



# Sure footing

## Making good decisions when group dynamics are in play, as in the co-counsel world

By MILES B. COOPER

The lawyer braced against the 70-mile-an-hour winds ripping across the ridge line, snow pelting the fractional exposed skin between goggles and balaclava. A gust triggered a harmonic hum as it passed between the skis strapped to the lawyer's pack. Below was the lawyer's climbing partner. Above, their local expert guide urged them on. The lawyer glanced upward at a looming cornice. The guide assured them it was safe – only moderate avalanche conditions. The lawyer, an experienced mountaineering skier, was not so sure...

### The whole is greater than the sum of its parts

A select few of us in this trade are true solo lawyers. Even those folks however, tend to have staff, suite mates, or family members to bounce case strategies off of. The rest of us work in some form of team dynamic. Those teams contain people with vastly different skill sets. There can be the battle-hardened trial lawyer, skills sharp but who might rely too much on those skills, too little on case nuance. There can be the junior lawyer, master of facts but who might miss a trial trap. Then there's staff, whose decades of experiences, unclouded by law school's conditioning, give them access to shortcuts overlooked by lawyers.

Layer on that the increasingly frequent co-counsel world. A lawyer skilled in working cases up but lacking court trial experience may bring in a trial lawyer. A firm with a great case might bring in another lawyer with specialized knowledge about that type of case. A firm might be heading into a different location and need pro hac vice sponsorship or other local knowledge.

Every one of these situations results in a group dynamic, and groups are great. Groups, working well together, can solve complex problems and outthink their opponents. The flip side? That old example of groupthink gone bad – the camel as unintended result of a committee working to produce a horse. Groups, focused on the win, can be blind to the risk immediately before them.

### Look for fail points, not successes

There's an organization that tracks avalanche fatalities and does detailed after-action analysis. This research has influenced avalanche training. The old premise, confirm that it is safe, switched to looking for ways it is unsafe. This risk analysis can be overlaid on most situations, particularly litigation. Look for ways one might lose (and shore those up or consider resolution) rather than ways one will win. Perform a pre-mortem analysis – ask what can kill you and plan for it before you encounter it. Spot the danger, don't seek confirmation of safety.

In doing so, there are several group dynamics to consider. Is there an expert or a local whose opinion is being given undue deference? Is everyone in the group half-listening, assuming another group member is the shot caller? Years ago, a group of avalanche experts attending an avalanche safety conference ended up buried when each expert thought another expert had performed the safety analysis. No-one had, however. This means someone – one person – needs to own a decision, and make sure everyone has weighed in. Are clashing egos taking the case down a perilous course? Sometimes a team member's need to be correct or desire for recognition can sabotage the ultimate goal – winning.

Don't overlook the danger posed by fatigue. Adrenaline masks fatigue's impact, but sluggish thinking can cloud judgment. Out-working the other side is important. At the same time, studies show that people operating under severe sleep deficits have elevated heart rates and suffer temporary IQ drops of up to 20 points. Keeping some portion of the team reserved and rested while others are taxed can reduce fatigue-induced irrationality.

At the end of the day it still comes down to trusting instincts. Those gut instincts are valuable. Does something feel off? Are team members voicing concern? Don't let the fear of embarrassment, ego insult, or confrontation with the expert prevent one from listening to those instincts. Voice the concerns. If there's risk of bruising an ego (and creating an unnecessary polarity in the group), consider a politic way of raising the issue. Doing this one on one rather than calling someone on the carpet in front of the group can help diffuse this.

### Outro

Back to our lawyer on the mountainside. The lawyer, unwilling to blindly follow the local expert's urging forward, huddled with the expert and climbing partner. After a detailed risk analysis with all three providing input, they reached a decision everyone agreed was acceptable. And after a full day in the elements, all three made it safely off the mountain. The application of avalanche risk analysis to litigation risk was inspired by a recent excellent New York Times article. For more on this, look to Heidi Julavits's What I learned in avalanche school, New York Times, Dec. 31, 2019, [www.nytimes.com/2019/12/31/magazine/avalanche-school-heidi-julavits.html](http://www.nytimes.com/2019/12/31/magazine/avalanche-school-heidi-julavits.html).



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*with his other partner Maryanne, is glad their adrenaline-seeking partner, Theo Emison, enjoys the mountains, and even more glad Theo makes it back from his adventures. ☒*