Challenge Acceptance: The Law Student's Guide to Anti-Racism and Advocacy

By Kelsi Robinson


The list of Black lives lost to race-based violence goes on, collecting countless names of Black fathers, mothers, sisters and brothers. Reducing Black lives into a hashtag before being forgotten by most of America once the adrenaline of sparking change wears off.

Even as a Black woman, I have felt hopeless in processing the murders of my Black brothers and sisters. Where do we go from here? Fear of not doing enough has crept over me, wondering how to use my platform as a law student to create change. Resources have overwhelmed me, conversations have drained me, and thoughts of not having the opportunity to create lasting change constantly haunt me. That is the problem. Fear of not being able to do enough stops us from doing anything at all, paralyzing our efforts for worry of not doing the “right thing” or “enough” things.

As law students, most of us like to see the big picture. Now, I challenge you to look at pieces of the picture. Tiny snapshots of change. We cannot change the world on our own; however, we can take small steps that lead to larger changes in the future. If you are searching for where to start, consider these five challenges.

Self-Reflect

The first challenge is to self-reflect. As law students, we are meticulous observers. We can issue spot multiple issues from one sentence in an exam; we can argue for or against any position of a case based on a few facts; we can predict which side the court will take by detecting the tone of a judge through their carefully selected words. Yet, self-observation and reflection may be the most difficult tasks of all.

If you don't know where to start, begin with an implicit bias test. Harvard has produced an implicit bias test online (https://implicit.harvard.edu/implicit/takeatest.html), which takes about 10 minutes to complete. Following the test, your results will show you if you have a slight, moderate or strong preference for a certain race. Do not stop after the test. Reflect on your biases and welcome them into the forefront of your mind so that you can be cognizant of when your bias is leading your thoughts. Think of your implicit bias when you feel a lack of security around someone that doesn't look like you; think of your bias when you choose to sit closer to someone whose skin color mirrors your own rather than someone whose doesn't. When you recognize that your gut feeling is creating distance between yourself and someone of a different race,

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label that gut feeling as a bias, and take the opposite route. The uncomfortable route. Once uncomfortable, you will know that you are beginning to dismantle your own bias, which is the ultimate goal of this self-reflection exercise.

Communicate
The second challenge: have tough conversations. What makes litigation worthwhile? The simplest answer is that your opponent is advocating for a different position than you. You don’t go to litigation because both parties agree; you go because there is some disagreement on the positions. If there weren’t any disagreements, there wouldn’t be any litigation, and litigation wouldn’t be worthwhile.

The same is true for conversations about racism. While it’s great to talk to your friends about your view on racism and how terrible you feel about the brutality toward Black Americans, these conversations are not tough. They are not as worthwhile as having conversations with friends, classmates or family members that don’t agree with you. There must be opposition to make the conversation worthwhile. Challenge opposing narratives. Embrace discomfort.

Support Black Law Students
The third challenge is to support Black law students. In 1865, Jonathan Jasper Wright, a future South Carolina Supreme Court Justice, was the first Black male admitted to practice law in Pennsylvania. See Justice Jonathan Jasper Wright, South Carolina African American History Calendar 2020. However, with over 150 years of progress in our legal system and removing explicit bias from the Black path to the legal field, the percentage of African American lawyers has still not surpassed 5% across the nation. See ABA National Lawyer Population Survey, 10 Year Trend in Lawyer Demographics (2008-2018), American Bar Association, https://www.americanbar.org/content/dam/aba/administrative/market_research/National_Lawyer_Population_Demographics_2008-2018.pdf (last visited June 23, 2020). While we don’t have the power yet to hire Black law students, we do have the power to make sure they feel comfortable, accepted and heard at any internship or associate position. It is not enough for Black law students and lawyers to have a seat at the table if no one can hear them.

Volunteer
The fourth challenge is to volunteer. Being a law student provides us with the power of knowledge, critical thinking and problem solving. Yet, many students are stuck in the uncertain phase of asking themselves “what can I do now?” You’re far along enough in your law school journey to know about the law, but not far enough to practice on your own. If you are looking for a place to volunteer, check in with your local Legal Observer Program. See NLG Legal Observer Program, National Lawyers Guild, https://www.nlg.org/legalobservers/ (last visited June 23, 2020). The Legal Observer Program, created in 1968, was established as a response to the New York City anti-war and civil rights protests. The program provides legal assistance for arrested protestors and assists in bringing civil litigation suits if necessary. Here’s the good news: law students are eligible to join the program and can serve as
deterrents to law enforcement officers who may otherwise behave unconstitutionally.

**Practice Anti-Racism**

The final challenge is to practice anti-racism. To start, let’s talk about hearsay. Rule 801 of the Federal Rules of Evidence lays out exclusions from hearsay, one of which is analogous to the idea of anti-racism. See Fed. R. Evid. 801. When commenting on the exclusions from hearsay, the advisory committee explained the established principles of the adoption or acquiescence of a hearsay statement. *Id.* Here’s a breakdown: when Person A makes a statement, if Person B, under the circumstances, would normally protest the statement Person A made if the statement was untrue, but Person B remains silent instead, that silence is relied upon, thereby causing Person B to adopt the statement. It is not enough for Person B to remain silent when Person B was expected to speak up but failed to do so. The same is true for practicing anti-racism.

It is not enough to be silent when witnessing overt acts of racism. Under any circumstance, the appropriate response is not silence. Rather, it is speaking up to confront and correct racism. Not being racist is not enough, as silence results in adoption of the statements and remaining complicit in the larger problem. To be an activist or ally, we need active anti-racism responses.

**Conclusion**

While we may not be able to change the world on our own, we have the power to take small steps toward dismantling racism and systemic oppression. If you are stuck on where to start, begin with these five challenges: self-reflect, communicate, support Black law students, volunteer and practice anti-racism. When you are finished, challenge someone else. Let the change begin with you.

Kelsi Robinson is a third-year law student attending Penn State School of Law at University Park. While attending Penn State, Kelsi has held positions in Phi Delta Phi, Black Law Students Association and Penn State Law Review. She is currently serving the student body as the Student Bar Association president.

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**In Defense of the Physical Office**

*By Frank DeVito, Esq.*

I write this article—and all motions, briefs and contracts over the last three months—from a desk in my bedroom. Corporate clients send contracts for review via email. Pleadings and motions are written and filed electronically. A legal assistant opens and scans my mail each day, sending me an email explaining the contents. Since the stay-at-home orders were put in place, most of us in the legal profession have been working under these circumstances. While it is a challenge to work in an environment containing a wife, a toddler and a baby, I am surprised to find that I can complete literally every task that my job demands from this desk in my bedroom.

For those of us who find this situation surprisingly manageable, the question naturally arises: why have a physical office at all?

Across the country and throughout the world, law firms are asking these same questions. Many firms are finding that their lawyers and employees are quite productive working from home. Are lawyers ready to work from home full-time? Has modern technology made the physical legal office an unnecessary overhead expense that can be left to the pages of history? These are legitimate questions. But let us not be too hasty in our reply, lest we miss some unseen—but crucial—issues.

First, a general comment and concern about human in-
interaction. This may go without saying, but technology in our 21st century world has made people more “connected,” and yet, more isolated than ever before. We now have access to an unlimited supply of information; we can communicate with people across the world instantly. Despite all our “connectedness,” people are spending more and more time with their computers and smartphones, which means less and less time interacting face to face with other people. A quick survey of a mall, restaurant or bar—once typical places of social interaction—will reveal something that should shock us: people sit or stand in the midst of other people, eyes glued to screens, completely unaware of the people who surround them.

This phenomenon is very new, so we do not have the studies to show the extent of the emotional and psychological impact these social changes will have on individuals and on societies. While technology provides amazing opportunities, both for personal enrichment and professional efficiency, personal contact with other humans is a critical part of the human experience that I fear is being lost. As it becomes easier to avoid stores by shopping online and to limit personal meetings by using text messaging or video chat, we risk creating a world where we live in front of a screen rather than other people. I find personal interactions with my co-workers, members of the bench and bar, and especially my clients, to be a joyful and enriching experience. While there are strong efficiency arguments in favor of home offices and Zoom conferences, law firms should seriously consider whether it is good to help create a world where we spend even less time interacting with the people we work with and serve.

I also offer a less philosophical, more pragmatic, defense of the goodness of the physical law office. I have often reflected on what a challenge it would be for a new lawyer to run a solo practice. As I began to file pleadings and motions, revise contracts and advise clients, I would constantly walk into the partners’ offices and ask for advice. Even the experienced attorneys constantly ask questions and float ideas to the other attorneys at the firm. In my experience, having other attorneys down the hall is a critical asset for the creative, refined and perfected practice of law. Sure, attorneys can call each other and have Zoom meetings. But daily personal contact with other attorneys is an invaluable asset. I think the culture of the law office is an indispensable part of learning to practice law for new attorneys. Law firms should be very hesitant to consider replacing the physical office with a home office format. There is simply no replacement for regular, personal interaction between attorneys, both for the purpose of forming new attorneys and of sharpening experienced ones.

The current situation can give law firms valuable insight about the flexibility of working from home. Perhaps some firms will decide to give employees more flexibility: working from home on certain days of the week or spending part of the workday in the office and the rest at home may become more common models. This is (at least potentially) a good thing. If efficient and trustworthy employees can work productively from home, employers can more confidently allow those employees flexibility, especially in certain circumstances such as illness or difficulty in the home, the arrival of new babies, etc. A flexible, hybrid business model allowing for greater ability to work from home should not, however, lead to the complete abandonment of the physical office. Law firms should reflect seriously on the necessity of mentoring young attorneys in the context of a law firm culture, the benefits of having other attorneys in the office to work with and the general needs of personal human interaction. I hope law firms will be hesitant to do away with the human, cultural and practical benefits of the physical office.

Frank DeVito is an associate attorney with the law firm of Lesavoy Butz & Seitz LLC in Allentown. His practice areas include corporate law, real estate law, trusts and estates and general civil litigation. He also serves as a commissioner on the Northampton County Elections Commission. He received his B.A. in philosophy from Sacred Heart University in Fairfield, Connecticut, and his J.D. from Quinnipiac School of Law, where he served as Lead Articles Editor of the Quinnipiac Law Review and president of the school’s Federalist Society chapter. He resides in the Lehigh Valley with his wife and two young children.
Since the inception of the #MeToo movement, men and women everywhere have come forward to share their encounters with sexual harassment, resulting in enormous light being shed on the prevalence of sexual harassment in all aspects of Americans’ lives.

A 2018 NPR study found that 81% of women and 43% of men reported being sexually harassed in some form during their lifetime. See Rhitu Chatterjee, A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment, NPR (Feb. 21, 2018).

This includes sexual harassment in public spaces, private spaces and within the education system or workforce. The Center for Gender Equity and Health at University of California San Diego School of Medicine found that 45% of all respondents, male and female, reported that the most recent experience occurred within the past five years. See Measuring #MeToo; A National Study on Sexual Harassment and Assault, CENTER FOR GENDER EQUITY AND HEALTH AT UNIVERSITY OF CALIFORNIA SAN DIEGO SCHOOL OF MEDICINE (May 2019). Of these, 18% of women and 16% of men reported the most recent experience having occurred within the past six months, although these numbers may have changed in the year since the study’s publication. Id.

While it is clear that men also fall victim to predatory sexual behavior, it is well-known that women encounter sexual harassment at a much higher rate than men – especially in the workplace. According to the EEOC, of the 7,514 charges filed alleging sexual assault in the workplace in 2019, only 16.8% were filed by men. See Charges Alleging Sex-Based Harassment (Charges filed with EEOC), FY 2010- FY 2019, Equal Employment Opportunity Commission (2019). In 2015, the EEOC created a task force to uncover why sexual harassment is so prevalent in the workplace. The study concluded that:

1. Women working in positions where income is based on “tips” are more likely to experience sexual harassment from management, co-workers and customers than women who work in non-tipped positions.
2. Women working in isolated jobs such as janitorial roles, in-home caregiving, agriculture and hospitality, were more likely to endure sexual harassment or sexual assault due to an abuser’s sense of power and a lack of witnesses.
3. Undocumented or immigrant workers with legal status were more likely to experience sexual harassment or assault due to a lack of knowledge about their rights and protections.
4. Women who work in male-dominated occupations including construction, military and academia, reported frequent gender-based harassment. In particular, women in academic medicine reported more frequent harassment than their female colleagues in science and engineering.
5. Women working in positions with significant power differentials are more likely to be sexually harassed due to the fact that women are less likely to be in senior positions. Females in “junior” roles are more likely to experience retaliation, threat of job loss and the overall careless handling of internal complaints.

Although the #MeToo movement exposed a huge gender bias and sexual assault problem and prompted the discussion worldwide, men and women are still being sexually harassed in the workplace. Looking specifically at male-dominated professions and professions where men maintain a much higher level of power than their female counterparts, it’s not shocking to see that sexual harassment lives in law firms.

A 2019 study conducted by the International Bar Association reported that sexual harassment in the legal industry is common and underreported. See Kieran Pender, Us Too? Bullying and Sexual Harassment in the Legal Profession, INTERNATIONAL BAR ASSOCIATION (May 2019). The study concluded
that 43.3% of female lawyers in North America experienced sexual harassment in the workplace. Further, three quarters of all sexual harassment incidents were never reported.

Unfortunately, this research is consistent with what has been conducted by the American Bar Association. A 2018 survey of approximately 1,000 female attorneys in Massachusetts found that nearly 38% of respondents reported that they had received or been copied on, some type of unwanted personal or sexual communication in the workplace. See Robert J. Derocher, As women lawyers across the country say #MeToo, bar associations play an important role, ABA Bar Leader (Vol. 43, Issue 1, September-October 2018). Approximately 21% reported either experiencing or witnessing unwelcome physical contact in the workplace. Over half of these incidents were never reported.

The Iowa State Bar Association posed a similar question and asked its members whether they had experienced or witnessed sexual harassment or sex-based discrimination in the past five years — roughly 84% of female attorneys and legal professionals and 34% of males in the same positions responded in the affirmative. Id.

Eighty-four percent. The number is staggering. Thousands of female attorneys are sexually harassed or discriminated against in the workplace and only a fraction of these incidents are reported. Which poses the question of why? Why are attorneys underreporting this behavior, even after the #MeToo movement exposed the skeletons in some of the most prolific institutions in the nation? Because it’s still a boys’ club, and women fear retaliation.

Lawyers in the United States, according to the 2019 U.S. Census Bureau, are only 38% female. See Commission on Women in the Profession, A Current Glance at Women in the Law, ABA (April 2019). Forty-five percent of associate level attorneys in law firms are female, but the numbers drop drastically at higher level positions. Id. Only 22% of managing partner positions, 22.7% of non-equity partner positions and 19% of equity partner positions are held by women. See Hannah Hayes, Is Time Really Up for Sexual Harassment in the Workplace? Companies and Law Firms Respond, ABA Perspectives (Vol. 26, No. 4 December/January 2019).

Women are underrepresented in the legal profession and in many instances may be the only female attorney at their firm. Further, it became abundantly clear that many firms failed to implement and/or enforce anti-sexual harassment procedures or internal training prior to the #MeToo movement. Anti-sexual harassment training firms noticed an increase in requests in the months after the start of the #MeToo movement. It is therefore not unfathomable for female attorneys who have been harassed to feel isolated and forced into silence, especially when there are no set reporting procedures in place.

The burden is now, more than ever, on law firms and attorneys in higher management to speak out and establish a strong office culture. The Center for American Progress published a detailed list of steps that many businesses can take to combat sexual harassment in the workplace. See Jocelyn Frye, How to Combat Sexual Harassment in the Workplace, Center for American Progress (Oct. 19, 2017). However, it is imperative that the following steps are enforced with intent and consistency to be effective.

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Establish a clear sense of leadership through consistency. Establishing a policy is only effective if the policy is enforced at all levels. The policy must be backed by consistency, accountability and transparency. When an employee makes a complaint, it must be taken seriously and investigated fully, no matter who is involved.

Establish equality as a core principle. This one sounds like a no-brainer. However, abusers often use sexual harassment as a method to isolate women and create an even stronger power differential. Therefore, it is paramount that equality is established in the workplace to show that this behavior is never tolerated—whether it’s at the associate or partner level.

Update any existing policies and standards to reflect modern communication and experience. With the advancement of social media and virtual communication, it is crucial that firms modify and adapt. Snapchat or Instagram, for example, are easy ways for abusers to single out employees in a “fun” environment, gain trust and then abuse that trust. Develop internal procedures that address the use of social media among all employees of the firm and create a level of separation or clear boundaries and expectations.

Enforce the law at all levels. Senior level partners are just as accountable for their actions as associates. Enforcing the policy on all members of the firm, at all levels, is essential to shaping the workplace culture. Sexual harassment coming from an associate is just as inappropriate as it is coming from an equity or named partner.

Work collectively to combat bias and stereotypes. Victim blaming, stereotypes and gender bias have been around for a very long time. Ignoring off-hand comments regarding these topics is counter-productive and creates an environment that is accepting of this behavior. Therefore, it is critical to establish clear expectations about workplace dialogue and to communicate that victim-blaming is neither appropriate nor tolerated.

Remember: Most incidents of workplace sexual harassment never get reported let alone make their way to court. Therefore, it is important to empower employees by taking complaints seriously and ensuring that retaliation has no place within your firm.

Kara D. Hill is an associate at Pogust Millrood, LLC in Conshohocken. She focuses her practice on pharmaceutical drug and device litigation, personal injury and FLSA class actions. Kara graduated with a B.A. in journalism from Eastern Washington University in Washington State and attained her J.D. at Willamette University College of Law in Salem, Oregon. While in law school, Kara worked for the Public Defenders Association. Additionally, she was an active member in Moot Court, Young Lawyers Society, Women's Law Caucus and Oregon Criminal Defense Lawyers Association. Prior to joining PM, Kara worked for a Philadelphia defense firm and focused her practice in the areas of premises liability and asbestos litigation.

"Allowing predators to fly under the radar to protect a firm's image is not only despicable, but hypocritical."
The rapidly changing nature of technology makes having a working knowledge of innovations in legal technology a tool to thrive in today’s legal practice.

A 2017 legal technology competition sponsored by LawGeex pitted man against machine to test whether humans or a thinking machine could more accurately spot legal issues in standard non-disclosure agreements (NDAs). In the competition, 20 experienced lawyers faced off against a three-year-old machine. The lawyers had decades of combined experience with NDAs and commercial law. The machine was trained by reviewing tens of thousands of NDAs. The NDAs used in the competition were selected from a publicly available data set. The lawyers were given up to four hours to annotate five NDAs based on a set of clause definitions. The competitors were judged based on their accuracy in spotting risks in the NDAs. The humans took an average of 92 minutes to complete the five NDAs with an overall 85% accuracy rate. The machine took 26 seconds and had a 94% accuracy rate.

The machine is a software platform developed by LawGeex that uses machine learning (ML), a subset of artificial intelligence (AI), to review contracts. Jessica Stillman’s 2018 Inc.com article, “An A.I. Just Outperformed 20 Top Lawyers (and the Lawyers Were Happy)”, provides a good summary of the competition. Think of AI as the ability of software to perform learning, analysis or decision tasks typically performed by humans. ML is the use of mathematical algorithms in software to learn about data and perform analysis either under the supervision of human trainers, who provide corrections to the algorithm as it makes predictions or unsupervised based on patterns and relationships found by the algorithm. AI is useful to lawyers because it autonomously performs routine tasks needed to complete legal work like research, electronic discovery, legal analysis or litigation prediction.

Artificial intelligence is a useful compass to navigate modern legal practice

I became interested in legal AI after seeing ML algorithms used to analyze documents and glimpsing the impact that AI is having on the practice of law. This led to reading Rickard Susskind’s book, Tomorrow’s Lawyers: An Introduction to Your Future, which I highly recommend. The book provides an excellent overview of legal AI developments and predicts how AI is changing legal practice and creating opportunities for lawyers who effectively use legal AI tools. There are many free online resources where you can learn about AI. Another good resource is Joshua Walker’s 2019 book, On Legal AI. Walker provides practical examples of AI solving legal problems and an overview of the current state of legal AI and its future.

My goal is to introduce AI to you and interest you in learning more about how AI can free you to focus on high-value work that is rewarding. Learning about AI is a smart way to invest in your future career. Knowledge of the AI tools relevant to your practice will help you to understand significant trends in the legal industry and capitalize on future opportunities made possible by the increased efficiency that legal AI creates. Although AI will not replace lawyers, it is increasingly capable of autonomously performing routine tasks like identifying relevant phrases in case law for legal research or coding documents for production in electronic discovery. Automation of routine legal tasks with AI means that lawyers can work more efficiently and focus on legal work that is highly valuable to clients and rewarding to lawyers.

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Thinking Legal Machines
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Artificial Intelligence is a valuable force multiplier for lawyers

Many AI tools are in development or exist to automate legal tasks routinely performed by lawyers. For instance, lawyers were traditionally trained to use a Boolean logic/terms and connectors search instead of just a natural language search to get the best research results. However, AI-powered legal research tools combine natural language processing and algorithms to enhance the accuracy of legal research. This allows researchers to conduct legal research in a more natural manner, similar to asking a colleague a question. AI is proving similarly useful for electronic discovery where the use of technology assisted review (TAR) makes it possible to use algorithms to replicate human attorney coding.

Michael Mills’ 2016 paper, "The State of Play," highlights several examples of these tools. Ross Intelligence’s legal research tool (ROSS) and Casetext’s Case Analysis Research Assistant (CARA A.I.) are examples of AI-powered legal research tools. ROSS uses question-based search, user highlighted text and whole document analysis to identify relevant case law and overturned or questioned cases. CARA A.I. analyzes legal pleadings or memoranda to identify cases based on existing citations or the issues and facts in a document. It also identifies cases omitted by opposing counsel in court filings.

LexisNexis and Westlaw also use AI tools that are tailored to solve specific legal research problems to augment Lexis Advance and Westlaw. Lexis Answers identifies the type of answer a researcher wants and suggests questions for an automated search. WestSearch Plus provides predictive recommended search queries and offers answer-based legal research results. Legal analytics is another area where AI is useful to lawyers. Lex Machina mines and analyzes litigation data to provide insight on how a judge has ruled in the past to predict future rulings. A lawyer armed with this information can accurately advise a client on settling a case or going to trial.

Further, electronic legal discovery is another area where AI is used to autonomously perform routine tasks. Discovery has come a long way from the days when associates manually reviewed boxes of physical documents for relevance or privilege. The advent of digital data made it easier to collect data on servers, but the volume of documents increased. Electronic review platforms like Relativity, Axcelerate or Ringtail were launched to facilitate the review of electronic data, but lawyers were still needed to review each document.

The introduction of TAR solves the problem of human lawyers manually reviewing each digital document because TAR makes it possible to autonomously code documents for relevance, privilege and other factors using the previous coding of documents by lawyers. TAR accomplishes this through ML-based predictive coding (TAR 1.0) and continuous active learning (TAR 2.0). Email threading and near duplication of documents are other uses of TAR to reduce the volume of documents that human lawyers review manually.

Under TAR 1.0, lawyers review a representative sampling subset of documents in a document production database to create a seed set of coded documents. A ML algorithm extrapolates the coding calls from the seed set of documents to the document database. Under, TAR 2.0 the ML algorithm actively studies the ongoing coding of lawyers to learn and simultaneously apply coding to the document production database without waiting for lawyers to create a seed set of documents. A good resource to learn more about TAR 1.0 and TAR 2.0 is Todd Heffner’s Law.com article, "Behind the Magic of Technology-Assisted Review, Part 1."

A key benefit of TAR is the automation of routine document coding tasks, which frees human lawyers to focus on the quality control process. Documents that may include privilege are still reviewed by human attorneys based on privilege hits. Besides automating routine coding, the ML algorithm identifies documents it believes are most relevant and feeds those documents to the lawyers conducting the review. This frontloads relevant documents and filters “junk” to

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the end of the review, where the parties may determine that it is unnecessary to review.

**Machine Learning is a subset of artificial intelligence particularly useful for lawyers**

Many legal AI tools use ML because it is used to perform analysis and make predictions, which are core aspects of many legal tasks. The capability to perform analysis and make predictions means that ML is a powerful tool for lawyers. For example, the autonomous learning made possible by ML enables software to make insightful predictions on how a judge will rule or whether a case is relevant for a legal brief.

ML occurs through supervised and unsupervised learning. Supervised ML is when human trainers provide positive or negative feedback to computer software on the accuracy of its analysis or predictions. The accuracy of the ML program improves over time through repetition based on feedback from trainers. The risk issue spotting capabilities of the three-year old thinking machine in the LawGeex competition is an example of supervised learning. A trainer provided feedback on each NDA reviewed during training to improve the algorithm's accuracy.

Unsupervised ML occurs when computer software analyzes a dataset under minimal supervision for unknown patterns, relationships, correlations or trends. TAR 1.0 and TAR 2.0 are examples of unsupervised ML. Another example of unsupervised ML is using algorithms to cluster like documents or identify near-duplicate documents in a document production database. These examples typify how ML algorithms are well-suited to improve the accuracy of legal work-product and autonomously perform specific legal tasks. Rex Martinez's 2019 *Nevada Law Journal* Comment, "Artificial Intelligence: Distinguishing Between Types & Definitions" is a good resource to learn more about how AI is defined.

**Artificial Intelligence is your newest coworker**

This is a great moment in your career to learn about AI because the technology is mature enough to directly affect your efficiency and productivity. However, widespread adoption of AI within the legal industry is still ongoing. This represents an opportunity for lawyers to gain a competitive advantage by understanding and incorporating legal AI into their work to increase efficiency and focus on work that is highly valuable to clients. Clients who see the impact of increased efficiency reflected in legal bills will come to expect the use of AI.

These AI concepts are a jumping-off point to the exciting world of legal AI that can enhance your practice and free you to focus on high-value work. Your next step is to get informed on AI tools for your practice. The website https://www.artificiallawyer.com/ is a great place to get started on your journey into legal AI. A quick internet search for legal AI technology will also give you a feel for the AI tools available to you. And, who knows, maybe that knotty case problem you are trying to resolve has a solution waiting for you in one of the many legal AI tools available today.

Andrew J. Throckmorton is an attorney based in Philadelphia. He is a graduate of Villanova University School of Law and is licensed in Pennsylvania and New Jersey. He can be reached at ajthrock@gmail.com.
In the wake of the COVID-19 pandemic, attorneys experienced an unprecedented shift in working environment. Lawyers left the office and entered an extended period of working from home. Even as Pennsylvania reopens, it remains unclear when a full return to normalcy might occur.

Arguably, young attorneys enjoy several advantages contributing to continued productivity in the remote workplace. First, unlike many trades and professions, attorneys in general have been able to continue working from home using technology. Second, young attorneys in particular are often more comfortable using technology. Many young attorneys are “digital natives” born after the rise of personal computing and the internet. This familiarity can help smooth a sometimes-bumpy transition into remote work.

What is Deep Work?

Because attorneys occupy an important sector of the “knowledge industry,” we provide our greatest value while performing “deep work.” Deep work requires extended periods of substantial concentration and focus. This concentration is difficult to maintain while responding to emails and checking notifications. These routine tasks are considered “shallow work” because they can undermine the total value produced during our work hours.

As attorneys, we don’t have the luxury of choosing between the two types of work. Unlike other professionals in the knowledge industry, attorneys have a duty to respond promptly to incoming communications. On the other end of the spectrum, some professional writers unplug their internet and phone to help prevent distractions during their productive hours. While this level of isolation may sound attractive, it’s simply not a viable alternative for most attorneys. In order to maintain focus, attorneys must continually attempt to minimize outside interferences.

Digital Clutter and Distractions

New research suggests the reality is much more complicated. We know smartphones and social media present a plethora of distractions. Email notifications are a constant stream of disruptions, which can undermine the focus needed to concentrate on complex tasks. Furthermore, the lockdown has generated a sharp rise in anxiety and depression. Social media-use is well-documented to exacerbate these problems.


Some studies estimate the average daily use by millennials may be nearly double this figure. Social media typically takes up the bulk of this time, with people perusing Instagram and Facebook both for about an hour a day. For young people, text messages can consume an additional hour.

Large, publicly traded technology companies appear to have developed a business model predicated on monopolizing users’ attention. These companies retain teams of data scientists and psychologists to help manufacture compulsive behavior in users. Numerous studies now demonstrate how intermittent reinforcement and social approval can trigger a dopamine response in the brain. The intermittency of the reinforcement turns out to be crucial. In other words, cognitive science suggests both gambling and checking notifications are addictive for the exact same reason.

This is causing many people to reexamine their digital lives. This is particularly true while we work from home. As attorneys, we are constantly striving to capture our time. Many of us have reported this to be especially difficult after the lockdown. Continued on page 12
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we transitioned to working from home. If true, the presence of family and childcare responsibilities almost certainly plays a role. However, it’s also worth considering how much of this may be due to digital distractions.

Productivity is Not Production

Generally, technology increases productivity. However, there are different types of productivity. For example, technology helped increase industrial production in the late 20th century. It’s important to note this type of productivity is qualitatively different than conducting legal research or drafting documents. We don’t need to coordinate supply chains or automate assembly lines in order to produce quality work product.

Productivity is not the same as production. Responding to routine emails or checking LinkedIn may be per se productive. However, these tasks may not be examples of production to the extent they fail to create value.

Working from home necessitates an increase in electronic communication. In the office, we might place our phone in our desk drawer so it’s less likely to distract us. When we’re working from home this could be less practical. No longer can we walk down the hallway to speak to a colleague about an assignment.

The struggle is real. I share the constant urge to stay on top of emails and respond as soon as possible. In my mind, this diligence is a method of demonstrating commitment and professionalism. However, at another level, I also understand this rationalization is not entirely logical. Each time I stop an assignment to answer a non-urgent email I disrupt myself from doing something more important.

How Can Attorneys Encourage Deep Work?

Clearly, a total digital detox including the elimination of internet and email is not realistic for most attorneys. Still, there are several strategies lawyers can use while working from home to become more mindful of threats to our focus:

Try to remember that focus—like time, money and natural resources—has a limited supply. Consider developing a fixed schedule to help prioritize the most important tasks. For some people this means only answering email at certain specific times of the workday. It could also mean scheduling blocks of hours to conduct dedicated deep work, free from other distractions.

Be aware of your screen time statistics. All those pickups of your smartphone add up over the days and weeks. Most phones have an app that tracks this data and the results can be surprising.

Consider digital minimalism. Like other forms of minimalism, this can require starting over from a blank slate. For example, once you delete social media from your phone you may discover you don’t actually miss it at all.

Finally, take time to unplug and get outside. Studies show going for a walk or spending time in nature can increase overall focus and productivity. It can also relieve stress and anxiety.

Conclusion

Author Cal Newport has championed the concept of digital minimalism in order to encourage deep work. You can find his work available at his website, www.CalNewport.com. He notes that deep work is often boring. In the short term, other stimulus is always more exciting. In the long term, however, research suggests digital media can make us less productive and feel lonelier. The argument here is not that digital technology lacks value. The point is to consider the marginal utility and opportunity costs of being plugged-in 24 hours a day. For most of us the cost/benefit analysis simply doesn’t add up.

It’s also important to remember the extent to which our ubiquitous relationship with technology is still quite new. Our neural networks developed over millions of years, and are easily hijacked by sophisticated third parties who profit from our attention. In many ways we’re still learning how to use technology thoughtfully and deliberatively. We shouldn’t beat ourselves up over the learning process, but neither should we discount its importance.

This is particularly true for young lawyers in the current work-from-home environment.
"My attorney told me I would be good to go after my probation" and "I wouldn't have pleaded guilty if I knew" are some of the common refrains of despondent clients who have just learned that the misdemeanor theft charge to which they pleaded guilty years ago prohibits them from purchasing, possessing and utilizing firearms and ammunition for the entirety of their lives.

Collateral consequences have drawn notable public attention in the last few years, specifically with respect to their lasting impact on employability and voting rights. However, little attention is given to the impact of criminal convictions (or certain other circumstances) on a person’s federal or state right to keep and bear arms. When asked, most people could tell you that felons can’t own guns, and some might successfully guess one or two other reasons a person could be prohibited from possessing firearms. However, few attorneys, and even fewer laypersons, could tell you all nine categories of federally prohibited persons, or how they are different from the many categories of persons prohibited under Pennsylvania state law. In simple terms, the nine federal categories are: 1) those convicted of a crime punishable by more than one year of imprisonment, or punishable by more than two years if it was a state law misdemeanor, regardless of what actual punishment was handed down; 2) fugitives from justice; 3) unlawful users of controlled substances (e.g., marijuana), even if it has been legalized by the state; 4) those who have been adjudicated as a mental defective or involuntarily committed to a mental institution; 5) certain classifications of legal aliens and all illegal aliens; 6) those dishonorably discharged from the military; 7) those who have renounced their U.S. citizenship; 8) those who are subject to a restraining order; and 9) those who have been convicted of a misdemeanor crime of domestic violence. 18 U.S.C. § 922(g).

Pennsylvania’s own Uniform Firearms Act of 1995 (18 Pa. C.S. §§ 6101-6128) is a more complicated scheme that overlaps the federal prohibitions in many areas, adds some new categories of prohibited persons, but is generally more lenient. For example, Pennsylvania law does not prohibit persons generally based on the possible length of their sentence, like federal law. However, it does prohibit anyone who is convicted of three DUI offenses in a five-year period from future purchases and transfers of firearms, but not possession of currently owned firearms, regardless of the grading, possible punishment or actual punishment. The Pennsylvania system also contains statutory avenues for relief from a state disability under limited circumstances, something federal law has failed to do since Congress defunded 18 U.S.C. § 925(c).

Generally, those who have become prohibited under state or federal law have two options for relief from their disability. The first is expungement of the conviction. In Pennsylvania, that means waiting until age 70 and having been free from arrest or prosecution for 10 years. The second is a pardon of the conviction. If the individual were convicted under state law, they would need a governor’s pardon. And, if convicted under federal law, a presidential pardon. While governor’s pardons are attainable in Pennsylvania, the process is several years’ long and ultimately a matter of discretion. The granting of a presidential pardon, however, is better described as a statistical anomaly than a reliable avenue for relief. As an aside, some states have statutory mechanisms in place to restore the civil rights, including firearm rights, of individuals with criminal convictions. Pennsylvania, however, is not one of those states.

It is important for attorneys, especially those practicing in criminal defense, to be aware of, and advise their clients of, all the consequences a certain offense may have. Many people will erroneously think that since the charge isn’t a felony or their offense wasn’t violent, their rights are safe, but that isn’t always the case.

Thousands of Pennsylvanians participate in the Commonwealth’s rich hunting culture every year and, while firearms

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are not the only means of hunting, they are the most popular. Don’t allow a blind spot in your knowledge of the law to limit your client’s access to that tradition. Remember, advise your client of the impact a conviction will have on their right to keep and bear arms. If you don’t know, don’t guess. Consult an attorney who has more experience or concentrates their practice on firearms law. Your client will thank you if you prevent them from making an uninformed mistake and you won’t jeopardize your malpractice insurance.

Planes, Trains and Cyberattacks
By Mimi Miller

Issues of Cyberattacks on Infrastructure

Cyberattacks on infrastructure could lead to a multilevel disaster on social and financial fronts, as well as affecting the provision of essential goods. Many countries are at-risk due to their reliance on public transportation, specifically trains, for movement of people and goods throughout their countries. This reliance becomes a glaring vulnerability when targeted.

An example of this vulnerability is the strike orchestrated by employees of France’s transportation system, which lasted from Dec. 5, 2019, through January 2020. This strike was carefully planned and orchestrated by workers advocating against changes to the national retirement age. It resulted in economic, travel, safety and state function problems, including: France’s economic growth for the fourth quarter of 2019 was reduced by about 0.1%; employees were unable to get to work; approximately three quarters of Paris-area business owners planned a job hiring freeze in January 2020 due to the loss of economic activity; and 80% of small businesses reported being impacted by either loss, turnover, delivery delays and/or fuel shortages.

If the above-noted impacts are the result of a halt in transportation that is the result of a planned and expected strike, what could be the outcome of an unplanned shutdown caused by a cyberattack? Such an attack could affect all or most of the automated and semi-automated travel in a country or state. This is especially pertinent as many countries have plans to incorporate increasingly autonomous and semi-autonomous trains into circulation. Moreover, this is an important warning to the United States of the dangers of a cyber incident, as the Department of Transportation has indicated that it will be developing and implementing more automated transportation systems in the coming future.

Lawyers in Pennsylvania must advocate for increased cyber protections across the board and implement them into their daily practice.

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Ransomware

There are various types of cyberattacks that pose a danger to transportation infrastructure. One of the common cyber-attacks is a ransomware attack, which is being seen increasingly nationwide.

A ransomware attack occurs when a cyber actor denies access to a computer system or data by the rightful users until a ransom is paid. An example of this type of cyberattack is when San Francisco's rail system was hacked and held for ransom for 48 hours over the 2016 Thanksgiving weekend. The cyber actor was only able to encrypt and deny access to systems relating to payment services, email and some operator and worker machines. Luckily, the core functioning of the trains was unharmed, and the local transit agency provided free train rides until the system was unencrypted. In this case, besides the loss in profit, serious harm was avoided by San Francisco's rail system.

Ransomware attacks on transportation infrastructure are increasingly dangerous as the United States and other countries are pursuing expanded automation of transportation. With fewer human interactions with the system and more independent system processes, the dangers to transportation exponentially increase. A cyber event that would previously only affect one small section of a greater system now has the ability to shut down all or most of a transportation system. This is why defensive measures—such as network segmentation—are crucial to the protection of these systems and why lawyers in Pennsylvania should advocate for these necessary protections.

Network Segmentation

In the San Francisco ransomware attack, the ability of the hacker to infiltrate core systems related to the operation of trains was limited. The cyber actor was limited because the core systems were separate from the systems to which he gained access.

The National Cyber Incidence Response Plan, developed by the U.S. Department of Homeland Security, explains that it is important to deliberately plan to develop tactical, strategic, and operation plans which will mitigate, protect, respond, and recover from a cyber incident. One of the recommended ways to protect and mitigate effects of a cyber incident is network segmentation.

Network segmentation is a practice of separating segments of a computer network into sub-networks. This allows for the “cutting off” of a segment of network that has been subject to a cyberattack. This is beneficial for two reasons. First, segmentation allows the other parts of a network to be protected from the spread of an attack or compromise. Second, it allows for more ease and speed when responding to the compromised segment of network.

Segmenting networks helps to halt a ransomware attack from compromising an entire system and to isolate and minimize the damage done or information compromised. While the separate systems protected the network in the San Francisco example (back in 2016), network segmentation takes this approach to a deeper, more sophisticated, level. The segmentation of a network would protect other parts of a compromised system, for example, segmenting the payroll system from the email system. Thus, if one part of a system is compromised, as is increasingly common in cyberattacks today, the rest of the information within that system could be protected.

Surrounding Law and Policy

The United States government has begun implementation of various cyber protections and publishes numerous recommendations to federal agencies as well as private and public parties. While most current federal laws relate to criminal liability for a cyber actor or mandating compromised organizations to notify various authorities or individuals with compromised information, there are many recommendations made for organizations to better protect and minimize the impact of a cyber event.

The U.S. Department of Transportation and National Highway Traffic Safety Administration identify several legal authorities relating to disclosure of cyber events and information privacy on their websites. However, their most recent policy setting forth a framework to deal with a transportation system cyber event is from 2017.

Adding to these difficulties is the fact that most public transportation systems are run by municipalities or cities that are not bound to the recommendations of federal agencies; there is effectively no governing law. The lack of legal guidance presents concerns as the only definitive standard for municipalities to follow is that of “reasonable” cybersecurity under the National Institute of Standards and Technology (NIST). While it is heavily encouraged for transportation systems to follow NIST standards, there is no legal requirement to do so. This is why it is so important for lawyers in Pennsylvania to advocate for the implementation of necessary state regulations and legislation to better prepare for cyberattacks.

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One of the best practices, recommended by the Department of Justice, Cybersecurity and Infrastructure Security Agency under the Department of Homeland Security, the Secret Service, the National Cybersecurity and Communications Integration Center and the FTC, is to segment networks or instill other protections to contain and minimize the potential harm of a cyberattack as a preventative measure.

Conclusion

While the United States and Pennsylvania are not as dependent upon public transportation as many European countries, a cyberattack on these systems has the ability to cause harm. A disruption of transportation, especially as it becomes increasingly automated, could have a negative impact on travel, safety and the economy, as shown in the effects of France’s transportation strikes. This is especially pertinent as members of an Iranian group hacked a flood dam in New York in 2016. Sen. Schumer explained that this attack was a message to the United States – that members of this Iranian group could touch our infrastructure, which includes transportation systems, and put American lives and property in danger if they wished.

Network segmentation is one of many options transportation companies and regulators can utilize to provide a safer system. Segmentation is an especially good approach because it allows users to isolate and deal with an attack while preserving and protecting the rest of the system. This will not only assist the user with halting an attack, but also with identifying where the infiltration occurred so they can prevent cyber actors from utilizing the same weaknesses in the future. Lawyers in Pennsylvania must be knowledgeable of and advocate for these types of forms and protection.

Mimi Miller is a rising 3L at Penn State’s Dickinson Law. She will be graduating in Spring 2021. She has published articles with the American Bar Association relating to workplace violence in healthcare and application of international human rights treaties to contrary domestic law in foreign nations. She has interned with the Pennsylvania Department of State prosecution division and will be spending her 3L summer working remotely for the Office of the Solicitor, Department of Labor, division of Occupational Safety and Health.

COVID-19: The Case for the Non-Traditional Attorney Candidate

By Katherine “Katie” Kennedy, Esq.

I have often shared and heard from others that having non-legal experience on a resume is something to feel bashful over. I graduated law school cum laude and passed the bar exam the first time, and I had expected the job market would open wide for me. However, in 2013, that was not the case. My husband was working on obtaining his doctorate, and money was tight. I moved to a new location where I did not know anybody. Networking cocktail hours were exhilarating, but exhausting and expensive. It was a lot to manage, and I was experiencing impostor syndrome without realizing it.

While I loved serving as a judicial fellow in Philadelphia, it became impossible to continue to do so without pay and with a lengthy commute. After many mistakes on job interviews and being ghosted for what felt like a century, I was finally approached by Lehigh University for a non-legal position. The idea of meeting people from all walks of life, celebrating student achievements and learning about higher education called to me. I worried that taking this position meant that my law degree would become dusty and that I was walling myself off from future legal positions. But I also knew that turning down the job meant that I would be fighting to survive another month. I accepted the position and served as associate director of stewardship for two years.

On job interviews, I have been asked about those two years with skepticism and a raised brow. I remember feeling very self-conscious about having two years of non-legal experience on my resume while transitioning back into the legal profession. However, I invite you to reconsider feelings of shame if you are like me and had to work in a different industry. I also invite managers and hiring partners to rethink the skepticism when you see a non-legal position on a candidate’s resume. This is my case for the non-traditional candidate.

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At Lehigh University, I learned much more than just the duties of my position. I learned how to navigate working in a large office with many varying viewpoints. I also learned how to navigate meetings with objectives that required discussion, decision-making and articulating next steps. I helped capture procedures and processes for an internal manual. I met inspiring individuals both within university and through my work in donor relations. I had to help events run smoothly, while also mentoring future engineers in their work-study positions. Lawyers are storytellers, and working in donor relations allowed me to play, be creative and hone that craft in a safe space.

More importantly, though, I learned how to adapt. During my time at the university, Lehigh was expanding and moving offices around. This also meant that my office was under construction. Atop of my makeshift desk, I was also in charge of organizing capital campaign information. This meant that, at any moment, I could be on-site, reviewing plaques and statues while overseeing undergraduate students and analyzing data. Early on in my career, I learned not to be too attached to an office or space. I was challenged to meet the demands of my job from anywhere at any given moment. Thus, when COVID-19 took hold, I was able to reflect on where I started. I knew that if I could handle a donor inquiry while sipping coffee on a construction site, I could handle drafting a motion at my dining room table with my dog barking at the postal worker. If anything, the latter seems like quite the dream!

Similarly, during my time at Lehigh, our office moved, and our unit was housed in two different locations. We would try to meet in person as often as we could, but many meetings took place using technology and/or conference lines. Because donor relations also requires travel, sometimes a key member of the team would call or video into a meeting from “the field.” I also took a few MBA classes while working at the university and our curriculum called for us to learn how to use more advanced conferencing software. My classroom used smart technology, and there were times that I appeared in class using videoconference software due to my work demands or because the weather proved treacherous for travel. I am thankful for those experiences now, especially since court is now held on a virtual platform. Many of the best practices that I was taught at the university are being enforced in virtual court: mute when not speaking, raise your hand, make sure the other participants can see and hear you,

using screen share technology, and more! Virtual court does not feel as foreign as it could have felt due to my experiences at Lehigh.

I also learned how to organize large datasets and data mine while working in donor relations. My boss and I were constantly working to make sure the databases were digestible and more intuitive. I was encouraged to play with information and present it in different ways, using various technologies and approaches. I had to adapt to using different applications and technologies to tell stories. This experience was invaluable. Even before COVID-19, I used best practices for data storage and analysis in my work. While I have been using cloud software for years, COVID-19 made cloud software and remote access all the more important. Having to log into large university servers and remotely access my desktop before, it was less frightening to do so during this pandemic. I was able to reflect on the database management that I was tasked with, and I have been able to use those skills to continue to manage my legal practice today.

These are just a few examples of how my non-traditional work experience has proven invaluable during the pandemic and as a legal professional in general. While I am a millennial and I grew up with changing technologies, working in higher education helped me navigate working remotely in a more meaningful way, and my varied experiences softened the blow when we were forced to adapt to working from home. While higher education was not my “forever home,” I am very thankful to have worked alongside the brilliant minds in my unit. Higher education is fast-paced and requires adaptation. Hiring partners may not have seen much by way of billable hours and legal writing for those two years of my life, but the folks who have hired me since have seen the transferable skills that have allowed me to serve teams and problem-solve in different ways. It is my sincere hope that, during this pandemic, our profession is taking an introspective look at how we manage ourselves and others. I hope that those who took a non-traditional path are finding their way and are feeling celebrated for doing so.

Katie is an adoption attorney for the CYF Legal Unit in Pittsburgh. The CYF Adoption Legal Unit represents the Allegheny Office of Children Youth and Families in termination and adoption proceedings. She graduated from Appalachian School of Law in 2013 and has practiced in various parts of Pennsylvania, including but not limited to Philadelphia, Scranton and Pittsburgh. Katie is active with the Pennsylvania Bar Association, especially the Commission on Women in the Profession (WIP).
PBA Names Lawyers for 2020-21 Bar Leadership Institute Class

PBA President David E. Schwager has named 18 Pennsylvania lawyers to the 2020-21 class of the association's Bar Leadership Institute (BLI).

"Each BLI class member this year has a unique, diverse background and perspective along with new ideas and goals for the future to help shape the association," said Schwager. "I look forward to working with them as they learn more about the PBA’s varied paths to leadership and connect with other PBA members and leaders. Given the changes necessitated by the recent pandemic, this year’s BLI class will have more opportunities to connect to PBA programs and events remotely but will have added challenges as a result of the transition to virtual gatherings. Nevertheless, BLI is a marvelous opportunity for these up-and-coming young lawyers to create a tight-knit community of PBA leaders from throughout the commonwealth to effect positive change."

This year’s BLI co-chairs are Stephanie F. Latimore, Legislative Reference Bureau of Pennsylvania, Harrisburg and Michael J. McDonald, McDonald & MacGregor LLC, Scranton. Both Latimore and McDonald have served in a number of PBA leadership roles.

To apply for the BLI, candidates had to demonstrate leadership ability, commit to attendance and participation in the required events, be currently licensed to practice law in Pennsylvania, be a PBA member, and be age 40 years or younger or have practiced five years or less.

The BLI was originally developed by Arthur L. Piccone of Kingston in 1995-96 during his year as PBA president to strengthen the PBA’s ongoing efforts to recruit and develop leaders of the association. The first chair of the institute, Gretchen A. Mundorff of Connellsville, re-launched the BLI when she became the 2010-11 president of the PBA. Its current purpose is to inform participants on the day-to-day operations, governance, resources and staffing of the association, as well as provide introductions to its various leadership opportunities.

The new BLI class members include:

**Allegheny County**
- Katherine Kennedy, Allegheny County Office of Children Youth & Families, Pittsburgh

**Bucks County**
- Mariam W. Ibrahim, Antheil Maslow & MacMinn LLP, Doylestown

**Butler County**
- Alyson Landis, Boyer Paulisick & Eberle, Butler

**Dauphin County**
- Anthony D. Cox Jr., Dickie McCamey & Chilcote, Harrisburg
- Nicholas A. Dalessio, Legislative Reference Bureau of Pennsylvania, Harrisburg
- Kimberly K. Meyer, Caldwell & Kearns PC, Harrisburg
- Triston “Chase” O’Savio, McNees Wallace & Nurick LLC, Harrisburg
- Cheri A. Sparacino, President Judge Mary Hannah Leavitt, Commonwealth Court of Pennsylvania, Harrisburg
- Sarah Stoner, Eckert Seamans Cherin & Mellott, Harrisburg

**Franklin County**
- Cayla E. Amsley-Mummert, Franklin, County Public Defender’s Office, Greencastle

**Lycoming County**
- Ryan W. Sypniewski, Magistrate Judge William I. Arbuckle, Middle District of Pennsylvania, Williamsport

**Monroe County**
- Gary Saylor, Cramer, Swetz, McManus & Jordan, P.C., Norristown
- Daniel Cortes, Legal Aid of Southeastern Pennsylvania, Norristown
- Ravi V. Mohan, Law Offices of Jennifer J Riley, Blue Bell
- Christopher M. Sperring, Warren McGraw & Knowles, Blue Bell

**Philadelphia County**
- Leigh Ann Benson, Cozen O’Connor, Philadelphia
- Taylor E. Pacheco, Philadelphia Lawyers for Social Equity, Philadelphia

**York County**
- Roberto D. Ugarte, Mooney Law, Hanover