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“Waiting for the time when I can finally say
That this has all been wonderful, but now I'm on my way.
But when I think it's time to leave it all behind,
I try to find a way, but there's nothing I can say to make it stop.”
- Phish, “Down with Disease” (1994)

What a year as your MSBA president! The Annual Bar Conference, lobbying in Washington, D.C, national bar leadership conferences, legislative efforts (including some 530 new laws that directly affected our practices), judicial relations, mindful legal work in my office, Board of Governors meetings, networking with new MSBA members and friends . . . the list goes on.

Serving as your Bar president has somehow made easier the challenges of managing a busy family life and personal issues with a new solo practice. I value this past year so much, and your association with the Bar truly has been all the more formative, inspiring, and enriching for me. It has made me a better member of our Bar, and a better legal practitioner. It also has opened my eyes to what that takes to succeed in this career. Thanks for this opportunity.

All your MSBA staff deserve so much applause – had I known all they do for us, I’d have been even more worried I could keep up with them. Each of you who served as CLE faculty for our fantastic CLE events excelled as always, and those of you who attended these seminars have continued to learn and grow. Your incoming Executive Committee will benefit from all these supports. As they prepare for a new year, I’ve no doubt the Executive Board, District Governors, and Governors-at-Large will continue to excel for you. Thanks in advance for your continued support for them and your Association. Contact any of us at the MSBA for anything. Your input is vital.

On another shamefully gratuitous personal note, I’ve practiced law for nearly 20 years. My new hobby of fly fishing (a challenge I’m only beginning to comprehend) took off in 2019. My other piscine addiction is much older – since 1997. I love Phish, the quirky complex band from Vermont whose long live musical excursions I continue to try to decipher. They’ve been a sort of crazy soundtrack to my legal career. I’ve seen their song “Down with Disease” eight times over 33 shows and can’t wait for its next incarnation. One of those lyrics sprang to mind as I began to write this, so I’ll share it with you again, even though it isn’t law-related:

“(T)his has all been wonderful, but now I'm on my way.
But when I think it's time to leave it all behind,
I try to find a way, but there's nothing I can say to make it stop.”

Indeed.

Guess this is my last one -
The Corporate Patron program connects our members with organizations that provide ancillary goods or services to Maine attorneys. Their financial support helps the MSBA keep its costs low, so you save money on meetings, events, and membership dues.

**Platinum Patrons**

Allen/Freeman/McDonnell Agency offers a variety of insurance plans, including professional liability insurance.

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Cross Employee Benefits offers a wide range of insurance programs, including life, medical, dental, disability, and long-term care, as well as flexible benefits services.

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Maine Lawyer Services works with Maine attorneys on litigation and practice-related issues, including mediation, arbitration, case evaluation, discovery planning, and trial strategy.
In November of 2018, we reached out to MSBA members to ask questions about their thoughts on the MSBA, our services, and our benefits. We followed up this survey with a similar one in March to non-members. In total, we heard back from 751 of you—529 MSBA members and 222 non-members. The breakdown of respondents was consistent with MSBA and Board of Overseers demographic statistics. Approximately 37 percent of the respondents were female, 62 percent were male and less than 1 percent identified as other. More than 64 percent of you are at least 50 years of age, and almost 30 percent are 65 or older. More than half of you have been practicing law for over 20 years. And, not surprisingly, over 45 percent of respondents practice in Cumberland County. You come from all types of practice, from solo to small and large firms to professor, in-house counsel and the judiciary, to government.

The survey asked questions about the services the MSBA currently provides, what you would like the MSBA to add to its list of products and services, and the best way to contact you.

1. We asked members why they maintain their MSBA membership. The primary reasons (each over 40 percent) are: 1. information & publications; 2. discounted CLE; 3. networking; 4. professional responsibility; and, 5. Casemaker. Non-members indicated that the primary reasons they are not MSBA members are: 1. retired/out-of-state/non-practicing; 2. dues are too high; and, 3. no use for the benefits offered.

2. We asked members what they would like to see the MSBA add to its products or services. Overwhelmingly at over 50 percent, respondents told us that they would like the MSBA to organize more local events, such as bench/bar and targeted county events. We asked non-members what the MSBA could do for them to consider becoming a member. The top responses were: 1. lower dues or a different type of dues structure; 2. free CLE; and, 3. additional discounted products and services.

3. Finally, we asked how you would prefer we reach out to you. Almost all of you (over 97 percent) indicated that the best way to contact you is through email.
The MSBA membership committee has analyzed the results and is researching ways to meet our member's needs, as well as find ways to add value to MSBA membership to keep our current members and gain new ones. We recently held our first round of focus groups with members of our Board of Governors, and gained some important insight about many of the services we currently offer and some that we don't. Next up is to reach out to newer lawyers, who are 36 years or younger or have been practicing less than five years. If we reach out to you to participate, please take the time to provide us additional information so that your professional association can serve you the best way possible and provide you the best value for your hard-earned dollars.

In the meantime, if you have specific comments about membership you would like to share or discuss, please reach out to me, Heather Seavey, or your District Governor. Call Heather or me at Bar Headquarters at (207) 622-7523 or email aarmstrong@mainebar.org or hseavey@mainebar.org. Contact information for all members of the Board of Governors is available at www.mainebar.org. We're here to serve you! Thank you for your support.

ANGELA P. ARMSTRONG is the Maine State Bar Association's executive director. She can be reached at aarmstrong@mainebar.org.
Over the past 25 years Maine’s judicial system has moved slowly and cautiously toward complete unification of its trial courts. For one reason or another, however, it has shied away from taking the final step. Although many of the characteristics of a unified trial court are present in Maine’s judicial system today, certain features of the old system still linger. By taking a historical look at what has transpired over the past 25 years, it becomes clear that there has been a dramatic shift in the way our court system handles its business. It is time for the Legislature to acknowledge these constructive changes and take the final step to completely unify our trial courts.

In 1997, as a State Representative in the 118th Legislature, I found myself in a rare position to do something about the complaints that I had harbored for many years about our overburdened court system. I always felt that we had an outstanding judiciary, but strongly believed that our trial court system was extremely inefficient. As a District Attorney and 25 years in private practice in central Maine, I experienced firsthand the difficulty of coping with the numerous trial courts’ conflicting schedules and inconsistent forms, all the while trying to coordinate and communicate with the five different clerks’ offices located within a 20-mile radius. I believed then that our trial court system needed to be more efficient and user-friendly.

In researching the matter, I learned that trial court unification had already been thoroughly considered and researched in Maine. In 1991, the Legislature created the Commission to Study the Future of Maine’s Courts (Futures Commission) in part, to study the “[i]ntegration of the jurisdictions of the various court systems, including the feasibility, cost and method of creating a unified trial court system.” In considering the issue, the Futures Commission held a symposium on Maine’s court structure in January of 1992, during which several judges from outside of Maine shared how their states had dealt with the process of trial court unification. They provided great personal insight as judges who came from states that had made the change to a single-tiered court system. Judge Charles Porter of Minnesota told the Commission that his state’s experience with trial court unification was a very positive one for the judiciary. He believed that the rotation of the judiciary through diverse jurisdictions provided both relief and variety for its judges. He thought it worked well in Minnesota and characterized himself as a “recovering opponent of merger.”

In 1993, following its two-year comprehensive study, the Futures Commission submitted its final report to the Legislature, entitled “New Dimensions for Justice,” which documented its evaluation of Maine’s trial court system and included several recommendations that it believed would vastly improve our trial court system.

In the report, the Futures Commission provided insight and commentary related to its various recommendations. A particular comment that I found to be significant was the Futures Commission’s narration of how it had debated several alternative plans for trial court unification. One proposal, referred to by the Commission as “Alternative A,” came within one vote of being adopted as a recommendation in its final report. Alternative A, which would have recommended a completely unified trial court system in Maine, proposed the creation of a single statewide “Superior Court” in which the present Superior and District Courts would be reconstituted as the “Circuit” and “District” divisions, retaining their present jurisdiction and personnel. Separate “Family” and “Appellate” divisions would be established within this single court. The Administrative Court would be abolished and its jurisdiction incorporated into the single court. The Probate Courts would retain their present functions but Probate Judges would become part of the Judicial Branch.
Although the Futures Commission did not recommend the complete unification of the trial courts, it did recommend several other measures that steered Maine’s court system in a direction towards a more unified trial court. 8 After considering the Futures Commission’s final report, both the Legislature and the Judicial Branch adopted several of its recommendations. Had Alternative A received one more commissioner’s vote and been proposed as a recommendation for adoption by the Legislature, the Legislature—eager to cut costs and intrigued by the idea of creating a unified trial court system—would have seriously entertained the issue as early as 1993.9

In 1997, as a State Representative, I sponsored the bill L.D. 1372, “An Act to Unify the Court System.”10 The main purpose of the bill was to create one unified trial court system, referred to as the “Superior Court,” which would consist of eight separate judicial districts consistent with Maine’s eight prosecutorial districts.11 As proposed, each judicial district would contain five sub-divisions: (1) Family Division, (2) Civil Division, (3) Juvenile Division, (4) Criminal Law Division, and (5) Appellate Division.12 All District Court judges and Superior Court justices would simply be referred to as Superior Court Judges.13 To promote harmony between the eight judicial districts, the Chief Justice of the Supreme Judicial Court would select one judge from each judicial district to serve as its administrative judge, responsible for handling various administrative duties, including coordinating the responsibilities of the judges within their district and representing their district on a statewide council made up of the other administrative judges.14

In conjunction with L.D. 1372, I prepared a position paper for my colleagues on the Judiciary Committee outlining what I considered to be the many benefits of trial court unification in Maine.15 I highlighted how trial court unification would foster greater accountability among the trial courts, noting that “[i]t will be more meaningful to compare statistics of eight districts rather than the difficulty of examining the figures coming out of sixteen counties and thirteen districts. It will be easier to determine where the system needs resources and where they should be assigned.”16 I also emphasized that unifying Maine’s trial court system would lead to greater judicial flexibility and efficiency, less judicial burnout, more efficiency on the administrative end, and a sense of regional identity.17

Following committee hearings on the proposed bill, the Legislature referred the trial court unification issue to the Chief Justice of the Supreme Judicial Court. A legislative resolve directed the Chief Justice to establish a Court Unification Task Force (CUTAF) to make recommendations to the Chief Justice “on how to unify the District and Superior Courts.”18 In the legislative process, this type of referral was a common way of slowly euthanizing a legislative bill, rather than killing it outright. However, Chief Justice Daniel Wathen took the referral from the Legislature seriously, and kept the concept of trial court unification alive by appointing a well-respected former Chief Justice, Vincent McKusick, to chair the task force.

Beginning in September of 1998 CUTAF met numerous times and in December of 1999 it published a report outlining a series of recommendations that it had to better utilize our courts.19 In doing so, CUTAF praised several existing unification features of the Superior Court and District Court.20 Similar to the Futures Commission CUTAF did not recommend complete trial court unification, instead, it recommended “unification measures that would result in a net improvement of court services for Maine citizens.”21 In its report, CUTAF made eight recommendations moving the court closer to outright trial court unification.

Both the Judicial Branch and the Legislature took steps to adopt these recommendations. For example, in 2000, the Legislature passed legislation directly implementing four of the eight recommendations.22 Among other provisions, the new legislation gave the District Court exclusive jurisdiction over divorce cases and other family matters,23 required most appeals from the District Court to proceed directly to the Law Court rather than the Superior Court,24 and gave the District Court and Superior Court concurrent jurisdiction for all nonjury civil trials and real estate partition actions.25

The Judicial Branch, under Chief Justice Leigh Saufley’s direction, also took steps to adopt CUTAF’s recommendations. In September of 2002, the Supreme Judicial Court created the Judicial Resource Team (JRT) to “assess the workload and judicial resources of Maine’s trial courts and generate a new model for scheduling courts and allocating judicial resources.” The JRT was comprised of one Supreme Judicial Court Justice, three Superior Court Justices, four District Court Judges, the State Court Administrator, a clerk from both the District Court and Superior Court, and the Director of the Family Division. After a yearlong effort, in September of 2003 the JRT proposed several comprehensive recommendations in its report entitled, “A New Model for Scheduling Courts and Allocating Judicial Resources.” Many of those recommendations built upon prior efforts aimed towards complete trial court unification.

One particular recommendation that has since been implemented called for the establishment of Coordinating Regions.26 Like the proposal set forth in L.D. 1372, these judicial regions coincide with the state’s eight prosecutorial districts. As implemented, each region has a District Court judge and a Superior Court justice designated to work with the clerks within the region and other regions in order to create more consistent and reliable court schedules. Working together, the judges and clerks facilitate the cross assignments of judges, create unified trial lists, and develop methods to
share resources.

The Judicial Branch has unified the Clerk of Courts’ offices for all of Maine’s trial courts, and has implemented a unified criminal docket system. Under a unified criminal docket and working under new Unified Criminal Rules, the Superior and District Court judges and clerks of court within a region work together to schedule all criminal matters in a uniform and comprehensive manner.

If one were to step back in time to 1997 when L.D. 1372 was proposed, and compare our court system then with the court system today, it is clear to the observer that there has been a dramatic restructuring of our court system. Almost all of the provisions originally proposed by L.D. 1372 are in place today, including the structuring of judicial districts consistent with Maine’s eight prosecutorial districts, the development of specialized divisions within each trial court, the unification of the clerks’ offices, the application of uniform rules, standards and statistics, the cross assignments of Superior Court justices and District Court judges, and the performance of administrative tasks by judges in each region.

Consider the following characteristics of our present system:

1. The Judicial Branch has one leader: Chief Justice of the Supreme Judicial Court;
2. The Judicial Branch has a single administrative office: The Administrative Office of the Courts;
3. Superior Court justices and District Court judges are paid the same salary;
4. Cross-assignments of judges and clerks are present in all courts;
5. Unified District Court and Superior Court clerks’ offices;
6. Uniform Court Rules and case management procedures;
7. A single appellate court;
8. Unified trial lists for District Court and Superior Court for criminal cases;
9. Superior Court and District Court collaboration in designated coordinating regions; and
10. Elimination of almost all concurrent jurisdictions in District Court and Superior Court.

These characteristics lead to only one conclusion—we in fact have a unified trial court system. If judges and justices were given the same designation, and judicial appointments were made to a single trial court designated as the “Superior Court,” rather than appointments to either the District Court or the Superior Court, then the final step towards trial court unification will have been taken. There is no reason to continue the distinction between the two trial courts, especially when the court system is operating pursuant to unified rules. Historically, the Superior Court handled all jury matters, criminal and civil, while the District Court handled divorces, juvenile, and other family matters. In the present system, District Court judges may handle jury trials and Superior Court justices may handle family court matters. With the changes that have been made over the years, the Judicial Branch, under the guidance of the Chief Justice, has the flexibility of assigning judges based on their strengths, weaknesses, and preferences. Assignments to the various regions across the state present differing challenges. Because of geography and numbers, a judge in a rural region may handle a more diverse range of cases then a judge in an urban area where a judge could specialize and handle a narrow range of cases. In reality, it is all about the efficient scheduling of judge time, not whether it’s a District Court judge or a Superior Court justice.

The Judicial Branch has updated and modernized the infrastructure of the court system with the construction of new courthouses or major renovations in Bangor, Augusta, Rockland, Belfast, Machias, South Paris, Dover-Foxcroft, Ellsworth, and Portland; and a new courthouse is now being constructed in Biddeford. In all of these locations the Superior Court and the District Court are located in the same building along with the combined clerk of court’s office.

As we proceed into the 21st century, our institutions must be examined and challenged. There are ever-increasing demands upon all institutions to be more efficient, relevant, and responsive to society’s needs. Our court system is no different. It is unacceptable to continue doing things in the same way simply because it is the way things have been done for years. Unless we continue to modernize our court system, making it more efficient, more accessible, and more user friendly, it will become unavailable to a vast majority of our citizens. The Judicial Branch is in the middle of transforming the court system into an electronic filing system and it seems to me that having a single trial court would make the transition much easier. It would certainly make the system more user friendly.

As a result of legislative and judicial initiatives adopted over the past twenty-five years, Maine’s court system has undergone many positive changes. We should recognize the progress that has been made, and take the final step in reaching the goal that Maine’s court system has been working toward since 1991—trial court unification.27 The time has come for the Judiciary, the Legislature, and the Governor to take the final step to unify Maine’s trial courts.
JOSEPH JABAR, a Maine Supreme Court Justice, has served as a federal prosecutor with the Department of Justice, a Workers Compensation Commissioner, a State Representative, and was in private practice for 25 years.

1 P.L. 1989, ch. 891, § B-5(1).
5 Id. at 69.
6 The Future’s Commission final report outlined the procedures that it utilized in arriving at its recommendations, which included a “two-thirds vote” by its members of any measure that it would propose to the Legislature “for adoption.” Id. at 69. According to the final report, the vote on Alternative A was 10-6 in favor of adoption, making it one vote shy of the two-thirds majority necessary for adoption of a final recommendation. Id.
7 Id. Although the Future’s Commission recommended that probate judges become part of the Judicial Branch, LD 1372 did not include this recommendation as part of the bill. There is presently a bill before the Maine Legislature, L.D. 657 (129th Legis. 2019), to bring the probate judge function into the state judicial branch.
8 Among other proposals in its final report, the Future’s Commission recommended (1) the “cross-assignment of judges in all trial courts”; (2) the “resident judge system [to] be abolished”; (3) “[a]ll trial judges [to] have the same title of ‘judge’; (4) equal pay for all Maine trial judges; (5) the merger of support personnel and records; (6) the “cross assignment of clerks”; (7) the development of a uniform docket numbering system; and (8) the “use of central filing for all courts from all locations.” Futures Comm’n, supra note 4, at 67-68.
9 Id. at 67-73.
10 L.D. 1372 (118th Legis. 1997).
11 Id. §§ 1081, 1101.
12 Id. §§ 1111-1116.
13 Id. § 1121.
14 Id. §§ 1122-1123; see also L.D. 1372, Summary (118th Legis. 1997).
15 Jabar, supra note 3, at 2-8.
16 Id. at 7.
17 Id. at 2-8.
19 Id. at 3.
20 In its report, CUTAF summarized the features of Maine’s Superior and District Courts that demonstrated a transition towards complete unification, including, but not limited to (1) the judiciaries in both courts being substantially equal; (2) the authority to cross-assign judges in both directions; (3) equal pay for judges; (4) joint participation by judges in judicial education and conferences; (5) the administrative functions of the court being substantially unified; and (6) both courts using the same unified court rules. Id. at 8-9.
21 Id. at 2.
23 Id. at § ZZZ-4 (codified at 4 M.R.S. § 152(2013)).
1. Exclusive jurisdiction over divorce and related matters should be vested in the District Court, with direct appeal to the Law Court.
2. Except for a few minor matters, elimination of appellate review by Superior Court.
3. Civil nonjury matters should be treated equally in both courts. Therefore, the $30,000 damages limitation should be eliminated from District Court actions, and longer nonjury trials should be subject to a unified Rule 16 process and trial in either the District or Superior Court on a unified trailing list.
4. Removal of civil cases to Superior Court should be permitted only for jury trials.
5. A pilot project should be undertaken to create a unified case scheduling and case management system for misdemeanor cases transferred to Superior Court for jury trial.
6. District and Superior Courts should have concurrent jurisdiction in real estate partition cases.
7. The Supreme Judicial Court should establish “ongoing goals” to take further steps toward unification of the District and Superior Courts.
8. The Supreme Judicial Court should create an Oversight Committee to supervise and monitor the implementation of the foregoing seven recommendations.
24 Id. at § ZZZ-7 (codified at 14 M.R.S. § 1901 (2013)).
25 Id. at § ZZZ-4.
26 Id.
27 This article represents my personal opinion and does not reflect the opinions of my colleagues or the Maine Supreme Court.
Recommend a charity without recommending a charity

Talk to your clients about giving through the Maine Community Foundation.

It’s a delicate dilemma. Estate planners, financial planners and other professional advisors often want to discuss the many benefits of charitable giving with clients, but avoid recommending specific charitable causes or organizations.

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Please call the Maine Community Foundation to learn more about the personalized services we provide.
Business valuation reports are often long and complicated and involve technically detailed descriptions, causing them to be somewhat difficult reading. Valuation reports can exceed 100 pages, summarizing Excel models that can easily span 50 to 100 individual worksheets. On a conceptual level, business valuations combine elements of accounting, finance, economics, tax, law, management, operational efficiency, organizational behavior, industry-specific topics, and other subjects. Summarizing all of these topics into a valuation report can result in a document that is difficult to follow and a narrative thread that is easily lost.

Within this flood of information, important information may become obscured, whether intentionally or unintentionally. Even relatively simple processes may become quite complicated.

There are three basic business valuation approaches: (1) the income approach, (2) the market approach, and (3) the asset-based approach. Within each valuation approach, there are multiple valuation methods. Valuation analysts often apply more than one method from more than one approach to value a business. This article describes the application of the market approach, including its strengths and weaknesses, to assist you when formulating your strategy.

In its simplest form, the market approach is fairly straightforward: the valuation analyst estimates business value by looking at the selling price of similar businesses. However, thorough valuations often describe the market approach in much deeper detail. This rigorous analysis is warranted as seemingly minor elements of the market approach often result in large differences in value. Companies with higher levels of profit typically attract a higher multiple, transaction terms may influence the selling price, seller motivations also impact the selling price, and two similar industries may have very different M&A patterns.

Among all this data, valuation report readers, such as attorneys and finders-of-fact in litigated disputes, may become confused and frustrated. To help clear up this confusion, in this discussion, we distill the market approach to its simplest form to provide high-level clarity regarding its application. We also discuss the strengths and weaknesses of the market approach from our perspective and experience in valuing businesses for litigated matters. Knowing these strengths and weaknesses may be helpful when formulating your approach.

**Application of the Market Approach**

The market approach is often applied in valuations for litigated matters. If you have ever had a house appraised, you have a level of familiarity with the market approach. When real estate appraisers value a house, they look for similar houses (i.e., comparables, or “comps”) that have sold and calculate the price per square foot of these comparables. They then select a reasonable price per square foot from the range indicated by the comparables and multiply this figure by the square footage of the house being valued, indicating its value.

The market approach in business valuations follows the same basic procedures. However, price per square foot is not a meaningful indicator of business value. Extremely valuable businesses may have small facilities, and less valuable companies may have sprawling facilities. Therefore, instead of using a price per square foot, the valuation analyst uses more relevant denominators, such as annual revenue or profit.

There are two primary market approach methods: the guideline completed transaction method and the guideline public company method. The guideline completed transaction method relies on the prices of recently sold similar companies. The guideline public company method uses the stock prices of similar publicly traded companies. By summing up the market value of all outstanding stock and debt, valuation analysts calculate the total value of publicly traded companies from the disparate ownership interests.

In both the guideline completed transaction method and the guideline public company method, the analyst performs the following steps:
1. Identify sales of similar companies or calculate the value of similar publicly traded companies.
2. Calculate relevant valuation multiples by dividing the value of each guideline company by a denominator such as revenue, operating income, EBITDA, or other value drivers.
3. Select an appropriate valuation multiple(s) from the range of indicated multiples and multiply it by the subject company financial fundamentals, indicating business value.

There are many nuances to valuing a business using the market approach, but these steps summarize the basic market approach framework.

1. While valuation reports may be complicated, it is reasonable, after having read the valuation report, to expect to have a general understanding of how the company was valued. If an expert witness is unable to communicate their findings in a decipherable manner, it is possible that they either don't understand it themselves or they have something to hide.

**Strengths**

The market approach has many strengths to consider when formulating your dispute strategy.

The market approach may provide a very compelling indication of value. Fair value is defined in the Maine Revised Statutes as “using customary and current valuation concepts and techniques generally employed for similar businesses in...”
Identifying guideline public companies has its own set of challenges. Publicly traded companies often diversify their operations to reduce risk. By comparison, many privately held companies are undiversified. The lack of pure-play public companies may limit the number of guideline companies available to the analyst.

...the context of the transaction requiring appraisal.”¹ The foundational definition for customary and current valuation concepts for closely held businesses is drawn from Revenue Ruling 59-60, which defines fair market value as “the price at which the property would change hands between a willing buyer and a willing seller…”² The market approach can provide a convincing indication of value because it is based on exactly that—an actual transaction involving people buying and selling similar businesses. Therefore, finders-of-fact may find the market approach to be relatable and to make intuitive sense, given the standard of value.

The income approach is the other commonly applied approach for litigated purposes. (The asset approach is not commonly applied in valuations for litigated purposes.) In the income approach, business value is estimated by discounting or capitalizing the benefit stream of a business. If the finder-of-fact is not familiar with the estimation and application of income approach variables, they may find the market approach to be more reliable. It may also be heavily reliant on projected future cash flows, which might be influenced by which side of a disagreement the parties find themselves.

Even when the income approach is applied and given more weight, the market approach can be used as an indicator of reasonability. Credibility is enhanced if a valuation analyst uses two or more different processes to get similar indications of value.

Weaknesses

The market approach is often exposed to the following weaknesses. Keep these weaknesses in mind when reviewing valuation reports.

While one of the strengths of the market approach is how well it relates conceptually to the definition of fair value and fair market value, it also highlights a potential weakness of the market approach. Many transactions occur because the acquirers expect to achieve synergistic benefits from the transaction. These synergies may be priced into the transaction, potentially inflating the transaction price above fair market value. Therefore, it is possible for the market approach to indicate investment value³ rather than fair market value. It is also difficult to know what motivated a sale. Without knowing the intent of the buyers and sellers, it is difficult to determine how close to fair market value a transaction might be, rather than investment value.

It is often difficult to locate companies that are reasonably similar to the subject company. As with a real estate appraisal, the moment comparables are listed, the positioning begins. Real estate appraisals have any number of adjustments, based on location, materials, and features, each of which can alter the price per square foot. And the number of real estate transactions to compare to are vast when compared to business transactions. People often start businesses because they see a need that isn’t being met—that is, there aren’t any companies like the one they want to start. The point of a business is to be different than its competitors. While differentiation is great for creating a competitive advantage, it makes it difficult to find similar companies. Even if a market supports multiple similar businesses, these companies may not have ever sold. As a result, valuation analysts often struggle to identify guideline companies.

Identifying guideline public companies has its own set of challenges. Publicly traded companies often diversify their operations to reduce risk. By comparison, many privately held companies are undiversified. The lack of pure-play public companies may limit the number of guideline companies available to the analyst. Further, publicly traded companies are often significantly larger than privately held companies, posing additional comparability challenges. Another feature of publicly traded companies is that the shares trade in a relatively efficient market with low transaction costs. Based on the efficient market hypothesis, this allows the market to express its opinion on the value of the underlying shares. Private companies do not benefit from efficient markets. The cost of a transaction can be substantial and the timing typically infrequent.

Another common limitation when applying the market approach is the lack of data from completed transactions. Quality data from completed transactions typically comes from subscription-based databases. The price tag for access to these databases can be steep. Public company data is more readily available. There are services that make this data much easier to analyze and study and those services also come with a steep price. If a valuation analyst works on a limited budget,

...
they may not be able to afford access to quality data. This lack of quality data may weaken the application of the market approach.

Even if a valuation analyst has access to top-tier databases, financial data may be incomplete as it may have never been disclosed by either party. Even if involved parties report financial data in databases, supporting documentation may be unavailable.

The consideration paid in completed transactions is another potential weakness in the market approach. Consideration may include stock of the acquiring party, earn outs, non-compete agreements, and other items. Adjusting these to a cash equivalent can be a subjective exercise. And where there is subjectivity, there is room for error.

Another area of subjectivity and potential errors is in the selection of valuation multiples. When valuing a house, the price per square foot of the selected comparables is typically in a much narrower range than the range of multiples when valuing a business. Analyst judgement is required to select a valuation multiple from the reported range. Often, analysts err by selecting a multiple that is not warranted by the subject company’s historical and projected financial performance. (One way to mitigate this weakness is to support the selected multiple by benchmarking the subject company’s financial performance to industry benchmarks.)

These potential weaknesses are important to keep top of mind when reviewing your expert witness’s report. If any of these errors surface, talk to your expert witness. It is possible for an oversight to have occurred; it is also possible that your expert witness made a conscious and justifiable choice based on reasons not documented in the report.

These errors may also be present in opposing expert witness’s valuation reports. Keep them in mind when formulating your dispute strategy.

Conclusion

Valuation reports are often long and technical. They can be confusing and tedious for legal counsel to read, with salient information lost through sheer volume. The market approach is one area of valuation reports that readers frequently have difficulty deciphering and digesting.

The application of the market approach can be confusing to read about in valuation reports, but at a high level, it is a straightforward three-step process. As legal counsel, you should understand the contents of valuation reports; the market approach discussion above should arm you with the tools to do so. As you review valuation reports, keep in mind the market approach strengths and weaknesses discussed above. This information will help you defend your expert witness’s work, critique the work of opposing expert witnesses, and formulate your dispute strategy.

1 Maine Revised Statutes, Title 13-C: Maine Business Corporation Act, Chapter 13: Appraisal Rights, Subchapter 1: Appraisal Rights And Payment For Shares, §1301.4(b).
2 Revenue Ruling 59-60, 1959-1 CB 237; Estate Tax Regulations §20.2031-1(b); Gift Tax Regulations §25.2512-1.
3 Investment value is defined by the International Glossary of Business Valuation Terms as “the value to a particular investor based on individual investment requirements and expectations.”

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JUDGE RICARDO FAHRE listened attentively as the defendant’s lawyer made her arguments for a lower federal sentence. Suddenly his computer screen went dark, quickly replaced by a flashing message: “Take the lunch recess early. You must meet a visitor in chambers.” Judge Fahre was startled; he was unaccustomed to a flashing, emphatic notice on his screen and to being told when to take a recess. The tone of the message was unlike that used by his longtime judicial assistant or anyone from the Clerk’s office in addressing him. Nevertheless, it was close to noon, so Judge Fahre recessed the proceeding, and directed everyone to return in an hour-and-a-half. He stood up from the bench and testily went out the door behind him. The door took him directly into his chambers.

There to his surprise he saw, not his judicial assistant nor a clerk, but a seated figure of uncertain age, dressed much like he was, in a long black robe. Fahre could not decide whether it was a man or a woman, and the figure’s complexion shifted continuously, so that its ethnicity and race were indeterminable.

“I’m sorry to have interrupted you, Ricardo,” the figure said. “But I didn’t want to wait. Besides, I have never really understood time.”

“Who are you?” Fahre demanded.

“I am who I am,” the figure responded. “Exactly who you think I am. I want to ask you some questions about what you do, Ricardo. I hope you don’t mind. But I’m going to ask the questions and demand answers even if you do mind.”

All Fahre’s instincts warned him not to object.

“How do you decide what punishment to impose on someone in your courtroom, Ricardo? Like this poor woman whom you are about to sentence for internet fraud?”

“Well, I won’t talk about someone I’m about to sentence, even to you, just as I wouldn’t in the confessional. But I can tell you the factors I consider in every case. They are things that Congress and the Supreme Court have told me I must take into account.”

“Really! You have a checklist?”

“Yes. First I have to consider the Sentencing Guidelines.”

“What are Sentencing Guidelines?”

“Don’t you know everything?”

“Humor me, Ricardo.”

“Well, the Sentencing Guidelines give judges criteria for determining the range of a sentence. Researchers collected sentences federal judges previously imposed in a wide variety of cases around the country and tried to categorize the factors of the offense and offender characteristics that drove the sentences. The Guidelines they came up with are supposed to produce more consistency and uniformity among judges in sentencing. They aren’t binding, but they are always the starting point.”

“What a great idea. I wonder if I could use something like that.”

“What are you talking about? Why do you want to know how a federal judge sentences, anyway?”

“Ricardo, have you ever heard of the Last Judgment or Yawm al-Din?” (Fahre shuddering): “Yes.”

“It’s getting closer every day and I need to be prepared to do my part.

Let me ask you, do the Guidelines give you much help? I mean, do they achieve consistency and uniformity over the course of time – for example, between offenders already a long time in prison and those whom you are newly sentencing? Do they take into account cultural and ethnic differences? Can they really mathematize a person’s past history or his conduct?”

“Probably not. But they’re better than a judge having no guidance at all.”

“I suppose that’s right. Of course, as I think about it, Guidelines aren’t relevant to my task, because I will be the only judge imposing the punishment and there’s only one penalty available at the Last Judgment. But tell me this, once you figure out the Guideline sentence, what else do you take into account?”

“I consider deterrence – in other words, I try to use the length of the sentence to discourage the person I am sentencing and others from engaging in criminal conduct. I consider the seriousness, nature, and circumstances of the offense. I assess whether I need to protect the public for a length of time by warehousing the offender in a federal prison. I consider the need to promote overall respect for law. In some cases, I take into account the need for restitution to victims. And I follow the principle of imposing no greater a sentence than necessary.”

“When you say you ‘consider’ all these, Ricardo, what does that mean?”

“It means that I think about them and I talk about them at the sentencing. But I have to confess that they don’t really tell me what sentence to impose. We just don’t have empirical data to assess what weight to give them or much consensus on their proper

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**FINAL JUDGMENT**

Hon. D. Brock Hornby
role in a particular case.”

“Well, those factors won’t help me much at the Last Judgment anyway. There’ll be no more need for protection and deterrence, it will be too late for restitution, and there’ll be only one penalty. By the way, deterrence hasn’t worked much for me. You’d have thought the threat of hell would be the ultimate deterrent, but it doesn’t seem to have improved human behavior. Are there any other factors you use that might help me?”

“I also consider the offender’s personal characteristics and history, and what punishment is just.”

“Now we’re talking, Ricardo. How do you weigh those factors?”

“They may be the hardest part of sentencing. Many offenders have had very destructive childhoods and upbringings; many have serious emotional, mental, or addiction challenges. That can make them sympathetic when it comes to punishment, but it can make them dangerous in the future as well. People from privileged backgrounds may be less likely to reoffend once they are caught and they are less likely to commit violent crimes, but I have to be careful that my sentences don’t favor the privileged. In the end, it’s very difficult to know what punishment is just and necessary in any given case.”

“So what do you do, Ricardo?”

“As I said, I don’t have data or any other way to predict what people will do in the future or what sentence will produce more law-abiding behavior. Sentencing goals sometimes conflict. Victims may cry out for a stiff penalty, but the offender’s personal circumstances may call for leniency. So I often have to rely on instinct, while recognizing that I probably harbor unconscious biases and may use heuristic techniques that are not optimal. I ask myself if I would impose a different sentence if I were not a white male, or if I belonged to a different religious or political group, or if the offended were of a different race, gender, or ethnicity. I try not to impose sentences that treat similar offenders differently. Those are some of the reasons why the guidelines can be helpful. In considering what sentence is just, I also have to think about community values. I try to keep my judgment independent of popular backlash for a particular crime, but I can’t help thinking about community reaction. Some things are just beyond my control. For example, sometimes Congress has imposed a sentencing floor that I cannot go below, or has mandated that a particular sentence be consecutive to other sentences. There is nothing I can do to shorten those sentences.”

“Wow, I see that sentencing is challenging work, Ricardo. In considering what punishment is just, do your sentences presume free will on the part of an offender, or are you a Calvinist believing in predestination or, in more modern terms, that an offender is an unwitting product of his genes and environment?”

“A little of both. As a sentencing judge, I do tell the community that I hold criminals accountable for their conduct, and the damage they’ve caused to a victim or society. The general public has to proceed on that premise, despite what neuroscientists are learning about how our brains operate. But I also take into account the role of the offender’s background and upbringing in producing the criminal conduct. And I try to assess what effect my sentence will have in the future for this offender and others.”

“Ricardo, there’s something that has always bothered me about your profession – you judges don’t get any systematic feedback about the effect of your sentences. Let’s take a look at some of your past sentences to see how things actually turned out.”

The figure pulled out from its robe’s folds what appeared to be a new-generation iPad, announcing, “I have access to my own cloud, Ricardo, and some pretty fancy apps and software. Let’s see what we can find.”

Something akin to Google Maps brought up a tough part of town on the screen, then focused onto an impoverished apartment within it. Once the figure double-clicked on the apartment, there appeared a real-time video and audio of the people living there. Fahre watched a mother read a disciplinary note from school that her young daughter handed her as the mother listened sadly to the little girl describe the jeers of her fellow students about the clothes she wore; heard the mother talk despondently about an older child in a juvenile detention facility; saw that there was little food in the apartment and that the furnishings were shabby and sparse; and heard gunshots from a passing car outside.

Fahre asked the figure, “Why are you showing me these unfortunate people on your iPad?”

“Well, Charles Dickens might have used dreams and ghosts, Ricardo, but now we have better technology. Do you remember the name Leroy Howard?”

“Why, yes, I sentenced him some years ago for armed bank robbery. He didn’t actually use the gun, but . . . I gave him 10 years in federal prison. The tellers – the victims – were very compelling in their description of the resulting fear they faced every time the bank door opened after the robbery, and I wasn’t satisfied that he wouldn’t do it again. At sentencing, I really lashed into him for what he did, and he was pretty angry about how I treated him.”

As Fahre spoke, the video and audio switched to Howard’s sentencing proceeding, showing Fahre berating Howard, calling him “scum” and a “coward.”

“How did you come up with the sentence?”

“His Guideline range, given the amount stolen and some previous convictions, was around 5 years. And he was charged and convicted of possessing a gun during the robbery, although he didn’t use or brandish it. That resulted in a mandatory consecutive sentence of 5 more years for a total of 10. But why do you ask?”

“Look more closely at the name on the dunning envelopes on the apartment table, Ricardo.”

Fahre squinted at the video and after pausing, asked, “Are these people Leroy Howard’s family?”

“Yes. He died in prison from an assault after serving 6 years. This is what happened to his family as a result of your sentence, Ricardo. Do you think you sentenced him fairly?”

Fahre’s face reddened, and he spoke indignantly: “There are always collateral consequences flowing from a sentence, consequences that are beyond a judge’s control. I can’t let those consequences af-
fect my sentence, because the defendant deserves to be punished, the community wants to see him punished, and he shouldn't be able to use his family circumstances as a 'get out of jail free' card to avoid prison when he breaks the law. And I can't determine what happens to him in prison. I do remember having second thoughts over my excoriating remarks in front of his family but, as I recall, the public reaction to my sentence was very positive. In this case, too, the prosecutor tied my hands by charging the gun possession separately. If it hadn't been a separate count, it would have caused the Guideline range to go up somewhat, but it wouldn't have generated the mandatory 5-year consecutive sentence. That's the sentencing system Congress has given us.”

“Okay, Ricardo, let’s look at a different one.”

The screen flickered, then showed a dilapidated doublewide, modest but clean. They could hear and see a woman in the kitchen preparing lunch for her children while describing positively to a friend her recent morning session at Narcotics Anonymous.

“I recognize her, that’s Marlene Batson,” said Fahre. “I sentenced her for drug-dealing, something she did to feed her cocaine habit. Knowing she had young children and no other family members to care for them, and given that she cooperated against her supplier, I gave her a modest sentence – actually probation – taking a gamble. I didn’t know if the gamble would pay off. I was also worried about how she would be treated in prison as a snitch.” Somewhat mollified at seeing this different sentencing outcome, Fahre added, “I can’t really take credit for any success. The sentence was risky and easily could have come out badly – she might have failed her children or exposed them to drugs and drug habits. Many drug dealers do recidivate when they get out of prison, and I see defendants all the time whose parents exposed them to the evil effects of drugs and alcohol when they were children, a toxic mix that the children were unable to escape as they grew up. I’m glad to see Batson’s staying clean for now.”

“As am I, Ricardo. I know enough about her – much more than you do – to consider her current behavior exemplary.”

The screen flashed to a third location, showing sheriff’s deputies evicting an elderly couple, crying, from their home. Fahre could make out their names on the sheriff’s papers.

“I’ve never sentenced anyone by that name. You can’t hang their misfortune on me.”

“Do you remember Kirk Madsen?”

“Yes, he was somebody I sentenced for internet fraud.”

“What did you give him, Ricardo?”

“Well, it was a light sentence of just a few months, because it was a first offense, he paid restitution, he showed remorse, he came from a good family that supported him, and I thought he would turn his life around. Why do you ask?”

“Within three months after he came out of prison, Ricardo, he defrauded these folks, and many others, of their life savings through an investment scam. The community – maybe you’ve heard – is outraged, and local politicians are making headlines over judges being soft on crime.”

“That hurts. I do get it wrong sometimes. Critics come out of the woodwork when I show mercy, although I never get criticized for imposing too harsh a sentence. Sometimes mercy works, as apparently it did for Marlene Batson, and sometimes it doesn’t, as apparently for Kirk Madsen. If only I could know for sure at the time! I wonder whether unconscious preconceptions led me to look more favorably on Madsen than I should have. Now I wish I’d thrown the book at him.”

The screen flashed to ramshackle buildings on the edge of arid farmland, showing a couple of thin goats and some scraggly corn. Children in tattered clothes mingled with the animals. The audible language was Spanish.

“This is Guatemala, Ricardo. This is where Miguel Santoya and his family live. You sentenced him for illegally and repeatedly entering the United States to work as a migrant laborer harvesting crops. He served his prison time and was deported. Now he is trying to eke out a living on the land back home where he was raised. His family often goes hungry, his children sometimes are unable to attend school, and they fear violence from local drug gangs. But Santoya loves his family, and he and his wife do the best they can.”

Fahre grimaced. “I find sentencing immigrants very difficult. Many of our American forebears came to the United States as immigrants, some legally, others illegally. Generally the immigrant offenders I see are hard-working, and except for coming here illegally, they are honest and trustworthy with high moral and family values. They sometimes deprive themselves so as to send back home to their family as much money as they can. I know that the economic conditions in their country of origin are often so severe that sentences do not deter their illegal return. But the law is clear and I have to enforce it; I have to maintain respect for the rule of law. Plus, the actual prison time I gave Santoya was relatively short. I don’t impose the deportation, which is what really matters; that’s up to federal immigration authorities.”

Glancing up from the mesmerizing images, the figure saw that Fahre was looking down at his hands despondently, and quickly snapped the iPad shut.

“Why the long face, Ricardo? I can tell you want to say something. Go ahead.”

“This isn’t working for me like Scrooge’s transformation in *A Christmas Carol*. I can’t say, ‘Aha, I’ve been misbehaving and now I see how I ought to behave in the future.’ I know I haven’t been a perfect judge. But I’ve tried to do my best. Congress wrote a great list of goals for sentencing, but they often conflict; victims pull one way; the defendant’s family pulls the other way; prison terms aren’t successful ways to deal with substance abuse or mental and emotional challenges. I don’t have good data to tell me who will misbehave in the future and who won’t. The community at large can’t decide what it wants, strict punishment or rehabilitation. All in all, sentencing is a very tough enterprise, and in a particular case, I don’t get to say ‘I want to pass on this one.’ I often lie awake at night before I sentence, wondering what to do. When
I often lie awake at night before I sentence, wondering what to do. When it’s my turn, how will you judge me? What would you have done in these cases if you were the judge in my place?”

“Frankly, Ricardo, I don’t know. I don’t trust abstract statements about punishment or Monday-morning quarterbacking by the media, academics, politicians, or even appellate judges. Over many more years than you can count, I’ve learned there is no single correct answer for the appropriate punishment for an individual. There are so many audiences – the offender, victims, law enforcement, the offender’s family, media, interest groups, the broader community – with often different demands. That’s why I leave the sentencing job to humans. I want you human judges to agonize over the decisions, and I prefer that you endure the criticism that ensues. People are supposed to love me, and they don’t love those who do the judging! It’s also why I’ve delayed the Final Judgment so many times. You just can’t add up the bad and the good of a human being and make a final irreversible declaration. And being who I am, I know everything there is to know about an individual, and that makes it even harder.

I’ll be honest with you. In the beginning, I had no idea punishment would be this difficult. Whose idea was this Last Judgment thing anyway? I don’t recall saying anything about it to Noah after the Flood. How can I make decisions about whom to punish that will seem fair to people from all walks of life, all ethnic groups, all religions, all over the world, all millennia?

But that’s my problem, not yours, and today’s not your day for a final accounting, Ricardo. Get back to work and do your best; your courtroom is waiting for you. They’re depending on you. I’m depending on you. Treat your offenders with dignity. Be merciful when you can – you can take the heat (excuse the pun). And as you humans say when you part, ‘I’ll see you.’ When I say it, you can count on it!”

D. BROCK HORNBY is a Senior District Judge on the U.S. District Court for the District of Maine. This story was inspired by Charles Dickens, A Christmas Carol; Karel Capek, The Last Judgment, in Tales from Two Pockets; and George Burns in Carl Reiner’s Oh, God!

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To this day, I still get the occasional call from an attorney wanting to know how to go about purchasing a tail policy, and my response is always the same. I need to make sure that the caller understands there really is no such thing as a tail “policy.” Clarification on this point is important because confusion over what a tail is and isn’t can have serious repercussions down the road. To make sure you don’t end up running with any similar misperceptions, here’s what you need to know.

An attorney leaving the practice of law can’t purchase a malpractice insurance policy because he or she will no longer be actively practicing law. There is no practice to insure. This is why an attorney can’t buy a tail “policy.” What you are actually purchasing when you buy a tail is an extended reporting endorsement (ERE). This endorsement attaches to the final policy that is in force at the time of your departure from the practice of law. In short, purchasing an ERE, which is commonly referred to as tail coverage, provides an attorney the right to report claims to the insurer after the final policy has expired or been cancelled.

Again, under most ERE provisions, the purchase of this endorsement is not one of additional coverage or of a separate and distinct policy. The significance of this is that under an ERE there would be no coverage available for any act, error, or omission that occurs during the time the ERE is in effect. So for example, if a claim were to arise several years post retirement out of work done in retirement as a favor for a friend, there would be no coverage for that claim under the ERE. This is why you hear risk managers say things like never write a will for someone while in retirement. I know it can be tempting, but don’t practice a little law on the side in retirement because your tail coverage will not cover any of that work.

Another often misunderstood aspect of tail coverage arises when an attorney semi-retires and makes a decision to purchase a policy with reduced limits in order to save a little money during the last few years of practice. The problem with this decision is that insurance companies will not allow attorneys to bump up policy limits on the eve of a full retirement, again, because no new policy will be issued. For many attorneys, this means the premium savings that came with the reduced limits on the final policy or two will turn out not to have been worth it. Here’s why: All claims reported under the ERE will be subject to the available remaining limits of the final policy that was in force at retirement, and this may not be enough coverage.

For example, if you were to reduce your coverage limits from $1 million per occurrence/$3 million aggregate to $500,000 per occurrence/$500,000 aggregate during the last year or two of active practice in order to save a little money, you will only have coverage of $500,000 per occurrence/$500,000 aggregate available to you for the duration of your retirement, assuming there was no loss payout under that final policy. In terms of peace of mind, that may be an insufficient amount of coverage. Therefore, if you anticipate wanting those higher limits of $1 million/$3 million during your retirement years, keep those limits in place.

Unfortunately, while many attorneys hope to obtain an ERE at the end of their career, the availability of tail coverage isn’t necessarily a given. For example, most insurers prohibit any insured from purchasing tail coverage when an existing policy is canceled for nonpayment of premium or if the insured failed to reimburse the insurance company for deductibles paid on prior claims. An attorney’s failure to comply with the terms and conditions of the policy; the suspension, revocation, or surrender of an insured’s license to practice law; and an insured’s decision to cancel the policy or allow coverage to lapse may also render an ERE unavailable.

An attorney’s practice setting is also relevant. Particularly for retiring solo practitioners, insurers frequently provide tail coverage at no additional cost to the insured if the attorney has been continuously insured with the same insurer for a specific number of years. Given that tail coverage can be quite expensive, shopping around for the cheapest insurance rates in the later years of one’s practice isn’t advised, since the opportunity to obtain a free tail could be lost. Review your policy provisions or talk with your carrier well in advance of contemplating retirement so that you don’t unintentionally lose this valuable benefit.

The Ins and Outs of Tail Coverage

By Mark Bassingthwaite
When an attorney wishes to retire, leave the profession, or is considering a lateral move and worried about the stability of the current firm, some insurance companies will not offer an opportunity to purchase an ERE due to policy provisions. The reason is the firm’s existing policy will continue to be in force post attorney departure.

The situation for an attorney who has been in practice at a multi-member firm is a bit different. Here, when an attorney wishes to retire, leave the profession, or is considering a lateral move and worried about the stability of the current firm, some insurance companies will not offer an opportunity to purchase an ERE due to policy provisions. The reason is the firm’s existing policy will continue to be in force post attorney departure. This isn’t as much of a problem as it might seem in that the departing attorney will be able to rely on former attorney language under the definition of insured. However, because the definition of insured varies among insurers, you should discuss this issue with your firm’s malpractice insurance representative so options can be identified and reviewed well in advance of any planned departure. That said, I can share that under two ALPS policies and as long as certain conditions are met, we provide some of the most comprehensive tail coverage options in the industry, to include free individual EREs in event of retirement, death, disability or a call to active military service.

Be aware that the period in which one can obtain an ERE can be quite limited. Most policies provide a 30-day or shorter window that will start to run on the effective date of the expiration or cancellation of the final policy. There are even a few very restrictive policies in the market that require the insured to exercise the option to purchase an ERE on the date of cancellation or expiration. Given this, you should review relevant policy language well in advance of contemplating departing the profession, because the opportunity to purchase an ERE is one you can’t afford to miss.

The duration of tail coverage (i.e., the length of time under which a claim may be reported under an ERE) varies depending upon what is purchased. Coverage is generally available with fixed or renewable one-, two-, three-, four-, or five-year reporting periods or with an unlimited reporting period. If available, the unlimited reporting period would be the most desirable, particularly for practitioners who have written wills during their later years of practice.

The premium charge for an ERE is usually specified in the policy. Often the cost is a fixed percentage of the final policy’s premium and can range from 100 percent to 300 percent depending on the duration of the purchased ERE.

Given all of the above, if the ERE provisions outlined in your policy language have never been reviewed, now’s the time. One final thought, be aware that if the unexpected ever happens such as the sudden and untimely death of an attorney still in practice, know that tail coverage can be obtained in the name of the deceased attorney’s estate if timely pursued in accordance with policy provisions. Therefore, even attorneys who are not near retirement should still have some basic awareness of ERE policy provisions. Take the time to familiarize yourself with your malpractice insurance policy, including what ERE provisions are available to you.

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JEST IS FOR ALL

By Arnie Glick

Myron, the Probate Attorney, Was a Strict Thanksgiving Day Host

“Before we begin the meal, please be advised that the dessert pies will be held in trust until everyone has finished all of their cooked vegetables.”

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BEYOND the LAW

Stanley R. Tupper III

Interview by Daniel J. Murphy, Photos by Joe S. Murphy

It is not hard for the imagination to wander when spending time in the massive hanger at American Classic Aviation in Brunswick. In one corner, Stan Tupper is putting the final touches on a fiberglass replacement part that he fabricated for the 1968 Piper Cherokee that he shares with his wife. In another part of the facility, a teenager is performing maintenance on his own plane, surrounded by a fleet of small aircraft of different ages and styles. Guiding visitors toward a separate project – the rehabilitation of older airplane wing frames – Tupper notes that he hopes to cover them with what essentially is fabric and resin so that they will be able take flight again. In moments like these, one is reminded that modern aviation is a true miracle of sorts. Tupper, who maintains a diverse practice that includes criminal law and family law, sat down with the Maine Bar Journal to discuss his interest.
MBJ: How did you first become interested in flying airplanes?
ST: After high school, I went to California for a while to see what it was like. I didn’t know enough to go to college then. After having a look around, I ended up back here. I built a houseboat and lived on it while also doing carpentry in the Boothbay area. At this time, I remodeled a small place on the lake in Boothbay for an interesting fellow. He did two things for me. First, he convinced me that I should go to college. He also liked my carpentry work and asked me to build him an airplane. This was around 1984 or so. By that time, I had some decent carpentry skills and had worked in a boat yard for a bit. So, I went to UMO and agreed in the summer to build him an amphibious plane out of foam, fiberglass, carbon, and epoxy.

MBJ: It takes a fair amount of trust to ask someone to build a plane for you. What allowed your friend to have this trust in you as a builder?
ST: Building an airplane is not as technical as you might think. Gunsmithing, for example, probably requires more fine-motor coordination and skills. The Wright brothers in 1903 put together something that flies using bicycle technology and revolutionary ideas. In fact, I recall a plane at a museum – maybe the Owls Head Transportation Museum – that a kid had built in the 1920s or 30s that was flown in Old Orchard Beach. So a person can build a plane. To be eligible for an amateur-built certificate from the FAA, the builder must follow the “51% Rule.” This means that a major portion (at least 51 percent) of the airplane must be built by the owner/builder. Some pre-built components, however, are allowed. After I built the plane, the FAA sent four designat-ed examiners who looked at the plane for four hours. They also reviewed my logbooks, photographs, and the notes I had taken during the building process. The plane obtained an Airworthiness Certificate and I obtained a Repairman Certificate specific to that plane. So, that’s how I got into doing it. I took my time and was careful, but it’s not rocket science. If you can build a boat, you can build a plane.

MBJ: So how did you shift from building an airplane to flying an airplane?
ST: The owner of the airplane made me a deal. He said, “I’ll pay you carpenter wages to build the plane, but when you’re done with the airplane and it gets signed off by the FAA, I will pay for you to get a pilot’s license. Further, when I’m done with the plane, I’ll give the plane to you.” So that was the deal. So, I was paid relatively low wages, considering the skills I brought to the job, but in the end, he paid the roughly $10,000 for me to get my pilot’s license.

MBJ: When did you get your pilot’s license?
ST: I think sometime probably around 2003 or 2004.

MBJ: How many hours of flying do you need to get a license?
ST: The rule is 40 hours, and that’s broken up into some hours of cross-country flight, some hours after you solo and so on and so forth. It probably took me somewhere in the neighborhood of 75 or so hours. I had several instructors before I settled in with an instructor I really liked, and I had the use of a relatively new Cessna 172 Skyhawk with a G-1000 panel. This means the plane had computer screens instead of the old steam gauges. This “glass cockpit” makes navigation super easy.

MBJ: Where was your first solo flight?
ST: I think my first solo was at the Wiscasset airport in a Cessna 150. That’s when an instructor will put a new pilot through some amount of training to make sure that the new pilot understands how to land the plane. At some point, the instructor gets out of the plane and says, “Go do it once.” That’s your first solo. There’s a tradition where they then tear your shirt off your back and write the date of your solo and hang it on the wall. It’s a funny, old tradition in aviation.

MBJ: What became of the amphibious plane that you built?
ST: Unfortunately, he wrecked it right away. I love him dearly, but he made the plane unrepairable. So, I took the engine out of that plane and pickled it. A couple of years later, he approached me and said, “Hey we got this engine, it’s worth like $30,000. What certificated aircraft could we put it in?” I looked around, and I found a couple planes for sale that used that type of engine, and he bought one of them. It came with a 95-horsepower engine that was not particularly powerful. The plane couldn’t get off the water with two grown men and full fuel, so I put the 160-horsepower engine that I had used for the first plane in this new one.

MBJ: How often do you get out to fly?
ST: In the summer, as often as possible. I got married this past June and my new wife, Lisa, has become interested in flying. Not long ago, we bought a 1968 Piper Cherokee that we keep in Brunswick. It’s a good plane for Lisa to learn in and get her private pilot’s license. We also have a SuperCub plane on floats, which is a lot of fun. In the SuperCub, you fly really low over the water. If the engine quits, it is fine. You glide down, and the floats will land you safely. But in the plane with wheels, you always want to be a couple thousand feet in the air so you have time to think about how to avoid serious trouble.

MBJ: Where do you like to fly?
ST: The SuperCub and the Piper Cherokee are two different planes with different missions. In the SuperCub, I take off from a lake in Boothbay and typically I go up and down the coast. I also will go up the Damariscotta River and cut over to Wiscasset and down the Sheepscot. If I venture further, it can be as far as Pemaquid, Camden, or Turner, which has a nice seaplane base.
You fly out, you look at how pretty the world is, you tend to fly at lower altitudes, and you come back to the same lake. The Piper can go much further.

MBJ: Have you had any close calls when flying?
ST: Yes. I had arranged to do a bi-annual flight review with a designated FAA flight examiner. The examiner gets in the back of a plane and puts you through some paces, trying to get you to almost die—deep turns, power-on stalls, power-off stalls. If it’s in a seaplane, a good examiner will make you demonstrate glassy water landings, how to sail it when it’s on the water, and so forth. So, I had arranged for this bi-annual flight review, which I scheduled the day before law school. I was in a little bit of a rush. I picked up the examiner down by Robin Hood Marina and we took off and got to about 500 feet when the engine made a loud noise and there was some diminished power. It wasn’t particularly worrisome. I landed it in the river and tied up. I took a look at the engine and it had blown out one spark plug. I did a field repair and flew it back to the lake where another mechanic replaced the cylinder. After the plane was pronounced ready to fly again, I drove up to Boothbay to give it a test, but something was not right. It was running a little hot. I figured that cylinder break-in was just hot. I stayed close by the lake and I landed without incident. I took it up again later and the whole engine quit. That silence was remarkable. The only place to go is straight ahead when you’re in that situation. You cannot turn, or you will stall and die. So I went straight ahead and I managed just barely to get the plane down in the same lake that I took off in. I fussed around with it for a while with no luck, paddled it back to the dock, and drove back to Portland to make it on time for Torts class. It turns out that the mechanic had put chrome rings on the pistons in a chrome cylinder and you can’t do that. You have to put a softer, cast-iron type ring in the chrome cylinder. The rings tore the cylinder, the cylinder tore the rings, it filled the oil passages with fine metal shavings, there was oil starvation, and that killed the engine. So, that was my close call. I figure that I am pre-disastered.

MBJ: Is there any overlap between your legal career and your interest in flying?
ST: There is, and I have taken on cases for pilots. There are two general categories of legal issues for pilots. One is where the pilot gets in trouble with the FAA. That can happen a number of ways. For example, you can fly into prohibited airspace. Probably the most common, though, is to get an OUI driving. The FAA really wants to be reassured that this was a one-off, and that there will be no drinking and flying. The other area is that sometimes pilots may need to resolve disputes with vendors, mechanics, or other aviation-related issues.

MBJ: What’s the best advice you have ever received?
ST: It’s better to be happy than right. That was from my grandfather who was happily married for many decades and in regards to personal relationships, he told me, “Stan, it’s better to be happy than right.” I think it was really in regard to his personal relationship with his much-loved wife. They were together for close to 40 years, and they had an exemplar marriage. They were fabulously in love for a long time and I think part of why that was the case was my grandfather would let it go. You don’t have to be right all the time. You don’t have to prove that you’re right. Sometimes it’s worth letting it go. That’s particularly useful for lawyers because we are conditioned to be right or to show that we’re right.
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Maine’s Lawyer Poet

My longtime friend James A. McKenna of Hallowell spent 33 years as an attorney in the Maine Office of Attorney General where he focused on consumer, child support, and child protection cases. Since 2013, Jim has worked half-time as a volunteer legal aid lawyer, helping clients of Pine Tree Legal Assistance. Jim is also a poet. In the fall of 2012 the Maine Bar Journal ran an article about his collection of poems, The Common Law.

Now Jim has created a new book of poetry, One Day in One Town, recently published by Moon Pie Press. With Jim’s permission, I am pleased to share the following poem with Journal readers.

Civil Motions in Courtroom Four

Next were civil motions.  
So he sat for awhile  
in Courtroom 4 and  
heard again the legal phrases,  
so fixed and narrow and calm in court,  
that if spoken in a home,  
his home, at least,  
might explode.  
Such as:  
duty of care,  
abuse of trust,  
a debt not cured.  
But not the one he longed to hear:  
a release from all claims.

Access to Justice Funding

In addition to poetry, I want to share information about legal aid funding. The Maine Justice Foundation administers several programs and funds that help poor and vulnerable Mainers access our justice system. It is important for readers to keep in mind that in spite of this range of funding sources, there remains a persistent, gaping chasm between the need for and access to civil legal aid. Studies over the past 30 years consistently have shown that only 20 to 25 percent of those eligible for legal aid services are able to get help due to lack of funding and staff.

Please Give to the 2019 Campaign for Justice:

The Campaign for Justice is your opportunity to support all of Maine’s civil legal aid providers with one gift. The Campaign for Justice is a successful collaboration between Cumberland Legal Aid Clinic, Immigration Legal Advocacy Project, Legal Services for the Elderly, Maine Equal Justice, Pine Tree Legal Assistance and Volunteer Lawyers Project. These agencies have agreed to combine their annual appeals to Maine’s lawyers, cutting down on the mail you get. Maine’s Bar has responded very generously, giving $616,000 in 2018. The Maine Justice Foundation is proud to manage this annual appeal to the Bar.

If you have not yet given to the 2019 Campaign, please do so today at www.campaignforjustice.org or mail your gift to: Campaign for Justice, 40 Water Street, Hallowell, ME 04347.

Income from Interest on Lawyers’ Trust Accounts (IOLTA) Hits 10-year High:

Since 1986, Maine’s Interest on Lawyers’ Trust Accounts (IOLTA) program has provided over $27.5 million for civil legal aid. Recipients of IOLTA funds are the six legal aid agencies listed above.

In the early 1980s, new laws and rules allowed for the creation of IOLTA programs throughout the United States, through which small amounts of client funds and client funds held by lawyers for a very short time could be placed in single, pooled, interest-bearing accounts and used for charitable purposes. The Foundation has collected and disbursed the state’s IOLTA funds on behalf of the Maine Supreme Judicial Court since the program was created.

IOLTA is a critical, ongoing source of funding for civil legal aid in Maine, and it is significant. Unfortunately, the Great Recession of 2008 and 2009, and the associated plunge in federal interest rates, caused funding for legal aid in Maine and around the country to plummet. Maine’s IOLTA revenue started dropping in 2008, from a high of $1.48 million in 2007, and didn’t stop until it bottomed out at $653,000 in 2015. Nationally, IOLTA revenues fell from a high of $371 million in 2007 to $50 million in 2016—a stunning 86 percent drop. Maine was “lucky” to experience only a 50 percent decrease in that time.

IOLTA income in the Foundation’s last fiscal year, just ended, rose to $996,000. This figure is increase of a quarter of a million dollars over last year’s income of $744,000. This is the highest
IOLTA income has been since 2008, when it stood at $1.4 million. Rising interest rates are of course the primary cause.

The accompanying graph shows how IOLTA income tracks with the Federal Reserve’s fed funds target rate.

But the outlook is not as rosy for 2020. The Federal Reserve has reduced its target rate three times in recent months (it is currently 1.75-2.00 percent), so we cannot count on IOLTA funding remaining at this level.

Maine’s lawyers can help increase IOLTA income even in the face of flat or falling interest rates. Where you choose to bank is important. Please visit www.justicemaine.org/iolta to learn which financial institutions offer the highest rates on IOLTA accounts.

Three Grants Awarded for Legal Aid in Downeast Maine:

The Foundation recently awarded a series of three-year grants to civil legal aid providers for their work in Hancock and Washington Counties, a desperately underserved area of the state. In 2015 an anonymous donor bequeathed a gift of $2 million to the Foundation, thus creating the ESO Fund to serve the donor’s intent to help people in Downeast Maine. For 2020, the Foundation has awarded $22,000 to Immigrant Legal Advocacy Project, $50,000 to Legal Services for the Elderly (LSE) and $22,000 to Volunteer Lawyers Project.

The Immigrant Legal Advocacy Project (ILAP) launched a Washington & Hancock County Project in 2016 with support from the ESO Fund. The project has been instrumental in expanding ILAP’s reach and increasing access to justice for immigrants living in rural parts of the state. Many are migrant laborers in the blueberry fields and other parts of the agricultural or natural resources economy.

The project’s goal is to help more immigrants in Washington and Hancock counties achieve legal status, a threshold need and the critical first step towards finding safety from persecution and violence, keeping families together and advancing towards economic security. With legal status, immigrant community members are able to access educational and employment opportunities, build networks and resiliency, and become powerful advocates for social justice in Maine. To achieve these target outcomes and build stronger communities, ILAP works closely with partners Mano en Mano and Maine Migrant Health Program, among others.

Legal Services for the Elderly’s Downeast Senior Safety Net serves disadvantaged seniors (those 60 and older) living in Washington and Hancock counties who face legal problems relating to their basic human needs. A major life event—the death of a spouse, divorce, hospitalization, job or income loss, becoming the victim of fraud or abuse, or becoming the primary caretaker for a family member—can easily lead to a host of legal problems.

Resulting consumer debt, foreclosure or eviction, abuse or exploitation, and challenges accessing public benefits can cause seniors without legal help to lose their homes, health care, and even essentials like food, prescription drugs, and heat.

The primary service components of the Senior Safety Net are: 1) free legal services provided by LSE at or near the senior’s home; and 2) help for seniors in understanding and successfully accessing all available public benefit programs and other needed support services. LSE is partnering with Maine Equal Justice, Eastern Area Agency on Aging, and Downcast Community Partners to help improve access to public benefits.

Since the program was first launched in 2013, there has been an overall increase of 50 percent in seniors receiving legal services in these areas, and more than 3,200 senior have received free legal help since the program was started.

Volunteer Lawyers Project seeks to increase access to pro bono resources for those needing help in Washington and Hancock County. VLP has increased the number of its clients from Hancock County, with help from the ESO fund since 2016, largely through the success of its family law clinic at the Ellsworth courthouse. In 2020, VLP will focus their ESO funding on recruiting lawyers in more populous areas of Maine to take Washington County cases using new software that allows remote consultations, training local libraries to use the Free Legal Answers-Maine website (maine.freelegalanswers.org), identifying social service agencies who will forward initial intakes to VLP for their clients, and marketing VLP services in Washington County.

LGBTQ Justice Fund makes its first grant:

Maine Equal Justice received the inaugural grant of the Foundation’s LGBTQ Justice Fund to work with transgender advocates Maine TransNet. LGBTQ individuals suffer significant health disparities and often face significant barriers to health care. Primary barriers to care include a lack of access due to health care providers’ lack of knowledge and education on the topic, financial barriers, discrimination, health systems barriers and socioeconomic barriers. To reduce barriers to affordable and adequate health care, Maine Equal Justice received a grant of $3,500 to partner with Maine TransNet to provide education for people in the LGBTQ community, with a focus on the transgender community, and health care providers. The groups will design training modules for both community members and health care providers to provide education and reduce some of the most common barriers to care.

The LGBTQ Justice Fund was instituted in 2017 by Bill Robitzek and donors Teresa Cloutier, Jon Doyle, Sarah MacDaniel, Arnie Macdonald, Jodi Nofsinger, and Judy Woodbury, joined by over 70 other donors. The Foundation is deeply grateful to these donors.
Haley Hunter Selected as 2019 James M. Roux Fellow at Cumberland Legal Aid Clinic:

Each year the Cumberland Legal Aid Clinic at Maine Law selects a student to be the James Roux Fellow, a summer internship supported by the Foundation with a grant of approximately $5,000. In 2019, Haley Hunter, a native of Caribou, was chosen. Ms. Hunter graduated summa cum laude from the University of Maine. As an undergraduate, she worked summers at the Caribou law firm of Solman & Hunter. She is a top student at Maine Law and an editor of the Ocean and Coastal Law Journal.

After her first year of law school, Ms. Hunter interned in the Office of the Attorney General and traveled around the state to various courthouses. She had the opportunity to see how many people were in court without the benefit of legal representation. That experience, coupled with her study of Criminal Law as a first-year law student, left her with a strong interest in helping disenfranchised people understand and protect their rights.

Arnie Macdonald and Liza Moore of Freeport created the James M. Roux Fund at the Maine Justice Foundation to honor Jim Roux. Jim grew up in Lewiston and graduated from Maine Law in 1984. He served in the U.S. Army as Judge Advocate General with the 82nd Airborne Division and was also an attorney in private practice. He died in the attacks of September 11, 2001. The Foundation thanks Arnie, Liza and all the generous donors to the Roux Fund who made gifts in Jim's memory.

Two More Years of Bank of America Grants:

Since January 2016, Maine’s legal aid providers and the University of Maine, School of Law have received grants funded by a $1.8 million donation from the Bank of America under a settlement with the U.S. Department of Justice. The Maine Justice Foundation will distribute $314,500 in grants in 2020 and again in 2021, at which point this source of funds will be gone.

Bank of America settlement funds have paid for grants for foreclosure prevention legal services and community redevelopment legal services. They also supported the University of Maine, School of Law’s three-year Rural Practice Fellowship pilot project. The Foundation is very pleased to learn that Maine Law has found additional support for the Fellowship for at least another three years.

Maine Civil Legal Services Fund Commission has Increased Funds:

More funding for legal aid providers will be available from the Maine Civil Legal Services Fund Commission. A program of the Maine Supreme Judicial Court, the Foundation provides in-kind staff support to this three-person Commission, assisting with the biennial application process and submission of annual reports from grantees to the Legislature’s Joint Standing Committee on Judiciary.

Legal aid providers received over $1.4 million from the Maine Civil Legal Services Fund in FY 2018, but there has been a drop in disbursements during FY 2019. Fortunately, Representative Barbara Cardone of Bangor (who serves on the Maine Justice Foundation’s Board) introduced and successfully championed LD 214 before the 129th Maine Legislature to increase the amount of the Maine Civil Legal Services Fund. Enacted as PL 2019, c. 509, this new law is projected to generate an additional $700,000 in FY 2020 and $950,000 in FY 2021. Legal aid providers and the Foundation thank Representative Cardone for her leadership and hard work at the Legislature to make LD 214 a reality.
Banks and credit unions recognized at the Blaine House for their support of civil legal aid and “justice for all”

Governor Janet T. Mills and the Blaine House hosted a tea reception on October 7 to thank the Maine banks and credit unions that support legal aid for poor and vulnerable Mainers.

William S. Harwood, President of the Board of the Maine Justice Foundation, welcomed legal aid supporters and representatives of Maine’s financial institutions that take part in the state’s Interest on Lawyers’ Trust Accounts (IOLTA) program. “We are so grateful to all the participating credit unions and banks for their support of this important program and for helping the Maine Justice Foundation advance our mission of equal access to justice,” Harwood said.

Speakers at the reception included Governor Mills; Hon. Warren Silver, retired Justice of the Supreme Judicial Court of Maine; Charles Soltan, managing member of Soltan Bass, LLC, and President of the Board of Legal Services for the Elderly (LSE); and Mr. Harwood, who is a partner at Verrill.

LSE’s Charles Soltan told the audience, “It is not age alone that is causing more Maine seniors to need ready access to free legal help in order to meet their basic human needs. It is poverty. Twenty-nine percent of Maine seniors live below the poverty level. It is predatory behavior. Seniors are being preyed upon by family members and by scammers in record numbers. And it is the number of legal problems faced by low-income seniors. A recent Legal Services Corporation study found that 56 percent of low-income seniors experience at least one legal problem a year, and a stunning 10 percent experience six or more problems.”

Financial institutions are a key partner in the important work of providing “justice for all” regardless of income. Forty banks and credit unions take part in Maine’s IOLTA program. Some banks choose to pay interest on IOLTA accounts that are well above their usual rates, voluntarily providing additional funds for civil legal aid. Thank you!
JOIN MSBA! Now more than 2,750 members strong, the Maine State Bar Association is the largest and most active alliance of lawyers in Maine. Our members include active and inactive attorneys, judges, law professors, corporate counsel and government lawyers. The goal of the MSBA is to provide its members with membership services and benefits to enhance their practice and enrich their experience in the legal profession. Our MSBA leadership and professional staff are dedicated to meeting your high expectations of quality, commitment and service. There’s never been a better time to join the Maine State Bar Association!
What's in a name?


When the government names a statute, it’s natural to question the motive.

Sometimes the name has political overtones, as in the USA PATRIOT Act, which stands for “the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001,” Pub. L. 107-56, October 26, 2001. Other times, the name is more of a marketing device, such as the BABIES Act, which is a less-than-perfect abbreviation for “the Bathrooms Accessible in Every Situation Act,” Pub. L. 114-235, October 7, 2016.

The motive behind a statutory name was questioned in _Dames and Moore_, in which the Supreme Court upheld the government’s power to transfer frozen assets to Iran, as part of a settlement of the 1979 Iranian hostage crisis. In that case, the Court upheld the government’s authority based primarily on the sweeping language in the International Emergency Economic Powers Act, Pub. L. 95-223, December 28, 1977.

The government, however, also relied on an unnamed 100-year-old statute “concerning the Rights of American Citizens in foreign States.” In an effort to refresh that old statute, the government’s lawyers referred to it as “The Hostage Act.” But that moniker was not well-received by Judge Mikva of the U.S. Court of Appeals for the D.C. Circuit. According to Judge Mikva, the government was only using that name as “a sobriquet newly coined for the purposes of the Iranian crisis.”

Thankfully, when the case reached the Supreme Court, the name-calling ended. Writing for the majority, Justice Rehnquist acknowledged Judge Mikva’s criticism while insisting the Justices focused their attention on the statutory wording, “not any shorthand description of it.” In further pushback against the government’s name game, Justice Rehnquist relied on the famous line from Shakespeare’s tale of star-crossed lovers, quoted above.

**SUPREME QUOTES**  
By Evan J. Roth

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_Evan J. Roth_  
After nearly 20 years in Portland as an assistant U.S. attorney, Evan is now an administrative judge for the Merit Systems Protection Board in Denver. He can be reached at evan.j.roth@icloud.com.

_Disclaimer: The views expressed are those of the author and do not necessarily represent the position of the Merit Systems Protection Board or the United States government._
The sailors returning with Odysseus after the Trojan War needed a sturdy boat, supreme discipline, and a little help from their friends to weather the storms and dangers awaiting them. Probably the most dangerous part of the journey was sailing through a narrow strait that was guarded by two monsters. On one side lived Scylla. From her hips grew six, angry, snarling dogs, eager to tear Odysseus's ship, the Argo, to pieces if it came too close. On the other side was the ever-hungry Charybdis, whose whirlpool “sucked into her gullet all ships that ventured within her reach.”

For legal writers, the biggest danger is writer’s block. To arrive at their destinations—a well-researched, articulate memo, brief, or judicial opinion—law students, lawyers, and judges need to navigate the treacherous waters between their own Scylla and Charybdis: procrastination and perfectionism. These two monsters go hand in hand. Writers’ need for perfection leads to delay, dread, and procrastination. Because the goal of perfection is never attainable, writers may feel like giving up altogether, believing that whatever they are able to accomplish will not be good enough because it can never be perfect.

To complete his arduous journey home, Odysseus needed to begin the journey with a sturdy boat, a boat that would withstand the dangers ahead. Writers, too, need a study vehicle for their written work if it is to come to fruition. The materials needed to construct that sturdy vehicle are research, organization, a support system, and time to complete the project. Odysseus reached home, partly because of his sturdy boat and excellent crew, but also because he knew exactly where he was going and how to get there. Similarly, before legal writers set off, they need to know their destination and how to reach it.

Stage 1: Start with an Idea and Think About It

Too often, writers rush into a project without having any idea of what they want to say. They know they have to accomplish a certain goal, like writing a brief to convince a court to rule in their client’s favor, but they do not take the time to think about the raw materials that are available to accomplish that goal. Sometimes, the idea may seem obvious, for example, when a lawyer is arguing that a judgment should be overturned on appeal because of an error in the trial court, but it is rarely that simple. Even if that lawyer is aware of the error on which the appeal will be based, further thought is still required.

Ideas are a form of inspiration. As such, they can come in many different ways and at many different times. I often get ideas early in the morning, before I have even opened my eyes. If I don’t write them down quickly, I forget them as the day goes on. That is why I keep a pad of paper and a pencil close by to capture them as they occur to me. The ideas for this column appeared in the middle of the night. When I found myself writing the column in my head at 2:00 in the morning, I jumped up and wrote down what I was thinking on a pad of paper. By the time I went back to sleep, I had covered five small sheets of paper with ideas that are now appearing in this column.

Stage 2: Research

After getting an idea and thinking about its possibilities, the next step should involve research to determine the strength of the idea and develop it further. Lawyers rarely know everything about a particular area of law without taking some time to update their understanding. Recent cases and developments may trigger insights that will strengthen the arguments to be made in a brief. Although taking the time to research an issue may seem to be slowing down the writing process too much, that is rarely the case. Time spent researching an issue will save time later, during the writing stage. Adequate research helps to ensure that the necessary raw material is available once actual writing has begun, preventing distracting interruptions to the writing process that occur when the need for additional research occurs.

Conducting research has one danger, however. Sometimes writers get lost in the pleasures of researching a topic or use it as an excuse to delay writing. If this happens, research can...
lead to procrastination. Perfectionism may also come into play during the research stage. A writer simply cannot bring herself to stop researching the topic until she has read every single thing ever written about it. She believes her research must be perfectly complete, which, of course, is not possible.

A writer needs to learn when to stop to avoid the dangers of procrastination and perfection during the research stage. That means he must understand when he has read enough, and it is time to move on to the next stage: organization. The best way to tell that a writer's research is sufficient is when he notices that the cases and other authorities he has found are being cited over and over in new authorities. When he stops seeing anything new coming up, it is time to end the research stage. Research is an essential stage, but it can contribute to writer's block if it is not carefully limited.

Stage 3: Organization

Good writing, like good shipbuilding, relies on a strong, underlying structure. The craftsmanship involved in building a seaworthy boat is not unlike the craftsmanship essential to good writing.

Many years ago, I helped build an 18.5-foot strip canoe, under the guidance of Gil Gilpatrick, a Master Maine Guide, who literally wrote the book on strip-canoe-building. We began by building a “strongback,” the spine that holds the stations and stem forms in place. Around a temporary frame, we built the body of the canoe by stapling and gluing strips of plywood in place, which were later covered with fiberglass for waterproofing and strength. Because the underlying structure of the canoe was so strong, it is still seaworthy almost 40 years later.

In legal writing, as in building a canoe, structure-building occurs in multiple steps, each requiring time and attention. Fortunately, the underlying steps required for legal writing can be satisfying and even fun, if the writer views the process as putting together a puzzle rather than undergoing a form of intellectual torture.

If the research stage has been successful, a legal writer has before her many pieces of a puzzle, which, at first, may feel overwhelming. If you have ever put together a 2,000-piece jigsaw puzzle, you know what I am talking about. However, just as is true in putting together a jigsaw puzzle, the process begins with organization. Most people start by sorting the jigsaw-puzzle pieces into different piles. After they set aside the border pieces, they usually group pieces together in some other logical way, such as by color or distinguishing design features. Gradually, the 2,000 pieces begin to take shape. If putting together a jigsaw puzzle actually amounted to torture, a billion-dollar industry would cease to exist. Fortunately, for jigsaw-puzzle enthusiasts, new jigsaw puzzles continue to be available, offering limitless opportunities for experiencing the joy and satisfaction of completing the seemingly impossible task of transforming a pile of random, indecipherable jigsaw-puzzle pieces into a beautiful picture.

The same can be true when turning an intimidatingly large pile of legal research into an effective piece of legal writing. As with the jigsaw puzzle, the first step is organization, figuring out how to arrange the research into piles of materials that seem to belong together. Although jigsaw-puzzle-doers begin the process knowing exactly how their end product will look, legal writers need to be more creative in putting together the pieces of their puzzle. Nevertheless, if they took the time to think about their assignment in the first stage of the process, they should have a pretty good idea about what they want to say, and if their research stage has provided them with good raw materials, the organizational stage can be as fun and even more interesting than putting together a good jigsaw puzzle.

Sometimes, a jigsaw-puzzle-doer discovers that a piece of the puzzle is missing. She cannot complete the puzzle until she finds that piece, which may require some searching and even crawling around on the floor. Similarly, after organizing all the research, a legal writer may discover a missing piece in her analysis, requiring more digging around in cases or treatises. At last, once all pieces have been found, the jigsaw puzzle is complete. The legal brief, however, still needs to be written.
Stage 4: Writing the First Draft

If the first three stages of the writing process have been successful and satisfying, making the transition from organization to actual writing should not be difficult. If a quilter has laid out all the individual pieces of a quilt into a pattern, sewing the quilt together into one piece should be relatively easy, assuming the quilter knows how to sew. The same is true for the legal writer. It should be relatively easy to turn the organized research into a finished piece of legal writing, assuming, of course, the legal writer knows how to write.

This column is not about the mechanics of legal writing. However, everyone knows that good legal writing requires not only a command of legal analysis, but also a command of English grammar, punctuation, and usage. Sometimes, writer’s block may occur, not because someone does not know what he wants to say, but because he is afraid he does not have strong enough writing skills to communicate his ideas.

Although I did not plan to include the following admonition in this column, I have decided that I have no other way to get beyond this moment of potentially paralyzing perfectionism. Even if you truly believe you do not write well enough, just do it. Once you have something down on paper, you can turn to your support system for help in refining your writing and making it good enough, remembering that no writing is ever perfect. It can always be improved, but at some point, it has to be completed.

Stage 5: Confer with a Trusted Reader

Good writing rarely occurs in isolation. Every writer needs a support system and especially a trusted reader. My trusted reader is my spouse and partner, Susan Sanders. She has heard me read aloud every Res Ipsa Loquitur column I have written and provided me with valuable feedback every time. She does not read my columns on paper because I don’t need her help with punctuation and grammar. Her job is to tell me whether my writing is interesting and makes sense.

Others may need a reader to help with writing mechanics and overall impressions even if his reader is not a lawyer who can help with legal analysis. A good reader should always do what Susan does. She should tell you whether the writing is interesting and makes sense.

Choosing a trusted reader is not as easy as it sounds. Although it can be reassuring to have a reader who likes or even loves you, she will not be helpful if she goes too easy on you. Tact and diplomacy are valuable assets, but the essential traits a trusted reader must possess are clarity and honesty. Nothing is accomplished in this stage if a reader simply soothes the writer’s ego. The reader must give clear, honest feedback to be helpful.

Some writers may experience writer’s block at the trusted-reader stage. Those writers must simply take a deep breath and hand over their writing to their readers. If they have chosen their readers carefully and trust them to give clear, honest feedback, all will be well. A writer can assess the feedback and incorporate it if it is useful. In the end, the collaboration between a writer and her trusted reader will ensure a better end product, even if the reader only spots grammatical errors and typos.

Stage 6: Completing the Final Product and Submitting it on Time

This final stage can be the hardest for some people. Deciding when a piece of writing is good enough and ready to be submitted, can be terrifying. Most of us remember a time when we have flipped open a brief, just after it has been submitted, and a mistake leaps out at us. Although we had proofread it countless times, we missed that error, and we want to run to the courthouse and take back the brief. Unfortunately, this will probably continue to occur, even (or maybe especially) in this era of spellcheck.

Writer’s block at this stage is the product of perfectionism. It may also be the product of procrastination if the writer has not, in fact, saved enough time for proper proofreading. Being aware of the passage of time as a deadline approaches is essential to creating an excellent final product.

Adequate time is needed for every stage of the process. The writer needs time for thought and reflection in the thinking stage; time to conduct adequate research; and time to organize, write, and share the brief with a trusted reader. Finally, time is needed at the end for careful editing, proofreading, and polishing.

Some people claim that they cannot write unless they are pushing up against a deadline, that they cannot summon the necessary adrenaline rush unless they are in a little bit of a panic. Although I am not this way myself and can’t even begin to understand this approach to deadlines, I cannot agree that waiting until close to the end results in better writing. Especially if writer’s block is a concern, waiting until it is almost too late can be dangerous. To these people, I offer this advice: Create a false deadline about two weeks before the actual deadline. Convince yourself that the false deadline is the real deadline and force yourself to complete your work by that deadline. Then, even if an emergency should occur, you will probably be able to meet the actual deadline.

Stage 7: Celebrate your Achievement

Celebration is an important component of writing. I believe in mini-celebrations throughout the writing process, like treating yourself to something after finishing each stage of the process, reporting your progress to your trusted reader, and enjoying the resultant praise.

Writing is hard work. Successfully completing a challeng-
ing writing project generates a feeling of enormous satisfaction. Such an achievement deserves to be celebrated. Think of something worthy and enjoy your celebration with abandon, remembering that you have succeeded in overcoming significant obstacles along the way. You have met the high expectations you set for yourself without falling into the trap of perfectionism. You have triumphed over procrastination, completed your project, and submitted it on time. You have vanquished the paralyzing fear at the heart of writer’s block. Few things in life are more deserving of celebration than that.

1 Ingri & Edgar Parin D’Aulaire, Book of Greek Myths 173 (1962).
2 This column is dedicated to my good friend and Wellesley classmate, Natalie Gaull, Esq., who helped me to understand the relationship of perfectionism and procrastination to writer’s block.
3 See generally Gil Gilpatrick, Building a Strip Canoe (2d ed., 2010).
4 After completing my first draft, I sent it to Marilyn Hagstrum Sharpe, a trusted friend and Wellesley classmate. I am grateful to Marilyn for noticing that I had included Stage 6 twice and omitted Stage 7. Ironically, as she pointed out, seven is the biblical number of perfection and completion, concepts that are central to this column.

NANCY A. WANDERER is Legal Writing Professor Emerita at the University of Maine School of Law. For decades, she oversaw the updating of Uniform Maine Citations, and her articles on proper citation, email-writing, and judicial opinion-writing have appeared in the Maine Bar Journal, the Maine Law Review, and the National Association of State Judicial Educators News Quarterly. Off and Running: A Practical Guide to Legal Research, Analysis, and Writing, co-authored with Prof. Angela C. Arey, is being used as a textbook in first-year legal writing classes. Nancy may be reached at wanderer@maine.edu.

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Feb. 8-15  CLE at Sea
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TELEPHONE SEMINARS

Dec. 13  Ethics & Artificial Intelligence: What Lawyers Should Know | 1.0 ethics

Dec. 16  Drafting Legal Holds in Civil Litigation | 1.0

Dec. 17  Letters of Intent in Real Estate Transactions

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Dec. 26  Ethics Issues in Contract Drafting | 1.0 ethics

Dec. 27  Ethics of Shared Law Offices, Working Remotely & Virtual Offices | 1.0 ethics

Dec. 30  2019 Ethics Update: Part I | 1.0 ethics
Dec. 31  2019 Ethics Update: Part II | 1.0 ethics

VIDEO REPLAYS

Dec. 6  Identification & Prevention of Harassment, Discrimination, and Bullying in the Legal Profession Augusta | 3.0, including 1.0 H&D and 1.0 ethics

WEBCASTS

Dec. 12  Cannabis Law Update: Recreational Marijuana Regulations and Law, Freeport | 3.0

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Dec. 10-11  Bridging the Gap, Freeport
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Jan. 30-31  Annual Bar Conference, Portland
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