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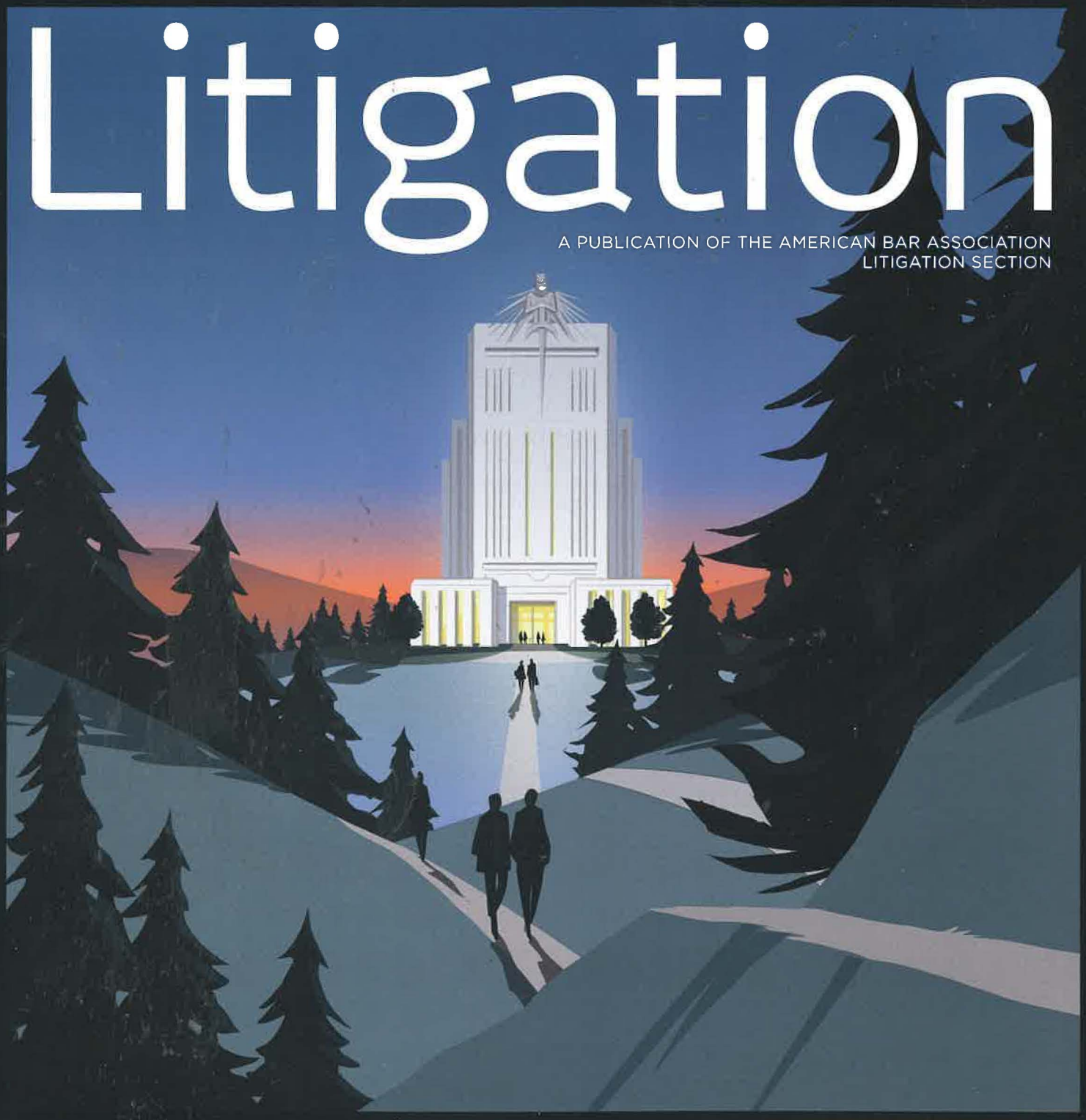

Tribunals

JUSTICE SYSTEMS

Reversal of Roles on Access to Courts

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For almost 10 years, I have been involved in Uzbekistan's journey from its old, Soviet-based justice system to a more open system, working with lawyers and judges there and speaking at Tashkent School of Law. The concept of transparency did not exist in Uzbekistan, and reformers looked to the United States, among other countries, as a guiding star. While Uzbekistan has made extraordinary progress, there is still much to be done. Yet, ironically, as Uzbekistan moves from a closed judicial system to an open one, our system in the United States has moved in some respects in the opposite direction, toward closure, as national security and privacy are increasingly becoming excuses for secrecy.

Recently, I was asked to give a presentation at a conference sponsored by the Uzbekistan Ministry of Justice on expanding public access to courts. While going through some of the history and arguments in favor of transparency, it struck me that we in the United States could use a reminder of why openness is so essential to our judicial system.

Around 40 years ago, the Supreme Court issued a landmark opinion, *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). Chief Justice Burger, writing for the Court, carefully analyzed the history and arguments demonstrating the value of open courts.

First, open courts improve the fact-finding process, by involving the public. For example, public trials can alert key witnesses, previously unknown to each party, to come forward with relevant testimony.

Second, transparency increases judicial accountability by shining a light on the judicial process. As stated in *Richmond Newspapers*,

> [p]ublic access to trials acts as an important check, similar in purpose to the other checks and balances that are in our system of government. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . . Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for the law.

Third, openness increases the legitimacy of the courts. In *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884), Oliver Wendell Holmes stated:

> [T]he trial of causes should take place under the public eye . . . because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

Finally, open courts increase public education and trust in the judicial system.

Richmond Newspapers found that "public inclusion affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice."

While reflecting on the reasons for open courts, we must consider the components necessary for their proper functioning. Court proceedings and outcomes, including any evidence and documents tendered, need to be accessible to the public. Public accessibility must also integrate the media. As noted in *Richmond Newspapers*, "instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public." In addition, courts need to provide information on process, such as cases heard, cases decided, and case backlog. Judicial decisions need to be made and explained publicly, to promote both understanding and precedent. With precedent, there is continuity, consistency, and predictability, as litigants in subsequent cases can strategize efficiently, decreasing waste and confusion.

Although there are several arguments against open courts, such as cost, capacity, and risk of prejudice, the courts have generally worked to manage these concerns. However, the American judicial system is recently having difficulty balancing the more powerful countervailing issues of privacy and national security. Certainly, there are cases in which an individual's privacy is essential, including cases involving victims of abuse and children. Courts must take steps to protect such sensitive information. In our internet world, where the smallest bit of personal information in a high-profile case gets instantly splashed around the world, the balancing of privacy and openness has become more difficult. Courts today must also deal with national security and terrorism issues, as we live in an increasingly dangerous world. For example, Congress created the Foreign Intelligence Surveillance Courts, which secretly handle investigative matters involving national security.

With issues as troubling as privacy and national security, courts are often tempted to take the easy path and resort to secrecy. Balancing these issues is a constant challenge. When privacy and national security need to overcome open courts, courts must be surgical and responsible in their methods. Beverley McLachlin, chief justice of Canada, suggested the following in a lecture at the International Rule of Law conference in 2014:

> The goal is to draw the line at the point where privacy and security are appropriately protected, yet the essentials of the open justice principle are maintained. The science is not exact, to be sure. Yet the task can be accomplished, if a judge identifies and carefully evaluates what is at stake on both sides of the issue. It is all too easy in this arena to allow emotion and fear to cloud judgment and twist the balance in favor of privacy or security. The antidote is reasoned identification and examination of what is really at stake in the case at hand.

Almost 250 years ago, the great Patrick Henry said, "The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them." Although the United States has historically been a strong proponent of open courts, we cannot allow current challenges to move us toward secrecy while other countries are struggling toward openness. Observing the experiences of countries like Uzbekistan can remind us of what is important in our judicial system and the need to keep it free and open. ■