CLE materials
for Thursday, September 22
2022 State Bar of Montana Annual Meeting
“The Ghost of Meagher – Ireland, Montana and their Constitutions. Perspectives on Constitutional Order”

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Irish Influence on US Constitutional Order?

Limited Irish influence on US Constitution – unsurprising given the timing!

Irish founding Fathers – four born in Ireland (James McHenry, Pierce Butler, William Paterson, Thomas Fitzsimons)

John Dunlap - Irish Printer of the Declaration of Independence and US Constitution

Irish Influence on the Constitutions of Montana – Irish Americans feature strongly
And here is a portrait of the Author,

Mr. G-O’RILLA, the Young Ireland Party, exulting over the insult to the British flag. Shouldn’t he be extinguished at once?
Meagher’s Irish Life
The Ghost of Meagher

Meagher’s words from the Dock when he was convicted were interesting;

To lift this island up—make her a benefactor to humanity, instead of being as she is now, the meanest beggar in the world—to restore to her, her native powers and her ancient constitution—this has been my ambition and this ambition has been my crime. Judged by the law of England, I know this crime entails upon me the penalty of death; but the history of Ireland explains that crime and justifies it. Judged by that history, the treason of which I stand convicted loses all its guilt, has been sanctified as a duty, and will be ennobled as a sacrifice.
• Declaration of the Irish Republic – closely modelled on the US Declaration and mention of “her exiled Children”

• Recognition of Popular Sovereignty

• Some overlooked elements? Potentially concern about the tyranny of Government itself?
1922 Irish Constitution

- Broad acceptance that there was a very strong US influence but direct references to same somewhat harder to come by.

- US Constitution widely known and understood

- US Lawyer part of the drafting committee; CJ France although appears to have had his influence downplayed

- Irish Chief Justice Kennedy noted it was “a Constitution whose democratic character is manifest if Gettysburg still speaks.”
The Ghost of Meagher 2

Meagher is invoked frequently throughout Irish history post over the last 100 years or so;

1919 – Eamon De Valera visits Montana, speaks at Legislature and is impacted by Meagher’s story (more later!)

1919 – Trying to get legitimacy internationally at first Dáil (Pre Independence)

1919 – invoking Meagher when Irish-American Commission arrives to Dáil (Pre Independence)

1932 – Constitutional amendment – removal of oath to British crown

1934 – Death of William Wallace McDowell – US Ambassador to Ireland, former Lt Gov of Montana – Meagher invoked in his memory

1959 – Meagher invoked in an attempt at amending the voting system

2004 – Invoked in debate on future of the Senate
US Influences on 1937 Constitution

Dev himself perhaps the biggest “American” influence

Most of the 1922 Constitution survives into the 1937 Constitution but key differences have ensured its longevity

Nationalistic in tone and language, some well hidden American echoes to be found

Less American legal influence that generally assumed
Enduring US influences

“In this State, one would have expected that if the approach of any court of final appeal of another State were to be held up as an example for this court to follow, it would be more appropriately have been the Supreme Court of the United States rather than the House of Lords.” – Mr Justice Walsh, State (Quinn) v. Ryan (1965) IR 70

But generally not been the case however a few exceptions
- Unenumerated Rights Doctrine
- Contraception
- Abortion (Ongoing!)
<table>
<thead>
<tr>
<th><strong>IRELAND: Preamble</strong></th>
<th><strong>MONTANA: Preamble</strong></th>
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</thead>
<tbody>
<tr>
<td>In the Name of the Most Holy Trinity, ... We, the people of Éire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, Do hereby adopt, enact, and give to ourselves this Constitution. (Preamble.)</td>
<td>We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution. (Preamble.)</td>
</tr>
</tbody>
</table>
# Montana and Ireland: Comparative Contexts

<table>
<thead>
<tr>
<th><strong>IRELAND: Popular Sovereignty</strong></th>
<th><strong>MONTANA: Popular Sovereignty</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>The Nation.</strong> The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions. Art. 1.</td>
<td><strong>Popular sovereignty.</strong> All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Art. II, § 1.</td>
</tr>
<tr>
<td><strong>The State.</strong> All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good. Art. 6.</td>
<td><strong>Self-government.</strong> The people have the exclusive right of governing themselves as a free, sovereign, and independent state. They may alter or abolish the constitution and form of government whenever they deem it necessary. Art. II, § 2.</td>
</tr>
<tr>
<td><strong>IRELAND: Rights</strong></td>
<td><strong>MONTANA: Rights</strong></td>
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</tr>
<tr>
<td><strong>Citizenship.</strong> It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage. Art. 2. <strong>Personal Rights.</strong> All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function. Art. 40.1.</td>
<td><strong>Inalienable rights.</strong> All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. <strong>Individual dignity.</strong> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person... shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas. Art. II, § 4.</td>
</tr>
<tr>
<td><strong>IRELAND: Justice</strong></td>
<td><strong>MONTANA: Justice</strong></td>
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<tr>
<td><strong>[Personal Rights]</strong> The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen. Art. 40.3.2°.</td>
<td><strong>The administration of justice.</strong> Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character... Right and justice shall be administered without sale, denial, or delay. Art. II, § 16.</td>
</tr>
<tr>
<td><strong>Trial of Offences.</strong> No person shall be tried on any criminal charge save in due course of law.... Save in [special cases] no person shall be tried on any criminal charge without a jury. Art. 38.</td>
<td><strong>Trial by jury.</strong> The right of trial by jury is secured to all and shall remain inviolate. Art. II, § 26.</td>
</tr>
<tr>
<td><strong>The Courts.</strong> Justice shall be administered in courts established by law ... and, save in such special and limited cases as may be prescribed by law, shall be administered in public. Art. 34.1.</td>
<td></td>
</tr>
<tr>
<td>IRELAND: Personal Rights</td>
<td>MONTANA: Privacy &amp; Due Process</td>
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<tr>
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<td>--------------------------------</td>
</tr>
<tr>
<td><strong>Personal Rights</strong></td>
<td><strong>Right of privacy.</strong> The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest. Art. II, § 10.</td>
</tr>
<tr>
<td>1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.</td>
<td><strong>Due process of law.</strong> No person shall be deprived of life, liberty, or property without due process of law. Art. II, § 17.</td>
</tr>
<tr>
<td>2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.</td>
<td></td>
</tr>
<tr>
<td>3° Provision may be made by law for the regulation of termination of pregnancy. Art. 40.3.</td>
<td></td>
</tr>
<tr>
<td>No citizen shall be deprived of his personal liberty save in accordance with law. Art. 40.4.</td>
<td></td>
</tr>
<tr>
<td>IRELAND: Rights, cont.</td>
<td>MONTANA: Rights, cont.</td>
</tr>
<tr>
<td>------------------------</td>
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</tr>
<tr>
<td>The State guarantees liberty for the exercise of the following rights, subject to public order and morality: -</td>
<td><strong>Right to bear arms.</strong> The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons. Art. II, § 12.</td>
</tr>
<tr>
<td><strong>The right of the citizens to assemble peaceably and without arms.</strong> Provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas. Art. 40.6.1.</td>
<td><strong>Importation of armed persons.</strong> No armed person or persons or armed body of men shall be brought into this state for the preservation of the peace, or the suppression of domestic violence, except upon the application of the legislature, or of the governor when the legislature cannot be convened. Art. II, § 33.</td>
</tr>
</tbody>
</table>
Meagher’s legal legacy

There is one law left on the books that Meagher is responsible for and it's an important one but it isn’t quite in Montana...
"A constitution is not simply a piece of legislation. It embodies the aspirations and emotional feelings of the people who have enacted it. Not everything in a constitution therefore is intended to have legal implications."

- Mr Justice Geoghegan, Ó Beoláin v Fahy [2001] 2 IR 279
Article 50

1 Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.

2 Laws enacted before, but expressed to come into force after, the coming into operation of this Constitution, shall, unless otherwise enacted by the Oireachtas, come into force in accordance with the terms thereof.

Dochum Glóire Dé

agus

Onóra na hÉireann

Airteagal 50

1 Na dlíthe a bheas i bhfeidhm i Saorstát Éireann dó mBunreacht níos tábhachtach roimh lá an Bunreacht seo a theacht i ngníomh leanfadh de bheith i lárn feidhm agus i lárn feacht, faoi chuimsí an Bhunreachtá seo agus sa mhéid na bhfuilid ina choine, go dtí go n-aísear ní geasaighítear nó go leasaítear iad nó aon chuid díobh le hachtú ón Oireachtas.

2 Dlíthe a bheas achtaithe roimh an mBunreacht seo a theacht i ngníomh agus a mbeidh luaite iontu iad do theacht i bhfeidhm dá éis sin, tiocfaidh i bhfeidhm de réir mar a luaitear iontu mura n-aísear an tOireachtas a mhalairt.

Dochum Glóire Dé

agus

Onóra na hÉireann
MASS ROCK

With their faith proscribed, their churches closed, and their clergy pursued by priest hunters, the Irish in the Penal Times gathered around the Mass Rock to celebrate the Holy Sacrifice of the Mass and to affirm their loyalty to their faith and culture. The Mass Rock stands as a perpetual reminder of those dark days and of the unyielding spirit of the Irish. So stay awhile and say a prayer for all those lying in this graveyard and for their descendants living here in Butte, back home in Ireland and throughout the world.

For the Glory of God and the Honour of Ireland

CARRAIG AN AIFRINN

Agus a gcreideamh coiscithe, a séipéil dúnta, agus a gcléir ar a dteithheadh ó lucht seilge sagart, bhailigh na Gaeil tímpéall ar an gCarraig Aifrinn in Aimsir na bPéindlithe d’Thonn Naomh-íobairt an Aifrinn a cheiliúradh agus a ndílseacht dá gcreideamh is dá gcultúr a fhógairt. Seasann an Charraig Aifrinn mar bhuanchuimhne ar na laethanta dorcha úd is ar spioraid dochloite na nGael. Fan tamall, más ea, agus abair paidir leo siúd uile fén bhfóid so sínte agus ar a bhosrú beo dá sliocht abhus i mButte, ag baile in Éirinn agus ar fuaid an domhain bhraonaigh.

Dóchum Glóire Dé agus Onóra na hÉireann
A final note...

Meagher of the Sword...

...but where is the Sword?

Time to bring it home to Montana?
Representing Government: Basic Ethics Overview
Common Issues/Questions:

Who is your client?
- Potential conflicts of Interests

What is protected? Whose confidences do you protect?

What is privileged communication?

Scope of authority
Rule 1.11

Special Conflicts of Interest for Former and Current Government Officers and Employees
Rule 3.8

Special Responsibilities of a Prosecutor
Rule 1.2

Scope of Representation and Allocation of Authority Between Client and Lawyer
Rule 1.13

Organization as Client (a) and (b)
Rule 1.13
Organization As Client
(c)

“That must have been the paradigm shift.”
Rule 1.13

Organization as Client
(d) and (e)
Rule 1.13

Organization As Client

(f) and (g)
Montana Code Annotated
Title 2, Chapter 2

Part 1. Code of Ethics
Part 2. Proscribed Acts Related to Contracts and Claims
Part 3. Nepotism
2-2-104 Rules of conduct for public officers, legislators, and public employees.

(1) Proof of commission of any act enumerated in this section is proof that the actor has breached the actor’s public duty. A public officer, legislator, or public employee may not: (a) disclose or use confidential information acquired in the course of official duties in order to further substantially the individual’s personal economic interests; or (b) accept a gift of substantial value or a substantial economic benefit tantamount to a gift:
   (i) that would tend improperly to influence a reasonable person in the person’s position to depart from the faithful and impartial discharge of the person’s public duties; or
   (ii) that the person knows or that a reasonable person in that position should know under the circumstances is primarily for the purpose of rewarding the person for official action taken.

(2) An economic benefit tantamount to a gift includes without limitation a loan at a rate of interest substantially lower than the commercial rate then currently prevalent for similar loans and compensation received for private services rendered at a rate substantially exceeding the fair market value of the services. Campaign contributions reported as required by statute are not gifts or economic benefits tantamount to gifts.
2-2-104 Rules of conduct for public officers, legislators, and public employees.

(3) (a) Except as provided in subsection (3)(b), a public officer, legislator, or public employee may not receive salaries from two separate public employment positions that overlap for the hours being compensated, unless:
   (i) the public officer, legislator, or public employee reimburses the public entity from which the employee is absent for the salary paid for performing the function from which the officer, legislator, or employee is absent; or
   (ii) the public officer’s, legislator’s, or public employee’s salary from one employer is reduced by the amount of salary received from the other public employer in order to avoid duplicate compensation for the overlapping hours.

(b) Subsection (3)(a) does not prohibit:
   (i) a public officer, legislator, or public employee from receiving income from the use of accrued leave or compensatory time during the period of overlapping employment; or
   (ii) a public school teacher from receiving payment from a college or university for the supervision of student teachers who are enrolled in a teacher education program at the college or university if the supervision is performed concurrently with the school teacher’s duties for a public school district.

(c) In order to determine compliance with this subsection (3), a public officer, legislator, or public employee subject to this subsection (3) shall disclose the amounts received from the two separate public employment positions to the commissioner of political practices.

2-2-104, MCA
2-2-105 Ethical requirements for public officers and public employees.

(1) The requirements in this section are intended as rules of conduct, and violations constitute a breach of the public trust and public duty of office or employment in state or local government.

(2) Except as provided in subsection (4), a public officer or public employee may not acquire an interest in any business or undertaking that the officer or employee has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by the officer’s or employee’s agency.

(3) A public officer or public employee may not, within 12 months following the voluntary termination of office or employment, obtain employment in which the officer or employee will take direct advantage, unavailable to others, of matters with which the officer or employee was directly involved during a term of office or during employment. These matters are rules, other than rules of general application, that the officer or employee actively helped to formulate and applications, claims, or contested cases in the consideration of which the officer or employee was an active participant.
2-2-105 Ethical requirements for public officers and public employees.

(4) When a public employee who is a member of a quasi-judicial board or commission or of a board, commission, or committee with rulemaking authority is required to take official action on a matter as to which the public employee has a conflict created by a personal or private interest that would directly give rise to an appearance of impropriety as to the public employee’s influence, benefit, or detriment in regard to the matter, the public employee shall disclose the interest creating the conflict prior to participating in the official action.

(5) A public officer or public employee may not perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when the officer or employee has a substantial personal interest in a competing firm or undertaking.
Mental Well-Being in the Law

Scope, Evidence and Thoughts to Improve

STATE BAR OF MONTANA ANNUAL MEETING

22 SEPT 2022
Let me introduce myself

- PhD in Public Health, specifically Occupational Epidemiology
- 20 year career studying interplay of job and health
- 3 of the Largest Studies ever among workers and employers
- 115 peer-reviewed publications, dozens of invited lectures
- Conducting Well-Being research with legal professionals
  - National Center for State Courts and Conference of Chief Justices
  - State Bars and Firms for Well-Being among lawyers, staff
  - Law Schools for Well-Being among students
Disclosures

- Employed by the University of Utah – Associate Professor (Tenured)
- Received grants and contracts from NIH, NSF, CDC, NGOs
- Institute for Well-being in Law Board Member
  - Chair of the Research and Scholarship Committee
- Consultant for multiple organizations
  - American College of Occupational and Environmental Medicine
- Chief Research Officer for ShiftAside
Well-Being

A continuous process toward thriving in all dimensions of life.

- Emotional
- Occupational
- Intellectual
- Spiritual
- Physical
- Social
Managing Stress at Work

Stress is how we react when we feel under pressure or threatened.

You will never completely remove stress from your life.

A certain amount of stress is actually good.
What Is Burnout?

Three domains:

Depersonalization

◦ “I feel I look at certain people/clients impersonally, as if they are objects.”

Emotional exhaustion

◦ “I feel emotionally drained by my work.”

A sense of low personal accomplishment
Differences between Stress and Burnout

**STRESS vs BURNOUT**

- **Stress**
  - Overengagement
  - Reactive or over reactive emotions
  - Sense of urgency and hyperactivity
  - Lost or diminished energy
  - Leads to anxiety
  - Physically tolling

- **Burnout**
  - Disengagement
  - Blunted or distant emotions
  - Sense of helplessness
  - Motivation is lost or diminished
  - Leads to feeling depressed
  - Emotionally tolling
Depression: Clinical vs Reality

9.5% clinically diagnosed

up to 60% experience symptoms

80% of us will experience some form of depression in our lifetimes

Harvard Business Review | People Want their Employers to Talk About Mental Health
Organizational Impacts of Depression

200 million lost workdays per year

Median cost $30.5 billion
 Increase in injuries (e.g. Low Back Pain)

Impacts Presenteeism | Absenteeism | Productivity
Lawyer Specific Well-Being Data

First report was 1978 by C. Maslach on burnout in legal services

1990 Report by Benjamin et al
• Lawyers average depression was worse than 98.8% of general population
• 19% suffered from depression
• 18% were problem drinkers

1990 Eaton et al.- Lawyers have 3.6 times level of depression as compared to other professions, highest out of all professions screened

2013 Bergin et al. – Law profession specific demands related to both depression and anxiety (in Australia)
• These were exacerbated by overcommitment

Lawyers at Risk

Psychological Health of the Legal Profession

- Suicidal Thoughts: 11.5%
- Anxiety: 19%
- Alcohol Use Disorder: 21%
- Harmful Stress: 23%
- Depression: 28%

Study of 13,000 Lawyers; 19 States (Krill, Johnson, & Albert, 2016)
Feelings of Value among Lawyers

- 62.4% reported feeling valued for personal/professional attributes
- 27.5% reported feeling valued for productivity/responsiveness
- 10.1% reported feelings of value from employers
- Thompson Reuters Institute reports that firms risk potentially losing 125% of associates in just 5 years.

(Krill, Anker et al., 2022, Thompson Reuters Institute 2022)
SF-12 Mental Health Scores

The SF-12 is a health-related quality-of-life questionnaire used to assess physical and mental health. Higher scores are better.

(Krill, Anker et al., 2022)
Utah Lawyer Well-Being Study

Completely Confidential
Approved by U of U IRB

Collecting Data:
Demographics
Mental Well-Being
Activities to promote well-being
Utilization of Available Services
Measures

Depression – Patient Health Questionnaire 9 question assessment (PHQ-9)
  ◦ High sensitivity and specificity
Maslach Burnout Scale
General Anxiety Disorder screening tool (GAD-7)
Drug Abuse Screener Tool (DAST)
Alcohol Use Disorders Identification Test-Concise (AUDIT-C)
Results

Participants: 3 Selection Strategies, statistically equivalent

565 Lawyers
185 Law Students
135 Law Administrative Staff (e.g. paralegals)

<table>
<thead>
<tr>
<th>Type of Law Practice</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative, Government or Regulatory</td>
<td>14.0%</td>
</tr>
<tr>
<td>Family Law</td>
<td>11.7%</td>
</tr>
<tr>
<td>Litigation (civil)</td>
<td>34.2%</td>
</tr>
<tr>
<td>Litigation (criminal)</td>
<td>8.5%</td>
</tr>
<tr>
<td>Transactional</td>
<td>20.6%</td>
</tr>
<tr>
<td>Other</td>
<td>11.1%</td>
</tr>
</tbody>
</table>
NATIONAL HEALTH AND NUTRITION SURVEY (NHANES)

- Publicly Available Data
- Collected since 1960s
  - 2 year time blocks
- NHANES (n=2305) subjects included for comparison only if:
  - currently employed working 30 hours or more per week
- Each NHANES participant is supposed to represent 50,000 people
- Adjusted for age and gender differences between the populations
Over the last 2 weeks, how often have you had trouble falling or staying asleep, or sleeping too much?

Lawyers in this study are **3.3, 4.3 and 2.6 times** more likely to report trouble falling asleep, staying asleep or sleeping too much as compared to the general working population.
Over the last 2 weeks, how often have you felt down, depressed, or hopeless

Lawyers in this study are **4.3, 3.7 and 6.7 times** more likely to report feeling down, depressed or hopeless as compared to the general working population.
Over the last 2 weeks, how often have you felt bad about yourself — or that you are a failure or have let yourself or your family down

Lawyers in this study are **7.2, 5.3 and 13.8 times** more likely to report feeling bad about themselves or that they are a failure than the general working population.
Over the last 2 weeks, how often have you had thoughts that you would be better off dead or of hurting yourself in some way

Lawyers in this study are **8.5 times** more likely to report thoughts of being better off dead or hurting themselves as compared to general working population.
17.5% of the population meet definition for Major Depressive Disorder
AUDIT-C Measure for problems with Alcohol

33.2% of lawyers meet definition of problem drinking
## Results from Lawyers- AUDIT-C

<table>
<thead>
<tr>
<th>Effect</th>
<th>Odds Ratio</th>
<th>95% Confidence Limits</th>
</tr>
</thead>
<tbody>
<tr>
<td>In house attorney: corporation of for-profit institution</td>
<td>1.00</td>
<td>Reference</td>
</tr>
<tr>
<td>College or law school</td>
<td>8.04</td>
<td>0.85 75.97</td>
</tr>
<tr>
<td><strong>In house attorney: government, public interest, or non-profit</strong></td>
<td><strong>4.38</strong></td>
<td><strong>1.53 12.55</strong></td>
</tr>
<tr>
<td>Other law practice setting</td>
<td>9.99</td>
<td>2.33 42.81</td>
</tr>
<tr>
<td>Other setting (not law practice)</td>
<td>2.59</td>
<td>0.61 10.96</td>
</tr>
<tr>
<td>Private firm</td>
<td>3.78</td>
<td>1.40 10.19</td>
</tr>
<tr>
<td>Sole practitioner private practice</td>
<td>3.29</td>
<td>1.12 9.67</td>
</tr>
</tbody>
</table>

- Many types of law practice settings are associated with potential for alcohol problems
- Adjusted for age and gender
Results from Lawyers- AUDIT-C

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<tr>
<th>Effect</th>
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<th>95% Confidence Limits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transactional</td>
<td>1.00</td>
<td>Reference</td>
</tr>
<tr>
<td>Administrative, Government or Regulatory</td>
<td>1.85</td>
<td>0.93</td>
</tr>
<tr>
<td>Family Law</td>
<td>1.23</td>
<td>0.59</td>
</tr>
<tr>
<td>Litigation (civil)</td>
<td>1.69</td>
<td>0.95</td>
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<tr>
<td>Litigation (criminal)</td>
<td>3.23</td>
<td>1.47</td>
</tr>
<tr>
<td>Other</td>
<td>1.00</td>
<td>0.46</td>
</tr>
</tbody>
</table>

- May different types of law practice are associated with potential for alcohol problems
- Adjusted for age and gender
## Correlation Statistics among Lawyers

<table>
<thead>
<tr>
<th></th>
<th>Burnout</th>
<th>Engagement</th>
<th>Workload</th>
<th>Control</th>
<th>Reward</th>
<th>Community</th>
<th>Fairness</th>
<th>Values</th>
<th>Detachment</th>
<th>Employer's Commitment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Burnout</strong></td>
<td>1.00</td>
<td>-0.65</td>
<td>0.20</td>
<td>-0.46</td>
<td>-0.35</td>
<td>-0.43</td>
<td>-0.48</td>
<td></td>
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<tr>
<td><strong>Engagement</strong></td>
<td>-0.65</td>
<td>1.00</td>
<td></td>
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</table>
Quotes from participants

• **Statements about doing well/thriving at your job**
  - Collaboration/Enjoy working with others
  - Creativity/Intellectual Challenge
  - Flexible work schedule, ability to do other things
  - Knowing that my contributions are valued

• **Statements about challenges to thriving at your job**
  - Actions of other attorneys at my firm
  - Billable hour requirement
  - Client stress/pressure
  - Frustrations with opposing counsel
  - Inflexible court deadlines
Research Take Home Messages

- Lawyers in this study, and other published research have statistically significantly high levels of depression, anxiety, burnout, suicidal ideation than the general working population.
- Many of these are inter-related.
- Scientifically validated measures.
- Wide variability within the profession.
What can you do?
From Burnout to Wellbeing
Do Mitigation Strategies Work?

Meta-analysis of 52 studies

Individual and organizational strategies:

- Decreased burnout from 54 to 44%
- Decreased emotional exhaustion scores from 23.8 to 21.2 points
- Decreased depersonalization scores from 9.1 to 8.41 points.

Both individual and organizational strategies reduced burnout

More research needed on combined methods
Social connection

Lack of strong relationships increase risk of premature death by 50%

- equivalent of smoking 15 cigarettes a day
- worse than obesity
- worse than physical inactivity
What are the most effective treatments for depression?

1. Talk Therapy
2. Improved Sleep
3. Antidepressants
4. Exercise
5. Nutrition
6. Cognitive Behavioral Therapy
### Positive Psychology and A Culture of Wellness

<table>
<thead>
<tr>
<th>The Seven Principles</th>
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<tbody>
<tr>
<td>Social Investment</td>
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<tr>
<td>The 20 Second Rule</td>
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<tr>
<td>Activation energy</td>
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<tr>
<td>The Zorro Circle</td>
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<tr>
<td>Locus of control</td>
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<tr>
<td>Falling Up</td>
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<tr>
<td>The Tetris Effect</td>
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<tr>
<td>Happiness, Gratitude, Optimism</td>
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<tr>
<td>The Fulcrum and the Lever</td>
</tr>
<tr>
<td>The Happiness Advantage</td>
</tr>
</tbody>
</table>

*Success*

*Happiness*

Achor: [The Happiness Advantage](https://www.amazon.com/dp/0470395286)
Principle #1: The Happiness Advantage

Happiness → Success
Success → Happiness

Workers who were primed to feel happy were much faster and more creative in solving problems and having higher productivity.

Achor: The Happiness Advantage
Principle #2:
The Fulcrum and The Lever

In order to maximize our potential, we can adjust:

- The length of our lever, i.e., the potential power and possibility we believe we have

OR

- The position of the fulcrum, i.e., the mindset with which we generate the power to change

Example would be to reframe your perspective about your employment:

- Job
- Career
- Calling

Achor: The Happiness Advantage
Principle #3: The Tetris Effect

This principle teaches us to retrain our brain to spot pattern of possibility and seize opportunities

Drivers of the Positive Tetris Effect:
- Happiness
- Gratitude
- Optimism

Example: List 3 positive things that happened in the last 24 hours

Achor: The Happiness Advantage
Principle #4: Falling Up

Finding the mental path that leads us up out of failure or suffering and teaches us to be happier and more successful because of it.

Example: Changing from a volume based to value based reimbursement system may threaten financial viability of a practice.

OR

This opportunity may help to develop a better model of care utilizing all the skills in a practice and improving patient access and experience.

Achor: The Happiness Advantage
Principle #5: The Zorro Circle

Self-awareness
Locus of control
Focus on one small goal

Achor: The Happiness Advantage
Principle #6: The 20 Second Rule

We like to follow the path of least resistance

The 20 Second Rule

- Lower the activation energy (or the effort to overcome inertia) for the habits you want to adopt

- Corollary: Make the distracting activities more difficult
  E.g., Remove shortcuts

Achor: The Happiness Advantage
Principle #7: Social Investment

Interactions with others are crucial.

Actively and constructively respond to good news.

Be present.

Achor: The Happiness Advantage
Towards a Mindset of Wellbeing
B-A SMARTER Goals and Objectives

Goal: To promote positivity for my personal health and wellness

Barriers: Time, energy level
Accountability: I will let my family know about my goal
Specific: Write down three good things for 14 days
Measurable: Journal entries
Appropriate: Will promote personal resilience
Relevant: Important personal strategy to prevent burnout
Timely: Yes – Short term measure within two weeks
Evaluate: Assess - progress and outlook after two weeks
Re-evaluate: Re-evaluate after a month
Towards a Mindset of Wellbeing: Personal Resilience and A Culture of Wellness

**Individual skills**
- Working from strengths
- Tracking activation
- Healthy boundaries
- Regulating emotions
- Recognizing distortions
- Reasonable expectations
- Finding meaning
- Commitment to long term

**Workplace factors**
- Enabling control
- Structuring rewards
- Building community
- Promoting fairness
- Recognizing values
- Calibrating workload

Fig. 2. Resilience skills and workplace factors.

Maslach and Leiter. Med Teach, 2017
Questions?

Contact me any time

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801.587.3322

References and original articles available on request
Lies and Technology
Ethical considerations for civil and criminal practitioners

September 22, 2022
Applicable rules

MRPC Preamble
MRCP Technology
Rule
MRPC Rules
• 3.3
• 8.4
• 1.16(b)
• In all professional functions a lawyer should be competent, prompt and diligent. **Competence implies an obligation to keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.** A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.
Who is this?
Rule

Don't lie

to the jury
Defense Attorney for Alex Jones’s Defamation Lawsuit
What was “probably the worst day of my legal career” for F. Andino Reynal?

A. When the jury found his client liable for $4.1 million in compensatory damages and $45.2 million in punitive damages?

B. When he learned during the cross-examination of his client that he had accidently provided plaintiffs’ counsel with the entire contents of his client’s cellphone which showed that his client’s testimony on direct exam was a lie?

C. When he was required to testify in a show cause hearing on whether he should be referred for sanctions for his misconduct?

D. When he hired his legal assistant who sent the link to the client’s cellphone data?
Civil focus - What to do when your client lies in a deposition
• 1 A lawyer shall always pursue the **truth**

• 3 . . . a lawyer shall behave consistently with the requirements of **honest** dealings with others

• 14 “All lawyers understand that, as officers of the court, they have a **duty to be truthful**, which engenders trust in both the profession and the rule of law” . . . “**truthfulness** must be the hallmark of the legal profession, and the stock-in-trade of all lawyers”
MRCP 3.3 Candor toward the tribunal
ABA comment on model rule 3.3

“tribunal” includes “ancillary proceedings conducted pursuant to the tribunal’s adjudicatory proceeding such as depositions”
(a) "A lawyer **shall not knowingly:**

...  
3. Offer evidence that the lawyer **knows** to be false.

If a lawyer, the lawyer's client, or a witness called by the lawyer **has offered** material evidence and the lawyer comes to know of its falsity, the lawyer shall take **reasonable remedial measures**, including, if necessary, disclosure to the tribunal.

A lawyer **may** refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer **reasonably believes** is false.”
Rule 3.3 “requires a lawyer to take **reasonable remedial measures** if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false”
Rule 1.16(b) - Permissive Withdrawal

“... a lawyer *may* withdraw from representing a client if:

2. The client **persistence** in a course of action involving the lawyer’s services that the lawyer’s **reasonably believes** is criminal or fraudulent;
3. The client has used the lawyer’s services to perpetuate a crime or fraud;
4. The client insists upon taking action that the lawyer considers **repugnant** or with which the lawyer has a **fundamental disagreement** or

7. Other good cause for withdrawal exists”
Lawyer **knows** client lied in depo

- Lawyer has duty to take remedial measures
  - Try to convince client to correct
  - Disclosure to opposing counsel
  - Disclosure to court
  - Withdrawal
- Lawyer cannot offer misrepresentation as evidence

Lawyer **reasonably believes** client lied in depo

- Lawyer may refuse to offer statement as evidence in civil matter
- Lawyer may withdraw - permissive withdrawal
MRPC 8.4

“It is professional misconduct for a lawyer to . . .

c. Engage in conduct that involves dishonesty, fraud, deceit or misrepresentation

d. Engage in conduct that is prejudicial to the administration of justice”
Fact Scenario

- Civil case in state court
- In deposition, client states that he did not engage in the conduct you know he in fact did take
  - Scenario 1 - You know it's a lie during deposition
  - Scenario 2 - You later learn of lie upon reviewing written discovery.
Scenario 1 - during deposition . . .

1. Ambiguous question? If so, **object** and ask that it be **rephrased**

2. **Take a break** and **confer** with your client to figure out why the incorrect answer was given

3. If client can’t provide satisfactory explanation, **warn** about the consequences of his perjury and advise of duty to tribunal

4. If client refuses to correct record, **suspend deposition** to prevent additional damage and buy time to try to persuade client to do right thing

5. If client persists, **create a record with the client**, perform ethical duty to correct deposition testimony and withdraw.

6. Do not use testimony as evidence.
Do NOT interrupt client during his/her depo to correct error immediately. While spontaneous remedial action may be instinctive, it is ill advised

1. Deprives adverse counsel of right to conduct examination i.e., lawyer can’t testify on behalf of witness

2. Irretrievably places client in bad light. Need to first query reason for misstatement before prejudicing client.
Scenario Two - You subsequently learn deposition testimony was a lie

Duty to take “remedial measures”
- Talk with client
- Disclose to opposing counsel
- Disclose to tribunal
- Do not rely on testimony as evidence
- Withdraw
Criminal Focus

What to do if your client plans to lie on the stand

• Differs from civil analysis because of Defendant’s Constitutional Rights
• Still dealing with Rules 1.6 and 3.3
• Fact Scenario: You learn on the morning of trial that your client plans to take the stand and lie. What do you do?
Three Approaches

1. Professor Freedman’s Approach

• “Full Advocacy”

• Recognizes criminal defense attorney’s trilemma: duties to investigate case, confidentiality, candor to court

• If attorney cannot dissuade client not to perjure himself, Freedman argues should sacrifice candor in favor of confidentiality

• Rejects idea of withdrawing during trial because it is blowing the whistle on client and next lawyer would likely have the same problem

• Client testifies “cold”—no prep for direct or cross
2. Narrative Approach
Middle ground?

- Allow Defendant to take stand and testify as narrative
- Attorney does not question so does not elicit perjury
- Can’t use testimony in closing argument
- In practice it telegraphs to trier of fact that client is lying
- Damages atty-client relationship and confidentiality
3. Knowledge Based Approach

• ABA approved

• Distinguishes between what lawyer “reasonably believes” v. what lawyer knows

• How does lawyer know what the truth is? Or that their client will definitely lie on the stand?

• Tries to resolve trilemma but criticized as being disingenuous
Take Aways

• Try to get your client to tell truth and advise them on consequences if they lie

• If you decide to withdraw, do so as early and discreetly as possible

• You can ask client about things you believe to be true

• Can’t use false testimony in closing argument

• If you know client will perjure himself, easier to disclose to court before he testifies under Rule 1.6