Maine State Bar Association

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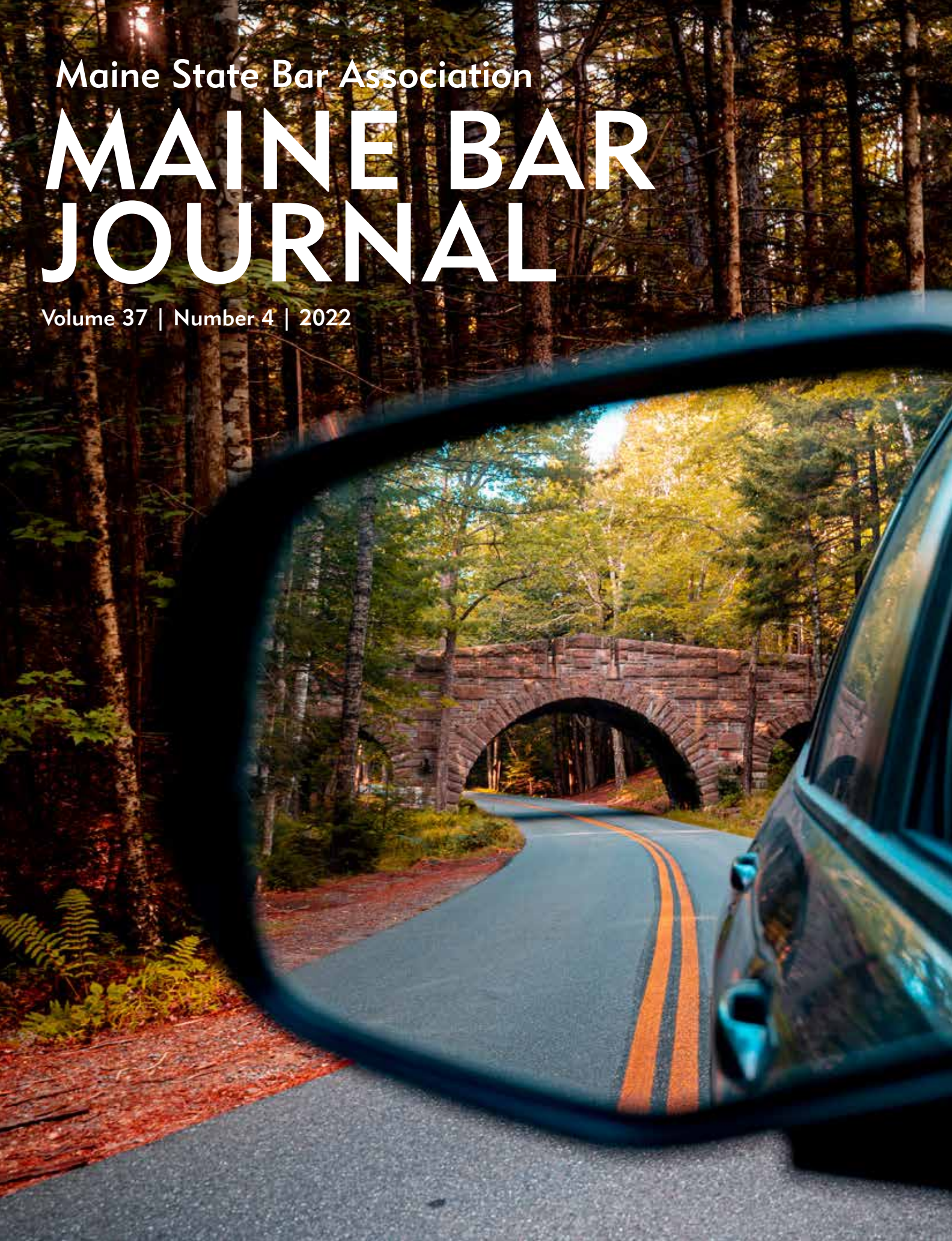

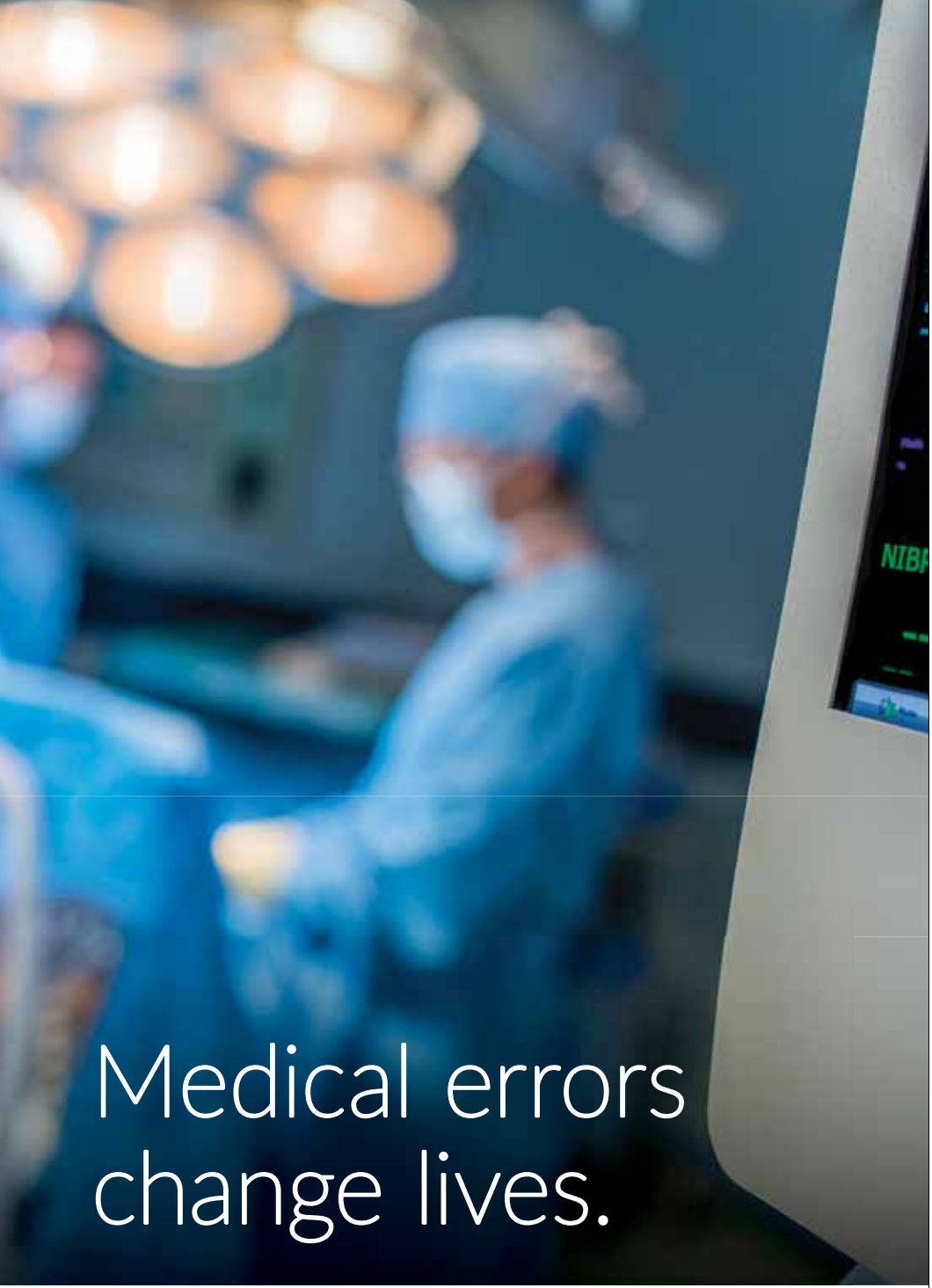

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Accomplishments & Opportunities: My Year as Bar President

When you read this article, I will be winding down my term as President of the Maine State Bar Association. It has been a tremendous pleasure to preside over this organization for the last year, but I will also be happy to hand over the reins to my trusted friend and colleague Stacy Stitham on Jan. 1, 2023. The highlight of my year was holding our first in-person event since 2020 in Bar Harbor in June. I can confidently report that the MSBA is in excellent shape financially and organizationally and is well poised to remain an important force in improving the practice of law and well-being of lawyers for the near future. As you will be hearing from my successors over the next few years, a focus on attorney wellness and happiness will be a major theme of the work of the MSBA going forward.

Civil Process Stakeholders Working Group.
On Oct. 13, 2022, Chief Justice Valerie Stanfill of the Maine Supreme Judicial Court (SJC) ordered the creation of a Civil Process Stakeholders Working Group. The Working Group will be initially co-chaired by myself and Susan Faunce, who is currently the President of the Maine Trial Lawyer Association (and who also serves on the MSBA's Board of Governors). The rest of the Executive Committee will initially include Liz Stout (designee of the Justice Action Group), Laura Perlman (Manager of the Civil Process and Foreclosure Division Program), and Eric Wycoff. Associate Justice Andrew Horton serves as the SJC's liaison to the Working Group.

The MSBA has been working on this initiative for a long time and we are extremely excited to see it come to fruition. I would like to personally thank Chief Justice Stanfill for being open to creating this mechanism to hear directly from Maine attorneys regarding how to improve our court system. I would also like to thank those MSBA members who have contacted me over the last year with concerns about our courts, and who were the catalyst for the creation of this Working Group.

According to the Charter, the Working Group will "work with the Maine Judicial Branch to assess and recommend to the Supreme Judicial Court policies, processes, rules, technology, legislation, and other actions, taking into account the individual features of particular kinds of cases, for the purpose of the just, efficient, and relatively inexpensive resolution of civil cases or otherwise for the benefit of civil cases in the trial courts." Practically, I see this group as a sounding board for the Judicial Branch to hear from us and other stakeholders on how to make our court system work better for litigants and lawyers, and more particularly how to manage the current backlog of cases in the court system.

The Executive Committee is tasked with recommending to the SJC 10 additional members to the Working Group. Susan and I envision these additional members to include a family law attorney and the Judicial Branch's Family Process Manager, a District Court Judge, a Superior Court Judge, a representative from the Attorney General's office, a municipal or administrative law attorney, an attorney from the civil legal aid service providers, such as Pine Tree Legal, Legal Services of the Elderly, or the Cumberland Legal Aid Clinic, as well as attorneys with broad-based civil practices. The full Working Group will be formed by the second week of November and is required to report its first round of recommendations to the SJC by March 1, 2023.



I can confidently report that the MSBA is in excellent shape financially and organizationally and is well poised to remain an important force in improving the practice of law and well-being of lawyers for the near future.

I am certain that many of you have excellent ideas about how to make our civil court system work better and more efficiently. Please do not hesitate to contact me with your suggestions for how to make this system work better. I am happy to receive your suggestions by email or by a phone call at any time. I perceive this Working Group as a tremendous opportunity and do not want it to go to waste.

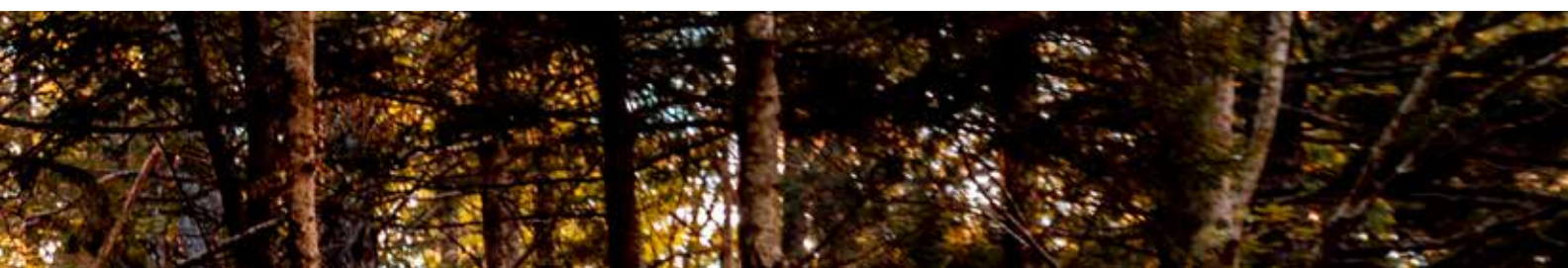
Decisis.
This past September, the MSBA switched its legal research platform, which is complimentary with your MSBA membership, from Fastcase to Decisis. This change follows two of years of research and testing and has been one the principal objectives of my time in the leadership of the MSBA. I think that Decisis is extremely easy to use, has an excellent citator, and will be a tremendous benefit for MSBA members. I also think that Decisis can be a source of savings for lawyers and law firms that rely on private legal research tools. When you use Decisis in connection with your MSBA membership, you will quickly discover that you can rely on Decisis to deliver the same quality of research as other private, and expensive, legal research platforms. So please give Decisis a try and consider using it as your full-time legal research tool. The Decisis service also comes with access to its legal research assistants, who are available by phone or chat almost any time, which is a huge upgrade over the legal research platforms the MSBA has used in the in the past. If you are not sure how to access the Decisis tool on our website, please contact us and we can show you how to access your account.

Maine Commission on Indigent Legal Services.
We are currently working with Justin Andrus, Executive Director of the Maine Commission of Indigent Legal Services, to encourage attorneys to take MCILS cases to ease the backlog of criminal cases in the court system. On Nov. 9, Justin and Chief Justice Stanfill appeared on the MSBA's monthly Bar Talk to announce an initiative which would allow seasoned Maine litigators to take MCILS cases after taking a one-day training from MCILS, that will initially be offered on Nov. 30 at the MCILS office in Augusta. To qualify for this training, an attorney must have a minimum of three years of litigation experience in Maine courts. If you meet this eligibility requirement, please sign up for the training and agree to take on some cases to help MCILS manage its caseload.

However, this stopgap measure from the MCILS is not enough. We are going to be asking you repeatedly over the next legislative session to demand that MCILS be adequately funded. Indigent criminal defendants do not have a political constituency to advocate for their constitutional rights and so the executive and legislative branch will not take their rights seriously unless we attorneys make it clear that it is our priority. Please support the MSBA in this effort to get MCILS the funding it needs to do its job under the state and federal constitution by contacting your local legislator and the Governor.

Winter Bar Conference.
The WBC will be held on Jan. 25-27, 2023, at the Westin Portland Harborview and will include MSBA section meetings, an in-person social networking event on Thursday evening at the Top of the East Lounge, and a variety of CLEs. This is our first in-person winter meeting in years, and we are looking forward to seeing those of you who did not attend our summer meeting this year in Bar Harbor.

As always, I am happy to hear your compliments and complaints, so please do not hesitate to contact me. See you soon and take care.





ANGELA P. ARMSTRONG is the Maine State Bar Association's executive director. She can be reached at aarmstrong@mainebar.org.

Bar Association Ushers in New Fiscal Year

With the turn of the seasons and shorter, cooler days upon us, this is also the time of year when staff are busy processing membership dues renewals. I've been reflecting on the past year at the MSBA and looking forward to what's in store next. Staff and leadership of the MSBA have been hard at work for you, providing ample opportunities to earn CLE credits, offering fun, in-person networking opportunities, updating our menu of membership benefits, and planning for the future of the MSBA.

Continuing Legal Education

Whether you are looking for a CLE in a substantive area of law, an ethics or H&D program, or sessions about professional development or attorney wellness, the MSBA can help. We offer programs to support you in your practice of law as well as meet your annual legal education requirements. And these programs are available in a wide variety of formats: in-person, Zoom, webinar, audio webcast, webinar replays, and self-study options. Visit our CLE calendar today to register for the programs that fit your needs. Upcoming CLEs you may find helpful include:

- What Lindsay Lohan Teaches Lawyers About Substance Abuse on Nov. 29 (live webinar)
- Integrating Anti-Bias Practices on Dec 14 (live webinar)
- Time Management & Digital Detox for the Legal Profession on Jan 13. (live webinar)

Networking Opportunities

The MSBA also offers many opportunities for you to connect with your colleagues throughout Maine. These networking events allow time to catch up with old friends, meet new acquaintances, interact with attorneys in your areas of practice, build personal and professional connections, seek advice, and learn new skills.

Were you able to join us at the Summer Bar Conference in Bar Harbor in June? If you did, you know what a terrific event it was—our first in-person membership event since the pandemic began. We enjoyed a sunset picnic cruise on picturesque Frenchman's Bay, attended quality CLE programming presented by Maine attorneys, honored our friends and colleagues whom we've lost since the start of the pandemic, and celebrated attorneys who have given so much of themselves to Maine's legal community. In 2023, the Winter Bar Conference will be held on January 25-27 at the Westin in Portland and the Summer Bar Conference will be on June 26-28 at the Harborside in Bar Harbor. I hope you will consider joining us for these upcoming events, perfect for connecting with colleagues and members of Maine's legal community.

Are you a golfer? We just held the inaugural Maine Professionals "Hit the Links" Open at the Augusta Country Club. This was a tournament co-sponsored by the MSBA, the Maine Society of CPAs, and the Maine Medical Association. What a beautiful day we had! It was a great experience to have Maine professionals come together outside of the office setting, and just enjoy the stunning fall day with fun and light-hearted competition. Congratulations to the following winners of the day:

- 1st Place Gross: Matt Early, Matt White, Robert Kearns, and Marc Powers
- 2nd Place Gross: Quinn Perkson, Jake Black, Ryan King, and Matthew Dube
- 1st Place Net: Brett Baber, Lee Chick, John McNeal, and Jim O'Connell
- 2nd Place Net: Gabriel Marchese, Matt Brunette, Liam Maker, and Anthony Diphilippo
- Longest Drive (Men): Liam Maker
- Longest Drive (Women): Chloe Gore
- Closest to the Pin (Men): Lee Walker
- Closest to the Pin (Women): Linda Morin-Pasco

And don't forget about all the other networking opportunities for MSBA members: New Lawyers Section Happy Hours, Leadership Academy, New Lawyers Section *Pro Bono* Fair, Family Law Section Award Dinner, Elder Law Section Unprogram, Women's Law Section Spring and Fall Programs, MEBarConnect, and other MSBA Section meetings and events. Don't hesitate to reach out to me with your networking ideas—we are always looking for ways to bring Maine lawyers together!

Membership Benefits

Your membership in the MSBA affords you access to benefits you would not otherwise enjoy. Unfortunately, I believe many of our members do not know about or take advantage of all the benefits the MSBA has to offer, despite our efforts to keep you informed. We are all so busy these days—it is hard to cut through all the noise. And let's face it, you typically don't pay attention to something until it is something you need or want. However, many of the benefits you receive from the MSBA can help you simplify your practice and in turn, hopefully, cut out some of that noise. Here are just a few of the many benefits you receive as an MSBA member:

- We are your one stop shop for discounted CLE opportunities, and we ensure your credits get reported to the Board of Overseers.
- We just launched Decisis, a next-generation legal research platform included as part of your MSBA membership, offering a streamlined, easy-to-use interface, a full library of primary caselaw, and a reliable citator.
- Protect yourself and your practice with NortonLifeLock, offering discounted rates to MSBA members. Keep your mind at ease by knowing that you have identity theft protection, device security, online privacy, and parental controls.
- ABA Retirement Funds has been providing affordable 401(k) plans exclusively to the legal community for 50 years. The program's bundled approach allows your firm to keep its focus on the success of the practice.
- Set yourself up to accept credit card payments securely and correctly. LawPay takes the guesswork out of electronic payments, and it meets the requirements for the ABA trust account guidelines as well as the Attorney's Professional Codes of Conduct.
- Take the guesswork out of malpractice insurance. ALPS, the nation's largest direct writer of lawyers' malpractice insurance, specializes in solo practitioner and small firm insurance.
- MEBarConnect is the MSBA's exclusive online community platform where you can connect, share ideas, discuss challenges, post questions, and search for other members.
- Need to hire someone for your growing practice, or looking to change jobs? Check out the MSBA Career Center where you can post your resume, search job openings, or review resumes from those looking for new opportunities.

Looking Ahead

In September, the Board of Governors and senior MSBA staff met in Rangeley for our biennial strategic planning retreat. Because we've been holding board meetings by Zoom since the start of the pandemic, many of our Governors had never met each other in person. It was a great opportunity to build our board and relationships, in addition to planning for the future of the MSBA. The retreat was facilitated by Chris Newbold, vice president of ALPS Lawyers' Malpractice Insurance. Thanks to the MSBA's relationship with ALPS, we've had the opportunity to conduct our strategic planning with Chris for the past 10 years.

By the end of the two-day retreat, we had identified our goals for the next two years. Our primary efforts will be focused on membership value, access to justice, DEI (diversity, equity & inclusion), attorney wellness, and rural practice needs. Over the next 24 months, we anticipate making advances in the following areas:

- member needs survey
- efforts to increase funding for indigent legal services
- efforts to increase rate of pay for those attorneys providing indigent legal services
- opportunities for DEI training and CLEs
- the formation of partnerships with other Maine legal entities
- revitalization of MSBA sections
- attorney wellness survey
- new membership categories

As you can see, there is a lot going on at the MSBA, with even more to come. I hope that you are taking advantage of all the resources, services, and benefits offered through your membership. Perhaps by reading this column, you learned of a service or benefit that you receive as part of your MSBA membership that you didn't know about before. As always, if you have ideas for new services or benefits or questions about the Maine State Bar Association, please contact me by phone at (207) 622-7523 or by email (aarmstrong@mainebar.org). Thank you!





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The Small Business Reorganization Act of 2019: A Powerful Lifeline for Financially Distressed Small Businesses

Introduction

Anyone passing by the Maine Mall in South Portland during the past four or five years has played witness to some of the largest bankruptcy filings in the country, with giant retailers like JC Penney, Sears, Forever 21, Payless, Toys 'R' Us, and Sports Authority all going through—or attempting to go through—their own Chapter 11 bankruptcy cases. These bankruptcies are highly publicized, and it is easy to see their impact in everyday life. However, they represent only a small percentage of business bankruptcies nationwide. Yet, until early 2020, multi-billion-dollar companies and local small businesses attempting to reorganize were required to utilize largely identical provisions within Chapter 11 of the Bankruptcy Code.

Recognizing concerns about Chapter 11 for small businesses and their owners, Congress passed the Small Business Reorganization Act (SBRA) in late 2019, with an effective date of February 19, 2020. Through the SBRA, Congress created a new subchapter (Subchapter V) of Chapter 11 of the Bankruptcy Code for certain eligible small business debtors. The SBRA was enacted to help eligible small businesses and individuals restructure through a faster, more affordable, and more effective process than a traditional Chapter 11 bankruptcy case historically offered to these debtors.[1]

As the SBRA turns toward the end of its third year, this article reflects on the early years of Subchapter V, its origins, statistics on SBRA cases nationally and in Maine, and some important basics about how the law works. Thus far, the SBRA largely is functioning as intended, and, as a result, numerous debtors have reorganized successfully in SBRA cases, including many that likely would have closed and liquidated but for the SBRA. Accordingly, it is vital for anyone working with small businesses and their owners in Maine to remain aware of the SBRA as an effective tool in times of financial distress.

A. The SBRA: A Strong Start Both Locally and Nationally.

1. Chapter 11's Historic Challenges for Small Businesses and Their Owners.

Scholars and practitioners have long recognized the high costs and daunting complexities of traditional Chapter 11 cases. Together, these and other factors have made reorganizing and exiting chapter 11 too difficult or too expensive for many businesses and individuals.[2] Although Chapter 11 of the Bankruptcy Code is highly effective in preserving the going-concern value of businesses, saving jobs, and maximizing creditor recoveries, those tools have not always worked quite as well for—and may be inaccessible to—small businesses and their owners.[3]

The SBRA took effect right as the COVID-19 pandemic began upending the global economy and everyday life. At the same time, Maine relies heavily on entrepreneurs and small businesses to provide critical services, goods, and employment opportunities, with small businesses accounting for more than half of Maine's workforce.[4] The SBRA, therefore, took effect at an opportune time to offer a new solution to small businesses (and eligible individuals with sufficient business-related debts) that are experiencing financial distress but are not ready to—and should not have to—close their doors forever.

Although the legislative history is limited, the Report from the House Committee on the Judiciary (Report No. 116-171) summarized the need for the SBRA as follows:

> [S]mall business chapter 11 cases continue to encounter difficulty in successfully reorganizing.… As the bill's sponsor, Representative Ben Cline (R-VA), explained at the hearing held by the Subcommittee on Antitrust, Commercial, and Administrative Law on June 25, 2019 at which H.R. 3311 was considered, the legislation allows these debtors "to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business" which "not only benefits the owners, but employees, suppliers, customers, and others who rely on that business."

As recognized in the House Report, the ability for these businesses to reorganize is critical.

Small businesses, however, have been far more likely to close than reorganize, as seen early in the COVID-19 pandemic, with one report finding that more than 80,000 small businesses permanently shuttered from March 1 to July 25, 2020, alone.[5] Even small businesses that took a shot at reorganizing in Chapter 11 faced long odds. A 2018 study in the American Bankruptcy Institute Journal revealed that of 76,845 Chapter 11 cases filed between 2008-2017, only about a quarter of debtors with assets of less than $10 million (*i.e.*, most of the SBRA's target demographic) were able to confirm an exit plan.[6] This contrasts with debtors with assets above $10 million, which had an approximately 40 percent chance of confirming a plan, and debtors with assets above $100 million, which had an approximately 60 percent chance of confirming a plan.[7] As a result, the "fresh start" goal underpinning the bankruptcy system, which courts have sought to promote for more than a century, remained elusive to important sectors of the American economy.[8] The SBRA is changing that.

2. SBRA Statistics in Maine and What They Say About the SBRA So Far.

More than 4,000 businesses or individuals have filed cases under the SBRA across the country, with the number of monthly filings reaching its peak in March 2021 with 194 filings that month.[9] Among the states within the First Circuit Court of Appeals, more than 130 SBRA cases have been filed, with 24 of those cases filed in Maine. [10] Of the 24 Maine cases, 16 were filed in 2020, six in 2021, and two in 2022 so far.[11] A closer look at the Maine SBRA cases reveals several positive signs about the statute's early success.[12]

Successful Outcomes. Of the 24 SBRA cases filed in Maine, 20 confirmed plans of reorganization, three were converted to another chapter or dismissed for grounds unrelated to confirmation, and one remains in progress. That is a plan confirmation rate of approximately 87 percent for filed, completed cases.

Early Focus on Plan Confirmation. Debtors in Maine are filing their plans an average of 83 days into a case, with the earliest plan filed 28 days after the petition date.[13]

Faster Cases. In cases with confirmed plans, the average time from the start of the case until confirmation of a plan is apparently six months.[14]

More Creditor Consent. Of the 20 cases with confirmed plans, all those plans appear to have been confirmed on a consensual basis—that is, without a class of creditors voting against the plan (whether because no objections were filed or because objections were settled during the confirmation process).

Diverse Mix of Debtors. Of the 24 SBRA case filed in Maine, 13 were filed by individuals and 11 were filed by businesses. SBRA debtors in Maine come from a variety of different industries, ranging from logging, to transportation, to retail, to real estate development projects.

Altogether, early Maine data for SBRA cases are consistent with the authors' experience and national statistics. The SBRA is highly effective for debtors. Subchapter V cases move faster than traditional Chapter 11 cases, with proposed plans filed earlier and cases wrapping up on an expedited schedule. Faster cases and streamlined procedures also make Chapter 11 less costly for Subchapter V debtors. And, due in large part to the modified confirmation standards and the skilled panel of Subchapter V trustees in Maine, these cases are more likely to end with a consensual, confirmed plan of reorganization in a matter of months.

3. Early National Statistics Comport with the Success in Maine.

Preliminary SBRA statistics nationally also reflect its early success, consistent with the trend in Maine. According to one survey of the 465 earliest SBRA cases, more than 50 percent had confirmed a plan within six months of filing for bankruptcy, with most of the rest still working through the confirmation process.[15] It is not surprising, then, that a significant majority of eligible debtors are opting into Subchapter V rather than proceeding as traditional Chapter 11 debtors, which supports the growing recognition of the SBRA's benefits among practitioners.[16]

B. SBRA Nuts and Bolts: How It Works and What You Should Know.

Like every area of legal practice, bankruptcy law in general, and the SBRA in particular, contains numerous statutes, rules, and other intricacies that require the expertise and experience of skilled advisors. However, no matter the practice area, it is possible—and, perhaps, all too likely—that clients, neighbors, and others will find themselves in situations of financial distress.

Scholars and practitioners have long recognized the high costs and daunting complexities of traditional Chapter 11 cases. Together, these and other factors have made reorganizing and exiting chapter 11 too difficult or too expensive for many businesses and individuals.

In many ways, a debtor's SBRA case looks much like a typical Chapter 11 case, in which a debtor obtains a reprieve from creditor collections, agrees to a plan to repay creditors, and receives a discharge of debts. That is a good thing. The SBRA, however, features several changes to the Bankruptcy Code that make the process more accessible—and more effective—for debtors, while still affording them the powerful reorganizing tools that larger businesses have long enjoyed in Chapter 11. In this time of continued economic uncertainty, here are four features of the SBRA that highlight how it works and what financially distressed small businesses and individuals should know:

1. Eligibility and the Debt Ceiling: New Statute Expands Access.

Consistent with its purpose, not everyone is able to proceed under the SBRA. To be eligible, the debtor (which can be a business or an individual): (i) must be "engaged in commercial or business activities"; (ii) must have "aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing … in an amount not more than $7,500,000" (including debts of affiliates but excluding debts owed to insiders); and (iii) not less than 50% of those non-insider debts must arise "from the commercial or business activities of the debtor."[17] (But, a debtor is not eligible for the SBRA if its "primary activity is the business of owning single asset real estate.").[18]

Although the debt ceiling is $7.5 million today, that was not always the case. Originally set at $2,725,625, in March 2020, the "Coronavirus Aid, Relief, and Economic Security Act"[19] temporarily increased the debt limit to $7.5 million. Congress extended the $7.5 million debt limit through the "COVID-19 Bankruptcy Relief Extension Act of 2021,"[20] but the higher threshold returned to $2,725,625 on March 27, 2022, when Congress failed to pass a further extension in time. However, on June 21, 2022, President Biden signed the "Bankruptcy Threshold Adjustment and Technical Corrections Act,"[21] which amended section 1182(1)(A) of the Bankruptcy Code to return the debt ceiling to $7.5 million, effective retroactively.[22] That increase, however, will sunset again two years after enactment, on June 21, 2024, unless Congress takes further action in the meantime.

Importantly, as to other eligibility criteria, most courts have taken a broad approach to expand access to the SBRA. That is particularly true as to the "engaged in commercial or business activities" requirement, where courts have determined that far less than full business operations are required and, instead, winding-down operations, settling claims, and liquidating assets are sufficient business activities for SBRA eligibility.[23]

2. No Committee and No Operating Trustee, but a Valuable Subchapter V Trustee.

Like in a traditional Chapter 11 case, debtors opting into Subchapter V retain control over their assets, business operations, and case strategy as the so-called "debtor-in-possession."[24] But unlike a traditional Chapter 11 case, a committee of creditors is not appointed unless ordered by the court for cause, which would be rare.[25] The absence of a creditors' committee decreases the cost of a Subchapter V case, because the debtor is required to pay for the committee's professionals.

Another key component of the SBRA is the addition of the Subchapter V trustee, who is a lawyer or other professional appointed by the United States Trustee.[26] The Subchapter V trustee does not control the debtor's assets, replace existing management, or represent any party in the case. Rather, the Subchapter V trustee is a neutral, non-operating trustee appointed to assess the viability of the reorganization and to facilitate the development of a consensual plan, often acting as a mediator among the debtor and creditors as a case proceeds.[27]

3. Faster Cases, New Deadlines, and Streamlined Exit Procedures.

The SBRA also modifies Chapter 11 to speed up and streamline the plan confirmation process and to reduce restructuring costs by moving cases from start to finish more quickly. For instance, the debtor must file a proposed exit plan within 90 days of the start of the case, with a status conference on exit issues to occur within 60 days of the filing.[28] This not only places a running clock on the debtor, but also requires the debtor and creditors to focus on the exit strategy earlier than in a traditional chapter 11 case, when it is not uncommon for a debtor to take a year or more before filing a plan.

4. More Powerful Exit Plans and Easier Confirmation.

In one of the biggest substantive changes from a traditional Chapter 11 case, the SBRA modifies the requirements for a debtor to confirm a plan of reorganization, particularly in contested confirmation situations. If a creditor objects to approval of a debtor's plan, the debtor and its owner can retain the assets and equity as long as the plan does not "discriminate un-

fairly" and is "fair and equitable" to the dissenting creditors.[29] To meet that requirement, if the other statutory standards are met, the debtor can confirm a contested plan—and, ultimately, receive a discharge of its liabilities—as long as it proposes to contribute its projected net disposable income for three to five years to pay creditors, whereas in a traditional Chapter 11 case, the debtor may be required to pay all creditors in full to preserve equity.[30] This change can result in needing less money to preserve equity and achieve significant debt savings through Subchapter V, freeing up future cash to fund operations, invest in capital expenditures, and otherwise put revenue back into the business (or other ventures) post-bankruptcy.

Conclusion: Takeaways as Year Three Wraps Up.

By all indications, the SBRA is off to a strong start. At the same time, it is vital for Congress to permanently extend (and even raise) the $7.5 million debt ceiling beyond June 2024 to ensure that businesses and individuals will benefit from the SBRA. And although bankruptcy filings remain below historic levels, according to one 2022 survey by Reuters, U.S. small business confidence fell to an 11-month low in early 2022 due to worker shortages and rising labor and material costs.[31] There is no doubt that a need exists for the SBRA, and there is good reason for optimism that its early success will continue into the future as practitioners further refine their SBRA practices and case law develops.

ENDNOTES

1 *See, e.g.*, *In re Parking Mgmt., Inc.*, 620 B.R. 544, 547 (Bankr. D. Md. 2020) (Subchapter V "offers small business debtors a streamlined Chapter 11 procedure that is intended to be less costly and time-consuming than a traditional case"); H.R. REP. No. 116-171, at 1 (2019), https://www.congress.gov/congressional-report/116th-congress/house-report/171 (Subchapter V is meant to be a streamlined "process by which small business debtors reorganize and rehabilitate their financial affairs").

2 American Bankr. Inst. Comm'n to Study the Reform of Chapter 11, 2012-2014 Final Rep. and Recommendations (2014), 275-77, http://commission.abi.org/full-report (describing view that traditional chapter 11 process is now too slow and too costly for small and medium-sized businesses to effectively make use of it).

3 *Hearing on Oversight of Bankruptcy Law & Legislative Proposals Before the Subcomm. On Antitrust, Com. and Admin. L. of the H. Comm. On the Judiciary*, 116th Cong. 3 (2019), https://docs.house.gov/meetings/JU/JU05/20190625/109657/HHRG-116-JU05-Wstate-KeachR-20190625.pdf (statement of Robert J. Keach, Bernstein Shur, Am. Bankr. Inst. Past President and Co-Chair, Comm'n to Study the Reform of Ch. 11).

4 United States Small Business Administration, 2019 Small Business Profile, 81 (2019), https://advocacy.sba.gov/2019/04/24/2019-small-business-profiles-for-the-states-and-territories/ (Maine, 2019 hyperlink).

5 Madeline Ngo, *Small Businesses Are Dying by the Thousands – and No One is Tracking the Carnage*, Bloomberg (Aug. 11, 2020), https://www.bloomberg.com/news/articles/2020-08-11/small-firms-die-quietly-leaving-thousands-of-failures-uncounted.

6 Ed Flynn, *Chapter 11 is for Individuals and Small Business?*, Am. Bankr. Inst. J., Dec. 2018, https://www.abi.org/abi-journal/chapter-11-is-for-individuals-and-small-business.

7 *Id.*

8 *See, e.g.*, *Traer v. Clews*, 115 U.S. 528, 541 (1885) ("The policy of the bankrupt act was, after taking from the bankrupt all his property not exempt by law, to discharge him from his debts and liabilities, and enable him to take a fresh start."); *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 563 (1994) (describing the "fresh start" for debtors as "at the core of federal bankruptcy law").

9 Data as of August 12, 2022. Am. Bankr. Inst., *SBRA Resources* (Feb. 23, 2022), https://www.abi.org/sbra (navigate to "Bankruptcy Statistics" subheading, and follow hyperlink "For more detail and further analysis on Subchapter V cases" to access full data on Subchapter V cases).

10 The authors' analysis does not include one case originally filed under the SBRA but that was converted to a traditional Chapter 11 case because the debtor was ineligible for the SBRA.

11 *Id.*

12 Data is derived from an analysis by the authors of publicly available dockets on PACER. For full disclosure, Mr. Prescott has represented the debtors in five Subchapter V cases filed in Maine, and he has represented creditors in several others.

13 This average excludes one case that converted to the SBRA because it was pending for months before the SBRA took effect. A plan was filed 224 days after the petition date in this case, and only 88 days after the case was converted to subchapter V.

14 Again, this average excludes one case that converted into the SBRA after the SBRA took effect. A plan was confirmed after 304 days in that case.

15 J. Michelle M. Harner & Kimberly Goodwin-Maigetter, *Subchapter V Cases by the Numbers*, Am. Bankr. Inst. J., Oct. 12, 2021, https://www.abi.org/abi-journal/subchapter-v-cases-by-the-numbers.

16 Press Release, H. Comm. On the Judiciary, COVID-19 Bankruptcy Relief Extension Act Signed into Law (March 29, 2021), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4497.

17 11 U.S.C. § 1182(1)(A).

18 *Id.*; *see also*, Adam R. Prescott & Kyle D. Smith, *Coverage Gap: Rethinking SBRA's Exclusion of SARE Affiliates*, Am. Bankr. Inst. J., Oct. 20, 2021, https://www.abi.org/abi-journal/coverage-gap-rethinking-sbra's-exclusion-of-sare-

affiliates.
19 Public Law No.: 116-136.
20 Public Law No.: 117-5.
21 Public Law No.: 117-151.
22 Public Law No.: 117-151.
23 *See, e.g.*, *In re Offer Space, LLC*, No. 20-27480, 2021 WL 1582625 (Bankr. D. Utah Apr. 22, 2021) (debtor was eligible by having active bank accounts; having accounts receivable; analyzing and exploring counterclaims in a lawsuit; and winding down its business); *In re Ikalowych*, No. BR 20-17547, 2021 WL 1433241 at *275-76 (Bankr. D. Colo. Apr. 15, 2021) ("engaged in commercial or business activities" includes "any private sector actions related to buying, selling, financing or using goods, property or services for the purpose of earning income[.]").
24 11 U.S.C. §§ 1107, 1182(2).
25 *Id.* §§ 1102(a)(3), 1181(b). The creditors' committee is typically composed of a debtor's largest unsecured creditors.
26 *Id.* § 1183.
27 *Id.*; *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 346 n. 81 (Bankr. S.D. Fla. 2020) (Subchapter V trustee serves "as a *de facto* mediator between the debtor and its creditors").
28 11 U.S.C. § 1189(b).
29 *Id.* § 1191(b).
30 *Compare id.* § 1129(b)(2)(B)(ii) (mandating that a dissenting class of unsecured creditors must be paid in full before a junior class of claimants may receive or retain property), *with id.* § 1191(b), (c) (providing that a Subchapter V plan that proposes to pay three to five years of projected disposable income is "fair and equitable").
31 *U.S. small business sentiment drops to 11-month low*, Reuters (Feb. 8, 2022, 6:10 AM), https://www.reuters.com/business/us-small-business-sentiment-drops-11-month-low-nfib-2022-02-08/.

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Since 1998, MARK BASSINGTHWAIGHTE, ESQ. has been a Risk Manager with ALPS, an attorney's professional liability insurance carrier. In his tenure with the company, Mr. Bassingthwaighte has conducted over 1200 law firm risk management assessment visits, presented over 400 continuing legal education seminars throughout the United States, and written extensively on risk management, ethics, and technology. Mr. Bassingthwaighte is a member of the State Bar of Montana as well as the American Bar Association where he currently sits on the ABA Center for Professional Responsibility's Conference Planning Committee. He received his J.D. from Drake University Law School.

Ten Ways to Have a More Constructive Conversation with Your Clients

In the context of a conversation between an attorney and a client, effective communication occurs when both the attorney and the client feel they have been heard. For example, at the outset of representation, a client is often looking for confirmation that their lawyer understands what the problem and desired outcome is. Similarly, a lawyer is often looking for confirmation that the client has a clear understanding of what the lawyer can realistically do for the client given the circumstances at hand. The challenge here is that effective communication can only occur by way of a constructive conversation, which requires both participants to enter a mutual conversation. There must be a balance between talking and listening.

This balance thing can be harder than it might seem. Suffice it to say, that while I can be a good listener at times, having a constructive conversation every time I open my mouth remains a challenge and it's all about my being unable to find that proper balance between talking and listening. In fact, in my personal life I have been told more than a few times by my lovely wife that if I would just listen, it would become apparent that she isn't looking to have me solve her problem. Sometimes she just wants to be heard. Unfortunately, the problem solver in me just can't shut up. I suspect I'm not the only lawyer who suffers from this conversational shortcoming. I don't know about you, but law school taught me how to problem solve. I never had any law professor pontificate on the virtues of being an effective listener. Quite the opposite in fact, I was taught how to debate and how to put forth a compelling argument.

If any of this is striking a chord with you, following through with even one or two of the following tips will enable you to have a more constructive conversation with your clients. All 10 tips come from a Ted Talk by noted author, journalist, and speaker Celeste Headlee. The following are a summary of her points coupled with my trying to put an attorney-client conversation spin on them. If you care to view the entire Ted talk, and I encourage you to do so, you will find it at https://www.ted.com/talks/celeste_headlee_10_ways_to_have_a_better_conversation#t-653478. In sum:

1. DON'T MULTI-TASK.
Simply be present and pay attention. No texting, no thinking about other matters, no working through your email. You are in your client's employ, and this is his or her time.

2. DON'T PONTIFICATE.
Enter every conversation with an assumption that YOU have something to learn. Remember, the matter being discussed is the client's matter. The more you learn, the better your advice will be.

3. USE OPEN-ENDED QUESTIONS.
Questions such as, "Will you tell me more about that?" invite your client to think and provide a more informative response. You don't want to make it easy for a client to sit back and just confirm what you think you know or want to hear.

4. GO WITH THE FLOW.
Don't get stuck on what you want to say next. To do so requires that you miss half of what your client has just told you because it's quite difficult to concentrate on an important point you want to make and listen at the same time.

5. IF YOU DON'T KNOW SOMETHING, SAY SO.
Honesty instills trust. Faking it fosters doubt. It's as simple as that.

6. DON'T EQUATE THE OTHER PERSON'S EXPERIENCE WITH YOURS.

For example, as a client shares his or her story during intake, don't try and relate by telling your story. Worse yet, don't respond by talking about how many times you've heard this story before. Again, you are in someone else's employ. These conversations are not to be about you.

7. TRY NOT TO REPEAT YOURSELF.

If you feel you haven't been heard or understood, ask your client to make sure. Continuing to repeat yourself can appear condescending.

8. STAY OUT OF THE WEEDS.

Most people really are not that interested in the minutiae or the nitty gritty details. Clients just want to know they're in good hands.

9. LISTEN, TRULY LISTEN.

This does take a lot of effort and energy. According to Steven Covey, most of us don't listen with the intent to understand, most of us listen with the intent to reply. The only way to maximize the relevancy of any reply is to first listen well.

10. BE BRIEF.

Share your thoughts and advice in a succinct manner. Demonstrate that the client matters to you as a person by confirming that he or she understands what has been discussed. Invite questions.

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A CONVERSATION WITH: THE HONORABLE RICK LAWRENCE

The Maine Bar Journal recently asked Justice Rick Lawrence, of the Maine Supreme Judicial Court, about his life and experience practicing law in Maine.

What led you to come to Maine to begin or further your career?
It was a lifestyle choice. My wife and I grew up in a small town in western Massachusetts and enjoy the four seasons of New England living. Pursuing a legal career in Portland offered a blend of "small town" lifestyle, with some "big city" amenities, in a four-season setting. When we made the decision to move here, however, we did not realize that Maine frequently provides a bonus "fifth season" of mud.

Describe your proudest career moment, or a moment that helped define who you are as a BIPOC lawyer.
While I was on the District Court bench, I persuaded several BIPOC college students who expressed an interest in the law to come work as interns in the District Court. I felt a strong commitment to these internships because it exposed these students to the legal profession in a way that they would not get otherwise. Three of those interns went on to attend law school and enter the practice of law. Seeing their personal growth and professional progress has been a very rewarding and fulfilling experience. My only regret from the endeavor was that I was unable to convince any of these interns to pursue their legal careers here in Maine.

If you weren't an attorney, what would you be?
Based on my group insurance claims management and sales experience with Prudential Insurance following college, I think it is likely I would be a group insurance claims administrator.

What motivated you to become an attorney?
Growing up in the 1960s, I watched the boycotts, sit-ins, civil disobedience protests, rallies, and marches that occurred during the Civil Rights Movement. Over time, my attention was increasingly captivated by the court battles regarding the scope and effect of newly passed federal laws, battles which directly touched the lives of my family and other persons of color. Those events shaped my impression of both lawyers and the courts and fostered my view of how both are powerful forces that can positively impact peoples' lives. That impression stuck with me through college and during my work at Prudential Insurance. In fact, while I worked in group sales and support at Prudential, the part of the job I enjoyed the most was the contract interpretation required to answer policyholders' questions about how unusual claims would be treated under the group insurance policy. Ultimately, a college classmate, who had just graduated from law school, convinced me to pursue a law degree.

What book, website, or other resource would you recommend to MSBA members interested in BIPOC issues and why?
Fortunately, today there is an ever-increasing number of resources focusing on BIPOC issues. I would recommend the following two websites based on: (1) their recognized tradition of advocacy, scholarship, and perspective, (2) their breadth of information and available materials, and (3) their content's "immediacy and relevance":

- The Leadership Conference on Civil and Human Rights (https://civilrights.org/): The Leadership Conference has existed since the 1950s at the forefront of the fight for equal opportunity and social justice in the United States. The website offers commentary, fact sheets, reports, legislative testimony, action alerts, scheduled events, and podcasts.

- National Museum of African American History & Culture (https://nmaahc.si.edu/): The Museum was established pursuant to an Act of Congress to promote and highlight the contributions of African Americans. It opened in 2016 as the nineteenth museum of the Smithsonian Institution and is the only national museum devoted exclusively to the documentation of African American life, history, and culture.



How would you say law school prepared you to deal with the issues of race and anti-racism issues in your career, if at all?
Attending law school served to alleviate lingering concerns from past experiences about having to make concessions to other people's preconceptions of where and what kind of work I could do. So, law school really afforded me the opportunity to pursue a professional career in the place and manner of my choosing. Also, early in my career, law school provided me the wherewithal to venture into *pro bono* work on race-related issues in matters including employment, housing, juvenile justice, and small business development.

What might someone be surprised to know about you?
I have been at the right place during the right time on a few different occasions. For instance, I have had the good fortune to meet and talk with the Jackson Five, Count Basie and Ella Fitzgerald, Stevie Wonder, and Secretary of State Colin Powell.

How does your MSBA membership keep you connected to the legal community?
My membership helps me stay informed on issues and concerns related to practicing law in Maine. In addition, it allows me to interact periodically with attorneys outside of the areas of the state where I routinely work.

What is anti-racism, and how would you encourage an attorney to engage in anti-racism?
Anti-racism is a melding of a person's commitment to treat people of all races fairly and equitably with a commitment to proactively oppose racist conduct that the person sees. As racist conduct is often subtle, recognition of such conduct is a crucial first step. Developing one's recognition skill will likely require self-education through reading and relationship building.

What advice do you have for a new BIPOC lawyer considering a career in Maine?
I believe that greater diversity in the Maine bar and bench is critical to the evolution of the law in Maine, the perception of the fairness of our legal system, and the maintenance of our citizens' trust in and respect for the law. Consequently, I submit that the need for that increase of diversity in Maine's bar and bench creates a tremendous opportunity for BIPOC lawyers to embark on interesting and challenging careers in Maine and provides them with a profound opportunity to be powerful and positive forces in lives of the citizens of this state.

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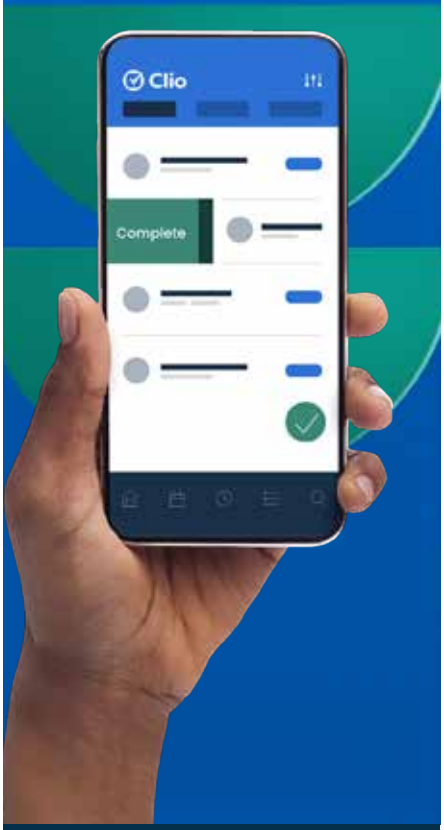

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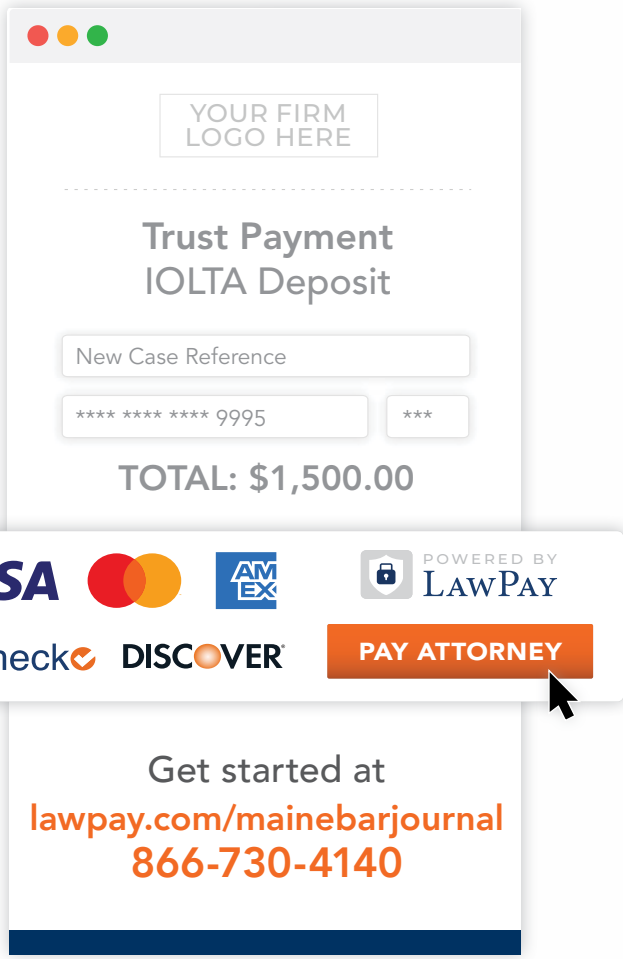

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DANIEL J. MURPHY is a shareholder in Bernstein Shur's Business Law and Litigation Practice Groups, where his practice concentrates on business and commercial litigation matters.

BEYOND THE LAW: BENJAMIN J. SMITH

Watching Ben Smith examine his hand-tied fishing flies and his homemade fishing rod, it is not hard to wonder whether fishes caught by Smith simply taste better. If not the case for the rest of the world, it certainly must be true for Smith. For all of his life, Smith has been surrounded by and has deeply appreciated the wilderness. When not practicing law in the fields of public utility and regulatory matters in Augusta, Smith spends much of his free time fishing, hunting, and hiking in the great outdoors, including as a Maine Guide. He spoke with the *Maine Bar Journal* about his interests.

For the uninitiated, what is a Registered Maine Guide?
I believe that the law defines a guide as an individual who assists people with fishing, hunting, or some other recreational activity and receives any type of remuneration. It is a pretty broad definition.

What kind of classes or training are required to obtain certification as a Registered Maine Guide?
There are several classes available for people who want to obtain certification. Some are more specialized, such as sea kayaking or whitewater rafting. My certifications are in hunting, fishing, and recreation, which are broader. There are courses available and a lot of guides who obtain certification take these courses. I did not take any course to obtain certification. I wanted to do it on my own and handle it that way.

Are there tests that you must take to get certified?
Yes, there are. Some certifications are more hands-on, like rafting. For hunting, fishing, and recreation, it is a combination of oral and written tests. The oral exam is something that is done right upfront in the process. They basically give you a map-reading and orientation scenario. You must pass that. If you pass this stage, you move on the lost person scenario. A panel of a few guides, wardens, or other people essentially sit you down and run through a lost person scenario. You are tested on your ability to adapt to some challenging hypotheticals that you may confront in trying to locate a lost person. If you pass that phase, you then address other wilderness-type scenarios where a problem or emergency arises. It all ties to the type of certification that you are seeking. If you pass the oral tests, then you have to take a written examination.

How was the process to obtain your certifications?
I am a guide in recreation, fishing, and hunting. Before 1998 or so, if you got all three classifications, you were considered a Master Guide. However, they changed the requirements to make it more stringent. To be a Master Guide now, you must also have a minimum number of 240 hours each year in each classification for a period of at least five years in a 10-year period and need to be tested for the master certification.

We live in a rural state where at our back doors we have some of the most beautiful streams, mountains, and rivers that that anyone could ever have. Therefore, appreciating the value of the wilderness from a conservation point of view is incredibly important.

Did you go through the certification to be a Master Guide?
I just missed the cutoff for doing it the old-fashioned way. Given the number of logged hours now required each year, it would not be practical for me to pursue Master Guide status and maintain my law practice.

Do you have any particular type of guiding that you enjoy more than other types, such as fishing over hunting or the opposite?
I have an uncle who has some sporting camps up north and on occasion, I will help when he needs help when it comes to guiding for bear hunting. Most of my guiding activity focuses on hunting. Apart from helping my uncle, I also help fellow guides or friends hunting if they need assistance.

What is the name of your uncle's camp?
Moose Point Camps, up in Aroostook County. It's on Fish River Lake.

Did you have an interest in hunting growing up, or is it a more recent interest?
I grew up in a very rural area in Aroostook County. It was right in the middle of the woods and farmland areas, which are very abundant with wildlife. So, I had very early exposure to the woods and started hunting at a really young age. I have family members who were into hunting as well, including my grandfather, who was probably one of the biggest influences on me.

Any encounters with black bears in Aroostook County?
Yes, a few. I remember when hunting for birds when I was younger, I had a very close encounter with a very large black bear. It didn't threaten me, but I was very surprised by the size of the bear and how close I got to it. When it noticed me, it kept on walking and didn't have any interest in me.

I've also had some other unplanned encounters with bears that have been in very close proximity to me. I passed by a cub in the early summer that was laying off to the side of a road, only a few feet away. I had no idea where the mother was. Another time when I was mountain biking, I happened upon a sow and two cubs that were right at the corner of a field. I had my head down while turning a corner and they were right there. I was probably 15 feet away from the sow when I finally stopped, and she did not like me. She made that very apparent. Once the cubs were out of harm's way, she backed away and took off. But there was a moment there that I was wondering, what am I going to do?

I also have had guiding experiences with some close encounters with black bears. Generally, bears are more afraid of humans than we are of them. They just want people to give them space. The best thing you can do is know your surroundings and make your presence known. Encounters between bears and humans that usually have been most problematic are where the person or the animal lacks the ability to create distance from each other, triggering a fight or flight response, or where human-bear contact has increased due to human activity such as leaving food or garbage out.

Regarding your fishing activities, what kind of fishing do you do?
My fishing activities have not branched out into my guiding activities as much as hunting, but I enjoy fishing very much. Growing up in Northern Maine, I had access to the large lakes and great streams that fed right into the St. John River. My early experiences were worm fishing and bait fishing, but right around the time of middle school or so, I got into fly fishing. I still enjoy fly fishing today. I cannot do it as much as I would like, but it is a passion. I also like spring trolling for salmon, trout, and other cold water game fish. I have never really gotten into much bass fishing, but I will go out on occasion with some friends that are into bass fishing.

Do you tie your own flies?
I do. I used to tie a lot in high school and college. Once I got into law school and then private practice, I had less time to do so, but I still have my flies. I tied dry flies, some wet flies, and some streamers. My favorite is the dry flies because there is nothing like taking a fish after seeing it break the surface.

Were there any flies that you tied that you found were particularly effective?
In my prime, I was pretty good at several of them. I can remember tying flies with a cousin. We were both tying orange hoppers, which resemble grasshoppers in summer that may fall or hop into stream beds. My cousin's father was really impressed with my hopper and even asked me for a few. Although my cousin was tying the exact same fly, his father jokingly asked him what he was tying.



Do you remember the first fish you ever caught?
I do. I was probably five years old. It was my parent's property that had a brook that was downstream, next to a camp that they had built. I was the youngest of four and had seen my older siblings catch fish in this particular stream. Back then, to catch fish, it was basically just a matter of tying a fish line onto a branch and putting a hook and worm on it. I don't know if it was due to sheer luck or any skill, but I caught a small brook trout on that occasion and remember it to this day.

I understand that you have a young daughter. Has she shown any interest in fishing, hunting, or canoeing?
She certainly engages in the outdoors with me. She has gone out a couple times with me for lake and stream fishing and she enjoys it. She has not gotten into fly fishing just yet. We also go out camping and hiking. We like to get out in the woods and go for walks as much as we can. If I have time in the afternoon or on the weekend, we will go out in the woods. She and I will identify different trees or plants or discuss different scenarios like the ones we discussed.

What do you think is special about growing up in Maine and having access to the wilderness?
We live in a rural state where at our back doors we have some of the most beautiful streams, mountains, and rivers that that anyone could ever have. Therefore, appreciating the value of the wilderness from a conservation point of view is incredibly important. Conservation certainly has benefits when it comes to economic opportunities in the western and northern parts of the state especially. There are also wildlife management reasons for appreciating hunting, for instance. The state has seen a decline in overall number of hunters in recent decades. There are parts of the state where we are seeing an overpopulation of deer. If the herd is not managed, you are going to see more human-animal contacts, more car accidents, and more deer deaths because of scarcity of resources. There must be a balance between the carrying capacity and what the population can sustain.

Have you ever had to find a lost person?
I have been lucky in that I have not lost anyone, but I personally experienced being lost before. That certainly had an impact on me growing up and shaped how I approach the woods.

Was this when you were younger?
I was seven. My parents had a friend who owned some property that abutted some of the larger timberland up there. One afternoon in the spring, he offered to take us out for a walk to check out a peat bog. He also was going to show us some essentially virgin timberland that had not been cut in a very long period.

We expected a short outing, but after visiting the bog, seeing pitcher plants for the first time, and checking out the woodlands, we unknowingly crossed into adjacent property that was owned by Great Northern Paper at the time. We intended to cross back but ended up walking further into the adjacent property before dark was upon us. We spent the night in the rain but were able to get out in the morning.

That is a memorable experience for a seven-year-old. Do you think that that experience has a link to you becoming a Maine guide?
It certainly had a direct impact on how I approached the wilderness and having respect for nature but becoming a guide might just be me seizing the opportunity.

What is it that you enjoy about guiding?
I have had some memorable experiences. The most rewarding ones are where you had someone who was completely unfamiliar with the wilderness, and you succeed in imparting on them a love of nature and respect for the woods. My best experiences are when people listen to the guidance and conduct a hunt in a way that respects the process and respects the animals.

What is the best advice you have ever received?
I think whether it's practicing law, hunting, or fishing, be patient and wait for your opportunity – it will come.

BEYOND THE LAW features conversations with Maine lawyers who pursue unique interests or pastimes. Readers are invited to suggest candidates for Beyond The Law by contacting Dan Murphy at dmurphy@bernsteinshur.com.



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MICHELLE DRAEGER is the Executive Director of the Maine Justice Foundation as of May 2020. A native of Maine, much of Michelle's career has been spent in public service including Pine Tree Legal Assistance, the U.S. Securities and Exchange Commission in Washington DC and Boston, and serving as an Assistant United States Attorney for the District of Maine. She may be reached at mdraeger@justicemaine.org.



LINSEY MACDOUGALL joined the Maine Justice Foundation as Development and Programs Manager in March 2022. Prior to joining the foundation Linsey has spent her career working in marketing, sales, corporate partnerships and special events in the commercial arts and entertainment, sports, tourism, and hospitality industries. She may be reached at lmacdougall@justicemaine.org.

Maine Justice Foundation Awards Grants to Groups Working Towards Racial Justice, Programs Addressing Rural Access to Justice in Washington & Hancock Counties and Announces the First Recipients of the Access to Justice Tax Credit

Racial Justice Fund – Maine Justice Foundation Awards Grants to Seven Maine Groups Working for Racial Justice and Equity

Since the inaugural grant round of the Racial Justice Fund in early 2021, corporations, philanthropic leaders, and individual donors across Maine have donated an additional $290,000 raising the fund to $680,000 to combat racial injustice and inequity. This growth has allowed the Foundation to increase both the number of grants made and funds distributed in 2022. The goal of the Fund is to support Black, Indigenous, and People of Color statewide to forge social, systemic, and economic solutions that will address systemic racism and inequity in our culture, organizations, and systems.

The Fund's Advisory Committee recently issued a request for proposals and reviewed applications for a second grant round. The current members are co-chairs Dr. Evelyn Silver and Prof. Marcelle Medford, Michael-Corey Hinton, Mary Herman, Reginald Parson, Francys Perkins, Shelly Okere, Bill Harwood, and Janis Cohen. On completion of the application and review process, the Maine Justice Foundation's Racial Justice Fund awarded seven grants to Maine groups in 2022. The Foundation is honored to showcase their work and highlight how we are expanding access to justice in Maine. For more information about the Racial Justice Fund, its Founders and other donors, the Advisory Committee, or to donate to the fund, please go to https://justicemaine.org/grants-and-programs/racial-justice-fund/.

The grants issued range between $5,000 and $10,000, an increase in both organizations supported and funds distributed in its inaugural year. The projects supported will meaningfully advance racial justice and equity for BIPOC Mainers.

The 2022 grantees and projects supported are:

Immigrant Legal Advocacy Project

The Immigrant Legal Advocacy Project (ILAP) is "Maine's only state-wide immigration legal services organization. ILAP advances justice and equity for immigrants and their families through direct legal services, community education, and systemic advocacy."[1] Started in 1993 as a volunteer legal services project, the mission of ILAP is to help low-income immigrants improve their legal status and works for more just and humane laws and policies affecting immigrants. The Foundation grant will support a new fellowship opportunity for law school students who identify as immigrants or having lived immigrant experience. The project acknowledges the underrepresentation of immigrants and other historically oppressed groups in staff roles in Maine's legal community and more broadly. The fellowship will recognize and compensate

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students for the expertise that comes from navigating the immigration system and other forms of systemic oppression, the value of having deep relationships with immigrant communities and the new skills, competencies, and perspectives that fellows will bring to the organization. Learn about ILAP at www.ilapmaine.org

Greater Portland Immigrant Welcome Center
The Greater Portland Immigrant Welcome Center (the Center) serves as a "hub of collaboration that strengthens the immigrant community through language, acquisition, economic integration, and civic engagement." [2]

Started in 2017 by Francophone asylum seekers, the Center's goal is to create a welcoming and accepting place for the professional needs of immigrants. Located on Preble Street in Portland, the Center expanded to a second floor in 2018 to make room for the iEnglish language lab, for which the Foundation's Racial Justice Fund is continuing support. The language lab also teaches customer service and other skills. The Racial Justice Fund grant will support the continued expansion of the Center's iEnglish project to provide more language training to non-English speaking BIPOC community members so they can join Maine's workforce. Reza Jalali, Executive Director of the Center shares that "Maine, the state we all love, will thrive if every Mainer, including those born in other parts of the world and calling Maine home now, succeed in reaching their full capacity. The Center helps New Mainers learn English to join the workforce and become economically independent. Their successful integration is good for all of us. The Maine Justice Foundation's support will make it possible for us to do our work better. "

In Her Presence
Started in 2015 and organized and led by immigrant women living in Maine, In Her Presence "strives to bring together immigrant women from across communities and generations to ensure that Maine's economic agenda includes the aspirations and needs of immigrant women."[3] The programs and services In Her Presence offers are shaped by the women participating. The Maine Justice Foundation grant will support the Bridge to Career Fulfillment program which aims to equip immigrant women with the tools they need to find fulfilling employment and achieve success in the workplace. This program, which collaborates with individuals to identify and shape their career path, offers career consultation, mentorship & coaching, partnership and collaboration and special workshops throughout the year.

Indigo Arts Alliance
The mission of the Indigo Arts Alliance is to "build global connections by bringing together Black and Brown artists from diverse backgrounds to engage in their creative process with an opportunity to serve as both mentors and mentees. An integral aspect of the Indigo vision is to provide Maine based artists of African descent access to a broader range of practicing artists of color from around the world."[4] The 2022 Racial Justice Fund grant will support Artists in Residence and community engagement for social justice to develop opportunities for social practice artists. The residency "aims to connect Black and Brown artists from across the globe to local artists of African descent. Indigo Arts Alliance provides an environment to produce artwork in all media across disciplines. It is intended for professional, mid-career and emerging artists to grow their work in a creative atmosphere. "

Ladder to the Moon Network
Ladder to the Moon Network (LMN) is a Portland, Maine based non-profit founded in 2016 by Georges Budagu Makoko. The organization has a twofold mission: "Striving to educate the public about Africa, increase awareness of the connection between current conditions in Africa and migration, and describe the challenges faced by African immigrants as they are in the process of relocating as well as after resettlement."[5]

The Racial Justice Fund grant will support Amjambo Africa, a LMN publication, to expand their reach by increasing materials printed in seven languages and adding distribution at social service agencies, libraries, food pantries and soup kitchens, the shelter/hotel system, medical facilities and elsewhere. Kathreen Harrison, Vice President of the Board for LMN is excited to expand their reach. "Our award from the Racial Justice Fund will enable us to get our publication

into the hands of many more people desperate for information about how to navigate life in Maine. We will be able to print more copies each month and distribute through expanded networks, including through food pantries and soup kitchens, at hotels housing asylum seekers, and through social service organizations. Since we publish in seven languages, newly arrived Mainers will be able to gather tips of all sorts, such as how to stay safe from scammers; how to prevent illness – including COVID; how to access free community college and certificate program opportunities; how to protect against immigration fraudsters; and what to think about when choosing a financial institution in the U.S."

Maine Inside Out

Maine Inside Out (MIO) began 12 years ago when its three co-founders were organizing theater workshops and performances at the Long Creek youth detention center in South Portland. Featuring audience participation and a focus on social change, it quickly gained traction with performances in schools, at the Maine Legislature and in Washington, DC. "Maine Inside Out was founded with the intention of building a movement for transformative justice, in which communities acknowledge and attend to the social, structural, and systemic roots of crime and harm. Maine Inside Out's mission activates individuals and communities to imagine and embody freedom through art, advocacy and support, and transformative justice."[6] The grant from the Racial Justice Fund will support arts and advocacy-based leadership development programs for system impacted youth of color who have lived experience of Maine's juvenile and criminal justice systems.

Mindbridge

"Mindbridge is a nonprofit organization dedicated to transforming the impact of local, national, and international human rights work by integrating psychological and neurobiological applied science. Mindbridge uses neuroscience and psychology to access the values, beliefs, motivations, and drivers of violence in order to develop more effective interventions and propel change."[7]

The Racial Justice Fund grant will support the Healing Racial Trauma Initiative to measure and make improvements on the quality of healing interventions and to re-define, destigmatize, and improve the accessibility of metrics and clinical methodologies. The Healing Racial Trauma Initiative "is a program designed for and by members of Maine's BIPOC community that seeks to heal compounded wounds from exposure to structural violence and inequity through regeneration of the collective body."

Access to Justice Tax Credit: Maine Justice Foundation Awards the Access to Justice Tax Credit

In an effort to encourage lawyers to provide services to underserved areas of our state, the Legislature enacted the Access to Justice Tax Credit Program. Starting in 2022, the program will authorize five lawyers who practice in underserved areas and maintain eligibility for five successive years to claim a $6,000 state income tax credit. The Maine Justice Foundation will ensure continued eligibility for the tax credit by the recipients at the end of each tax year of the program.

36 M.R.S. Section 5219-ZZ provides that the Maine Supreme Court or its designee shall certify up to five qualified attorneys annually for participation in the Access to Justice Tax Credit program. The Court has designated the Maine Justice Foundation to administer the program and established a Standing Committee to assist and advise the Foundation in the process. The Standing Committee includes representatives of the Maine Justice Foundation, the Maine State Bar Association, and the Maine Trial Lawyers Association.

The Foundation accepted applications from eligible attorneys from June 1-July 5, 2022, and received submissions from numerous eligible applicants statewide representing Penobscot, Hancock, Waldo, Aroostook, Somerset, Androscoggin, and Cumberland Counties.

To be eligible for selection, the recipient attorney has committed to practicing law in an underserved area for at least five years, are rostered by the Maine Commission on Indigent Legal Services to accept court appointments to represent clients in an underserved area and agree to perform pro bono legal services in an underserved area. Once eligibility was

In an effort to encourage lawyers to provide services to underserved areas of our state, the Legislature enacted the Access to Justice Tax Credit Program. Starting in 2022, the program will authorize five lawyers who practice in underserved areas and maintain eligibility for five successive years to claim a $6,000 state income tax credit.

determined, the five successful recipients of the tax credit were made by random selection.

The attorneys selected to receive the 2022 Access to Justice Tax Credit include Cassandra Rogers and Benjamin Everett of Presque Isle, Taylor Kilgore of Turner, Gregory LeClerc of Standish, and Ryan Rutledge of Skowhegan.

ESO Endowment: Maine Justice Foundation Awards Grants for the 2023 Hancock/Washington County Legal Aid ESO Fund

The ESO Endowment Fund was established in 2011 by an anonymous donor who dedicated it to providing support for people in need of civil legal assistance in Washington and Hancock Counties. The ESO grant supports applicants and programs dedicated to the provision of legal aid in Maine, offer legal services not currently available in these counties, and who are collaboratively addressing unmet needs of underserved populations. "The ESO Endowment is a wonderful example of a generous Mainer deploying their resources to help their underserved neighbors and community members in dire need of legal assistance," says Michelle Draeger, the Foundation's Executive Director. The Maine Justice Foundation will award over $109,000 in grants to three organizations currently addressing the needs of underserved populations in Hancock and Washington Counties.

The 2023 grantees and projects supported are:

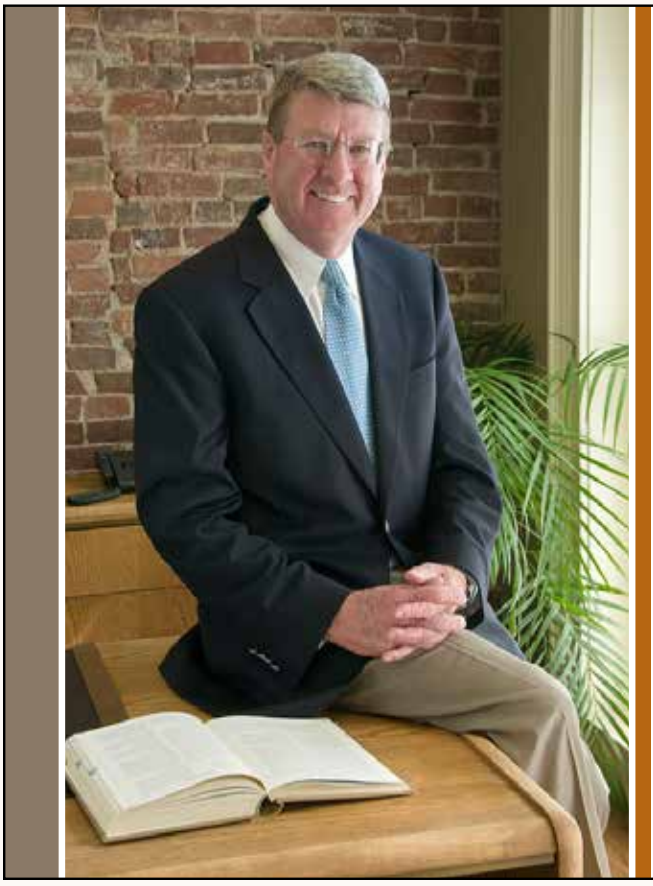
Immigrant Legal Advocacy Project

The Immigrant Legal Advocacy Project (ILAP) serves low-income immigrants and their US citizen family members, defining "low-income" as incomes up to 200% of the federal poverty guidelines. Clients come from nine countries, speak 3-+ languages and are active members of their communities.

The grant from the Maine Justice Foundation ESO fund will increase the accessibility of services from the Washington & Hancock County project which will reach people who would otherwise go unserved. The model of this program seeks to overcome barriers, including those created by the Covid-19 pandemic and increased transportation costs, through a combination of in-person and virtual services tailored to the legal needs of the immigrant community.

Maine Volunteer Lawyers Project

The Mission of the Maine Volunteer Lawyers Project (VLP) is "to increase access to justice in Maine through volunteer engagement. To achieve this end, the VLP acts as a nexus, connecting pro bono attorneys and individuals with civil legal issues who cannot afford attorneys."[8]



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The grant from the Maine Justice Foundation ESO fund will support the VLP's services in Washington and Hancock Counties including through the family law clinic, Court House Assistance Project (CHAP), two new clinics for employment law and small claims, and full representation in other civil matters. VLP helps in a variety of civil cases including assisting people with legal questions in family law, employment law or with small claims court. The project also helps with protection from abuse matters and will connect people with attorneys for full representation in other civil law matters. VLP recruits lawyers in this region to promote pro-bono services and advocates for systemic changes to increase access to justice.

Legal Services for the Elderly

"Since 1974, Legal Services for the Elderly (LSE) has been helping Maine seniors protect their rights to live independently and with dignity. Legal Services for the Elderly's mission is to provide free, high quality legal services to Maine's socially and economically needy elderly aged sixty and over. While many people recognize income as a barrier to obtaining necessary legal help, many seniors with social needs also face barriers to getting assistance. Social needs include needs caused by non-economic factors such as physical and mental disabilities, language barriers, and cultural, social, or geographic isolation."[9] This project focuses on helping older people who live in Washington and Hancock counties who face legal problems that keep them from meeting their basic human needs. LSE attorneys provide free legal assistance in elder abuse, eviction defense, and public benefit cases. They collaborate with local partners to survey residents about barriers to benefit access and conducts outreach to overcome identified barriers.

ENDNOTES

1 Immigrant Legal Advocacy Project; www.ilapmaine.org
2 www.welcomeimmgrant.org
3 www.inherpresence.org
4 www.indigoartsalliance.me
5 https://www.laddertothemoonnetwork.org/
6 www.maineinsideout.org/our-story
7 www.mindbridgecenter.org/our-work
8 www.vlp.org
9 www.lse.org



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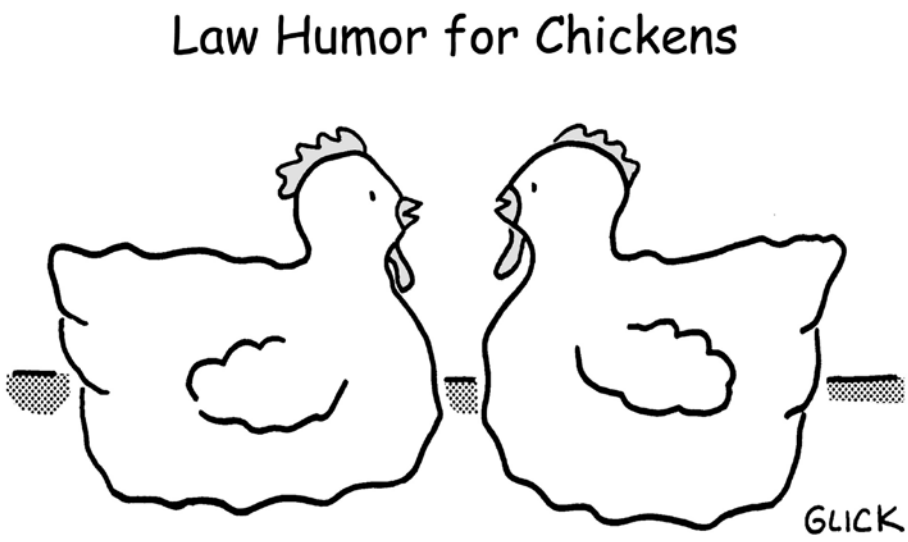

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NANCY A. WANDERER is Legal Writing Professor Emerita at the University of Maine School of Law. For decades, she oversaw the updating of Uniform Maine Citations, and her articles on proper citation, email-writing, and judicial opinion-writing have appeared 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.

Friendly Persuasion: Amicus Briefs

The headline proclaims: "Trump-Appointed Judge Rejects Amicus Brief in 'Bizarre' Move, Critics Say."[1] Most people would not have run across this headline or, even if they had, they would probably not have considered this development to be very significant in the evolving saga of the former president's legal battles. For me, though, U. S. District Judge Aileen M. Cannon's rejection of an amicus brief offered by a group of distinguished former Department of Justice and state officials was shocking. The signers included former federal prosecutors Donald B. Ayer, Gregory A. Brower, John J. Farmer Jr., Stuart M. Gerson, Peter D. Keisler, William F. Weld, and former New Jersey Governor Christine Todd Whitman.[2]

In the subheading to another commentary,[3] Charles P. Pierce summed up the situation as follows: "If you ever wanted to know what the legal version of 'LALALA, I CAN'T HEAR YOU' looks like," this is it. In a paperless order with one sentence of explanation, Judge Cannon had dismissed the need for the former federal and state officials' thoughts on the various legal issues at stake in the unprecedented criminal inquiry into the former president's conduct.[4] In doing so, Judge Cannon broke with the longstanding and well-regarded tradition of judges appreciating and even relying on a little help from their friends.[5]

Amicus Briefs: What They are and Why They Matter

Amicus briefs have ancient roots.[6] Originating in Rome, the participation of amici curiae became common in England during the seventeenth and eighteenth centuries where courts would permit, and even invite, an amicus curiae to present "neutral, unbiased information."[7] The original amici were lawyers who were physically present in the courtroom and able to assist the court with "oral Shepardizing,"[8] bringing up cases not known to the judge.[9] In the absence of any comprehensive compilation of cases and opinions, courts needed assistance in recalling what had happened in the past. It is no surprise that lawyers who could inform the court about the outcome of previous cases would come to be known as amici curiae, friends of the court.

In the United States, the role of the amicus curiae evolved "from friendship to advocacy."[10] Throughout the nineteenth century, the amicus remained a lawyer assisting a judge; soon after the turn of the twentieth century, however, the amicus as a friend to a judge became an advocate for a party,[11] attempting to persuade the judge by filing a brief on the party's behalf. This shift coincided with two other changes: the proliferation of interest groups seeking to effectuate social change and the "corresponding rise of the courts as engines of social reform."[12]

Two basic theories of amicus utility run through political science literature: "(1) the affected groups theory and (2) the information theory."[13] The affected groups theory assumes that courts use amicus briefs "as a barometer of opinion on both sides of the issues."[14] The information theory finds amicus briefs useful because they supplement the parties' arguments and provide information not found in the parties' briefs.[15]

Amicus briefs have played an influential role in the battle over school segregation,[16] abortion rights,[17] women's rights,[18] and the death penalty.[19] Allowing social science information presented by amici serves as an important check against governmental abuse of power. The alternative to allowing such information is "to return to nineteenth century legal formalism, according to which justices . . . substitute their own normative beliefs for scientific findings," as illustrated in *Korematsu v. United States*, in which the Court sanctioned internment camps for Japanese-Americans.[20] The Court simply accepted the government's untested assertion that large numbers of Japanese-Americans were likely to engage in treasonous activities "without a scintilla of social scientific data."[21] According to Justice Murphy, who dissented from the

majority opinion, the order was based upon "misinformation, half-truths, and insinuations."[22]

Purposes of Amicus Briefs

Generally, amicus briefs serve three purposes: (1) endorsing and repeating a party's position, sometimes offering a variation on that position; (2) offering the court specialized, mostly non-legal knowledge; and (3) proposing unconventional legal theories or arguments that appeal to emotion.[23] The endorsement briefs allow interest groups to throw their prestige behind a party and demonstrate to the court that widespread support exists for that party's position. The technical briefs generally provide medical, sociological, or historical information the court may require. Such briefs are generally submitted by experts and legal scholars who can provide necessary context and background to the court. The third category of cases are filed by "risk-takers," who can provide novel perspectives and communicate the urgency and complexity of the issues being decided.[24] Together, these types of briefs can provide the court with a variety of perspectives, an abundance of specialized information, and the incentive to break new legal ground.

The Rise of the Amicus Brief

During the first two centuries of the Supreme Court's existence, amicus briefs were rare. The first recorded appearance of an



amicus curiae occurred in 1821.[25] Even during the initial decades of the twentieth century, amicus briefs were filed in only about 10 percent of the Court's argued cases.[26] By 2000, they were being filed in 85 percent of the cases.[27]

In 2014, a record number of amicus briefs were filed in the same-sex marriage case, *Obergefell v. Hodges,*[28] with 143 amicus curiae from both sides of the issue seeking to influence the Court's decision.[29] In the recent abortion-rights case, *Dobbs v. Jackson Women's Health Organization,*[30]approximately the same number were filed.[31] Amicus briefs played a large role in many cases during the October 2021 Term, with 887 briefs filed on the merits of the cases. During the previous term, even more briefs were filed (940). The height of amicus brief filings came in 2012 when 1,003 amicus briefs were filed.[32]

Although amicus briefs appear in greatest numbers in highly controversial cases, amicus participation is now well established in all areas of Supreme Court litigation. Along with the rise in the number of amicus briefs being submitted has come the development of a Supreme Court Bar composed of people who appear before the Court on a regular basis. Apparently, the justices "prefer a system dominated by Supreme Court specialists who can be counted on for excellent advocacy."[33]

People and groups frequently submitting amicus briefs are a growing part of this Supreme Court Bar. This group is sometimes referred to as "the amicus machine."[34] Although some amicus briefs are still the product of interest-group lobbying at the Court, an increasing number are filed by an elite few.[35] In addition to appearing before the Court representing parties, they frequently submit briefs as amici curiae. As demand for amicus briefs has grown, many Supreme Court teams now include an "amicus wrangler—someone who has the job of recruiting the 'right' amici."[36] Paul Smith, an experienced Supreme Court advocate, explains the process this way: "[S]ophisticated parties and counsel often convene meetings of potential amici in an attempt to form coalitions and to influence the nature of the presentations that will be made. Potential amici, in turn, often contact counsel for the party they support, recognizing that such party coordination can be beneficial."[37] Because the Court seems to have "embarked on 'a widespread empirical turn,'" issuing decisions that contain numerous "legislative facts" about the way the world works, many advocates believe that it is not possible to win a Supreme Court case without "assembling a portfolio of 'Brandeis briefs'[38] from historians, social scientists, physicians, and other individuals" who can impart their expertise to the Court as amici.[39]

The coordination of amici does not stop with recruitment, however. Someone must also play the role of an "amicus whisperer" to keep those amici in line and encourage them to work together to file a single brief whenever possible.[40]

The Office of the Solicitor General plays an important role in the amicus machine, too, meeting with the parties pitching their positions, advising the Court about which petitions for certiorari should be granted, and appearing before the Court.[41] Not coincidentally, many members of the elite Supreme Court Bar are former Solicitor Generals themselves.[42] The Supreme Court Bar has deep ties to the Court through other connections as well, with many members having clerked for the justices or associated with them professionally or socially.[43] "The amicus machine—the systematic orchestration of amicus briefs by specialists—is fueled by all of these reinforcing relationships."[44]

Benefits of Amicus Briefs

Amicus briefs offer the justices technical expertise to inform their decisions and alternative legal arguments aimed at the broader societal ramifications of a case. Justices have praised the assistance that amici have provided over the years. Justice O'Connor explained that amici curiae "file briefs calling our attention to points of law, policy considerations, or other points of view that the parties themselves have not discussed. These amicus briefs invaluably aid our decision-making process and often influence either the result or the reasoning of our opinions."[45] Justice Breyer underscored this assessment by pointing out that amicus briefs play an important role in educating the judges on potentially relevant technical matters, not making them experts, but informing them in a way that helps to improve the quality of their decisions.[46]

Returning to where we began, it is hard to imagine Judge Cannon rejecting, out of hand, the amicus brief of a group of such distinguished former Department of Justice and state officials. In doing so, she showed an astounding contempt for the knowledge and wisdom they had to offer. Unlike Justices O'Connor and Breyer, Judge Cannon failed to recognize the potential benefit of amicus briefs that call attention to points of law and policy considerations that might not have been discussed in the parties' briefs. If she had read the brief, she could have simply rejected its arguments if she thought they lacked merit. By concluding in advance, however, that the participation of the amici was not warranted in a complex case involving executive privilege, she acted the same way as the Court in *Korematsu v. United States.* She returned to 19th century legal formalism, substituting her own normative belief for the expertise offered in the amicus brief. As a result,

her decision is likely to be held in the same low regard as the Court's decision in *Korematsu.* It didn't have to be that way.

ENDNOTES

1 Chris Walker, *Trump-Appointed Judge Rejects Amicus Brief in "Bizarre" Move, Critics Say,* https://truthout.org/articles/trump-appointed-judge-rejects-amicus -brief-in-bizarre-move-critics-say/.
2 *Id.*
3 Charles P. Pierce, https://esquire.com/news-politics/politics/a41106889/aileen-cannon-trump-special-master/.
4 *Id.*
5 Two songs are playing in my head as I write this column: "Friendly Persuasion," recorded by Pat Boone in 1956, and "With a Little Help from my Friends," recorded by the Beatles in 1967. Somehow, both songs seem relevant to the topic of amicus briefs. "Amicus curiae" is Latin for "friend of the court." The plural form is "amici curiae." People often refer to "amicus curiae" and "amici curiae" with reference only to the "friend" part of the name: "amicus" (friend) and "amici" (friends, plural).
6 Alison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901, 1909 (2016).
7 *Id.*
8 Shepardizing involves looking up case citations in *Shepard's Citations* to check the status of the case, parallel citations, or citations to the case in other jurisdictions and publications.
9 *Id.*
10 *Id.* (quoting historian Samuel Krislov).
11 *Id.* at 1910.
12 *Id.*
13 *Id.* at 1913.
14 *Id.*
15 *Id.*
16 Frank M. Covey Jr., *Amicus Curiae: Friend of the Court*, 9 DePaul L. Rev. 30, 36 (1959) (stating that the Supreme Court invited the attorney general to file a brief and participate in oral argument).
17 Susan Behuniak-Long, *Friendly Fire: Amici Curiae and* Webster v. Reproductive Health Services, 74 Judicature 261, 268 (1991).
18 Karen O'Connor & Lee Epstein, *Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's Folklore*, 16 Law & Soc'y Rev. 311, 313 (1981).
19 *Id.*
20 Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C.L. Rev. 91, 162 (1993).
21 *Id.*
22 *Id.* (citing *Korematsu v. U. S.,* 330 U.S. 81, 239 (Murphy, J., dissenting)).
23 Behuniak-Long, *supra* n. 17 at 267
24 *Id.* at 268.
25 *See* Green v. Biddle, 21 U.S. (8 Wheat) 1 (1823).
26 Joseph D. Kearney & Thomas Merrill, *Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 743 (2000).
27 *Id.*
28 576 U.S. 644 (2015).
29 Adam Feldman, *Many SCOTUS Friends with Ideological Interest in OT 2021*, https://abovethelaw.com/2022/07/many-scotus-friends-with-ideological-interests-in-ot2021/.
30 597 U.S. ____ (2022).
31 In two different sources I found two different totals listed: 140 and 133. Either way, it was a significant number.
32 Feldman, *supra* n. 28 (noting that another same-sex marriage case, *U.S. v. Windsor*, was decided in 2012).
33 Larsen & Devins, *supra* n. 6, at 1907.
34 *Id.* at 1915.
35 *Id.*
36 *Id.* at 1919 (quoting Kathleen Sullivan).
37 *Id.* at 1920.
38 A "Brandeis brief" is a brief containing information and statistics relevant to social and economic problems as well as legal and factual arguments. The name refers to Louis D. Brandeis (1856-1941), who introduced evidence of social and economic factors in his arguments before the Supreme Court in *Muller v. Oregon*, 208 U.S. 412 (1908) (holding that limiting the number of work hours for women did not violate the right to contract in the Fourteenth Amendment).
39 *Id.*at 1921.
40 *Id.* at 1924.
41 *Id.* at 1932.
42 *Id.* at 1934-35.
43 *Id.* at 1935.
44 *Id.* at 1936.
45 Paul M. Collins Jr., *Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, 60 Pol. Res. Q. 55, 58 (2007).
46 *Id.*



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Representing a Client with Mental Health Issues

Most lawyers will confront client mental health issues at some point in their career. Issues of this sort can arise upon intake of a matter with a client who has a recognized impairment and involve questions of how to structure the representation. Others may surface after the representation has begun when the client displays psychological or emotional distress and/or impairment. Circumstances can become especially fraught if the client threatens bodily harm to themselves or another or even suicide.

Lawyers instinctively want to try to do all they can to assist their client in these circumstances. However, the Rules of Professional Conduct set forth certain obligations that may constrain the lawyer's response. It is worth reviewing these issues to make sure that your instinct to be a "good Samaritan" are compatible with your ethical obligations.

Rule 1.4: Client With Diminished Capacity

Maine Rule of Professional Conduct 1.14, entitled "Client With Diminished Capacity," addresses the lawyer's relationship with a client with "diminished capacity"; *i.e.,* the capacity "to make adequately considered decisions in connection with a representation" due to "minority, mental impairment, or for some other reason."[1] For purposes of this discussion, a client with diminished capacity will refer to one suffering from a mental impairment.

The overarching command of Rule 1.14 is for the lawyer, "as far as reasonably possible" to "maintain a normal client-lawyer relationship."[2] Nevertheless, Rule 1.4 permits—but does not require—a lawyer to take certain actions to protect their client in circumstances where the lawyer reasonably believes that the client: (i) has diminished capacity; (ii) is at risk of substantial harm unless action is taken; and (iii) cannot adequately act in their own interest.[3]

Determining the Extent of the Client's Diminished Capacity

Most lawyers have not been trained in mental health assessment, which may make the determination of diminished capacity difficult. Moreover, clients have the right to make bad decisions and Rule 1.14 does not contemplate a lawyer taking corrective action simply because the client makes bad choices, exercises bad judgment, or disagrees with the lawyer as to what is in the client's best interest. In other words, the issue is not whether the client *is* acting in their best interest, it is whether the client *has the capacity* to act in their best interest.

Official Comment 6 identifies several factors that the lawyer should consider and balance in forming their reasonable belief as to the client's capacity.[4] These factors include:

> the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision, and the consistency of a decision with the known long-term commitments and values of the client.[5]

"A lawyer's reasonable belief [as to a client's diminished capacity] depends upon the circumstances known to the lawyer and discoverable by reasonable investigation."[6] Depending upon those circumstances,[7] "the lawyer may seek guidance from an appropriate diagnostician."[8]

Most lawyers have not been trained in mental health assessment, which can make the determination of diminished capacity a difficult assessment. Moreover, clients have the right to make bad decisions and Rule 1.14 does not contemplate a lawyer taking corrective action simply because the client makes bad choices, exercises bad judgment, or disagrees with the lawyer as to what is in the client's best interest. In other words, the issue is not whether the client is acting in their best interest, it is whether the client has the capacity to act in their best interest.

Taking Protective Action On Behalf Of A Diminished-Capacity Client

The Least Intrusive Action

Rule 1.14 enumerates a non-exhaustive list of actions a lawyer may take in these circumstances, which include seeking appointment of a third-party to act in the client's interest, such as a guardian *ad litem*, conservator, or guardian.[9] Official Comment 5 identifies other potentially appropriate responses, such as:

> (i) Consulting with family members;
> (ii) Using a reconsideration period to permit clarification or improvement of circumstances; and
> (iii) Using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.[10]

In deciding what, if any, action should be taken, a lawyer should take into account and be guided by, among other things, the client's desires, values, best interests.[11] The lawyer should intrude on the client's decision-making autonomy to the least extent feasible, maximizing the client's capacities while respecting their family and social connections.[12] In other words, Rule 1.14 "does not give the lawyer carte blanche to impose on the client the lawyer's personal view of what is in the client's best interest. Rather Rule 1.14 authorizes the lawyer to engage in a limited intervention when the client's mental capacity is such that he or she cannot adequately protect his or her own interest."[13]

Implied Authorization to Disclose Information

Determining whether a previously competent client has descended into a state of diminished capacity and/or to take action to protect the interests of a diminished-capacity client almost always requires disclosure of confidences or secrets of the client, which is generally protected from disclosure under Rule 1.6.(a).[14] Moreover, such disclosures oftentimes will adversely affect the client's interest in the matter. Thus, a client's diminished capacity places the lawyer's duty to maintain confidences on a collision course with their duty to address the diminished capacity. Fortunately, subsection (c) of Rule 1.14 deals with this dilemma. It provides that "When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client," but again the Rule emphasizes that such permissible disclosure is "only to the extent reasonably necessary to protect the client's interests."[15] The Official Comments to the Rule make clear that when taking protective action, "the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary."[16]

Withdrawal Is Not a Favored Option

Representing a client with diminished capacity presents challenges that may greatly exacerbate the lawyer's already demanding and stressful job. If such representation becomes unreasonably difficult, the lawyer's withdrawal may become an available and option.[17] However, insofar as withdrawal would leave the diminished-capacity client unrepresented in their most vulnerable state, withdrawal is typically not a favored option.[18] In Ethics Opinion No. 84, the Board of Bar Overseers considered the question whether a lawyer

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would violate the bar rules if the lawyer were to inform his client's son that the lawyer believes the client is incapable of making rational decisions concerning her affairs and that a conservatorship should be considered. While the Opinion concluded that, in the circumstances presented, the lawyer's disclosure was permissible, it cautioned that "We conclude that the attorney's mere withdrawal from representation is not likely to be a satisfactory resolution of the dilemma described in the question, since it leaves the client without advice when it seems to be most needed."[19]

Rule 1.6: Disclosure Of Confidential Information To Prevent Reasonably Certain Bodily Harm or Death

Rule of Professional Conduct 1.6 deals with confidentiality of client information.[20] After setting forth the lawyer's well-established obligation to preserve a client's "confidence[s] and secrets[s]," the Rule sets forth several exceptions. Rule 1.6(b)(1) provides, in pertinent part, that:

> A lawyer may reveal a confidence or secret of a client to the extent the lawyer reasonably believes necessary:
> (1) to prevent reasonably certain substantial bodily harm or death…. [21]

The Reporter's Notes make clear that there is no requirement of the client's criminal intent and that the test for reasonably certain bodily harm or death is an objective one.[22]

Be aware that subparagraph (c) of Rule 1.6 places a threshold requirement on the lawyer before revealing client confidences or secrets in these circumstances:

> Before revealing information under paragraph (b) (1)… the lawyer must, if feasible, make a good-faith effort to counsel the client to prevent the harm and advise the client of the lawyer's ability to reveal information and the consequences thereof.[23]

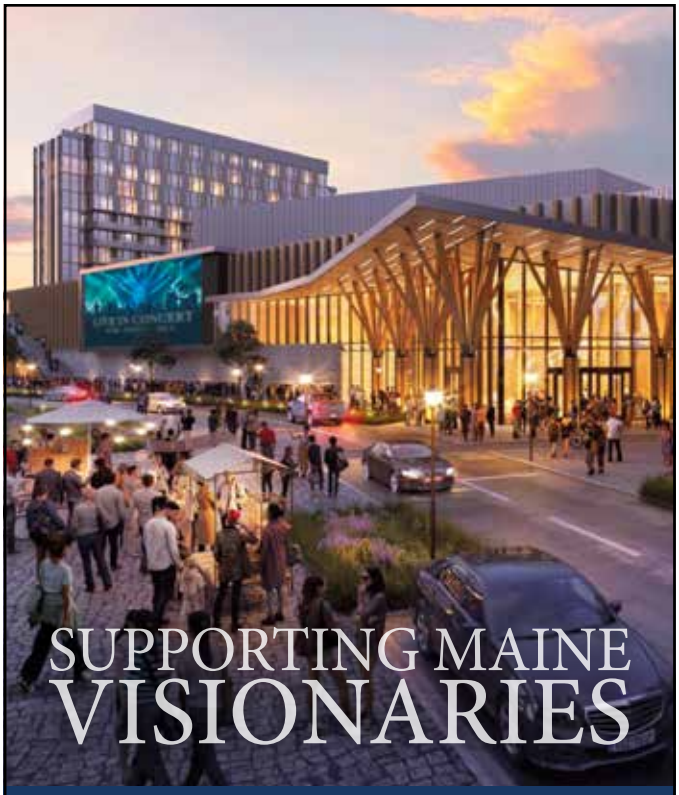
Summary and Conclusions

When a client displays signs of mental or emotional impairment the very foundation of the attorney-client relationship can be threatened. While the Rules do not mandate that the lawyer take any action in these circumstances, arguably the lawyer's duty of loyalty suggests that the lawyer should not stand idly by. To the extent feasible, the lawyer should first-and-foremost attempt to maintain a normal attorney-client relationship.[24] Depending upon the circumstances, this may include discussing the lawyer's concerns with the client and seeking consent to reveal information in an effort to address the situation. If the lawyer is uncertain whether the client has sufficiently diminished capacity to "make adequately considered decisions," the lawyer may consult with others to assist in making that decision.[25] If the lawyer reasonably believes that the client does have such diminished capacity, the lawyer may take further action, while being careful to intrude on the client's decision-making authority to the least extent possible. If the client's words or actions lead the lawyer to the reasonable belief that the client will take actions resulting in substantial bodily harm or death, the lawyer must make a good faith effort to counsel the client to prevent the harm and explain to the client that the lawyer may reveal such information and the consequences of that disclosure.[26] If the situation is not thereby resolved, the lawyer may ethically contact appropriate authorities—*e.g.,* the police, suicide prevention hotline, *etc.*—to respond to the situation.

There may never be one right way to respond ethically to a client's apparent mental impairment. The circumstances are endlessly varied, and more than one approach may be appropriate. While these circumstances are especially trying and the ethical path difficult to navigate, lawyers can take comfort in the words of the Restatement of the Law Governing Lawyers: "A lawyer who acts reasonably and in good faith in perplexing circumstances is not subject to professional discipline or malpractice or similar liability."[27]

ENDNOTES

1 Me. R. Prof. Conduct 1.14(a).
2 *Id.*
3 *Id.* R. 1.14(b).
4 *Id.* Official Comment 6.
5 *Id.*
6 Restatement Third The Law Governing Lawyers §24 Cmt. d.
7 *See* discussion *infra* regarding the lawyer's confidentiality obligations.
8 Me. R. Prof. Conduct 1.14(b) Official Comment 6.
9 Me. R. Prof. Conduct 1.14(b).
10 *Id.* Official Comment 5.
11 *Id.*
12 *Id. See also* ABA Formal Ethics Op. 96-404 (1996).
13 Ronald D. Rotunda & John S. Dzienkowski, Legal Ethics The Lawyer's Deskbook of Professional Responsibility, §1.14-1 pp. 707-08 (2018-19) (*citing* Daniel L. Bray & Michael D. Ensley, Dealing With The mentally Incapacitated Client: The Ethics Issues Facing The Attorney, 33 Family L. Quarterly 329, 330 (Summer 1999).
14 Me. R. Prof. Conduct 1.6(a).
15 Me. R. Prof. Conduct 1.14(c). *See also* ABA Formal Ethics Op. 96-404 (1996) (disclosure is appropriate "to aid the lawyer's assessment of the client's capacity as well as the decision of how to proceed.); Me. Ethics Op. 84 (1988) (discussed *infra*.).
16 Me. R. Prof. Conduct 1.14 Official Comment 8.
17 *See generally* Me. R. Prof. Conduct 1.16, Declining or Terminating Representation.
18 *See* Me. Ethics Op. 84 (1988); ABA Formal Ethics Op. 96-404 (1996).
19 Me. Ethics Op. 84 (1988).
20 Me. R. Prof. Conduct 1.6.
21 *Id.*
22 *Id.* Reporter's Notes.
23 Me. R. Prof. Conduct 1.6(c).
24 *Id.* R. 1.14(a).
25 *Id.* R. 1.14(a), (b).
26 *Id.* R. 1.6(c).
27 Restatement Third The Law Governing Lawyers §24 Cmt. d.



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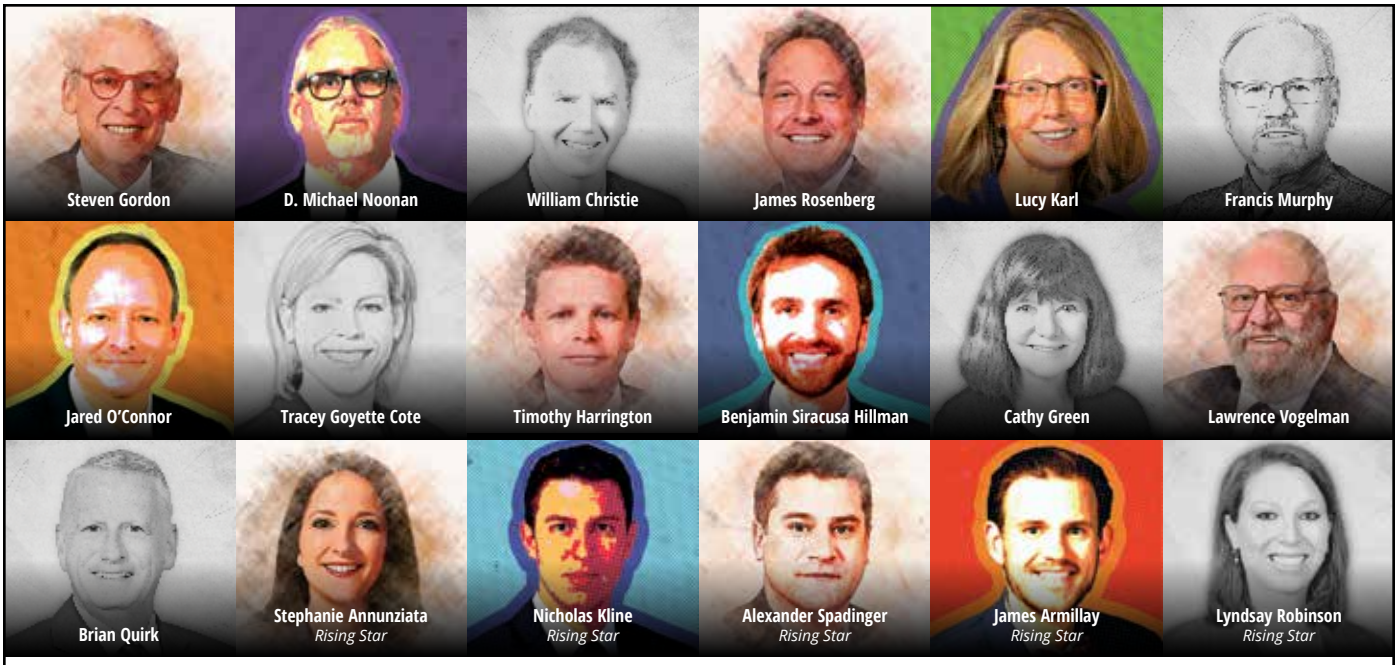

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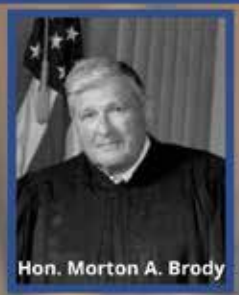

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How to Think Your Way to Better Results

Attorneys often come to me for assistance with thinking more positively. They understand the importance of being optimistic, but they can't seem to will themselves into consistently looking up. I always explain that it's human nature for untethered thoughts – ranging from *I ate too much last night* to *I don't like the lighting in here* to *I need to pick up the dry-cleaning* to *I can't do this* – to course through us all day. And despite the quick-fix gurus who say you can just push unwelcome thoughts away and invite in the ones you want, it's impossible to simply grab control of thoughts and force them out.

Positivity is a smart goal for attorneys wanting to reduce problems, be more accomplished, and feel more powerful, but only if you take a reasonable, long-term approach.√ The key is to stop trying to *command* your thinking, which only exacerbates things, and instead aim to *influence* your thoughts by refining the overarching framework that propels them. The process of shaping inner chatter in a more constructive direction is a big commitment that takes consistent practice over time and pays off enormously. You can absolutely stream thoughts that are more motivating and affirming than draining or agitating – if you're willing to slow down, take a few breaths, and consider these suggestions:

Take your stressful thoughts to court: Have you ever been unnecessarily frazzled by a "time is running out to register" email, a text from a colleague that strikes you the wrong way, or a minor error you made? These are examples of how you can create undo anxiety by jumping to over-the-top conclusions like "I'll get left behind if I don't do this right now," "That person must be mad at me," or "I'm going to lose that client." Our stress levels rise and fall all day based on irrational appraisals we make when we are going too fast to align our feelings with reality. You can level your perspective by pausing at a disruptive thought and asking yourself for evidence against it. You will find as countless memories arise of realizing something wasn't as bad as you thought it would be that considerable stress can be avoiding by reducing troubling thoughts down to the truth. Yes, you really are going to get left behind if you don't act now, people are going to get upset with you, and you may get fired – but far less often, and with less dire results, than your initially dramatic thoughts would have you believe. When you manage your mind's reactivity by interjecting and asking extreme thoughts for evidence before you buy into them, you will be calmer, more grounded, and better able to make assessments of all kinds.

Embrace exceptions to your unwritten rules: Basing your expectations on assumptions is another thinking error that can make lawyering more stressful than necessary. We generally know how things will go based on similar past experience, but rules of thumb cause interference if you're not prepared for exceptions. Maybe you're counting on a routine court proceeding ending by a certain time because that's what usually happens – and then you become impatient and annoyed when the day drags on. Or perhaps you're expecting the customary approval from your usually agreeable boss, and you feel insulted when you get questions instead. You can deal better with inevitable scenarios that don't transpire according



Positivity is a smart goal for attorneys wanting to reduce problems, be more accomplished, and feel more powerful, but only if you take a reasonable, long-term approach.

to the maps in your head by recognizing your probabilities as theories and converting them to hypotheses. *Things generally go efficiently when I'm organized, but sometimes road blocks happen* works well; so does *People are usually cooperative but you never know*. When you elasticize the laws you've arbitrarily constructed, you become more satisfied, flexible, and at ease with whatever is happening around you.

Pivot toward possibility: Another effective method for defusing disruptive thoughts is to slightly nudge them along a more encouraging route. When you're completely inundated with work, you might make the pivot from "How will I ever get this done?" to "How would an attorney I really respect approach this challenge?" In anticipation of being intimidated, you could shift from "I never do well with that judge" to "I'm pretty good at getting along with difficult people." The key here is to recognize that any disruptive cognitions – from *The air in here isn't very fresh* to *Why is this happening to me?* – can start a self-defeating thought-train capable of sabotaging performance. When you are intentional at intervening before a potentially destructive thought-train can take hold, spinning the instigating thoughts positively, empowering thoughts will become more the norm.

Strive for a fan's perspective: Probably the easiest way to deflate unhelpful thinking – especially when it's bullying self-talk – is to picture your fan base of friends, family, and colleagues as vividly as you can. When you're questioning yourself professionally or struggling to sustain your momentum – maybe facing an accelerated deadline when you're running on empty – ask yourself whether your biggest fans would agree with whatever self-defeating thoughts might be coming up. And then start reminding yourself what they'd probably be saying to you, such as: "You're a pro and you can totally figure this out." "You're going to find a way!" Seeing yourself as your fans see you – a person to be cheered on and celebrated – will not only brighten your thinking, but keep at the forefront the importance of treating yourself well if you want to feel valued and strong.

Take the long view: Like with the stock market, a steady outlook means viewing success as a pattern of achievement over time, with inevitable dips mixed in. For you, this applies to unproductive client meetings, poor performance reviews, lost cases, unforeseen delays, and any other normal disappointments in the world of law as par for an extended course and not a way to gauge progress. That's not to say you shouldn't pay attention to slip-ups and evolve from them, just that you shouldn't define yourself by them when they happen. Whether you just snapped at a colleague or got fired, the long-view approach is the same: acknowledge the unfortunate setback, remedy what you can, and get back in the game.

Make it about the moment: If there's one major reason for making the effort to steadfastly cultivate a more resilient mindset, it's the rubber-hitting-the-road attorney work requiring absolute focus on what needs to be done right here, right now. When you need to be present for an acutely vulnerable client or you're speaking in court with no chance for a redo, you have no room for any thoughts that might pull your attention away. Your emphasis, when the pressure is all the way up, must be entirely on what you are doing, motion by motion, so that you are fully prepared to channel each moment into ramping up.

When you rehearse the principles we've covered here – resolutely and with priority – you will find yourself thinking evermore clearly, sharply, and innovatively. It's worth saying one more time that positively conditioning your thoughts is no quick fix, and valuing the concepts and vowing to apply them is not enough. You've got to stay right on top of your thoughts, nipping those destructive ones in the bud before they can obstruct you, to curate a mental climate that will bring out your best. Though you will always be susceptible to self-defeating talk and the countless disruptions of law and our busy culture, your proficiency with dismissing irrelevant inner clamor will evolve with diligent practice.



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