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### *Practice Area Snapshot, Part One ...*

## A Confluence of Factors Keep Elder Law Attorneys Hopping

*The following is the first installment of a two-installment feature as Of Counsel examines the dynamic and growing elder law area and a related area, trusts and estates law. Look for part two in the May issue.*

While the legal profession has experienced a demand boost in many areas of the law, perhaps none has grown as consistently and substantially as elder law. Of course, much of this uptick can be traced to sheer demographics. That is, the graying of the Baby Boomers contributes the most to this growth, and many of those from the Woodstock generation seek out different living arrangements.

“Clients, as they age, are downsizing and transitioning more frequently into senior communities to age in place or they need to explore assisted living options,” says Kimberlie Fiero, a partner at New Jersey-based Timothy Rice Estate and Elder Law Firm, which also serves clients in eastern Pennsylvania. “This creates a need for detailed estate and elder law plans.”

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Like many attorneys, elder law attorneys and trusts and estates practitioners expected a drop-off in demand three years ago when COVID took hold, a slowdown during the lockdown, if you will. But that wasn't the case at all. "The pandemic caused clients to focus on getting their affairs in order, think about mortality, and revisit their current estate plans," says Laura Jeltema, a T&E partner at Michigan-based Warner Norcross + Judd. "From the beginning of the pandemic until today, we've been very busy, working with both new and existing clients in reviewing their plans."



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Dana Walsh Sivak, senior counsel at Falcon Rappaport & Berkman in Rockville Centre, NY, concurs that since March 2020 many people who had been putting off such planning stopped procrastinating, which was one of the reasons her practice has kept active over the last three years. "The pandemic definitely brought the thought of 'finally getting around to their estate planning' to the forefront of their minds for a lot of people," she adds.

That seems to be the norm for many such attorneys. When asked what's driving his and his team's practice, Timothy Takacs of Takacs McGinnis Elder Care Law, just outside of Nashville, agrees this component of elder law practice is trending. He says he and his colleagues are very active in providing services to clients, especially in estate planning "with a focus on probate avoidance and asset protection."

## Area of Constant Changes

Another factor fueling the growth is the ever-changing regulatory framework, requiring elder law attorneys to closely monitor what lawmakers in their states and in Washington are doing.

This and other dynamics make the elder law arena very fluid and keep attorneys on their toes as they're constantly learning new lessons and adapting to changes to stay current, according to Walsh Sivak.

"The laws change ... [so] we are all constantly pivoting to help our clients avoid potential pitfalls," she says, "and take advantage of opportunities to better their positions and their future options while they can. It requires so much ongoing professional development to make sure you're on top of your game, and able to meet your clients' needs."

*Continued on page 17*

### Taylor's Perspective ...

## Pros & Cons of ChatGPT for Law Firms According to ... ChatGPT

It seems you can't get away from ChatGPT—or opinions about it. On one hand, the ubiquitous chatbot app created by the artificial intelligence R&D company OpenAI has been hailed as the best thing since the internet itself. On the other, it's also essentially been portrayed as the proverbial root of all evil.

Personally, I find it very intriguing and promising but I can't help but think of my many years as a college professor teaching nonfiction writing. Had this AI creation been around in those days (which weren't so long ago) I'd be suspicious of every essay a student "wrote." My concerns about rampant plagiarism would consume me, propelling me into panic attacks and paranoia.

Like it or hate it, it seems ChatGPT is here to stay, and it just may become a useful tool for many professionals, including those in the legal profession.

Last month in the lead article of *Of Counsel* entitled "Messages to Clients ... Survey Offers Key Communication Points to GCs," one of the people I quoted shared this observation and anecdote. "What has captured my attention over the last few weeks is the enormous potential for the use of AI in the legal profession," said David Scheidemantle, president of Scheidemantle Law Group, in Pasadena, CA. "A couple of weekends back, my son showed me ChatGPT. He told the app to compose a

letter of apology for all of a son's wrongdoings over the years. I was floored, and amused, at the speed and quality of the reply."

Scheidemantle then posed his own question, asking the app to construct an argument for a legal scenario he cleverly conjured up. "The response?" he said. "I've gotten worse from a first-year associate." He also added, "With all ethical considerations well in mind, I suspect that lawyers who aren't at the forefront of using this technology will be left in the dust."

In a blog post by Nick Martin, director of managed services at the New Holland, PA technology company Mainstreet IT Solutions, offered praise for the app. "ChatGPT is easy to use, provides precise information, and has quickly become a valuable tool for lawyers and the legal field," he wrote. "For example, the chatbot can write content, create templates, and draft technical documents, saving lawyers time on what have always been manual tasks." Although, Martin did acknowledge that the technology does have its "limitations."

One of its flaws, at least at this stage in its young life, seems to be ... well ... making stuff up.

Consider this comment posted on Twitter by Mark C. Palmer, chief counsel of the Illinois Supreme Court Commission on Professionalism: "I asked #ChatGPT for

some fun caselaw. It quickly returned 3 cases from NY, OR, WI. Wow, cool! End of story? No. In checking for all three cases in @fast-case, I realized, THEY ARE NOT REAL CASES.”

## ChatGPT on ChatGPT

Google “ChatGPT and law firms” and you can read about many of the benefits and drawbacks it has for the legal profession. I wondered what the app would say about itself so I tried it (for free) and typed “Benefits and Drawbacks of ChatGPT for law firms.” In a few blinks of the eye, it looked into its soul, in deep but rapid self-reflection, and delivered 297 words on its own pros and cons.

Here are a couple of benefits, according to itself: “Faster and more efficient research: ChatGPT can quickly scan through vast amounts of data, making it an excellent tool for legal research. With ChatGPT, law firms can save time and improve efficiency, allowing them to focus on more critical tasks. Improved accuracy: With ChatGPT, law firms can receive more accurate information as it can analyze and process large amounts of data, reducing the risk of human errors. Cost-effective: Hiring a team of legal researchers can be expensive. ChatGPT is a cost-effective alternative, and law firms can save money on salaries and benefits.”

And now, again in its own words, a few self-confessed drawbacks. “Limited to available data: ChatGPT’s accuracy and usefulness depend on the quality and quantity of data available. If the data is incomplete or incorrect, ChatGPT’s output may be flawed. Lack of personalization: ChatGPT is a machine and cannot personalize its results based on individual preferences or case requirements. No guarantee of legal expertise: ChatGPT can provide answers to legal questions, but it cannot provide legal advice. It is essential to

have human experts to interpret and provide legal advice based on ChatGPT’s results.”

## Use Me Responsibly

Thinking about some of the criticism it has generated in the media, I then typed in “Bad press about ChatGPT for lawyers” and got this response from my new friend I’ll call “Chatty.” The first part, which I italicized, almost made me cry:

*“As an AI language model, I do not have feelings or emotions, nor do I have the ability to engage in any activities that may result in bad press or legal issues. However, I can understand how some individuals may have concerns about the use of AI language models like myself in the legal industry.*

“It’s important to note that AI language models like myself are tools that can assist lawyers in their work, but we are not intended to replace human lawyers or legal professionals. As with any technology, there may be concerns about issues such as data privacy, accuracy, bias, and ethical use. It is the responsibility of legal professionals to carefully consider these issues and ensure that they use AI language models like myself ethically and responsibly.

“If you have specific concerns or questions about the use of AI language models in the legal industry, I would recommend speaking with a legal professional or expert in AI ethics to get more information.”

I appreciate and even respect Chatty’s candor—and self-awareness. Now excuse me as I need to ponder my own pros and cons, and in fact, conduct a thorough, honest assessment of my very being. Good day. ■

—Steven T. Taylor

## Critical Questions Concerning Industry Specialization (Part Two)

Against the most fraught global macro-economic backdrop in years, law firm leaders are hearing more about how some firms have accomplished incredible prosperity through strategies of being more client-industry-focused. Questions abound following the release of my latest book last January, entitled *Industry Specialization* and what follows here are some specific questions and my brief responses to each, regarding how this new reality will affect current and prospective marketplace success.

### 1. How does one deal with partners who do not want to play on industry teams?

I received the following question from a firm leader: “*When one attempts to organize their firm into a few chosen Industry Teams,*

*how do you handle partners who do not want to work in industry teams or feel neglected because their personal practice doesn’t seem to fit?”*

The merit of having an industry focus is that it forces firms to concentrate attention on a few selected industries—preferably those in which you have a position of recognized strength. This means that lawyers in other practices can feel left out. How you deal with those partners may determine the success of your commitment to industries.

The initial reaction from any partner who doesn’t feel included is often to withdraw from communication, boycott selective meetings, or even delay performing certain activities. They are attempting to gain credibility for their position by demanding management’s attention. As crass as it may sound, your best approach is to treat them as you would



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a pouting child. Continue to invite them to participate in firm activities, but don't offer sympathy. It is important to CONSTANTLY communicate and DEMONSTRATE how the success of any industry group will benefit everyone—in terms of additional referral work and overall profitability.

At some point, you can probably expect some partners to attack the basic logic of focusing on industries. Any assumptions made in the creation of your reorganization, any statistics or financial information may all be challenged. In the extreme, the credibility of those on your Management or Executive Committee may be brought into question. Arguing toe-to-toe rarely works. Your best approach is to express confidence and offer partners the opportunity to review any of the factual information used. It is also very powerful to share real commentary (questionnaire or video interview feedback) from your firm's ACTUAL clients, citing the importance of their lawyers having an industry focus.

In some extreme circumstances, practice groups aggrieved by the focus on industry teams may attempt to become obstructive by failing to cooperate and share information, disregarding basic procedures, and scheduling conflicting meetings, events, and activities. Fortunately, such obstructionism is so extreme that it does not occur very often. When it does, it is usually short-lived. This is because it is so obviously counter-productive for the firm that it fails to gain attention or sympathy for the position of those involved.

In the best of all circumstances, it won't take long before visible client-sharing occurs between the industry team receiving strategic attention and any practice that is not. This is, of course, what your reorganization was envisioned to create.

In fairness, I should note that there are firms in which none of these disruptive behaviors occur and everyone realizes that driving the firm to focus on client industries is in everyone's best interests.

## 2. You claim to have industry practices - but who are you kidding?

I see law firms list "Industry" but when you examine their website particulars there is little there of much substance. They list what legal services they may provide to the broader industry, but they do NOT identify any specific sub-industry client groupings where they have expertise. Here are but 10 examples of growing Billion Dollar niches worth identifying:

- **TECHNOLOGY**—Digital Forensic Services. (\$2 Billion)  
Companies recover, analyze, investigate digital data found in encrypted and erased files; often to help solve cybercrimes.
- **MANUFACTURING**—3D Printing & Prototyping. (\$2 Billion+)  
Automatic construction of physical objects using additive manufacturing technology.
- **INSURANCE**—Cyber Liability Insurance. (\$3 Billion)  
Companies protect business/working professionals lost income/liabilities related to business interruptions, network security, internet liability, electronic communications, intangible assets, and online content liability.
- **LIFE SCIENCES**—DNA & DNA Forensic Laboratories. (\$3 Billion)  
Provides DNA paternity testing, DNA forensic services, veterinary DNA testing, ancestry tracking, and services related to human genetics.
- **RETAIL**—Cannabis Equipment & Accessory Stores. (\$3 Billion)  
Operators in this niche sell cannabis-related equipment and smoking accessories; but do not include cannabis sales.
- **SOFTWARE**—Speech & Voice Recognition. (\$4 Billion)

Speech recognition signifies the ability of a machine to understand/carry out spoken commands by interpreting articulated words.

- **INDUSTRIAL SERVICES**—Hazardous Waste Collection. (\$4 Billion)  
Includes hazardous waste collection services; radioactive waste collection/hauling services; hazardous waste transfer stations.
- **FINANCE**—High-Frequency Trading. (\$6 Billion)  
Financial securities trading firms/individual broker-dealers using high-speed market data/sophisticated analytics to identify temporal supply/demand trading opportunities.
- **UTILITIES**—Solar Power Generating Facilities. (\$11 Billion)  
Operators own/operate solar-power-generating facilities in the form of either photovoltaic panels or solar thermal power stations.
- **HEALTHCARE**—Ambulatory Surgical Centers. (\$30 Billion)  
Operators provide emergency services, including setting broken bones, treating lacerations, tending to patients who have suffered injuries due to accidents/trauma.

Each of these lucrative niche opportunities involves hundreds of potential clients and millions in revenues. So, see if you can find one competitor in your market footprint that claims to be serving any of these sub-industry clients?

### 3. How should one go about investing in some new emerging practice?

Developing some new micro-niche industry practice requires a different mindset and a unique skillset. Here are 10 questions to consider:

- **Is the client NEED real?**  
It is not uncommon to get excited about some potential new opportunity without really knowing what is involved. Take the Agri-Business Industry where there are 50+ companies in the high-growth Vertical Farming micro-niche. A good test is to create three hypothetical engagements—describe (1) what critical business PROBLEM you would solve, (2) which lawyers might be involved and (3) how much you might charge. If your answer doesn't make sense to you, it probably won't make sense to some prospect either.
- **Do you have EXISTING expertise and experience or would you have to build capability?**  
Your new opportunity should largely involve adapting existing knowledge and skills to a slightly different application. The test is, if you won an engagement today, could you deliver or would you need to acquire additional, perhaps lateral expertise?
- **Is this a service that clients will BUY?**  
You serve the Insurance Industry and have developed some experience with Cyber Liability Insurance (300+ Businesses in \$4 Billion market). Test your intentions with a basic client question: "We're building a capability in \_\_\_; would that be of value to you?"
- **Can you protect a FIRST-MOVER position?**  
Are there sufficient barriers to entry, making it difficult for other firms to jump onboard after you have pioneered the emerging practice?
- **Is your TIMING right?**  
Your new service offering can be appealing but the market may not be ready. 120-lawyer Ellenoff Grossman became a leader in the micro-niche known as SPACs but it took a number of years before they gained traction, and as SPACs lost their appeal, they are now focused on a related new micro-niche.

- **What is the LIFE expectancy of this emerging opportunity?**  
Is this a practice that has a shelf life (3D Printing) or is it related to a specific event (remember Y2K) or could it just be a passing fad (NFTs)?
- **Is the market SUBSTANTIAL enough?**  
Can you secure enough volume to make it legitimate? Will this niche grow into something substantial that can be accessed, or will it always represent a small opportunity?
- **Can you successfully MARKET the offering?**  
Your new offering will need to quickly acquire visibility, credibility, and a loyal client base.
- **Will the firm SUPPORT your effort?**  
A new offering to create a game-changing micro-niche will need leadership support as it may need to share resources and competencies with existing practices.
- **Are you prepared to JETTISON the niche if it doesn't work?**  
Firms creating an emerging practice should set benchmarks for success within a reasonable period—which means being able to decisively double down on successful niches and jettison those that don't take root.

#### 4. Is there any advantage to working with Industry Associations?

The typical industry team meeting agenda that I see is obsessed with marketing topics to the point where I often hear that *“our practice groups are substantive focused while our industry groups are marketing focused.”* And if you believe that, you are destined to be up Schitt's Creek without a paddle!

Meanwhile, I have learned from observing the actions of the very best rainmakers that

their most fertile ground for nurturing strategic relationships and building their practice within any given industry is through active trade association membership. That assertion should be obvious to anyone interested in developing a go-to presence within a given industry, but I rarely see evidence of action. In fact, when I inquire as to which industry or trade associations the members of the group are active within, I will rarely elicit more than one association name and that association is usually the prized possession by one of the most senior partners in the group—*“so it's taken.”*

This assumes that any given industry will only have one association representing industry participants. But as I outlined in one of the Chapters in my book on how industries splinter into numerous sub-industries *“GET GRANULAR”*, we forget there may indeed be a larger number of sub-industry groupings. A recent investigation of the Ag and Food Industry that I endeavored confirmed no less than 22 sub-industries comprising over 57 various trade groups.

#### *Benefits of being active in an Industry Organization:*

- can enhance your professional reputation as evidenced by your investment of time and energy in being actively involved;
- offers opportunities to work with other members on projects that increase your profile and exposure;
- provides a terrific framework to connect with C-Suite decision makers;
- provides a sounding board for identifying and exploring common problems that you can help with;
- assists you to understand the internal dynamics and language of the industry, and develop your skills through participating in industry-specific educational sessions;



- keeps you in touch with emerging trends—how the industry is growing and changing.

***Some Specific Actions to Consider:***

- Identify a common problem, from the latest regulatory hurdle to disruptive consumer expectations, concerning companies.
- Author and provide interested industry group members with a prescriptive White Paper or Case Study to position yourself as a thought leader on the specific issue. (The association may well have a listserv or email directory of members that are part of a particular group or share an interest in this chosen topic.)
- Inquire of the association whether they would host, and also participate and contribute content to, a Webinar for their member firms to detail action plans and answer member's questions to help address this issue.
- Compile a target list of members with a particular area of interest as your best prospects. Explore offering an in-house

presentation for this group at one of their face-to-face C-suite meetings or perhaps via webinar (or both).

- Consider engaging in a joint marketing venture with one of the associations other (non-competing) professional service member firms that also has an interest in serving this particular industry.■

—Patrick J. McKenna

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# Reexamining Law Firm Capital Models

After several years of explosive growth in law firm demand and financial performance, firms now face the potential for a shift in financial strategy, moving from a period focused on practice and revenue growth to one of maintaining financial stability. During this time of transition, firms need to revisit a critical tool for managing cashflow and ensuring financial stability—contributed capital.

Contributed capital is a relatively underappreciated tool available to law firms seeking to manage and balance firm financials. As a result, firms have been slow to reevaluate and realign contributed capital systems as they have expanded in size or geographic reach and adapted partnership structures. Coming off several years of particularly strong financial performance, the time has never been better to assess capital needs and consider strategies for fine-tuning capital systems.

## The Purpose of Contributed Capital

Like many other types of business, law firms require capital to fund operations, to finance growth, and to weather rainy days. Partnership-contributed capital provides a primary source of capital for most US-based firms. Other sources, including undistributed earnings and bank debt, are used to varying degrees, although these sources can be less advantageous than contributed capital. Bank debt, particularly without a corresponding contributed capital system, can become both expensive and destabilizing in periods of economic weakness and shrinkage, and too much bank debt can even act as a catalyst toward dissolution. Long-term undistributed earnings in a cash basis accounting partnership model results in phantom income, creates undesirable tax consequences for partners, and therefore, is typically only applied as a shorter-term capital source.

Contributed capital is a key tool in creating fiscal responsibility and commitment among equity shareholders, as well as illustrating financial stability to banks, laterals, and potential merger partners. Partnership-contributed capital offers law firms both defensive and offensive strategies in support of law firm financial management. As a defensive play, contributed capital not only serves to finance the lag time from the recording of billable time to the receipt of payment, but it also reduces (or in some firms, eliminates) the need to take on bank debt to fund operations. As an offensive strategy, contributed capital funds critical growth initiatives, including underwriting new lawyers during training and ramp-up periods, financing the pipeline for laterals (who come into the firm without a build-up of work in progress or accounts receivable), and financing the opening of new offices and the expansion of existing offices.

## Mechanics of Contributed Capital Systems

Most law firm capital systems rely on capital contributed by equity partners with post-tax dollars according to the firm's capital funding policy. These systems are typically structured as “cash in-cash out” systems, with no appreciation, and, for many firms, without interest on contributed capital. Many capital policies allow for a phase-in period for funding a partner's initial contribution, although a growing number of large firms require the initial contribution upon admission to equity partnership, typically via a firm-negotiated bank loan available to individual partners.

In determining a contributed capital methodology, we see firms employ a range of approaches, including:

- **Requirement Tied to Income:** Most law firms keep capital levels proportional with income (e.g., a 3% partner funds 3% of the firm's total capital needs/target). Often, particularly for midsize and large firms, this takes form as a percentage of an equity partner's compensation amount. The percentage typically ranges between 20-35% of an individual partner's compensation, although some firms require as much as 40% or more of compensation.
- **Annual Capital Call:** Other firms utilize an annual capital call approach, typically after a low or modest fixed initial contribution. For example, a partner may be required to contribute an initial lump sum ranging from \$20,000 - \$100,000, and then in future years, contribute additional capital according to the firm's annual capital call, which may necessitate that 2% - 3% of an equity partner's annual earnings be allocated as a capital contribution.
- **Fixed Contribution:** Fixed contribution systems are relatively rare in today's legal industry and tend to be seen only in smaller firms. These systems require that all equity partners contribute the same dollar amount of capital. The amount may be as low as \$25,000 in some small firms, up to \$250,000 in others. Small partnerships where owners contribute to firm performance at relatively similar levels find these systems are less administratively burdensome to administer and are seen as fairly equitable.

## The Rationale for Re-examining Capital Systems

For many firms, the methodology being used to determine an individual partner's contributed capital obligation was adopted decades ago at a time when the firm's size, geographic platform, and equity partnership were a fraction of what they are today. Accordingly, the firm's capital needs were far more limited. As firms have grown in

headcount, expanded their geographic reach and added office locations, and pursued more aggressive lateral growth strategies, the capital needs of firms have increased, in some cases dramatically.

The ability of a firm's capital system to keep up with the firm's growth over time hinges on a number of factors, including the type of system being used, the growth trajectory and capital needs of the firm, the firm's growth in profitability, and the partnership structure. For *some* law firms with capital requirements tied to income, contributed capital models have kept up with firm growth due to an expanding equity partnership and increased profitability, which has translated into larger capital contributions from the partnership. However, some of the firms using these systems have seen stagnation or decline in the size of the equity partnership due to higher promotion criteria, the admission of fewer equities, and a growing number of retirements. In addition, firms have increased the percentage of income allocated to a bonus pool, and in many firms, the capital requirements do not apply to the bonus portion of a partner's compensation.

The bottom line is that a number of law firms are outgrowing their capital models based on current capital needs for the entity, and given the potential for near-term economic pressure, firms would be wise to step back and analyze how effective the current capital model is in meeting the firm's capital needs.

When determining how much capital is needed for the overall firm, firms should consider three major categories or uses of capital, including:

- 1) *Operating capital needs:* At a minimum, capital models should ensure that the firm has sufficient operating capital (combined with an appropriate draw policy) to ensure the firm is not borrowing excessively to fund operations.
- 2) *Strategic capital needs:* At a more strategic level, the firm's capital model should

enable the firm to fund “pipeline” costs associated with expected growth in lawyer headcount. Capital is needed to fund all levels of hiring in law firms but is particularly critical in funding partner-level additions and lateral groups.

- 3) *Rainy day capital needs*: Lastly, contributed capital provides a valuable resource for firms during times of economic pressure, allowing for greater financial flexibility when demand and collections slow, particularly during recessions, or helping firms to remain stable in the event of partner departures. While contributed capital must be repaid to departing partners, well-structured, phased, capital return policies typically provide law firms with greater flexibility and less onerous terms relative to bank loans.

After several strong years of performance, and looking ahead at economic uncertainty, the time has never been better for firms to

revisit and reevaluate their capital structures to ensure that contributed capital is effectively supporting the firm’s current and anticipated future capital needs. ■

—Lisa Smith and Kristin Stark

*This Insight was written by Lisa Smith and Kristin Stark, Principals at Fairfax Associates. Fairfax is a specialist firm of highly experienced consultants focused on serving law firms. Our focus is built on a deep understanding of the strategy, organization, and motivation of professionals. Fairfax assists law firms in defining and executing strategy, pursuing strategic growth and merger, and addressing partnership issues including partner compensation, governance, and firm performance. The Insights series draws upon our collective consulting experience to address topics that we consider of current interest to the senior leaders of law firms.*

## Litigation Communications in the Age of AI

The accelerated information revolution of the last generation is giving way to the nascent Artificial Intelligence (AI) revolution in which apps are already making rudimentary arguments in legal proceedings. As such, lawyers face obviously dramatic new challenges in litigation and other high-profile matters. How do we control the narrative amid ever-faster-moving media than hardly anyone can comprehend, much less command? The plaintiffs' bar, NGOs, and activist investors are among the leaders in the effective use of these new technologies, which increasingly put companies and their lawyers on the defense, often after it is largely too late to control the message.

This information revolution has changed the power dynamic. For our entire careers, information flowed from the top down through advertising, public relations, candidate funding, and lobbying. It was a republican form of communication; that is, a few groups of people served as gatekeepers to the masses. As a result, credible journalists, committee staff, and financial analysts were the purported truth-tellers. What they wrote, said, or did, controlled the narrative. Today, we exist in a democratic form of communication and the narrative comes from the other end—the grassroots.

Information works its way up into the mainstream narrative and that content determines how consumers, legislators, shareholders, jury pools, and influencers think, feel, and act. The difference between republican and democratic forms of communications is akin to the difference between monologue and dialogue. Listening—social, critical, risk-mapping—is now essential.

In this environment, litigation, real or potential, is only one concomitant factor that C-Suites, Boards of Directors, and law departments must weigh in order to determine a best course of action. Today, those

decision-makers have to manage risk in an exponentially broader context where, for example, an inopportune firing or victory in a court of law can be disastrously Pyrrhic if it ignites a social media firestorm or social activism that may lead anywhere from adverse regulatory or legislative initiatives to consumer boycotts. As such, any decision regarding high-profile litigation—*e.g.*, to settle or not to settle—must be made with a more prescient eye to the business consequence of that decision. If technological innovation means anything, it means transparency and speed. Anything that is not sealed will almost instantly become public.

Lawyers can, amid this maelstrom, carefully limit their “proper” roles as advisors on legal liability. They can, if they want, dutifully take themselves out of the larger fray, separating themselves from functions more traditionally associated with “corporate communications,” “investor relations,” “risk management,” “government relations,” etc. Alas, those who do so will simply make themselves less relevant. As challenging as it is, wiser corporate leaders eschew silos; they are moving instead toward seamless corporate teams that bring multidisciplinary skills to bear in order to determine what’s coming next and prepare for the alternative contingencies. Of course, with this breadth comes the realization that the lawyer cannot—and should not—always control the decision, much less the internal conversation.

Recent watersheds underscore the anger as well as the unprecedented empowerment of diverse stakeholder segments. With Donald Trump’s election, in particular, a “Rule by Tweet” was ushered in. It soon became obvious that any company—large or small, public or private—is potentially implicated in a complex political dynamic and cast as a hero or villain, depending on one’s point of view, with respect to a potentially infinite number of policy issues, from trade to immigration.

All that is required is an accusation—any accusation—on a topic that fits a pre-existing bias held by an angry mob, especially a digital one. The days of reflection and discussion in the marketplace of ideas are over, replaced by so much shouting (sometimes all in caps).

It isn't, of course, just the Presidential Tweet, a tactic which quickly lost its power—a power, by the way, initially considered so vast that the Eurasia Group listed it as the number one enterprise risk at the start of 2017. Since then, however, we have actually seen the stock values of companies attacked by Trump go up. In any event, fake news has supplanted real news as an essential risk index. We have gone from the inveterate “two-source” rule used by journalists to verify their facts, to the “one-source” rule that was the norm during the Clinton impeachment, to the “no source” rule that governs today. Risk is no longer about what is real, but what is perceived.

The legal issues are critical but they are part of the equation and not necessarily the sum. Suddenly, if lawyers are to be considered a truly strategic asset during a potentially high-profile legal matter, much more is required of them than simply telling your client and team, “No comment” and “Stay off Facebook.” When liberty, market share, and regulatory fines are at stake, the brand is paramount and the strategy must be, well, strategic.

## May 1, 2012: The Revolution Will Be Televised

Not just the audience, the Internet itself is also constantly changing to an extent that demands persistent attentiveness to the actual means of communication. The challenge is therefore both strategic and tactical; in other words, companies must have both a game plan and a familiarity with the ever-evolving digital tools by which that plan can be made to succeed.

It's not about the new “shiny” but rather about separating the wheat from the chaff. Of all the hundreds of new media platforms and hardware, which ones change the way in which people receive and share information? Both receiving and sharing are pivotal: receiving, for the obvious reason that democratized news choices undermine the nearly three-century-old Fourth Estate oligopolies. But sharing is equally powerful because how information is exchanged changes the equation. If a news consumer can now share their stream of information, they have the power of William Randolph Hearst (“You furnish the pictures, and I'll furnish the war”) to develop and sway trends. Since truth is usually only what people learn first—“A lie can travel halfway around the world while the truth is putting on its shoes”—you concede the argument by ignoring seismic trends.

On May 1, 2012, the trend grew ever more seismic when Google changed its analytics to give optimization precedence to spoken versus written content: *i.e.*, that content which shows up first at the top of their dominant search engine listings. (If you want to keep something a secret, the safest place is the second page of a Google search result.) Changes in analytics happen maybe 100 times a year at Google. It's always kept secret until it's implemented, so no one can game the system. But the May 1, 2012 change was historic because, for the first time, audio changed the game.

Suddenly, videos could control the narrative of a case or a controversy largely by controlling the search results. While the defense bar still has largely not figured it out, the plaintiffs' bar and activist investors merrily control the narrative in matter after matter. It was precisely the sort of decisive “event” that should inform how lawyers and corporate communicators go about their business. At a crucial moment during a litigation, crisis, or other brand-impacting scenario, global corporations and those who advise them must know, not just what to communicate, but how to communicate it. Emotions, not facts, control the narrative and therefore jury pools.

## The Three Lessons of the Information Revolution

There are three critical takeaways from this transformative shift in communications. While they may seem obvious, they are indeed so transformative as to demand separate consideration.

1. **Speed:** To say that the Internet has sped up our lives is to repeat the painfully obvious. Yet we usually miss the real lesson because we think it's all about doing the same thing, only faster. But that is a drastic misreading of the fact, and a sure-fire recipe for disaster. Speed really means that we can no longer base litigation or crisis communications strategy on being reactive. We must now enter the far riskier, unfamiliar world of the proactive. There is no longer any time to be reactive because minds are already made up by the time you have done so.

This new pro-activity doesn't necessarily mean going first and it certainly doesn't mean taking unnecessary risks. Agile pro-activity entails instead the kind of in-depth and substantive risk assessment that informs you as to what's going to happen next. All communications strategy must be built on the kind of risk intelligence that is gained from a far deeper dive than Google searches or a discussion with traditional Enterprise Risk Management professionals. We're talking instead about the resources, human and otherwise, that can spot the canary in the coal mine. For Wells Fargo, Mylan's EpiPen, fracking, the TransCanada Keystone Pipeline, Fox News litigation, offshore drilling, sugar, and thousands of other matters and entire industries, there are key patterns evident months or years ahead. You must look for them; understand who's saying what, from where, and why. Who is the first to tweet? What is the URL? Who is funding it? Are they purchasing Search Engine Marketing (SEM) advertisements? Where is the information coming from? What does relevant NGO fundraising cover?

- Who's behind the video? To which journalists are your adversaries pitching their sides of the story? Who's hacking whom and what information has now become available? In all cases, intelligence informs strategy. Forewarned is proverbially forearmed and everything else is guesswork.
2. **Transparency:** Information leaks as hacks are veritable 100% inevitabilities. The reason for the hack may have nothing to do with the litigation or matter that you're working on but, once in the ether, the information is fair game for anyone to exploit, including your adversaries. We all claim to be in favor of transparency until we're the ones called upon to be transparent; our enthusiasm then wanes. If you don't want it public, don't write it down. Difficult advice to follow some of the time, but a very sound practice all of the time! If you have written it down, if you're running that risk for whatever sound business or legal reason, anticipate in your contingency planning how you'll respond when the worst happens and the information is shared publicly from the least flattering point of view.
  3. **Anger:** We've mentioned anger as a decisive component of the New Normal; let's understand what it means. People are angry in ways we have not seen since the 1968-72 period at the height of the anti-Vietnam War movement, and at times it feels like we are moving toward an 1856-1860 pre-Civil War environment. Trust is at a premium and your corporate trust bank may be overdrawn. No time on Mount Olympus is ever permanent as trust is now measured in terms of days and weeks: Yesterday, you or your client might have gotten the benefit of the doubt. "That's not the company I've come to know and trust," said your stakeholders. But now they're wavering and, in a week or two at most, you will be perceived guilty until proven innocent. Now more than ever, you have to use your peacetime wisely and build a brand like Hershey's or Harley-Davidson's. Such companies have armies of true believers who know that problems are the exception rather

than the norm. To aspire to this favored circle, you have no choice but to build your trust bank now, before the litigation or crisis tests your brand loyalty. Once the blockbuster lawsuit is filed, the lawyers need to ask the communications professionals what they are doing outside of the litigation to earn trust in an environment where trust is no longer a given.

## What Separates Success and Failure in High-Profile Litigation and Crisis?

In working on hundreds if not thousands of high-profile matters around the world, we have found three consistent rules that separate success and failure.

1. **Fear:** Companies hire senior executives for their monetizing skills in order to grow the company. They spend precious little time during the hiring and integration stage focusing on the descendant side of the curve. How will they do in a crisis? Most people have never been in the foxhole and they are just not at their best under fire. Even in the military, when highly trained soldiers go to battle, it is assumed that 50% won't discharge their weapons when they need to. If your teams are not tested, haven't prepared for a crisis, are not accustomed to making rapid, critical decisions with the information at hand, they will be ruled by fear. Fear never allows for the best decisions. Only through practice and drilling do we develop the instincts that overcome the power of fear.
2. "What got you here won't get you there." Because the careers of most crisis team members are all about building the company and success, their perception is to just keep doing more of the same in a crisis; presumably, that will work as well as it did prior to the crisis. The presumption is natural but it's wildly unjustified. In a high-profile matter, all the rules change.

Your audience is different because it's now comprised largely of non-customers and non-shareholders. You are no longer trusted. Prior to the high-profile event, all you needed to do to be on the side of the truth was to say you are. Now, you need others to do the evangelizing and it's all subject to proof in any event. Nor is everyone within the company rowing in the same direction. The longer a crisis goes on, the likelier it is that people will start worrying about their division, their personal liability, and, of course, their job. It's no longer the brand first, no longer command and control. You need to look at the situation differently and act differently.

3. "Why we can't." These three simple words are the most damaging at the critical moment of a high-profile matter. A smart company gets its crisis team together and HR makes a suggestion about firing someone and legal will say "why we can't." Or legal will make a suggestion and IR will say "why we can't." It goes on and on until the moment of opportunity when a sacrifice, an apology, an act of contrition, or simply generosity would contain cancer. But at that moment, no team member has the stomach to take the risk and recommend a sacrifice, be it a temporary dip in share value, a product recall, or the firing of a division head. So the team makes no decision at all until they can "gather all the facts." Alas, in a crisis, such moments of opportunity do not return—and failures to seize such moments are far commoner and far more damaging than most of our less-than-perfect decisions. "Why we can't" is the opposite of opportunity. ■

—Richard Levick

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## Elder Law

*Continued from page 2*

Other developments also add challenges to elder lawyers' workloads. The rise of the non-traditional family increases the complexity of their counseling; more of the nation's elderly are subject to financial abuse; and there's been a hike in litigation in this area.

"Our practice is experiencing an increase in all areas of elder law," says Jennifer Cona, founder and managing partner of Cona Elder Law in Melville, NY. "We are fortunate to provide the full spectrum of elder law and estate planning services and [particularly] have seen an uptick in asset protection planning, estate administration, and litigation."

When disputes do arise, elder law cases involve many issues and can drag on for quite some time. "When [elder care] facilities prove to be bad-faith actors and we must defend our clients, litigation can be lengthy," Fiero says.

### The "Aunt Sally Crisis"

At Chattanooga-based Chambliss Law, Dana Perry has more than 30 years' experience helping individuals and families secure their futures and protect their assets, among other elder law-related services. She says one of the approaches she takes is to convince people to prepare for changes before the arrival of their Golden Years and avoid "crisis planning," which often falls on older Americans' children when their parents weren't pro-active.

Consider this scenario that Perry presents. A beloved nephew visits his aunt, who lives alone, as she recovers in the hospital from a stroke or hip fracture or other serious

condition. It's often left to him to scramble through this crisis and so he contacts Perry. "The call comes in," she says, "and he tells me, 'I need to help Aunt Sally, and I don't know about her assets, don't know if she has insurance. She's going to be discharged from the hospital and I don't have any place to put her.'"

Perry talks about this kind of situation to prospective clients. "The way I describe it when I try to get people in their 60s and early 70s to do comprehensive planning is how tough it is when you're in that Aunt Sally crisis planning mode," she says. "A lot of time they go to the house find whatever documents they can find, put them in a box, and bring the box over to my office, where we'll spend hours going over everything and trying to figure out what in the heck is going on. Are we going to need to go to court because there aren't any legal documents about who's supposed to make decisions?"

Sometimes this and other such crises prompt elder law attorneys to go the extra mile. All too often, older people have little to no family to help them with many aspects of living, including overseeing the care they receive. "To protect my clients," Fiero says, "I have [sometimes] assumed guardianship status and, in some cases, serve as power-of-attorney and primary contact for their medical care. It's a joy and privilege, and why I have focused in this hands-on area of the law."

Guardianship presents many issues, often rising to a level of calamity, frequently requiring attorneys to deal with contentious situations. "When a guardianship case comes up, it's usually already an emergency, and a family is in crisis," Walsh Sivak says. "You sometimes have to drop everything else you had on your plate to jump all the way into that matter or it can go fully off the rails. These cases are always so emotionally fraught for the clients because the parties often both believe they are doing the right thing for mom or dad."

## An Array of Roles

It seems these lawyers take on many roles outside the legal dimensions of their job. “It sometimes feels like an elder law attorney has to be an attorney, a social worker, a therapist, a mediator, an accountant, a teacher, and a health care professional all at once,” Walsh Sivak says. “It can be a lot of pressure, but most of that pressure is self-imposed, because when you pursue a career in elder law, it’s often because you really want to help people. And, you know that the work you do will impact the day-to-day lives of your clients in such a significant way.”

While all good lawyers need to ask the right questions of their clients and then listen closely to their answers, Jeltema says that attorneys serving older clients need to be especially excellent listeners and be more than willing to learn about their lives. “It’s a very personal practice,” she says. “You’re often acting as a family counselor and sometimes mediating delicate even heated emotional conversations [among family members].”

Additionally this “personal practice” might mean meeting clients where they live, literally, because of older clients’ communication preferences or mobility issues. “Sometimes they prefer in-person meetings,” Jeltema adds. “Some clients have mobility difficulties, and many documents in this area of law need to be signed in person with witnesses. So sometimes we go to their homes.”

Another role these attorneys perform appears to be that of a “fixer.” “Elder Law is constantly changing and our attorneys practice only in this field, day in and day out, and are on top of all the legislative changes; we don’t dabble,” Cona says. “Too often, we are asked to fix a problem started by another attorney unfamiliar with or inexperienced in this area of the law.”

*Part two of this state of the practice area examination will discuss elder law hiring, marketing, and other matters, while also expanding on some of the topics covered in this installment. ■*

—Steven T. Taylor

## Of Counsel Profile

*Continued from page 24*

Prize winners, athletes, industry leaders, artists, and others whose work has made a “lasting impact on humanity.”

An active advocate for the hiring and promotion of women in the legal profession, Sungaila created and hosts an award-winning podcast, “The Portia Project.” The twice-weekly podcast honors and explores the accomplishments of trailblazing and leading women judges and lawyers, in the hopes of inspiring the next generation of women lawyers and law students. In its first year, Sungaila has already brought on and interviewed multiple state supreme court justices and heads of large law firms, as well as general counsel for large organizations and non-profit executives. In March she conducted her 100th podcast.

Recently *Of Counsel* spoke with Sungaila about why she chose to become a lawyer, her career path, what she disliked about trial work, why and how she shifted her focus to appellate matters, women in the law, and other topics. For the second time in the 25-plus-year history of this feature, the following interview is part one, as Sungaila has agreed to a second interview. Part two will run in the May issue of this publication. (The only other two-part *Of Counsel* Interview, published in the spring of 2017, was with prominent immigration lawyer and author Susan Cohen, who founded the immigration law practice at Boston-based Mintz Levin more than 30 years ago.)

### Practicality over Poetry

**Of Counsel:** MC, what influenced your decision to pursue a career in law? What was the source of your career path?

**MC Sungaila:** I discovered my original career aspiration when I was probably eight. I thought I would be a writer, a poet. But I recall immediately after having that great idea that I saw an image of myself starving in a garret. At that age, I’m not sure I even knew what a garret was. [laughter] And then I thought, *Well, maybe I could do that for myself on the side. But I have to have a roof over my head so what am I going to do?*

I seriously pondered it for awhile. People ask kids, “What do you want to be when you grow up?” Because, well, that’s what you ask kids. But usually they don’t really want your serious answer. I’d say, “I’m considering it and when I decide, I’ll let you know.” And they’re thinking, *Yeah, sure, okay. Let’s move on to the next kid.*

But I thought about it and came up with lawyer. I have no idea where that came from. There are no lawyers in my immediate family. But back in Lithuania, I understand that one of my great-great grandparents was a judge. But that was a long time ago and nobody that I knew was a lawyer. While I don’t know how I came up with that idea, I learned that the law is so wide-ranging. There are so many things you can do with it.

As it turns out, as an appellate lawyer, I’m essentially a writer. That’s mainly what we do. We persuade through writing legal briefs, and of course we do oral advocacy. We talk to the judges, not the juries, and that suits me very well. I worked for several great judges and I really liked talking with them and working on issues.

It seems like poetry writing is quite far from serving as an appellate lawyer but actually it isn’t because good writing is good writing. I really like being in the real world with the writing. I’m making an impact, an immediate impact that you can see when you persuade a court. And, as an appellate lawyer you’re creating not just the good results for your clients; you’re creating law for others. It worked out very well.

I'll tell you, I had an early mid-life crisis. I went back to school for creative writing and thought that maybe I should have done this. I enjoyed it. I learned a lot of techniques that I now use in my legal writing. But I realized that I actually made the right decision to become a lawyer—because I like being out in the real world and seeing the impact of my writing in an immediate way. When you write a book or something else, you usually don't really know if you're having an impact from that writing.

## Appeal of Appellate Law

**OC:** You received your law degree from UCLA. Where did you go after that? What did you do?

**MCS:** I had two courtships. One was with Judge Alicemarie Stotler, the judge for the U.S. District Court for the Central District of California District Court. And then I clerked for Judge Ferdinand Fernandez of the United States Court of Appeals for the Ninth Circuit. In between those clerkships and then afterwards for a few years, I practiced at (LA-based) Irell & Manella and at the time it wasn't all IP-heavy. It was litigation and all kinds of things. [Sungaila also clerked for Ninth Circuit Judge Dorothy Nelson, who will be discussed next month in part two of this interview.]

**OC:** And how did you get into appellate work?

**MCS:** In about my fourth year of practice, I had an epiphany. I had a trial and was a significant member of the trial team in federal court. And I was able to recognize that this was not my thing. You're working all kinds of hours. You're doing all kinds of work. There needs to be a pay-off for doing all that work.

Well, I saw that trial lawyers had that pay-off and it was largely in cross-examining

people. They really enjoyed that part. I found that I really felt uncomfortable—even when others were doing the cross-examination. Even for those who were being cross-examined and clearly were not being totally above board, I felt badly for them ... as people. They were being eviscerated on the stand and I felt empathetic for them.

I had this moment where I felt that I was a different animal in the zoo. The trial lawyers really enjoyed that pay-off. I felt that I may not be able to do that work very well. I thought, *Uh-oh, this was my plan and it's not looking very good. What am I going to do next?*

About a month or two later, I was asked to write a brief for a case before the US Supreme Court, the first appellate brief I've ever written. It was a particularly high-profile case involving a judge who sexually assaulted female court employees and litigants in a small town in Tennessee. He was convicted but the conviction was overturned by the Sixth Circuit. The government was seeking US Supreme Court review, and they went into court for that. I wrote an amicus brief to support it, and then we wrote a brief on the merits and we won! Nine to zero. And the guy had to go back to jail. [The case, *United States v. Lanier*, was the subject of a true crime book and many media stories and broadcast segments.]

That was very exciting and gratifying. I loved it. I essentially locked myself in a room and wrote it for six days because as with most amicus briefs, it's always the last minute. So I was asked: "Can you write this brief for the Supreme Court—and you have six days?" I said, "No problem." (*laughter*) And I didn't mind it. It was very different than trial work and I felt I had an instinct for it. I thought, *Gee, if I really got trained up and understood this more, I could probably do some more good with this kind of practice.* So, that's how I came to do appellate work.

**OC:** It sounds like empathy was one of the reasons why you decided to shift your focus to appellate law. When you write the book about your career you can call it *The Empathetic Appellate Lawyer*. [laughter] You talked about what you don't like about trial work, and what you like about appellate work. But what do you dislike. What would you like to see changed about appellate law?

**MCS:** One thing is that it is changing and has been changing slowly over the last 10 to 15 years, and that is the stage at which the appellate lawyers are involved in the case. It used to be that the judgment would be handed down, then there'd be an appeal, and then they called you. So you come in afterwards and see the battlefield on which the war has been fought.

Now, it's much earlier, and I like that change because if I'm collaborating with the trial lawyer early in the litigation at the major motion stage or even across multiple cases, it allows me to see which cases to proceed with because those have a better chance of success on an institutional issue than others. I can help them develop the record and the facts to position the case in the best way possible for an appeal later on. I look at it through a legal lens and trial lawyers look at it through the evidentiary lens and sometimes we can bring those perspectives together and create something better than each of us would on our own. I like that collaboration and the ability to be much more pro-active.

## A Step Backward

**OC:** Okay, and now what's one you'd like to see change?

One trend that I'd like to see swing back is this: When I first entered the appellate area, there weren't many big law firms that had appellate departments. And, the specialty had just started to be recognized in states like

California and Texas. Early on, as is often the case [in the development of a] practice area, it was mostly women doing this work. It wasn't as prestigious. You wouldn't get paid as much as you would if you were practicing in other areas. But it had the benefit of interesting work and a little more of a predictable schedule than if you were doing trial work. So it attracted a lot of smart women. There were many more women when I started 30 years ago.

Now as I look around, there are not many of us women arguing cases, taking the lead in cases. In US Supreme Court cases you see the advocates who appear the most regularly and have the most appellate arguments. The women will get the experience in government work but the private practices are definitely led by men. That's one trend I'd like to see swing back. I'd like to see more women work across the spectrum at different levels as lead attorneys in appellate practice.

**OC:** Why is that the case and how can the profession change this lack of gender diversity? We've made some progress but clearly more needs to be done in the hiring of women lawyers but maybe even more in the promotion of women to leadership positions.

**MCS:** Yes, I've been involved in the National Association of Women Lawyers surveys and a lot of other annual surveys to try to measure progress. At some level, it's doing pretty well. But I would say at the equity partner level it remains static over the years and that's very frustrating. It sounds like you track this so maybe you know about a study a few years ago that was very eye-opening to me and I think to others as well. It was a study by the ABA about senior women in the law and the pace by which they were leaving. Many were leaving in their 50s, which is where you're at the maximum of your potential, generally. They're walking out the door of major firms after having been their quite some time.

Why is that? You can't say, "Oh they have kids." They're past the point of having small children. So what is going on? Some of those interviews were pretty interesting. Some people said, "Hey, I've been here fighting the good fight for a long time and it just doesn't seem like it's going to change. I'm a little discouraged. Why should I continue to be the front-line warrior on this?"

I think that has downstream effects because, unlike our generation, the newer generation really looks for role models being in those positions. And it just turns out to be this constant hamster wheel of problems. If senior women leave, the younger women say, "Did I not get a memo? Maybe I should leave too. It just looks like there's not a sustained path for me." So they move off to other places where they have more freedom, more respect, whatever you want to call it.

I think a lot of firms focus on the entry level, having more women in the pipeline. That's important but if you don't carry that

through, the pipeline is going to run dry at a key junction in people's careers.

**OC:** And if I recall that survey correctly, it came out years before the pandemic, before The Great Resignation. So it's not like COVID and its ramifications were a factor at all.

**MCS:** Yes, it was well before the pandemic.

**OC:** MC, you've been doing a lot to help women in the legal profession, particularly with the work you do with "The Portia Project." When we speak again next month, let's talk about the genesis of that podcast, some of the guests you've interviewed as well as your pro bono work and other subjects. Thank you for talking with *Of Counsel* today and agreeing to a second interview.

**MCS:** It's my pleasure, and thank you as well. ■

—Steven T. Taylor

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## Of Counsel *Interview, Part One ...*

# Appellate Lawyer Helps Shape the Law While Also Supporting Women in the Profession

When Mary-Christine (MC) Sungaila talks about her work as an appellate lawyer, you leave that conversation energized ... and smarter than before you talked to her. While Sungaila's the recipient of numerous awards, including California Lawyer of the Year—twice!—and widely recognized for her legal acumen and creativity, she's as modest and down-to-earth as they come.

In January, Sungaila joined California-based Complex Appellate Litigation Group, after practicing at two AmLaw 150 firms. Bringing extensive experience and a reputation for innovative and strategic thinking combined with strong writing skills, she has briefed or argued more than 170 appeals. This includes handling cases in the US Supreme Court, multiple state supreme courts, federal

and state appellate courts, as well as in the Inter-American Court of Human Rights.

Many of these appeals involved complex and cutting-edge issues in employment, class action, product liability, franchisor, probate, and constitutional law. She has also developed special expertise in appeals involving Holocaust art recovery.

What's more, Sungaila is a vigorous proponent of pro bono work and has donated her time and knowledge in serving many people and causes in need. In recognition of her community service, she was awarded in 2017 the Ellis Island Medal of Honor, whose recipients include seven US Presidents, Nobel

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