Maine State Bar Association

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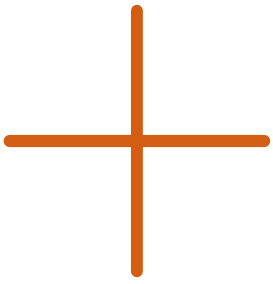

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Seasons of Change

It's spring in Maine and today the sun is shining. The change of seasons, though, may be the only constant right now. As I write this column, the entire nation is under siege by COVID-19, the disease caused by the novel coronavirus SARS-CoV-2. President Donald Trump and Governor Janet Mills are at odds on how and when to reopen Maine's economy. The Governor has declared our state of civil emergency will continue to May 15, issued Executive Order 40 FY 19/20 requesting that evictions stop, and at the same time provided $5 million in emergency rental aid for the month of April. Acting Chief Justice Mead issued his first Pandemic Management Order cancelling the July Bar Exam and rescheduling it to September 30. Longtime Chief Justice Saufley accepted a new position as Dean of the University of Maine School of Law. It's hard to predict how the current state of affairs will look when this column appears in print rather than on my monitor.

Under Angela Armstrong's leadership, the MSBA staff has been hard at work to keep you informed and able to access to professional development and personal support. When the Judicial Branch began issuing COVID-19 orders, Angela's team was posting COVID-19 information on your MSBA website and reaching out to stakeholders. When we realized Executive Order 19 19/20 was creating even more challenges for notarization executions and acknowledgements, we issued a letter to the Governor with proposed language requesting remote notarization during the declared civil emergency. The next week other organizations followed our lead and requested that the Governor order remote notarization as an option. After the Governor's office, Secretary of State's office, and the Attorney General's office worked their magic, Executive Order 37 19/20 was issued. Although the remote notarization process is cumbersome, it does provide a great option for people who desire the comfort of a familiar place and the time they need to ask questions about the documents they are executing. And finally, in addition to issuing important updates to our membership, Angela's team coordinated "Bar Talk," a daily 15-minute forum for legal issues, operations, and concerns. Bar Talk made its debut on March 30 with each segment lasting for 15 minutes or less. Each segment has been different, with many guest stakeholders sharing information with us. You can find the recorded segments linked on the Bar Talk webpage.

Your Board of Governors is also working hard for you, pushing questions and concerns up to Angela and me for sharing with the Judicial Branch, Board of Overseers, MAP, or the Governor's office. In addition, the Board is taking an in-depth look at the Medical-Legal Code of Cooperation (the Code), a medical-legal document, last revised in 2010 in collaboration with medical legal community. Please take a look at the Code, which can be found under the Publications tab, and share with us any thoughts you may have about its effectiveness, along with suggestions to make it better.

Despite the provision of legal services being an essential business, the civil state of emergency has negatively affected most legal businesses; most attorneys are working from home, and some have lost their jobs. Please review your membership benefits, take advantage of the CLEs offered from our website, and reach out to colleagues and stakeholders.

I have read a few "self-help" books in the last month. The first I would recommend is *Personal Branding in One Hour for Lawyers* by Katy Goshtasbi. You can find it at the ABA Law Practice Division Library; we should also have it at the MSBA lending library. It did take me more than an hour to read, but I found it helpful to gain an understanding of the benefits of branding; a quick read for those who are looking at reinventing their practice or fine-tuning their marketing. Should you be interested in other books that I read, just send me a note.

In my last column, I set the focus of the MSBA for the year ahead. Although COVID-19 has hindered our work on "community engagement," this is an excellent time to focus our attention on attorney wellness and even take another look at the way we practice law. With all that is going on, the concept and practice of mindfulness is even more important. Operating in this world of executive orders, many of us have lost our outlets for getting back to a normal mindset. Our new normal for personal and business operations is on the edge of change, and we need to be ready for it. For example, Maine Public Radio recently aired a story on why the handshake should be reconsidered as the American way of greeting a person. Our new normal may not include a handshake in the future. Like many of you, losing the handshake would be a big adjustment for me.

Based on the Governor's new staged plan to reopen Maine, the MSBA had to cancel the Summer Bar Conference; we will look for new ways to be festive and promote camaraderie this summer and earn CLEs! Thank you so much for this opportunity to serve.

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

A New Normal

Wow. As I sit down at my "make-shift kitchen table desk" to write my quarterly Executive Director column, I realize that when you read this issue of the Maine Bar Journal we will most likely find ourselves still quarantined during this pandemic. It is hard to wrap my head around how quickly our lives changed in March of 2020, and the fact that we don't have any idea how long it will last nor what going back to "normal" will really look like.

Most of us are working from home with a new set of co-workers, whether that is a spouse, kids, or pets, or all of the above. You've probably now determined that all co-workers can get on your nerves at some point, no matter who they are! If you are an extrovert like me, this quarantine is driving you crazy and you are craving more interaction than just the dog during the day…leading me to daily Zoom calls with folks in my circle of family and friends. However, I do like the fact that I don't have to get dressed up every day, I'm able to make time to take the dog for a walk and get a workout in, and all my laundry is caught up. I'm pretty sure my dog will be very upset and lonely when I do go back to work at Bar Headquarters.

In some instances, I feel like I am getting so much more done at home with fewer phone calls and distractions. But at other times, I struggle because I don't have my usual desk configuration with all my equipment and files. And in the great scheme of things, what I am actually working on has changed significantly.

The MSBA has been very focused on trying to provide you and its staff with the most up-to-date information about changes due to COVID-19 at the Bar Association and in the courts. We have worked very hard to deliver information and resources about how to work remotely, share emergency orders related to legal filings and court proceedings, and how to take care of your employees during this time of quarantine and employer-related obligations. All of these resources are consolidated on our COVID-19 Response page available on our website www.mainebar.org/coronavirus.

Just prior to going to print, Governor Mills extended the state's stay-at-home order through May 31 and released her staged plan to reopen Maine's economy. Unfortunately, the plan prohibits us from holding our Summer Bar Conference in Bar Harbor this June. While we are disappointed, we remain committed to developing educational opportunities for our members. Our short-term efforts are focused on CLEs that meet the live credit requirements but can be completed at home with your telephone and/or laptop. We are working with our CLE Committee to explore longer-term opportunities that reflect the tentative nature of the in-person CLE programming. Please visit http://www.mainebar.org/events to see what's currently available.

It is my most sincere wish that all of you and your families remain well and healthy. As always, please contact me by phone at (207) 622-7523 or by email (aarmstrong@mainebar.org) with any ideas or concerns about the Maine State Bar Association. Thank you!

Jacqueline M. Rogers Recipient of the 2020 John W. Ballou Award

The Maine State Bar Association is honored to present Jacqueline M. Rogers, Executive Director of the Board of Overseers of the Bar, with this year's John W. Ballou Award. Recipients of this prestigious award demonstrate qualities in keeping with the aims and purposes of the Maine State Bar Association, and emphasis is placed upon the contributions of non-lawyers.

Jackie served as the Board of Overseers' Executive Director since 2004. Prior to that, she spent 20 years in different capacities at the Maine State Bar Association. At the time of her departure from the MSBA, she was Deputy Director. Throughout her career, Jackie has shown a steadfast commitment to the legal community in Maine, fulfilling with competence and efficiency not only the essential duties of her position, but going above and beyond to support the Supreme Judicial Court, the Lawyer's Fund for Client Protection, the University of Maine School of Law, and the Maine Assistance Program for Lawyers and Judges.

Sadly, Jackie passed away on April 29 after a courageous battle with cancer. We encourage you to share any memories or condolences with Jackie's family by forwarding them to the Board of Overseers at 97 Winthrop Street, Augusta, ME 04330.

"We have attained long-term benefits from Jackie's organization and dedication; those two qualities serve as constant reminders of how much we, the Court, and the Maine bar have come to rely on her."

"Jackie Rogers is a 'can do' person who has spent her entire career doing for and supporting the work of lawyers."

"Her energy, creativity, and good relationships with others was a major factor in making MSBA's CLE program widely respected as the best source for CLE to improve attorney professionalism."

"...I came to appreciate that her dedication to enhancing the legal profession and protecting the public interest were the touchstones for everything she did. While Jackie may not be a lawyer, the value of what she gave to our profession and to the public is incalculable."

CAPTAIN JASON HEBERT is admitted to practice law before the Supreme Courts of Texas and New Hampshire, the Air Force Court of Criminal Appeals, and the United States Court of Appeals for the Armed Forces. He may be reached at jasonhebert603@gmail.com.

From Inside the Italian Quarantine: Lawyering on Lockdown

Growing up in New Hampshire, I'm used to a degree of isolation from having to remain indoors during winter months. The isolation I experienced from the occasional nor'easter pales in comparison, however, to the necessary shelter-in-place conditions we're currently facing here in Italy. We originally moved to Italy in 2015, where for the first three years I represented the United States as a prosecutor for the Air Force. I have since moved into the position of Special Victims Counsel representing survivors of rape and sexual assault. My wife, three kids, and I live in the town of Sacile in the province of Pordenone, located about 50 miles north of Venice, and we have fully embraced the Italian culture and the relaxed lifestyle.

Sacile is a stereotypical Italian town with old Venetian style buildings painted in bright colors. Like most Italian towns, it's typically filled with vibrant signs of life: people riding bicycles, walking, eating gelato, and sitting at cafes sipping tall glasses of prosecco. Italy is a very peaceful and laid-back country that tends to reject technology and embrace the concept of simplicity. This approach is highlighted by the phrase "a domani" (tomorrow) which is a favorite phrase used by locals to mean "no hurry."

Since the last week of February, we have seen quite a departure from the typical laid-back lifestyle however, with the country taking a panic-driven turn into isolation. Although we are beginning to hear rumors of the Italian government potentially relaxing rules in the coming weeks, currently, the streets remain empty and are continuously patrolled by Italian Polizei and Carabinieri. The schools, restaurants, cafés, and shops are closed. The only authorized businesses that are allowed to remain open are grocery and pharmacies. COVID-19 has essentially reshaped Italy and everything it represents.

Upon confirmation of the first handful of COVID-19 patients, the Italian government decided to close all schools; coronavirus had become the new snow day. COVID-19 hit northern Italy faster than any of us could've anticipated. Although the Schengen agreement of 1985 has allowed for uninterrupted transit across European borders, the heavy saturation of the virus in the northern part of the country has thrown borders into flux, with countries closing to Italy. This has further stressed a situation already taut with fear and uncertainty.

Over the past five years, I've had several opportunities to experience the Italian healthcare system firsthand. Italian healthcare providers are incredibly hard-working and extremely compassionate, but the system lacks the technology and supplies that we, as Americans, take for granted. The most startling observation I've had of the Italian healthcare system is that even in the absence of a pandemic, it's overwhelmed with patients, likely as a result of a system that provides universal coverage. Now combine an already saturated healthcare system with a rapidly growing pandemic and it's no surprise that the system is struggling to care for patients. Currently, most of the local hospitals are out of supplies, have no ICU beds, no ambulances, and no staff to tend to new patients. This has forced Italy to abandon the initial call for isolated red-zones and instead quarantine the entire country. "A domani" is simply no longer an acceptable answer.

The most recent Italian declaration has increased measures and further restricted individual movement. No more casual walking, exercise, or gathering outside. Everyone needs to remain in their homes unless identified as mission essential personnel. Nonessential personnel are only allowed to leave their homes, one-person at a time, for groceries or medical supplies. Everyone must be wearing single use disposable gloves and a face-mask when entering grocery stores. Violations of this new decree will result in heavy fines or jail time. All though these new measures do not signal an end to the lockdown, it does give locals hope that the number of daily confirmed cases will continue to decline. So far, it's been impressive to see the local community come together to support the lockdown measures and to follow the strict rules of social distancing which is a rare sight since the Italian culture relies on physical contact (the mere thought of "personal space" is unheard of). With the new restrictions not having an expiration date, I've had to create a plan to continue zealously representing my clients.

Since arriving in Italy, I have had the unique opportunity of representing clients on four different continents, in 10 different countries, which has provided me with the skills necessary for teleworking and managing cases. In response to the quarantine, I've implemented a four-step process to make sure I can maintain competent representation and continue caring for all of my clients.

Step 1: Logistics
I backed up all files for easy transport home, updated office voicemail, placed signs on the door, and secured the office.

Step 2: Clients:
I called each client and updated them on the Italian quarantine, then I reassured them that I am still tracking their case and protecting their rights and interests. Even though Italy has been thrown into chaos, for most of my clients their well-being is dependent on the outcome of an upcoming trial.

Step 3: Prosecution
It's been essential to contact each prosecuting office to confirm they have my current contact information. It's also been important to provide a brief synopsis of the current quarantine measures so there is no expectation for me to travel for a court appearance.

Step 4: The unimaginable
In the event that someone in my house becomes ill, and I must divert my full attention, I have granted access to my case files to a supervising attorney outside of Italy. This attorney has access to a quick-reference client contact sheet that can be used to easily contact all of my clients to inform them of the situation.

So far these simple, common sense preventative measures have helped me maintain my duties to clients. And in the end, I'm optimistic that we will overcome this situation. But in the meantime, "andra tutto bene." Everything will be fine.

Disclosure: The views expressed in this article are solely those of the author and do not reflect the official policy or position of the Judge Advocate General's Corps, the Department of the Air Force, the Department of Defense, or the United States Government.

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Three Lessons Learned From Recent Jury Trials

Last year, I tried six civil jury cases to a verdict (two medical malpractice and four personal injury) in five different counties (York, Cumberland, Androscoggin, Penobscot, and Aroostook). Along this journey, I learned three important lessons: (1) proceed with caution in stipulating to liability, (2) apply new approaches to jury selection, and (3) harness the power of core truths.

1. **Proceed with Caution in Stipulating to Liability**

In several of my trials, defendants sought to stipulate to liability on the eve of trial. Defendants often emphasize their good intentions when they extend these stipulations to liability: "we take responsibility;" "we just want to simplify the case;" "we don't need to waste time;" etc. Not surprisingly, they often have ulterior motives in seeking to stipulate to liability. Defendants want to divorce the actions that caused the harm from the harm itself. If you accept a stipulation to liability, the defendant will then argue that all of the negligent actions that caused your client's injuries are irrelevant. Defendants may use the stipulation as a shield to neutralize powerful facts in your case and to preclude your presentation of a cohesive story about the incident that caused your client's injuries.

In a medical malpractice case, I tried in the Penobscot Superior Court in December 2019, a surgeon sought to stipulate that he was negligent in installing mesh backwards during a hernia repair. The surgeon had previously denied that he was negligent in his answer. When we refused to accept the defendants' stipulation, the defendants moved *in limine* to exclude the plaintiff from introducing evidence of the defendant's negligence. After a hearing, the Superior Court denied the defendants' motion.

At trial, we called the surgeon to testify on issues pertaining to liability and damages. We also called an expert in general surgery, who fully described the errors that had been made during our client's surgery and the systems that every surgeon should have in place to prevent such errors from occurring. Our expert also drew helpful illustrations for the jury to demonstrate the errors that had been made. This evidence was critical for the jury to fully understand the negligence and to appreciate the severity of our client's injuries.

In Maine, a stipulation requires agreement by both parties. The Law Court has held that a party bearing the burden of proof is generally allowed to present its "entire case," and is under no obligation to accept a proposed stipulation.[1] In *Maine v. Michaud*, the Law Court affirmed a conviction in which the trial court admitted evidence of the extent of the victim's injuries through testimony and photographs despite the defendant's proposal to stipulate to the element of serious bodily injury.[2] The Law Court explained its holding as follows: "[t]he State is not required to accept a stipulation from the defendant. The State must be allowed, within the rules and bounds of justice, to present its entire case . . . Therefore, although Michaud offered to stipulate to the injuries before trial, the State was under no obligation to accept the stipulation."[3]

In support of this holding, the Law Court cited *Old Chief v. United States*, 519 U.S. 172, 189 (1997):

> People who hear a story interrupted by gaps of abstractions may be puzzled at the missing chapters . . . A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.[4]

There can be compelling reasons to stipulate to liability; however, just because a defendant proposes a stipulation does not mean you are obligated to accept it. Ultimately, a stipulation carries with it inherent risks and benefits. It is critical to weigh these in advance of trial and discuss them with your client.

2. **Apply New Approaches to Jury Selection**

Jury selection may be the single most important part of a trial. Ensuring the selection of a fair and impartial jury is critical to providing your client with an opportunity to prevail. All it takes is one or two jurors who have underlying biases or prejudices towards you, your client, or your case to undo all of your hard work at trial. The traditional jury selection process in which judges question prospective jurors is often ineffective at identifying fair and impartial jurors, because it is not robust enough to provide "reasonable assurance" that "juror prejudice, if present, will be discovered."[5] Moreover, *voir dire* directed by the Court often relies too heavily on potential juror's self-assurances that they can be "fair and impartial." The Law Court has explained the potential shortcomings of asking jurors to assess their own impartiality:

> Asking prospective jurors to evaluate their own ability to be impartial is not always adequate, particularly if there is significant potential for juror bias. Even if prospective jurors assure the court that nothing in their past experiences would influence or affect them in any way . . . such assurance of disinterest *is but one consideration*.[6]

The right to examine jurors and to exclude those who are unfit to serve is codified by statute and rule. By statute, the trial court must permit "challenges for cause" and "peremptory challenges."[7] Maine law provides that a juror should be excused if he or she:

A. has given or formed an opinion in the cause;
B. is sensible of any bias, prejudice or particular interest in the cause; or
C. does not stand indifferent in the cause.[8]

In October 2015, Chief Justice Leigh Saufley approved a pilot project for attorney-directed panel *voir dire* in Penobscot and Franklin Counties. This came on the heels of similar pilot projects in New Hampshire and Massachusetts. On September 1, 2019, the Maine Supreme Judicial Court amended M.R. Civ. P. 47, "Selecting Jurors." As the Advisory Notes state, Rule 47 was amended "to state more explicitly that, in addition to oral questioning of prospective jurors by the court, the

court may allow (i) use of written questionnaires or (ii) direct questioning of prospective jurors by attorneys or unrepresented parties." Most importantly, Rule 47 provides that the court shall allow the use of questionnaires or direct questioning if the court makes the findings specified in Rule 47.

The Superior Court permitted attorney-directed *voir dire* in three of my six trials in 2019. The process was completed efficiently in all three cases. Attorney-directed *voir dire* consistently helped me to identify jurors' preconceived beliefs and attitudes about general topics that were central to my case, such as attitudes towards awarding noneconomic damages, attitudes about people with preexisting medical conditions, and attitudes about attorneys and clients who bring personal injury lawsuits.

For example, during questioning on the topic of awarding noneconomic damages, some jurors vigorously shook their heads in the negative when asked about whether they could award money damages to compensate an injured party for pain and suffering. Other potential jurors openly expressed concern that money damages for pain and suffering were too speculative and could not eliminate a person's pain. Still other jurors explained that they would need "overwhelming" evidence of pain and suffering before they could award noneconomic damages. Without attorney-directed *voir dire*, these underlying biases and attitudes would not have been exposed.

Judges understandably have concerns about relinquishing control over questioning jurors to attorneys. The concerns I have heard articulated include concern that attorneys will argue their case during *voir dire*, concern that questions or answers will taint the entire juror pool, and concern that the process will take too long. Rule 47 has built in safeguards to ameliorate these risks. First, Rule 47 requires a party to make the request for attorney-directed *voir dire* 21 days before jury selection. This ensures that the parties and the Court can discuss the logistics of the process in advance of the actual jury selection.

Second, Rule 47 requires attorneys to identify topics they intend to cover during attorney-directed *voir dire* and may require attorneys to submit specific questions to the Court in advance of jury selection. This provides the Court with advance notice about topics that may be covered and questions that may be asked so there is less likelihood for surprise.

Third, Rule 47 allows the Court to set specific time limits for direct questioning thereby eliminating the possibility that the process will carry on indefinitely.

In addition to the structural safeguards imposed by Rule 47, attorneys have strong incentives to remain within the lines of acceptable inquiry. Attorneys who run far afield in questioning risk admonishment from the Court. Just as being admonished by the Court during opening statements or closing arguments can damage an attorney's credibility with a jury, so too can similar admonishments during jury selection. Moreover, attorneys run the risk of alienating jurors if they are not thoughtful and respectful in their questioning.

Attorney-directed *voir dire* can benefit plaintiffs and defendants alike, because juror bias and prejudice transcend party labels. For attorney-directed *voir dire* to be effective, however, the parties must develop a clear plan in advance of jury selection that outlines the topics they intend to cover and the time estimate for *voir dire*.

3. **Harness the Power of Core Truths**

A core truth is a foundational principle in a case that is authentic and integral. Every case has one or more core truths that relate to the issues of liability and damages. Tapping these core truths is essential to harnessing the power of a case, because juries see cases for what they are and they can spot facades.

Core truths were particularly integral to two cases I tried in 2019. The first was a personal injury case in York County in which my client fractured his L-2 vertebra when he fell through a large hole in a residential home that was under construction. At deposition, the defendant testified that he repeatedly warned my client about the open hole. He testified to standing next to the hole with my client for 5-10 minutes before my client fell; pointing to the hole; and discussing his work on the hole with my client. He testified that the hole was large, open, and apparent and that my client was at fault for falling through it.

My client testified at deposition that he never knew the hole was present until he fell through it. He further testified that he had never been to the construction site before the night of the incident and that the site was dimly lit and shadowy when he arrived.

The core truth that emerged through discovery is that this case was about a lie. The testimony from my client and the defendant was diametrically opposed. If the jury concluded that the defendant discussed the hole with my client and stood around the hole with him for 5-10 minutes, then we would lose. On the other hand, if they believed my client, we had a path to victory.

It is critical to present a core truth to the jury in a clear and direct manner. Do not obfuscate or equivocate with respect to

a core truth. In this case, I told the jury during my opening statement that one party was lying and one party was telling the truth and that it was their job to figure it out. With this foundation, the jury knew exactly what to look for during the trial. The trial became focused on the lie, and the jury assumed their role as chief detective. Ultimately, the jury found the defendant negligent; however, the jury still reduced its overall award based on my client's comparative fault. Without the core truth in this case, overcoming liability and comparative fault likely would have been insurmountable.

In a medical malpractice case, I tried in Aroostook County in November 2019, core truths counteracted the hospital's affirmative defense of comparative fault. In that case, my client injured her right shin when a piece of wooden debris struck her while taking apart an old bookcase. She developed a large hematoma—a collection of blood beneath the skin. My client was concerned about the hematoma, because she took a blood thinning medication for an unrelated medical condition, and she feared that she had broken a bone.

At the hospital, the physician assistant ordered an x-ray that confirmed no fracture and drew blood that confirmed her blood was therapeutically thin. He ordered the administration of an intramuscular narcotic pain medication and discharged her home less than two hours after she arrived with instructions to return if her condition changed or worsened.

My client returned home and went to bed. When she awoke the next day, the hematoma had grown, but she assumed it was not serious. Later that afternoon, my client's hematoma exploded through the necrotic skin on her shin. An ambulance transported her back to the hospital with an open and bleeding wound. In total, she underwent three surgeries, including a skin graft, and a blood transfusion.

The hospital argued that my client was comparatively at fault for her injuries, because she failed to follow discharge instructions that warned her to immediately return to the emergency department if her condition changed or worsened. The hospital argued that there was no dispute that her condition changed and worsened during the period after her discharge and, therefore, my client was responsible for her own injuries. This argument had the potential to cultivate negative attribution among jurors, i.e., "I never would have waited that long return to the emergency department;" "I would have been more careful;" "I would have known that my condition was getting worse."

One of the core truths that we developed during discovery is that a hospital emergency department must not send a patient home until the patient's condition is stable, because doing so risks serious harm or death to the patient. This core truth shifted the focus from my client's conduct at home to the hospital's actions when she was at their facility. The evidence demonstrated that the hospital failed to provide any treatment to ensure the stability of my client's hematoma: no measurements of the hematoma; no application of ice; no application of compression dressings; and no surgical consult. Instead, the hospital administered narcotic pain medication and sent her home to manage her potentially serious hematoma.

The core truth that the emergency department failed to stabilize my client's medical issue resonated with jurors on a level beyond the facts of this particular case. This core truth applies to a person who goes to the emergency department with chest pain that is concerning for a heart attack or a child or elderly person with a worsening infection and vital signs. In both instances, an emergency department cannot send a patient home without first ensuring that the patient is stable.

This liability core truth along with core truths related to damages allowed us to obtain a favorable verdict. Moreover, the jury did not find any comparative fault.

Identifying core truths involves spending time with your clients at their homes, listening carefully to all aspects of their story, and working closely with experts. Core truths enhance the power of the case by transforming potential weaknesses (i.e., arguments the plaintiff or defendant will emphasize) into strengths. To be effective, cultivate core truths early and throughout discovery.

ENDNOTES

1 *Maine v. Michaud*, 2017 ME 170, ¶ 9, 168 A.3d 802.
2 *Id.* ¶¶ 2, 9.
3 *Id.* ¶ 9 (citations omitted).
4 *See also*, *Briggs v. Dalkon Shield Claimants Trust*, 137 F.R.D. 369 (D. Md. 1997) (applying holding of *Old Chief* in context of civil trial).
5 *State v. Lovely*, 451 A.2d 900, 902 (Me. 1982) (quoting *United States v. Delval*, 600 F.2d 1098, 1102 (5th Cir. 1979); *see also State v. Nigro*, 2011 ME 81, ¶ 15, 24 A.3d 1283 ("[V]oir dire questioning must be sufficient to disclose facts that would expose juror bias."); *State v. Lowry*, 2003 ME 38, ¶ 11, 819 A.2d 331 ("Questioning during voir dire must be sufficient to disclose facts that would reveal juror bias.").
6 *Lowry*, 2003 ME 38, ¶ 8, 819 A.2d 331 (citations and quotations omitted); *see State v. Holland*, 2009 ME 72, ¶ 54, 976 A.2d 227 ("[A] juror's claim of an ability to remain impartial is not always adequate and is but one consideration.").
7 *See* 14 M.R.S. §§ 1204, 1301.
8 *See Id.* § 1301.

Maine-based psychologist AMY WOOD, Psy.D., created Law and the Good Life, a research-based attorney wellness coaching and training system designed to address the challenges of lawyering. She frequently offers CLE opportunities through the Maine Bar. To learn about upcoming events, visit www.mainebar.org. For more information about Dr. Wood, go to www.amywoodpsyd.com.

Navigating Negativity: An Optimistic Approach

The Power of Positive Thinking was a revelation when Dr. Norman Vincent Peale's classic self-help book debuted in 1952. Now, over 60 years since we started seeing the glass half-full as the secret to happiness, positive thinking as a success strategy is more popular than ever. In an era where personal and professional reinvention is all the rage, the party line is that whatever you want – a fit body, your soul mate, the corner office, you name it – can be yours if you show zero tolerance for nay-saying and focus exclusively on what is possible. Pay no attention to doubt and fear. Just vividly picture your dreams, fiercely affirm your deservedness, and your desires will manifest.

Positive Psychology, a relatively new movement in the behavioral sciences that studies the ingredients of advanced mental health, highlights the potency of a rose-colored perspective in accelerating performance. Identifying and channeling natural personal strengths, rather than pushing against the grain by striving to overcome weaknesses, is a smoother and more time-efficient way to excel. Recognizing and applying what is already working is a quicker route to transformation than lamenting what's wrong and broken. But as social critic Barbara Ehrenreich asserts in her provocative book Bright-sided, positive thinking has a definite downside when taken too far. Not only can tireless cheerfulness lead us to ignore inconvenient yet important truths and skip over painful yet character-building growth experiences, it is utterly off-putting to those of us who prefer to confront rather than repress reality.

As we all know, too much negativity is draining, deflating, and downright depressing. But too much positivity can lead to denial, avoidance, and dangerous oversights. The key is to strike a healthy balance between needless catastrophizing and inflated confidence. What's required, in other words, is true optimism, which is the measured capacity to step back and be objective, distill significance from positive and negative extremes, and steer what's relevant into a promising future.

Here are four general steps of optimism in action:

1. See the full picture.
Rarely is one particular theory or approach all right or all wrong, and so the practiced optimist sits back and listens, observes, notes, mulls over, and then selects the most fruitful advice and channels it into a workable strategy. In the spirit of real diversity, an optimistic trouble-shooter brings in a few experts with wildly opposing takes on a particular topic and hears them out. When divergent perspectives are culled for what resonates, what originates is eclectic resolution encompassing what's best from the spectrum.

2. Find value in cynicism.
Optimists know that people who look at the downside, as demoralizing as they can be at times, are essential to success because they alert us to vital caveats. Having your enthusiasm interrupted is never fun, but the injection of important warnings and considerations into the mix is incremental to full readiness. When a pessimist puts the brakes on by asking

what we'll do if it rains, if we run out of money, if it takes longer than we think, or if our proposal gets turned down, we are forced to take a hard look at what we're doing, find and fix holes, and become sufficiently prepared for the worst case scenario. The beauty of pessimism is that it reins us in when we're too pie-in-the-sky and invites necessary pragmatism and down-to-earthness to the table.

3. Offer a chair.
Optimists understand that emotional experience, though not always pleasant, is tantamount to personal and professional development. And so when someone is in the throes of upset feelings, an optimistic person makes ample time and space for processing. The only way to get from emotional upheaval to calm and clarity is through it, and patient empathy is the catalyst. As my friend in customer service puts it, "Let the distressed person climb mount anger, and when they've complained all the way to the top, you can step in with possible solutions."

4. Switch gears when enough is enough.
Optimists are open-minded about negativity only until the wet blanket has been given fair floor time and sufficient venting has occurred. When a conversation turns to familiar droning about a seemingly intractable circumstance, an optimistic person directs the conversation to a new place by asking, "What have you done, or what can you do, to try and make the situation better?" or "In a perfect world, if you had unlimited resources and power, what would you do to solve the problem?" When a chronic complainer starts belly-aching, the optimistic companion intervenes with, "What do you hope to accomplish with our conversation today?," "Tell me three positive things that have happened since we last talked," or "What personal skill can you apply to make your situation better?" As Dr. Peale knew well, the real power of positive thinking lies in the potential it opens up with a provocative line of inquiry.

ALPS Risk Manager MARK BASSINGTHWAIGHTE, ESQ., has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Check out Mark's recent seminars to assist you with your solo practice by visiting our on-demand CLE library at alps.inreachce.com. Mark can be contacted at mbass@alpsnet.com.

How COVID-19 and a Recession Could Impact Malpractice Claims

During a recession, and for the three years following, there has historically been a huge spike in paid claims, which is a number that typically doesn't return to a more normalized level until five years post-recession. In addition, and looking back at the events of 2008 specifically, legal malpractice insurers experienced a spike in paid claims above $10,000 that ranged from 35 percent to 41 percent. I share this in order to explain why recessions always capture the attention of the insurance industry because given how the markets look of late, another recession appears to be imminent, thanks to the COVID-19 pandemic. I wish it were otherwise, but it sure looks like history is going to repeat itself.

As a risk manager for a legal malpractice insurer, one interesting question for me is, "How will COVID-19 impact our insureds?" While only time will tell, I have a few thoughts. Lawyers are already having to deal with telecommuting and all the associated risks, not the least of which is a significant increase in the risk of someone at a firm becoming a victim of a cybercrime. A number of lawyers and more than a few clients will be forced to deal with significant and potentially long-term reductions in household income. Some lawyers may simply decide enough is enough and retire, while others may be forced into postponing retirement as a result of steep declines in their retirement accounts. There are as many possible scenarios as there is uncertainty right now.

Here's the point I'm trying to make. Everyone, including lawyers, is trying to find a way to maintain some level of control and normalcy during very uncertain times. The challenge here is to not let emotions, such as fear and panic, cloud one's personal and professional judgment, because that's when poor decisions are made. For example, investments get sold at the market's bottom, an attachment to an email that claims to have the answer to preventing the spread of coronavirus is opened too quickly, or an important deadline never gets entered into a calendar all because worry and fear rule the day.

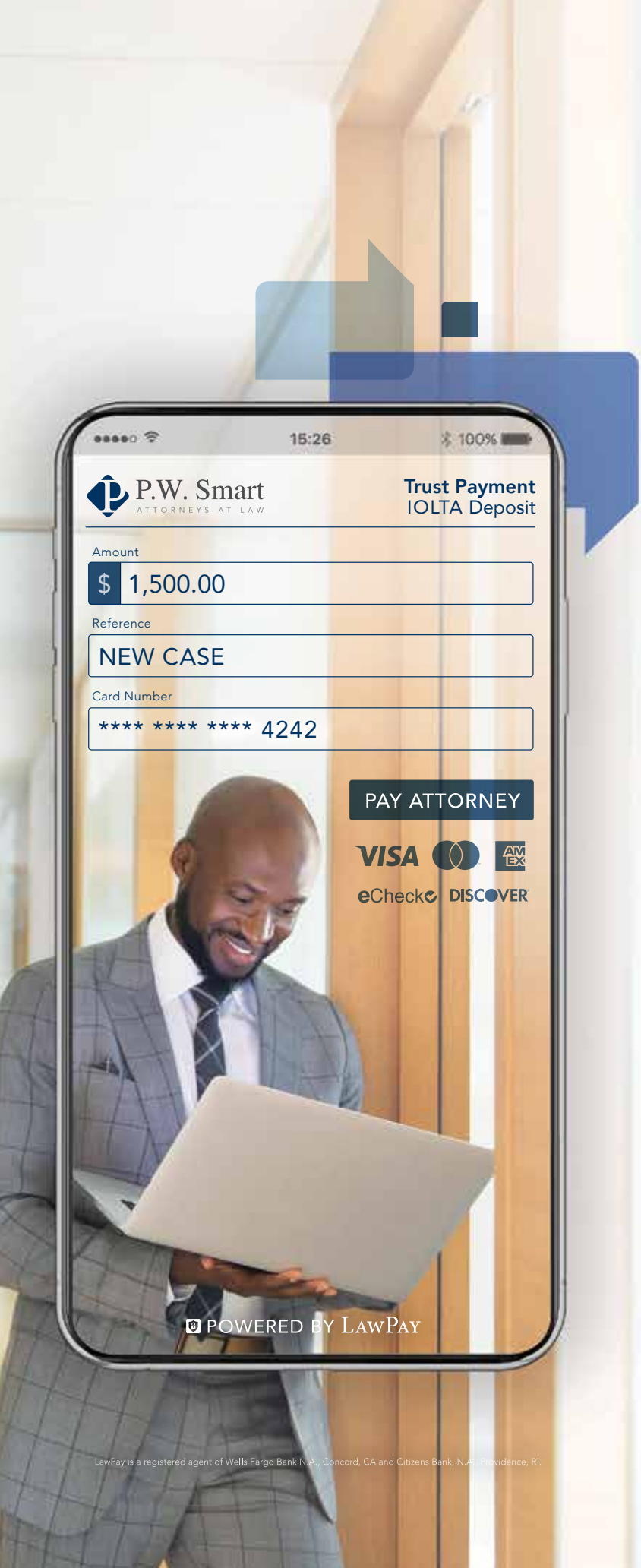
Now, based upon what has happened as a result of past recessions, coupled with the response to COVID-19 individually and governmentally, legal malpractice insurers are currently concerned about claim frequency and policy retention.

First, we expect claim frequency and/or claims severity to change. This will be due to a variety of reasons. Unfortunately, we can't accurately predict how these will change. At a minimum, clients will look to blame their lawyers when their business dealings go south as a result of the near-certain recession that's coming. Lawyers and staff will make mistakes that would otherwise not have been made due to the rapid transition to working from home and/or being under excessive stress. And clients, who are also experiencing excessive stress, will question decisions they made in light of the advice their lawyer gave them if their legal matter doesn't work out as they way expected. Regardless, there will be a new normal in terms of claims, at least for a few years.

Second, policy retention may be an issue; but again, we can't accurately predict how this might evolve. Lawyers facing difficult financial times may choose to leave the practice of law entirely or may decide to allow their policy to lapse and simply go bare as a way to save money. Of course, there's the flip side: some who have previously been bare may decide now's the time to purchase coverage because the value of their assets have dropped, and their level of risk has risen. Only time will tell. Right now it may be difficult to turn off the noise and stay

focused on the tasks at hand; to stop worrying about finances and family and take care of the business side of the practice; and to keep emotions in check as you try to find the time to document your files, keep your clients informed, and struggle to deal with courthouse closures and emergency orders. It's a given that mistakes will be made; but it seems to me that times like these truly underscore one of the values of having a malpractice policy. It's the comfort that comes with knowing that if some mistake does eventually turn into a malpractice claim, you've got coverage in place.

That said, I can't help myself. I need to add one final comment. For those of you who have up until now made a choice to forgo coverage, I can't imagine a better time to rethink that decision. Remember, the value of assets has dropped, and the level of risk has increased. The peace of mind that comes with the purchase of a legal malpractice insurance policy is worth every penny.



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MATHEW SCEASE is development director at the Maine Justice Foundation. He can be reached at mscease@ justicemaine.org.

Maine Justice Foundation Hires New Executive Director; Legal Aid Providers Respond to the COVID-19 Pandemic

"After a national search, the Board of the Maine Justice Foundation has unanimously and enthusiastically approved hiring Michelle Giard Draeger to serve as our new Executive Director," announced Foundation President William S. Harwood. "She has the skills and abilities essential to leading the Foundation into the future and advancing our mission of access to justice for Mainers who are vulnerable and hurt by poverty."

A native of Maine, Ms. Draeger graduated from the University of Maine, School of Law in 1999. She began her legal career as a staff attorney at Pine Tree Legal Services, focusing on cases involving domestic violence. From 2001-2003, she was an associate in the litigation practice of Friedman Gaythwaite Wolf & Leavitt in Portland.

Ms. Draeger joined the U.S. Securities and Exchange Commission's Division of Enforcement in 2004, first in Washington, D.C., where she worked for two years and then in the Commission's Boston office for six years as a Senior Enforcement Counsel. In 2012-2013, she served as an Assistant United States Attorney for the District of Maine and from 2013-2016, she was Manager of Compliance, Legal Affairs, Privacy and Program Integrity at Martin's Point Health Care.

Since 2016, Ms. Draeger has served on the Board of Trustees of the Falmouth Land Trust and has also served as Vice President and Chair of the Development Committee. Ms. Draeger was a member of the inaugural class of the New Girls Network and later served on the boards of the Maine Women's Fund and the Maine Humanities Council.

According to H. Lowell Brown, Chair of the Search Committee and the Foundation's President-Elect, "We are very impressed with Michelle's commitment to service, her collegial management style, her effective courtroom presence, and her calm and practical focus on mission." Michelle Draeger adds, "It is the honor of my legal career to serve the Maine Justice Foundation in this capacity and support its mission of ensuring access to justice for low-income and vulnerable Mainers."

Ms. Draeger succeeds Diana C. Scully, who has served as the Foundation's Executive Director since May 2013 and announced last fall that she planned to retire at the end of May 2020. Ms. Draeger will begin her new position on May 18, 2020.

Maine's Legal Aid Providers Respond to COVID-19

If you are sitting in your home office reading this, I don't need to underline how tumultuous and disruptive the past weeks have been. Maine's providers of civil legal aid are not immune. They have met the challenges of social distancing, court closures and work-at-home with flexibility and quick thinking.

The needs of their clients will increase just as surely as the unemployment rate and the social dislocation following the economic "freeze."

Evictions: The security of home in the face of a pandemic is an urgent need. Getting evicted and needing to find a new apartment in just a few days would be extremely difficult. Given the current health crisis, many landlords aren't renting.

Pine Tree Legal Assistance dealt with a mass eviction situation case in Augusta as early as March 13. With the subsequent closure of the courts, eviction cases (except in emergencies) will not be heard until after May 15.

Domestic abuse: Social distancing, shelter-in-place and isolation have much different implications for victims of domestic violence. Home is not a safe haven but the one place where abusers exercise the most control over their victims. Domestic abuse is likely to worsen during the nationwide lockdown. Victims will be less willing to reach out to shelters during the pandemic. And victims with no paid sick leave or who have been laid off from work will have even less ability to escape their abusive environment.

Family law: Child-custody arrangements have been thrown into disarray as one parent or another seeks to change the agreement or simply ignores it due to the changes wrought by COVID-19. When one parent is considered an "essential" employee and may have more exposure to the coronavirus, the situation becomes more complicated.

Elders: Maine's aging population is especially vulnerable to the coronavirus. Helpline attorneys at Legal Services for the Elderly (at 800-750-5353) continue to staff the toll-free numbers during regular business hours. Callers are often more anxious and agitated when they call, but they are relieved to find that expert help is still on the other end of the phone.
Serving seniors who are victims of elder abuse is a challenge right now. The courts will hear cases for Protective Orders, but elderly clients are at high risk for contracting the virus and should be remaining at home. Many can't participate in telephonic hearings due to hearing problems. When the home is not safe, and appearing in court is not safe, the right path can be difficult to find. LSE is developing an array of possible responses for these situations.

Policy advocacy: A statewide policy advocate, Maine Equal Justice is working to expand access to unemployment insurance for people impacted by Covid-19. MEJ's Policy Team shared their recommendations with the Maine Department of Labor to promptly get unemployment insurance to people who were asked not to come to work or because of illness. The Governor embraced these ideas, and a bill passed in March to help keep people whole economically.

MEJ promptly hosted a Zoom meeting, working with AFL-CIO and the Labor Commissioner, attended by over 700 people and got the word out to employees and employers about these changes. And their website at www.maineequaljustice.org has updated information on how to access public assistance during this time and any changes that have been made.

Immigration law: The slow process of immigration applications and hearings has ground to a halt because of the coronavirus lockdown. The Immigrant Legal Advocacy Project has responded to COVID-19 with changes to minimize the exposure of their clients and staff.

The Next Generation: At the same time that all of their law school classes were moved online, the student attorneys of the University of Maine School of Law Cumberland Legal Aid Clinic continued their direct representation of clients and broad-impact advocacy work. The Clinic made the necessary arrangements to ensure that the students could continue to provide legal help to survivors of domestic violence, prisoners in the state prison system, juveniles in detention, new Mainers seeking legal status, and other clients with urgent legal matters.

One way you can help: The Maine Volunteer Lawyers Project has closed its in-person clinics and switched its focus to its helplines and maine.freelegalanswers.org. One option is to visit the Free Legal Answers website and register as a volunteer attorney.

To learn more about Maine's legal aid providers, visit them at:

www.mainelaw.maine.edu/public-service/clac/
www.ilapmaine.org
www.mainelse.org
www.maineequaljustice.org
www.ptla.org
www.vlp.org

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One Lawyer's Story

Sam (not the attorney's real name) had arrived at middle age. He had been practicing in the same firm for 20 years. A graduate of a prestigious law school, Sam was a well-seasoned and successful veteran of litigation. He had been an effective advocate and was well liked by his partners, clients, and peers. Sam also had a long standing and serious drinking problem. For many years he was able to practice at a very high level. He did not let his drinking affect his work. As often happens, however, his alcohol consumption increased over time and began to adversely impact his considerable legal skills. His partners noticed a gradual change in his appearance and demeanor. On one occasion a court clerk called his office because he was late for a court appearance. The clerk stated that when Sam finally arrived, he appeared to be somewhat disheveled and seemed slightly disoriented.

When his partners confronted Sam about the worrisome changes they saw, he denied having a drinking problem. They wanted to believe him, but felt something was wrong. The firm's partners were close knit. They were very fond of Sam and were uncomfortable pressing their concerns further. None of them was very familiar with substance abuse or mental health problems. They decided to contact MAP, the Maine Assistance Program for Lawyers and Judges.

The MAP volunteer assigned to the case met with one of the partners and obtained as much background information as possible. The firm informed Sam that they had contacted MAP. So he expected the phone call he received a few days later. The volunteer had known Sam for a long time. Early on in their careers they had several cases with each other. In the intervening years they had little contact, but were friendly whenever their paths crossed. Sam agreed to meet with the volunteer.

At the meeting Sam conceded that he had been somewhat "off his game" of late. He attributed it to some difficult family issues. He acknowledged that he drank alcohol, but never to excess. The volunteer thought otherwise. He explained his concerns and told Sam that he should feel free to contact MAP if he ever felt in need of help. Sam thanked the volunteer and assured him he would call if the occasion ever arose.

Additional meetings took place over the following months. Each time Sam assured the volunteer that he was fine. His partners, however, were becoming increasingly concerned.

Their last meeting was at a coffee shop. Sam looked unwell. He could not drink his coffee. His hands shook so badly that he was unable to bring the cup to his lips without spilling. The volunteer was alarmed at Sam's appearance. He pointed out that Sam had been unable to drink his coffee during the last half hour. Sam said it was not a problem. He also stated that he had undergone his annual physical exam the previous month, and his doctor told him he was in very good health. The volunteer left the meeting with a renewed awe at the level of denial to which an alcoholic can rise.

Shortly thereafter Sam's world came crashing down. He was arrested for an incident that occurred while he was intoxicated. He spent the night in jail, and was facing a significant criminal charge. Sam finally called MAP.

After Sam made bail he met with the volunteer. All pretense was gone. He admitted having been an alcoholic for years. He knew he needed help, but could not imagine his life without alcohol. He was facing a serious criminal charge. He thought he might be thrown out of his firm. He feared his law license was in jeopardy. Sam had hit his bottom.

Mental health challenges can occur at any time, and do not discriminate on the basis of age, gender, experience, or anything else, for that matter. They can be exacerbated during times of crisis. The COVID-19 pandemic has added considerable stressors to everyone's lives. Don't let today's "new normal" become an unmanageable problem.

Sam finally accepted MAP's assistance. He started to attend Alcoholics Anonymous meetings regularly. He asked another MAP volunteer, one with years of sobriety, to become his AA sponsor. Sam also entered into a MAP monitoring agreement that included among other things: complete abstinence from alcohol, random alcohol testing, frequent AA attendance, and periodic contact with MAP. The contract helped Sam's defense attorney negotiate a deferred disposition of his case. Its provisions required compliance with the terms of the MAP agreement as well as a waiver of Sam's MAP confidentiality such that the program would notify the prosecutor if Sam failed an alcohol test or otherwise materially breached the agreement. The duration of the deferred disposition was three years. Those conditions were satisfactory to Sam's partners, who graciously gave him a chance to redeem himself. And no adverse action against his law license was taken by the Board of Overseers.

Many years have passed since Sam's crisis. He fulfilled the terms of his deferred disposition and the criminal charge was dismissed. He is still with his law firm. He has maintained his sobriety. His personal life and health have greatly improved. Sam continues to be a very active member of Alcoholics Anonymous. He still attends several meetings each week. Over the years Sam has helped many other alcoholics stay sober. In addition, he has become one of MAP's most valued volunteers.

All credit for the happy conclusion to this story goes to Sam. After all, he is the one who has remained sober all these years. He had some help: an excellent defense attorney, a prosecutor who understood the disease of addiction, caring partners willing to extend another chance, the fellowship of Alcoholics Anonymous, and MAP. However, none of these would have had any effect on the outcome of his crisis had Sam not asked for help and utilized the help that was offered. All the assistance in the world is to no avail if an alcoholic does not fully commit to recovery.

Sam's story is by no means unique. Members of the legal profession have alarming rates of alcohol abuse. The same is true of depression, anxiety and stress. Unfortunately, many lawyers have difficulty asking for assistance with any of these issues. Shame, embarrassment and privacy concerns are all obstacles to seeking help. So too is the erroneous belief that if we are able to solve our clients' problems we are fully capable of solving our own.

Mental health challenges can occur at any time, and do not discriminate on the basis of age, gender, experience, or anything else, for that matter. They can be exacerbated during times of crisis. The COVID-19 pandemic has added considerable stressors to everyone's lives. Don't let today's "new normal" become an unmanageable problem.

MAP has been in operation for 17 years. It is always available to provide free and confidential assistance to attorneys, judges, and students at Maine Law who struggle with mental health and substance use problems as well as issues such as burnout, life balance, bullying and harassment, and behavioral disorders. There is no downside to contacting MAP. Help is just a phone call or email away: 207-266-5951 or maineasstprog1@myfairpoint.net.

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.

Legal Writing and Creativity: Polar Opposites or Perfect Partners?

At my alma mater, English majors were prohibited from reading literary criticism. Especially when writing papers, we were expected to rely exclusively on our own ideas. Presumably, keeping us from reading other people's analyses of the books we were studying would foster independent thinking and creativity.

I believe this strategy did have the desired effect, at least in my case. I was relieved not to have to spend hours in the library, finding out what other people thought of the symbolism in John Donne's poetry or foreshadowing in *Macbeth.* Years later, I was pleased to discover a paper in which I explained why I thought the Wife of Bath, in *The Canterbury Tales*, was a feminist. Of course, in 1968, I didn't use the word "feminist" because that term was not yet being used to describe strong, independent women. Nevertheless, because I was required to rely on my own ideas, I chose to analyze the Wife of Bath's character in feminist terms. Had I been exposed to publications by scholars, most of whom were probably men, I doubt I would have taken that approach. Unwittingly, I would have been influenced by their views and probably would have chosen a safer, more traditional topic for my paper.

Twenty years later, I enrolled at the University of Maine School of Law, where I needed to master a whole new approach to writing. Although, as an English major, I had been expected to write solely from my own observations, I learned that lawyers are required to base everything they write on primary and secondary legal authority. As a law student, and later as a law clerk and practicing attorney, I could no longer steer clear of the library, where the basis for every assertion or argument had to be found.

Although this was a big change, it did not trouble me. I enjoyed researching relevant law and learning how to apply it to the facts of a case. I soon realized, however, that not everyone liked legal research and writing as much as I did. When I returned to the Law School as the founding director of the Legal Research and Writing Program, I needed to find a way to help students learn to appreciate and master those necessary skills.

Legal Writing: Does It Stifle Creativity?

From the beginning, I had no problem recognizing which students' memos and briefs were superior. Assigning grades was easy. The bigger challenge was determining *why* one paper was better than another and figuring out how to teach all students to write more effectively. Eventually, I realized that the students who received higher grades were following a certain pattern in their legal analysis. After presenting the facts as a compelling story, they identified the issue in the case; stated the applicable law; provided some analogous cases; applied the law to the present case, comparing and distinguishing the analogous cases; and, finally, reached a conclusion.

Having made this realization, I dedicated myself to helping students identify these different elements of legal analysis and present them in the proper order. To help them remember what to do, I created a paradigm, called the IRAAC, and required them to color-code the different elements in earlier drafts of their writing.[1] Specifically, they needed to highlight the issue (I) in pink, the legal rule section (R) in orange, the analogous case section (A) in yellow, the application of the law to the current facts (A) in green, and the conclusion (C) in blue.

Many students were grateful to have this paradigm, but some stubbornly resisted it, claiming it stifled their creativity. A few of them thought legal writing itself stifled their creativity, not just when it was organized into an IRAAC. Although I continued to require them to organize their legal analysis as an IRAAC, I needed to convince myself, as well as my students, that the paradigm, and legal writing itself, did not stifle creativity.

"Without creativity, briefs and memos fail to engage or persuade the reader."

What is Creativity?

"Creativity" has been defined as the "use of imagination or original ideas to create something; inventiveness."[2] This was apparently the definition adopted by my English professors at Wellesley College. They believed we would have a better chance of using our imaginations and original ideas to create something if we did not consult outside sources. Law students and lawyers, however, cannot avoid consulting outside sources, specifically applicable constitutions, statutes, and caselaw. This does not mean, however, that creativity has no place in legal writing.

Sources of Creativity in Legal Writing

Creativity is possible and essential in each phase of legal writing: from telling the story of the case, to determining and researching applicable law and analogous cases, to comparing and distinguishing the facts in analogous cases to the facts in the current case, to making arguments, and, finally, to reaching conclusions. Without creativity, briefs and memos fail to engage or persuade the reader.

Some legal writers are unaware of the importance of the "Facts" section of a brief or memo. They mechanically lay out the important historical events without thinking about the order of the story or ways to emphasize the facts that favor their clients. In truth, the Facts section is the first section judges read, providing a context for the case that will influence them later as they think about how to apply the applicable law in the case.

Writing an effective Facts section definitely uses the legal writer's imagination and original ideas to create something—an interesting, compelling story that presents the client in the most favorable light possible. Much has been written about the importance of storytelling in legal writing.[3] No one doubts that storytelling requires creativity, even when the story is not fiction. Deciding how and when to introduce the client in the story and how to tell the story in a sympathetic way requires imagination. Legal writers cannot make up an interesting story out of whole cloth, of course. They need to stick to the facts. Nevertheless, choosing the order of those facts and the words used to present them effectively requires imagination and creativity.

Researching the relevant law and analogous cases also requires creative thinking. After digesting the story presented by a client, a lawyer needs to imagine what different legal theories might possibly apply to those facts. Then, after settling on a legal theory and determining the law that applies, the lawyer needs to search out analogous cases with facts that might be compared to or distinguished from the client's facts. Deciding how to use analogous cases to support arguments in a client's favor probably requires the most creativity of all. Trying to show a judge how the facts and outcome in a particular case compare to the present case, when the case may deal with a very different scenario, requires imagination. The same is true when it is necessary to distinguish a case with similar facts that has an undesirable outcome. That really takes some creativity.

Conclusion

Legal writing may require even more creativity than works of fiction or poetry. The imagination required to determine how to tell a story when the facts already exist and to show how previous cases bolster legal arguments, even when the outcome of those cases goes the wrong way, requires an enormous amount of creativity. Legal writers need to understand what will grab judges' attention and help them understand how justice requires the legal outcome they are seeking. They also need to recognize analogies and distinctions when reading cases and figure out how the facts and holdings in those cases support the arguments being made in the present case, even when the facts are similar in cases that came out the wrong way or the facts in cases that came out the right way are very different.

Explaining all this to first-year law students is a challenging task, but practicing attorneys know how important creativity is to their work. This column is dedicated to them—the unsung legal writers, who will never win a Pulitzer Prize for their briefs or memos, but who have made a difference in countless lives because of the creativity and imagination they have brought to their work.

ENDNOTES

1 *See generally* Nancy A. Wanderer, *The Secret to Legal Analysis: The Rainbow Connection*, 34 Me. B.J., 34 (Winter 2019).

2 *See* https://www.lexico.com/en/definition/creativity.

3 Nancy A. Wanderer, *Legal Writing and Fiction: Strange Bedfellows or a Marriage Made in Heaven*, 32 Me. B.J. 34, 36 (Summer 2017); J. Christopher Rideout, *Storytelling, Narrative, Rationality, and Legal Persuasion*, 14 J. Leg. Writ. Inst. 53, 53 (2008).

The MSBA is committed to serving our members as well as supporting our employees during these uncertain times. In order to minimize physical contact, the MSBA office is closed to the public until June 1, 2020. However, the staff is working remotely and is available to assist you. Please continue to contact us through email, telephone, and regular mail. Thank you.

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

[Hercules] now set out to perform his fifth Labour, and this time his task was to cleanse the stables of Augeas in a single day

Sakraida v. Ag Pro, Inc., 425 U.S. 273, 275 n.1 (1976) (quoting C. Witt, Classic Mythology 119-120 (1883)).

Not every Supreme Court case is glamorous. Indeed, sometimes, the subject is nothing more than cow dung removal.

In 1968, in El Paso, Texas, a company known as Ag Pro sued Bernard Sakraida for infringing a patent for "a water flush system to remove cow manure from the floor of a dairy barn." The District Court concluded the system was not patentable because it utilized elements that were "old in the dairy business." Simply put, Ag Pro's system released water from a storage tank to wash the manure down a sloped floor into drains.

The U.S. Court of Appeals for the Fifth Circuit reversed and concluded the patent was valid. While conceding the system did not involve a "complicated technical improvement," the Fifth Circuit nevertheless opined it used a "novel combination" to achieve a "synergistic result."

That argument, however, did not wash with the Supreme Court. Writing for the unanimous Court, Justice Brennan was unimpressed with a system in which the only "inventive feature" was an "abrupt release of water." As a result, Justice Brennan agreed with the District Court that the system was nothing special, particularly for "those skilled in the art."

As Justice Brennan pointed out, "[s]ystems using flowing water to clean animal wastes from barn floors have been familiar on dairy farms since ancient times." For an ancient example, Justice Brennan relied on the fable of Hercules cleaning the stables of Augeas by re-directing a nearby river, so that water "streamed in at one end and streamed out at the other, carrying away all the dirt with it."

Disclaimer: The views expressed are those of the author and do not necessarily represent the position of the Merit Systems Protection Board or the United States government.

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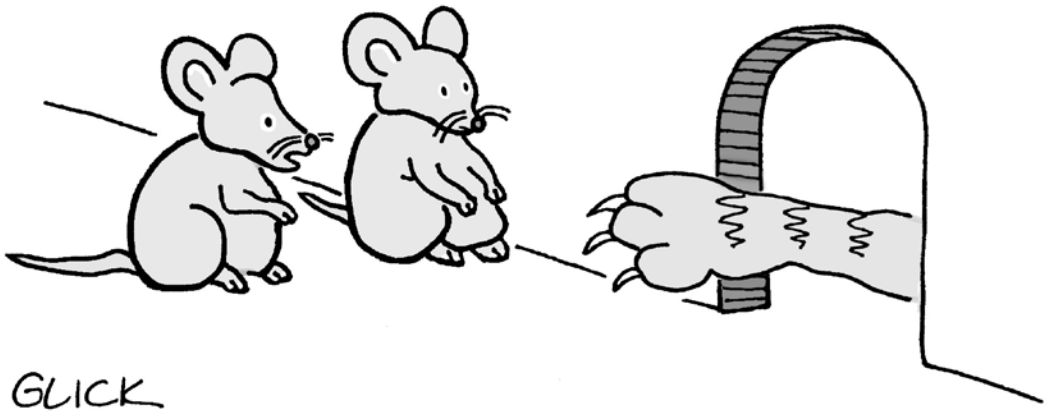
By Arnie Glick



"With that cat around, this is definitely one of those situations where the likelihood of harm is reasonably foreseeable."

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