faxes and e-mail messages sent by or on behalf of the Federal Bar Association, the Foundation of the Federal Bar Association, and the Federal Bar Building Corporation.

Signature of Applicant ***Date***

(Signature must be included for membership to be activated)

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Federal Bar Association

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***For eligibility, date of birth must be provided.**

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- ❍ North Alabama

Alaska
- ❍ Alaska

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- ❍ Phoenix
- ❍ William D. Browning/ Tucson

Arkansas
- ❍ Arkansas

California
- ❍ Inland Empire
- ❍ Los Angeles
- ❍ Northern District of California
- ❍ Orange County
- ❍ Sacramento
- ❍ San Diego
- ❍ San Joaquin Valley

Colorado
- ❍ Colorado

Connecticut
- ❍ District of Connecticut

Delaware
- ❍ Delaware

District of Columbia
- ❍ Capitol Hill
- ❍ D.C.
- ❍ Pentagon

Florida
- ❍ Broward County
- ❍ Jacksonville
- ❍ North Central Florida–$25
- ❍ Orlando
- ❍ Palm Beach County
- ❍ South Florida
- ❍ Southwest Florida
- ❍ Tallahassee
- ❍ Tampa Bay

Georgia
- ❍ Atlanta–$10
- ❍ Southern District of Georgia Chapter

Hawaii
- ❍ Hawaii

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Illinois
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Kentucky
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Louisiana
- ❍ Baton Rouge
- ❍ Central Louisiana
- ❍ Lafayette/ Acadiana
- ❍ New Orleans–$10
- ❍ North Louisiana

Maine
- ❍ Maine

Maryland
- ❍ Maryland

Massachusetts
- ❍ Massachusetts –$10

Michigan
- ❍ Eastern District of Michigan
- ❍ Western District of Michigan

Minnesota
- ❍ Minnesota

Mississippi
- ❍ Mississippi

Missouri
- ❍ St. Louis
- ❍ Kansas and Western District of Missouri

Montana
- ❍ Montana

Nebraska
- ❍ Nebraska

Nevada
- ❍ Nevada

New Hampshire
- ❍ New Hampshire–$10

New Jersey
- ❍ New Jersey

New Mexico
- ❍ New Mexico

New York
- ❍ Eastern District of New York
- ❍ Southern District of New York
- ❍ Western District of New York

North Carolina
- ❍ Eastern District of North Carolina
- ❍ Middle District of North Carolina
- ❍ Western District of North Carolina

North Dakota
- ❍ North Dakota

Ohio
- ❍ Cincinnati/ Northern Kentucky-John W. Peck
- ❍ Columbus
- ❍ Dayton
- ❍ Northern District of Ohio–$10

Oklahoma
- ❍ Oklahoma City
- ❍ Northern/ Eastern Oklahoma

Oregon
- ❍ Oregon

Pennsylvania
- ❍ Eastern District of Pennsylvania
- ❍ Middle District of Pennsylvania
- ❍ Western District of Pennsylvania

Puerto Rico
- ❍ Hon. Raymond L. Acosta/ Puerto Rico–$10

Rhode Island
- ❍ Rhode Island

South Carolina
- ❍ South Carolina

South Dakota
- ❍ South Dakota

Tennessee
- ❍ Chattanooga
- ❍ Knoxville Chapter
- ❍ Memphis Mid-South
- ❍ Nashville
- ❍ Northeast Tennessee

Texas
- ❍ Austin
- ❍ Dallas–$10
- ❍ El Paso
- ❍ Fort Worth
- ❍ San Antonio
- ❍ Southern District of Texas–$25
- ❍ Waco

Utah
- ❍ Utah

Vermont
- ❍ Vermont

Virgin Islands
- ❍ Virgin Islands

Virginia
- ❍ Northern Virginia
- ❍ Richmond
- ❍ Roanoke
- ❍ Hampton Roads Chapter

Washington
- ❍ At Large

West Virginia
- ❍ Northern District of West Virginia–$20

Wisconsin
- ❍ Wisconsin

Wyoming
- ❍ Wyoming

Professional Chapter Dues Total: $ ____

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Nicole Cordero Gomez
Eduardo Navedo-Sanchez
Gabriel Pena
Gabriela Velez Gordillo

Massachusetts

Nieve Anjomi
Adrian Johnson
Michael Maroney
Courtney Mayo
Alan Wong

Rhode Island

Rebecca Briggs
Morgan Hedly

SECOND CIRCUIT

Second Circuit At Large

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Rachida Mecheri
Michelle Perez
Elissa Rivera

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M. Wahla*

Eastern District of New York

Nicholas Calabria
Aneeba Rehman*
Michael Vitaliano

Southern District of New York

Galen Baynes
Efram Klipper
Enet Somers-Dehaney

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Third Circuit At Large

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Clare Pozos

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Michael Berry
Joshua Wolson

Middle District of Pennsylvania

Patrick Best
Phil Caraballo

New Jersey

Benjamin Brenner
Jon Shadinger
JoAnn Thayer

Western District of Pennsylvania

Gregory Monaco

FOURTH CIRCUIT

Fourth Circuit At Large

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Shane Hursh
Mark Loftis
Andrea Saenz
Michal Shinnar
Mia Yugo

Eastern District of North Carolina

Robert Hasty
Kacy Hunt

Hampton Roads

Ross Broudy

Maryland

John Connolly
Maggie Grace
William Greene
Kirstin Hopkins
Lauren McLarney

Middle District of North Carolina

Finesse Couch*

Northern Virginia

Adrianne Blake
Lawrence Hagel
Patrick Kusiak
Scott Laurer

Richmond

Edward Bagnell

South Carolina

DeKiah Baxter
Arden Boore
Bradley Bridger
Jacqueline Buffa
Toni Marie Conliffe
Kyanna Dawson
Madison Friedrich
Emma Higgins
Jawan Hodges
William Koontz
James Land
Jillian Lesley
Jordan Lester
Matthew Looper
William MacIlwinen
Alyssa Markheim
Kennon McFalls
Kelley Mobley
Hunter Morris
William Neal
Graham Newman*
Michelle Pappas
Niki Patel
Tia Reed
Perry Rupert
William Schwartz
Gabrielle Sharp
Isabel Sink
Kathleen Stringer
Amber Thompson
Charles Thompson
Rob Tiro
Trent Turner
Robert Walters
Kristina Zervoudis

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Charles Rabon*
Sally Santiago

Western District of Virginia

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Brooks Duncan
Malissa Giles
Julian Harf
Mark Holland
John Lichtenstein
Amy Pruett
Briana Salyers
David Smith

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Fifth Circuit At Large

Angela Angotti
Graham Bateman
Randy Bruchmiller
Daniel Hatoum
Madaline King
Patsy Yung Micale

Austin

Zhao Guo

Baton Rouge

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Colton Hilgenkamp
Katherine Macfarlane
John Ray
Deidre Robert*

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Mississippi

Princess Abby
Meta Copeland
Paul Watkins

New Orleans

Yinghua Chen
Wesley Davis
Lex Kumar
John Lawrence
Matthieu RobÈrt
Robert Stassi
Anamaria Vizcaino
Justin Woodard

North Louisiana

Sheva Sims

San Antonio

Joshua Johnston
Matthew Mueller
Linda Trevino

Southern District of Texas

Gerald Birnberg

SIXTH CIRCUIT

Sixth Circuit At Large

Jessica Blake
Douglas Carey
Brent Derry
Franklin Edrich
Joseph Froehle
Clayton Jackson
Kylie Ronnow
Zachary Williams

Cincinnati-Northern Kentucky, John W. Peck

Megan Bailey
Sarah Brown
Carissa Coy
Ashley Duckworth
Bryn Ericksen
Laura Fox
Abbey Geurin
Essengo Goz
Lauren Gwyn
Kiley Harris
Natalie Hurst-Rollins
Emily Janowski
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Leah Kubala
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Perrin Long
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Zachary Porter
Hanna Puthoff
Michael Roberts
Kendra Sauro
Justin Seibert
Theodora Siegel
Carrie Stambaugh
Natasha Steele
Amy Volz
Ashley Ward
Emily Weber

Columbus

Scott Stitt

Eastern District of Michigan

Alexander Furtaw
Phillip Korovesis

Kentucky

Cody Ryan

Knoxville

Luke Ihnen
Lane Odom

Memphis Mid-South

Nicholas Barnhart
Scott Cheadle
Nery Chiles
Slayton Crowder
Christina Mulliford
Ryan Rosenkrantz
Ashley Singleton
Jonathan Swann
Cody Tolbert
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Nashville

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Northern District of Ohio

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Alexandra Eckrich
James Ewing*
Taneisha Fair
Kyle Hutnick
Doron Kalir*
McDaniel Kelly
Jeff Lazarus
Nathan Leber
Jennifer Lesny Fleming
Steven Paffilas
Julia Shagovac

SEVENTH CIRCUIT

Seventh Circuit At Large

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Tracy Crump
Morgan Drake
Garrett Fitzsimmons
Natalie Freeman
Abbey Fritz
Sherry Joseph
Kathleen Kivarkis
Callie Kutasi
Beth Palmer
Michael Vega

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Mohamed Murshed

Chicago

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Christina Farley Jackson
Christopher Grohman
Danielle Hamilton
Monica Llorente
Nicholas Reinberg
Makeba Rutahindurwa
Elizabeth Van Der Weide
Jordan Vick

Indianapolis

Kevin Bennett
Taylor Decker
Alexander Fay
William Huse

Cayla Irlbeck
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Jason Roberts
Justin Walton

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Lloyd Cueto
Kim Freter
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Bryce Pfalzgraf
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Wisconsin
Emily Capodarco

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Eighth Circuit At Large
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Brooks Severson

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Benjamin Hernandez-Stern
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Maryanne Mohan
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Kathleen March
Michael Turrill

Nevada
Devo Leichter

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Andrea Jacobs
Robert Marticello
Erithe Smith

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Aubrey Davis
Teo Dragic
Gregory Esser
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Garrett Leatham
Heidi Weinrich

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Charles Bates
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Noah Kemohah
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Catherine Chan
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Eli Milne
Caroline Olsen
Lisa Petersen
Katherine Priest
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Bentley Tolk
Landon Troester
Ashley Walker
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Cole Harper
Courtney Hogan
Cameron Kemp
Hannah Lee
Noble Masters
Jon May
George Miseyko
Roya Naghepour
Millie Price
Scarlet Riviere
Cheryl Sattler
Stephanie Segalini
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Lindsay Macmillan
Jesse Unruh

Palm Beach
Robert Allen

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Jennifer Blanco
Nicholas Cole
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Alberto Garcia Marrero
Michael Hantman
Daniel Humphrey
Marcos Jimenez
Jacob Koffsky
Lauren Krasnoff
Luis Martinez
Karen Pineda
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Tallahassee
Mark Blanton

Tampa Bay
Brandon Breslow
Jeffrey Bristol
Paul Downing
Cynthia Duncan

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District of Coumbia At Large
Daniel Meade

Capitol Hill
Ellen Lazarus
Rose Petoskey*
Courtney Walte

District of Columbia
Joseph Barloon
Jacqueline Bechara
Gregory Block
Joseph Carapiet
Tiffany Derentz
John Falvey, Jr.
William Greenberg
Kaitlyn Klass
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Matthew Lapin
Michael Mancusi
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Lauren Mittman
Kara Rollins
Jonice Tucker
Jessica Waddle
Mark Westenberger

Pentagon
John Harms*

Federal Bar Association Calendar of Events

▸ Visit **Fedbar.org** for more information.

JANUARY

JANUARY 11
John W. Peck Cincinnati-Northern KY Chapter: Federal Practice Seminar for the Southern District of Ohio

JANUARY 11
Section on Taxation: Cryptocurrency Update

JANUARY 11
Webinar: Contending with Depression as a Lawyer

JANUARY 12
Chicago Chapter: Sherlock Holmes and the Art of Evidence

JANUARY 12
Webinar: International Assets Investigation, Tracing and Recovery

JANUARY 25
Eastern District of Michigan Chapter: New Lawyers' Seminar

JANUARY 29
National Board of Directors Meeting

FEBRUARY

FEBRUARY 10–11
[VIRTUAL] Art Litigation and Fashion Law Conference

FEBRUARY 23–25
[VIRTUAL] 2022 Qui Tam Conference

MARCH

MARCH 3–4
Tax Law Conference

MARCH 14–18
2022 **[VIRTUAL]** Thurgood Marshall Moot Court Competition

APRIL

APRIL 7–8
Indian Law Conference

APRIL 27
National Board of Directors Meeting

APRIL 28–30
2022 Leadership Summit

MAY

MAY 13–14
Immigration Law Conference

JUNE

JUNE 2–3
Insurance Tax Seminar

JUNE 10
National Board of Directors Meeting

JUNE 12
John W. Peck Cincinnati-Northern KY Chapter: Federal Practice Seminar for the Southern District of Ohio

SEPTEMBER

SEPTEMBER 15–17
2022 FBA Annual Meeting & Convention – Charleston, SC

SEPTEMBER 15
National Board of Directors Meeting

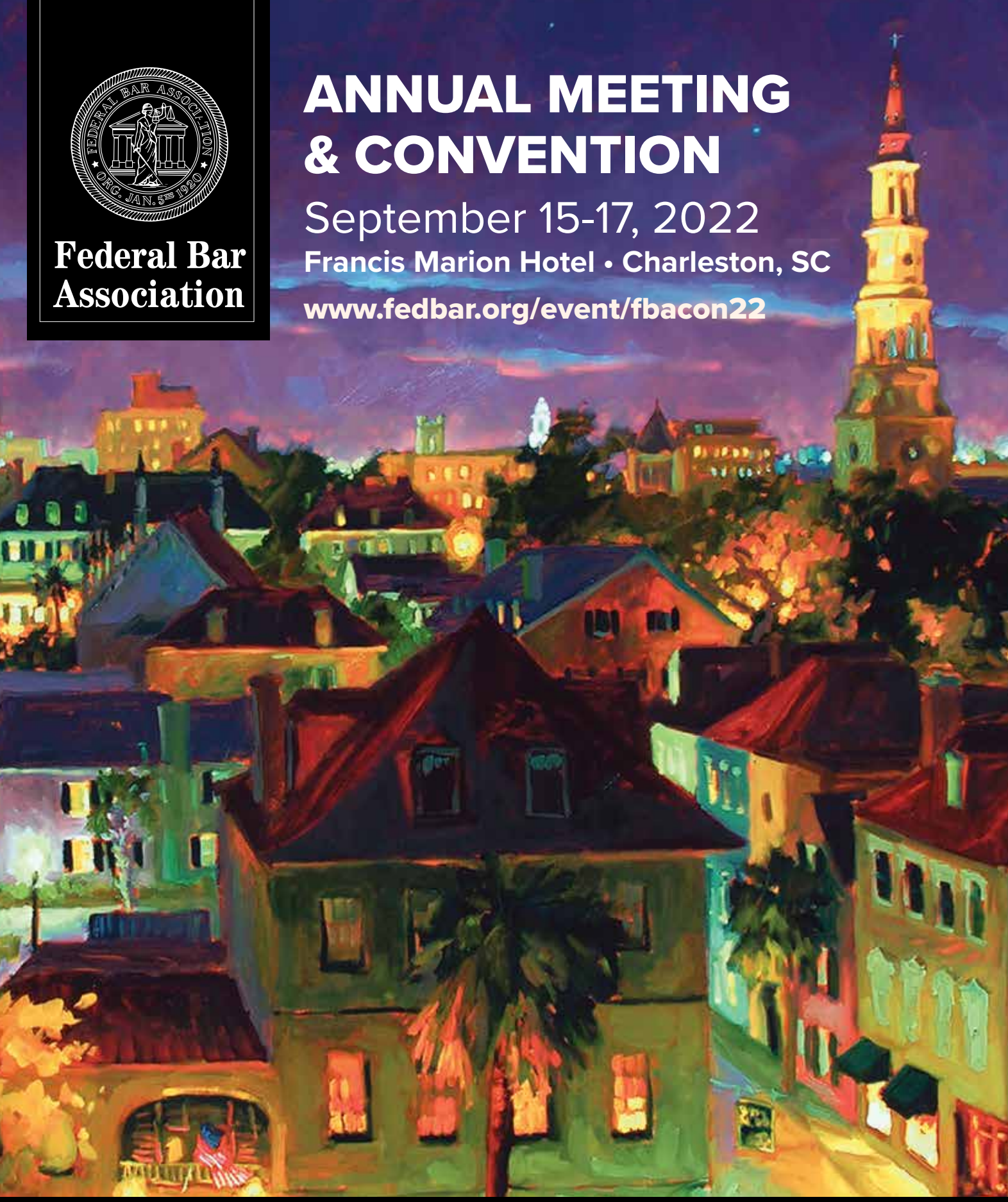
Federal Bar Association

ANNUAL MEETING & CONVENTION

September 15-17, 2022

Francis Marion Hotel • Charleston, SC

www.fedbar.org/event/fbacon22



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