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Sounds of Silence

By M. Kelly Tillery

In the last quarter century, the Philadelphia Bar Association Board of Governors has passed about 500 resolutions, some of which concern issues beyond our profession. One of the most recent, supporting action on climate change, is a good example. Others concern such issues as land mines (against), diversity (for), marriage equality (for), bullying (against), religious freedom (for) and discrimination against women (against).

Some view resolutions as worthless pontification that only placate liberal consciences. Lincoln hesitated to issue an Emancipation Proclamation until he could give it effect, telling a group of ministers on Sept. 8, 1862, “I do not want to issue a document that the world will see must necessarily be inoperative, like the Pope’s Bull against the comet.” In 1456, Pope Calixtus III supposedly had issued a Papal Bull ordering Halley’s Comet not to appear in the sky. Lincoln issued his Preliminary Proclamation two weeks later. Covering 3 million slaves, the final Proclamation of Jan. 1, 1863, had actually freed more than 1.3 million by late 1864. And the 13th Amendment, ending slavery, was born of two crusading women, Elizabeth Cady Stanton and Susan B. Anthony, who began a petition drive, just 2 ½ years before it was adopted 150 years ago, this Dec. 6.

It occurred to me that because our Association had existed for 63 years during which slavery was legal, including in Pennsylvania until 1848, perhaps it had spoken on this seminal national scourge. Unfortunately, neither our nor any other bar group ever said anything about slavery. Or about the 13th Amendment. Nor did any speak out on any other major social or political issue of the day.

To be fair, antebellum bar associations were more like exclusive social or library clubs and protective professional guilds, not having the wider mission such as that of ours today, “to serve the profession and the public by promoting justice, professional excellence and respect for the rule of law and … strive to foster understanding of, involvement in and access to the justice system.”

Trained lawyers did not arrive here until after the English “Glorious Revolution” of 1688. Parliament’s Bill of Rights (1689) inspired some English lawyers to spread the good word of “rights” to the colonies, though not to those then here enslaved.

Ours is the oldest continuous bar association in the U.S. (1802). Detroit, Cincinnati and New Orleans had bar associations, as did six slave states. Similarly, not one seems to have spoken on slavery, at least not against it.

There is, however, ample evidence of individual members of this bar who bravely spoke out and litigated cases that helped erode and bring about the eventual demise of the slave power.

Philadelphia jurist John Meredith Read’s (1797-1874) public stance against slavery expansion cost him a seat on the Supreme Court when President Tyler withdrew his nomination in 1845 due to Southern opposition.

In 1851 Philadelphia lawyers Read, Brown, Theodore Cuyler, Joseph J. Lewis and W. Arthur Jackson secured acquittal of a white miller in the celebrated treason trial arising out of the Christiana Riot in which a large group of blacks and whites prevented the U.S. Marshal from capturing a fugitive slave.

Other Philadelphia lawyers such as Horace Binney (1780-1875), Jared Reed Ingersoll (1749-1822), John Sergeant (1779-1852), Evan Lewis (1782-1834), George H. Earle Sr. (1823-1907) and William Morris Meredith (1799-1873) were publicly active in opposition to slavery.

And at least five of our first six Chancellors, acting as individuals, strongly and publicly opposed slavery. The second, Peter S. DuPonceau, (1760-1844) spoke out, but against abolitionism, not slavery.

The silence of some such as Chief Justice Benjamin Chew (1722-1810), John Dickinson (1732-1808) and even the first “Philadelphia Lawyer,” Andrew Hamilton (1676-1741), may be, in part, because they each owned slaves for a time.

In 1860, there were 33,193 lawyers in the U.S. (no women, only four black), 2,414 of whom in Pennsylvania. Only a
handful spoke out. And an even smaller number took action.

There is no record of any lawyer among the 2,000 settlers of Jamestown, Virginia on Aug. 20, 1619 when “20 and Odd Negroes,” slaves from Angola, first arrived on a Dutch ship. And there is no record of anyone objecting on that day or any day for a long while thereafter.

This, the first time slavery was brought to mainland America, was the crucial opportunity for someone to speak out and say, “No!” What a different world we might live in if just one person, particularly one political, business, religious or legal leader, had had the guts to say, “No. Not here!”

There also arose no hue and cry from any Philadelphians, lawyers or not, in 1684 when the British ship Isabella offloaded the first 150 African slaves on our Delaware River docks. Most were purchased by Quakers at auction at the London Coffee House at the southeast corner of Front and High (now Market) Streets, a frequent gathering place for members of the bar.

Ninety years later, Thomas Paine (not a lawyer), who for a time lived across the street, was one of the first to speak out in his first essay, “African Slavery in America” (March 8, 1775).

Great public apologies began in 1077 when Henry IV apologized to Pope Gregory VII for political conflicts with the church, but there has been an explosion in the last 25 years. The U.S. has apologized for internment of innocent Japanese Americans in World War II and doing ghastly experiments on African-Americans at Tuskegee Institute, but it has never apologized for slavery.

The Senate (2009) and House (2008) passed different apology resolutions but, unsurprisingly, could never agree on common language. President Clinton expressed regret for the slave trade (1998), but there has never been a formal government apology.

Some say apologies are as useless as resolutions. But perhaps it is time for the nation to do so. And, perhaps for our Association as well, for not standing up and saying, “NO!” as its first act, in 1802.

Of course, no officer or member of ours or any association pre-1865 lives today. But that is likewise true of officers, directors, employees, stockholders and leaders and citizens of entities which have apologized for involvement in and shared responsibility for slavery.

In the last decade, numerous disparate entities have apologized, including the City of London, Ghana, Benin, Wachovia, J.P. Morgan, Aetna and Lehman Brothers.

In 2005, Philadelphia enacted a law requiring those doing business with the city to research and disclose any historical ties to slavery, though not mere silence in the face of it. Lest you think these corporate mea culpas were a result of the soul-searching of repentant executives, know that most were a result of a similar 2003 Chicago ordinance.

But this is not about slavery. Or apologies. It is about silence. In the face of injustice.

John Stuart Mill’s “marketplace of ideas” cannot produce truth, wisdom and effective solutions unless and until we actually come to market and ascend the soapbox.

Whether we heed Eldridge Cleaver, “If you’re not part of the solution, you’re part of the problem;” Albert Einstein, “If I were to remain silent, I’d be guilty of complicity;” Dr. Martin Luther King Jr., “In the end we will not remember the words of our enemies, but the silence of our friends;” or Paul Simon, the sounds of silence speak volumes.

As members of the bar, we are privileged to have special powers that come with heavy responsibility, not only to our clients, but also to our community, nation and planet. If we remain silent, we fail. ■

M. Kelly Tillery (tilleryk@pepperlaw.com), a partner with Pepper Hamilton LLP, is Editor-in-Chief of The Philadelphia Lawyer.
Law as Both Advocacy and Art at Bench-Bar at Borgata Oct. 16-17

This year’s Bench-Bar & Annual Conference at Borgata in Atlantic City, N.J. will feature two attorneys who have brought national attention to the law in distinct ways. Benjamin Crump, president of the National Bar Association, and Marshall Goldberg, former general counsel to the Writers Guild of America-West, will be this year’s plenary speakers.

Crump, a partner at Parks and Crump, LLC in Tallahassee, Fla., is perhaps best known for his advocacy in the Trayvon Martin case, the Martin Lee Anderson Boot Camp case and the Robbie Tolan Supreme Court case. He will open Bench-Bar on Friday, Oct. 16 with a fireside chat, speaking with Rachel E. Branson, special advisor to the Chancellor, on how to “breathe” new life into the due process system. Crump is a frequent speaker and author, and he has been featured on the BET network and on NPR. He was the first African-American president of the Federal Bar Association for the Northern District of Florida, the first African-American chairman of the Florida State College of Law Board of Directors and the first African-American chair of the Tallahassee Utility Commission. Crump has also been recognized as one of The National Trial Lawyers Top 100 Lawyers, Ebony Magazine Power 100 Most Influential African Americans and bestowed the NAACP Thurgood Marshall Award and the SCLC Martin Luther King Servant Leader Award.

Goldberg, currently an adjunct professor at Stanford Law School and University of Michigan Law School, spent 24 years writing and producing television shows, television movies, screenplays and an animated feature. He will open the session on Saturday, Oct. 17 speaking on how writers put together compelling stories and how attorneys can apply those insights. Before his show business career, Goldberg served as counsel for the U.S. Senate Judiciary Subcommittee on Constitutional Rights where he was lead counsel on the extension of the Voting Rights Act of 1965. In 1979, he moved to Los Angeles and wrote and produced shows like “Paper Chase” and “L.A. Law.” Most recently, he served as the Writers Guild of America-West’s deputy executive director. Goldberg has been a Humanitas Prize and Writers Guild Award finalist.

A total of 23 CLE seminars where attendees can earn a minimum of 8 credits are available at this year’s Bench Bar & Annual Conference. More than 400 judges and attorneys are expected to attend at Borgata. For more information, visit benchbar.philadelphiabar.org.

Job Market Improving for New Lawyers

Nearly one-third (32 percent) of lawyers surveyed said their law firm or company plans to increase its hiring of entry-level associates in the next 12 months. Five percent of lawyers said they expect to decrease hiring while 60 percent anticipate no change in hiring activity.

The survey was developed by Robert Half Legal, a legal staffing and consulting services firm specializing in lawyers, paralegals and other highly skilled legal professionals.

While job responsibilities may vary, certain skills are deemed essential for new associates. Nearly half (48 percent) of lawyers surveyed said analytical or critical thinking abilities are the most important skills for entry-level lawyers to possess, aside from legal knowledge.
Interpersonal skills ranked second, with 32 percent of the survey response. "As the economy gains strength, law firms and corporate legal departments are expanding their teams to pursue new business opportunities," said Charles Volkert, executive director of Robert Half Legal. "While the legal job market has yet to return to pre-recession levels, hiring prospects for new lawyers are improving as employers recruit first-year and summer associates to support busy practice groups."

To enhance their marketability, job seekers need to highlight in-demand skills, such as critical thinking, problem solving and team collaboration, on their resumes and during interviews, Volkert added. "Pursuing additional training or enrolling in continuing legal education programs can help early-career professionals gain expertise in these areas and excel in today's competitive environment," he said.

Investment Strategies - Active Versus Passive

Investors seem to be questioning the value of active investment strategies amid weak relative returns, concerns about transparency, and other issues. According to The Wall Street Journal, in 2014 investors took out almost $99 billion from actively managed U.S.-stock mutual funds – even as they put $71 billion into passive ones. It appears investors are re-evaluating their investment strategies, but are they necessarily making the appropriate choices?

A passive investment strategy seeks to match the returns and risks of an index by mirroring its composition. An active investment strategy involves a manager using his or her insights to make investment choices to help meet a client’s objectives.

On the plus side, passively managed index funds have low expense ratios. These low costs can mitigate the reduction of returns due to expenses. Also, this strategy is typically much simpler than actively managing investments, as there are no decisions on the part of the investor beyond selecting the index. However, although the costs are typically lower than those associated with an active strategy, passive investing still has them, including trading costs and taxes. In addition, passive investment strategies must inherently underperform their benchmark, even though the stated goal is to track the index performance as closely as possible.

Investors should also understand that there is a limited range of investment choices with a passive strategy, and likely no qualitative oversight of the markets – an option only available with active investing. Finally, passive investors should be aware of the "valuation trap." That is, buy and sell decisions are automatically brought about when the composition within the index changes. Thus, when a stock is experiencing a run-up in price, a capitalization-weighted passive strategy would increase its exposure to that stock, regardless of its merits.

The key advantage to active investing, first and foremost, is the possibility of beating the benchmark, an option unavailable to passive investors. Also, managers can take defensive measures with a portfolio, potentially insulating against a downturn. In a similar vein, an active manager can properly diversify holdings and help protect against market drops.

Simply put, active managers create more investing opportunities. With experience and seasoned judgment, these professionals can identify opportunities that may boost an investor’s returns. In addition, strategies can be created based on criteria ranging from financial metrics (such as return on equity), to geography, to ethics (such as socially responsible investing).

Of course, having a person or team manage an investment portfolio may cost more, which can reduce the return, and mandates that managers target a return above the benchmark just to match it. Also, there is the potential for errors. Even
a skilled manager is capable of making an error in judgment. However, this risk can be mitigated by carefully choosing and vigilantly monitoring the investment manager.

Confronted with numerous options, investors may focus on past performance as the sole determinant when selecting an investment manager, often overemphasizing recent performance. Instead, we believe an investor should employ an approach that evaluates both quantitative and qualitative factors that can help identify the performance potential of an investment manager over time.

In our view, an investor should purchase investment products with a goal in mind, taking into account the different costs and benefits of each. For many investors, a combination of both active and passive strategies may be the best course. However, despite the recent pushback against active strategies, it is clear to us that some investors can benefit from active management.
Consider this scenario: You represent Mary Jones in an employment-related lawsuit against the Stephens Company, where Mary had worked for many years. Her performance had always been excellent. When Mary turned 55, the Stephens Company increased her workload, and assigned her to a different supervisor, who was highly critical of her performance. Mary’s new supervisor, Ellen Wilson, hired numerous young employees, whom she openly favored.

Mary no longer had contact with her prior supervisor, Bob Harrison, with whom she worked very well. After a few months of working for Ellen, Mary was fired. Her employer said it was letting her go because of her unsatisfactory performance and her failure to work well with her co-workers. In response, Mary filed an age discrimination claim and this lawsuit.

After she was fired, and while the lawsuit was pending, Mary’s old supervisor, who had also left the company, contacted her. He said he wanted to “give her information that would make her case a slam dunk.” Mary immediately called and asked you to meet with Bob.

Are you ethically permitted to contact Bob? And if so, must you interview Bob with counsel from the Stephens Company present? The Philadelphia Bar Association Professional Guidance Committee recently addressed this situation in Opinion 2014-3, and concluded that (1) you may contact Bob and (2) you are not required to notify counsel for the Stephens Company.

In its Opinion, the Committee cited Pennsylvania Rules of Professional Conduct Rules 4.2 (“Communications with Persons Represented by Counsel”), 4.3 (“Dealing with Unrepresented Person”) and 4.4 (“Respect for Rights of Third Persons”) and Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Formal Opinions 90-142 and 2005-200. Regarding Opinion 2005-200, which addressed only changes to Rule 4.2 since the Committee issued Opinion 90-142, the Committee concluded, *inter alia*, that:

(a) The rule applies to any “person” represented by counsel in the matter, even if that person is not a party to litigation.

(b) An attorney may need to seek a court order granting permission to contact a represented person or entity in exceptional circumstances.

(c) A lawyer is not prohibited from advising a client concerning communications the client might have initiated with the opposing represented party.

(d) Counsel may generally communicate with former employees of a represented organization.

(e) When an organization is represented by counsel, the opposing lawyer may not communicate with a person “who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.”
The Philadelphia Bar Association Opinion agreed with these conclusions. In doing so, the Committee explained that Rule 4.2 was amended to “explicitly remove former constituents from the category of persons deemed to be represented by corporate counsel. These former constituents, therefore, are treated as unrepresented persons with whom attorneys may communicate subject to the ethical obligations set forth in Rule 4.3. This Rule and its comments do not require an attorney to advise a former constituent – or any unrepresented individual – that they have a right to refuse to be interviewed or to be interviewed with company’s counsel present.” Consequently, the Committee concluded that attorneys communicating with unrepresented former constituents are not required to affirmatively advise them that they have a right to refuse to be interviewed or to be interviewed with company’s counsel present.

Opinion 2014-13 explains that there is no requirement in the Rules of Professional Conduct or the accompanying comments that an attorney seeking to interview an unrepresented individual is obligated at the outset to affirmatively advise Bob that he has the right to refuse to be interviewed. But, to the extent that you, the lawyer, recognize that Bob does not appreciate your role, Rule 4.3(c) requires you to make reasonable efforts to clarify your role. Depending on the circumstances, you may have to advise Bob that he can end the interview, but such advice is not required at the opening of every such interview.

The Professional Guidance Committee also referred to State Farm Mutual Automobile Ins. Co. v. Sanders, Civ. A. No. 12-3052, 2013 U.S. Dist. LEXIS 137829 (E.D. Pa. Sept. 25, 2013). In this case, State Farm alleged that the defendant had engaged in “systematic and widespread” medical insurance fraud, and sought discovery from former employees of a law firm that represented more than 100 of the defendant’s patients in personal injury lawsuits. The Court denied the defendant’s request for a protective order preventing State Farm from directly contacting those former employees. In its decision, the Court specifically relied upon the express language in Comment [7] to Rule 4.2, that consent “of the organization’s lawyer is not required for communication with a former constituent,” and refused to impose any additional conditions on the discovery.

The Professional Guidance Committee also explained that the communications you desire are “subject to the overarching provisions of Rule 4.4(a), that prohibit a lawyer from using methods of obtaining evidence that violate the legal rights of third persons or that have no substantial purpose other than to embarrass, delay or burden a third person.”

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Judge Margaret T. Murphy was appointed by the Pennsylvania Supreme Court as Administrative Judge of the Family Division of the Philadelphia Court of Common Pleas on December 1, 2014. Prior to her appointment, Judge Murphy had served as the Supervising Judge of Domestic Relations since 2006. In her 30-year career in Philadelphia’s Family Court she also served as a Permanent Master in both divorce and support matters and then as the Deputy Court Administrator of Domestic Relations from 1996 until being appointed to the bench in November of 2000. Judge Murphy received her master of law in taxation from Villanova University School of Law, her juris doctorate from Widener University School of Law and her bachelor’s degree from Chestnut Hill College.

SHABREI M. PARKER: Let us talk about the new Family Court building in all of its splendor, the Family Court Help Center, the case backlog and how it’s been addressed and any other interesting story you want to share.

JUDGE MARGARET T. MURPHY: I think that the attorneys have been so pleased and delighted coming into the new Family Court that I’ve had several occasions where they’ve sent emails just saying “what a difference.”

Recently, a few of the judges in the building, Judge Irvine and Judge Thompson, allowed some students to come in through the Philadelphia Bar Association’s Lawyer For a Day program. It was beautiful to be able to have a dozen students come into a courtroom and sit down. In the old courtrooms over at 34 South 11th St., you couldn’t fit that many people in. It just wasn’t feasible. That is the truth. The other thing is that when you get into the courtroom, you feel like you’re in a courtroom. And many of them have secure adjacencies directly next to the courtroom for the holding cells, so that incarcerated defendants can go directly from the cell block to the courtroom. Since we have individuals that are defendants in protection from abuse petitions who are also being held on aggravated assault or attempted murder charges, we are now able to provide a much more secure setting for litigating the civil protection from abuse cases than was previously available at 34 South 11th St.

You’ve spoken a lot about the domestic relations department. What is it like to have the reunification of the juvenile branch and domestic relations branch?

What we have done is really transformed the way we existed by now co-existing. The interesting aspect about that is that I believe each type of case brings a certain personality to it – be it attributable to the attorneys or the litigants. We now
have a blend of our domestic relations cases along with our dependency and our delinquent cases, and that has been a very smooth transition – much to my surprise.

For example, your child custody case today can easily be your dependency case tomorrow. Or you can transform a dependency case into a custody case if you provide the right resources to the family so that they can be deemed to be fit and able to deal with their own situation, transferring that case back to the custody section. Custody cases can become dependency cases, because the resources were not available to a family who just needed help. Our next step, the big step, is going to be locating and securing resources for families, and making sure we help the families in Philadelphia benefit from access to resources that they otherwise would have been isolated from until their children became the subjects of a dependent or a delinquent matter.

Since Philadelphia has such nominal filing fees, the courts don’t have the finances to provide those sorts of resources. Do you foresee any way that we could get those dependency resources available sooner?

Everything that is provided as a resource, either through the statewide child support program or by DHS in dependency or delinquency matters, is regulated by some funding stream with strict legal terms and restrictions. So, as long as you can
properly identify available preventive services and provide a family with access to those preventive services, or any other resources that are permissible for a family to access, you can open a door to resources that Family Court has never been able to previously provide to families in the domestic relations section.

Financial resources aside, I believe that we've got a resource that's just getting off the ground. I want to talk about the Help Center. I understand that the Help Center is a brain child for pro se litigants. How did it come about?

In 2009, I began participating as the representative of Family Court on the Civil Gideon Task Force. Part of that Task Force was for our Family Law Section and the court to come up with a project that would benefit the citizens and the users of our system through our own Civil Gideon project.

In 2009, I began participating as the representative of Family Court on the Civil Gideon Task Force.

After struggling with various concepts for a few years, we were determined to develop a Civil Gideon project that would fit the practice of family law, that involves attorneys who are already volunteering. So we finally decided to open the Help Center, to provide litigants with a place to acquire legal information, primarily regarding child custody cases. We started by making available in the Help Center sample forms and brochures for every type of domestic relations case. Going forward, we hope to add all of the forms for adoptions, another area where people come in to the courthouse and ask a lot of questions regarding procedure and process.

Then we had to figure out how attorneys could provide volunteer services, but not assume representation of an individual seeking information. Basically, our volunteer attorneys just give advice to litigants on the legal process. The reason that providing unrepresented litigants with information on the procedure became important was because of the volume of repeated
filings in custody cases that really were inappropriate filings, or filings that didn't give an attorney or an unrepresented person a clue as to what the petitioning litigants wanted or the purpose of the litigation. Currently, the Help Center is staffed daily with volunteer attorneys from noon to 3 p.m., who assist individuals seeking information regarding child custody cases.

**Last year, there was a backlog of a few months that had led to a number of changes within the court, and I believe that it was addressed. A lot of those cases had been listed and the previous practice of scheduling litigants to come back and make their filings in a few months has dissipated. Tell me about how we're addressing all of those administrative hurdles now that we've gotten to this place.**

Before we moved, we faced a backlog in processing our custody cases. Since we have relocated to 1501 Arch St., we've made it a budgetary priority to hire four additional custody masters, which will greatly enhance our complement of custody masters. We previously couldn't increase the number of masters because we had no room to do so. We also want to see how we could better introduce the concept of mediation. Assuming people really want to pursue mediation, we would like to have the ability to provide it, if financially feasible to do so.

Right now, we do have mediation available, but not for the thousands of cases that we handle. What you have to anticipate when you introduce a concept such as mediation, is that you must be able to actually provide it. The other resource that we've never actually had even an opportunity to consider was parenting programs and whether or not we should start adopting that type of a program to give people an opportunity to be offered some training that could possibly prevent them from having to come to court for 18 years of their child's life to resolve their differences.

**I was just going to ask you about what innovations you have, but it sounds like you have them in the pipeline.**

Yes, we have quite a few. We have concerns about the
dependency caseload, because there have been new changes in the law where now there are additional requirements of more people who are mandated to report what could be abuse. There are many more mandated reporters and as a consequence, we anticipate that there will be a greater volume in our dependency caseload. We’ve also decided to hire a new dependency master who we want to assist us in focusing on our permanency initiatives. We are also making it a priority to identify and resolve our uncontested termination cases to avoid children unnecessarily languishing in placement. We want all kids to have a fair shot at a future.

I know that you take your role as Administrative Judge very seriously, and it sounds like you have a lot of great ideas. Did you see the potential for such growth coming when you took on the position?

I knew if we could only get to a place, a location where we could combine the courthouses and have a little spare room to grow, that the opportunities would open. I think that having struggled so long, having spent 23 years of my life at 34 South 11th St., I’m anxious for the opportunity to have a chance to grow and a real chance to see how we could make family court even better. The possibilities are endless as long as you’re willing to reach for them.

However, if one of the goals we set doesn't work, we will regroup and work toward reaching another goal. No one has the perfect answer and the interesting part of this job is that there is so much to learn. No matter what you know, there's so much you don't. Each day, a new issue arises that can really chart your course where you otherwise never thought you would go – be it a change in the law or be it just a development in a change of philosophy for kids.

How have the other judges responded? Have they met with the same kind of innovation and inspiring attitudes?

Most of our judges have been in their respective sections for several years, and they work extremely hard every day. I think they are driven by this line of work and most of the judges here love this work.
Is there anything that you know now about your role as Administrative Judge that you wish you’d known when you were going into it?
I can’t say that there’s anything I wish I knew. I think I’ve always known that no matter how long or how well-versed you may be in any area of the law, there is always so much more to learn and so much more to understand. And the thrill of this position is that there is a whole new chapter waiting for me to try and open it, study it, conquer it and do something with it so it’s better than it was when I started the book. That’s what I’m excited about. There is just nothing dull about this line of work. It might be because people are so interesting, and they are.

Shabrei M. Parker (Shabrei@minceyandfitz.com) is an associate at Mincey & Fitzpatrick, LLC.
When I was a young associate with a large Philadelphia law firm in 1980, I got my first secretary. It was the luxury era of IBM Selectric typewriters in which each lawyer, including associates, had his/her own secretary. Before I met her, the office manager alerted me that she looked just like Sophia Loren. And she did. Turns out that she was also an outstanding secretary and eventually, a good friend. But she had a past which she sheepishly disclosed to me one day almost out of the blue. She had worked for years for a then elderly, prominent Philadelphia lawyer who I had encountered on occasion. She was his typist for his secret “hobby,” writing steamy, pornographic novels and stories. She was amused by my then wild and carefree yuppie bachelor life in Center City, but her past explained why she blushed at nothing I told her.

I was bemused but thought no more of this curious experience of my new assistant until a few years later, by which time I had started my own firm with two partners and my secretary. I got a call from a gentleman who said he was an advisor to many businesses. When I asked what kind, he simply said, “adult.” My secretary laughed when told and said her experience might be very helpful to these new clients.

So in my first foray into the world of “adult” businesses, I was asked to represent the “Adult Entertainment Coalition,” a group of Pennsylvania businesses who sought to challenge a new law that restricted the manner in which adult films could be shown. The Coalition’s advisor had come to me as a result of seeing press reports about some of my victories in intellectual property cases on behalf of famous musical artists. I guess he thought if I could protect the intellectual property of Madonna, I could do the same for Marilyn Chambers. Well, I did once represent Barenaked Ladies.

Anyway, I was somewhat leery and knew my more conservative partners would be concerned, so I asked for a huge retainer. To my surprise and delight, a check appeared the next morning. Although I tried mightily to craft a viable theory under Federal Copyright Law to undermine this Puritanical Pennsylvania law, it was simply not possible. Cognizant of the admonition of J. Paul Getty to his lawyers, “Don’t tell me I can’t do what I want to do. Tell me how I can do what I want to do,” I hesitated to tell my new clients that I could not accomplish what they wanted me
In this new era of Internet porn, I was shocked to hear that anyone was still buying an X-rated movie made in 1972, much less bothering to counterfeit it.

to. Businessmen so often see lawyers as impediments, naysayers. But, as we sometimes must, I said no. So I sent the Coalition my opinion letter and a firm check for more than half of the retainer which I had not had to use.

My new clients were stunned. Not that a lawyer had told them they could not do what they wanted to do (and without a “how to” either), but that a lawyer would return any part of a retainer, much less more than half.

This led to a plethora of more clients and matters in almost every aspect of the “adult industry.” Only recently, that same Coalition advisor observed, in connection with a new case, “Win, lose or draw; you are still the best. I am certain of this. The first time I met you, you didn’t tell me what I wanted to hear but I knew what you told me was correct and this is more important than appeasing someone and giving them false hope.”

While I had represented some clients in the film industry such as Universal Studios, Steven Spielberg’s Amblin Entertainment and George Lucas’s Lucas Films, I had never handled a matter involving an adult, X-rated film. But since I had lots of experience successfully pursuing counterfeits in a wide variety of industries, I guess it was natural for The Mitchell Brothers of San Francisco, producers of the Marilyn Chambers (the original Ivory Snow girl) “classic,” “Behind The Green Door,” to turn to me for help when their film was being widely counterfeited.

In this new era of Internet porn, I was shocked to hear that anyone was still buying an X-rated movie made in 1972, much less bothering to counterfeit it. I was soon educated by those in the trenches of this unique and interesting industry. Seems that in the pantheon of porn, there are four “classic” films – “Deep Throat” (1972), “Behind The Green Door” (1972), “Debbie Does Dallas” (1978) and “The Devil In Miss Jones” (1973), all which still sell (and are counterfeited) briskly.

After several filings and an equal number of embarrassed federal judges, I made the world safe for the “classic” film “Behind The Green Door” and, of course, also the inevitable “Behind The Green Door – The Sequel” (1986). My mother was so proud.

The adult industry also includes the manufacturing, distribution, advertising and sale of a wide variety of devices and substances, many of which require/invite intellectual property protection, whether patent, copyright, trademark, trade dress and/or trade secret. And I have had cases involving all. Many such items, previously available only at the likes of Doc Johnson’s, now appear on the shelves of your neighborhood Rite Aid, albeit discretely near the pharmacist. Some are even advertised on network TV in highly suggestive ads. We have come so far.

A client once invited me to a “trade show” at his enormous warehouse in a God-forsaken, urban wasteland of a former industrial neighborhood. I thought I had seen it all. Turns out I had no clue. I still cannot conceive of (and do not want to think about) what one does with/to most of what I had seen.

And I met many actual porn “stars.” Let’s just say that sometimes you do not really want what you think you do. Sometimes it is better that a fantasy remain a fantasy.

My legal skills were not always utilized on behalf of adult businesses, sometimes against them. While the Philadelphia Police regularly arrest street walkers, inexplicably the City Paper and The Philadelphia Weekly include page after page of ads for prostitutes and “massage parlors.”

A few years ago, I read in one of those papers that legendary cellist Yo Yo Ma was to appear the next day at the Academy of Music. A few pages later, there was an ad, with a picture of a comely, scantily-clad young Asian woman, for the “Yo Yo Ma Spa.”

Since Mr. Ma earns a rather handsome living teasing angelic notes from the depths of his 1712 Stradivarius, I thought it unlikely that he had branched out into massage parlors or that he had licensed his name to these “masseuses.”

So, on the evening he appeared at The Academy, I had a letter hand delivered to him alerting him to what appeared to be an unauthorized use of his famous name.

Sure enough, the next issue of that urban paper included no further ad for the “Yo Yo Ma Spa” and shortly thereafter, I received a letter of thanks from Mr. Ma’s management who obviously had taken measures to stop the illegal use of his name.

One of the fun aspects of IP law is that it presents frequent opportunities to seek or defend against motions for preliminary injunctions. There is nothing like the exhilaration of basically preparing for and trying a case in just a few weeks or sometimes days. Most fun you can have with your clothes on! Oftentimes, the injunction card is played as a clever gambit to force resolution of an otherwise vanilla commercial dispute by getting the matter before a judge quickly and ahead of all others. Such as it was for my licensee client in a seemingly mundane licensing dispute over royalty payments and scope of use under a license. What made it unusual was that the license was for the sale...
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The judge closely examined several “Exhibits” paying particular attention to the “instructions” on the packaging. She turned to counsel and inquired as to why a work of art had “instructions” and was “dishwasher safe.”

of “reproductions” of male porn stars’ “equipment.”

The licensor sued for copyright infringement claiming it owned copyright rights in and to each of these “works of art” and had even registered them with the Copyright Office. Well, as criminal defense lawyers say that prosecutors can get a grand jury to indict a ham sandwich, IP lawyers know that lots of things that are not copyrightable get through the Copyright Office.

I had learned in 1978 from Professor Paul Bender at Penn Law School that in order to be copyrightable, a work had to be “an original work of authorship” and it could not be functional. So, I argued that these “works” were merely slavish copies/castings of human body parts and thus, not original. And, that if they had any “author,” it was either God or the actors’ parents, not the Licensor. Further, these items were clearly “functional” as used for sexual gratification, not works of art.

My opponent, a rather stylish gent, bearing a large gym bag filled with “exhibits,” creatively and amazingly, with a straight face, argued that his client’s “works” were indeed “works of art” as they constituted “an homage to the male phallus” – a phrase I never imagined I would hear, must less in a Federal courtroom. As titters rolled through the courtroom filled with observers from a local college, I thought of the scene from Stanley Kubrick’s “A Clockwork Orange” wherein Malcolm MacDowell assaults a homeowner with a huge white sculpture, more arguably such an “homage.”

The Judge was less amused or distracted. She was a middle-aged, woman and had once been an Oakland, Calif. police officer, so I figured she had seen everything. Non-plussed, she asked my foppish opponent to bring forth his “exhibits” so she could examine these “works of art” for herself. As he eagerly delivered several packaged items to the bench of this Article III Jurist, I stood by quietly knowing my work here was done. A good lawyer knows when to stand down.

The judge closely examined several “exhibits” paying particular attention to the “instructions” on the packaging. She turned to counsel and inquired as to why a work of art had “instructions” and was “dishwasher safe.” The licensor’s counsel reluctantly acknowledged that his art “homage” could also be used for other purposes. Case closed. Motion denied. ConWest Resources, Inc. v. Playtime Novelties, Inc., 2006 WL 3346226, 2006 U.S. Dist. LEXIS 85461, 84 U.S.P.Q. 2d 1019 (N.D. CA. 11/17/06) - a reported case which copyright law legend William Patry observed “should immediately make its way into copyright casebooks.”

Media reports say that Viagra® is the nation’s #1 recreational drug. Thus, it is no surprise that enterprising businessmen would seek to counterfeit it and/or replicate its effects using a non-drug dietary supplement, not subject to the rigors of the FDA drug approval process. I recently encountered the latter in a preliminary injunction motion. The owner of a federally registered trademark for “STIFF NIGHTS®,” for a “male sexual enhancement herbal supplement,” one Erb Avore (yes, his real name) sought to stop a couple of clients from selling product they had purchased in the marketplace claiming it was counterfeit.

As these things are wont to occur, the hefty filings were dumped on me by my clients about 48 hours before the Preliminary Injunction Hearing. Scrambling to investigate the facts and law, we found that plaintiff had not sold any product in two years because his supplier was under indictment for allegedly including an analogue of the active ingredient in Viagra® in his product and the plaintiff’s principal was an indicted co-conspirator. And, it turned out the papers filed included little, if any, evidence of wrong doing on the part of my clients.

So, I first demanded that plaintiff produce the affiant to testify live and be cross-examined at the hearing. And I contacted the U.S. Attorney handling the case who was very interested to know that a man he was still investigating might be testifying and being cross examined in court in a civil case on the very topics pertinent to his investigation. Needless to say, the affiant did not show, plaintiff could not prove its case and the motion was denied. More than one way to skin a cat. Or make the world safe for STIFF NIGHTS.

Comment 5 to Section 1.2 of the Pennsylvania Rules of Professional Responsibility provides that, “Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client’s view or activities.” As I like to say, everyone is entitled to intellectual property protection.

While some may not approve of the adult industry, it is, like all other industries, including cigarettes, guns, and alcohol, entitled to intellectual property protection.

M. Kelly Tillery (tilleryk@pepperlaw.com), a partner with Pepper Hamilton LLP, is Editor-in-Chief of The Philadelphia Lawyer.
WHO SAID RETIREMENT’S A WALK ON THE BEACH?

Building Your Next Chapter and Calling it Your Own

By Michael M. Coleman

My last day of full-time employment (FTE) after 45 years in the legal community was Sept. 30, 2011. My departure was preceded by articles in The Legal Intelligencer and Philadelphia Business Journal announcing my new positions. Before starting, I climbed Mt. Kilimanjaro to celebrate my 70th birthday.

FAQ #1:

What’s life like after retirement (the big "R")? The answers are good, OK, not so good. R is like life itself with highs and lows, good and bad. For many lawyers, R will not be a “walk on the beach,” literally or figuratively. It’s challenging to leave the structured known for the unstructured unknown. It was for me.

In the beginning, I avoided use of the R word and chided others when asked. I equated R with being dead, which I was not. After more than three years in transition, I’ve finally become less sensitive about the question.

LESSON #1:

There’s no playbook for the transition from FTE. No one size fits all. Each of us has different DNA, personalities, etc. Each of us must chart our own course. The more you know about what you need to feel good in this new stage, the easier your transition will be. Be as honest and introspective as you can. A successful transition process takes hard work and patience. If you don’t want to go through it alone, get help from an experienced family member, friend or transition counselor. It will make your process easier.

I knew my transition would be challenging. I’ve had two careers. The first was practicing law. In 1985, I left my Pepper Hamilton partnership for a legal recruiting career. I founded Coleman Legal Search Consultants (today, Coleman/Nourian), where for 26 years, I helped lawyers transition from one legal job to another. When I left, I knew I was leaving much more...
Don’t waste time, especially since most individuals, after FTE, are in the final third of their lives.

than a job. Prior to leaving Pepper, I knew I needed something to build and call my own. Starting my firm was my career game changer, an event that defined me and gave me my business chops, identity, self-esteem and community respect.

Given how much fulfillment and personal growth I experienced from legal recruiting, I wondered whether I’d find similar satisfaction after FTE or become irrelevant. Because I had a new wife (in addition to turning 70), I knew I was making the right decision to leave FTE when I did. Nevertheless, I still had concerns about whether it could work.

**LESSON #2:**

To get started, take what you know about yourself and, together with your strongest-known interests and priorities, compile your menu of activities.

The parts of me that were most relevant to getting started were the following: As a morning person, I need planned morning activity. I like structure and focus. Each night I like to know my plans for the next morning. In my early transition, I wanted to be over-scheduled. I also wanted some income stream. Ideally, I wanted to work four mornings a week, leaving afternoons and Fridays open. With that knowledge, I was ready.

An attractive opportunity developed before I left FTE. A prominent lawyer I knew started a legal boutique and asked me to join as a strategic advisor. I accepted his offer to work on a part-time basis.

I also added a second part-time activity. I approached my alma mater, Penn Law, to join its Career Planning Office to counsel alumni, utilizing my legal recruiting experience. Penn welcomed me.

I was enthused with my choices, as each represented something new. The end result – one worked, one didn’t. After two months, I left Penn. I concluded it wasn’t working (through no fault of Penn). Because the situation wasn’t going to improve for six months (which represented too much unproductive time), I decided to move on.

**LESSON #3:**

Zealously guard your time. Don’t waste it, especially since most individuals, after FTE, are in the final third of their lives. As the philosopher Seneca wisely said, wasting time has the effect of shortening your life. If a new activity isn’t working, drop it and try something else. A trial-and-error approach
means just that – some choices work and others won’t. The benefit is that you learn more about yourself from each effort.

After leaving Penn, I used my newly freed-up time to pursue my interests in theater, film, arts education and mentoring, interests which accelerated after I founded Philadelphia Volunteers for the Arts (PVLA) in 1978. Through my work with the Philadelphia Theatre Company, I met the head theater teacher at CAPA (the city’s premier performing arts high school). That meeting led to the creation of my position as advisor to CAPA’s after-school theater ensemble.

Through my association with the University of the Arts (UArts), I audited a contemporary drama course. I also became actively involved in Philadelphia Young Playwrights, an education program that helps develop storytelling skills in area schools. I also reached out to the Philadelphia Film Society (PFS) to facilitate new connections between PFS and local schools. These activities have continued throughout my transition process.

Other activities I pursued either didn’t work or I chose not to continue them. Nevertheless, each provided something of value and contributed to my process.

LESSON #4:

With FTE ending and a new chapter beginning, think more openly, flexibly and broadly about which new opportunities to explore and which people to get to know. Your new chapter represents unlimited opportunities to help others, give back and feel good. By applying that approach, I achieved a positive impact for students at CAPA.

When I first went to CAPA, my “advisory” role was more that of an observer. Over time, I stepped up my participation but was still skeptical about whether it was the best use of my time.

As is want to happen, something unexpected then occurred. CAPA, like other Philadelphia schools, was severely affected by the school budget crisis. I developed a strong desire to help but wasn’t sure what would be impactful. After considerable effort and applying my community connections, I initiated several actions with positive results. The first was to connect CAPA with its neighbor, UArts, an institution also dedicated to the arts. As a result, a collaborative partnership has begun with CAPA students benefitting in numerous ways. I also brought theater professionals to CAPA to give workshops to supplement classroom learning and, finally, introduced lawyers to the CAPA Foundation (newly created as a result of the school crisis) to provide legal counsel and business connections.

LESSON #5:

Once you’re no longer practicing law, allow yourself to remove the filters you utilized to advance your legal career. You worked hard to build a reputation and your financial resources. You made choices and sacrifices to reach your professional goals. Hopefully, you accomplished what you
If you love golf or tennis and want the sport to consume your primary activity, your transition work is largely done.

LESSON #6:

After you leave FTE for a new life stage, recognize that the differences between old and new require you to adjust expectations, make different choices and get accustomed to living without the characteristics of your prior life.

Shortly after leaving FTE, I went to a big firm reception. I always looked forward to such events because they represented excellent business opportunities. I approached this event like previous events. In hindsight, I should have considered my changed circumstances. I was no longer a player. I was just Michael Coleman, R. The event was a good but painful learning experience.

FAQ #2:

How do I figure out how to occupy my time? The answer again starts with knowing yourself. If you love golf or tennis and want the sport to consume your primary activity, your transition work is largely done. Many others, including myself, don’t share such interests. I like sports and leisure activities for exercise and vacations, but not for a life focus.

Choosing how to spend your time should be the fun part. Here are some categories to get started: identify your interests; people to reconnect with; teaching (including courses and places to teach); courses to take; organizations to join, work at or support; books to read; lessons to take; places to visit; projects to undertake; collections to begin; ways to give back as a mentor or volunteer; updating your bucket list. If financial considerations require paid work, then finding a job becomes a priority.

After selecting your “first round” categories, go back and narrow your list into a smaller, workable group. Once done, take your chosen generic categories and convert each into something specific within that category. That is, select the specific organization you want to join, the place you want to visit, etc.

A final consideration relates to the role you want to play. Some want to lead because leading makes them feel better about their involvement and achievements, provides recognition and makes them less dependent on others. Others don’t want the responsibilities of leadership. While the choice you seek undoubtedly will change over time, choosing the right role for personal fulfillment is always important to keep in mind.

LESSON #7:

Once you’ve selected your lineup of specific activities to start your transition phase, congratulate yourself and start to enjoy them. However, don’t expect your choices, once made, to remain intact. Be prepared to make changes over time because of changed circumstances. Some choices will have a natural end date. Others will start well but diminish in interest. Others may never live up to expectations or no longer fit your priorities. And that’s OK.

I was fortunate. After I left Penn at the beginning of my transition, I settled into a routine for three years of planned time, four mornings a week. I left to devote more time to my personal interests. With mornings now free, I’m again trying to create a new structure and focus for myself.

This notion of periodic shuffling, while characteristic of this new life chapter, is unlike the practice of law where the outline and structure stay largely the same, even though the daily routine is varied. Many people, and particularly lawyers, dislike frequent change, including a need to make periodic choices to modify a schedule that took so much time to put together. It’s easier to acclimate if you equate the adjustments to tweaks, not seismic shifts.

FINAL LESSON:

Occasionally, re-examine what’s important for your personal fulfillment and happiness. If you’re uncertain about the answer, think about your past accomplishments and identify those factors that made you feel good. While those factors may be different than what they are today, they also may be the same. Whatever they are, seek opportunities and roles with those current factors in mind. Having identified them, you’ll find choosing the right activities and roles easier the next time around.

I’m currently trying to make a major adjustment to my menu. I’m applying the above principles. In my re-examination, I identified the common elements in my proudest life accomplishments. In each situation, I had taken a leadership position. I’m again looking to add one significant project that I can lead. Wish me luck as I wish you when your R time comes.

FINAL, FINAL LESSON:

R is an ongoing learning process. It never stops. But at least there’s no homework.

Michael M. Coleman (coleman.mmc@gmail.com) is a former partner at Pepper Hamilton LLP and founder of Coleman/Nourian. He is currently semi-R, serving as a transition counselor, mentor and avid supporter of the arts and arts education (primarily theater).
SPOTTING ATTORNEYS IN DISTRESS

Before It’s Too Late

By Maya J. Brown

Laurie Besden doesn’t look like a woman who needed 55 pain pills a day just to function.

“I share my personal story, and everything is factual. The facts are what they are,” the deputy executive director of Lawyers Concerned for Lawyers (LCL) disclaimed at the beginning of her story, which to some may sound like something out of a Lifetime movie. She recently spoke to members of the Philadelphia Bar Association’s Women in the Profession Committee.

Laurie opened by explaining that her notion of a drug addict when she was growing up was a “guy with long hair in a Metallica T-shirt.” Laurie experienced what she described as the “first taste of euphoria outside of myself” during a routine dentist appointment when she was no more than 10 years old. After receiving a standard dose of nitrous, Laurie remembers feeling paralyzed. Rather than being scared, she tried to figure out how to intensify the feeling and get more nitrous. This would be the first of many drug abuses that ultimately led to her losing her freedom in 2004.

Laurie graduated from the University of Maryland College Park with a Bachelor’s degree in criminology and criminal justice in 3.5 years with a 3.97 grade point average. Before graduating, she began experimenting with alcohol. Laurie lived in a suite with five other girls. On Thursday nights, they would go out and drink so heavily that she resorted to taking naps in the public restroom stall the next day at her internship with the Silver Spring (Md.) Parole and Probation Department. Laurie also admitted to drinking in the shower (in
After college, Laurie began dating a doctor’s son. While in his home, she found Vicoprofen. As Laurie described it, she was “diligent in her theft – take just enough so they wouldn’t know if they were missing.” What should have been another red flag indicating Laurie had a serious problem went unnoticed.

The first encounter with LCL came when Laurie was a first year at the Dickinson School of Law at Penn State University. She recalls sitting in orientation listening to an LCL representative speak, annoyed, thinking, “We’re in law school, do they even know who we are? What is this drugs and alcohol?” During the mandatory program – she wrote a note to the student next to her that read, “this is a waste of time.” The school had a keg in the curtilage following the presentation and Laurie was already there, in her mind.

LCL is an independent, nonprofit corporation run by judges and lawyers for the benefit of the Bench, Bar and law students. LCL is made up of men and women in recovery from stress, anxiety, depression, bipolar, substance abuse, alcoholism, addiction to medication or other drugs, problem gambling, eating disorders, compulsive behaviors and various emotional or mental health disorders. “We understand these illnesses and we understand the pain, fear and frustration of the lawyer or judge who is in distress. We offer nonjudgmental, discrete and confidential assistance,” according to LCL’s website.

In her third year of law school, Laurie’s addiction reached new, dangerous heights. While on winter vacation in Miami with her boyfriend, a law student, Laurie, experienced ecstasy for the first time. This was her first taste of recreational, non-prescription drugs. “I did it. I was hooked!” Laurie explained. Also in year three of law school, Laurie was involved in a car accident that resulted in a minor leg injury. She used the non-life threatening injury to convince the emergency room doctors to give her Vicodin. Even after the pain from the accident had subsided, Laurie found herself using multiple identities to order the pain pills from the pharmacy in Texas. She even wore doctor’s scrubs during her bar exam with 25 pain pills in the pocket. “I didn’t realize at that time, I actually needed them to breathe,” Laurie said. She was taking three 10-milligram pain pills each hour during the exam.

After passing the bar, Laurie began an appellate court clerkship. During this time, the pill use not only continued, but her tolerance increased. The DHL deliveries were, at the time, delivered to chambers. Laurie assured the staff the deliveries were vitamins. By this time, the deliveries were coming in Laurie’s name, her mother’s name and even her dog’s name.

“I did the best I could with my job. Although when the one-year clerkship came to an end, I was told that I was the only employee ever to use every sick and personal day,” Laurie said. By the middle of the clerkship in December 1999, Laurie was taking 40 pain pills a day simply to function, breathe and appear normal. Unbeknownst to Laurie, this would soon come to an abrupt stop.

One day, when Laurie called to refill her prescription from the Texas pharmacy, she was told the doctor that had been prescribing her pills had been suspended and that no more prescriptions would be honored. Laurie remembers thinking, “I have a 40-pain-pill-a-day habit. What am I going to do? I needed to find a way to continue this. I thought I was so unique and no one would ever understand what happened. I still thought I could get myself out of it.”

She then became the doctors and called in prescriptions in very large unheard of quantities to pharmacies from Collegeville, Pa., to Margate, N.J. Her situation continued to escalate. One night, Laurie ended up experimenting with cocaine with a friend. Before she knew it, she was calling the friend’s drug dealer – looking for more.

At this time, Laurie was beginning another one-year clerkship in Philadelphia. She was down to 110 pounds and remembered times she would go to meet with judges while dressed in sweaters, sweating in the summer. She had been awake on cocaine for four days at a time. Laurie reflected on the days she would enter the Criminal Justice Center with cocaine and Vicodin on her person with no regard for the drug dogs or for possibly killing someone while driving to and from work. She said she “was no longer capable of thinking rationally.”

At the conclusion of that one-year clerkship, Laurie was unemployable. She did nothing but “the getting of drugs, using and planning to get more.” Laurie described this time as “being in a personal prison and feeling death was the only way it would ever end. I would look outside and see life going on and all I wanted was to be that person that actually woke up, walked my dog and went to any job and did not need drugs
to breathe.” She feared it was too late and there was no way out. In the years following, Laurie was arrested five times – four for felony prescription fraud and one for driving under the influence of drugs. She was involved in 29 car accidents and spent time in three rehab facilities and was incarcerated three times. The final incarceration was in Montgomery County. Laurie’s family sent her to rehab but she eventually re-violated.

January 29, 2004 is a date Laurie Besden will never forget. It is her sobriety date. She was being arrested for her second violation and she knew it was over when Plymouth Township Police came to her home to arrest her for violation of her probation. When Laurie was being arrested, her father answered a phone call from J. David Farrell, a local LCL volunteer who was informed by John Carroll that “there was a Montgomery County attorney that may be in trouble.”

When Laurie arrived at the police station, she received a call from Dave. When she picked-up the phone and asked, “Who is this?” Dave replied, “You don’t know me, I’m with LCL. John Carroll told me to find you and go see you. I’m an attorney. I’m 30 years sober. I’ll tell you when I get there.”

Laurie finally met Dave when she was notified she had an attorney-visit while sitting in jail. He walked up to her whistling and said, “I’m a drug addict 30 years sober. I am also an attorney and volunteer with LCL. I’m going to stick through this process with you. This is what we do at LCL.” Dave later spoke at Laurie’s sentencing hearing. She was sentenced to 11.5 months in jail. She recalls thinking Judge Carpenter was throwing the book at her because she was a lawyer. Laurie later realized that she could have been sent upstate for many years instead.

After serving her time and a short stay with at the Caron Foundation, Laurie began to get her life back in order. With Dave’s help, she was attending support group meetings, filing for bankruptcy and even getting a job as a paralegal. However, Laurie had an obligation to report her series of unfortunate events to the Disciplinary Board. The result of her report was a three-year joint suspension in New Jersey and Pennsylvania.

During her suspension, Laurie became a volunteer with LCL. She became one of the people LCL would call upon in Montgomery County who would reach out to an attorney in need who was struggling with addiction. She recalls one story that she will never forget. “I ended up getting a call to follow-up with a woman who had a daughter and was struggling with drug addiction. The woman was detoxing herself at home and told me it would be most helpful if I could deliver a pizza for her teenage daughter.

“I was like, ‘I can do that!’ So, I did. I told the woman’s daughter: ‘Oh it’s your 10th one, it’s free.’ That woman is sober today and now one of our volunteers at LCL. That was 2006.”

It eventually came time for Laurie’s reinstatement hearing. Dave was one of five people who spoke on her behalf. The others were her mother, her sponsor, a partner in the law firm where she worked and the Plymouth Township detective who arrested her. After an eight-hour hearing, she received the news that she was unanimously recommended to be reinstated in Pennsylvania. New Jersey followed suit. Laurie later contacted Judge Carpenter, who sentenced her and thanked him, telling him, “Never underestimate how powerful your job is. You literally saved my life.” In fact, she presented him with one of her 10-year medallions.

Laurie is now the primary contact for intervention services at LCL and JCJ. She speaks at many of the county bar associations across the Commonwealth, participates on panel programs with the Pennsylvania Bar Association, speaks at the orientations of the nine law schools, presents at professional responsibility classes and hosts “student hours.” She has graciously shared her story of recovery with the Hearing Committee members of the Disciplinary Board to show that recovery is possible. She was on a panel with Judge Carpenter at the Criminal Justice Symposium in June 2015. During student hours she is available on campuses for students to come speak with her in a private, tucked-away room. She noted that helpline statistics are up 40 percent as a result of the “student hours program.”

Laurie said LCL pays for an evaluation with a health care professional and says people can remain completely anonymous. “We handle anything substance use/mental health disorder. We will accommodate anyone willing to get help. As long as someone is still breathing, there is hope,” she said.

In 2013, LCL received 305 hotline calls. Of the 91 calls that were intervention calls, 79 of those people were approached and accepted help. Laurie emphasized the importance of calling LCL/JCJ if you have concerns about your colleagues or family members. She said, “In 2013, 79 people were helped because a third party cared enough to call and help someone they were concerned about.” Laurie encouraged the attendees at the program to be that person. “No one has ever been turned down for treatment if they are willing to get help. If someone does not have insurance and no other options to fund treatment – LCL applies to the M. Patricia Carroll Fund,” Laurie said.

“The moral of the story is addiction does not discriminate. I am proof of that. Recovery does not, also. I am not unique; I was very blessed that John Carroll reached out to Dave Farrell and that Judge Carpenter sentenced me to the option of a new life,” she admitted.

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In mid-April, I was fortunate to be selected by the American Council on Germany as a participant in a five-day German Immigration Study Tour. I joined a diverse group of academics, immigration and other attorneys, journalists, policy advocates, a state court judge and government officials from 14 different states.

There was some bit of irony in having been chosen; after all, my organization HIAS (Hebrew Immigrant Aid Society) Pennsylvania worked for decades to assist European immigrants fleeing anti-Semitism, and of course, played an active role in post-Holocaust resettlement. But more than 70 years have passed and there have been massive changes in Germany and the world. I realized this was an excellent opportunity to learn more about the country and about comparative immigration policies.

After arriving in Berlin by air, I traveled by bus and subway to my hotel. My first impressions were how comfortable an English speaker could be in Germany; almost everyone spoke the language and signage was generally in English and German. The buses and subway were used by a cross-section of the population who happily and freely offered advice about directions when I asked. As I walked toward the hotel I heard Spanish and Italian conversations, underscoring the reputation of Berlin as an international city.

It is difficult to imagine that 25 years ago Berlin and Germany were divided, when today the chancellor of all of Germany, Angela Merkel, was formerly from East Germany. Berlin is a thriving city of more than 3 million people; my hotel was located in what was formerly East
Walking through the "Memorial to the Murdered Jews of Europe," also known as the Holocaust Memorial, near the Brandenburg Gate.
Berlin. There are wide boulevards and trees and many cultural institutions. Berlin has three opera houses and beautifully reconstructed government buildings with simple and striking designs containing huge windows and open, lighted spaces. Our intense schedule did not allow much sightseeing – we were in meetings from 8 a.m. to 9 p.m. We did visit the Jewish Museum, where its unique architecture such as its outdoor “garden of exile” which creates a sense of unbalance so visitors experience the instability and turmoil brought about by forced migration and persecution.

IMMIGRANTS IN GERMANY

Germany is undergoing a demographic shift; 20 percent of the population of Germany has an immigrant background and currently close to 10 percent of Germany’s 82 million people are foreign citizens. Immigrants generally reside in urban areas; in some major cities, 70 percent of the children have parents with immigrant backgrounds. Most of the immigrants – 36 to 40 percent – come from other European Union countries. With the economic downturn in Spain, Greece and Italy, many professionals arrive in Germany seeking work. Another dominant group includes ethnic Germans, many of whom lived in Eastern Europe or the former Soviet Union for generations and were permitted to migrate to Germany following World War II. Jewish people from the former Soviet Union were also allowed to emigrate; the Jewish population in Germany is now 200,000. A large proportion of foreign-born are Turkish nationals and their descendants, consisting of about 4.5 million residents, or 5 percent of the population.

A significant group of immigrants are asylum seekers. Asylum requests can take up to five years or longer to resolve. Germany is second only to the U.S. in the number of those requesting asylum; an estimated 64,000 individuals requested asylum in Germany compared to 74,000 in the U.S. in 2012. Germany tightened its asylum laws in 2005, but even with new restrictions, there are 3 1/2 times more asylum seekers proportionally in Germany than in the United States.

The situation of those of Turkish descent led to early debates on immigration policy and immigrant integration. Recruited as guest workers in the 1960s and 70s, both Turkish residents and the German government expected the influx of the new workers to be temporary. With an increasing number of migrants and a downturn in the economy, Germany ended the guest worker program in 1983 under Chancellor Helmut Kohl, although family members of those already in Germany continued to come. “My parents talked as if our suitcases were packed and we would soon leave,” explains Özcan Mutti, a spokesperson for the Alliance ‘90/Greens party. “Now, we are entering our third generation and realize we are here permanently.”

Our group met with 18 present or former members of the government from three mainstream parties – Christian Democratic Union (CDU), Social Democratic Party (SPD) and the Greens, along with a media commentator and NGO
leaders. All representatives were extremely knowledgeable about the U.S. and sensitive to events, expressing sorrow at the Boston Marathon bombing, which occurred during the visits. There was general agreement across party lines on the need to maintain the European Union, the importance of trade with the U.S. and the need to view Germany as a “welcoming” country. On this last point, there was a consensus that Germany faced a demographic challenge that required immigration. Germany has an aging population, and only 1.6 children per family – 1.3 for German women. Thirty percent of all German women chose not to have children. There are labor shortages in the health care/aging field, among IT professionals and in engineering.

The differences among Germany’s political parties turned on the extent to which the government was dealing with public and institutional resistance to immigrants and embracing diversity. Most of the Turkish leaders we met were members or leaders in the Greens party, which has taken a leading role in pushing for immigrant rights. One incident that often came up was the trial of a member of a Neo-Nazi group responsible for the murder of eight people, largely of Turkish descent between 2000 and 2007. There was a feeling that government officials underestimated the strength of right-wing groups, and focused their investigations on minority communities instead. Another cause of concern was a 2010 book by banker and former SDP politician Theolo Sarrazin that was on the bestseller list. The author argued that immigrants are harming German culture, and that Turkish immigrants and others from Africa or the Middle East had lower intelligence. Given Germany’s Nazi past that declared the superiority of the “pure” German race, the popularity of the book dismayed many in the establishment, not to mention ethnic communities.

Both Germany and the United States are grappling with immigration policy, molded around different histories and culture but cognizant of the global realities. Several areas struck me as important to compare – who can enter legally; enforcement regimes; diversity and the integration of newcomers; and citizenship.

**WHO GETS TO COME**

“Germany is now an immigrant country – but the issue is how to bring in quality immigrants,” Karstein Voight, a former member of Parliament and coordinator for German-American Cooperation at the German Federal Foreign Office, told our delegation. Germany’s immigration policy is almost wholly based on labor needs. Many of its provisions that affect non-European Union immigrants became operational only in the last two years. Members of the EU are allowed to work in Germany without a residence permit; for all others it is required. Borrowing from the U.S. jargon of “green cards,” Germany now issues temporary resident permits or “blue cards” which lead to permanent resident permits provided a person has a job offer. If the intending immigrant has a college degree and the job offer exceeds a significant salary threshold, the foreign national’s spouse receives a resident permit. If the foreign national has a university degree, the job does not infringe on German labor, and the wage is less than the threshold amount, then the path to permanent residency is longer and the spouse must demonstrate a basic knowledge of the German language BEFORE emigrating. The government has begun training courses for nurses in selected countries like Vietnam; those trained will gain a resident permit. Non-graduates who have an employment contract in areas of labor shortage can also earn a temporary resident permit. This is the first time in 40 years that less-educated workers from non-EU countries can achieve permanent residence.

In contrast to Germany’s emphasis on labor immigration, the core of U.S. immigration policy is the family. Annually, about 700,000 immigrants enter the U.S. and earn permanent residence under family sponsorship. The Senate immigration bill (S. 744) proposed by the “Gang of Eight” moves us slightly closer to the German model. The bill expands the
number of H1-B visas available to those with a bachelor’s degree or specialty occupation from 65,000 a year to between 110,000 and 180,000 and also creates a “merit” or point system where immigrants who are more highly educated, speak the language and have ties to the U.S. can immigrate without a job. Agricultural workers are favored in the bill and can achieve permanent resident status in five years and citizenship in 10 years. There is an acknowledgement in S. 744 that close ties to the U.S. and family unity continue to be valued. Children, known as “Dreamers” can achieve citizenship in five years if they arrived before the age of 16, completed high school or GED, and have two years of college or four years of military service. S. 744 provides an arduous 13-year path for individuals who are undocumented. Initially, such immigrants would receive Resident Provisional Immigrant (RPI) status and after 10 years can apply for permanent residency. Currently individuals with “green cards” who sponsor children and spouses have a five-year wait before their spouses and children can emigrate legally. Under S. 744, green card holders would be able to bring them to the U.S. immediately. However, in exchange for these new routes to permanency, S. 744 abolishes the ability for parents to petition for married children over the age of 31 or for U.S. citizens to sponsor their siblings. Abolishing the ability of some family members has been criticized by many immigrant advocates, as extended immigrant families often become a supportive unit that leads to self-sufficiency.

ASYLUm SEEKERS

Under an agreement known as the Dublin Accords, Germany has a right to return asylum seekers to the European country where the seekers first arrived. Recently Germany has opted to retain asylum seekers who arrived in Spain and Greece and made their way north, due to the economic downturns faced by those nations. Asylum seekers are not permitted to work but are entitled to housing and social welfare benefits. In the United States those applying for asylum can neither work nor access public benefits.

IMMIGRANTS AND SOCIAL WELFARE

One member of our delegation observed that even with Germany’s policy changes it is more difficult to gain

Being an unauthorized immigrant in Germany is a crime; but the status alone is not a priority for the police; they prioritize violent crimes, arson and racial/ethnic tensions.
residency in Germany than the U.S. But in Germany, asylum seekers and those who obtain resident permits gain access to many social welfare benefits. While permanent migration to the U.S. may be easier than to Germany due to family sponsorships, immigrants in the U.S. are generally expected to fend for themselves and denied social welfare. This principle of barring immigrants in the U.S., including lawful permanent residents and those who work legally, from social welfare benefits is reinforced by S. 744. Immigrants in RPI status, up through permanent residency, are prohibited for 13 years from receiving any means-tested public benefits, including subsidized medical insurance. Indeed, S. 744 goes even further; immigrants in RPI status cannot be unemployed for more than 60 days or earn below the poverty level in order to remain eligible for the legalization program.

IMMIGRATION ENFORCEMENT

The Immigration Department of the German Police in Berlin is located in a former Nazi SS building. Climbing the stairs to meet members of the police in the old structure was unnerving. The visit by contrast, revealed a rather kind and thoughtful perspective on enforcement of the immigration laws. Being an unauthorized immigrant in Germany is a crime; but the status alone is not a priority for the police; they prioritize violent crimes, arson and racial/ethnic tensions. The police do extensive outreach into the community as a means to gain trust. If they discover an undocumented person, the immigrant is referred to federal authorities, but deportation is rare. In 2010 only 7,500 people were deported from Germany; many immigrants who are not considered dangerous are allowed to stay in a humanitarian category, and may be eligible for some public benefit support, and after a period of time can gain a resident permit.

In the U.S. enforcement is at an all-time high. In 2012, $18 billion was spent on border control and internal enforcement. In 2011, it was estimated that half of all federal criminal cases concerned immigration violations. In the past two years, more than 800,000 people have been deported from the U.S. The trend to continue enforcement is captured by the proposed Senate bill, which requires a border control plan to be in place before provisions leading to legalization can be implemented.

DIVERSITY AND INTEGRATION

Tensions around diversity are intertwined with ethnicity and religion. Germany is evolving into a multi-faith country, with a significant Muslim population; Islam is the third-largest religion in Germany. Religious practice in the Turkish community varies from secular to observant, but on the whole Muslims are more religious than other denominations. Turkish talk show host Ali Aslan shared that the issue of religious pluralism was heightened after Sept. 11. “I went to bed a Turk and I woke up a Muslim” as perceived by the larger society he explained. The concept of being a “German Muslim” is being addressed through a government funded German Islam Conference and by supporting instruction of Islam in schools and the training of imans. The U.S. Embassy also promotes interfaith relations in a popular program that hosts films and programs bringing together immigrants and native Germans. Another component is the development of a media campaign that embraces diversity. Brochures and a website with the theme “make it in Germany” depicts Germans of different races and nationalities in various activities. The media campaigns and new policies lay the groundwork for a new German identity. The unanswered question is whether the German public will accept a multicultural society.

The U.S. is further along in embracing diversity. It is common to be proud of a hyphenated American identity, such as African-American or Chinese-American. Immigrants of color either in our delegation or Germans with whom we spoke who had been to the U.S. all reported feeling more comfortable in America. One Southeast Asian member of our delegation who grew up in Germany, completed high school there, and then moved to the U.S. said that to this day Germans are shocked to hear her speak German. She felt more accepted in the U.S. where an immigrant background is shared by so many Americans.
A cornerstone of Germany’s more open immigration policies is a mandatory 660-hour language and civic integration course that is required of most foreign nationals before they renew their resident permits. “Speaking the same language and accepting the basic values of the receiving society are basic requirements for maintaining societal cohesion,” explains one government publication. To their credit, the German government generally funds these courses. Mekonnen Mesghena, an Eritrean German from the Heinrich Böll Foundation, had a more critical perspective. He explained that integration meant the government wants to make immigrants speak and act like traditional Germans; however, he pointed out that immigrants need opportunity, not just integration.

Education in Germany is highly segmented. There are three general “tracks.” First, is the academic track where students attend “gymnasium” as a preparation for university study. Next is a middle track, the realschule. The last is a general educational track known as hauptschule; these students are not expected to enter university. Immigrants, including a large number of Turks, dominate the third track and many don’t complete their high school education. Decisions about which track to enter are made when the child is 10. Several representatives, particularly those representing minority communities, thought the track system poses a major obstacle in promoting immigrant opportunity and was discriminatory. When talk show host Aslan was asked by the delegation if Germany needed an affirmative action policy to break out of the tracking system he immediately replied, “no, our situation is much different than the history of slavery and the African-American experience in the U.S.” He urged systematic change that involved more flexibility in students’ course of study. Since each of the 16 German states governs its own educational system, reform is dependent on each state’s willingness to engage in changing the status quo.

The U.S. is only recently examining immigrant integration on a federal level. There are few federally funded programs that encourage integration; newcomers become integrated through the labor market or by taking courses offered by local schools or agencies. Our current policies require a knowledge of English at the stage when someone applies for naturalization, not when they receive permanent residence status. The Department of Homeland Security provides some grants to schools or nonprofits to prepare individuals for the citizenship test. But the number of hours of instruction most programs can provide with the funding – from 20 to 40 hours – is far below the 660-hour requirement in Germany. If comprehensive immigration reform is achieved, that might change. Under S. 744, immigrants granted RPI status for 10 years, must demonstrate knowledge of English before they are eligible for a “green card.” Whether there will be additional resources allocated for English instruction is not clear. At this time, English language instruction and adult education has been left largely to the state and local governments. S. 744 sets up an Office of Citizenship and New Americans to promote additional programs.

CITIZENSHIP IN GERMANY AND THE U.S.

For a long time, Germany relied primarily on *jus sanguinis* – or citizenship by blood or ancestry. Under this doctrine, a person had to be born to a German. The principle of *jus soli*, enshrined in the 14th Amendment, guarantees citizenship to any person born on U.S. soil. One of the criticisms of the German model is that many minorities continued to live outside the mainstream because of the difficulties of the naturalization process. In 2000, the German policy on citizenship became more like the American one when it passed a law that permitted individuals who are born to non-Germans who have lived in the country legally for eight years to acquire both German citizenship and the citizenship of his or her parents. When the person is between 18 and 23 he or she must choose the citizenship desired. The citizenship policy potentially can have a dramatic effect on immigrant integration and empowerment. Since its passage, more than 1.4 million people have become German citizens.

**MOVEMENT TOWARD EACH OTHER: SOME FUNDAMENTAL DIFFERENCES**

If Germany and the U.S. are moving toward each other in the areas of labor immigration and citizenship, I ended my trip treasuring two pillars of U.S. immigration policy. The first pillar is the U.S. traditional emphasis on family unification. Immigrant families provide economic and social security to each other, especially in our system where the government plays a limited role in providing benefits to newcomers. The second pillar is the 14th Amendment of the U.S. Constitution and the gift it bestows on each person born in our country – the right to be treated like everyone else, even if one’s parents are foreign-born. These fundamental principles have served as a mechanism for acceptance and integration of newcomers and continue to define the U.S. as a nation of immigrants.

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1. All the information is taken from notes and materials given to delegates during the trip by public officials or policy experts.

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Earlier this year, the Young Lawyers Division invited fourth-, fifth- and sixth-graders in Philadelphia elementary schools to create posters based on this year’s Law Week theme, the “Voting Rights Act of 1965.” Prizes were awarded during Law Week, April 27 to May 1, to students with the best posters. Here are the first-, second- and third-place posters from the contest, all from Anna L. Lingelbach School.

First Place: Kaylee Corbin, “We Need You - Every Vote Counts”
Second Place: Zahirah Johnson, “You Vote Let’s Party”
Third Place: Sean Allen, “What We Need Is Love and Your Vote”
Rationalists, wearing square hats
Think, in square rooms,
Looking at the floor,
Looking at the ceiling.
They confine themselves
To right-angled triangles.
If they tried rhomboids,
Cones, waving lines, ellipses—
As, for example, the ellipse of the half-moon—
Rationalists would wear sombreros.

Those lines are the last canto of a poem called, “Six Significant Landscapes.” They were written by a staid New England lawyer who specialized in construction bonds at the old Hartford Accident and Indemnity Company. His secretary typed his poems as he dictated them. He lived all his working life Hartford, Conn., my hometown.

In a long time, he lived across the street from a wonderful park, took his daughter skating on the park’s pond in winter and walked with his wife in its rose garden when it was in bloom. He hunted and fished in Florida with his pals. He lived a long, respectable and respected life. He lived, worked and raised his family without glory, tragedy, catastrophe or a defining event.

But he managed to win a Bollingen Prize, two National Book Awards and a Pulitzer Prize and was arguably the best American poet of the 20th century (with all respect to T.S. Eliot, who arguably is more influential and famous but didn’t live or write in America). His name is Wallace Stevens.

There is no compelling explanation for the weight of his poetry or any window into the inner life of the mind that could produce it. We can’t even guess. Charles Reznikoff, another American poet with a law degree (he practiced very briefly), liked to cite the Tung Dynasty poet, Wei-Ta’i, that “Poetry presents the thing in order to convey the feeling. It should be precise about the thing and reticent about the feeling.” The thought seems right when scanning the compressed beauty of the last lines of Wallace’s second canto.

A pool shines,
Like a bracelet
Shaken in a dance.

In the sixth canto, Stevens addresses the limits of linear reasoning and the self-imposed boundaries of rational thought that presumably resolve into predictability and therefore the presumption of some control of things. The contrast between the precision of right angles and the more problematic, more mysterious oscillations of waves and curves speaks to the contrast between straight-line thinking and the less immediately accessible, idiosyncratic processes that are the heart of human creativity. What’s implicit in the last four lines of the poem is that the way to see things differently, more creatively, is to let go.

Lionel Trilling, the quintessential literary critic who championed closely reasoned textual analysis, never wrote a good novel. He knew why, and it tortured him. In a 1933 entry in his diary, Trilling describes a letter he’s read from Hemingway to Clifton Fadiman, a now forgotten man of letters in his day, when America still had men of letters. “A crazy letter,” Trilling writes, “written when he was drunk.” Then Trilling confesses the point that haunts him: “his (Hemingway’s) life which he could expose without dignity… is a better life than anyone I know could live…”.
Adam Phillips, arguably the most literary of Freudians extant, says of Trilling, “Dignity is a form of self-possession; he [is] too self-possessed to be otherwise possessed.” Trilling, that is, is too dedicated to the project of constructing a respectable, respected rational life to be like Hemingway: “self-revealing, arrogant, scared, trivial, absurd…”. The same could be said of most of us lawyers.

The price paid by Trilling was terribly expensive psychically. His dedication to being both respected and respectable hid a gnawing secret unhappiness with his own rectitude and the recognition that he was inherently powerless to do or be anything else. It’s a great mystery how Stevens, the workaday lawyer drafting his bonds, pulled off both bourgeois respectability and his unique, powerful creative poetic anarchy.

So, what do Wallace Stevens’s poetry and Lionel Trilling’s anxieties have to do with us lawyers? Only this: we’re trained to be logical, rigorously so, and often enough we mistake logic for reason, which can lead us to some unhappy results. With the passing of years, it’s come to seem more important, though not always strictly logical, to consider the wider world when advising a client. It’s not just the logic of the law, but the causes and consequences of action and its ripples in the larger web of our social relations that perhaps should rightly be considered more than we do. It’s not always what the client hopes, it’s certainly not the no-holds-barred aggressiveness that many clients expect, but it may well be the better way.

Still, I’d rather not go to a meeting wearing a sombrero. Then again, there are lots of days when I’d rather read Wallace Steven’s poetry than go to a meeting with or without a sombrero. If more of us wrote poetry more often, I think the world would be in better shape, even if that’s an idea not quite respectable.

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By Daniel J. Siegel

Court filings, both online and in paper form, often contain sensitive information, including Social Security numbers, financial account numbers, income tax returns, medical records numbers and birthdates. In many cases, the public can simply search a court's records and obtain the documents and the data they contain.

Although some Pennsylvania courts have limited the records available to civil cases, and some do not provide any online access, others provide online access to family court, criminal and other types of cases. In many cases, the courts' policies do not address how attorneys should handle documents containing confidential personal information. These differing policies have created confusion among attorneys, and the need for a standardized statewide policy.

Fortunately, the days of filings containing this type of sensitive information are almost certainly nearing an end in Pennsylvania because the Pennsylvania Supreme Court is expected to adopt policies and procedures to assure that personal and confidential information is not available to those who are not authorized to have it. The goal of the policy is to assure that personal and confidential information is not available to those who are not authorized to have it. In short, instead of including these types of information and documents in their filings, litigants will be required to use a “Confidential Information Form,” or a “Confidential Document Form” and/or redact personal, sensitive information from the documents. The onus will be upon the filer, and not the particular court, to assure that all filings comply with the policy.

On February 6, 2015, the AOPC released the “proposed policy [that] for the first time establishes uniform standards for all appellate and trial courts in responding to requests from the public for case records. This includes how requests for access are to be handled, establishment of fees, which information is considered confidential and other pertinent recommendations. It also builds upon existing policies governing access to magisterial district court case records, electronic case records and financial records.”

The policy, which contains an Explanatory Report outlining the reasons for the recommendations, is the product of a working group created by the Court Administrator of Pennsylvania with the approval of the Supreme Court. It recognizes the dangers of unfettered access to case filings and the concurrent need to create a uniform statewide policy applicable to all matters, including criminal, domestic relations, civil, juvenile, orphans’ court and appellate cases. The working group is comprised of judges, appellate and local court administrators, representatives from the Pennsylvania Bar Association and the rules committees of the Supreme Court, and AOPC staff. I serve as the Pennsylvania Bar Association’s
representative on the working group, which is chaired by Commonwealth Court Judge Renée Cohn Jubelirer and Montgomery County Court of Common Pleas Judge Lois E. Murphy.

The proposed policy is an outgrowth of prior efforts by AOPC, including its “Electronic Policy and MDC Paper Policy,” which restricts access to Social Security numbers and financial account numbers. The proposed policy governs access to all (1) official paper case records of Pennsylvania appellate courts, the Courts of Common Pleas and Philadelphia Municipal Court, (2) the images of scanned or e-filed documents contained in the three statewide case management systems, (3) the images of scanned or e-filed documents in the case management systems of the various judicial districts and (4) case record information posted online by judicial districts by their own “local” case management systems. The policy is intended to create a more equitable and systematic approach to the case records filed in all of the affected courts.

One of the central themes of the proposal is that all cases will remain open to the public. However, the recommendations balance openness with the need to protect confidential information, and create procedures for requesting and obtaining access to records, as well as for responding to such requests.

The new regulations will prohibit a party from filing any court pleadings, documents or other legal papers that contain Social Security numbers, financial account numbers (although an account number may be identified by the last four digits when the account is the subject of the case and cannot otherwise be identified), driver’s license numbers, state identification (SID) numbers, a minor’s name and date of birth except when the minor is charged as a defendant in a criminal matter and the address and other contact information for abuse victims.

The policy also classifies as “confidential” certain documents, including (1) financial source documents, (2) a minor’s educational records, (3) medical and psychological records, (4) Children and Youth Services’ records and (5) a Marital Property Inventory under Pa.R.C.P. No. 1920.33. “Financial source documents” include (1) tax returns, W-2 forms and schedules, (2) wage stubs, earning statements and other similar documents, (3) credit card statements, (4) financial institution statements, (5) check registers, checks or their equivalent and (6) loan application documents.

The working group proposed two approaches to maintaining the confidentiality of this information. Parties and their attorneys may list the information on a Confidential Information Form, which will be designed and published by the AOPC. The form will likely be similar to the Confidential Information form on the Unified Judicial System’s website at www.pacourts.us.

The alternative approach identified by the working group is for litigants and attorneys to file two versions of each document with the court – one with sensitive information redacted (the “redacted copy”) and the other with no information redacted (“unredacted copy”). The redacted copy would not contain any information prohibited under this policy but would be available for public inspection. On the other hand, the unredacted copy would not be available to the public.

There remain certain records that would not be available to the public under any circumstances, including (1) birth/case records under 20 Pa.C.S. § 711(9), (2) records concerning incapacity proceedings filed pursuant to 20 Pa.C.S. §§ 5501-5555, except for the docket and any final decree adjudicating a person as incapacitated and (3) transcripts in family court actions, as defined by Pa.R.C.P. No. 1931(a), lodged of record, excepting portions of transcripts when attached to a motion or other legal paper filed with the court. They also include any Confidential Information Forms or any unredacted versions of any pleadings, documents.
or other legal papers, any documents filed with a Confidential Document Form cover sheet, as well as information sealed or protected pursuant to court order, information to which access is restricted by federal law, state law or state court rule. Finally, “[i]nformation presenting a risk to personal security, personal privacy or the fair, impartial and orderly administration of justice, as determined by the Court Administrator of Pennsylvania with the approval of the Chief Justice,” will also be excluded from the public.

Before developing the proposed policy, the working group studied and considered the types of records contained in criminal, domestic relations, civil, juvenile, orphans’ court and appellate matters, and then addressed each case type individually. The panel then considered existing legal restrictions and the public access policies in other jurisdictions before recommending which information and documents should be considered confidential, and how access would be limited. The group also evaluated what information should be banned from online viewing by the public, but should nevertheless remain available for public inspection at a court facility, such as original and reproduced records filed in the appellate courts.

The Explanatory Report highlights the considerations that the working group considered when formulating the proposed policy. Perhaps the most difficult consideration the group addressed was to balance the need to assure the transparency of judicial records and proceedings with the security issues mentioned above that cannot be ignored in this Internet age. Finally, the committee focused on practical considerations, such as how redaction would be implemented and how to create the “best practices” that must be instituted statewide.

Among the suggestions offered is the use of software, such as Adobe Acrobat, i.e., “optical character recognition” (OCR) software, which permits a reader to search documents, and facilitates the ability to “copy and paste” text from one document into another. The report also recommends that exhibits should be e-filed separately from pleadings and other legal papers to easily safeguard those that contain restricted information. Such actions will make the transition easier for attorneys and parties.

The public comment period ended on April 8, 2015. The working group met in May to review those comments and to finalize its recommendations. The final recommendations will be submitted to the Supreme Court for its consideration and issuance of final rules.

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Eye Patches, Investment and Law
A Legal Look at The Golden Age of American Piracy

The Politics of Piracy: Crime and Civil Disobedience in Colonial America
Written by Douglas R. Burgess Jr.
308 pages
$35, Fore Edge Books, 2014

Americans have always enjoyed a peculiar relationship with pirates and their trade. The pirates as we know them kind of died out in the 1730s only to be revived in an entertainingly abstract form by Robert Louis Stevenson in the late 19th century. Today we celebrate the days of yore with pirate costumes at Halloween, pirate flags and never ending concoctions of spiced rum.

Douglas Burgess’ legal history, “The Politics of Piracy,” does not read as easily as Stevenson or even some of the more recent histories on the subject. But it is after all, a legal history, and some of the tale is worth repeating. Burgess is a professor of Atlantic History at Yeshiva University and a law professor at Benjamin N. Cardozo School of Law.

Piracy has always been a part of world culture. It is still prevalent today in the Far East and, as we know from recent history, along the horn of Africa around Somalia. But the piracy we have grown to know and love (from a careful distance) is Atlantic piracy. And it turns out that Atlantic piracy was not exclusive to the Caribbean by any means.

Burgess’s book actually opens with a reference to Pennsylvania’s colonial governor William Markham. In 1697 the Board of Trade wrote to Markham asking for his cooperation in the pursuit and capture of anyone who had been part of the crew of Henry Every (some spell as Avery), a pirate who had caused a good deal of diplomatic difficulty for the British crown. It seems that like many others of his ilk, Every chose not to confine his activity to depredations on French and Spanish vessels in the Caribbean. He was not above sailing around the Cape of Good Hope and up into the Red Sea where each year hundreds of vessels carried wealthy Muslims to undertake the haj from Medina to Mecca. These passengers traveled with both their wives and their wealth that made them ripe targets for anyone interested in enjoying either or both.

Every happened upon a vessel that included friends and family of the Great Mughal and spared no effort in robbing the men and raping the women. At the time the government of Great Britain was amidst efforts to win the Mughal into a series of political and economic alliances and the Mughal did not respond kindly to British subjects attacking his citizens while they were en route to the holiest of religious places. So the call went out to find Every and bring his crew back to England for trial.

It turns out that at least some of Every’s crew probably was resident in William Penn’s peaceable kingdom. But Gov. Markham’s response to the inquiry about these fellows was not exactly what one would expect. He told customs agent William Snead that he had no business trying to arrest these men as it was none of his affair and they brought good solid income to Philadelphia and its inhabitants.

Was Markham some kind of rogue governor? If so, he had plenty of company. Because it turns out that just about every colony on the Atlantic coast tolerated pirates and, in some cases actually licensed them to plunder enemies at sea without being too careful about defining who was an enemy.

The story is one of how England transformed itself from tiny island colony to nation and ultimately the world’s greatest naval power. Recall that in Elizabethan times, the queen made free use of “gentlemen” like Francis Drake and Walter Raleigh to sail and capture foreign merchants for the benefit of the crown and to harass England’s enemies, Spain and France. But with the defeat of Spanish Armada in 1588, Britain began to turn from protecting its own island to trader with the world. With the establishment of Jamestown and the formation of the East India Company in 1600, Britain began to emerge as the leading carrier of foreign trade. And as Europe became addicted to everything from sugar to tea and tobacco, Britain needed to protect its commercial trade routes.

The British navy was not born overnight. In fact, Britain had to rely strongly on private ship owners to provide defense of its new trading ports around the globe. The crown did not have millions for defense so it made deals that permitted ship owners to prey upon foreign enemy vessels in exchange for dividing the “booty” that came from capturing foreign ships laden with gold and silver from the Americas and coffees and spices from the Middle East. Ship owners were issued “commissions” or letters of marque that licensed them to capture foreign vessels. They were supposed to bring the vessel back to a British port where the ship would be condemned as a prize and the cargo sold with the government taking a portion and the privateers dividing the rest. All of this was legal. But as the British economy grew wildly
from foreign trade in the 17th century, seafarers and royal governors relied less and less on official British permissions to ply this trade. As Burgess notes, particularly in the tiny but enormously rich sugar islands of the Caribbean, private vessels were often the only reliable ships available to defend these ports. So governors freely issued permissions to capture foreign ships or, alternatively turned a blind eye to what was going on. Time and again, these governors were supposed to be the chief law enforcers, but many were contemporaneously “investors” sponsoring ships whose sole business was to capture foreign vessels transporting commodities and keep whatever they seized.

The problem was not exclusive to the Western half of the Atlantic. While the Lords of Trade and its successor the Board of Trade, tried valiantly to make order out of the chaos of transatlantic trade, Burgess notes that not all of the British upper class was in favor of a “new order.” While Parliament did pass a series of Navigation Acts during the 17th century intended to regulate shipping, the Acts were sometimes riddled with loopholes and enforcement was often winked at even in London and Liverpool. After all, there was a lot of money to be made from stealing other people’s property especially if those people had interests inimical to Mother England.

Yes, occasionally pirates like William Every crossed the line but ironically when Every was captured and tried for his attack upon the Mughal’s vessel and passengers, a common pleas jury had the temerity to acquit him of the crime; further embarrassing the government in Whitehall and enraging an emperor who controlled all of present day India and Pakistan.

The fun continued until the advent of the 18th century when economic growth and the emergence of real government sponsored navies made piracy something the crown could no longer tolerate. Thus began an orchestrated war on piracy that was evidenced in port cities like Philadelphia with dead pirates hanging from gibbets over the Delaware River. The message was clear. The golden age of piracy would sink into the mists of time until 1883 when Stevenson published “Treasure Island,” what he called a story for boys.

The theme of this trails us through history. As noted, the Navigation Acts passed in the 17th century were not really enforced until Britain found itself besieged with debt from the French & Indian Wars. American colonists who had traded freely and thus ignored the Navigation Acts were incensed to see Britain now suggesting that trade restrictions needed to be obeyed. The response in America was a demand for representative government if England wished to enforce its laws in America. We know how that struggle came out.

More recently, we have heard the cry raised most notably by U.S. District Court Judge Jed Rakoff that very few of the pirates who co-opted American financial markets in the last decade were ever brought to justice. America still loves its pirates, or at least turns a patched eye to their prosecution.

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2005

That Was Then

Philadelphia Bar Foundation’s 17th Annual Golf Outing

USI Colburn’s Douglas Kreitzberg (from left), Bar Foundation President Robert D. Lane Jr., Vice Chancellor and Bar Foundation Vice President Jane Leslie Dalton, Chancellor-Elect Alan M. Feldman and Golf Committee Chair Rod E. Wittenberg relax on the patio at the conclusion of the June 27 event.

A golfer watches his long putt approach the hole on the 18th green.

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