



MSBA

BARBULLETIN

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McSherry Named 2020-21 President-Elect Nominee

The MSBA Board of Governors has named Kramon & Graham PA Principal and past Maryland Bar Foundation President M. Natalie McSherry, Esq. as the Association's President-Elect Nominee for the 2020-21 bar year. McSherry tops a slate of nominees that includes Maryland State Delegate Erik L. Barron as Secretary and Alexander & Cleaver PA Senior Litigation Attorney and Vice-President, Government Relations, Jason A. DeLoach, as Treasurer-Elect.

McSherry is a nationally-recognized trial lawyer with more than 40 years of experience in commercial litigation and health care law. She has been widely recognized for her competence, professionalism, civility, commitment to public service, and leadership in the legal profession, having re-

ceived numerous awards, including the The Daily Record's Icon Honor, Circle of Excellence, and the Leadership in Law Lifetime Achievement Award as well as the Maryland Volunteer Lawyers Service, Winnie Borden Pro Bono Leadership Awards, and Maryland Legal Services Corporation, Arthur W. Machen Award.

During her legal career, McSherry has been committed to serving the legal profession and community. Her past MSBA service includes serving as a member of its Board of Governors and Executive Committee, and most recently as the association's Treasurer. She has also been active with the Maryland Bar Foundation, having been a Fellow since 1984, and serving on its Board of Directors since 2011, and serving a two-year term as President from 2017-2019. In addition, she has served in leadership roles with various other legal organizations, including being elected as the first female Chair of the Maryland Legal Services

Corporation in 2018.

McSherry procured her J.D. from the University of Maryland Francis King Carey School of Law and was admitted to the Maryland Bar in 1974. Prior to joining Kramon & Graham, PA as a Principal in 2008, McSherry was a Partner at Whiteford, Taylor & Preston.

Current President-Elect, Honorable Mark F. Scurti, an Associate Judge of the District Court of Baltimore City, will be installed as MSBA President on Saturday, June 13, 2020, at the MSBA Legal Summit & Annual Meeting in Ocean City, Maryland. McSherry is slated to succeed Scurti as President for the 2021-2022 bar year. ●



Delegate Erik L. Barron



Jason A. DeLoach



Honorable Mark F. Scurti

MSBA Welcomes Maryland's Newest Attorneys

The December 2019 2-day "Swearing-In" ceremony at the Court of Appeals, featured over 500 law school graduates who passed the July 2019 Bar Exam and became new attorneys in Maryland. MSBA volunteer leaders and staff were there to welcome them to the profession and as the newest members of the MSBA!

We captured a few of the new admittees on camera, including identical twins, Adam and Joseph

Chandlee, who have done mostly everything together in life, including becoming attorneys, as well as Ellis Zapas, the last person sworn into the bar in the 2010s decade.

MSBA Past-Presidents also welcomed family members to the legal profession. Meredith Storm, daughter of MSBA Past-President Hon. Harry Storm, and Elizabeth Howard, daughter of MSBA Past-President Katherine Kelly Howard, are now both Maryland attorneys.



On behalf of the MSBA, we would like to congratulate all of the new attorneys. You are... the MSBA!



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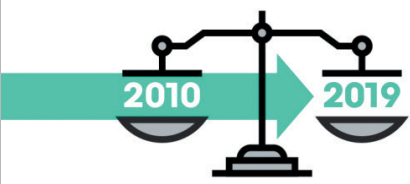
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Energy, Retail, Finance Led Decade's Biggest Bankruptcies

Cratering oil prices and a growing appetite for shopping online fueled the biggest bankruptcies of the 2010s.



What a Peter Luger Steak House Review Can Teach Lawyers About Effective Legal Writing

Litigators can learn about good legal writing from a recent New York Times review giving zero stars to Brooklyn's Peter Luger Steak House.




The California Consumer Privacy Act Goes Live, And May Be Coming For You!

You may have noticed that many on-line services have updated their privacy policies lately. For that you can blame or, depending on your point of view, thank the State of California.



Law School Enrollment Up Overall, But Not for Minorities

Total law school enrollment rose 2% to 132,684 in 2019, but the percentage of minority students getting a legal education didn't grow with the industry under pressure to boost diversity, American Bar Association figures showed.



Supreme Court Generally Disapproves of a Discovery-Rule Exception to Federal Statutes of Limitations

Not so long ago, federal courts began to hold that a federal statute of limitations did not run until the plaintiff knew or reasonably should have known of his or her claim. This is commonly called the "discovery rule."

MSBA ETHICS HOTLINE

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Members should address their written ethics inquiries to Patricia Weaver, Ethics Committee, 4800 Hampden Lane, Suite 700, Bethesda, MD 20814, or call (301) 951-9360, or e-mail tweaver@paleyrothman.com. Opinions of the Ethics Committee are available online at www.msba.org/ethics. Please consult the Rules and MSBA Ethics Opinion Website before calling.

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From the Boardroom



The December 2019 Board of Governors' meeting was held in its traditional venue, the Senate Chamber at the Maryland State House in Annapolis. The significance of the meeting was not lost on the Governors' in attendance, as it represented the last meeting of 2019, but also the last meeting of the decade.

During his report, MSBA President Dana Williams submitted names of several sitting judges that will be facing election in 2020. After discussion, the Board of Governors elected to support all sitting judges consistent with the MSBA's longstanding policy. The sitting judges will receive letters of support and collateral for use in their campaigns.

Following President Williams' report, MSBA Executive Director, Victor Velazquez gave

his report, and provided an update on several ongoing initiatives, including the soon to be released MSBA Passport - the new all-access membership that will give the purchaser access to unlimited MSBA CLE, events, and content (with minimum exclusions). He also provided updates on the work that the new Strategic Implementation Committee (chaired by Past-President Mike Baxter) will undertake.

During the report of the Secretary, Del. Erik Barron re-

viewed the Board of Governors' distribution for the 2020-21 fiscal year. The new distribution can be found on page 23, along with instructions on how to submit your materials if you are interested in seeking an available seat.

The next Board of Governors meeting will be a virtual meeting on January 24, 2020.

More information about the Board of Governors, including agendas and approved minutes can be found at www.msba.org/BOG.

MSBA's Strategic Vision Committee Recommendation Report features highlights the organization's priorities for the next 3-5 years.

You can review a copy of the MSBA Strategic Vision Plan at www.msba.org/Strategic-Report



The McCammon Group is pleased to welcome our newest Maryland Neutrals



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Dateline

JANUARY

16 The MSBA and the Calvert County Bar Association Present: *Connections!* Join us for a social & networking event, open to all attorneys (member & non-member) in Calvert County for an opportunity to meet MSBA President Dana Williams, Esq., Calvert County Bar Association President, David Wiegel, Esq., President-Elect Amy Lorenzini, Esq., and MSBA Executive Director, Victor Velazquez. Mingle, network, and participate in a brief discussion on the value of being a member as well as things to come! To register for this complimentary event, please visit: www.msba.org/Connections-Calvert

16 The MSBA YLS Section and the Maryland Hispanic Bar Association present "Back to School Student Networking Event" beginning at 6:00pm at Little Havana in Baltimore, Maryland. For more information and/or to register, please visit: www.msba.org/Back-to-School

20 Martin Luther King Jr. Day - Courts and MSBA Offices Closed

21 MSBA Board of Governors Meeting

23 Join your local MSBA Real Property Section and Environment & Energy Law Section member colleagues for a fun-filled evening of networking and socializing over hors d'oeuvres and drinks! The event will include an informative guided tour of the Guinness brewery (the only one on American soil) and is free to section members and law students. For more information and/or to register, please visit: www.msba.org/New-Year-Celebration

25 Join the MSBA YLS Public Service Committee and the MSBA Public Awareness Committee for the 2020 Special Olympics Maryland Polar Bear Plunge! Take the plunge and join "Team MSBA" or donate to "Team MSBA" by visiting www.msba.org/PolarBearPlunge

28 Join the MSBA Learning and Publications Department for the new presentation of *Lawyers and Stress – Identifying it; Learning from it; Responding to it* beginning at 9:30am in Baltimore, Maryland. For more information and/or to register, please visit: www.msba.org/product/lawyers-wellnessmsba

30 The MSBA Department of Learning and Publications is offering an all new presentation *Financial Issues in Divorce – Taxation, Valuation, Equalization: Navigating Potential Asset and Income Obstacles in Divorce Negotiations* on Thursday, January 30, 2020 at the Ecker Business Center in Columbia, MD! Let us help you walk through the trifold landmines of taxation, valuation and equalization and develop a clearer understanding of how financial concepts and nuances can impact outcomes. Presented by Jamie S. Lapin, CFP®, CDFA®, AIF® For more information and/or to register, please visit www.msba.org/product/financial-issues-in-divorce

30 The MSBA Estate & Trust Law Section Study Group presents "Estate Planning for the LGBT Community" presented by Lee Carpenter, Esq., Saul Ewing Arnstein & Lehr, LLP. Participants can attend either in Baltimore or Bethesda. For more information and/or to register please visit: www.msba.org/ET-Study-Group

FEBRUARY

1 The Maryland State Bar Association's Young Lawyers Section, as an affiliate of the Wills for Heroes Foundation, is proud to sponsor the Wills for Heroes program. We are looking for volunteer attorneys and notaries to participate in a Wills for Heroes event to benefit Montgomery County first responders. For more information and/or to register, please visit: www.msba.org/Wills-for-Heroes-2-1

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New Maryland Report Highlights Value of Legal Representation

BY REENA K. SHAH, ESQ. AND GABRIELA KAHRL, ESQ.

Early in 2017, the Maryland Access to Justice Commission (A2JC) started convening immigration legal services providers in the face of a surge of immigration-related provocations and changes on the national stage. The convened group still meets monthly, with the goal of working together across organizational boundaries to provide a comprehensive continuum of state-wide immigration legal services; sharing information; and working on collective solutions.

Announcing the Release of a New Report on Immigration Bond Proceedings

Recently, two members of the A2JC's Immigration Providers Group - The University of Maryland Carey School of Law Immigration Clinic and the Catholic Legal Immigration Network, Inc. (CLINIC) - released a report focusing on the immigration bond proceedings at the Baltimore Immigration Court, the court which has jurisdiction over all immigration cases of Maryland residents. In the report entitled *Presumed Dangerous: Bond Representation and Detention in Baltimore Immigration Court* (Bond Report), the two groups conducted a study to discern the impact of changes in immigration policy and practice at the federal level since January, 2017 on bond proceedings.

One of the key findings of the Bond Report dealt with the impact of legal representation on the out-

What is the Importance of a Bond Proceeding?

The bond proceeding is the most critical moment in a detained immigrant's case. Because of the lack of appointed counsel and other due process limitations in immigration proceedings, the bond hearing alone can determine the outcome of the detained immigrant's case. If the immigrant remains detained (for reasons that include being ineligible for bond, denied bond by the judge, or having bond set too high), the immigrant's case typically results in an order of deportation, usually within 6 months of the immigrant's initial arrest and detention.

The advantages of a successful bond hearing cannot be overstated. If the detained immigrant is granted a reasonable bond and released, the immigrant's case is transferred to a less expedited docket with more generous scheduling that facilitates both retention of counsel and case preparation. This new time frame gives the immigrant the necessary time to work, save money, and hire an attorney to

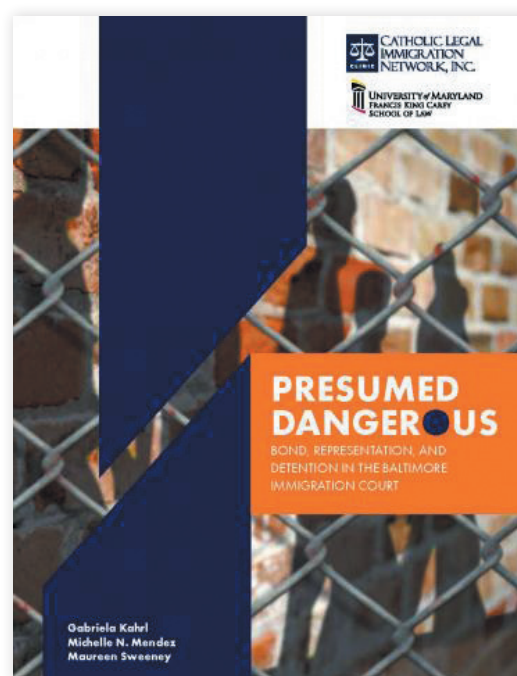
handle the immigration case. Because the immigrant is free, the immigrant can assist their attorney with case preparation, including collecting essential documentary evidence.

Further, much of the success of a client's merits case depends on a finding that his/her testimony is credible. A detained client is a far less effective witness than a non-detained one. Detention is a physically and emotionally stressful and traumatic experience. Detainees are often housed with the general criminal inmate population for many months in

county jails that were originally designed for short stays of no more than days or a couple of weeks. In Maryland, ICE holds detainees within the county jails of Frederick, Worcester, and Howard Counties. The largest facility is at the Worcester County Jail, where the majority of ICE detainees are held, hours away from their families and most lawyers' offices. For many, this is the first time they have ever been detained. The stress of detention often affects the quality of the detainee's testimony, which can represent the difference between winning and losing their case.

The Importance of Legal Representation in Immigration and other Civil Proceedings

The report bolsters the argument for legal representation in immigration proceedings for those who cannot afford to hire an attorney. Other immigra-



“

The bond proceeding is the most critical moment in a detained immigrant's case.

come of a bond case. The study showed that those who had legal representation in a bond proceeding were more likely to obtain bond than those without legal representation. Those who had legal representation in their bond proceeding were successful in getting bond in 72% of the time. Those who appeared in court without legal representation were only successful in getting bond only 48% of the time.

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PRO BONO PROFILE

PBRC PARTNER PROFILE:



Angela Kuan, Esq.
MSBA Member, PBRC Academy Fellow

Angela Kuan is a 2019-2020 Fellow in PBRC's Professional Skills Academy. (www.probonomd.org/academy) The Academy is a one-year, cohort-based program of training, mentoring, and pro bono legal service for newer attorneys (the Fellows) to enhance the Fellows' lawyering skills; to introduce the Fellows to mentors and colleagues who can help them grow; and to help the Fellows select and learn from significant pro bono service opportunities.

Can you tell me a little about your own practice?

I stepped away from the practice of law for about ten years to raise children and serve our community through other volunteer efforts. I was originally licensed in Virginia. I took the Maryland bar exam last winter and received my Maryland license this past summer.

What caused you to be interested in the PBRC Academy?

The Academy provided the training and mentorship I needed after having been away from the full-time practice of law. I loved that the resources were provided in order to bring legal services to those who need them most.

Which aspect of the Academy (training, service, or mentoring) have you found to be most useful?

All three! I could not serve without the comprehensive training and mentoring. And in serving, I can immediately see the positive difference our work makes in our clients' lives.

Which of PBRC's projects have you volunteered with, and what do you do there?

I have represented tenants in rent court through PBRC's Tenant Volunteer Lawyer of the Day program, and I have represented consumers through PBRC's Consumer Protection Clinic. I have also drafted wills, advance medical directives, and financial powers of attorney for low-income seniors through PBRC's Estate Planning Clinic.

How do the projects make it easy to volunteer?

PBRC provides all the training you need. You can complete the online training at your convenience, and there are experienced mentors on site each

time you volunteer, so you can always consult with a supervisor.

Can you tell me about a specific client you've met while working at the clinic?

I met a client in the Consumer Protection Clinic who was distressed because of an overwhelming debt for dental care for his wife. He talked about how the debt had mounted due to a health emergency that kept him out of work for months. It's something that can happen to any of us – an unexpected loss of health or job. Despite all his challenges, he wanted to take care of his family and make good on his commitments. I was able to negotiate a debt reduction and manageable payment plan for him. He looked like a load the size of Mount Everest had been taken off his shoulders. I was so happy to be able to give him support during a difficult time.

How has doing pro bono work changed you?

Doing pro bono work has increased my hope, because I see the positive impact our work has on the community.

What message would you give to attorneys thinking about volunteering?

Whatever area of law you want to serve others in, PBRC has an online training for that. I'm not sure I would have had the confidence to serve others in this way if not for PBRC's training.

You may worry that you don't have time. It sometimes feels like I actually gain time when I'm helping someone who really needs it. I would also encourage those who have left the legal track in order to care for family members or do other work to consider volunteering through PBRC. ●

PBRC's featured service opportunity

Volunteering with the Consumer Protection Project: probonomd.org/consumerprotection

For more information about volunteering in Maryland, contact:

Annie Speedie, PBRC Director of Programming: aspeedie@probonomd.org, 443-703-3051.



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Detecting Deepfakes

BY SHARON D. NELSON AND JOHN W. SIMEK

Deepfake videos are becoming harder to identify and may threaten the 2020 election. If some nefarious person has decent photos of your face, you too (like so many unfortunate celebrities) could appear to be the star of a pornographic video. If someone has recordings of your voice (from your website videos, CLEs you have presented, speeches you've given, etc.), they can do a remarkably good job of simulating your spoken words and, just as an example, call your office manager and authorize a wire transfer—something the office manager may be willing to do because of “recognizing” your voice.

Unnerving? Yes, but it is today's reality. And if you don't believe how “white hot” deepfakes are, just put a Google alert on that word and you'll be amazed at the volume of daily results.

Political and Legal Implications

We have already seen deepfakes used in the political area (the “drunk” Nancy Pelosi deepfake, a reference to which was tweeted by the president), and many commentators worry that deepfake videos will ramp up for the 2020 election. Some of them, including the Pelosi video, are referred to as “cheapfakes” because they are so poorly done (basically running the video at 75 percent speed to simulate drunkenness), but that really doesn't matter if large numbers of voters believe it's real. And the days when you could tell a deepfake video by the fact that the person didn't blink are rapidly vanishing as the algorithms have

gotten smarter.

In August 2019, the Democratic National Committee wanted to demonstrate the potential threat to the 2020 election posed by deepfake videos, so it showed, at the 2019 Def Con conference, a video of DNC Chair Tom Perez. The audience was told he was unable to come but would appear via Skype. Perez came on screen and apologized for not being in attendance—except that he had said no such thing. It was a deepfake.

Another deepfake video surfaced of Facebook CEO Mark Zuckerberg in June 2019, with him supposedly saying: “Imagine this for a second. One man, with total control of billions of people's stolen data. All their secrets, their lives, their futures. I owe it all to Spectre. Spectre showed me that whoever controls the data controls the future.” It was hardly a credible fake, but since

he appeared to be talking to CBS, CBS asked that Facebook remove the video, complaining about the unauthorized use of its trademark.

Deepfakes are capable of influencing elections and perhaps the rule of law, which should certainly compel the attention of lawyers, especially since many lawyers regard the rule of law as already under fire.

Legislation has been introduced in Congress to do something about deepfakes to prevent an impact on our elections. It has gone nowhere. The First Amendment is often cited as an obstacle to legislation, as is the fair use provision of copyright law, existing state privacy, extortion and defamation laws, and the Digital Millennium Copyright Act, all for different reasons.

The Malicious Deep Fake Prohibition Act, introduced in Congress, would make it a federal

crime to create a deepfake when doing so would facilitate illegal conduct. It was not well received. The DEEPFAKES Accountability Act requires mandatory watermarks and clear labeling on all deepfakes (oh sure, the bad guys will respect that law!). It contains a very broad definition of deepfakes, which almost certainly would guarantee that it would face a constitutional challenge. In short, we haven't gotten close to figuring out how to deal with deepfakes via legislation.

And yet, according to a June 2019 Pew Research Center survey, nearly two-thirds of Americans view altered videos and images as problematic and think something should be done to stop them. According to the survey, “Roughly three-quarters of U.S. adults (77 percent) say steps should be taken to restrict altered images and videos that are intended to mislead.” The survey indicated that the majority of Republicans and Democrats believe that.

What Is a Deepfake Video?

No worries, we'll get to deepfake audios later. The audios are a new

phenomenon in the toolbox of criminals, but deepfake videos have become—quickly—terrifyingly mainstream. Remember the “old” days of video manipulation when we were all amazed, watching Forrest Gump as he met President Kennedy 31 years after the president's assassination? Ah, the days of innocence!

We are writing here for lawyers, so we are not going into the weeds of how true deepfakes are produced. It is a remarkably complex process when well done. But we can give you a 10,000-foot picture of what deepfakes are and how, in vastly simplified terms, they are created.

We actually like the Wikipedia definition:

“Deepfakes (a portmanteau of ‘deep learning’ and ‘fake’) is a technique for human image synthesis based on artificial intelligence. It is used to combine and superimpose existing images and videos onto source images or videos using a machine learning technique known as generative adversarial network. The phrase ‘deepfake’ was coined in 2017.”

CONTINUED ON PAGE 22

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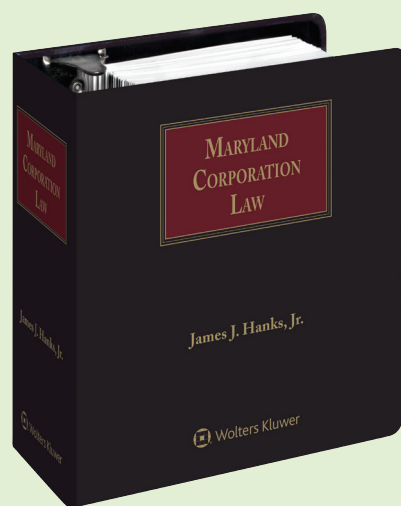
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by James J. Hanks, Jr., Partner, Venable LLP

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Online Reviews are About the Client Experience at Your Firm

BY ERIN GERSTENZANG, EHG LAW FIRM



Online reviews, much like referrals, are social proof of the type of experience a client can expect to have with your law firm. Yet when lawyers talk about these online reviews we often hear them complain bitterly that “anyone can say anything – regardless of whether it is true.”

What is interesting about this response is that it assumes that reviews are just something that passively happen to us – as if we cannot control what our clients write about us.

We have a lot more influence on the frequency and type of review we receive than one might normally assume. Attorneys should be more strategic when it comes to thinking about how to cultivate positive reviews.

Malcolm Gladwell's book, *Blink*, offers us insights about why we should start paying more attention to what our clients value and how we can deliver more of it. In his book, Gladwell examined lawsuit trends in the medical field to see what kinds of doctors were being sued for malpractice. He expected to learn that the most competent doctors were sued the least.

To the contrary, the data revealed that incompetent doctors were rarely sued when their patients liked them, despite shoddy medical care. On the flip side, exceptionally competent surgeons

were frequently targeted with lawsuits when patients reported that they were “rushed, ignored or treated poorly.”

There is a valuable lesson for lawyers in Gladwell's findings. Like doctors, lawyers are brought in to solve difficult, and sometimes impossible problems for our clients. We cannot guarantee favorable outcomes, and there are many factors that we cannot control.

But we can control for our client's experience with our firm. We can protect our clients from being rushed, ignored or treated poorly. Gladwell's findings suggest that a good client experience is what the client values most.

Gladwell's Rule: Protect Your Clients From Being Treated Poorly

Lawyers are rarely taught to prioritize kindness when dealing with clients, or that we will be better advocates for our clients if we can cultivate a friendly attorney-client relationship. We are taught to find the right answers,

be honest, and be professional. But it is rare for attorneys to prioritize kindness.

Like lawyers, doctors are not always known for treating patients with kindness. This was part of what Gladwell found so compelling. The doctors who were most frequently sued were often renowned experts who were well known for also having a poor bedside manner, in other words, their demeanor was less than kind.

The lesson we need to learn as lawyers is that competency is no longer sufficient – and quite frankly, never was. Our clients deserve more, and one of the things they are entitled to is our kindness.

We can have difficult conversations with our clients, but we can also be kind. Not only does it create a fantastic client experience, but it is also the right thing to do.

ABA Rule 2.1 – Advisor
In representing a client, a lawyer shall exercise independent professional judgment

and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Clients Know What Customer Service Looks Like

There are plenty of practical reasons to care about the client experience in the modern world, reasons beyond ‘it's the right thing to do.’ Ten years ago, an unhappy client might have been fairly ordinary. Lawyers would tell themselves “I'll do better next time.” The chances of the client filing a disciplinary complaint or impacting future profit were slim.

Today's world is different, and there are new rules that apply to running a successful business. One bad review can have a severe impact on your bottom line. If you are not prioritizing the client experience, then you are not going to have good reviews. In the absence of good reviews, it is difficult to imagine a lawyer and/or law firm succeeding in the modern business world.

Your next clients will expect to be able to see what your former clients have to say about you online.

Happy Clients Make for Happy Lawyers

There are other benefits to designing an exceptional client experience. A positive client experience will impact how satisfying your work is.

There is a curious truth about human interaction. We almost always enjoy working with people who also enjoy working with us. This is very true in the attorney-client relationship. The clients who seem to like us the most, are also the clients we love to work with.

In fact, isn't the most basic definition of a ‘good’ client one who likes and values his attorney? When the majority of our clients are ‘good’ clients, we experience far less stress, fewer sleepless nights, and greater

satisfaction in our work.

When people enjoy working with your firm, they will reward your efforts by promoting you online and by posting good reviews.

Conclusion

There is little doubt that online reviews and social media have become the new word of mouth. No matter how someone is referred to you, they're likely to go online and search for information about how your clients describe working with you.

While there are a variety of systems, tools, and processes that can increase the number and quality of online reviews, none of them are a substitute for providing remarkable client service.

If you do nothing else, you should seek ways to make your practice more client-centric. Get regular feedback from clients. Listen to what they are telling you. Make adjustments to how you serve clients.

Lawyers that do not adjust to this new paradigm are likely to lose business to those that adopt a more client-centric approach and motivate their happy clients to sing their praises online. ●

Erin Gerstenzang is a trial attorney with a law practice in Atlanta, Georgia. She provides concierge-level service to clients facing drug and alcohol-related offenses. In addition to running her boutique criminal defense law practice in Atlanta, Georgia, Erin Gerstenzang is dedicated to helping other attorneys succeed in their practices. She is a regular speaker at CLE events across the country and helps lawyers understand legal ethics in a technology-enabled world. She also lectures on design-thinking for law firms, automation, paperless systems, and using social media to build a legal brand.

Erin Gerstenzang is a part of the ABA TECHSHOW 2020 Planning Board.



Litigating on Principle... and Interest

A Q&A with Irwin Kramer, Kramer & Connolly

Q. Unhappy with my client's engineering work, a huge contractor ignored my demand for payment of a \$150,000 bill. It's a small sum to the contractor, but a lot of money for my client to lose. With more documents than cash on hand, my client wants to sue and fight "on principle." How should I engineer this?

A. Your client may litigate as a matter of "principle." But if you want to get paid, you must focus on "principal and interest."

With a large number of documents, allegedly negligent engineering services, and a defendant with far greater resources, things could get expensive. Unless you're foolish enough to assume all risk by taking the case on contingency, a client that has already lost \$150,000 could lose even more in hourly fees, litigation costs, and a potential counterclaim.

Lawsuits are harder to ignore than demand letters, so it's possible that filing suit may prompt more productive negotiations. But it may not.

One should never embark on litigation on the belief that

the case will settle early, easily or cheaply. Like any big investment, litigation is a risky proposition. Before clients invest in a lawsuit, they must consider the following risks:

- **Lack of Control** - once you embark on litigation, you have entered an unpredictable world that revolves at its own pace and may easily veer off course. You can shape your own strategy, but you cannot control the tactics of your adversary. This will affect the actual time you will need to spend on the case and the duration of the litigation itself;
- **Unpredictable Budgets** - just as you cannot control the time it will take to litigate this dispute, you cannot predict what it may cost in the end. A

client who insists on a precise budget for complex litigation will be impossible to satisfy;

- **Counterclaims** - where, as here, the contractor is unhappy with your client's engineering services, an action to collect on this bill could trigger a counterclaim for damages arising from any alleged negligence. Even if your client prevails, the cost of litigating complicated engineering issues could easily exceed the amount of your original claim;
- **The Risk of Losing** - no matter how much evidence your client may have, few cases are "slam dunks." No matter how much your client spends on you, your experts and other litigation costs, no one can guarantee that the client will win, how much the client will win, or whether a future award will be worth the investment required to get there. Unless provided by contract or by some sort of

fee-shifting statute, your client will bear its own attorney's fees and costs regardless of the outcome. So, even if you win in court, your client may still lose money.

To avoid misunderstandings later on, you should reduce this advice to writing in a retainer agreement which limits the scope of your representation to proceedings before the trial court.

But no matter how you express it, actions speak louder than words. Rather than postpone a tense discussion over litigation expense, your fee agreement should require a substantial financial commitment up front. In addition to a sizable deposit toward initial fees and expenses, the agreement must require that the client replenish this "evergreen" retainer periodically to leave sufficient funds in escrow as security for future bills. To give you sufficient time to withdraw from a case that

your client may fail to fund in the future, at least 120 days before trial, your agreement should provide for a "balloon" retainer approximating the cost through trial. If you don't get it well in advance, you could get stuck trying a case for which you will never be paid in full.

If your client isn't willing to put his money where his mouth is, why would you be willing to invest your time? As a matter of "principle," focus on "principal and interest." Unless you get the "principal" up front, you cannot protect your interests and should have little interest in taking the case.

The managing partner of Kramer & Connolly, Irwin R. Kramer represents attorneys faced with grievances. He provides additional information on this process at AttorneyGrievances.com and may be reached at irk@KramersLaw.com. ●

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Role of Public Companies

A Modest Proposal

BY STUART J. KASWELL, ESQ.

There is workable solution to the perennial dilemma about the role of public companies in society. In the last thirty years, the prevailing view has been that companies operate for the benefit of their shareholders, period. Since 1997, the Business Roundtable has stated that “corporations exist principally to serve shareholders.”¹ According to this view, management has no right to give away the shareholders’ earnings for funding the CEO’s pet projects, providing public goods to the local communities in which they operate, or paying above market wages. Those profits belong to shareholders and they should be the ones to use their money as they see fit. The other view is quite the opposite – that public companies have responsibilities to stakeholders to serve the communities in which they operate. The company (meaning the shareholders) should pay for public works or higher wages as a contribution to the broader public good.²

Recently, the Business Roundtable attracted attention for altering its stand on such issues. Some of the so-called “FAANG” companies, Facebook, Apple, Amazon, Netflix and Alphabet’s Google, have taken steps to address community concerns. For example, Apple announced that it would commit \$2.5 billion towards affordable housing in California.³ The grant includes: (i) a \$1 billion investment in an affordable housing investment fund; (ii) \$1 billion to help first-time home buyers with financing and down-payments; (iii) \$300 million of its land to develop affordable housing; (iv) \$200 million for low-income housing. It appears that some of the money may go to Apple employees and may help the company attract and retain talented employees. Apple may intend that some of the money may benefit the community at large. Either way, Apple has chosen to allocate significant sums that it otherwise could return to shareholders.⁴

Presidential Candidate Senator Elizabeth Warren (D-Mass.) would go further with her proposed “Accountable Capitalism Act.” Among other things, the legislation would require “very large American corporations to obtain a federal charter as a “United States corporation,” which [would] obligate...company directors to consider the interests of all corporate stakeholders.”⁵

In my view, there is a way to satisfy both camps. Each year, the management of the company should ask individual shareholders (*i.e.*, beneficial owners)



“Allowing shareholders to use pre-tax money would create an incentive for shareholders to donate to the charitable foundation.”

to designate the percentage of dividends that they wish to donate to an affiliated charitable foundation. The company would permit shareholders to donate from 10 to 100% in increments of 10% of their cash dividends. The company would establish a separate §501(c)(3) charitable organization to receive the funds and to manage the charitable work. The charitable organization would have board members from the company’s management, labor groups, community leaders, and so on. The charitable organization would adopt a

mission statement and would operate independently of the company. It would make grants or fund programs, as it deemed appropriate, in furtherance of that mission.

Presumably, shareholders would have to pay income tax on the entire amount of their dividends, but would receive a tax deduction for the amount that they donated to the charitable foundation. Shareholders would see explicitly the cost of such activities and could choose to donate or not, as they saw fit. Shareholders who didn’t like the

foundation could do what they always have – spend the money on themselves or donate it to their favorite charity. In other words, if you like your dividend, you can keep it. Really.

A variation on the theme would be to let the shareholders use pre-tax dividends for their contributions to the foundation. Allowing shareholders to use pre-tax money would create an incentive for shareholders to donate to the charitable foundation. Of course, that approach would add more complexity to the tax system. It also would

create an unlevel playing field for charitable contributions made from dividends to the affiliated foundation, as opposed to other charitable organizations.

My suggestion does not address every concern. Many profitable companies don’t pay dividends. For example, with the exception of Apple, the FAANG stocks don’t pay dividends. Investors who own shares through a mutual fund or ETF probably could not participate. Without changing the tax law, investors who do not itemize deductions would not get any tax benefit. (Then again, they don’t get any additional tax benefit from any other charitable contribution.) Although my suggestion does not solve every issue, I’ve always subscribed to the notion that the perfect should not be the enemy of the good.

In my view, we don’t have to resolve uniformly the debate about the extent to which public companies serve the shareholders or the stakeholders. We can empower shareholders to decide for themselves. ●

Stuart Kaswell is an experienced financial services attorney. The views he expresses are entirely his own and do not reflect the views of any prior employers, former colleagues, clients, or the Maryland State Bar Association.

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¹ Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans’ AUG 19, 2019, <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.

² In their seminal work, *The Modern Corporation and Private Property* (1931), Adolph Berle and Gardiner Means proposed altering the role of the public company in modern society. They noted at 356:

³ “Apple Commits \$2.5 Billion to Fight California Housing Crisis,” *Wall S.J.*, Nov. 4, 2019, available at https://www.wsj.com/articles/apple-commits-2-5-billion-to-fight-california-housing-crisis-11572868345?mod=hp_lista_pos3. Alphabet (Google) and Microsoft have launched similar initiatives. *Id.*

⁴ It is beyond the scope of this article to ascertain whether or not such programs are helpful. An extreme example of a company providing housing to its workers was in the 1890s when the Pullman railcar company that built an entire factory town for its employees. That experiment failed for numerous reasons and precipitated a bitter labor strike in 1894. Pullman, Illinois, available at https://en.wikipedia.org/wiki/Pullman,_Chicago; Schneirov *et al.*, Introduction to *The Pullman Strike and the Crisis of the 1890’s*, (1999) available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1829&context=articles>.

⁵ <https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%20Act%20One-Pager.pdf>. See S. 3348 (115th Cong. 2d. Sess.). Apparently, Senator Warren has not introduced this legislation in the 116th Congress.



Continuing Legal Education Opportunities

Learning & Publications Department:
Raising the Bar for Education

BY ANDREA TERRY, ESQ.

Happy New from the MSBA! We're starting 2020 off with some exciting new programs: Financial Issues in Divorce – Taxation, Valuation, and Equalization. This program will offer guidance through the potential pitfalls helping clients evaluate their assets during a divorce. You'll develop a clearer understanding of how financial issues and their nuances can impact your divorce client outcomes. Join us for the live seminar in Columbia or via live webcast!

Software Licensing and Cloud Computing Boot Camp will be offered for the first time on February 20th in Rockville, MD! Program chair Ward Classen explore the issues that arise in negotiating software licenses and cloud computing agreements. A panel of experienced in-house and outside counsel representing both vendors and customers will discuss “what is market” for limitations of liability, data breach, representations and warranties and other significant issues.

Keep an eye on the MSBA website www.msba.org/cle-catalog for all upcoming live programs. If you cannot attend the live program, many are being webcast concurrent with the live program and you can find these programs available online, on-demand approximately 6-10 days after the live program. Online programming carry CLE credit just like the live programs. See below for details. ●

UPCOMING LIVE CLE PROGRAMS

Registration is open for:

- **Financial Issues in Divorce – Taxation, Valuation, Equalization: Navigating Potential Asset and Income Obstacles in Divorce Negotiations** | January 30, 2020 | Columbia
- **Hot Tips in Family Law – A Multi-Disciplinary Approach to Your Practice** | February 12, 2020 | Columbia
- **Hot Topics in Adult Guardianships** | February 19, 2020 | Columbia
- **Software Licensing and Cloud Computing Boot Camp: Successful Contracting in an Ever-Changing Environment** | February 20, 2020 | Rockville
- **Estate Planning in the Era of High Estate Tax Exemptions – a New Way of Thinking** | February 25, 2020 | Columbia
- **20 Hour Mediation Training in Child Custody and Visitation** | April 21-23, 2020 | Columbia

Registration Opening Soon!

- **Mediation in Commercial Disputes** | March 5, 2020 | Columbia
- **2020 Employment Law Institute** | April 29, 2020 | Columbia
- **2020 Advanced Business Law Institute** | April 30, 2020 | Columbia
- **2020 Hot Tips in Workers' Compensation** | May 14, 2020 | Columbia
- **2020 Advanced Estate Planning Institute** | May 19, 2020 | Columbia



Additional information and online registration available at www.msba.org/calendar

NEW ONLINE, ON-DEMAND

- **2019 Using and Drafting Trusts in Estate Administration** - presented live on June 19, 2019
- **Family Practice Update** - presented live on August 22, 2019
- **2019 Handling Drinking and Driving Cases in Maryland** - presented live August 28, 2019
- **How to Conduct an Effective Workplace Investigation** - presented live October 3, 2019
- **Nuts and Bolts of Medicaid** - presented live October 10, 2019
- **2019 Criminal Law Update** - presented live on October 28, 2019
- **Maryland's New Elective Share Law: Adjustments and Opportunities** - presented live on November 4, 2019
- **Advanced Real Property Institute** - presented live November 7, 2019
- **Maryland Federal and State Employment Law Update** - presented live November 21, 2019
- **Premarital Agreements – Drafting and Negotiating from the Estates/Trusts and Family Law Perspectives** - presented live December 3, 2019

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NEW & RECENT PUBLICATION UPDATES

(All titles available in print and electronically)

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Maryland Divorce & Separation Law, Tenth Edition—The NEW Tenth Edition of this definitive work is the Family Law practitioner's comprehensive reference book and guide on divorce and separation law in Maryland. The book sets forth the legal principles and procedures for handling family law actions, including divorce, separation, child custody, child support, adoption and paternity matters, from the initial contact with a potential client through appeal. Updated by expert practitioners, it provides tips and forms and is an easy-to-follow guide on Family Law.

Workers' Compensation Manual, Nineteenth Edition—The *Workers' Compensation Manual* has been the authoritative workers' compensation reference for Maryland attorneys for more than three decades. The text provides clear and concise explanations of substantive law, while also emphasizing practical advice for lawyers at every stage of representation. The new *19th Edition* brings this Manual up to date with all of the most relevant development in workers' compensation law through September 2015 including current benefit amounts and helpful accident rate charts.

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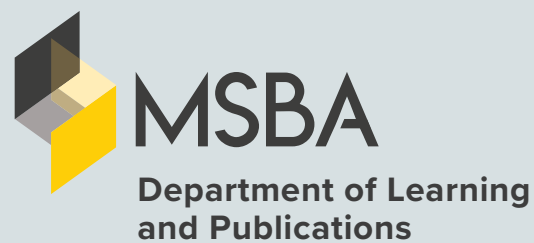
Maryland Will Contests—In this indispensable publication, the authors, Jeffrey E. Nusinov and Paul D. Raschke of Nusinov Smith LLP provide current procedural and substantive rules to navigate caveat litigation. *Maryland Will Contests* will enable the practitioner to contest or defend confidently a Maryland will. Topics covered include Orphans' Court Jurisdiction; Pleadings and Procedure; Grounds for Challenge; Problems of Proof; Caregivers, Gold Diggers, and Death-Bed Marriages; *In Terrorem* Clauses; Appeals; and Fees. The authors also provide invaluable sample petitions and interrogatories.

Practice Manual for the Maryland Lawyer, Fifth Edition—This first update since the 2012 Fourth Edition brings the Practice Manual up to the minute! The best how-to-guide and fundamental reference on the essentials of Maryland law practice, the Practice Manual is the ultimate practical, nuts and bolts resource. Since 1981 it has served as both a cornerstone for new lawyers who are building real-world know-how and a touchstone for seasoned practitioners who trust its reliable, concise authority. Its two volumes include sixteen chapters covering key practice areas of law, with over 1400 pages of practical information and how-to pointers from experienced, accomplished Maryland practitioners. The publication includes more than 300 forms (there is an option to purchase the book with downloadable forms) to give you a valuable head start on drafting almost every basic practice document.

Criminal Practice & Procedure in the District Court of Maryland, 2019 Edition—This new, updated book, published with the help and review of the District Court itself, provides the “nuts and bolts” for handling all aspects of a criminal case in District Court. It is a handy, easy-to-follow guide for practitioners relatively new and experienced and all who practice in the District Court.

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The Business of Law



BY RONALD K. WILLS, REGIONAL PRESIDENT, CEO FOCUS

Successful lawyers know running a law firm is running a business. Lawyers who don't manage their firm like a business often learn lessons the hard way. They encounter unnecessary hurdles and miss opportunities to strengthen their firm.

Brand and Vision

If you can't define your brand or articulate your vision, it is likely your clients won't be able to do so either. Making decisions becomes harder when you can't consult foundational tenets for guidance. A strong vision statement will create your firm's core values and will set the aspirational standards for your firm. Similarly, a strong brand statement signals key value points to your clients and community. For maximum impact, everyone from the boardroom to the file room must understand and embrace these points.

Scalable Operations

Some firms cobble together a patchwork of systems, tools, and policies in an attempt to save money. They manage each new issue with ad hoc decision making. Over time it creates unnecessary complications. If growing systems cannot be integrated, complications occur, and efficiency is lost.

All firm decisions can have a cumulative impact. It's important to plan for success. Healthy growth requires constant vigilance and flexibility. With defined systems and protocols in place, these risks are reduced.

Mastery of Financials

You don't need to have a CPA to understand the importance of financial reporting. Having access to reliable, accessible data is critical. An incomplete financial analysis can create a false narrative on the profitability of the firm. Firms lacking systems merely react to issues as they occur. You can't manage to the margins if you don't know your margin goals. Good systems provide ongoing tracking and succinct analysis to ensure the firm is heading in the right direction. Variances are easily identified under a systematic approach and quickly rectified.

Marketing Systems

The days of relying on one single method to find clients are long gone. Without marketing data, firms are forced to rely on opinion and assumption. Replicating past success can be difficult without sufficient data to support the right initiatives. Modern businesses require a more systematic approach to marketing and business development. Client relationship management systems track interactions and can help identify opportunities for greater connection with clients.

Commitment to the Plan

A strategic plan is not a panacea, but it is an important tool. Skipping the planning process is like taking a road trip without a map. Developing a plan only to file it away without follow-up is just as bad. Having a plan gathering dust in a file cabinet can create a false sense of security.

Like any journey, the path is

easier if you have a good map for guidance. Strategic plans should be discussed, challenged, and fully shared once implemented. Once a plan is drafted, it's important to follow it.

Manage Your Business, Master Your Firm

Success in business does not occur by accident. Law firms face many challenges, but those who embrace business management

as a necessary aspect of their practice are more likely to produce the results they hope for. ●

Ron specializes in helping business owners make their small businesses operate more successfully, with lower stress and higher profitability. CEO Focus Members runs businesses with \$1 million or greater revenues and work together to share the collective wisdom of a room

full of fellow business owners. Ron is also President and Founder of the National Association of Business Owners & Entrepreneurs (NABOE) hosting owner breakfasts in Maryland and Virginia. Ron can be contacted at ronwills@ceofocus.com or by phone at 301-873-0448.



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Tips to Overcome the Post Holiday Blues

BY LISA CAPLAN, LCSW-C

It is very normal to have a difficult time getting back into the swing of things after the holidays and very normal to experience the post holiday blues. After months of preparation, stuffing yourself on holiday food, stress, excitement, and the adrenaline rush, decompressing from the holidays can take time. Whether the holidays are a happy time for you or bring back feelings of childhood stress, each person needs time to adapt to regular life again. Symptoms of the post holiday blues might include feeling down, procrastination, under the weather, lack of motivation, etc.

Here are tips to help overcome the holiday blues:

1 Reframe referring to January as cold and dreary. Yes, January is cold but calling it dreary just sets you up to feel dreary. Projecting negativity onto something just brings it to life as negative. There are beautiful sunny days in January, so put on a coat, get outside and enjoy them.

2 Allow the adrenaline to settle. Holidays bring on a lot of adrenaline. The rush to get things done, spend time with friends and family, cook, etc. keep our adrenaline high. After the holidays all that adrenaline has to settle down, so have a self-care plan to help you decompress. It doesn't need to be fancy. Read a book, have some tea, exercise, see a movie, or get outside.

3 When I was a kid, my mom used to say, "I need a vacation from my vacation." I never understood that until I had kids. **Build in time to come back from a trip to settle in.** The time you need might be a day or several days depending on your trip. I highly recommend not coming back from vacation and immediately going back to work the next day. You won't feel like you have been away and will start off tired, feeling like you can't catch up.

4 Stay hydrated and drink plenty of water. Holidays are full of unhealthy, although good, food, alcohol, and lack of sleep. If you feel sluggish this could be due to dehydration.

5 Avoid stimulants and alcohol. When we are tired we often want a quick fix, so we might increase caffeine, sugar, alcohol or other drugs. This makes things worse by not allowing your body to naturally adjust. That is not sustainable and only provides a short-lived comfort. If you notice that you often look for a quick fix, talk with The Lawyer Assistance Program or another professional to get help.

6 Learn to say, "No". Follow my 24 hour rule. Give yourself 24 hours, before you say yes, to think about whether you can commit to taking it on. This gives you time to take a step back and look at the pros and cons of taking on another commitment.

7 Pay attention to what is going on now. Focusing on the past can make you feel depressed, while focusing on the future can bump up your anxiety. Try to focus on the present, what you are doing right now and how you feel. Don't dwell on the feelings; just notice them. Focus on your breathing without trying to change it, and bring yourself back to what you are doing at the moment whenever you catch yourself in the past or future.

8 Make changes. Look at what you enjoyed over the holidays and build it into your everyday life. Put it on your calendar. Post holiday is a great time to take things off your plate that you really don't want to do. Look at what is working for you and what is not and make some healthy changes.

9 Live with intent. Make active decisions and choices in your life.

10 Talk about your feelings. Talk with someone who is supportive about how you feel. Sometimes just saying it out loud can be a huge help.

11 Start journaling. Getting it out of your head and into a journal can be very therapeutic.

12 Talk to a professional. If the post holiday blues persist call the Lawyer Assistance Program or other professional to discuss how you feel. Sometimes talking with someone who is objective can help.



For more tips on wellness check out the Wellness Portal www.msba.org/wellness-portal

For assistance, please contact the Lawyer Assistance Program for **free, confidential counseling**. We have a network of counselors throughout Maryland. Jim Quinn, Director, (443) 703-3041, jim@msba.org; Lisa Caplan, LCSW-C, Associate Director, (443) 703-3042, lisa@msba.org. Toll Free 1(888) 388-5459. **We offer financial assistance for mental health and substance abuse treatment.** Please feel free to reach out to our LAP Committee Members and Volunteers www.msba.org/health-and-wellness ●

Lisa Caplan, LCSW-C has over 20 years experience in her field, and extensive experience working with lawyers and judges in the areas of mental health, substance abuse and trauma. In her free time she enjoys spending time with family and friends, paddle boarding, sailing, rock climbing and doing triathlons.



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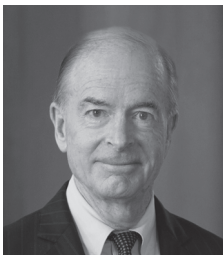
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Amy Hennen

Maryland Volunteer Lawyers Service (MVLS), the largest provider of pro bono civil legal services to low-income Marylanders, today announced that its managing attorney for consumer and housing law, **Amy Hennen**, was recognized by the Maryland Legal Services Corporation (MLSC) with its Rising Star Award. Hennen was recognized for her leadership, energy and profound commitment to serving low-income Marylanders.



Andrew Jay Graham

The 2020 edition of Maryland *Super Lawyers* recognizes twenty-four **Kramon & Graham** lawyers. For the eleventh consecutive year, firm co-founder **Andrew Jay Graham** was named to the "Top 10: Maryland Super Lawyers List." **Natalie McSherry** appears on the "Top 50: 2020 Women Maryland Super Lawyers" list for her work in Health Care.



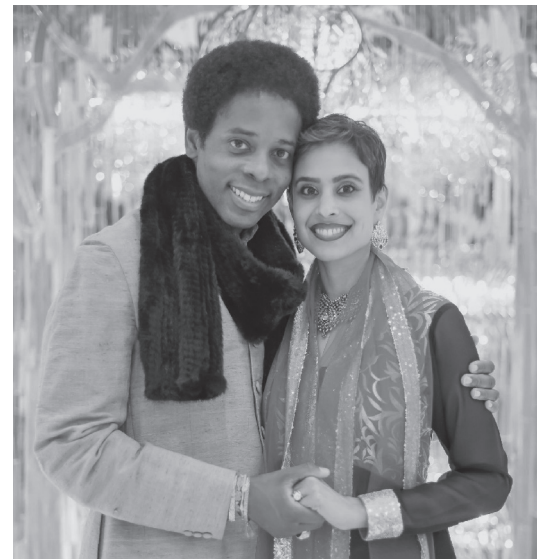
Natalie McSherry

Davis, Agnor, Rapaport and Skalny, LLC, one of the region's leading law firms, today announced that **Eric L. Hightower** was selected to serve as a Director of the Association of Legal Administrators. Eric's three-year term to the Board of Directors will officially commence on May 5, 2020. Eric has been with Davis, Agnor, Rapaport & Skalny, since 2011, where he manages the key areas of the Firm's operations and shares responsibility for the implementation of the Strategic Plan and practice management.



Eric L. Hightower

The Children's Guild Alliance, a nonprofit organization serving children, families and child-serving organizations, will honor **Guy E. Flynn** and **Nupur Parekh Flynn** at the organization's Kids First Celebration, an evening commemorating a legacy of innovation and transformation. At the event, The Children's Guild Alliance will present 2020 Sadie Awards to the Flynnns for their leadership in innovation and philanthropy. The Sadie Award recognizes people who embody the organization's spirit and vision of making the seemingly impossible possible. **Guy E. Flynn** practices law at **DLA Piper**, one of the world's largest law firms, where he serves as chairman of the firm's Maryland real estate practice and partner-in-charge of the firm's Baltimore office.



Guy E. Flynn and Nupur Parekh Flynn

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ECONOMIST: Lost income, benefits and life-care plans valued for personal injury, wrongful death and employment cases. University professor with extensive experience. DR. RICHARD B. EDELMAN, 8515 Whittier Boulevard, Bethesda, MD 20817. (301) 469-9575 or (800) 257-8626. References and vitae on request. Visa/MC. Please visit at: www.economic-analysis.com.

Send your latest news and updates for inclusion in Et Alia: BarBulletin@msba.org.

Access to Justice

CONTINUED FROM PAGE 4

tion-related studies show similar disparities between outcomes in cases with and without legal representation. The American Immigration Council's 2016 Special Report entitled *Access to Counsel in Immigration Court* demonstrated that immigrants with attorneys fare better at every stage of the court process. That report showed that immigrants who had legal representation were more likely to obtain the immigration relief they sought. Among detained immigrants, those with representation were twice as likely as unrepresented immigrants to obtain the relief they sought (49% with counsel v. 23% without). Further, represented immigrants who were never detained were nearly five times more likely than their unrepresented counterparts to obtain relief if they sought it (63% with counsel v. 23% without).

This finding holds true in other types of cases, beyond immigration as well. One Maryland study found that in appeals where public benefits were denied, the

In the six months following January, 2017, average bond amounts rose by

38%

rate of reversal for the unrepresented was 40 – 45%, whereas the rate of reversal for the represented doubled to 70 – 80%. In another Maryland study looking at the impact of counsel on consumers sued by debt buyers, the rate of dismissals or judgments for the consumer dropped from 71% for the represented to 23% for the unrepresented. In yet another Maryland study, the rate of acquiring a protective order with counsel was 83%, but without counsel was 32%.

Other Key Findings from the Bond Report

Beyond the key finding on the importance of legal represen-

tation, other findings from the Bond Report include:

- In the six months following January, 2017, average bond amounts rose by 38%
- In the same six month period, bond was granted less, with the rate dropping from 73% to 66%
- When people without lawyers did obtain bond, the bond amounts were 14% higher when compared to similar cases of people with lawyers
- A mere allegation by the government of gang affiliation was enough to all but guarantee a denial of bond. 88% of respondents labeled as gang affiliated (usually without evidence that would be deemed

admissible under federal rules) were denied bond entirely, regardless of other criteria, like length of stay in the U.S., age, merit of their immigration claim

Recommendations from the Bond Report:

- *Ensure equal access to due process by providing legal representation to indigent immigrants in bond proceedings who could not otherwise afford an attorney*
- More than one judge should preside over the bond docket to prevent fatigue and promote fairness
- Ensure that judges are trained in the applicable law, so they are aware of their power to grant the full range of relief during the bond proceeding, like conditional parole (essentially, release on own recognizance)
- The person's ability to pay the bond should be a factor the judge weighs when setting bond amounts, so that the bond amount set both discourages flight but also is affordable to

the detainee.

- Revise the process for seeking an appeal of a bond decision so that the BIA must adjudicate an appeal within 30 days; currently, bond appeals are a toothless remedy as many people are ordered deported while their appeal is still pending
- The government should be required to provide any evidence it intends to present of gang affiliation in advance of the bond hearing, with enough time for meaningful review
- Provide regular reports to the public and immigration judges of the bond amounts, denials, and other relevant metrics, so outcomes are comparable

The Maryland Access to Justice Commission supports the formation of legal defense funds for immigrants who cannot afford an attorney in an immigration case. ●

Dateline

CONTINUED FROM PAGE 4

6 Join the **MSBA Young Lawyers Section** to help celebrate with Maryland's newest attorneys. The event begins at 6:00pm in Columbia, Maryland. For more information and/or to register, please visit: www.msba.org/SwearingInYLS

12 Join the **MSBA Family and Juvenile Law Section** for the newest presentation of *Hot Tips in Family Law – A Multi-Disciplinary Approach to Your Practice* beginning at 8:30am at the Sheraton Columbia Town Center Hotel in Columbia, MD. The 2020 Hot Tips in Family Law program will focus on cross training, specifically where family law practitioners may encounter issues from other areas of law, specifically bankruptcy, estate planning/elder law, tax, immigration and real property. For more information and/or to register, please visit: www.msba.org/FamilyLawTips

16-22 MSBA Professional Excursion

17 Presidents' Day - Courts Closed.

19 Join the **MSBA Elder Law and Disability Rights Section** for the newest presentation of *Adult Guardianships in Maryland* beginning at 8:30am at the Loyola Graduate Center, Columbia Campus in Columbia, MD. Experienced practitioners will review the latest topics of New Rule Changes in Maryland Guardianships, Alternatives to Guardianship and more! The program will include recent case studies. This program geared towards experienced Guardianship attorneys who already have the Nuts & Bolts. For more information and/or to register, please visit: www.msba.org/Adult-Guardianships

19 The **MSBA Young Lawyers' Section** presents "Cultivating Your Young Lawyer Career" beginning at 6:30pm at the University of Baltimore School of Law. Panelists will discuss ways to cultivate their budding law careers through personal and professional goal setting. For more information and/or to register, please visit: www.msba.org/Cultivating-Your-Career

20 Join the **MSBA Learning and Publications Department** for a all new presentation of *Software Licensing and Cloud Computing Boot Camp: Successful Contracting in an Ever-Changing Environment*, beginning at 9:30am at the Universities at Shady Grove in Rockville, MD. This program will explore the issues that arise in negotiating software licenses and cloud computing agreements. Experienced in-house and outside counsel representing both vendors and customers will discuss "what is market" for limitations of liability, data breach, representations and warranties and other significant issues. For more information and/or to register, please visit: www.msba.org/Cloud-Computing

20 The **MSBA Estate & Trust Law Section Study Group** presents "Basics to Elder Law" presented by Joseph Mathis, Esq., Offit Kurman. Participants can attend either in Baltimore or Bethesda. For more information and/or to register please visit: www.msba.org/ET-Study-Group

25 Join us for the *MSBA Mid-Year Meeting* beginning at noon in Bethesda, Maryland. The Mid-Year meeting gives MSBA members insight into where we've been & where we're headed. This annual event offers in-person learning & networking opportunities as well as an opportunity to envision the future of our association, together. For more information and/or to register for this complimentary event, please visit: www.msba.org/MidYear2020

25 Board of Governors Meeting

26 Join the **MSBA Estates and Trust Law Section** for the newest presentation of *Estate Planning in the Era of High Estate Tax Exemptions – a New Way of Thinking*, beginning at 8:30am in Columbia, MD. This program is designed to cover estate planning for the Maryland practitioner in 2020 and moving forward primarily in light of recent tax law changes. For more information and/or to register, please visit: www.msba.org/Estate-Planning

26-29 ABA Techshow - MSBA Members receive a discount on registration by utilizing the Event Code: *EP2013*. For more information and/or to register, visit: techshow.com



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Because of these capabilities, deepfakes have been used to create fake celebrity pornographic videos or revenge porn. Deepfakes can also be used to create fake news and malicious hoaxes.”

If you thought Photoshop could do bad things, think of deepfakes as Photoshop on steroids!

Deepfake video is created by using two competing (and yet collaborative) AI systems—a generator and a discriminator. The generator makes the fake video, and then the discriminator examines it and determines whether the clip is fake. If the discriminator correctly identifies a fake, the generator learns to avoid doing the same thing in the clip it creates next. The generator and discriminator form something called a generative adversarial network (GAN). The first step in establishing a GAN is to identify the desired output and create a training dataset for the generator. Once the generator begins creating an acceptable level of output, video clips can be fed to the discriminator. As the generator gets better at creating fake video clips, the discriminator gets better at spotting them. Conversely, as the discriminator gets better at spotting fake video, the generator gets better at creating them. If thinking about that makes your head spin, you are not alone.

Yes, it is technical and not especially easy to understand, though there are (of course) Ikea-like DIY toolkits that will do most of the advanced work for you.

Hany Farid on Deepfakes

Hany Farid, a professor who is often called the father of digital image forensics, is a special hero to the authors. His incredible work on detecting altered images has inspired us for years. Here is what Farid says about deepfakes:

“The technology to create sophisticated fakes is growing rapidly. Every three to six months, we see dramatic improvements in the quality and sophistication of the fakes. And, these tools are becoming increasingly easier to use by the average person.

Deepfakes (image, audio and visual) can have broad implications ranging from nonconsensual pornography to disrupting democratic elections, sowing civil discord and violence, and fraud. And more generally, if we eventually live in a world where anything can be faked, how will we trust anything that we read or see online?”

That’s a darn good question for which, at the moment, no one has a satisfactory answer.

Farid doesn’t believe, and we agree, that we can truly control the deepfakes situation. To exercise any degree of control, according to him, “will require a multifaceted response from developing better detection technology to better policies on the large social media platforms, a better educated public and potentially legislation.”

New photo and video verification platforms like Truepic (full disclosure: Farid is an advisor to the company) use blockchain technology to create and store digital signatures for authentically shot videos as they are being recorded, which makes them easier to verify later. But today, that is the exception and not the reality.

By the way, sharing deepfake revenge porn is now a crime in Virginia (effective July 1, 2019), the first state to make it a crime. We hope many more will follow. How do we combat the spread of \$50 apps like DeepNude (thankfully defunct as we write, but there will be others), which could undress women in a single click? DeepNude was trained on more than 10,000 images of nude women and would provide the undressed woman within 30 seconds—and of course the image could be shared to smear reputations (sending it to the woman’s employer or friends and family) or to post online as revenge porn.

How Do We Tell If a Video Is a Deepfake?

Researchers can now examine videos for signs they’re fake, such as shadows and blinking patterns. In June 2019, a new paper from several digital forensics experts outlined a more foolproof approach that relies on training a detection algorithm to recognize the face and head movements of a particular person, thereby showing when that person’s face has been imposed onto the head and body of someone else. The drawback is that this approach only works when the system has been trained to recognize particular people, but it might at least keep presidential candidates safe from attack.

The Defense Advanced Research Projects Agency (DARPA) announced in August 2019 that it would undertake an initiative focused on stopping malicious deepfakes from spreading. Researchers from the Semantic Forensics program, or SemaFor,

plan to teach computers to use common sense to catch deepfakes. We fear that DARPA may be a bit late to the game. As we write, the internet is replete with stories of how, when audio is part of a deepfake video, our new best friends might be mice. At the University of Oregon’s Institute of Neuroscience, researchers are training mice to detect speech irregularities and sounds that differentiate words. The animals’ accuracy was 80 percent, which could offer useful insights when paired with AI’s skill at detecting deepfakes.

Progress has been impressive. Still, the deepfakes are getting better all the time. Are we ready for a barrage of deepfake videos before the 2020 election? The almost unanimous answer of the experts is “no.”

To return to Farid’s colorful expressions of futility, “We are outgunned. The number of people working on the video-synthesis side, as opposed to the detector side, is 100 to 1.” Those are daunting odds.

Audio Deepfakes

As if deepfake videos weren’t driving us crazy trying to discern the real from the unreal, now voice-swapping has begun to be used in artificial intelligence cyberattacks on business, allowing attackers to gain access to corporate networks and persuade employees to authorize a money transfer.

Business email compromise (BEC) attacks have become woefully common. Generally, they start with a phishing email to get into an enterprise network and look at the payment systems. They are looking for the employees authorized to wire funds and the entities that they usually wire funds to.

It is a theatrical game, as they emulate the executive, scaring or persuading the employee. This is really ramping up the success of the acts, as using the phone to impersonate an executive is a powerful tool.

As with video deepfakes, the AI has GANs that constantly teach and train each other, perfecting the outcome.

Also emulating the fake videos, the bad guys come up with a convincing voice model by giving training data to the algorithm. The data might come from speeches, presentations or law firm website videos featuring the voice of the executive. Why is deepfake audio more flexible? Well, with video, there needs to be a baseline video. Not so with

audio deepfakes. Once there is a credible audio profile created, the attacker can use “text-to-speech” software and create any script desired for the phony voice to read. This means you don’t need to have an exact recording of the words you want to use in the deepfake audio.

Creating deepfake audio is not easy or cheap—it takes time and money, which is a barrier to many attackers. The most advanced of these systems can create a voice profile by listening to just 20 minutes of audio, but in most cases the process is longer and resource intensive.

Alexander Adam, a data scientist at AI training lab Faculty, tells CPO Magazine that he estimates that you can spend thousands of dollars training a very convincing deepfake audio model. Added to the mix? Background noise of some kind—traffic noises, for instance—that sort of gloss over imperfections in the audio. We’ve got to admit—these people are crafty.

How Can We Defeat Audio Deepfakes?

Whoever can authorize wire payments might want to take a look at the audio footprints they have in the public realm to assess their degree of possible risk. If the risk is considerable, they should tighten requirements before funds are sent.

Naturally, researchers are working out ways to review the audio of a call authorizing the release of funds to assess the probability that it is real or fake. We are not sure yet about the implementation of a certification system for interorganizational calls, but it’s a possibility. Another possibility would use blockchain technology in combination with voice-over-IP calls in order to provide caller authentication. As you can imagine, it is (as they say) complicated.

Defenses against these attacks summon all the rules of cybersecurity, including the wisdom of educating employees. There is little knowledge among employees about these deepfakes, particularly the audio fakes. After training, employees are much more apt to be suspicious of an unusual payment request or—another frequent ploy—a request for network access. Education can motivate an employee to question an unusual payment or network access request. Putting additional verification methods in place is wise.

Baseline BEC defenses such as filtering and authentication

frameworks for email can stop these attacks in their tracks by snagging phishing emails before they’re delivered. As always, require multifactor wherever you can. We always advise law firms to require that an employee who receives a wire funds request call the authorizing party back—at a known good number, never at a number given in the audio message. Verify everything!

Final Thoughts

We tried to keep the information above as readable and informative as possible. The truth is, very few lawyers understand the risks of deepfake audios and videos and how to address them. More and more, we are asking law firms to accept a homework assignment, which is now an important piece of the ever-evolving cybersecurity threat. While it is fairly expensive to generate credible deepfake audio and video today, as the cost of computational horsepower goes down, we’re sure that deepfakes will become more affordable to the masses. ●

Sharon D. Nelson, Esq., is the President of Sensei Enterprises, Inc., a digital forensics, cybersecurity and information technology firm in Fairfax, Virginia. Ms. Nelson is the author of the noted electronic evidence blog, Ride the Lightning and is a co-host of the Legal Talk Network podcast series called “The Digital Edge: Lawyers and Technology” as well as “Digital Detectives.” She is a frequent author (seventeen books published by the ABA and hundreds of articles) and speaker on legal technology, cybersecurity and electronic evidence topics. She was the President of the Virginia State Bar June 2013 – June 2014 and a past President of the Fairfax Law Foundation.

John W. Simek is vice president of the digital forensics, information technology and cybersecurity firm Sensei Enterprises. He is a nationally known expert in cybersecurity and digital forensics. John is a Certified Information Systems Security Professional (CISSP) and holds multiple other technical certifications. He was a co-chair of ABA TECHSHOW 2019 and a frequent author (16 books and hundreds of articles) and speaker on technology, cybersecurity and electronic evidence topics.

UPCOMING LIVE WEBCASTS

- **Financial Issues in Divorce – Taxation, Valuation, Equalization: Navigating Potential Asset and Income Obstacles in Divorce Negotiations** - January 30, 2020 | 8:30 a.m. - 1:30 p.m.
- **Hot Topics in Adult Guardianships** - February 19, 2020 | 8:30 a.m. - 1:30 p.m.
- **Software Licensing and Cloud Computing Boot Camp: Successful Contracting in an Ever-Changing Environment** - February 20, 2020 | 9:30 a.m. - 1:30 p.m.
- **Estate and Income Tax Planning in 2020 – a New Way of Thinking** - February 25, 2020 | 8:30 a.m. - 1:30 p.m.
- **Mediation in Commercial Disputes** - March 5, 2020 | 9:00 a.m. - 1:30 p.m.

 For more information and to register go to www.msba.org/cle-catalog

UPCOMING PUBLICATION UPDATES

- Electronically Stored Information in Maryland and Federal Courts
- Maryland Discovery Problems & Solutions, Second Edition
- Maryland Automobile Accident Deskbook, Third Edition
- 2020 Replacement Pages to Maryland Criminal Pattern Jury Instructions, Second Edition
- 2020 Replacement Pages to Gibber on Estate Administration, Sixth Edition
- 2020 Replacement Pages to Maryland Civil Pattern Jury Instruction, Fifth Edition

Nominations Sought for
ABA Delegates

PURSUANT TO THE PROVISIONS OF SECTION 6.4 of the Constitution of the American Bar Association, the Maryland State Bar Association is entitled to be represented by a total of seven delegates in the ABA House of Delegates. The terms of four MSBA delegates will expire at the conclusion of the ABA Annual Meeting on August 4, 2020. Any MSBA member is eligible to apply for one of these four positions and our long-standing practice has been that the MSBA President-Elect takes one of those four seats.

The MSBA Board of Governors will elect the four delegates at its meeting to be held May 15, 2020. Each delegate will be elected to a two-year term.

The ABA House of Delegates has the ultimate responsibility for establishing the association's policies for administration of the association and its positions on professional and public issues. The House elects the ABA officers and board of governors. MSBA delegates to the ABA House of Delegates are expected to attend each House meeting and participate in its proceedings. The House of Delegates meets twice each year at the ABA Annual Meeting in July/August and at the ABA Mid-Year Meeting, typically held in February.

Any member of the MSBA who wishes to be considered for one of the three vacancies should submit his or her name and a brief autobiography and statement of interest. Please address the statement of interests to Victor L. Velazquez, Executive Director, Maryland State Bar Association, and submit, via email only, to Theresa Michael (theresa@msba.org) by or before Friday, March 31, 2020. Anyone who expresses an interest in these positions by submitting materials in accordance with these guidelines will be deemed nominated as a candidate.

NOMINATION AND ELECTION OF MSBA BOARD OF GOVERNORS 2020-21			
DISTRICT	NUMBER OF GOVERNORS TO WHICH ENTITLED	CLASS I ELECTED ODD YEARS	CLASS II ELECTED EVEN YEARS
FIRST <i>Baltimore City</i>	8	4	4
SECOND <i>Dorchester Somerset Wicomico Worcester</i>	1	1	
THIRD <i>Caroline Kent Queen Anne's Talbot</i>	1	1	
FOURTH <i>Calvert Charles St. Mary's</i>	1		1
FIFTH <i>Prince George's</i>	3	1	2
SIXTH <i>Montgomery</i>	7	2	5
SEVENTH <i>Anne Arundel</i>	3	2	1
EIGHTH <i>Baltimore County</i>	3	3	
NINTH <i>Harford Cecil</i>	1		1
TENTH <i>Howard</i>	2	1	1
ELEVENTH <i>Carroll Frederick</i>	1		1
TWELFTH <i>Allegany Garrett Washington</i>	1	1	
YOUNG LAWYERS	3	2	1
PURSUANT TO THE REGULATIONS governing the nomination and election of the MSBA Board of Governors, the membership is hereby notified that nominations are sought for all Districts which are listed under Class II of this chart. (Class II governors are elected in even-numbered years and Class I governors in odd-numbered years.) The MSBA bylaws require that all nomination petitions must be received by the Executive Director no later than 5:00 p.m. on February 12, 2020. If the election is necessary, ballots must be cast or postmarked no later than March 27, 2020, and received no later than April 3, 2020. If you are interested in being nominated by a local bar association or individual petitions, you may request a nominating petition from Victor L. Velazquez, Executive Director, MSBA, 520 West Fayette Street, Baltimore, Maryland 21201; (410) 685-7878 or (800) 492-1964; or victor@msba.org .			

ELECTRONIC SERVICE REQUESTED

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