

In This Issue

Virtual Currency. Not just a niche, blockchain/bitcoin technologies are generating diverse legal issues across the industry spectrum **Page 1**

Year-end Review. Here’s a look at the salient trends and topics that *Of Counsel* covered in 2017..... **Page 3**

Creative Cauldrons. Patrick McKenna’s complete guide to the art of brainstorming—what it can achieve, and specific processes to optimize successful sessions..... **Page 5**

Different Tune. Jenner & Block’s Andy Bart has long been the go-to guy for recording companies, music publishers, and artists **Back Page**

Trending Big Time ...

**Bitcoin/Blockchain Emerges as Hot (Relatively)
New Practice Area**

As recently as a few years ago, many people in the legal profession—from lawyers and nonlawyers in firms, to consultants and legal trade journalists—dismissed bitcoin and blockchain as some bizarre fad that simply fed the curiosity of tech nerds. Surely, the virtual currency (bitcoin) and the high-tech bookkeeping system (blockchain) would go away, many thought.

Not so. The technology’s here to stay and it’s exploding in popularity with changes and innovations coming at head-spinning speed.

“I’ve been practicing in this space since 2011, but it seems like two decades just because things move so quickly,” says Ryan Straus, a partner at Silicon Valley-based Fenwick & West and co-chair of the firm’s payment systems practice group, and a blockchain legal pioneer.

While the term “transformational” often gets tossed around a little too casually these

days, it truly seems to apply to blockchain technology, and it’s taking off in industries across the economic spectrum. Lawyers at some, but not many, law firms understand that their clients need help figuring out the ins and outs of cryptocurrency and its secure high-tech distributed ledger.

“You can’t pick up a newspaper—or read one online—without seeing some headline about the blockchain and how it will change the world,” says Jason Weinstein, a partner at Washington-based Steptoe & Johnson and a well-known expert on legal and regulatory issues involving digital currencies and blockchain technology. “But until you drill down

Continued on page 2

on how it will affect your business and your operations, it all seems esoteric. We focus on making the blockchain ‘real’ for clients—after all, we’re not coders, we’re advisors and practical problem-solvers.”

Associates Lead the Way

At Carlton Fields, two associates deeply involved in the bitcoin and blockchain community for years—first as a hobby and then as part of

their legal practice—were seeing more and more clients needing help in the cryptocurrency arena. Consequently, they counseled them under the umbrella of the firm’s traditional technology group and began marketing their expertise. And then last year they approached leadership with the idea of forming their own group.

“It made sense from an organizational standpoint to break out into a different practice,” says Justin Wales, co-chair with fellow associate Matthew Kohen of the firm’s blockchain technology and virtual currency practice. “We approached the leadership of the firm who were incredibly supportive, especially considering that I’ve been practicing law for about five and a half years and Matt for three and a half years. They encouraged us to take the initiative in trying to build the practice and to get an advantage in this emerging industry.”

Kohen says 10 to 15 people at the firm are “quite involved” in the blockchain practice but that the wider group of attorneys totals between 30 and 40, from many different disciplines. “We learned early on that it really takes a village to adequately handle a blockchain matter,” he says, adding that often he and Wales need to bring in Carlton lawyers with expertise in technology, tax, payment regulatory, commodity-regulatory, and other fields of law. “What it requires is for us to be quarterbacks for the various practice areas to merge the expertise.”

Both of the associates characterize themselves as very early adopters—often in self-deprecating ways. Wales says, “Matt and I share a common background in that we were nerdy sci-fi types growing up, the type of people who gravitate towards this sort of technology and the possibilities of what it could mean for our future.” And Kohen adds, “I was active in this community when it seemed it was only a handful of PhD’s and me—a bunch of weirdoes.”

Continued on page 17

OF COUNSEL

Copyright © 2017 CCH Incorporated.
All Rights Reserved.

OF COUNSEL (ISSN 0730-3815) is published monthly by Wolters Kluwer, 76 Ninth Avenue, New York, NY 10011. Subscription rate, \$1,125 for one year; single issues cost \$141 (except **OF COUNSEL 700 ANNUAL SURVEY**). To subscribe, call 1-800-638-8437. For customer service, call 1-800-234-1660. Address correspondence to **OF COUNSEL**, 76 Ninth Avenue, New York, NY 10011. Send address changes to **OF COUNSEL**, Wolters Kluwer, Distribution Center, 7201 McKinney Circle, Frederick, MD 21704.

This material may not be used, published, broadcast, rewritten, copied, redistributed, or used to create any derivative works without prior written permission from the publisher. For information on how to obtain permission to reproduce content, please go to the Wolters Kluwer Web site at www.WoltersKluwerLR.com/policies/permissions-reprints-and-licensing.

For customized article reprints, please contact *Wright’s Media* at 1-877-652-5295 or go to the *Wright’s Media* Web site at www.wrightsmmedia.com.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other professional assistance is required, the services of a competent professional person should be sought.

—From a *Declaration of Principles* jointly adopted by a committee of the American Bar Association and a Committee of Publishers and Associations.

www.WoltersKluwerLR.com

Taylor's Perspective ...

Year-in-Review: A Look at Some of the Twists, Turns, and Trends of 2017

As we come to the close of another year, we reflect on what transpired in the very active and exciting 2017. So much has happened. The nation's health care system has been overhauled and improved; race relations have never been more harmonious; the battle against climate change has been won; the United States has returned to its highly respected, prominent place in the world; the swamp's been drained; and America has been made great again.

Oh, wait a minute: Let me rethink all that.

In the legal profession, we truly have seen a lot of developments, with practice trends emerging, certain geographic legal markets blossoming, lawyers in high-profile battles fighting and winning, controversies swirling, and smart, experienced professionals doing and doing and doing... what they've always done: the hard work to make the legal industry the best it can be. In this year-end review, here's a taste of some of what we covered in 2017.

In January in our back-page interview, we highlighted the career of one of those "smart, experienced professionals," legal marketing wizard Sally Schmidt. This feature was long overdue, given all the ways in which Schmidt has advanced the profession. She offered some advice to law firms in their online marketing efforts: Don't hide your personality; put it out there. In her words: "I work with a lot of lawyers one-on-one to help them show

a little more personality in their bios and their social media postings, and I think that's being embraced a lot more with the people I work with individually. But it's really tough for law firms to do that."

Our front-page story in February explored a litigation trend that seems to be growing: Trial lawyers are increasingly turning to consultants for help with courtroom strategy. To quote from that article, "When you're up to your elbows in complicated facts, sticky legal issues, and technical often scientific expert testimony—as litigators often are—it makes it easier to get positive results for clients when you have extra help and a different perspective. This is particularly true for big-dollar cases."

In March, our monthly interview set a new precedent for *Of Counsel*. Never before in the 20-plus years we've had this feature have we run a two-part interview spanning two months. We did that when we published the second part of the Q&A with Susan Cohen, a partner and immigration attorney at Boston's Mintz Levin, who was and still is representing clients in one of the year's most hotly contested issues: President Trump's executive orders banning immigration from some countries. In this piece, Cohen talked about, among other things, what she and her team look for when hiring an immigration lawyer, that executive order banning Muslims and her involvement to fight against it, as well as changes the Trump administration is seeking

that would transform the entire fabric of immigration law in the United States.

Big Firm Controversy

When a lawyer at a large prominent law firm, Morgan Lewis, represented Donald Trump, one of its clients, a hedge fund, fired that firm. My May editorial explored that move through interviews with legal professional insiders who discussed whether they'd hire a firm that represents the president, as some do, including Jones Day. Here's what one consultant said: "To me, this isn't simply disagreeing with someone who happens to vote for George W. Bush or Barack Obama. This is not about politics. It's about morals and the very decency of our society. I would not hire Jones Day now."

In June, we turned our focus to Louisville with a lead story on this bustling legal market: "Several outside observers call Derby City one of this year's hottest legal markets in the nation. Along with the traditionally strong health care business in Louisville that has long kept lawyers' phones ringing, a convergence of factors contributes to the surge in legal activity." Chief among those factors, we discovered, were the city's strong educational environment and a significant boost in public investment.

Law firms enter new markets with much more consideration and planning than they did a decade ago, we reported in our October lead. If they don't expand judiciously the moves don't work. We turned to Altman Weil consultant Tom Clay for some wise words on what's behind a market entry that goes bad and results in a law firm taking a big hit to both its profits and its reputation. "A lot of

the expansion and failure to retract when you should is driven as much by ego as a good strategy," Clay said.

Also in October, I reported on something a source told me that I thought was remarkable. I led my editorial with this: "In the 26 years I've covered the legal profession, I've never heard of anything like this: The national labor and employment law firm Jackson Lewis pays for all of its lawyers *and their families* to take a long weekend at a luxury resort in San Diego every three years. The purpose: fun and collegiality. The cost: more than \$3.5 million a weekend. The value: priceless."

Last month we asked this question to many sources: Are lawyers happy these days? Naturally, the answer was mixed but it seems many attorneys are both content and satisfied with their law firms and their practices. It does require effort though and some firms have been very focused on initiatives to improve the psyche of their lawyers. At Chicago's Jenner & Block, for example, leadership has brought meditation and/or yoga into the workplace and feature it at its annual partner meetings. "It's amazing how well-received it is," the firm's chief talent office Charlotte Wager told us. "People are hungry for that kind of engagement. Another thing, this year we're bringing in workshops on nutrition. People want to feel better and healthier."

Speaking of which, as we approach the end of the year may we take this time to wish you happiness and good health—and a toast and tip of the glass that 2018 brings you the satisfaction that often comes from working in the important and dynamic legal profession. ■

—Steven T. Taylor

Strategic Ideas ...

Break Your Team Out of Its Rut

There will undoubtedly be times during your tenure as an Office Managing Partner or a Practice or Industry Group Leader when you will want to set a direction for your group, enter a new market, help improve your group's profitability, enhance the quality of service provided clients, or figure out how to solve some challenging internal problem.

As practice leader, you may be tempted to just simply proceed to think through your options and to take action on your own. However, any wise practice leader knows intuitively that the degree to which you involve other members of your group broadens the input, fosters even more ideas, and gains energy and buy-in to the solutions from the people you are going to want in helping you implement those ideas.

As Linus Pauling, the Nobel Prize-winning scientist, once said: "The best way to get good ideas is to get lots of ideas—and throw the bad ones away." And the best way to generate a lot of ideas is proverbially known as "brainstorming," a method for getting a large number of ideas from your group in a relatively short time. Brainstorming follows a proven process based on generating as many ideas as possible without stopping to evaluate them.

The only problem with brainstorming... many professionals *think* they already know how to do it.

Indeed, a survey conducted by one of the top accounting firms disclosed that 70 percent of businesspeople claimed to use brainstorming within their organizations. However, that same survey then went on to reveal that 76 percent of those who used brainstorming admitted that they engage in brainstorming rather infrequently—less than once a month. From my experience in a wide variety of

professional firms, I would be willing to bet that the frequency of brainstorming at firms like yours is radically lower.

I am constantly amazed at how few firms actively engage in continual brainstorming with their people, and how many of those that do think it a fairly trivial, low-level exercise. I'm convinced that those who do think brainstorming rather mundane have come to that conclusion largely because they either fail to generate many ideas during their brainstorming sessions (forgetting that quantity trumps quality), or they have a tendency to stop the process once having heard what they believe to be the first good ideas.

What many practice leaders fail to take into account is that brainstorming is an art that improves over time with constant usage. You are always learning. At IDEO, the world's leading design consultancy, general manager Tom Kelley claims that brainstorming is practically a religion, one their firm practices every day. Kelley says, "Most people are familiar with the fundamentals, like sticking to one conversation at a time and building on the ideas of others, but it takes extra effort if you want a great brainstorm with valuable results."

Planning Your Session

One of the first things you want to determine is whether indeed you need to conduct a brainstorming session at all. As mentioned, brainstorming should be used when you need to generate lots of new ideas and solutions. It need not be used for analysis or for decision-making. You may need to analyze and judge your group's ideas, but that is done afterwards.

If you decide to proceed with brainstorming, one of your firm's meeting rooms may

work for most sessions. However, if you are having the group focus on some important strategic topic, you may want to get out of the office altogether in order to avoid having professionals constantly subjected to unwanted interruptions. Everyone should be given a notepad so they can write down those thoughts that occur to them in the thick of hearing ideas shouted out by other colleagues. (Notice that I suggest using an old-school notepad as I believe anything electronic will only serve as a disruptor to the group's best intentions).

Again, if your topic is strategic in nature, or would benefit from having a creative flow or broader range of ideas than might be available from just the members of your practice team, you may want to consider also including people from different backgrounds. You could invite colleagues from other areas of your firm, clients who could offer some interesting insights, or people from other professions or academics who have relevant but different experiences with the topic under consideration. You may have to accept it on faith, but I promise that you will be pleasantly shocked by the "cognitive diversity" that these kinds of people will produce.

Finally, you need to decide who will facilitate your brainstorming session. This individual should introduce the session, keep an eye on time, and ensure the brainstorming guidelines are observed. His or her job is to facilitate the session, see that it runs smoothly, and insure that the participants feel comfortable and join in the process. They will also be responsible for restarting the creative process if it slows down. The facilitator doesn't have to be you as the practice leader, but whoever it is should be well versed in running your group's brainstorming session.

Leading Your Session

A brainstorming process can go a long way to tapping the imagination and creativity of

the members of your group. Those who may be concerned that such a creative activity will lack substance can be assured that the process merely creates a more imaginative menu and that the subsequent ordering from that menu will be executed with wisdom and discernment.

If all agree to be highly disciplined about getting to potential action ideas and refraining from engaging in lengthy discussions and debates, you can devote about forty minutes to each topic you choose to have the group focus on. In some professions, such as accounting, management consulting, and public relations, the brainstorming process is quite comfortable. Many of these practitioners employ the process in their work with their own clients. In other professions such as law, some have experienced the brainstorming process, but it is not a common activity.

Introduction

You should commence your brainstorming exercise by addressing a few basic questions that are likely on the minds of your team members. You need only spend about 10 minutes on this, but it is important that you give the members of your group a context for their participation. The first question you need to address: Why is this an important opportunity or problem for us to work on?

Start by composing a well-honed statement that describes the opportunity or problem that you want your group to concentrate on, and what you are trying to achieve. This statement should never suggest what a likely solution might be, as that would only serve to hinder your group's ideas. Define the problem or opportunity clearly before you start to brainstorm.

In some instances, you may want to get your group's input on "what is the real problem here?" You may well discover that the issue you've identified is really part of a bigger problem and, subsequently, deserves to be

broken into smaller pieces so that each piece can be tackled incrementally.

You need to let your group know what will happen if “we” are able to take advantage of this opportunity or solve this problem. For example: “We want as many ideas as possible from everyone on how we could develop an even stronger relationship with this client. We need to solidify our relationships now as competitors are making some aggressive moves to support their getting this client’s work. And the loss of this client would adversely impact our group significantly.”

Frame the task and make sure everyone understands the goal of your brainstorming exercise. Then, briefly provide only the truly critical information. “I need to let all of you know that this client has already received a written proposal from one of our competitors and invitations to lunch from another. We need some immediate remedial action.”

Your group members should also be told in advance if the ideas generated from their brainstorming are simply for your consideration as practice leader or will the ideas undergo review and selection by the group itself. You need to manage their expectations for the outcome of their efforts.

And, you need to define your own hopes for the group’s exercise. *“I’m looking for you to generate a minimum of 40 ideas from which I’m hopeful that we will have a few great ideas to further review and refine.”*

The overall intent of this introduction is to provide just enough information to stimulate the brainstorming without overloading or constraining your team.

Review the Ground Rules

Before you even commence generating ideas, it helps to have some ground rules. With groups of highly educated professionals, our natural propensity is to enjoy engaging in lengthy intellectual discussions, while

exercising our natural gift for being highly critical and analytical. These propensities are most often manifested when some participant shoots a “zinger” at some other member’s idea.

Fostering a “No Zingers Allowed” atmosphere requires that professionals learn to recognize the subtle (and sometimes not-so-subtle) behaviors that impede effective brainstorming. In most situations, building this awareness is all that may be needed to significantly reduce zinger-type behavior.

The spirit of any brainstorming session can make it or break it. Here are a few of the more common zinger-type behaviors:

- **Verbal Put-downs.** It is a common occurrence that shooting down ideas is the routine behavior. The put-down can vary from a lighthearted jest that provokes group laughter to the deadly serious comment that embarrasses. The action may be completely unintentional, but even the zinger accidentally fired does significant damage. Few ideas survive in a take-no-prisoners approach to brainstorming.

Meanwhile, defending oneself against some so-called harmless remark only serves to get you labeled as being overly sensitive (Wimp!). The consequence then becomes a “revenge ploy” in which, at the first opportunity, we blast others’ ideas in retaliation. Everyone starts to play the zingers game, losing any opportunity to generate meaningful ideas.

- **The Unintended Idea Killer.** One important objective for any practice leader is to instill enthusiasm. That becomes difficult to accomplish when we unthinkingly fall into the habit of liberally using the term “but” within our normal conversations. It may not be unusual to hear someone say to a colleague; “That’s a good idea, but what I think we should do is...”

Now how enthusiastic would you feel being on the other end of that statement? You need

to have your team avoid this “great...but” mode of communication. It takes a conscious effort to remove the buts, yet the effort pays dividends.

- **Non-verbal Put-downs.** We all know that words are not the only way we communicate. As one experienced facilitator expressed it, “A new idea is delicate; it can be killed by a sneer or a yawn, or worried to death by a frown on the right person’s brow.” Negative inflections and facial expressions can easily communicate criticism of any new idea. Between the victims who retreat into their shells and the ones who refocus on retaliating, it takes but minutes to move a brainstorming exercise completely off track.

One other consequence of either verbal or non-verbal zingers is that wounded individuals shut down and stop contributing ideas. At this moment, as you read these words, somewhere in a professional firm, there is a practice group meeting happening where the most astonishing idea has occurred to someone. It started as a crazy thought but, as the meeting progressed, it seemed ever more brilliant. But that professional chose to remain silent and the idea is lost forever.

It is therefore imperative that your group agree on some sensible Ground Rules before it begins. Fortunately, you need not come across as an ogre or concern yourself with devising those rules, as there are already some commonly accepted guidelines for brainstorming. Your task then, as the facilitator, is merely to review these guidelines and ask for everyone’s agreement to either modify or behave in accordance with the rules. (I will often post such Guidelines on a flipchart that everyone can easily see).

You might explain that the ideas that are being asked for are to serve as possible solutions as well as stimulate the ideas of others. As such, you need to tell them to expect some bizarre, weird, strange, and impossible ideas that may not in the final analysis be so

strange and will likely spark more workable solutions.

The accepted rules for this brainstorming activity are usually some variation on the following:

Say everything that comes to mind.

Yes, I know that you were schooled to think before you open your mouth, so it’s going to take a bit of an adjustment. Ideas should be advanced both as solutions and as a way to spark others. Even seemingly absurd ideas can spark off better ones. It is important to emphasize to your group that the “wilder” the idea, the better. Shout out bizarre and unworkable ideas to see what they spark off. No idea is too ridiculous.

Remember that your objective is to go for quantity of ideas and narrow down the list later. All activities should be geared towards extracting as many ideas as possible in a given period of time. Tom Kelley at IDEO finds that “a hundred ideas per hour usually indicates a good, fluid brainstorming session.”

No discussion.

Many professionals have a tendency to put everything they say into a discussion sandwich. First they present the general concept, then they give you the idea, then they rationalize why that was a good idea. But you need to have your group members avoid their stories, discussions, and elaborations on how the idea could be done or how great it might be.

You also want to ask the team to refrain from side whispers. It is crucial that everyone stay focused on the ideas that are being tossed out. Allowing side conversations to develop simply distracts and disrupts the process. A further area of caution is in dealing with the verbose energy killer. Your group is gathered for a brainstorm. Everyone is being encouraged to offer up ideas. One of your members begins to offer an idea—and we have all experienced the endless rambler who goes on and on until the air is eventually sucked out

of the room. As the facilitator, you need to encourage and enforce succinctness.

Make no value-judgment comments, either positive or negative.

It is often helpful to remind your people of the three questions that successful entrepreneurs adopt when confronting a new idea: How do I make this work? What's the worst that could happen? Where is my back door (exit) if the worst that could happen actually happens? Then remind them of the usual response among professionals to any new idea, that is, not a nanosecond passes before we hear 13 reasons why that is not going to work. If we allow ourselves to engage in making value judgments, it's NOT going to be a useful or productive exercise—“*so reach up with me right now and turn off that critical-analytical switch in your brain.*”

Recording Comments

Continue to keep in mind that your objective here is quantity not quality. If Janice gives you an idea and you write it down, and then Chuck gives you an idea and you don't record it, Chuck is probably thinking either, “I guess my idea wasn't good enough” or “What kind of idiot facilitator is this!”

It is also critical to capture peoples' words using exactly the phraseology that was just spoken. Changing the phrasing can change the meaning. (It can also annoy the person who offered the idea.) To assist in the accurate recording of ideas, ask participants to start with a headline that encapsulates their key thought in a single crisp sentence. They can then go on to elaborate while the recorder writes down their idea. (It also allows others to hear the central thought, make connections of their own during the elaboration, and come up with the next headlined idea.)

If the headline goes on too long and you lose your colleagues' exact words, try to paraphrase what he or she said, but be sure to go

back and make sure that you've got the idea recorded correctly. Finally, I have noticed that professionals love to be given a goal and so suggest to your group that you are “looking to get a minimum of 30 ideas in the next 30 minutes—Go!”

Encouraging Participation

Build and expand on the ideas of others. *Think and link.* Use other people's ideas as inspiration. Combine several suggested ideas to explore new possibilities. One of the great myths associated with brainstorming is that people think they'll recognize a good idea when they see it. The truth is that it is extremely rare that a breakthrough new idea is recognized for its brilliance when first uttered. New ideas almost always are flawed in some way when they first appear. Or as Albert Einstein once put it, “If at first a new idea doesn't seem totally absurd, there is no hope for it.”

Prepare to record ideas and appoint a recorder to do so. The facilitator and the note-taker should not be the same person. As the facilitator, you may choose to help the note-taker if the ideas are coming fast and furious, but you do not want to hold up the idea flow by trying to concentrate on what has just been said while also writing on the flipchart.

The recorder is responsible for writing ideas rapidly on (paper) flipchart pages; *number each idea* to allow an easy back-and-forth from idea to idea without losing track of where you are; and number your flipcharts. Then tape completed pages to the wall, in order. The recorder must also record *every* idea or comment; even seemingly outrageous points should be noted. The recorder must never act as editor.

Now for something completely school-marmish: legibility. Though it may seem of little importance, scribing good notes is a critical part of your brainstorming process. Not only is it the only collective record of

what happened, the clarity of the note-taking contributes to the development of the thinking that takes place during the session.

Warming Up

If necessary, familiarize your group with the procedures by engaging them in a practice exercise, which is all the more advisable if your group has not worked together before or if the group has not brainstormed on a frequent basis.

As a warm-up activity, you might start off with a brief artificial exercise. For example, ask them to: “suggest 30 new ideas for an entertaining television program.” Any topic that is fun and stimulating (but not work-related) will get people into the right mood for creatively participating. After warming up for about 5 minutes, you should reintroduce your main topic for brainstorming.

You might initially start by allowing your team members two minutes to think about and write down their ideas. Some may think fast, while others more slowly. Some may be overly influenced by the position, seniority, or perceived expertise of other participants. Giving the group a few minutes to think individually can greatly enhance the number and quality of ideas generated.

Begin to Generate Ideas

Formally begin your session by asking for as many ideas and suggestions as possible. If the group seems hesitant, call on someone you know who is likely to respond positively, to offer the first idea or tell your group you are going to start by going around the table and asking each individual for one idea.

In spite of agreeing to abide by the brainstorming rules, you must be watchful to quell anyone’s natural tendency to want to comment, criticize, or evaluate any of the

ideas being presented. I have personally seen facilitators who choose to use some “noise-maker” like a coaches’ whistle or a hand bell to remind participants when they get overzealous. One small caveat: that technique leaves all of the responsibility with the practice leader or facilitator. Personally, I would recommend instead that you give the group the tools, authority, and encouragement to police each other.

At one firm where sarcasm was a cultural norm, they adopted a football analogy to deal with partners who trampled on one another or on someone’s new idea. During a football match, players who commit a foul are shown different color cards by the referee to indicate the seriousness of the offence. In this group, they gave each of the participants two colored cards and encouraged them to adopt a similar football language in their brainstorming session. The first foul is a yellow card to indicate a “warning.” A further offence gets a second “warning.” Thereafter, any subsequent offences or a particularly negative comment gets a red card signifying a penalty, which is usually of a monetary nature. It was done playfully, but there was real serious intent behind it.

Writing Down Ideas

Something interesting occurs as we listen to our colleagues giving out their ideas. While we are listening, we generate ideas of our own. If we don’t write those ideas down, they are many times more likely to disappear than to ever get shared with the group.

Psychologists have concluded that people can only remember a few thoughts at a time before the memory starts erasing the old data and replacing it with new input. Consequently, without a place to store more ideas (like on a pad of paper), we either shut down in order to hold onto what’s in our heads, or we lose one stored idea for every new one we add.

Keep telling them how well they are doing when they come up with new ideas, especially when the idea is rather novel. Thank them for contributing their idea.

Variation One: Sensitive Topics

There are likely to be those times when you want your group to brainstorm and contribute their candid ideas to resolve a particularly sensitive issue, but you expect that people may be reluctant to speak freely.

Give everyone a pad of 20 8" × 14" cards. Ask your group to write down as many ideas as they can within 5 to 10 minutes, each idea on a separate card. Have the group turn in their cards to you. Shuffle the pack and give the cards out again. Ask each person to build at least two more ideas on the ones written on the cards they received. Have the group turn in their cards to you again. Shuffle the pack and give the cards out once more. Now have the people who received the cards read out the ideas contained on each card.

Variation Two: Working with the Virtual Team

With many groups, you are likely to have members participating across a variety of different geographic locals. In this situation, you can distribute the brainstorming topic in advance of your meeting and have each member contribute one idea. Publish the complete list of ideas without citing their source and distribute to all members in advance of the meeting.

At the meeting itself, pre-prepare some flip charts noting the ideas and begin your meeting with a brief review of the list. Then go office-to-office asking for just a couple of ideas to build on this initial list. This process ensures that everyone has participated and provokes a greater interest in the listed ideas.

Variation Three: Trashy Brainstorming

Even with ultra-serious, button-down professionals, there may be a particular opportunity or problem that requires some innovative thinking, enough so that you would like to see your colleagues get a bit crazy. Ask each of your colleagues to come up with their most absurd idea that addresses the opportunity or problem. (It helps if you can model what you are looking for with a wild idea of your own.)

Encourage your group to come up with ideas that are novel and disruptive. Give them a couple of minutes to legibly write their *one* idea on a clean sheet of paper. Ask people to take turns reading out their crazy idea to the group. Agree that it is perfectly outrageous and ask the professional to crunch it up and throw it into your wastepaper basket. After you have heard from everyone, now recycle that waste!

Pass the basket around and ask each participant to remove one trashy idea (obviously not their own). Now ask the group: "How can you turn this into a good idea? Is there something of value in it? Can you find a reverse or opposite of this idea that might work?"

Allow each of your colleagues to read out their trashy idea and then the idea that might be worthwhile that was sparked by the trashy idea. The benefit is that it allows the members of your group to stretch, have fun, and be creative, with little fear of ridicule.

You will find that the brainstorming session will go through phases of very rapid idea generation, and then through slow awkward times when no ideas are being created. Acknowledge it as a natural part of the process. In brainstorming, great ideas rarely come from a single flash of inspiration. The raw ideas need to be built and developed. This slow time is when you should return to the ideas listed on your flipchart pads.

Pick an interesting one and put that to the group. Ask your colleagues to expand, modify, or remodel it.

The “What If” Game

Have your group build upon their earlier ideas. Here’s a valuable way to encourage that: the “What If” game, which includes a series of provocative statements designed to challenge the group’s current perspectives. For example:

- What if some parameter were increased fourfold?
- What if some factor was decreased in half?
- What if this same situation was being approached in a different profession, industry, or country?
- What if this same situation were being faced by some particular famous person?
- What if we could eliminate a portion of the problem?
- What if we could find a new way to deliver our service?
- What if we could substitute automation for labor-intensive effort?
- What if we could have clients do certain steps for themselves?
- What if we could eliminate the paper?
- What if we could deliver with greater speed?
- What if we could combine two related services?
- What if we could make dealing with us more enjoyable?
- What if we did nothing?

These questions are intended as deliberate acts of provocation. If your group again falls silent, allow the silence to continue for a full two minutes. This maintains time pressure as well as giving an opportunity for the individual’s mind to work.

After a period, your group will have exhausted their ideas for a while and will need a break. Depending on the time you have allocated to the session and the number of ideas generated, you should ask them to

break. If you are taking a mid-session break, get people to move about, chat with others, and relax. Encourage them to look through the flipcharts of ideas. When the break is over, ask people to sit in a different place, then ask for their further ideas.

Divide the professionals into small groups around different flipchart pads and have them just brainstorm as a break-out team around the ideas on that pad. Then they can move on to the next grouping of flipcharts.

Sometimes all it takes is an unusual image or headline to get your brain working. If you’re in the middle of a brainstorming session and hit a point where no one has anything to say, rip out some pages from a variety of magazines and hand them around. By forcing a connection (any connection) between the content on the page and the task that people are working on, you can generate a few ideas that will beget other idea and more connections.

There are few people who have participated in brainstorming sessions who have not experienced “brain-chain reaction”—when minds are really warmed up, and a spark from one mind will light up a lot of others. Association of ideas comes in to play, so that an idea put into words stirs your imagination towards another idea, while at the same time it stimulates associative connections in other people’s minds, often at a subconscious level.

The Overnight Effect

It has been demonstrated that not more than 40 minutes should be allocated to having participants brainstorm any one particular topic. But we also know that sometimes great ideas occur to us after the formal session has ended. You could have people simply send in any ideas that occur to them.

In any event, one important reason for not trying to do all your brainstorming in a prolonged session is that you will miss out

on the benefit of one critical success factor: the “Overnight Effect.” This simple yet powerful psychological phenomenon dramatically improves the quality of the output from any brainstorming process. The ability of your group to generate great ideas will grow exponentially if you build at least one unstructured overnight into your session so that your afternoon meeting flows over to the next morning.

During that overnight period, people’s minds always operate in a relaxed concentration mode. Bits of information come together and new connections are formed. All of us have experienced the overnight effect usually without realizing it. We have gone to bed thinking about a situation and, presto, in the morning a great idea dawns on us. You should therefore always start the session on the following morning by asking group members for their overnight thoughts. I’ve seen some of the best ideas come forth from those morning debriefings.

Helping People Make Their Ideas Practicable

You must be vigilant in ensuring that the ideas expressed are specific, doable, and can be implemented. Sounds easy, but it’s not. In my experience, it is the most difficult step in the brainstorming process. As professionals, we are naturally prone to expressing concepts or goals, and often find it difficult to transform those concepts into specific actions.

For example, a couple of common concepts you might here are things like: “I think that we should always make a point of visiting our clients at their place of business.” Or; “we should improve communications.” As concepts, these are good. The only small hurdle then becomes “*how?*” How will we know that it is happening?

As the facilitator, you must always ask yourself, as these ideas surface: “Is this proposed idea specific, tangible, and quantitative enough or is it merely a goal, concept, or objective?”

For example, could some member of our group delegate this idea to a junior for implementation such that the junior would know exactly what initial action should be taken?

It also helps to think in terms of the tangible outcome (or “deliverable”) that will be presented at the next meeting to evidence the implementation of this idea. Will it involve doing some research (a report); developing a policy, procedure, checklist, or template; or taking some specific action that can be shown to have occurred? Where ideas do not measure up to these criteria, you might want to gently encourage more specifics.

Ask a question to *elicit more detail, without discussion*. For example, you might say to the individual: “Janice, that idea would no doubt be very helpful to you and the group. Could you expand upon it to help us determine how we could ensure that everyone in our group was doing this consistently and how we would know that it was happening?”

By gently probing for more specifics, you may likely elicit something like: “Well, we could develop a wall chart that would display a list of our top 20 clients down the vertical column and the members of our group along the horizontal. We could then initiate a system whereby each of us took responsibility to visit one client over the next quarter and note on the chart the date that client was visited and submit a one-paragraph report to the group on our findings.”

Or “I guess one of the tangible things we could do to improve our communications, is start a weekly internal newsletter.” Now you have something specific. The group will be able to assess for itself, at any point, how far along with this action plan they have progressed. Have the top 20 clients been identified? Has the wall-chart been developed? Has a visitation plan been drafted? Have client visits been made and reports submitted?

The facilitator’s job is to ensure that he or she has helped the group generate a good list

of very specific, tangible, quantitative, and implementable ideas for moving toward their objectives. Is this basic? Yes. Does it work? Yes. Do all groups do it? No. (Does yours?)

Analyze Your Ideas

You should now have a large number of ideas scattered about on sequentially numbered flipchart pages. Technically, your brainstorming session is over and the analysis process must begin. The analysis, selection, and implementation of your ideas is an important step.

If you should intend to end your group's session at this point, you will want to transcribe the notes on these flip charts for distribution to your team. Upon transcribing these notes, you should do so in exactly the same page format as they were originally recorded. When you distribute your group's work back to the individual members for further brainstorming, analysis, or implementation, you will find it very helpful to have the notes in a format that reminds them of how your brainstorming session progressed.

If you are going to proceed to the analysis stage, the very first thing that you should do as a group is to remove any duplicative ideas and also combine any ideas that are really saying the same thing.

You might then begin your analysis by having the group brainstorm your criteria for evaluating the various ideas. Label a new flipchart: "A good idea would have to have the following characteristics..." Your criteria might include characteristics like greatest potential for positively impacting the practice group's profitability; most attractive to our existing clients; most novel and likely to differentiate; and other such factors.

You may have already determined your criteria before beginning your brainstorming session and, if so, you should disclose the criteria to the group. Ask if your criteria make sense or if you have missed anything.

One of your challenges at this stage is to discern whether you are more attracted to selecting ideas for their *feasibility*, thus taking advantage of achieving some quick successes; or for their *newness*—thus enhancing the chances for a possible innovation breakthrough. (Here your initial statement, describing what you were trying to achieve with your brainstorming efforts, should guide you.)

My experience with this feasibility/newness conundrum is that, the newer and more innovative the idea, the more difficult it will be to realize. It creates for many groups a schizophrenia where our natural tendency is to gravitate to those ideas that are highly feasible. Now if your brainstorming efforts were inwardly focused, intent on solving some existing problem, then feasibility and quick successes makes perfect sense. However, if your brainstorming efforts were externally focused and intended to generate new ideas for differentiating your group, surpassing the competition, or developing a new service, then newness may be of higher priority.

By way of example, I once had a gathering of 42 professionals brainstorming in groups of seven in various break-out rooms. One of the criteria we decided on was that, if more than one of the six groups generated the same idea, it was to be discarded. We often think that the duplication of an idea validates its relevance.

How often have you heard the old notion, "great minds think alike?" But if you are really intent on stimulating innovation, differentiation, and wealth-creating initiatives as we were in this session, then we must accept the fact that great minds have different ideas. Only lemmings think alike. After all, if this group of 42 professionals were largely thinking of the same ideas, aren't the chances high that their competitors were already working on those ideas as well?

Once having developed your list of criteria, you will want to prioritize them. Depending

on the number of ideas that have been generated, you have a couple of optional ways of approaching the analysis stage.

- *If you have 50 ideas or less:*

On an easel pad, draw a 2' × 2' matrix. The vertical axis could be labeled “Feasibility” with “easy” at the bottom and “difficult” at the top. The horizontal axis could then be labeled with something like “ROI” showing “low” at the left and “high” at the right. You can experiment with whatever other terms suit your most important priorities for the axis.

“Feasibility” might be changed to “speed” or “effort” or “cost.” “ROI” might be changed to “excitement” or “value” or “potential.” (You might even construct two different matrices and include one that measures “Newness.” Then compare and contrast the ideas after you have placed them on each matrix.)

Have your group agree that you’re going to use this matrix just to conduct a rough evaluation of each idea. Now is not the time for lengthy debate on every idea, so as rapidly as possible, place your ideas into the matrix in a way that reflects the general agreement of the group. If there are too many ideas to put on the chart, have everyone pick their one personal favorite for inclusion. Identify only those ideas that generate the highest rating and take those ideas forward for implementation.

- *If you have more than 50 ideas:*

If you have a particularly lengthy list of ideas, have your group work through them and quickly arrange them into three color-coded categories. Your three *feasibility* categories could be:

- Green: Definitely will work and can be implemented immediately.
- Yellow: Will possibly work but may require further analysis.
- Red: Needs much more investigating. May work in the future. Park for now.

Or you may choose to have categories like:

- Green: Just-do-it because they contain elements of newness and feasibility.
- Yellow: Very exciting incremental improvements.
- Red: Breakthrough ideas, but representing some risk in time and resources.

You should plan to implement the best of the Green ideas and to investigate the Yellow ones. Don’t discard the Red ideas. Just let them percolate for some further thinking.

Finally, once you have your short list selected of the best ideas for your group to focus on implementing, you can take it one further step. I worked with one team that, after a rather productive brainstorming and analysis session, then devoted time to “reverse brainstorming” their best ideas. That is, they spent time thinking through together “in how many ways can this idea fail?”

Sound like overkill? This group didn’t think so, and their results reinforced taking the extra step.

Double-Barreled Brainstorming

This is a brainstorming variation that’s particularly useful when you want to involve your team members in working through their ideas toward a new strategy or change that may impact your group’s practice.

The positive barrel: First, participants are given the opportunity to state their ideal improvements to how a strategy might be implemented in their area. Then they are asked to draft feasible, cost-effective versions of the ideas.

The negative barrel: Participants are asked to list why the strategy won’t work—their concerns, resistances, and so forth. Then they are asked to recommend their preventative ideas.

Not only does this process improve your plan, it gives your colleagues a chance to

vent in a receptive environment. More often than not, pessimists turn into supporters of the strategy. The best improvements and most important preventative should then be included in the action plan. ■

—Patrick J. McKenna

Patrick J. McKenna (patrickmckenna.com) is an internationally recognized authority on law practice management and strategy. Since 1983, he has worked with the top management

of premier law firms around the globe to discuss, challenge and escalate their thinking on how to manage and compete effectively. He is co-author of business bestseller First Among Equals and Serving At The Pleasure of My Partners: Advice To The NEW Firm Leader published by Thomson Reuters in 2011. He advises executive committees and boards on leadership selection and succession issues and co-leads a program entitled "First 100 Days" (first100daysmasterclass.com) usually held at the University of Chicago. Reach him at patrick@patrickmckenna.com.



Editor-in-Chief

LARRY SMITH
Phone 201-854-3288
Fax 201-861-6728

Senior Editor

STEVEN T. TAYLOR
Phone 503-245-3209

PATRICK J. MCKENNA
Contributing Editor

Wolters Kluwer

JOANNE MITCHELL-GEORGE
Editorial Director

MEGAN ROSEN
Senior Developmental Editor

Editorial Office

2700 Lake Cook Road
Riverwoods, IL 60015
Phone: 847-267-7000
Fax: 847-267-2945

Virtual Currency Practice

Continued from page 2

But they've got the partnership firmly behind them, and they and their team are quickly becoming known for their blockchain expertise. "To the immense credit of our leadership team, they recognized that we were all well-positioned to be cutting-edge thought leaders in this area," Kohen says.

Carlton's team serves two classes of clients, Wales says, one that operates specifically in bitcoin- and/or blockchain-specific businesses and the firm's existing clients involved in industries like supply chains, insurance, telecommunications, and a range of other sectors. "We're really enjoying working with legacy clients," Wales says, adding that they also advise these clients on how they can move parts of their business over to blockchain solutions to gain more efficiencies, the liabilities involved in doing that, and the ways they should structure future deals in their contracts.

"That's very exciting to us," he says, "because we get to work with people throughout our various practice groups and learn about their clients and help them embrace what we think will be this revolutionary industry-agnostic technology."

"Parabolic Growth Curve"

One of the developments driving the work in this area the most is the burgeoning increase in initial coin offerings, what *The Wall Street Journal* described as a "red-hot fundraising method" in an article in November. It also reported that some \$3 billion worth of funding has been raised this year through 180 ICOs.

"That's a lot of money for a fundraising mechanism that's very new," says Josh

Rosenblatt, an attorney in the Nashville office of Cincinnati-based Frost Brown Todd, who leads the firm's blockchain team, which was launched in 2016 and consists of a core of six lawyers with several others helping out. "We're very active in the ICO space with more than a dozen going on right now. It's been a parabolic growth curve. The level of sophistication of the clients we've seen has increased. We've seen existing clients with strong management teams getting involved. It's no longer just startups with no track records."

Rosenblatt says that with all of this activity he and his team are searching for recruits to their group, but that it's not easy finding attorneys with the right combination of skills and experience. There also aren't that many firms that practice in this arena, especially the ICO sphere.

"The barrier to entry is pretty high because you need expertise in a lot of different regulatory areas," Rosenblatt says. "You just can't do an ICO well without commodities, securities, international, tax, and Bank Secrecy Act experience as well as a really strong understanding of blockchain technology."

Fenwick's Straus agrees that the legal profession is facing a talent gap in this area. "There aren't that many people who have the necessary combination of experience—with a financial services background and an interest and aptitude in technology," he says, adding that he and his co-chair in the payments systems group, Daniel Friedberg, have an advantage because they do have both. "It's hard to find lawyers who want to invest the time to get conversant in blockchain and do the difficult work of getting up to speed in the financial services space. It requires a unique confluence of skills."

That's why some believe BigLaw will be playing a bigger role in blockchain-related legal work because of the breadth and depth megafirms have in the multiple disciplines required to adequately serve clients. Weinstein

says Steptoe is one of those large firms that is already well-positioned to do this and has become a major blockchain-related service provider.

“By combining our firm’s blockchain experience with seasoned lawyers across industry sectors, we provide a unique set of services to a wide array of clients,” Weinstein says, “helping them not only understand this technology but also determine the feasibility of applying [it] in their business and sector, and ultimately, utilizing [it] in the most efficient, secure manner in compliance with all relevant laws and regulations.”

Into Law Firm Operations

Clearly, the technology has spread to many industries, including the health care sector, and law firms with health care and blockchain expertise are working to meet this growing demand. “The health care industry has really been focused on blockchain technology and the potential for [storing] patient information and other uses,” says Teresa Walker, chief operating officer of Nashville’s Waller Lansden Dortch & Davis, who has recently been spending a lot of time exploring the many layers of this area.

“We’re fortunate to have people who have hands-on health care law experience and also IP lawyers, and they have gotten very involved about what’s going on in the blockchain world,” says Walker, adding that the firm has six people working in this space and expects to bolster its ranks in this area to grow its practice.

What’s more, Walker says, she can see adopting the technology to help run the firm’s business. “I’m interested in it from the legal operations end of it,” she says. “We were asked to be a part of the Global Legal Blockchain Consortium, based out of Denver, which is all about trying to get standards developed around the technology.” The consortium launched last August “to drive the adoption and standardization

of blockchain in the legal industry, with the larger goal of improving the security and interoperability of the global legal technology ecosystem,” according to a report written by Robert Ambrogi on lawsitesblog.com.

Certainly, the use of the technology in law firms is generating a lot of buzz among the nonlawyer professional ranks at partnerships across the country. “It certainly is getting a lot of play in the profession,” says Tom Clay, a consultant with Newton Square, PA-based Altman Weil. “I hear CFOs and chief operating officers at law firms talk about how it could be transformational in terms of operations.”

Exponential Expansion

But of course lawyers also see the potential for transformation as they work to keep pace with the legal demand the technology is spawning. “One of the first areas of growth in our practice,” Weinstein says, “was in the government enforcement and regulatory space. But since those early days, the practice has expanded exponentially to include work for clients across a number of industries that are being affected, and will be affected, by the growth of this technology.” He says much of that early work came out of Steptoe’s creation of the Blockchain Alliance, a nonprofit organization that provides a forum for the blockchain industry to engage with law enforcement and regulatory agencies.

Weinstein and other lawyers exude enthusiasm in their commitment to these cutting-edge innovations, perhaps none more than the young associates at the helm of Carlton Fields’s blockchain team. “Our goal is to help grow and cultivate the ecosystem,” Wales says. “Matt and I spend a lot of time outside of work meeting with people in the industry and learning more about this. We are true believers in blockchain technology and bitcoin.” ■

—Steven T. Taylor

Of Counsel Profile

Continued from page 24

carry on the work he's done when he finally does decide to step aside from trying cases. "There are a lot of lawyers who are interested in working in this area, and for Andy, helping them and getting them to know the subject matter as much as he does is really important," Kohlmann says, adding that Bart wants such protégés to carry on "the legacy that he's created in the entertainment space."

Recently, *Of Counsel* talked to Bart about his career, some of the cases he's handled, the satisfaction he gains, and the challenges he encounters as an attorney, his mentoring work, and other topics. The following is that edited interview.

Of Counsel: Andy, our readers are always interested in why and when a person decided to become a lawyer. What led you to the legal profession?

Andrew Bart: There was a part of me that knew I wanted to be a lawyer from the time I was in seventh or eighth grade. I was on the debate team at my junior high school and there was something about standing up and arguing and reacting that I found challenging and stimulating. I thought that would be a good direction for me.

I think there was a point when I was in college where it was between pursuing law and wanting to be a psychologist. My dad had gone back to school and become a psychologist, after being a toy store owner when I was a kid. And I was fascinated by that area and that was my major in college. But I decided pretty early on in the process that, while psychology was probably a more interesting subject to me than law, the element of being a litigator and trial lawyer was what I had always wanted to do. So I think it really goes back 50 years.

OC: You got your law degree at Columbia in New York. And then what did you do after law school?

AB: I started working in a law firm right after law school, at Kelley Drye & Warren, before my 24th birthday. About three months later, they sent me to work on a case down in Puerto Rico, and I wound up living there for close to two years. When I came back I realized how much I enjoyed that experience of working in what felt like a small firm. I concluded that I didn't want to work at a big firm, so I spent about a year or two getting some state court experience, doing some depositions so I wouldn't come across as a novice. And then I moved over to Pryor Cashman in 1983. I was there from 1983 to 2006.

Matching Personalities

OC: That's when you went to Jenner & Block. You do a lot of litigation and your main focus is in the media and entertainment area. What was it that attracted you to that specialty?

AB: I think if you scratch the surface I will still tell you that I'm a commercial litigator, that I went into the practice of law to be a trial lawyer, and that's the way I still see myself. I certainly specialize in entertainment litigation, with a focus on copyright and more specifically music copyright, although I've dealt with lots of other areas.

That was an offshoot of the Pryor Cashman experience. When I went to Pryor in '83 the market was very different. There were a lot of small and medium firms to choose from. Although Pryor was an entertainment boutique, I went there because they were young, aggressive, good litigators, and they were somewhat sarcastic. I could see myself fitting in with the personality of the place. It felt like a really good base for me in. Once I was there I did many different things in many different areas.

We had a lot of entertainment litigation, and while most of the people there were gravitating to and wanting to work on the movie and TV cases, that didn't interest me all that much. I was fascinated by the music cases, and the first one I worked on was the Willie Dixon case against Led Zeppelin in '84 or '85, in which I represented Atlantic Records. I went to London, defended depositions, and we went to trial. And then it became a matter of continuing to work in that area, getting some name recognition, and enjoying the work immensely.

I'm a music geek. It's what I love and what I spend my free time doing, not as a musician but listening and exploring. It's my passion in the arts, so it's a natural fit for me. The percentage of work I did in the entertainment space probably went from 20 percent in 1985 to 60 percent in '95 to 90 percent in '05. That was just the natural trajectory of my [workload]. It's not necessarily something I sat down with the business plan and decided that this is what I was going to do.

OC: I've been interviewing lawyers every month for the past 20-plus years and I've never heard the word "sarcastic" used as an attribute that attracted someone to particular law firm until now, as you described part of the personality of Pryor. I like that.

AB: Yes, I say it with warmth, and I'm still friends with quite a few of the people who I practiced with through all those years. There are a lot of different personality types and I think I tend to be a relatively transparent person—I'm not a passive-aggressive person; if I disagree with you, you'll know it—but I try to deal with things with a sense of bemusement of the human condition and recognition of all of our profound fallibilities. And, I think all of those pieces go together. It's partly about being a New Yorker, because you almost have to have an edge. I've been riding the subway every day since I was 12 years old, sometimes three hours a day. If you don't get a somewhat cynical and yet loving feeling toward the human condition after all of that I don't know what will do it.

Matters that Matter

OC: Thank you for elaborating on that. You've obviously handled many, many matters. What are a couple of cases that are particularly important or were satisfying to have worked on? I'm guessing that the major *MP3tunes* case, as it's referred to, that you won this year is one of them.

AB: As a trial lawyer you think of the ones that took huge chunks of your life away. There are four cases that I worked on that did that, for better or worse. The Puerto Rico case I did very early in my career that I alluded to earlier was one. I did a case at Pryor Cashman in which I represented Royal Caribbean Cruise Lines, one that went on for 18 months, and just completely devoured my life. Those were episodic.

The other two, and one was the one you mentioned, were 10 or 15-plus year endeavors that created significant precedent in the music contract and copyright world. The *MP3tunes* case was the more recent. Another that's important, I think, is the Phil Spector/Ronettes' case from 1987 until 2002. [The case involved Bart's client, record producer Phil Spector, and the '60s group the Ronettes over millions of dollars in movie soundtrack royalties.]

In the old recording contracts the only compensation that was provided to artists, in many cases, was a royalty on the sale of phonograph records. Starting in the '70s, a significant amount of money began coming in from licensed uses of sound recordings for commercials, TV, and films.

And so there was nothing in the recording agreements that provided for compensation for the artists. The big labels started reflexively paying something out of a sense of equity, not necessarily out of a sense of contract. We represented Phil Spector through a company that we did more work for [ABKCO] Music and Records Inc. They wanted to draw the line there. They weren't making much money to begin with, and they

didn't want to pay the artists anything on the master use licenses.

Riding the Roller Coaster

OC: You eventually took that to an appeals court in New York and won, right?

AB: Yes, we got the New York State Court of Appeals to rule that if you own property free and clear of claims from another party, in this case the label owning the sound recordings free and clear from any claims of the artist, except for those set forth in the contract, then that's all they get. Although that might sound rather harsh, it serves as one of the basic principles of contract law. It was an important principle in terms of setting the relative relationship between the contracting parties, probably more than any case that I have ever worked on.

I mentioned that one for that reason and because I represented such an unsympathetic party and had to deal with all of the sympathies going the other way. We lost the case at trial. We lost at the first level of appellate court. And then we basically snatched victory from the jaws of defeat—after 14 or 15 years. It's one of those battles in your career that you look back on and say, "Well, that was a life-defining experience."

It probably goes without saying that the impact of technology on the entertainment industry was, at least initially, devastating. Taking an industry and transferring a significant part of the net worth and value of content companies over to the technology companies is in my opinion—and I'm as biased as they come—sheer theft. Litigating and trying to protect the value in the creativity of the artists and the assets of the studios and labels is something that means a great deal to me.

The *MP3tunes* case was one of very few cases where an appellate court handed the content owners a significant victory against companies that intentionally went out and

set up business models where they lured customers in with unlicensed music as a way of building their base. We were able to get a very sizable judgment and create good law. Like the other case, we've gone through a lot of ups and downs in this case—the roller coaster of litigation.

OC: Those ups and downs are fairly typical in litigation, aren't they?

AB: Yes, when it comes to litigation the act of being up there, being the person on the line, communicating a position, and telling the story and reacting to attacks is all well and good. But, I guess it's like what a relief pitcher in baseball experiences, you have to be able to absorb a game where you get hammered and then come out the next day and make better things happen. It's a little tough on the emotional transmission [laughter], but it's an inherent part of the business.

The Good & the Bad

OC: Andy, you obviously like what you do and you touched on why you like it. But could you elaborate a little more about what brings you satisfaction as a litigator? And then I'd like to ask you about the challenges and frustrations of your job. First, what do you like?

AB: I guess what I like is what I've always liked: being in the courtroom, and particularly arguing to a judge or presenting argument to a jury. When I'm up there and doing that I feel a direct emotional line back to that 11-year-old kid on the debate team, which I was telling you about at the beginning of our conversation. I presented a Second Circuit argument recently, and as I was walking out of there, I said to myself, "I've always loved doing this, and I still love it." That's true even, and maybe even particularly true, when the judge is giving you a hard time, and you're reacting and seeing what you're able to do.

I went into this business not to make money, although I've been fortunate to do

well, but it wasn't that. I thought it was a profession where I could invest in myself and see what I could become, that I could take the skills that I thought I had and tried to master them or get better at them and see where that pathway would take me. That part is great.

The other component is that being at Jenner I'm in a collaborative practice, and helping to create the content, media, and entertainment group and being either a co-chair or chair of that practice during the last decade has brought me a sense of communal responsibility of a desire to mentor and create something that's meaningful that will postdate my practice. I've been better at that. This isn't something that I think I did well at all when I was younger. But I try to teach and support and include my peers and my juniors in my practice and in my planning because it's not mine: It's ours. This has been personal growth for me and it brings me pleasure—in addition to the success in cases.

OC: Now the flipside: What do you not like? What drives you crazy and keeps you up at night?

AB: The flipside is the business component, that despite all of your victories and accomplishments, you're out pitching and competing for business and having to reinvent yourself constantly in a marketplace that's very competitive, very rate-driven. You

have to try to convince people of the excellent results, experience, and knowledge of me and our team, which is ranked at or near the top nationally. Selling that [record of success] in the marketplace, particularly to content companies that have gone through substantial economic downsizes and are looking for rate relief, makes it profoundly competitive.

Without mentioning names, there was a studio that gave us four cases to work on five years ago and we won all four cases, but we haven't been able to get additional work from them. It's troubling not just for me but for younger people and for where this practice is going to take them. I think there were very few people who went into the practice of law with the notion of becoming business people. But we have to be that in today's increasingly competitive, cut-throat business world. So, the business aspect of the work is what keeps me up at night.

Now I should tell you that other things, often my cases, wake me and keep me up in the middle of the night, but in a good way. Frequently, that's because there's something I need to focus my attention on. I can't even count the number of times that I woke up with an idea about a case. I've been very happy that I woke up because of that. ■

—Steven T. Taylor

Publications from CCH and Aspen Publishers
combined into single online resources

Integrated Libraries

on the CCH Internet Research NetWork

Antitrust & Trade Regulation—Core resources include the CCH *Trade Regulation Reporter* and *Antitrust Law* by Areeda and Hovenkamp.

Business Organizations Law—Expert guidance for selecting the most advantageous business entity.

Commodities & Derivatives Law—Coverage of legislative, regulatory and judicial developments affecting the U.S. commodities and derivatives market.

Computer & Internet Law—Analytical, primary source and current awareness information covering computer and Internet law issues.

Copyright—Copyright law and analysis along with current developments and commentary.

Corporate Governance—Comprehensive resource featuring news, analytic treatises, and primary source materials for achieving effective corporate governance policies and practices.

Corporation Law—A comprehensive solution for the corporation and business law practitioner.

Executive Compensation—Everything needed for formulating executive compensation programs.

Federal Securities Regulation—Federal securities law, regulations, analysis and current awareness.

Health Law and Compliance—Treatise series gives practical guidance on a wide array of topics.

Insurance Coverage Litigation—Practice-tested legal strategies, cases and litigation forms. Library includes Ostrager and Newman's *Handbook on Insurance Coverage Disputes*.

Investment Management—Online solution for research, practical guidance and compliance with the '40 Act, Advisers Act, '33 Act and '34 Act.

Labor and Employment Law—Federal and state laws with cases, explanations and expert analysis.

Mergers and Acquisitions—An exclusive resource featuring the works of the industry's top experts.

Payroll—Payroll resources for managing the countless details involved with compliance.

Pensions and Benefits—Hands-on knowledge for creating and managing pension and benefit plans.

Reimbursement—Expert guidance on reimbursement strategies used by successful organizations.

Trial Attorneys—Features *Wigmore on Evidence*, *Directory of Federal Judges* including *Almanac of the Federal Judiciary*, *New Wigmore: A Treatise on Evidence*, and *Evidence: Practice Under the Rules*.

 **Wolters Kluwer**
Law & Business

The CCH and Aspen Publishers products
presented here are now part of Wolters
Kluwer Law & Business

www.onlinestore.cch.com
888 224-7377

Of Counsel Interview ...

Cross-Rhythms & Back Beats in Courtroom: Litigator Succeeds in a Legal Lush Life

Travel around New York, Chicago, Los Angeles, or other cities with entertainment lawyer Andrew Bart and he'll likely mention in passing that he's seen a music concert in that jazz club or that concert hall or any number of venues. The guy simply loves music, especially jazz, and that, in part, drives the passion with which he fights in court for his clients.

"Andy's a huge music fan," says Susan Kohlmann, Bart's partner in the content, media, and entertainment practice group he chairs in the New York office of Chicago-based Jenner & Block. "Wherever I've been with him he has said, 'Oh, I caught such and such band here.' He is a superb lawyer, but he also has a deep appreciation for the music of his clients. It's one of the things that contributes to making him such a tremendous entertainment lawyer."

Bart has been recognized as one of the most distinguished, successful, and prominent

entertainment lawyers in the nation. He's clearly the go-to choice for recording companies, music publishers, and artists when they need legal help. He's won many precedent-setting cases in copyright law, trademark law, and the law of privacy and publicity, including this year's hallmark Second Circuit victory in *Capitol Records v. MP3tunes*.

"Andy's done so many amazing things in the music copyright space," says entertainment lawyer Kohlmann, who's also Jenner's managing partner of the New York office. "He brings so much passion to the arguments he makes."

In 2018 Bart will celebrate the 40th year of his graduation from the Columbia University School of Law, and he hasn't seemed to slow down. While he still handles such major cases as the MP3tunes litigation for his client Capitol Records, he also spends more time mentoring younger lawyers who want to

Continued on page 19