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Although it is unfortunately a true statement when referencing the unmet legal needs of many Mainers that we can’t help everyone, we should not stop trying, and, as the quote suggests, everyone has a role to play.

The Maine Rules of Professional Conduct state that “every lawyer has a professional responsibility to provide legal services to those unable to pay.”¹ The Rules also include aspirational goals: “In fulfilling this responsibility, the lawyer should provide legal services without fee or expectation of fee to:

1. persons of limited means; or
2. charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; or
3. individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate; or
4. activities for improving the law, the legal system or the legal profession.

In addition, a lawyer voluntarily should contribute financial support to organizations that provide legal services to persons of limited means.”²

As noted in the comments to the rule, Maine attorneys have traditionally delivered a high quantity of pro bono services. The Maine State Bar Association joins with the state’s legal services providers in recognizing and applauding the exemplary pro bono work done by attorneys and law firms at our annual meeting.

I have enjoyed taking pro bono cases for selfish reasons. I like the way it makes me feel to be able to help someone who is at risk of not getting a fair shake because they do not know how to properly handle their legal matter. “Nothing makes one feel so strong as a call for help.”³ When I receive a call for assistance from a family member, the prospective client, or the Volunteer Lawyers Project, it very much appeals to my vanity. Often the caller successfully cultivates the idea in my mind that I am someone who can help the situation. “Vanity, definitely my favorite sin.”⁴ The opportunity to put my experience, legal knowledge, and efforts to work for a client in need is one reason I became an attorney in the first place.

Some of the most personally rewarding cases I have handled have been my pro bono cases from the Volunteer Lawyers Project. The clients that I have represented pro bono were truly those people who were in desperate need of legal services and had a very poor understanding of the court process, their rights, and the options available through our courts.

I found that the fact that there was no client paying the bill allowed me the freedom to spend as much time as I wanted on the case, without regard for the client being charged for the time. In most pro bono cases where the client is not referred through VLP, I don’t even have to be concerned with entering my time records, because it doesn’t matter. If I could practice full time without having to complete a time sheet again, I would.

Also, anyone who has practiced in the family law arena has at one time or another had a client compromise their position, often against the advice of counsel, due to the costs of litigation. That is not to say you should treat pro bono cases as endless crusades, but it does prevent a client from buckling due solely to the financial pressures.

Some attorneys have expressed the concern that a nonpaying client does not value the service or respect the attorney’s time. Although I did find this to be the case in some instances with some court-appointed representation, I have never experienced this kind of attitude with any of the clients I represented pro bono. I found them to be thoughtful, respectful, engaged in the process, and extremely helpful in assisting me in understanding what they perceived to be their legal issue, their overall goals related to the representation, and grateful for my time and the time of my staff. I have received numerous thank you cards from pro bono clients at the conclusion of the case, ensuring that I would be willing to accept another pro bono case. The expressions of sincere and heartfelt gratitude at the end of a case are invigorating.

Mandatory pro bono
In a recent appearance at the American Law Institute’s annual meeting in Washington, U.S. Supreme Court Justice Sonia Sotomayor said “I believe in forced labor” when it comes to improving access to justice for the poor. “If I had my way, I would make pro
Obviously the attorney and the law firm must make financial sacrifices to participate in pro bono services. The pro bono cases do not assist in paying student loans or the expenses of a law firm. A mandatory pro bono requirement of 50 hours per year would essentially increase the annual registration fee. An attorney that normally charges $100 per hour, if they still exist, would have an annual registration cost of the equivalent of $5,265 each year for the privilege to practice law. For many attorneys, a mandatory requirement would have little practical impact on their practice, as they already provide in excess 50 hours each year. That certainly does not mean that I believe it is a good idea, I think it is a bad idea for several reasons.

Most Maine lawyers give their time, their expertise and their money to assist the less fortunate access legal representation in an ongoing effort to provide justice to all. Not all attorneys’ practice areas relate to those issues most frequently associated with those in our communities of limited means. By and large, those attorneys are the ones who generously give money rather than direct services in order to do their part for access to justice.

The attorneys that willingly give their time and money do so because they want to and view it as a professional responsibility. To make it a requirement tarnishes the profession. It would be the equivalent of forced attrition. As a profession, I think we are better than that. If you have ever participated in a community service project along with those who are there to satisfy a community service requirement of sentence or graduation requirement, you begin to understand that those who have the most significant positive impact are those who are there because they want to be there and take pride in helping others.

To be clear, there is a significant unmet need in terms of legal services for those who cannot afford an attorney. We need to encourage more attorneys to provide pro bono service in a manner that fits their practice and their particular circumstances. Access to justice is not just the goal of our profession, but of our society. In order to address this issue, it will take more than the efforts of lawyers. It will take effort on the part of the private businesses, the government and private citizens. Everyone helping someone is a good start.

1 Maine Rule of Professional Responsibility 6.1 – Voluntary Pro bono Publico Service.
2 Id.
3 George Macdonald, 1824-1905, Scottish novelist.
4 The Devil’s Advocate (Warner Bros., 1997).
6 The fee for the renewal of a Maine MD license is $500 biennially. http://www.maine.gov/md/licensure/md-licensure.html. An attorney who regularly bills $200 an hour would have an annual registration fee of $10,265 each year.
7 This is not to suggest that either community services as a sentencing alternative or as a graduation requirement is a bad thing. For many individuals, their participation can be the beginning of lifelong efforts to serve their communities. However, for some, they are there because they have to be, and it shows.
FROM THE EXECUTIVE DIRECTOR:

You Can’t Afford Not to be a Member

By Angela P. Weston

Did you know that your Maine State Bar Association membership costs less each month than one tank of gas, a movie night for two, or a round of mini golf for a family of four? That’s right…a typical member practicing for more than five years pays less than $22 per month! Semi-retired, non-practicing, and new lawyers pay even less than that. It’s interesting when you put that amount into perspective, and compare it to the thousands of dollars in measurable savings and intangible benefits you receive as a member of the MSBA.

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Casemaker is a comprehensive online legal research library exclusively for MSBA members. Have you looked at Casemaker lately? This is not the Casemaker of several years ago…coverage of materials has expanded and we’ve added premium services, making Casemaker worth more than $950 per year. In addition to a robust library of state and federal materials, the research tool offers:

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• Casecheck+, to report positive and negative treatments;
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• The ability to personalize and save searches;
• Mobile applications; and
• Free webinars, instructional videos and a live chat service.

If you are still paying for online legal research, I urge you to check out Casemaker on our homepage at mainebar.org. Click on “Casemaker” in the top right corner, sign in, and start saving!

Clio
Our newest member benefit, Clio is a comprehensive, easy-to-use cloud-based law practice management software. Every day, tens of thousands of lawyers across the country use Clio to schedule meetings, organize cases, track time, and invoice their clients. Accessible from your Mac or PC, phone or tablet, Clio allows you to take control of your practice from any device, in any location, at any time. Clio even integrates seamlessly with other popular applications like LawPay, Quickbooks Online, Gmail, and Office 365. Members can receive a 10 percent lifetime discount on Clio.

Silent Partners
In a low-key yet supportive way, the Maine State Bar Association offers a program to assist lawyers in dealing with problems in substantive areas and administrative areas of the law where there may be a lack of familiarity or comfort in helping a client. The program is open to any attorney who is challenged by new or unfamiliar areas of the law where some help and guidance would benefit both the practitioner and the client. A dedicated group of attorneys stands ready to assist, and the program provides confidentiality recognized by the Maine Supreme Judicial Court in Maine Bar Rule 13 (c) (1). For Silent Partners assistance or to volunteer as an advisory panel member, please contact me at (207) 622-7523 or aweston@mainebar.org.

Proud Member Logo
The MSBA is proud to introduce a new “Proud Member” logo for exclusive member use. As a member of the Maine State Bar Association, you are invited – and encouraged – to use the Proud Member logo on your business materials. Displaying the MSBA’s Proud Member logo sends a strong message to your clients and fellow attorneys that you are committed to the growth and success of your law firm and to the legal community.

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• Discounts on CuroLegal legal technology consulting and development services;
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• Access to 24 substantive practice sections; and
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Members receive free and discounted CLE credits.
Members receive three free CLE credits every year and pay discounted member rates for all MSBA-sponsored CLE programs. Members are also eligible to join the CLE Club, which provides additional discounts.

The MSBA protects your interests and keeps you informed.
Through email updates, legislative alerts, The Supplement and the quarterly Maine Bar Journal, the Association informs and reports on current issues affecting the profession and the practice of law, as well as on substantive legal issues. And, at the State House and beyond, the Association’s lobbying team works to protect your interests, enhance the profession and improve the justice system.

We work hard to add value to your Maine State Bar Association membership. Let me know how we are doing, and feel free to make suggestions at (207) 622-7523 or aweston@mainebar.org.

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ANGELA P. WESTON is the Maine State Bar Association’s executive director. She can be reached at aweston@mainebar.org or (207) 622-7523.
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Woodman Edmands Danylik Austin Smith & Jacques is pleased to announce that Amy McNally has joined the firm as an Associate. Amy’s practice includes estate planning and administration, civil trial work and criminal defense.

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234 Main St.,
PO Box 468, Biddeford, ME 04005
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Not Your Grandfather’s Rules of Civil Procedure

By Stacy O. Stitham

One of the hazards of being a fifth-generation attorney is the likelihood that you were infected with a quixotic view of the law at a tender age, hearing as many stories of the courtroom as you ever did of Cinderella’s ballroom. Though you suspected the tales grew taller with each telling due to the litigator’s gift of gab…nonetheless, it was too late for you. Off you went to law school to make yourself into the stuff of legal legends.

For my part, the stories featured larger-than-life protagonists who ran a family-owned firm in central Maine for more than a century, save for a brief interval when a world war intervened. As I write this article, I can see the talismans of several generations gathering dust in my office. Among those tokens is an inscribed paperweight belonging to my great-great-grandfather, whose lifespan was particularly well-timed, bookended at both ends by cataclysmic wars. Next to it rests my grandfather’s own paperweight, carved from the wreckage of the London Blitz.

I suspect that, despite the fact that they plied their trades in eras spanning from the presidency of Benjamin Harrison to the presidency of Bill Clinton, there was much that remained constant about the practice of law for each successive generation. Paper, for one. Reams and reams of paper—paper records, paper correspondence, and paper notepads—all held down by the satisfying solidity of a paperweight.

In this electronic age, however, paper is not necessarily something a lawyer can count on.

The recently-adopted changes to the Federal Rules of Civil Procedure (Federal Rules) highlight an evolving and expanding focus in the law, one geared towards dealing with the masses of electronic records that are the byproducts of modern communication. Admittedly, momentum has been building for more than a decade, since the Southern District of New York, in Zubulake v. UBS Warburg, first introduced terms such as “backup tapes” and “metadata” into the lexicon of discovery, and the Sedona Conference rolled out a best practices roadmap to help us navigate a changing world of document production. Yet the new amendments to the Federal Rules—coupled with a growing interest in adoption of e-discovery or electronically-stored information (ESI) plans by federal district courts around the country—suggest that the problems of proportionality and cost-sharing posed by electronic discovery will continue to vex us in the coming years.

The Past

Instead of A, we begin with Z—the five opinions known as Zubulake I through Zubulake V. No doubt, when Laura Zubulake first filed a complaint with the Equal Employment Opportunity Commission about employment discrimination that she experienced at UBS Warburg, she had no idea that her name would have the dubious distinction of being immortalized in e-discovery case law—a fate William Marbury, Ernesto Miranda, Clarence Earl Gideon, and Homer Plessy might well have sympathized with.

The first of its line, Zubulake I, sketched out a duty on the part of UBS Warburg to produce responsive e-mails not just from optical disks and active servers, but also from back-up tapes. The court warned the parties that, after a review of the contents of the back-up tapes, it would be back to conduct a cost-shifting analysis. So it came to pass. In Zubulake III, the court outlined a seven-part approach for allocating backup tape restoration costs between plaintiff and defendant. Finally, Zubulake V explained, among other issues, counsel’s duty to effectively communicate to the client its discovery obligations to ensure information is discovered, retained, and produced. Practicing what it preached, the opinion culminated in the issuance of an adverse inference instruction with respect to lost and deleted email.

Cases such as Zubulake ensured that, when the Sedona Conference published The Sedona Principles for Electronic Document Production in January of 2004 (the Sedona Principles), litigators took notice. Clarifying that ESI was potentially discoverable under Rule 34—still somewhat of a novel idea at the time—and should be preserved when reasonably anticipated to be relevant to litigation, the Sedona Principles advocated proportionality, practicality, and possible cost-sharing in instances where information sought was not reasonably available. They concluded by opining that sanctions, including spoliation findings, should be considered only if the court finds a clear duty to preserve, an intentional or reckless failure to preserve and produce, and a reasonable probability that the loss of the evidence materially prejudiced the adverse party.

An attempt to address the last point was made via an amendment to Rule 37(e) of the Federal Rules, adopted in 2006: “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of

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An attempt to address the last point was made via an amendment to Rule 37(e) of the Federal Rules, adopted in 2006: “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of
an electronic information system." But an instruction concerning when not to impose sanctions, of course, left wide open the question of when it was appropriate to impose sanctions.

The Present
Effective December 1, 2015, the current version of Rule 37(e) of the Federal Rules fills in that lacuna by outlining in detail the consequences of a failure to preserve ESI:

Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

1. upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
2. only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:
   A. assume that the lost information was unfavorable to the party;
   B. instruct the jury that it may or must presume the information was unfavorable to the party; or
   C. dismiss the action or enter a default judgment.

The advisory committee notes go on at some length about this change, noting that the prior “limited rule” had not “adequately addressed the serious problems resulting from the continued exponential growth in the volume of [electronically-stored] information.” Because, as stated before, the Federal Rules only informed what courts should not do when it came to e-discovery sanctions, rather than what they should, “[f]ederal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information.”

The key trigger for application of Rule 37 is whether (and when) a duty to preserve has arisen. In making that decision, the advisory committee notes caution that a court should consider the extent to which the party was on notice that litigation was likely and that the information would be relevant. Regardless of what form that notice might take, the rule only applies if the information was lost because the party failed to take reasonable steps to preserve the information, requiring the court to evaluate the reasonableness of a party’s efforts to preserve the information—no small feat in an age where “[d]ue to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible.”

With the threat of concrete sanctions for failure to produce relevant ESI looming over a litigator’s head, e-discovery becomes a significant hurdle in the pretrial stages of any case, regardless of the complexity of the issues involved or the merits of the case at hand. Say that you will be defending a local employer in a lawsuit brought by a disgruntled former employee. The employer hands over the employee’s personnel file along with a box of miscellaneous documents, assuring you those are the complete records. In the meantime, the employee’s counsel serves up a document request seeking all e-mails to, from, referring or relating to the former employee, as well as all e-mails referring or relating to any other employees who experienced a similar adverse employment action. Once you, fingers crossed, manage to locate someone at the employer’s office who is IT-savvy and can conduct a search, you learn that there are tens of thousands of such e-mails. What are your options? Perhaps your best bet is to simply call up opposing counsel and report your preliminary estimate of the volume of materials potentially covered within the scope of the request. Oftentimes, he or she would no more welcome such a deluge of documents than you would, and will work with you to narrow the search parameters to a more relevant and targeted outcome. But if not, you may find yourself with less attractive avenues. What do you do then? Devote hundreds of hours of attorney time to reviewing every e-mail for relevance? Simply throw open the gates to an inspection, and be as surprised as anyone by what is uncovered?

Obviously, neither option is particularly appealing. To address this problem, courts have increasingly turned to sample e-discovery orders which proactively limit, at the outset of a case, the number of custodians (e.g. individuals whose e-mail accounts may be searched) and the number of search terms. Such default limits—for better or worse—provide an anchor around which expectations of a “reasonable number” of custodians or terms will be set in the parties’ minds. A procedural requirement by which, for example, the parties must exchange a list of no more than ten search terms may well be a welcome development if you are trying to fend off a four-page, single-spaced list of search terms, or simply trying to guess at what search terms might be sufficient to comply with your obligations as to the discovery requests already served. But a procedural requirement whereby the parties must exchange a list of five document custodians may lead to unnecessary questioning of your good faith if you provide a list of only two custodians—even if that is simply due to the fact that you represent a company that only has two employees.

In a further effort to define the perhaps indefinable scope of e-discovery, there are a considerable number of district courts which now require submission of ESI plans by the parties as part of the case management process or, at minimum, impose guidelines or recommendations for electronic discovery. While a fair proportion of these rules are associated with patent cases—traditionally, document intensive—that is by no means exclusively the case.

Parallel amendments to Rule 26 of the Federal Rules now provide an important backstop against a potential flood of ESI, limiting the scope of discovery to:
any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.20

As amendments go, this one packs a punch. Gone is the former language of Rule 26(b)(1) permitting discovery of material “reasonably calculated to lead to the discovery of admissible evidence,” which allowed for fishing expeditions in a sea of documents,19 and in its place is a clear requirement that discovery must be proportional. Proportionality (and the problem of “over-discovery”) is something the drafters of the Federal Rules have struggled with for decades,19 but the recent amendments not only remove language encouraging an expansive view of discovery, but also expressly advocate for the scope of discovery to be tailored to the scope of the case itself. Lest there be any doubt as to the relationship between the two rules, the advisory committee notes encourage consideration of the proportionality standard of Rule 26(b)(1) in connection with the sanctions-setting authority of Rule 37: “Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts.”20

The Future

It remains to be seen (or litigated) whether these recent amendments have the effect of curing the persistent problem of over-discovery, or whether they will be cited as the basis for further reforms down the road. In the meantime, litigators will ride the tide of local rules, plans, and guidelines designed to tackle electronic discovery and attempt to define the parameters of proportionality and reasonableness (no small feat at the outset of a case, where the parties’ preliminary estimates of value may vary wildly).

Given the “ever-increasing volume of electronically stored information and the multitude of devices that generate such information,”21 e-discovery will continue to grow, morph, and require creativity to tame. It is not always a job that a federal court wishes (or feels equipped) to do, even with the creation of ESI guidelines. Rather than trying to bone up on what, exactly, the “cloud” stores, some courts are bringing in electronic discovery special masters, qualified attorneys with demonstrated litigation experience, particularly with electronic discovery; demonstrated training and experience with computers and technology; and mediation training and experience. Such special masters may be permitted to develop protocols for the preservation, retrieval or search of potentially relevant ESI; to develop protective orders to address concerns regarding the protection of privileged or confidential information; to monitor discovery compliance; or to resolve discovery disputes.22

Fortunately, in a federal system, the varying district courts may serve as Justice Brandeis’ laboratories of policy,23 experimenting with various options in order to tackle the problem of e-discovery. Moreover, in states such as Maine, where the parallel state rules of civil procedure do not (yet) contain similar proportionality language, local practitioners may provide guidance as to what extent the changes are a help or a hindrance, by watching similar issues play out on the state-side of their practice. To date, the District of Maine does not (yet) have the type of e-discovery plans, guidelines, or special master programs now cropping up in other districts (though the parties may be required to confer as to a discovery plan at the outset of a case, which does provide an option for the parties to make a proposal regarding e-discovery).24 To the extent that e-discovery has been an issue, it has largely been handled on an individualized basis in discovery conferences.

No doubt we practitioners like to think that is because we are an unusually reasonable and practical bar, and have no need of default court-imposed procedures or guidelines as to how to play nice in the electronic sandbox. I suspect, however, that it has more to do with the District of Maine’s relatively small caseload, which in turn means either that proportionally fewer e-discovery issues are making it to the attention of the court or that the court retains the flexibility to deal with the issues that do arise on a case-by-case basis. Given the ubiquitous nature of e-mail and other forms of electronic communication in the modern world, however, it may simply be a matter of time before the District of Maine begins work on its own set of e-discovery guidelines for practitioners.

In the meantime, however, I am grateful to have grown up in a world where the paperweight was still a graceful ornament of any legal desk.

STACY O. STITHAM is a partner at the firm of Brann & Isaacson, in Lewiston, representing business clients in civil and commercial litigation in federal and state courts and before administrative agencies. With varying degrees of enthusiasm, she has navigated local procedural rules and e-discovery plan requirements in courts from Texas to New England; from California to Delaware. She can be reached at sstitham@brannlaw.com.
While I am aware that it has become fashionable to speak of the greater Augusta area as “central Maine,” notwithstanding its plain location in the southern part of the state—I refer to the actual center of Maine.


3 The Sedona Conference is a nonprofit, 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights.


5 Including a seven-factor test in order to determine whether cost-shifting is appropriate for the discovery of inaccessible data:
(a) The extent to which the request is specifically tailored to discover relevant information;
(b) The availability of such information from other sources;
(c) The total cost of production, compared to the amount in controversy;
(d) The total cost of production, compared to the resources available to each party;
(e) The relative ability of each party to control costs and its incentive to do so;
(f) The importance of the issues at stake in the litigation; and


7 UBS Warburg and its counsel may still have considered themselves fortunate compared to Morgan Stanley, another early trailblazer in this legal thicket, which not only found itself subject to court–ordered sanctions following a series of e-discovery mishaps, but was fined by the Financial Industry Regulatory Authority for its mishandling of e-mail. See Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005); Morgan Stanley to Pay $12.5 Million to Resolve FINRA Charges that it Failed to Provide Documents to Arbitration Claimants, Regulator (FINRA, Sept. 7, 2007), available at https://www.finra.org/newsroom/2007/morgan-stanley-pay-125-million-resolve-finra-charges-it-failed-provide-documents (last visited May 27, 2016).


10 Id. (e) (2015).


12 Id.

13 Id.


18 “The former provision for discovery of relevant but inadmissible information that appears ‘reasonably calculated to lead to the discovery of admissible evidence’ is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the ‘reasonably calculated’ phrase to define the scope of discovery ‘might swallow any other limitation on the scope of discovery.’ The 2000 amendments sought to prevent such misuse by adding the word ‘Relevant’ at the beginning of the sentence, making clear that ‘relevant’ means within the scope of discovery as defined in this subdivision . . . . The ‘reasonably calculated’ phrase has continued to create problems, however, and is removed by these amendments.” Fed. R. Civ. P. 26(b) advisory committee note, 2015 Amendment (brackets added).

19 “The 1983 Committee Note stated that the new provisions were added ‘to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry . . . .’” Fed. R. Civ. P. 26(b) advisory committee note, 2015 Amendment (brackets added).

20 Fed. R. Civ. P. 37(e) advisory committee note, 2015 Amendment.

21 Id.


23 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”)

24 See, e.g., Local Rule 16.3(b)(3) (“Prior to the requested scheduling conference, the lawyers must confer and discuss the following topics: voluntary exchange of information and discovery; a discovery plan . . . .”)

25 While I am aware that it has become fashionable to speak of the greater Augusta area as “central Maine,” notwithstanding its plain location in the southern part of the state—I refer to the actual center of Maine.
A Practical Guide to Superior Court Practice in Maine

Hon. Thomas E. Humphrey, Maine Superior Court, Portland
William D. Robitzek, Esq., Maine Lawyer Services, Auburn,
Editors, et al.

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A Practical Guide to Superior Court Practice in Maine provides invaluable insight into civil and criminal practice before the Maine Superior Court. Civil litigators, defense attorneys, prosecutors, and judges take you through selected key areas of practice so that you will feel prepared whether you are obtaining pretrial security, filing pleadings, drafting motions, or arguing a complex case before a jury. Sample documents, practice tips, and rule and case references help answer your daily practice questions and provide a direction for further research.

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– Jamie Dufour, Esq., David Chase, Esq. and David Leen, Esq.
Ok. I get it. How many malpractice claims are there that have been the result of a failure to write a declination letter? You know the one that says thanks but no. Truth be told, not many; although we have seen a few. Some are conflict problems because the creation of this letter is what normally would trigger the entering of the names of declined clients into the conflict database. When the letter isn’t written, the names can’t be entered and a conflict problem sometimes arises down the road. Others are a bit more concerning and represent the real reason why these letters should be used. Sometimes a non-client who did speak with you eventually sues you for failing to do something. They allege that you were indeed their attorney, at least as they understood it. If you have no documentation that they weren’t, you may have a problem because these kinds of word against word disputes don’t always end well for the attorney.

Excuses vary. Declination letters are viewed as a waste of time, unnecessary in most matters, irrelevant, or too costly in terms of attorney and staff time. Sometimes they are just simply overlooked. Again, I get it. The good news is that declinations can be documented in another more efficient way. The letter approach isn’t the only option.

Many attorneys use some version of a client intake form during an initial prospective client interview. If you do use this form, consider making a few modifications to it that will help document the engagement or declination. Once you finish the initial interview you will give the prospective client a copy of this modified client intake form and then you and your prospective client should sign both the copy and the original. If you and your prospective client decide to create an attorney/client relationship, you will then ask the client to also sign a fee agreement. This leaves the client with a copy of the client intake form and the written fee agreement. If you decide not to form an attorney/client relationship at the conclusion of the initial consultation, the prospective client will sign only the original and copy of the client intake form and receive just a copy of that document.

Declination letters are viewed as a waste of time, unnecessary in most matters, irrelevant, or too costly in terms of attorney and staff time. Sometimes they are just simply overlooked. Again, I get it. The good news is that declinations can be documented in another more efficient way. The letter approach isn’t the only option.

In order to use your client intake form as the method of documenting the engagement or declination, you might add to the beginning of this form language that reads something like this:

The purpose of our initial consultation meeting is for me to determine what legal services (if any) our firm might be able to provide to address your legal concerns, as well as to provide an indication as to what your cost might be if you decide to hire this firm.

Our initial consultation meeting does not give me enough time or information to provide you with a definite legal opinion. The short time allotted for this meeting makes it impossible for me to properly and fully assess any legal matter that you might have.

Regardless of whether you and I create an attorney/client relationship today, the attorney/client privilege protects all
information that I gather during this meeting and record on this client intake form. Rest assured that I will hold that information in strict confidence.

At the end of the client intake form, you might add something similar to this:

**Please Read Carefully and Sign Below**

Now that we have concluded our initial consultation, if you agree to hire me as your attorney and I agree to represent you, we will both sign a Contract for Legal Services. That Contract will state the terms and conditions under which this firm will provide you with legal representation.

If I am willing to represent you and you decide not to sign a Contract for Legal Services today, I strongly urge you to do one of two things: (1) schedule a follow-up appointment with me at the earliest possible time; or (2) immediately consult with another attorney in order to ensure that you fully protect your legal rights. **Unless and until both of us sign a Contract for Legal Services, neither I nor this firm represent you on the matters described in this client intake form or discussed during this initial consultation. No action of any kind will be taken on your behalf until you authorize us to do so by our both signing a Contract for Legal Services.**

If I do not agree to represent you, then we have not formed an attorney/client relationship, even though we had this initial consultation. Neither this firm nor I will represent you on the matters set forth in this client intake form or discussed during this initial consultation. If your legal matter involves a potential lawsuit, it is important that you realize that you must file your lawsuit within a certain period of time, known as a Statute of Limitations. Therefore, I strongly urge you to immediately consult with another attorney in order to protect your rights. My decision **not** to represent you is not a legal opinion regarding the merits of your case.

**By signing below, you acknowledge that you have received a copy of this completed client intake form. Your signature also confirms that you understand that I have not been hired as your attorney and that this firm will take no further actions on your behalf.**

Signature____________________ Date _________

The expanded use of a client intake form with text substantively similar to what I have suggested above does effectively eliminate the need for a separate declination letter. The issue is addressed and documented while the client is in your office. Finally, if your practice covers several areas of the law, simply alter the sample language to meet the needs of each practice area. For example, a big reason that these letters aren’t used with prospective divorce clients is out of a fear of notifying an innocent spouse. This approach is a win/win on that front. The innocent spouse will never see a letter from an attorney in the mail and documentation of the declination is hand delivered to the prospective client before they ever leave your office.

*ALPS Risk Manager Mark Bassingthwaigte, Esq., has conducted more than 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the U.S., and written extensively on risk management technology. Mark can be contacted at mbass@alpsnet.com.*
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Tell me about your interest in kayaking.
I grew up in Alaska actually, not on the ocean, but I did do some kayaking up there. We used to live on Kenai Peninsula and it was pretty incredible. We lived in Cooper Landing, which has a population of about 300 people, about three hours south of Anchorage. And then when I went to high school, I moved to the Soldotna area, which is a little bit bigger.

Did you kayak with your family in Alaska?
I did. My family did a little bit of kayaking. I did a lot more with a friend of mine in the Soldotna area. The Kenai Peninsula is just north of Kodiak Island, so we would drive down to the end of the Peninsula in Homer. We did a couple of camping trips and overnight kayaking adventures near Seldovia. They were a lot of fun.

How did you become a Maine certified guide for kayaking?
I went to college in D.C. and then law school in New Orleans. After law school, I came back to Maine. It has such an incredible coastline that I really wanted to take advantage of it while I was here. So shortly after I started a clerkship and was living here in Maine, I took a guide certification course.

What does the certification course entail?
You can take a two-week or three-week course where you learn about everything from navigation to safety on the water to rolling and rescues. It also includes the elements of planning a good trip, such as navigation, the supplies you need, how to take into account weather patterns, and things like that. Most people work with a sea kayaking business after they get certified, I work with Coastal Maine Kayak in Kennebunk. The examination process is delightful. You go to the Inland Fisheries and Wildlife Office in Augusta. The do all of the testing—not just for sea kayaking guides, but also hunting guides and recreational guides.
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.

They are two old Mainers who just know everything about the back woods. They do know a lot about sea kayaking too, but you can tell that this is kind of just a portion of their job. They are very colorful.

You mentioned rolling. Can you tell our readers what rolling is?
On sea kayaks, you have a skirt around you. This is not the case for lake kayaks or white water kayaks. For many sea kayakers, it becomes important to right your kayak or flip. If you get turned upside down without exiting the kayak, you can use your paddle in such a way that you can right yourself. It’s just one broad sweeping stroke that will allow you to turn back upright without having to exit your boat.

What equipment do you typically use when you go out on the sea?
It depends on the type of trip, but a good guide’s supplies typically would include your spray skirt, which keeps water out of your cockpit. The type of kayak that you have is very important. A lot of people go out on the oceans without being prepared for the elements. You definitely want a sea kayak that is designed for use in the ocean as opposed to a sit on top kayak or a lake kayak that would just be open. Some people even use a canoe, which can be really, really dangerous in the open ocean here in Maine. You also would need a PFD or a life jacket. You would want to carry a whistle with you. This is required by the Coast Guard. Usually, you have a knife with you. Depending on the season, you always dress for the water temperature, so you would usually have a wetsuit with a paddling jacket in the summer, or you can have a dry suit if you’re going in the winter. You’ll also want dry bags and water bottles, and you always have a spare paddle. If you are a guide, you have a tow system just in case you need to get anybody out of a sticky situation, which I had to do recently. You hook on to another kayak, and you can tow them. Usually, you carry a paddle float. It’s just a balloon basically that attaches to the end of your paddle that you can use to either self-rescue to just get back in your boat if you end up outside of it. You also would want charts to know where you are.

How did you become interested in giving kayaking tours and lessons?
I consider it my moonlight job. It is a kind of therapy in a lot of ways! It is so intensely enjoyable just to be out there with people who are relaxed. They are there to have a good time and are interested in activity. I have had a fantastic time with it. I get to see people in a completely different element compared to my normal day-to-day work in litigation or family law cases. After I was certified, I basically wanted to be able to pay for my hobby. But after I started, it really became something that I just enjoyed doing for the sake of being out there, especially meeting people from all over the country.

How often do you do the tours?
Usually, throughout the summer, we start on June 15 and we go through about October 15, and I am usually out there every Saturday and Sunday.

And how long do the tours typically last?
Four hours are our typical tours. They always occur at high tide because we go out of Cape Porpoise, and it’s all intertidal zone. You don’t want to have to schlep through the mud.
Any interesting experiences while giving a tour?
I’ve certainly had some very interesting experiences. Last year, I had this man who was on my tour with his wife. They both wanted their own boats. I normally try to put somebody who I think maybe needs a little more stability in a tandem boat so that they paddle together. It tends to be a little bit more stable. The single boats can be tippy. We got out to the water, and the man tipped over five times before we started paddling. I went through my process as a guide. You’re trying to get everyone into their boats and fitted. You are adjusting their foot pegs in the bottom of the boats, making sure everyone is comfortable in their boats. And as I’m doing that and am just watching this man tip over and over. I would help him and go back, and then he would tip over and over. This happened again and it became clear that he might need a little bit more assistance, but he really wanted to do the trip on his own. Normally, I might hesitate in a situation like this, but I agreed that we could go out as long as we stayed in areas that would not be dangerous or compromising. I ended up towing him, but he got to go on the trip out on the water. When we got back to the shop after the tour was over, his wife pulled me aside and said that he was recently diagnosed with terminal cancer and that this was their trip together. They were fulfilling their dream vacation and a big part of that was kayaking the coast of Maine. It just totally mowed me over, and I felt really honored to share the experience with them.

What are some of the things you love about kayaking?
It’s always fun to see wildlife. I’ve been kayaking a number of times up in the Stonington area, on Deer Isle. If you head up there around June, you get to see the seals with their pups on the rocks. It’s one of the most peaceful experiences to sit there from a safe distance and just watch the mother and the pups jumping on and off the rocks.

What’s the best advice you’ve ever received?
The best advice I think I’ve received is probably from Cheryl Strayed, an author who also has an advice column. In a book called Tiny Beautiful Things, she reminded me to not lament about how your career is going to turn out. You don’t have a career; you have a life. It is important to just do the work, keep the faith, and have the courage to keep going. I heard another quote from someone else recently that said courage is not always loud, boastful, or roaring. Sometimes the strongest courage is this tiny little voice at the end of the day that says, “I’ll try again tomorrow.” I thought that was pretty great.

Any intersection between your legal world and your kayaking world?
I have had a number of people on my tours who are also lawyers, so we do end up talking shop. I had a couple of women who are family law lawyers on a tour that I had earlier this year. I actually ended up calling one of them because I had a question about New York family law. That was very helpful. Other than that, I’m happy to report no. I haven’t had too many of my legal clients show up in my other world.
The MSBA’s Silent Partners program offers low-key assistance to lawyers in dealing with problems in substantive and administrative areas of the law where there may be a lack of familiarity or comfort, where some help and guidance would benefit both the practitioner and the client.

The coordinator has a list of attorneys associated with organizations, sections, and committees who are willing to provide help. The program provides confidentiality recognized by the Supreme Judicial Court in Maine bar Rule 7.3(o). We can provide guidance and assistance in most areas of law.

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I spend a lot of time in this column imagining what it would be like to be a judge and thinking about how I would want lawyers to behave. The principles I keep coming back to, framed here as suggestions for counsel, are these:

• Don’t make bad arguments;¹
• Don’t overstate your claims;²
and
• Don’t go on for very long.³

But what do I know? I’m not a judge.

So I was delighted when, at a CLE seminar the seven justices of the Law Court held in May, advice was given that seemed to be consistent with much of what I have been saying in this space. The takeaway was unmistakable: I was right!

(At this point the reader may object that the author is delusional to the extent that he is making this “about him.” The author acknowledges that the conceit is a stretch, but is concerned about what would happen to the narrative flow of the piece if he reverted to the dreary I-went-to-a-seminar-and-here’s-what-they-said template. The author has therefore inserted himself into the story, but for readability purposes only.)

So what was I right about? First, the Law Court advised lawyers not to make bad arguments. One justice described this as the Kenny Rogers theory of briefing: “you gotta know when to hold ‘em, and know when to fold ‘em.” That means focusing on arguments that have some actual (or at least potential) merit, and letting go of arguments that don’t. No justice objected that folding ‘em is a sign of weakness or evidence of a zeal deficiency, or suggested that a lawyer with bad cards could somehow gain a strategic advantage by holding ‘em. Bluffing doesn’t seem to work in appellate litigation.

The advice Kenny Rogers delivered in “The Gambler” was given by a serious hipster who the singer encountered “on a warm summer’s evening on a train bound for nowhere.” This gentleman, like some mythical trial lawyer, had passed his days “reading people’s faces” and “knowing what the cards were by the way they held their eyes.” He requested payment for his counsel, not via monthly invoice, but in the unusual currency of “a taste of your whiskey.” If that guy is cool with folding ‘em when circumstances dictate, we can get there too.

Second, the Law Court indicated that lawyers should not overstate their claims. An argument is not made more persuasive by asserting that it is not just correct, but “clearly” correct, or by otherwise adorning it with emphatic adjectives. Doing so is contrary to the common-sense notion that the best way to convince someone to agree with you is to address them with the tone and demeanor of an objective analyst, rather than writing or speaking in a style that serves as an insistent reminder that you are in fact a hired gun. Better to cast yourself as the disinterested voice of reason than as just one more over-agitated partisan yelling at another.

The Court advised that “excessive adjectival excitement” in a brief is a tip-off that the lawyer probably doesn’t have a very good argument. In other words, adjectives deployed to advertise the depth of the lawyer’s conviction tend to be counterproductive, because “when somebody says ‘clearly’ or ‘obviously,’ it’s a trigger that what’s being said is not clear or obvious.” The best briefs are written in the language of objectivity; the more adjectives, the less persuasive the argument. Or at least, so says the Law Court.

Third, the Law Court said that lawyers should not go on for too long. The rules permit you to write 50 pages, but that doesn’t make it a good idea. The justices offered the stacks of briefs on their desks as a context for thinking about how much to write—the notable characteristic of these stacks being their height. If I had a large stack of papers on my desk, I would be grateful to writers who honed their submissions down to the essential points, and irritated by those who let their words proliferate until they fill the available space. “Shorter,” the Law Court explained, “is always best for us.” Is that not a near-universal truth about work-related reading? Do business schools not teach that professional writing needs to be concise to be effective? (They do.) Why would legal writing be any different?

Now, just because judges say something doesn’t necessary make it true. Voters tell pollsters that they dislike negative advertising by politicians, and that positive ads are more persuasive. But negative ads are effective. Could the justices of the Law Court, like the American voter, be in the dark about what rhetorical techniques work best on them?

I doubt it. Why would mixing a good argument up with a bunch of bad ones do anything to enhance the power of the good argument, or make the bad ones any less bad? Why would a lawyer
who embraces the agitated style of the huckster be more effective in communicating with intelligent judges than one who casts the measured illusion of objectivity? And who in their right mind would be more inclined to agree with an argument simply because it keeps on going and going and going? What principles of persuasion would support these peculiar practices?

The simplest explanation here is the best one: the Law Court says it doesn’t like bad arguments, overstated claims, or long-winded briefs because they are ineffective and annoying. We should take this sound advice.

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Recently, Maine attorney Mary McQuillen brought to my attention a concurrence in which Judge Richard Posner, of the Seventh Circuit, United States Court of Appeals, agrees with the court’s decision, but expresses “reservations about some of the verbal formulas in the majority opinion.” Recognizing that they are “common, orthodox, and even canonical,” Posner asserts that “they are also inessential,” “in some respects erroneous, and, on both grounds, ripe for reexamination.” He suggests that an over-reliance on jargon might even load the dice against defendants.

First, Posner objects to the majority’s use of the “great deference” standard to review the issuing judge’s conclusion that probable cause existed. Although that standard was established by the United States Supreme Court, Posner questions why the standard is “great deference,” especially because warrants are issued by magistrates, who are “the most junior judicial officers.” Posner is similarly puzzled by the use of terminology like “actual guilt” and “actual innocence,” rather than simply “guilt” and “innocence.” He also takes issue with the majority’s assertion that “any challenge to the sufficiency of the evidence . . . comes with a 'heavy, indeed nearly insurmountable burden.’”

He also takes issue with the majority’s assertion that “any challenge to the sufficiency of the evidence . . . comes with a 'heavy, indeed nearly insurmountable burden.’” Posner quotes a previous opinion in which the court characterized the “wholly irrational” standard as a “nearly insurmountable proposition to establish,” characterizing that standard as “the kind of hyperbole that creeps into opinions,” implying that everyone would be better off without it.

In conclusion, Posner reiterates his disagreement with the court’s decision to affirm the district court in the present case, but questions “the rhetorical envelope in which so many judicial decisions are delivered to the reader.” Describing judicial opinions as “littered with stale, opaque, confusing jargon,” Posner asserts that “[t]here is no need for jargon, stale or fresh. Everything judges do can be explained in straightforward language—and should be.”

The Reasoned Opinion: The Foundation of American Jurisprudence

In an increasingly polarized society, courts bear the responsibility of helping both those trained and untrained in the law to understand the concepts and principles underlying their decisions. The first paragraph of the preamble to the Code of Judicial Conduct states that “judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.”

American lawyers, judges, and scholars expect an appellate opinion to be “a discursive narrative, consisting of a candid and reasoned explanation of the court’s holding.” Only by providing a reasoned justification for the outcome in a case can courts achieve the goals of our judicial system: (1) guiding the participants through the process, (2) persuading judges, officials, and citizens that the court has reached a proper resolution of a dispute, (3) limiting judicial arbitrariness, and (4) legitimizing any judicial departures from apparently established law.

Furthermore, as Justice Oliver Wendell Holmes stated more than 100 years ago, “the command of the public force [in our society] is entrusted to the judges . . . and the whole power of the State will be put forth, if necessary, to carry out their judgments and decrees.” Thus, as Justice Holmes observed, people need to know what is expected of them, based on prior judgments of the courts, and they can only know that if they are able to understand both the outcomes of prior cases and the justifications for those outcomes.

Commentators have challenged judges to consider their audience when writing opinions, asking, “To whom is this . . . writing addressed?” and “What ideas should it convey to that reader?” Regardless of the outcome of a case, readers will have more faith in the judicial system and be more likely to abide by the court’s decision if they are able to understand that decision and how it was reached. Judges who are able to explain their decisions to those who will read them are the judges who will be revered.
Kelo v. City of New London: A Failure to Communicate

When opinions fail to consider and address the needs of their audience, voluntary compliance evaporates, making way for passive and active resistance to the rule of law. A prime example of this occurred in 2005 when the United States Supreme Court decided that citizens’ homes could be taken by the government under the doctrine of eminent domain in Kelo v. New London.17 The decision led to an immediate backlash, with the media reporting that cities could now bulldoze residences to make way for shopping malls and hotels in order to generate revenue.18 Anti-government demonstrations and folk songs sprang up.19 A proposal even surfaced that the town of Weare, New Hampshire, should purchase the family home of Justice Souter through an eminent domain action so the “Lost Liberty Hotel” could be constructed on the property.20

State v. King: A Far Better Way

Although it should be sufficient for a court to reach the correct result based on existing law and precedent, more is often needed. This is especially true when a decision seems likely to cause extreme discontent or widespread controversy, like the Kelo opinion. In such cases, a court must take extra measures to make the rendering of judgment more understandable, acceptable, and even therapeutic for those who particularly care about the outcome.

In State v. King, a much-publicized case involving the killing of a child by a vicious dog, Minnesota Judge Kevin Burke succeeded in crafting such an opinion.21 Judge Burke was charged with deciding whether to prosecute Zachary King for second-degree manslaughter after his child, Zach Jr., was killed by the family’s pet pit bull.22 For obvious reasons, the case had set the community on edge.23

In his opinion, Judge Burke recognized at the outset that “[w]hat happened in this case was a horrific tragedy.”24 Although he had decided that King should not be criminally prosecuted, Judge Burke made it clear that “there is no victor” in the case and asked rhetorically, “Who is responsible” for the death of a child, the traumatization of his siblings and parents, and the bewilderment of so many people who are wondering how this could happen?25

Judge Burke’s only obligation was to reach the correct result based on the applicable law. Nevertheless, he was able to craft an opinion that was acceptable to the defendant, his grieving family, and a bewildered community because he recognized the sensitivities in the case and took the time to acknowledge them. Unlike in Kelo, the opinion did not inspire any backlash or anger. Everyone accepted the judgment because it was evident in Judge Burke’s opinion that justice had been served in a highly controversial case.

Conclusion

This discussion began with Judge Posner’s call for clearer communication and less jargon in judicial opinions. Undoubtedly, the goal of opinion writing must be clear communication. If judges make every choice regarding the tone and content of opinions with an eye toward communicating with the audience for those opinions, the purposes of our judicial system will be met. Even highly controversial opinions will be viewed as more acceptable if the public actually understands the legal underpinnings for those opinions and how they apply to the case at hand.

In addition to clear communication, however, is the need for opinions to demonstrate respect for everyone affected by judicial rulings. By demonstrating respect at every stage of the process, including the opinion-writing stage, courts encourage respect for the judicial system itself and widespread acceptance of their opinions.

As the noted legal philosopher Professor Lon L. Fuller has stated, “the great judges of the past are not celebrated because they displayed in their judicial ‘votes’ dispositions congenial to later generations. Rather, their fame rests on their ability to devise apt, just, and understandable rules of law; they are held up as models because they were able to bring to clear expression thoughts that in lesser minds would have remained too vague and confused to serve as adequate guideposts for human conduct.”26

NANCY A. WANDERER is Legal Writing Professor Emerita at the University of Maine School of Law. For decades, she has overseen 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.

2 Id.
3 Id. at 21.
4 Id. at 17.
5 Id.
6 Id. at 18.
7 Id. at 20.
8 Id. (quoting United States v. Curescu, 674 F.3d 735, 741 (7th Cir. 2012)).
9 Id. at 22.
10 Id.
13 Nancy Wanderer, Writing Better Opinions: Communicating with Candor, Clarity, and Style, 54 Me. L. Rev. 48, 49 (2002).
14 Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 457 (1897).
15 Id.
17 545 U.S. 469 (2005).
18 Nancy Wanderer, Fostering Public Trust through Judicial Opinion Writing, NASJE News Quarterly (Summer 2008).
19 Id.
20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
25 Id.
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At this year’s MSBA Summer Meeting, new and . . . ahem, seasoned, lawyers alike sat side-by-side painting, taking their children for a lesson about the sea with Diver Ed, and going on carriage rides. Also at the Summer Meeting, the New Lawyers Section was absolutely delighted to host an intimate conversation with Paulette Brown, the president of the American Bar Association. In the midst of the fun and the celebration that is the bright, beautiful, and short-lived summer in Maine, Ms. Brown’s talk gave us a sobering reminder that with all of the important work that we do, there is so much left to be done. Ms. Brown is in the process of traveling to all 50 states (not to mention the District of Columbia and the surrounding territories) and Maine was her 46th. Of all of the states, she shared with us her observation that Maine had the least diverse bar of any of the states that she had visited. Although Maine may be a small state, the New Lawyers Section has felt the importance of continuing its work to make the legal community reflective of Maine’s broader population.

As part of this effort, the New Lawyers Section will be working to educate high school students on general legal issues by publishing an informative pamphlet entitled “On Your Own,” to provide know-your-rights information along with general information on voting and the legal system. In a similar effort, New Lawyers Section Board Member Cheryl Cutliffe took some time out of her Friday on June 3 to attend a high school “Street Law” class at Lewiston High School to talk about how she became a lawyer, and what it was like to practice law in the State of Maine.

Also, on June 18, several New Lawyers Section members and law students traveled to Boston to share what we’ve been working on and hear ideas from other young lawyer groups from Vermont, New Hampshire, and Massachusetts, including one particularly poignant suggestion for tiered mentorship to facilitate the effort to make the bar more rich and diverse. The suggestion featured pre-law college students mentoring high school students. The college students are, in turn, mentored by law students, who are mentored by new lawyers, who are mentored by more senior lawyers. With each step like the rung of a ladder, the New Lawyers Section believes that this type of mentorship could make a real difference in the people who may go on to build great legal careers and the Section hopes to explore implementing a similar program here in Maine.

It may be easy to convince ourselves that this issue is not a problem here in Maine, that—looking around the bar and the people we spend time with—we are a pretty homogenous community, but that is not the Maine I know. As members of the bar, we have a responsibility and a greater calling to improve the bar.

In reflecting on the recent affirmative action decision by the U.S. Supreme Court, Judith Browne Dianis commented that Education is richest when student bodies reflect the unique makeup of our communities. Universities are strongest when scholars contribute knowledge that cannot simply be learned, but lived – through their unique cultural experiences, including those influenced by race.

So too is the legal community. It is with this renewed inspiration that the New Lawyers Section continues its work to promote the richness that comes with the widely differing life experiences of all members of the Maine bar.

On an unrelated note, stay tuned for some seriously wonderful events coming in the pipeline from the New Lawyers Section. Without giving too much away in the formative and planning stages, we are looking forward to collaborating with the Maine World Affairs Council for an international trivia night, a blockbuster gala featuring a pro bono showcase, games, and prizes.

**NEW LAWYERS SECTION REPORT**

By Tara Rich

TARA RICH is the former chair of the New Lawyers Section. She worked in Kennebunk as an associate attorney in the offices Libby O’Brien Kingsley & Champion. She formerly clerked for Maine Supreme Judicial Court Justice Joseph M. Jabar following her graduation from Tulane Law School in New Orleans. In addition to being a lawyer by day, she is also a registered Maine sea kayaking guide in Kennebunk.
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For more than a century, the Sioux Nation claimed that the United States had unlawfully abrogated the Fort Laramie Treaty of 1868, in which the United States “solemnly agree[d]” that no unauthorized person “shall ever be permitted to pass over, settle upon, or reside” in the territory of the Great Sioux Reservation in South Dakota’s Black Hills. In 1874, the government’s solemn promise began to unravel when Lieutenant Colonel George Armstrong Custer led an expedition that confirmed the presence of gold on Sioux land. As settlers rushed for the gold, President Grant secretly ordered the military to stand down from its role as the Sioux Reservation’s protector.

A majority of the Supreme Court ruled in favor of the Sioux. Central to the decision was President Grant’s duplicity, which a lower court summed up as follows: “A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history.”

Justice Rehnquist’s dissent offered a different historical perspective. He quoted the Oxford History of the American People for the proposition that the Indians would “inflict cruelty without qualm” and would rob or kill anyone “if they thought they could get away with it.” Considering the treachery on both sides, Justice Rehnquist believed that, instead of judging the situation by the light of “revisionist” history, that “both settlers and Indians [were] entitled to the benefit of the Biblical adjuration,” quoted above.

**SUPREME QUOTES**  
*By Evan J. Roth*

*Judge not, that ye be not judged.*


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

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### 2017 Live Programs

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*Also available as a live webcast.

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Sally Tongren: A Gift of Education

Sally Stetson Tongren (1926-2014) was the daughter of Albert K. and Hazel Hewes Stetson of Houlton. Her father was owner and publisher of the Aroostook Pioneer, the first weekly newspaper in The County. She attended Houlton schools and went on to earn a bachelor’s degree from Wellesley College. She served as a docent at the National Zoo and published several books about animals.

Tongren bequeathed nearly $4.8 million to the Maine Community Foundation to endow two scholarship funds benefitting students in Aroostook and Washington counties who are headed for college. We are honored to play a role in fulfilling her remarkable gift to the future.

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