

# The Legal Intelligencer

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## Lawyer Esuga Abaya On His Journey From Big Law to Boutique

BY ERICA SILVERMAN

*Of the Legal Staff*

Esuga Abaya is a business attorney at GrowthCounsel, a boutique corporate law firm in Philadelphia with five attorneys.

Abaya represents a range of clients, from startups and early-stage enterprises to Fortune 500 companies, on a variety of corporate and commercial matters in numerous industries, including software, technology, life sciences, insurance and financial services. He started his career in the corporate and securities group at Pepper Hamilton, where he spent five years, then moved to the corporate group at DLA Piper for three years, before joining GrowthCounsel.

Abaya has witnessed what he describes as an “exodus” of Black attorneys from corporate firms, and shared his insights about his career and his perspective. Abaya has a J.D. from Villanova University  
*Abaya continues on 8*

## Discovery Request in Mushroom Price-Fixing Case Denied by Judge

BY P.J. D'ANNUNZIO

*Of the Legal Staff*

A federal judge has denied a request by retailers Winn-Dixie and Bi-Lo for additional discovery in the mushroom price-fixing antitrust litigation.

U.S. District Judge Berle Schiller of the  
*Mushroom continues on 10*

## For Many Firms, Client Relations Pros Have Been the Missing Link

BY BEN SEAL

*The American Lawyer*

Melissa Prince has been watching change take place, gradually, for the past few years. As the chief client value and innovation officer at Ballard Spahr, she has seen more partners seek out her team’s assistance. She has seen more clients seek the type of technology from her firm that can help solve their problems. And she has seen a growth in creative alternatives to the billable hour.

The coronavirus crisis, she says, is going to expedite it all.

“Change has been underfoot for a long time, and I think this is exacerbating that change,” Prince says.

As lawyers in many parts of the country continue to work remotely, both they and their clients are turning more frequently to client value and client relations professionals like Prince to help bridge the gap that the pandemic has placed between them.



PRINCE

“Sink or swim.”

For business professionals who handle pricing and budgeting issues, the crisis has posed a major test as clients struggle with cash flow concerns. Prince says several clients have shared a “blanket communication” indicating they’re reducing the hourly rates of all their firms, most often by 20%.

“Our partners sometimes respond immediately and say, ‘OK, we’ll do it,’” Prince says. “And that’s why you need the pricing team to be involved.”

*Client Relations continues on 10*

And Prince and her counterparts across the industry are seizing the moment.

“This gives us an opportunity to shine,” Julie Henson, chief client officer at Taft Stettinius & Hollister, says.

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## Conservatives Seize on US High Court Losses to Push for Trump’s Reelection

BY JACQUELINE THOMSEN

*The National Law Journal*

When the Senate confirmed President Donald Trump’s 200th federal judge last week, legal conservatives cheered the remarkable milestone. But recent rulings from the U.S. Supreme Court keeping protections for “Dreamers,” LGBTQ rights

in the workplace and Monday’s decision striking down a Louisiana abortion clinic law have those on the right arguing Trump’s judicial work is far from done.

Trump has reshaped lower courts and appointed Justices Neil Gorsuch and Brett Kavanaugh to the bench, shifting the court’s ideological balance to the right.

*Conservatives continues on 10*

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# PEOPLE IN THE NEWS

## SPEAKERS



RAYZ

**Arkady “Eric” Rayz of Kalikhman & Rayz** presented a seminar for the **National Business Institute** on the topic of “Top 5 Business Formality Mistakes That Expose Members and Company to Liability.”

The areas of discussion included common operational breakdowns that expose shareholders to personal liability.

Rayz’s practice is focused on civil litigation on behalf of business and individuals.

His past experience includes serving a two-year term as a staff attorney for Justice **Sandra Schultz Newman** of the Pennsylvania Supreme Court.

He has experience in federal and state courts and is admitted to practice in the commonwealth of Pennsylvania and the state of New York, before the U.S. District Court for the Eastern District of Pennsylvania, the U.S. Court of Appeals for the Third Circuit and the U.S. Supreme Court.

A member of the Pennsylvania, Philadelphia and Bucks County bar associations, Rayz earned Juris Doctor from **Temple University’s Beasley School of Law**.

Rayz serves on the boards of several nonprofit organizations.

In 2010, Rayz was appointed to the board of appeals of Lower Southampton Township in Bucks County.

In 2011 Rayz was appointed to the board of auditors of Lower Southampton Township in Bucks County and thereafter elected its chairman.

## ADDITIONS

**Fox Rothschild** added **Evan W. Davis** to the gaming practice group as counsel in the firm’s Philadelphia and Atlantic City, New Jersey, offices.

Davis is an adviser to a range of companies that do business within the sports and gaming sectors and has knowledge of sports wagering.

He previously served as general counsel for a gaming company with more than \$300 million in annual revenues.

He has experience with the regulatory schemes and operations affecting gaming companies and those who do business with them.

Prior to joining Fox, Davis served as vice president and general counsel of **Rivers Casino Philadelphia** (formerly SugarHouse Casino), where he oversaw all legal matters involving regulatory, labor and employment, construction, intellectual property, real estate, litigation, compliance, risk management and contractual issues.

Davis was also previously an attorney in the Philadelphia offices of **Pepper Hamilton** and **Dechert**, where he focused

on antitrust matters and other complex commercial disputes.

After graduating law school, Davis clerked for U.S. District Judge **Robert B. Kugler** of the District of New Jersey.

He is an associate member of the **Economic Club of New York** and a member of the **International Association of Gaming Advisors**.

Davis is a member of the board of directors of the **Ed Snider Youth Hockey Foundation**, a charity that serves over 3,000 inner-city children in Philadelphia and Camden, New Jersey, and the board of trustees for the **Bala Cynwyd Library** in Lower Merion Township.

He also serves as a mentor in the **Chamber of Commerce for Greater Philadelphia’s Pay It Forward** program.

He earned his Juris Doctor from the **University of Pennsylvania Law School** and is admitted to practice in Pennsylvania and New Jersey.

## ANNOUNCEMENTS

The Delaware Business Court Insider is seeking contributors to provide analysis and insight into recent Delaware Court of Chancery decisions, as well as litigation and issues currently of interest to the business law community.

Potential topics that would be appropriate include, but are not limited to, arbitration, books-and-records requests, breach of contract lawsuits, controlling stockholder litigation, derivative claims, discovery disputes in commercial litigation, corporate dissolution, breach of fiduciary duty lawsuits, intellectual property litigation, jurisdictional battles in corporate litigation, merger and acquisition lawsuits, special committee decisions, corporate governance, limited liability company litigation and limited partnership agreement litigation.

Examples of articles written for DBCI are available online at [www.delbizcourt.com](http://www.delbizcourt.com). For more information, contact Kristie Rearick at [krearick@alm.com](mailto:krearick@alm.com). •

All potential items for People in the News should be addressed to **Aleeza Furman** at The Legal Intelligencer, [afurman@alm.com](mailto:afurman@alm.com)

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## REGIONAL NEWS

## New Jersey's Three-Month Spending Plan Gets Governor's Signature

BY SUZETTE PARMLEY

*New Jersey Law Journal*

Amid a flurry of activity in simultaneous voting sessions by the New Jersey Senate and Assembly, a temporary spending plan to keep state government fully operational over the next 90 days passed both houses and was signed by the governor Tuesday.

The Senate voted 21-17 to approve S-20, while the Assembly approved counterpart measure A-3 by a 46-27 vote Monday.

The purpose of S-20/A-3, as stated in the bill: "Amends and supplements FY20 Appropriations Act to effectuate extension of fiscal year through September 30, 2020; reduces authorized appropriations; makes FY20 supplemental appropriations of \$7,745,997,000 in State funds and \$4,586,243,000 in federal funds."

On Tuesday, New Jersey Gov. Phil Murphy signed the measure.

"The fiscal impacts of the COVID-19 pandemic are as unprecedented as this public health emergency itself," the governor said in a release from his office just after 1 p.m. "As we move forward toward the nine-month Fiscal 2021 budget, our choices will have an even bigger impact. But, make no mistake, we cannot just cut our way forward.

"We must have the flexibility to borrow essential funds to secure the core services

we will rely upon as we emerge from this pandemic, and we need direct assistance from the federal government," Murphy said. "Absent those, the tough decisions we have made now will pale in comparison to those which lay just around the corner."

Sen. Paul Sarlo, chairman of the Senate budget and appropriations committee, who guided the bill to passage before his committee just days earlier, said the three-month budget extension will serve its pur-

next stage of an extremely difficult economic recovery," Sarlo said in a statement after the 40-member Senate passed S-20 at 2:45 p.m. Monday.

"This budget is not what we want to do, but it is something we have to do to keep government operating."

Sarlo said the hard part was only beginning, and lawmakers will be working through most of the summer to come up with a new fiscal year 2020 budget.

S-20 was the result of an agreement announced April 1 between the governor and Legislature to extend the budget cycle during this most unusual of years. Residents and businesses were also bought time to file income and corporate taxes, as that deadline moved to July 15 in the same announcement. A month later, on May 4, the governor announced he was rescinding an executive order to commit \$1.28 billion toward the state's surplus fund as the fiscal picture worsened. The Governor's Office has said it expects revenue projections to be down by about \$10 billion, including \$2.8 billion less than expected in this fiscal year and \$7.2 billion less in the next fiscal year.

There was brief debate in passing S-20 and A-3 on Monday.

Sen. Ronald Rice, D-Essex, chairman of the Legislative Black Caucus, said "to not vote this budget would cause more harm than good." Rice said he feared that thousands of public workers getting furloughed, and critical services to urban, minority communities that have borne a substantial brunt of COVID-19's impact getting cut off, would cause more suffering.

Rice also spoke up earlier in support of S-19 to designate June 19—Juneteenth, which celebrates the end of slavery in the United States—as a state and public

*Plan continues on 9*

*Sarlo said the hard part was only beginning, and lawmakers will be working through most of the summer to come up with a new fiscal year 2020 budget.*

pose: to buy the state time to come up with a new fiscal year spending plan following the governor's proposed \$40.9 billion plan from earlier in the year—essentially voided by the pandemic-induced lockdown since mid-March that shut off the state's tax revenue streams and will force Draconian cuts across the board.

"We have developed a three-month budget plan under crisis conditions that requires hard decisions to get us through the

"We next have to focus on a fiscal plan for the following nine months and be prepared for the economic challenges we will continue to face over the next few years," said Sarlo.

Sarlo's message was pretty much the same when S-20 cleared the 12-member Senate Budget Appropriations Committee by an 8-4 vote along party lines June 26. The four Republicans on the committee voted against S-20.

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## Pennsylvania Commercial Litigation

Harry F. Kunselman - Strassburger McKenna Gutnick &amp; Gefsky



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## NATIONAL NEWS

## Justices Strike Down Broad Rule Limiting Generic Trademarks

BY NATE ROBSON  
AND SCOTT GRAHAM

*The Recorder*

Companies using otherwise generic terms for their websites are eligible for trademark protection if the domain is distinct to the general public, according to the U.S. Supreme Court, which struck down a broad federal rule that blocked Booking.com from registering its mark.

While the term “booking” on its own, like countless other one-word phrases, is generic and ineligible for trademark protection, Booking.com has taken on a secondary meaning with the public, wrote Justice Ruth Bader Ginsburg for the majority. The justices noted that upholding the U.S. Patent and Trademark Office’s application of the rule would strike down trademarks it already granted to Dating.com and Art.com.

“A term styled ‘generic.com’ is a generic name for a class of goods or services only if the term has that meaning to consumers,” Ginsburg wrote. “Consumers, according to lower court determinations uncontested here by the PTO, do not perceive the term ‘Booking.com’ to signify online hotel-reservation services as a class. In circumstances like those this case presents, a ‘generic.com’ term is not generic and can be eligible for federal trademark registration.”

Justice Sonia Sotomayor filed a concurring opinion while Justice Stephen Breyer was the lone dissenter.

Breyer, in his dissent, said adding .com to the end of a generic name adds no distinctive meaning that’s entitled to trademark protection.

“A top-level domain such as ‘.com’ has no capacity to identify and distinguish the source of goods or services,” Breyer wrote. “It is merely a necessary component of any web address. When combined with the generic name of a class of goods or services, ‘.com’ conveys only that the owner operates a website related to such items.”

Amsterdam-based Booking.com B.V., represented by Williams & Connolly, Debevoise & Plimpton and Foley & Lardner at the Supreme Court, said it had invested \$5



*Photo by Diego M. Radzinski*

**Justice Ruth Bader Ginsburg.**

billion in its name and wanted to protect that investment. Numerous amici curiae with generic top-level domain name brands, such as Salesforce.com, Cars.com and Dictionary.com, supported Booking.com’s case.

Debevoise & Plimpton partner David Bernstein praised Tuesday’s ruling for relying on consumers to determine whether a phrase is generic.

“This decision is a victory for countless brand owners that have invested significant resources in building their brands—such as Weather.com, Law.com, Wine.com and Hotels.com, as well as others like Home Depot, Salesforce, TV Guide, Pizza Hut, and The Container Store—whose trademarks, the court acknowledged, would have been at risk if the government’s position was accepted,” Bernstein said in a statement.

The USPTO had argued that simply adding .com to a generic word doesn’t make it any less generic. The agency pointed out that more than 100 years ago, the Supreme Court ruled that the addition of “Company” didn’t transform an otherwise generic brand. It also cited more recent decisions from the U.S. Court of Appeals for the Federal Circuit on names such as Hotels.com.

A long-standing rule of trademarks is that generic names cannot be registered. For example, a business selling apples could not register Apples or The Apple Company because it would allow that company to monopolize the name of the product. Even without federal registration, a valid trademark can still be enforced against would-be infringers. But registration confers additional legal rights and benefits, such as constructive notice of the mark.

Booking.com won a split decision at the Fourth Circuit. Judge Allyson Kay Duncan wrote for the majority that Booking.com is a descriptive mark that is recognized by many consumers. Dissenting Judge James Wynn Jr. wrote that the decision “conflicts with the determination that every other court has reached” in similar cases.

A Williams & Connolly partner argued for Booking.com that the 1946 Lanham Act had “repudiated” the Supreme Court precedent, and that the PTO doesn’t even follow the rule it was advocating, having registered generic top-level domains such as Tickets.com and Weather.com.

*Nate Robson can be contacted at nrobson@alm.com.*

*Scott Graham can be contacted at sgraham@alm.com. •*

## Conn.’s 1st Black State’s Attorney Leaves Office

BY ROBERT STORAGE

*Connecticut Law Tribune*

Hartford, Connecticut, State’s Attorney Gail Hardy withdrew her name from consideration for an eight-year term Monday, before the Criminal Justice Commission voted on the matter, according to commission chairman and Connecticut Supreme Court Justice Andrew McDonald.

The seven-member commission announced Hardy’s decision at about 3:15 p.m. Monday.

The commission heard public comments via Zoom from numerous stakeholders Monday morning and afternoon.

The news follows Hardy’s June 18 suspension for four days without pay for her involvement in the handling of several police-involved shootings. Hardy was suspended for her role in failing to report the findings of four police-involved shootings in a timely manner.

At the time, the state’s NBC affiliate quoted McDonald as saying there was a “serious dereliction in duty for her inexcusable delay in submitting these reports.” The shootings, the outlet reported, occurred between 2008 and 2012.

Hardy, who had been in her post for 13 years, was suspended without pay for June 19 and June 22-24. She returned to work June 25, and appeared before the commission June 26 for four hours.

Hardy, who became the state’s first Black state’s attorney in 2007, couldn’t be reached for comment Monday afternoon.

Before Hardy withdrew as one of the state’s top prosecutors, the commission heard from her supporters and opponents.

Speaking in support of Hardy was Geraldo Parrilla, a member of the George W. Crawford Black Bar Association.

“She is a mentor, leader and advocate,” Parrilla said Monday. “Attorney Hardy

*State’s Attorney continues on 8*



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## IN-HOUSE COUNSEL

## Legal Resourcing and Creative Thinking in a Time of Crisis

BY MONICA ZENT

*Corporate Counsel*

We've all read the stories—or experienced firsthand: people working from home are overloaded and burnt out. As a longtime businesswoman, attorney and entrepreneur based in Silicon Valley, I've noticed the same thing across legal teams. The stress-inducing WFH dynamic, reduced budgets, furloughs and layoffs within legal teams has left legal teams overwhelmed with work and frantically searching for helpful solutions.

As the founder and CEO of the alternative legal service provider, Zent Law Group, I've been fielding calls from organizations whose legal teams are struggling. I've noticed that some of the legal department leaders are in somewhat of a panic mode, signing up for more support from Big Law regardless of the cost when they could save significantly more with alternative solutions. I've heard several heads of legal operations at client organizations corroborate this panic-purchase phenomenon. Purchasing under duress is never a good idea. We've all witnessed that firsthand with empty supermarket shelves typically holding paper goods and price gouging

**MONICA ZENT** is ZentLaw's CEO and founder of LawDesk 360.

by unscrupulous suppliers for pandemic-era essentials.

Some of our in-house colleagues are forgetting they have options outside of Big Law that they can and should consider. Make no mistake, these are unusual times that require creative thinking and different approaches.

Here are three cost-effective solutions that will keep morale high while helping to prevent burnout and productivity issues for in-house legal teams:

- Secondments dedicated to the team: Ideal for clients who need legal resources dedicated to their team. These are normally provided at an all-inclusive cost that is less expensive than hiring an employee for what could be a short-term need. Secondments make sense when budget overruns are not an option. Plus, the added bonus is you can potentially hire the resource after working with them for a period of time.

- Subscriptions address ongoing needs: These are for clients with ongoing needs and a steady stream of work in a certain practice area (such as all transactions for a given

line of business) that can be supported off-site. They offer the benefit of a cost-effective pricing structure while budgeting and forecasting legal spend with absolute certainty. Our subscriptions allow clients to manage overflow legal work, spikes in workflow, special projects or any other legal support needed in that given practice area with absolute certainty as to cost.

- Legal operations consulting optimizes efficiency: With the increasing pressures felt by legal teams during this crisis comes a decrease in legal operations efficiencies. Having the ability to evaluate and adjust a wide variety of processes, methodologies and technologies is critical to success. Legal operations consultants put a strong focus on data and metrics to conserve legal spend, maximize legal resources and evaluate processes and solutions

within legal departments—all necessary steps at this juncture. At ZentLaw, within our legal operations solutions is a contract administration service. We're finding that legal teams are overwhelmed with contracting needs and having to refine contract processes.

Finally, in this era where a diversity and inclusion program in an organization needs to be far more than lip service, organizations would be wise to walk the walk. This is the time when legal teams should reexamine their in-house culture to assess what can be done to improve it within their department and their company at large.

The bottom line: If your legal team is showing signs of cracking, don't despair. Have an open mind, consider the many alternative solutions out there and simply be better.

*This article first appeared in Corporate Counsel, an ALM affiliate.* •

*This is the time when legal teams should reexamine their in-house culture to assess what can be done to improve it within their department and their company at large.*

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## LEGAL MARKETING

## Four Takeaways for Authentic, Appropriate Communications in a Crisis

BY MEG PRITCHARD

*Special to the Legal*

First of all, how are you? I hope you're all healthy, safe and managing as best you can as we head into the second half of 2020.

In the weeks after the COVID-19 pandemic hit, we were flooded with marketing messages—from social media and digital advertising, to television and print ads. My inbox, like yours, was flooded with emails from every company I'd ever done business with—and many I hadn't. Every organization I'd ever given my email to—voluntarily or otherwise—seemed to be reaching out to connect with me.

Some notable standouts aside, most of the content repeated the same message over and over and over again, until it became an indistinguishable cacophony of content. The messages of “we care about our clients and customers,” more often than not followed by a low-key (or not-so-low-key) sales pitch, came off as hollow at best in the face of the devastating health and economic effects of the virus. Some of the messaging was flagrantly opportunistic, as a number of organizations treated the global pandemic as a marketing opportunity.



**MEG PRITCHARD**, the principal of CREATE: Communications—Media—Marketing, is a lawyer, writer and marketing professional who works with law firms and lawyers to develop compelling content for their marketing and business development. She can be reached at meg.pritchard@create-cmm.com or 215-514-3206.

The scenario was repeated after the heinous killing of George Floyd by Minneapolis police last month sparked national and international protests and calls for criminal justice and policing reform. Organizations of all kinds jumped on the #BlackLivesMatter bandwagon and issued corporate statements denouncing racism in messaging across digital and traditional platforms. Again, with some very notable exceptions, the backlash has been fierce as brand after brand has been called out for its performative allyship and opportunistic messaging.

Of course, professional services marketing isn't fully aligned with consumer marketing, but many of the broader communications and content takeaways are applicable.

## USE YOUR PLATFORMS AUTHENTICALLY AND APPROPRIATELY

This is not the time for “business as usual.” When your clients and communities are in crisis—whether that's dealing with the impact of COVID-19 or confronting the need to eradicate systemic racism—you need to pause and decide how you want to communicate in direct response to the situation. This means evaluating how your usual messaging might land and also what other communications your clients and communities are looking to you to provide.

Figuring this out requires both an external and an internal check. Ask yourself two questions:

First, what do people need right now? If you listen to your clients, communities and

constituencies, they will tell you what kind of communications and content they are looking for the most. What are clients calling about? What's being talked about in the industries and market sectors you serve? If

you know your clients (as you should), you probably already have a good idea about the challenges they're confronting, but current events may have shifted the landscape, so it's essential to listen and ask questions.

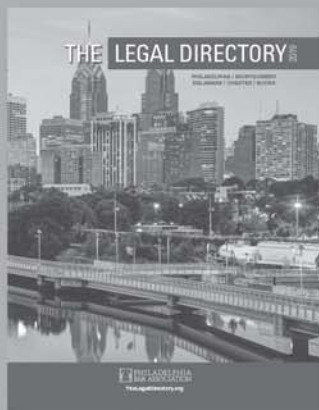
What's appropriate for my practice (or firm) right now? To be clear (again) this is not about turning a crisis into a marketing opportunity. Instead, it's about using your expertise and the role you play in your clients' lives—business and personal—to be

of service.

It's also not about jumping on the bandwagon and emulating what others are doing. So many firms ran for the COVID-19 ball

*Legal Marketing continues on 8*

*While you want to provide the legal, business and practical resources that clients are looking for, consider communications that acknowledge and address the human needs of the people who receive them.*



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# State’s Attorney

continued from 4

has opened the doors for Black attorneys. Attorney Hardy has done her job with integrity and honorably. We ought to consider her entire body of work. We should not judge her competency on these cases alone.”

Also voicing support for Hardy was former Connecticut attorney Corey Brinson.

Brinson said he had interactions with Hardy because he represented a man who Hartford police shot and injured.

“She was thoughtful and fair in the case

in dealing with my client, who had mental health issues,” Brinson said. “As someone who watched her and worked with her in her years as a prosecutor, she is very fair. I’d like to see Ms. Hardy get a second chance and not have her story end here.”

There were also voices against the reappointment.

They included resident Randy Watson, who identified himself as a member of the Black Lives Matter movement. “I strongly oppose the reappointment of Gail Hardy. She has failed miserably. I feel the suspension is not enough, and she should not be reappointed,” Watson said.

# Legal Marketing

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at the beginning of the pandemic, but what resulted was a scrum of content that missed the mark with clients, according to reporting by Legal affiliates Corporate Counsel and The American Lawyer, among others. Too general, too lengthy and too frequent were among the criticisms of the content that law firms put out at the beginning of the pandemic, as well as generic and stale. A lot of firms put COVID-19 content on blast without much thought as to what their specific clients wanted or needed in the moment.

## TAKE CARE WITH SOCIAL MEDIA

Social media deserve special mention because unlike your website, blog or email channels, which you fully control, social media is a public forum. You can control your own messaging but not others’ responses. Be careful of jumping on social media bandwagons. As a number of organizations found out when they posted their “support” for Black Lives Matter and the protests in the wake of George Floyd’s killing, this can look opportunistic—and it can backfire spectacularly. Inauthentic or poorly

thought-out posts can quickly earn you a lot of negative visibility. And deploy hashtags with care. More than a few companies have needed to apologize for including a trending hashtag in social media without fully understanding what it meant.

## BE PREPARED TO PIVOT

As time passes, both you and your clients will be operating in a changed—and changing—environment, and your communications will need to evolve to reflect new conditions, whether temporary or permanent.

During the first part of the COVID-19 pandemic, much of content firms put out highlighted government responses to the spread of the virus and the impact on individuals, businesses, industries and market sectors. That was rapidly followed by information on efforts to dampen the adverse economic consequences of shut-down and stay-at-home orders. The predominant form of this content was written—email alerts and COVID-19 newsletters, dedicated website “resource” pages and blogs—in part because large events and in-person thought leadership opportunities were off the table and remote substitutes like webinars and podcasts required time and technology that law firms may not have had the ability to deploy, especially as they

Another critic was Joe Verrengia, a Democratic member of the state’s House of Representatives and co-chairman of the Public Safety Committee.

Verrengia said, in part: “I certainly appreciate the work of all of the state’s attorneys in this state. But we must hold people in power accountable. I think if Ms. Hardy is reappointed, it would be a step in the wrong direction.”

The board did vote to reappoint Maureen Platt to another term as Waterbury state’s attorney.

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dealt with moving entire offices to work from home arrangements.

Now, several months into the COVID-19 crisis (or any crisis), clients are looking beyond their initial response for future-focused information and guidance. And firms may now have more options available for delivering needed information in a usable and accessible way. And while it’s not back to “business as usual,” it also doesn’t have to be “all COVID, all the time,” as it was back in March and April, as clients are looking for more variety in topics of interest.

## CLIENTS ARE PEOPLE TOO

Regardless of whether your clients are Fortune 100 companies, small startups, family offices or individuals, legal services is an industry based on one-to-one relationships. In times of crises, people are looking to be viewed as, well, people, not just as sources of revenue for you and your firm. So, while you want to provide the legal, business and practical resources that clients are looking for, consider communications that acknowledge and address the human needs of the people who receive them. Empathy, understanding and even a little bit of humor (a little goes a long way here!)—authentically expressed—are both welcome and appropriate. •

# Abaya

continued from 1

(Order of the Coif, Law Review), and a Master of Business Administration from the University of Findlay.

*The below responses were edited lightly for style.*

**ALM: Are there elements of the professional and/or cultural environment of a corporate law firm that are particularly challenging to a Black attorney?**

**Abaya:** The law firm environment is generally a difficult corporate environment. Because the baseline is long hours and hard work, only a certain type of person opts into it. The lawyers who want to stay have to be nurtured and cultivated by the organization. The most important issue is there is often not enough mentoring and support within these organizations to encourage Black attorneys to stay. Not enough senior attorneys, particularly partners, take the time to be intentionally involved in a junior lawyer’s development. The fast pace of the law firm makes it generally difficult to take the necessary time to train junior lawyers, and Black lawyers in particular get left behind.

For example, good mentoring often means giving someone the benefit of the doubt and knowing they might fail, even allowing them to fail. There has to be a trial-and-error process that is required for learning. The law firm environment is intolerant of errors by its nature; errors are seen as a waste of time or could make you look bad to a client. A busy partner is choosing against all the other demands on his or her attention when investing time to teach an associate, and Black associates are often not given this opportunity in the same way that white associates are.

This contributes to an already vicious cycle, because I also saw a pattern where Black attorneys at a junior level are given significantly less work, and therefore do not have the same opportunities to learn as their white counterparts. In a profession that requires a high amount of “reps” to develop and be successful, this lack of opportunity can be fatal to someone’s career. The small number of Black partners at corporate firms is a symptom of this cycle.

**Many corporate firms have made an effort to recruit Black associates. Why the retention problem?**

The problem is multifaceted, but the most significant issue, other than lack of

mentoring, is that corporate firms have not been able to convince Black associates, and frankly other associates, of the value proposition for staying at the firm. On this I can speak from experience. After I became a senior associate at DLA, at my evaluation that year, there was discussion about making partner. When I did the research of what is required of a lawyer, particularly of Black lawyers, to make partner at a firm like that, from my perspective it was not worth it.

For one, there is no generally applicable formula for advancement. The process involves not only hard work and lots of time, it also involves soft factors like politics and network, which in my opinion naturally disadvantages Black associates and can leave them frustrated with the process. But even attaining partnership doesn’t mean those things go away. At corporate firms, even if you become an equity partner and bring in your own business, you may still have to fight for the credit for your work. And even if you get credit for your work, you may not get appropriately compensated. As an associate, I personally saw these things happen.

Black lawyers are also fighting against the disadvantages of their network. Meaning, one of the primary ways of navigating these


*Abaya continues on 9*

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# Abaya

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issues within the firm is by finding allies. But Black lawyers make up about 3-4% of the legal profession, so the percent of Black lawyers that become partner at a corporate firm is minuscule and it works against you because you don't have the same pool of natural allies. I think law firms underestimate how much network effects advantage white lawyers and how powerful that network effect can be in determining success at a law firm. It takes so much to become a partner at a firm, and many Black lawyers believe they have to work even harder than their white colleagues, and many decide it is not worth it. The money is definitely an incentive—partners may make millions of dollars per year—and there are other incentives, such as recognition or prestige, or stimulating work, but for many Black associates, those do not outweigh the very real possibility that you could work very hard and put in all that time and still not succeed simply because of soft factors that are out of your control.

Pepper has increased their efforts to recruit and hire black attorneys, but today there are very few there. There is an effort to bring on black summer associates, and many do join the firm, but then decide not to stay.

**Is the attorney review process conducted in a fair manner at corporate firms?**

I give law firms the benefit of the doubt that they want their reviews to be fair, and even try to structure their reviews to be fair.

But ultimately, human beings implement review processes, and human beings can be unfair, even within a seemingly fair process.

For example, I received a negative review once as an associate that I definitely thought was unfair. The review essentially said that I was avoiding work, which was absolutely not the case. Luckily, well before the review I had raised some of the issues I was having with a Black partner in the office, who happened to be the firm's lead diversity partner, which gave me the opportunity to challenge that review and show that I was being proactive in addressing concerns. I could not have gone to the head of the practice group because he was too far removed from the situation. Frankly, I'm not sure what the correct protocol would have been. I specifically went to this partner because he is Black. He went to bat for me, and I stayed at the firm for another two years.

That story illustrates two things, fairness can be debated and it often takes a composite view to understand what is fair, and to defend yourself against unfairness in a system where you sit on the lower end of a power differential requires finding others in that system with more power than yourself who will work on your behalf, and many Black associates don't have that.

**What could corporate firms do better in terms of hiring and retaining Black attorneys?**

I think of this issue in terms of war. It's like a war against an attitude of complacency and self-interest that naturally excludes people of color and preserves the status quo. That is why diversity numbers in the legal profession have not meaningfully changed in almost two decades. The weapons being used are ineffective or insufficient. They include things like hiring diversity professionals, or starting diversity recruitment programs. To win this war requires winning people's hearts and minds, because you are fighting against an idea. That is very hard to do.

We need a systemic cultural shift in the way law firms work. The people who are in power in these firms are the very people that benefit the most from the current system. Somehow, we have to convince them that recruiting, retaining, promoting and including Black attorneys is a good thing, and not only that, it is worth whatever they believe will be the associated costs. Law firms, and especially large law firms, have the resources to meaningfully diversify their organizations, what is lacking, and what a few decades of diversity efforts seems to show, is that they do not have the will.

The more I see society changing on the issue of social justice and race relations, the more law firms will change. Firms tend to follow changes in society, which are taking place in significant ways. For example, a large number of protesters were white [who participated in the protests over the tragic death of George Floyd on May 25].

**How do you feel about the term "attorneys of color"?**

Frankly, I'm not that bothered by it. But I think using the term "attorneys of color" allows law firms to talk about diversity generally. It is a broad-brush term that does not reflect the unique history of Black lawyers specifically, and African Americans in general.

**Why are Black attorneys increasingly drawn to boutique and midsize firms?**

I decided relatively early in my legal career that if I was going to continue being a lawyer, I needed maximum autonomy and flexibility. I had the good fortune to get legal training at the highest level of corporate practice at some of the largest law firms in the world, but ultimately, I found more fulfillment working with startups and small businesses, and especially leveraging my expertise to help Black-owned businesses and entrepreneurs. I saw an opportunity to use my training to serve that community.

Black-owned companies and Black entrepreneurs are particularly underfunded and under-resourced. The large law firm financial model is not conducive to building the type of practice that serves them, at least not at the early stages. But boutique firms provide the flexibility, financially and otherwise, to do things that wouldn't work in a large law firm context. It might also be that boutique and midsize firms give Black lawyers more power to determine their own careers because the top of the power structure is not as far removed. There is a feeling of having more agency or access.

Part of it may also be a numbers game, where fewer people at the firm means any Black lawyer represents a larger percentage. But I would caution against seeing boutique or midsize firms as necessarily better environments for Black lawyers. The issue of diversity in the legal profession is very nuanced, which is why solutions are so elusive. I think the profession as a whole can do better to encourage more representation by Black lawyers, from boutique firms to the Am Law 100.

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# Plan

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holiday. S-19 passed the Senate 35-0 with five abstentions.

"I realize that all progress that was made was not sufficient, and there are still mindsets out there," said Rice, a cosponsor of S-19.

S-19 was among a handful of bills approved by both houses addressing racial injustice, as protests across the country in the wake of George Floyd's death in police custody in late May have spurred cries for massive police and criminal justice reforms. The measures in Trenton reflect how legislatures nationally are becoming active participants in the debate on how to achieve such reform.

On Monday, A-744 substituted for S-1482, which would require law enforcement agencies to provide internal affairs and personnel files of officers to other agencies under

certain circumstances, passed the 80-member Assembly 72-2; A-3201, sponsored by Carol Murphy, D-Burlington, which would recognize Harriet Tubman's contributions to freeing slaves and her role in women's suffrage by recognizing Howell House in Cape May as Harriet Tubman Museum in New Jersey, passed the Assembly 73-0; and AJR-171, a resolution to designate July 13 "Black Lives Matter Day" in New Jersey, passed the Assembly 53-0 with 18 abstentions, while its Senate counterpart, SJR-87, was introduced in the Senate and referred to the Senate state government, wagering, tourism and historic preservation committee for a hearing.

When voting action returned to the Senate—after the upper chamber waited on eight bills to pass the Assembly first, including A-3—Sarlo, who sponsored S-20 with Sen. Sandra Cunningham, D-Hudson, made a final pitch for the critical spending bill. Sarlo told his budget committee

colleagues June 26 that S-20 would help fund public colleges and universities experiencing severe revenue declines, the unemployed and those in need of affordable housing, and address other issues brought on by the pandemic.

"I just want to reiterate that this three-month spending plan includes no new taxes, no new fees and no borrowing to fund the three-month budget. I just want to be on the record for that," Sarlo said.

But just as lawmakers met in person for the first time at the Statehouse since mid-March's social-distancing guidelines were put in place, the governor put the brakes on easing restrictions to allow indoor dining as transmission rates showed an uptick in New Jersey and elsewhere.

Indoor dining was scheduled to resume Thursday at 25% capacity after outdoor dining resumed June 15. But that's no longer the case, said the governor, who said "he has no choice" but to pull back.

Murphy isn't alone.

As lockdown restrictions have been eased nationally, some states in the West and South are experiencing alarming increases in COVID-19 cases, forcing governors in those states to reinstitute social-distancing guidelines, such as the closure of bars for the second time in Texas and Florida over the weekend.

Murphy said Atlantic City, New Jersey's nine casinos are still on track to reopen Thursday after being shuttered since mid-March—at 25% capacity, and now without indoor dining. The governor signed Executive Order No. 158 on Monday, temporarily pausing the resumption of indoor dining and prohibiting the consumption of food or beverages and smoking in the indoor premises of any retail, recreational, or entertainment business where masks are strictly required.

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## Client Relations

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The requests can be hard to stomach, she says, but as a partner to the firm's clients, her team has to find solutions. In a growing number of cases, that has meant creative arrangements, like a fixed-fee plan for a client seeking rent relief for a number of properties, which included a success fee on the back end.

Ashton Batchelor, director of legal project management and client experience at Robins Kaplan, says her firm's pricing professionals are being introduced earlier in conversations with clients, a trend she expects to continue long after the pandemic subsides.

"To the extent that we weren't at the table before, it's created an impetus for us to be in those conversations," Batchelor says. "We've seen great outcomes."

Not everyone on either side of the table is comfortable with alternative fee arrangements, but client relations professionals say clients have become more interested in their options. Robins Kaplan has been aligning budgets with clients' fiscal calendars, taking on entire portfolios of litigation and other measures that can bring a level of predictability for clients, Batchelor says. She's also seen an increased appetite for shared-risk arrangements.

Henson says the coronavirus has made Taft "more empathetic" to clients that may have trouble paying in full or on time. With

so many industries and business sectors in turmoil, she says it's never been more important to have one-on-one conversations with clients "to figure out how we are going to do this differently, how we can be helpful for them, and also to make sure that in this new normal we're setting the course and connecting with clients in a way that matters."

Dawn Sheiker, director of client relations at midsize Delaware firm Morris James, has also noticed increased demand for her services, which focus heavily on sales and business development. She says the crisis has given business professionals an opportunity to demonstrate their value, and she's responded by helping partners prepare for clients' new challenges, whether they involve a change in litigation strategy or issues around billing and budgeting. Like her counterparts, she expects the crisis to drive more lawyers and clients to bring business professionals into their relationships.

"For the role that I'm in, I've found it to be positive," Sheiker says. "Lawyers are busy at home working, trying to handle everything. They're more willing to engage me to help them—and the clients have always been there."

More lawyers are beginning to see client value professionals as strategic partners who can have a meaningful role in helping address clients' challenges. Batchelor says even the lawyers at Robins Kaplan who have already integrated the legal project management team into their

work are looking "to take that to the next level."

"We've seen more depth in our adoption, and we are supporting more of the firm than we have before," Batchelor says.

For Prince, whose team of about two dozen professionals absorbed the firm's client technology efforts last year, the increased demand has largely been focused around technology, as lawyers and clients alike embrace the realities the pandemic has wrought, including senior partners who once remained distant. For the client seeking rent abatements, her team designed custom technology to help it track its requests.

Batchelor says her team can offer clients the data analytics and scenario modeling that they need now more than ever as they look to increase the efficiency and effectiveness of every dollar they spend on outside counsel. Her team has been most involved on the analytics side—developing dashboards for clients to help them focus on key performance indicators, and connecting both lawyers and clients to the data they need. That work has taken off during the crisis, she says.

"What drives all of this is price predictability, client value and price transparency," Batchelor says. "I don't see that returning to the pre-COVID state. We will continue to see that become a core part of the conversation."

The long-term effects of the current crisis could have a significant influence on the outlook for client-focused business

professionals, most notably in regard to the potential for diminished office space. If firms enter the post-pandemic landscape newly comfortable with remote work and, as a result, pull back on expensive leases, they could be in a better position to keep their two most important stakeholders satisfied: clients and talent.

"If overhead costs go down, you can pay people more, people are generally happier, and then you can meet those client demands," Prince says.

In the end, she thinks the growing prominence of her fellow business professionals could eventually result in law firms elevating more individuals without law degrees into key positions, including CEO.

As client relations professionals rise up within their firms, Henson says they should be helping lawyers realize that doing great work is simply "table stakes" in an environment full of high-quality competition. Lawyers should be thinking about how to become a trusted adviser for clients and then taking the next step to become a business partner—and Henson and her counterparts across the industry should help them to do it.

"The more we can understand what clients want, that's going to lead us down the path of the nonlawyer professionals being ingrained in that relationship," Henson says. "For years it's slowly been ticking up, and this is expediting it."

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## Mushroom

continued from 1

Eastern District of Pennsylvania's ruling relates to the plaintiffs' request for the defendants—members of the Eastern Mushroom Marketing Cooperative—to produce documents on mushroom sales. Schiller granted leave for the plaintiffs to refile.

Two particular defendant mushroom-sellers, Monterey Mushrooms and Modern Mushroom Farms, claimed they did not have the documents the plaintiffs requested. According to Schiller, the plaintiffs argued in their motion to compel that the defendants refused to provide documents on a "range of topics" addressing the reasonableness of the defendants' search attempt.

"The problem with plaintiffs' argument is that it wrongly assumes the burden is on defendants to provide enough information to prove their document search was reasonable," Schiller said in his June 29 opinion. "The burden, however, rests with plaintiffs to show that defendants' search was not reasonable. Plaintiffs cannot carry that burden by pointing to all the information they do not know about defendants' methodology. The mere absence of that information is not enough for a court to grant a motion to compel."

William DeStefano of Stevens & Lee represents the defendants and said, "It was in our view a correct result, and I thought it was a well-written and well-reasoned opinion."

Krishna Narine of Lauletta Birnbaum represents the plaintiffs and declined to comment.

Schiller cleared the lawsuit to move forward last year. Winn-Dixie and co-plaintiff Bi-Lo claimed that the mushroom farms violated the Sherman Antitrust Act by engaging in "naked price-fixing and conspired among themselves and in conjunction with [non-EMMC member] distributors to set artificially inflated [mushroom] prices," according to Schiller's April 2019 opinion.

The plaintiffs also accused the cooperative of "meeting and agreeing to fix the price of Agaricus mushrooms" and "by collectively interfering with, penalizing and retaliating against any non-EMMC growers that sought to sell at prices that were below the artificially-inflated prices set by EMMC," Schiller had said.

In requesting dismissal of the lawsuit, the defendants claimed the plaintiffs' allegations were not specific enough to move forward, claiming that there are no differences in the allegations against the cooperative and the individual member farms.

But the judge said that in the early stages of the litigation, it didn't matter.

"Winn-Dixie plaintiffs have furnished a clue as to which of the EMMC members allegedly agreed to the alleged conspiratorial scheme and 'when and where the illicit agreement took place,'" Schiller said. "At this stage of the litigation, the court must accept these allegations as true."

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## Conservatives

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However, Chief Justice John Roberts—widely viewed as the bench's new center vote—has joined liberal justices to create majorities in cases where conservatives hoped to win, clouding their other achievements on the courts.

It's highly likely that whoever wins the November presidential election will get to select at least one justice, with two members of the court's liberal bloc—Ruth Bader Ginsburg, 87, and Stephen Breyer, 81—at retirement age.

Conservatives who have been able to successfully run on the courts are energized to do so again, citing their recent losses as reason they need to

build an even stronger majority on the Supreme Court.

"Returning the courts to the rule of law has always been a very motivating issue for those on the right," said Carrie Severino, president of the conservative Judicial Crisis Network. "We've long experienced the courts usurping the legislative process to simply come to legal results. This term, unfortunately, is no different. I think that's something that will continue to motivate voters."

### 'JUST SHOCKED'

Trump recently announced he would once again release a list of potential justices to tap to the U.S. Supreme Court, repeating a move from his 2016 campaign that many view as having won over otherwise wary Republican voters.

Despite its past success, that strategy is now facing fresh skepticism. Sen. Josh Hawley, a Republican member of the Senate Judiciary Committee, recently told Politico he believes Trump should not release another list if it's drafted in the same way as prior iterations, arguing religious conservatives should play a bigger role in the process.

"I think they feel just shocked at what's going on with the Supreme Court, so I think it's vital that they be heard from and involved in this process," said Hawley, who previously clerked for Roberts.

Other conservatives, including Leonard Leo of The Federalist Society, who was involved in the nominations of Gorsuch and Kavanaugh, have defended the process. Severino on Monday said Trump releasing an updated list is "exactly the correct thing

for the president to do." And she predicted the new version will feature a number of Trump's nominees who are currently sitting on federal courts.

Conservatives acknowledge that a bench with Roberts, who they argue is ruling to protect the reputation of the court over what the law calls for, is an improvement on past versions of the court without a Republican-appointed majority. Statements from right-wing groups issued in the wake of Monday's abortion ruling drove home the importance of ensuring the court's ideological balance is left up to the GOP and not Democrats in the coming years.

"It is imperative that we re-elect President Trump and our pro-life majority in the U.S. Senate so we can further restore the judiciary, most especially the Supreme Court.

*Conservatives continues on 11*



## Conservatives

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President Trump, assisted by the pro-life Senate majority, is keeping his promise to appoint constitutionalist Supreme Court justices and other federal judges,” read one such statement from Marjorie Dannenfelser, president of the anti-abortion group Susan B. Anthony List, which called the abortion ruling a “bitter disappointment.”

“This is evidenced by Justices Gorsuch and Kavanaugh, who joined with Justices Thomas and Alito and dissented from today’s ruling,” Dannenfelser added.

Liberal groups on Monday took the win on abortion access, but warned future victories may not be achievable if Trump is allowed to fill future court vacancies.

While Monday’s decision threw out the Louisiana abortion law, Roberts leaned on the court’s prior ruling against a nearly identical Texas law where he was in the minority. He invoked stare

decisis—the legal doctrine against overturning prior precedent—in authoring his concurring opinion, splitting from the court’s liberal arm’s reasoning finding the law unconstitutional.

“The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana’s law cannot stand under our precedents,” Roberts wrote Monday.

Left-leaning groups pointed to Roberts’ opinion to argue he might not rule their way in future abortion cases, and that presumptive Democratic nominee Joe Biden must win in November to guard the court from going even further to the right.

“The increased public pressure on the court has once again caused Roberts to side with the liberals, but his opinion walked a very fine line and may pave the way for a much less favorable outcome on abortion rights in the very near future,” Brian Fallon, executive director of the progressive group Demand Justice, said

in a statement. “None of the victories this term leave enough breathing room for progressives to get comfortable. If Trump is able to nominate an additional justice, that person will vote like Brett Kavanaugh, not John Roberts. It could not be more clear that the future of the court is hanging in the balance this year.”

Biden has not gone as far as Trump in releasing a list of possible Supreme Court nominees, but has said he would tap a Black woman for the court.

The Supreme Court rulings haven’t all been bad for conservatives. The court on Monday rejected a challenge from federal death row inmates over U.S. Attorney General William Barr’s new federal execution protocol, which was upheld earlier this year by a pair of Trump appointees on the U.S. Court of Appeals for the D.C. Circuit.

Roberts on Monday also wrote a majority opinion that said Trump has the power to fire the director of the independent Consumer Financial Protection

Bureau at will and not solely for cause as originally required.

While the chief justice included an interpretation of severability—“It has long been settled that ‘one section of a statute may be repugnant to the Constitution without rendering the whole act void’”—that liberals viewed as a sign the justices won’t strike down the entire Affordable Care Act in a separate case pending before the court, they still decried the CFPB ruling as a whole.

“The far right just scored a victory in its decades-long battle to destroy the social safety net,” Marge Baker, executive vice president for policy and program at the progressive group People For the American Way, said in a statement. “It’s critical that we vote in November for a president and senators who will nominate and confirm fair-minded judges who won’t rule exclusively in favor of big corporations in this way.”

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## The Legal Intelligencer

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