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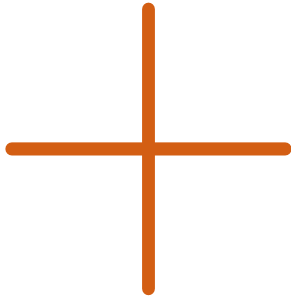
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Volume 34, Number 2, Spring 2019

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## PRESIDENT'S PAGE:

# Friends: Spring is Here!

By Eric N. Columber

Supposedly spring is here, though the view from my office as I write this column says otherwise.

So, let's skip ahead to summer. It's time to think about the Annual Bar Conference in Bar Harbor, June 19 through 21.

This letter's quote comes from Mark Twain, from a note he wrote in 1901:

*"Always do right. This will gratify some people and astonish the rest."*

Isn't that our job? To care for clients zealously, to protect our system of justice, and somehow to "do right" within that framework? As attorneys, we will forever be the butt of unknowing jokes, public and private scorn, and even personal difficulties in the midst of doing our jobs well.

But all of that pales with the honor of doing our job "right" for those clients, for a public that may not always care, for the system, and even for ourselves. We will gratify some and astonish the rest, including maybe ourselves.

The Annual Bar Conference this summer focuses on all those tasks and seeks engaged participants. *That is all of us.* The Conference will bring together nationally recognized speakers, from top-notch legal practitioners, to experts in the insurance and business worlds, and others. A wide variety of continuing legal education and practice and personal management tools will show all of us how to be better attorneys and better practitioners, all while providing a relaxing location to network and connect with friends. It is no secret that every Conference works better and offers more to all of us when the rooms are packed and participating. Come join in this summer!

Can you tell I am excited about it?

The MSBA continues its work behind the scenes monitoring and commenting on the myriad of legislative issues this busy session, which touch upon the practice of law, advancing the voice of attorneys, and working with the courts and other public systems to ensure access to justice throughout Maine.

MSBA has also launched a Law Day campaign for Maine youth to increase their voice in how this year's Law Day theme affects us with "Free Press, Free Speech, Free Society." We plan to publish the winning entries in the *Maine Bar Journal*, so you can see the level of thought our youth exhibit on this topic.

The snow and ice and difficulties will always pass, and we are left with the "astonishing" in our profession. See you In Bar Harbor.

Till the next one –



# FROM THE EXECUTIVE DIRECTOR: MSBA Annual Bar Conference

By Angela P. Weston

I hope you are planning to attend the Annual Bar Conference on June 19-21 in Bar Harbor. We've got some great things in store for you!

Join us Wednesday evening for a reception to honor our 50-year Life Members. Enjoy Rock Harbor Esquire Ale and heavy hors d'oeuvres while you catch up with old friends, meet new ones, and gain some insight from our newest Life Members.

With wellness as the meeting's theme, Chris Newbold, vice president of ALPS, will kick things off for us on Thursday morning. He will make you remember why you became a lawyer in the first place and share his thoughts on how we can work together to guide the profession toward a positive and fulfilling future. Matt Ward, founder of Breakthrough Champion, will share tips on gaining client referrals. You'll leave with tools to implement in your practice immediately, resulting in a closer connection with your clients, prospects, partners, and of course, more word-of-mouth referrals. Doug Brown, attorney and former executive director of the Connecticut Bar Association, will provide several proven strategies for a satisfying and successful practice. Additionally, there are CLE sessions on cannabis laws, digital court records implementation in Maine, the new Maine Probate Code, workers' compensation claims, coastal property rights, the intersection of divorce and bankruptcy, growing your practice, retaining associates, and reclaiming an hour of your busy day.

And it's not all about the CLE! Start your Thursday morning off right with an outdoor yoga class while you take in the stunning scenery of the coast. And on Thursday evening, wear your Hawaiian shirt, Bermuda shorts, or Maine lobster bib to our Maine luau lobster bake. We will honor retiring Bar Counsel Scott Davis, groove to the music of The Fox & The Hound, and enjoy a traditional Maine lobster bake.

Online registration is now open at [www.mainebar.org](http://www.mainebar.org). Don't miss this opportunity to attend a fun and educational event in a gorgeous setting that you can write off as a business expense!

And, of course, you can always contact me by phone at (207) 622-7523 or by email ([aweston@mainebar.org](mailto:aweston@mainebar.org)) with any ideas or concerns about the Maine State Bar Association. Thank you!



ANGELA P. WESTON is the Maine State Bar Association's executive director. She can be reached at [aweston@mainebar.org](mailto:aweston@mainebar.org).

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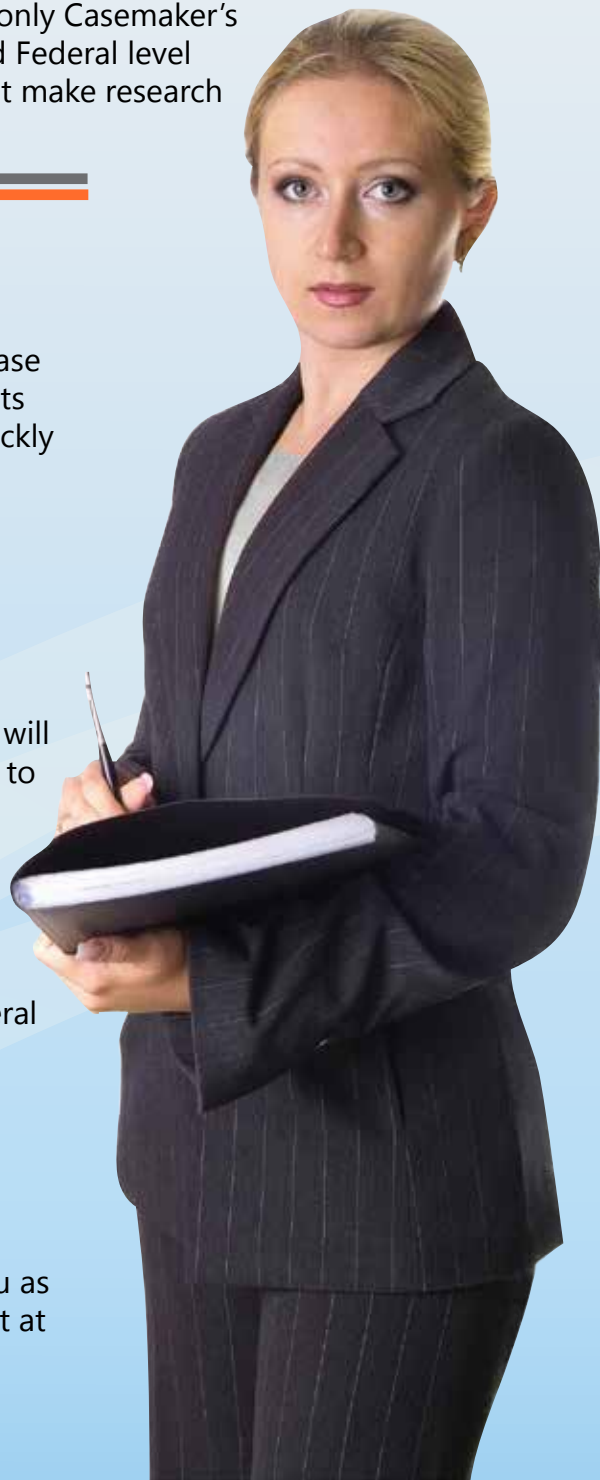
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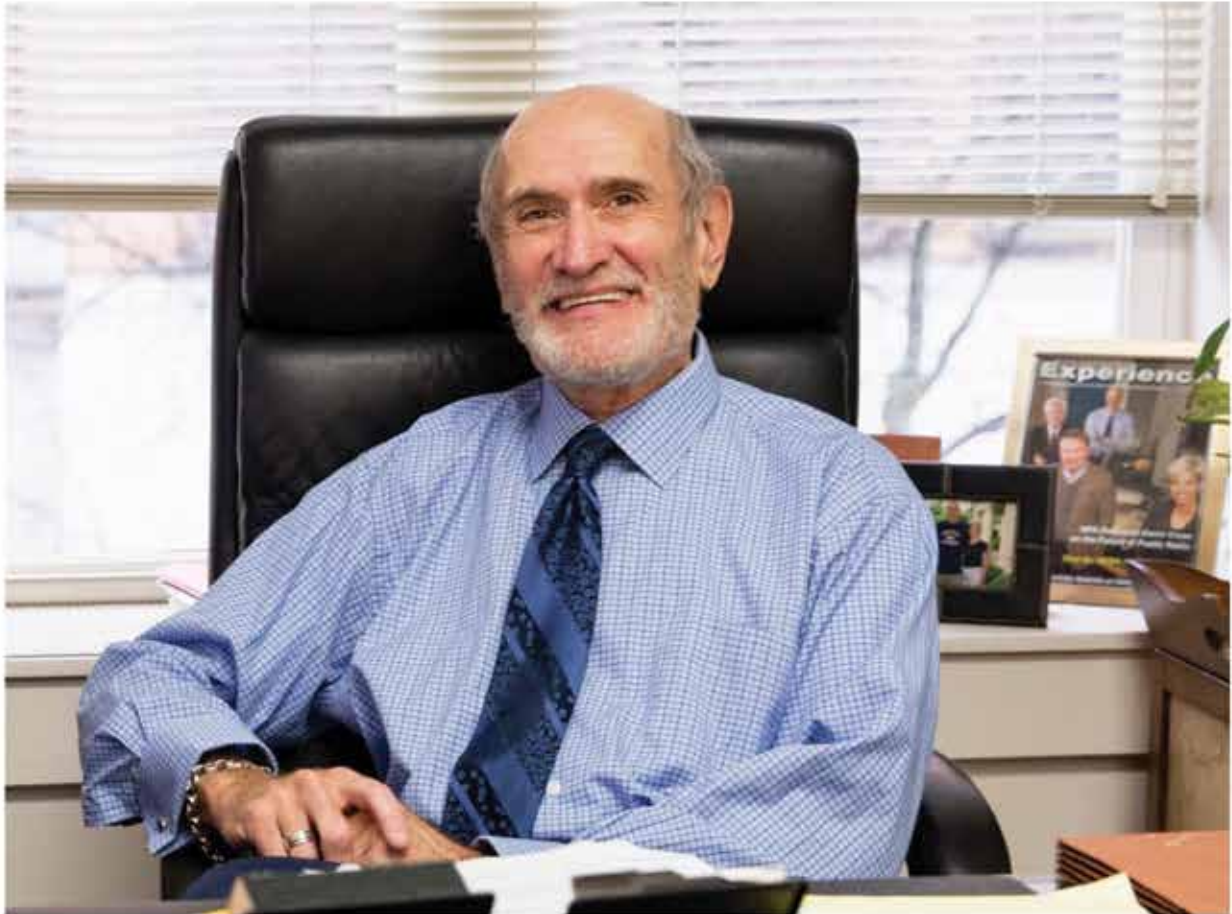
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# Rule of Law: The Holy Grail of Our Judicial System

By Nancy A. Wanderer

Throughout Brett Kavanaugh's confirmation hearings, one term kept coming up: the rule of law. But what is meant by the "rule of law"? Is it a powerful, objective principle used "to illuminate the dark corners of government and law" or a fancy name for "tilting at Leviathan with only the emotive force of a cliché?"<sup>2</sup> Is it an impartial standard that can be discovered in a value-free manner or a guiding principle that is influenced by the political and personal values judges bring to their interpretation of the law? Most importantly, if the latter is the case, what can be done to maintain public trust in the fairness and legitimacy of the judicial system?

## Rule of Law as Impartial Adherence to Precedent

When United States Supreme Court Justice John Paul Stevens retired, President Obama praised his "fidelity and restraint" and also his "fierce dedication to the rule of law."<sup>3</sup> Later, when announcing his nomination of Elena Kagan as Stevens's successor, Obama explained what it takes for a judge to uphold the rule of law: She must be "impartial,' act with 'restraint,' have 'respect for precedent,' and understand 'that a judge's job is to interpret, not make law.'"<sup>4</sup> He invoked the rule in a similar way when nominating Sonia Sotomayor, stressing the "limits of the judicial role" and the need for "impartial justice" and "a determination to faithfully uphold the law."<sup>5</sup> Judge Sotomayor replied, "I firmly believe in the rule of law" and later, in her opening statement to the Senate Judiciary Committee, she asserted that the law must always "command the result in every case."<sup>6</sup>

## Role of Empathy

Despite his insistence on judicial adherence to the rule of law, President Obama also included "empathy"—that is, a potential nominee's ability to identify 'with people's hopes and struggles—as an essential ingredient for arriving at just decisions and outcomes."<sup>7</sup> On the campaign trail he had stated: "We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges."<sup>8</sup>

Obama's acknowledgement that personal relationships and empathy should play a part in the way judges decide cases raised some people's hackles.<sup>9</sup> One commentator complained that relying on empathy would result in judges being partial instead of impartial, asserting that judges are "supposed to have empathy for no one but simply to follow the law."<sup>10</sup> Some even questioned whether Kagan was really committed to the rule of law because she had previously stated that the Court should try to help the disadvantaged.<sup>11</sup>

Others agreed with Obama's view that empathy ought to be an important part of judicial decision-making, with some going so far as to argue that the "single value we should demand in a justice [has] nothing to do with race or gender' but 'everything to do with empathy for others.'"<sup>12</sup> This debate became so divisive that it dominated coverage of Sotomayor's and Kagan's nominations, "leading one news organization to label the attendant vitriol as the 'Empathy Wars.'"<sup>13</sup>

## Judges Bound from the "Outside In" and the "Inside Out"

One commentator has tried to determine what is meant by "rule of law" by "going beneath the surface of law to the deeper values possessed" by the judges who interpret it."<sup>14</sup> He considers how judges might be constrained by the law from the "outside in" and the "inside out."<sup>15</sup> From the "outside in," a judge's actions are "bounded by the objective content or substance of the law itself,"<sup>16</sup> such as enacted law and precedent. The "inside out" approach requires a judge's actions to be "motivated by an attitude of legal fidelity."<sup>17</sup>

For example, two judges, one focused on the "outside in" approach and the other on the "inside out" approach, might reach the same judgment in a case. For an observer, it would be impossible to tell that the first judge arrived at that conclusion out of a strict adherence to the letter of the law, whether he agreed with it or not, while the second judge came to the same conclusion by applying her understanding of the spirit of the law in the particular circumstances.

Some might think that the "outside in" approach provides a more objective, logical ground for the decision. Research shows,



however, that judges interpret ambiguous law in a manner consistent with their subjective political preferences,<sup>18</sup> regardless of whether they claim to be simply applying the statute or precedent to the facts of the case. The “inside out” approach acknowledges that “the rules themselves do not determine judicial decisions in a heavy-handed way and that there are many instances where legal reasoning must be discretionary.”<sup>19</sup>

### Personal Values, Beliefs, and Biases

Presumably, the “inside out” approach would be more likely to rely on empathy. Similarly, it would allow for judges’ personal beliefs and biases to become part of the decision-making process. One scholar has even examined whether personal relationships—as opposed to attitudes about politics, race, or gender—might affect judicial decision-making.<sup>20</sup>

In the 1950s, political scientist C. Herman Pritchett began studying the votes and opinions of United States Supreme Court Justices “to test the hypothesis that the Justices were not only following the ‘law,’ but were also motivated by their own ideological preferences.”<sup>21</sup> Ranking the justices on their reputations for being liberal or conservative and keeping score on the direction of their opinions, Pritchett concluded that ideology did influence their decisions.<sup>22</sup>

Similarly, after conducting 25 experiments on 2,200 judges, two Cornell law professors and a United States Magistrate Judge found that judges’ political ideology does influence their resolution of hypothetical cases, “but only a very little.”<sup>23</sup> Asserting that “study after study finds that the political orientation of judges influences their decisions,” these researchers were interested in discovering why judges vehemently deny the influence of their political attitudes while academics consistently document it.<sup>24</sup> They offer several suggestions for this divide, including the possibility that “judges might be oblivious to the role politics plays in their decision-making processes.”<sup>25</sup> Recalling Chief Justice Roberts’s umpire metaphor, judges might believe they are “call[ing] them like they see them,”<sup>26</sup> but in an objective manner. Nevertheless, judges’ attitudes and beliefs do seem to “affect how they see facts, respond to arguments, and understand the law,” although many mistakenly “believe they are immune to

political influence.”<sup>27</sup>

Over the past two decades, social psychologists and legal scholars have become increasingly aware of implicit bias, which is “largely automatic and occurs below the level of conscious awareness.”<sup>28</sup> Although “old fashioned prejudice,” including the endorsement of “negative stereotypes, support for segregation and open discrimination, and belief in the inferiority of particular social groups,” rarely appears in contemporary appellate opinions, it “occasionally still rears its head in immigration courts”<sup>29</sup> and sentencing decisions. The privileged socioeconomic status of judges may also affect their decisions on the bench, especially in Fourth Amendment and child custody cases where judges sometimes “favor wealthy litigants over those living in poverty, with significant negative consequences for low-income people.”<sup>30</sup>

Perhaps most perniciously, judges may be influenced by people who contributed significantly to their election or appointment to the bench. Concerns about Brett Kavanaugh’s obligation to promote the political positions of the President who staunchly supported him during the divisive Senate Judiciary Committee hearings, will likely continue throughout his service on the Court. Similarly, concerns about the influence of campaign contributions to the judiciary persist, even following the Supreme Court’s landmark decision in *Caperston v. A. T. Massey Coal Co.*,<sup>31</sup> in which the Court held that the Due Process Clause required a judge’s recusal in a case involving his major campaign contributor because the financial connection between the contributor and the judge raised a “serious risk of actual bias—based on objective and reasonable perceptions” that legitimately called the judge’s impartiality into question.<sup>32</sup>

Concerns about bias in judicial decision-making have prompted a number of empirical studies, focusing on how judges’ political biases and other irrelevant characteristics, like race and sex, influence judicial voting patterns and the outcome of cases.<sup>33</sup> Studies indicating the existence of judicial bias have prompted legal reformers to call for judicial nominees whose backgrounds are devoid of political experience or partisanship.<sup>34</sup> Other proposals have included using three-judge panels, composed of judges from both parties, to decide cases and review trial judges’ sentencing decisions; requiring a more



deferential stance “toward agency regulations, legislation, or political-branch interpretations of the Constitution, because otherwise judges will just substitute their own political views for those of elected officials”; and replacing life tenure for federal judges with term limits.<sup>35</sup>

## Personal Relationships and Judicial Empathy

Responding to President Obama’s stated belief that judges should have the heart and empathy to recognize what it’s like to be poor, African-American, gay, disabled, or old, two political scientists sought to “provide empirical support for the idea that personal relationships—as distinct from partisanship, race, or gender—may affect how judges decide cases.”<sup>36</sup> Employing data on judges’ families and data on nearly 1,000 gender-related cases, they show that judges with at least one daughter vote in a more liberal fashion on gender issues than judges with sons, conditional on the number of children. The effect is robust and appears driven largely by Republican male appointees.<sup>37</sup> Pointing to scholarship indicating that female judges vote differently than male judges in cases involving sex discrimination and sexual harassment, and that African-American judges are “more likely to rule liberally on cases having a substantive racial dimension,” the authors assert that “a robust theory of judicial politics must incorporate not only partisanship . . . but also identity.”<sup>38</sup>

## Legal Fidelity

I trust Justice Sotomayor when she says she firmly believes in the rule of law and that the law must always command the result in every case. I also trust that she brings empathy to her decisions, based on her life experiences and values. I do not see that as contradicting her promise to base her decisions on the rule of law. Like President Obama, I have faith in her because I believe she is motivated by an attitude of legal fidelity, even as she brings her personal experiences and beliefs to the judicial decision-making process.

When Justice Ruth Bader Ginsburg faced the Senate Judiciary Committee, she did not try to hide her lifelong advocacy for women’s rights or even her support for *Roe v. Wade*.<sup>39</sup> A lifetime of fighting for gender equality may have given some members of the Senate pause. Yet, she was confirmed by an overwhelming majority; only three senators voted against her.<sup>40</sup> I believe the reason so many senators voted to confirm Justice Ginsburg, despite their complete disagreement with her political values, was because they sensed her legal fidelity. They trusted that she would approach each case impartially and apply the law fairly, not despite the values and experiences she brought to the bench, but because of them. Her honesty, integrity, and dedication were apparent to everyone. Her fidelity was to the fair administration of justice, based on both the letter and the spirit of the law.

## Public Trust in the Legitimacy of the Court

Brett Kavanaugh’s confirmation hearings took a toll on the public’s trust in the legitimacy of the Court. Unfortunately, many people came away from the hearings believing that the Court is simply another political arm of the government. Many fear that the judiciary is no longer independent, especially because the President has stated that view repeatedly, every time a ruling does not go his way. Many citizens have come to believe that any federal judge nominated by the President will be beholden to him and the political leanings of his party.

Fortunately, evidence to the contrary has appeared in our own state. Lance Walker, a native Mainer who was born in Milo and raised in Dover-Foxcroft, was nominated by President Trump for a seat on the United States District Court for the District of Maine on April 10, 2018.<sup>41</sup> Having been a member of the Federalist Society (“a conservative legal organization that has produced many Trump nominees”) from 1997-2002 and the National Rifle Association since 2001,<sup>42</sup> some people may have assumed he would fall in line with the President’s policies while sitting on the bench. A closer examination of his past rulings as a Maine Superior Court Justice tells a different story.

In 2016, Judge Walker granted a preliminary injunction to the State of Maine, barring anti-abortion protestor Brian Ingalls from being within 50 feet of Planned Parenthood facilities and ordered Ingalls to pay civil penalties and attorney fees for the state.<sup>43</sup> The next year, he blocked the State of Maine from reinstating criminal charges against seventeen protesters from the Black Lives Matter movement, holding that the State was bound by an earlier agreement to seek a restorative justice session.<sup>44</sup> Judge Walker has also “slapped the hands of one of Trump’s biggest supporters” by citing David D. Smith, who runs Sinclair Broadcasting, for contempt in a dispute with neighbors at his vacation home in Cape Elizabeth.<sup>45</sup>

Recently, Judge Walker demonstrated his judicial independence decisively when he ruled against Republican Bruce Poliquin’s challenge to the results of this year’s U. S. House election in Maine’s 2nd District and the legitimacy of the nation’s first congressional election to be decided by ranked-choice voting.<sup>46</sup> Praised in a *Portland Press Herald* editorial for providing a civics lesson on the ways the Constitution can adapt to change,<sup>47</sup> Judge Walker shows that a judge’s political values and personal background can work harmoniously with the rule of law and, in fact, may give life and vitality to its meaning.

The rule of law takes its meaning from the legal fidelity brought to our judicial system by judges like Justices Sotomayor, Kagan, Ginsburg, and Judge Walker. Rather than using their personal and political backgrounds to subvert the administration of justice, they use everything they bring to the bench to ensure it. With judges like these, the rule of law will endure and never become an unattainable, impossible dream.



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# Password Insecurity: Lessons from a Personal Story

By Mark Bassingthwaighte

Sometimes married couples see things differently, and the only way to resolve the tension is by finally deciding to agree to disagree. That's how things played out in our home for a number of years on the issue of passwords. My wife viewed my focus on computer security and passwords as something approaching mild paranoia. I, on the other hand, viewed her insistence on using one easily remembered password for everything in her life the equivalent of tattooing the phrase "victim here" on her forehead. The only way for us to move forward was to reach an accord. We agreed to disagree, and things were good, at least for a while.

A few years later, after receiving an email from one of our sons, our accord began to crumble. I was informed that my wife's email account had been hacked and was actively being used to send out spam email. Of course, I did what one normally does to remedy that situation and hoped all would be good. Sadly, it wasn't. Our accord abruptly ended a few months later after we received written notice from a credit union on the opposite side of the country telling us that they were most displeased with my wife. Apparently, credit unions don't like it when someone gets a new credit card, immediately maxes it out, and then fails to make any payments. Unfortunately, given that my wife wasn't the one who applied for and received that credit card, we had a new problem.

While this tale took a number of interesting twists and turns over the next few years, in the interest of time I will simply share that as a result of the initial identity theft a federal and an out-of-state tax return were also fraudulently filed in my wife's name. I spent over three years working to get everything cleaned up; but the one thing I can't do, and honestly no one can, is ever get her identity back. That's been taken and we'll have to deal with the ramifications of that for the rest of our lives. Hopefully, it's over; but only time will tell.

Today things are different around here. My focus on computer security is viewed in a much different light by my wife, and I no

longer worry about any unsightly tattoos on her forehead. Our state of marital bliss has been restored, because this time around we're both on the same page. Trust me, she gets it now. But, do you? Again, understand that this entire saga started with someone managing to figure out a password, a password that, unfortunately for my wife and me, opened all kinds of doors that would have remained locked had she not used one password for everything.

I chose to share this story because I wanted to put a real-world spin on the problems that can arise when too little attention is given to the importance of passwords. Every one of us in our personal and professional lives needs to abide by some sort of password policy, formal or informal, in order to try and avoid becoming yet another victim of identity theft. And heaven help you if an identity theft occurs and it turns out to be the identity of one or more of your clients because someone got into your office network.

With this tale of woe now told, it's time to talk about how to avoid becoming a victim. I'll start by identifying typical missteps.

## Here is a list of things no one should ever do.

- 1) Use the same password on multiple devices, apps, and websites.
- 2) Write down passwords on easily found sticky notes.
- 3) Believe that passwords like "qwerty," "password," "1234567," or "letmein" are clever and acceptable. They aren't.
- 4) Allow computer browsers to remember passwords.
- 5) Choose passwords based upon easily remembered information such as birth dates, anniversary dates, Social Security numbers, phone numbers, names of family members, pet names, and street addresses.

# Password:



This kind of information just isn't as confidential as you think, due to events like the Equifax breach and widespread participation in social media.

Knowing the common missteps, however, isn't enough. Such practices should be prohibited in a formal firmwide password policy that everyone at the firm must follow. There can be no exceptions. Of course, policy provisions must also detail what to do. The most important provision of a password policy is to mandate the use of strong passwords defined as follows. A password is strong if it is long (a minimum of 15 characters), includes a few numbers, special characters, and upper- and lower-case letters, if the device or application you wish to secure with a password will accept it. Additional provisions worth including would be requiring that every application and device in use have its own unique password, requiring that passwords in use with mission-critical devices and applications (e.g., banking login credentials or firm VPN login) be changed every six months, forbidding the reuse of old passwords, and prohibiting the sharing of user ids and passwords with anyone. Finally, make enabling two-factor authentication for any device or application that allows it compulsory.

Of course, a password policy like this creates a new problem, which is trying to keep track of all the complex passwords now mandated. I can share that between us, my wife and I have over 250 different passwords we need to keep track of in our personal and professional lives. I don't know about you, but I sure can't remember all of that information.

Fortunately, this problem can be easily managed by using a password manager such as RoboForm, LastPass, or Dashlane.

(My wife agreed to commit to learning how to use a using password manager shortly after her kerfuffle with the credit union and it has made a world of difference!) Such tools are often cloud-based software applications that allow users to conveniently store and manage all of their passwords. The data is encrypted and can only be accessed once a master password has been entered. Yes, users will still need to remember a long and difficult-to-guess master password; but having to remember one will be far easier than trying to remember 250. And again, no one should ever write down their master password. Everyone really must commit the master password to memory or find a way to store it in some other secure manner.

Now, I know that lawyers are sometimes hesitant to place passwords in the cloud. Try to avoid allowing such a concern to become an excuse for not making any changes at all. As I see it, those of us who use password managers are far more secure than those who simply write everything down on a piece of paper or on sticky notes that are always close at hand. Further, given the robust encryption in use, these applications are also going to also be more secure than keeping a list of passwords in an Excel or Word file. But here's the real value: The use of a password manager provides robust security when compared to relying on easily remembered weak passwords, using the same password on multiple devices or websites, allowing browsers to remember passwords, not changing passwords, and reusing old passwords, all of which is what so many do by default.

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# Taking Control in an Out-of-Control World

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By Douglas S. Brown

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Are you tired of feeling like a sword juggler at the circus—desperately working to keep all sharp objects in sequence in the air, without hurting yourself or someone else in the process?

You are not alone.

Success today requires simultaneous management of many swords and other potential implements of destruction: overhead, retention, engagement, finding and keeping staff and associates, managing the books, ordering supplies, and being active community contributors.

You must find and manage clients to exceed their high expectations, doing more for less and always with a smile. You must keep courts happy, writing briefs, meeting deadlines, and managing discovery, while wading through a sea of emails, text messages, notifications, and alerts.

Don't forget the CLE requirements, getting the bills out on time, and getting paid – all while working that pesky problem that keeps you up at night. We haven't even gotten to your blood pressure, the gym membership that expired (again), or the dog that barks at you like a stranger.

Are you living the life you imagined when you decided to attend law school? Are you where you planned to be? Is there a little voice in your head whispering thoughts like: What if you could have it all? If you only had more time, if you only had more money, if you only had more fun clients to work with, then you could spend time with your family, take the trips that you want, and live the life that you dreamed of.

What if that voice is right? How would it feel if you could have it all?

The truth is, you can take control of your practice and your life—even in this out-of-control world. You *can* have your work flow

smoothly over the inevitable speed bumps with grace and style. And you *can* have time for yourself, and your family—and your dog *will* know who you are.

## Taking Control of Change

Change is as certain as death and taxes. You can choose to initiate the change you desire. Or, you can react to change and let it control you. The simple choice is to be the change agent. The first step is taking control.

Luckily, we lawyers are great problem solvers. And, we're really good at being change agents for others. We can learn the process and skills to move ahead and take control of our destiny. Then, it is a matter of confidence, consistency, and courage to see the change through. Of course, it helps to have a tribe to support you on the journey.

One constant in my 28-year career has been seeking out and adapting to change. My journey has included roles as lawyer, business executive, entrepreneur, educator, executive coach, and speaker. Along the way, I tried many things that didn't work and I discovered many incredibly effective strategies. I found common blockers and blind spots that keep otherwise smart and successful people from taking action. I also learned the Change Equation, which can help us initiate and navigate change effectively and resourcefully.

## The Change Equation

The Change Equation is a model that explains how change happens and how to overcome blockers to moving forward. I learned it while designing and teaching courses in leadership,



Are you living the life you imagined when you decided to attend law school? Are you where you planned to be? Is there a little voice in your head whispering thoughts like: What if you could have it all?

# The formula is: $D \times V \times F > R$

innovation, and change management for the MBA program at The Malcolm Baldrige School of Business. It has its roots in 1960s research in organizational development. The modern formula was popularized in the early '90s by Kathleen Danmiller.

The formula is:  
 $D \times V \times F > R$

D is for dissatisfaction with the current state. Dissatisfaction is the catalyst for change. This factor is most powerful when you clearly understand the source of your dissatisfaction. Many lawyers are dissatisfied with their practice, the life it provides, or both. When we dig deeper, we find they struggle to articulate exactly what isn't working for them, why they aren't satisfied, or even what "satisfactory" looks like. Do you feel this way? The first step is to acknowledge those things that leave you feeling empty and dissatisfied. It's easy to shove your dis-ease down and accept it as normal. But when you do, it often manifests itself as malaise, lack of focus, perpetual overwhelm, and real disease. (Think of divorce and estrangement from your children and dissociation from what matters most, an accusation of malpractice, or a visit to the professional disciplinary committee.) So, call out the dissatisfaction from the dark recesses and name it.

V is for vision of the future. Create a clear and compelling mental picture of what the future can be like as a result of change. Most people start with what they want to move away from, not what they want to move toward. When you are bogged down by the daily grind, it can be hard to allow yourself to imagine or to dream of a better future. I see this often with lawyers who put themselves and their skills into a particular box with a label, such as "litigator" or "criminal defense attorney." Labels can keep you from seeing the possibilities for other applications of your skills into new areas of the law, or even other careers. Give yourself permission to dream again. Allow those lost interests to percolate to the top. Take some time to journal, and muse, and reflect. Invest some time in this process. Connect again with those things that bring you joy.

F is for first steps. You don't need to plan every step to your destination in order to begin. Getting comfortable with uncertainty is one of the keys to making the change equation work for you. That's why the equation focuses on first steps. Start by brainstorming the big steps you must take to achieve your vision. Organize them into a general sequence that you feel would work and is actionable. Consider what knowledge, skills, abilities, and beliefs are necessary to execute the first several

steps. The goal is not perfection; it is action. Plan for early wins. Then take a deep breath and take the initial steps. Assess whether you got the outcome you expected, what was the difference and why, and determine what you can do differently. Repeat to build momentum.

R is for resistance to change. Even people who are unhappy have a high resistance to change. And, typically, people seek to avoid the potential of loss rather than the potential of gain. FUD (fear, uncertainty and doubt) is a significant source of resistance. Fear of rejection. Fear of making a mistake, fear of commitment, fear of missing out. Fear of success. These all trigger our primal freeze, or our fight or flight response. We freeze up in the current state. We run away from the problem. Or we get angry and fight, denying the problem exists, or blaming others for our issues. We all resist change. The key to overcoming this factor is doing an honest assessment of what might be blocking our progress. Clearly defining your resistance points can reduce this factor and allow the rest of the equation to work for you.

You may have noticed that this is a multiplication equation. So, if any factor is zero, or if any factor is negative, the equation will fail. Each factor is related to and supports the others. When your  $D \times V \times F$  is strong, you will begin to move toward your goal. You'll then be in motion and increase your control in an out-of-control world.

## Advancing Your Practice

You can also use the Change Equation to help your clients and colleagues make important decision when they are stuck. I've found that the best approach is to ask good questions to allow the other person to articulate their views on each factor in their own words. This puts them in control and allows them to develop and own their solution.

## What's Next?

When we come together at your Annual Bar Conference on Friday, June 21, at the Bar Harbor Regency, I will show you the roadmap to help you pivot to your best practice, make more money, and have more fun in the process.



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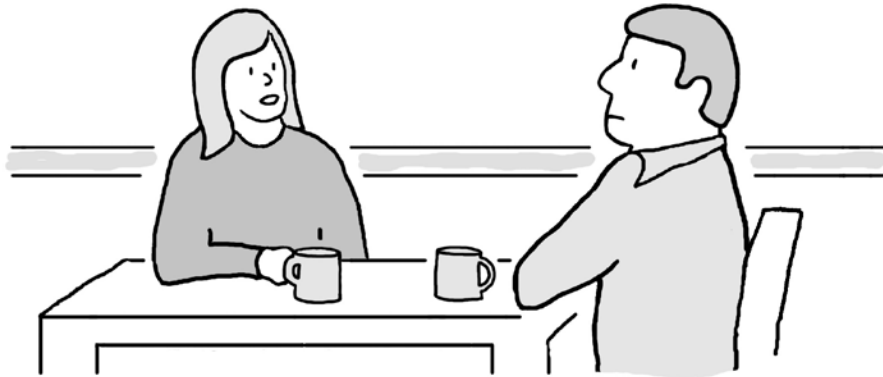
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# MARC AYOTTE:

## Reflections on a Career at the Maine Labor Relations Board

By Katy Rand

At the end of October 2018, Marc Ayotte retired after 37 years at the Maine Labor Relations Board (MLRB or Board), having spent the last 27 years as the MLRB's Executive Director. Not to be confused with the Maine Human Rights Commission, which investigates complaints of employment discrimination and retaliation arising under the Maine Human Rights Act, the MLRB referees and helps resolve collective bargaining disputes between public sector employers and their organized workforces.

After graduating from Edward Little High School in 1969, Marc attended the University of Maine at Orono, obtaining a B.A. in Zoology and graduating with distinction. Marc obtained his J.D. from Boston University School of Law in 1976, then worked for several years as an associate with Cote, Cote & Hamann in Lewiston, where he had a general civil and criminal law practice, before moving to the MLRB. After Marc served 10 years as the MLRB's Attorney/Examiner, the Board selected him to serve as Executive Director.

For nearly the past three decades, Marc has been a fixture at the MLRB on whom countless labor lawyers and bargaining agents have relied to render even-handed decisions, to shepherd their cases through the process, and—whenever possible—to help the parties resolve their differences. I had the privilege of working with Marc for only six of those years, during which time I have served as the MLRB's Chair. Before Marc left the Board, headed for Sugarloaf (where he modeled active retirement, skiing all 171 days Sugarloaf was open during the 2018-19 season!), and began growing what is now a very impressive beard, I took the opportunity to pick his brain about his time at the MLRB.

### **What makes labor relations disputes different from other kinds of disputes litigated in the courts or before other agencies?**

The fundamental difference between the disputes resolved before the Board and those before the courts and other state agencies is that most of the cases before the Board involve parties who have an on-going relationship. Litigation in the courts and in other agencies most often stems from the dissolution of relationships, questions over the denial of entitlements, or the granting of

licenses. This difference results in the Board's emphasis on assisting the parties reaching settlements; rather than adjudicating disputes according to any arbitrary timeline.

The Board does not enforce a set of laws; but, rather, facilitates an orderly process through which public employees, who share a community of interest, can join together in a bargaining unit and decide through a Board-conducted election whether to be represented for purposes of collective bargaining and, if so, by which employee organization.

The statutory duty to negotiate in good faith is the mutual obligation of public employers and bargaining agents to negotiate over the mandatory subjects of bargaining – wages, hours, terms and conditions of employment, and contract grievance arbitration. While the law does not require negotiating parties to make any particular concession or to agree to any specific proposal, parties evidence adherence to the statutory obligation by agreeing to and following negotiating ground rules, meeting at reasonable times, exchanging proposals, explaining their respective positions, reducing agreements to writing and signing them. If the parties are unable to reach agreement through direct negotiations, they may request the assignment of a state mediator. The overwhelming majority of bargaining disputes are resolved through direct negotiations or in mediation.

### **How does the field of public sector labor relations differ from the private sector?**

Private sector negotiations are often characterized in terms of bargaining power; the ability of the union to inflict business disruption through job actions and the ability of the enterprise

to withstand such harm and continue operations in spite of work stoppages. In Maine, public employee strikes, slowdowns, and work stoppages are illegal and the law provides mandatory dispute resolution procedures – mediation, fact-finding, and interest arbitration to help parties negotiate collective bargaining agreements.

### **How has the field of public sector labor relations changed over the many years you've been the Executive Director of the MLRB?**

Early on, public sector labor relations were very contentious. While public school teachers had been organized for many years, most other types of public employees became organized and represented after enactment of the Municipal Public Employees Labor Relations Law in 1969 and collective bargaining rights were not extended to state employees until 1973. Not surprisingly, public employees had high expectations and public employers were cautious in early bargaining. In addition, the Board was created by the Municipal Act, there was little Board precedent to guide the parties, and Board case law was not searchable until 1989, when the Board published an index and abstract of its decisions.

Given that Maine has a relatively small population and is geographically isolated from, and has a negligible impact on, the national economy, it is not surprising that the bargaining climate is very dependent on the national and regional economies. During periods of inflation, bargaining agents push for expeditious resolution of negotiations to help the employees maintain their purchasing power; while, employers are content to bargain at a leisurely pace, because negotiated outcomes will be paid by tomorrow's cheaper dollars. During economic downturns, the parties' interests are reversed and employers seek quick results, to achieve reductions through negotiated savings; while bargaining agents seek leisurely bargaining so as to prolong the employees' retention of the wages and benefits provided by the last agreement.

### **To what do you attribute those changes?**

Labor relations improved over time due to the maturing relationships of the advocates across the table as well as between the principal parties administering a series of successor collective



bargaining agreements through the grievance arbitration process. From 1981 until three or four years ago, there was a high degree of continuity in the labor-relations community. Union and management representatives got to know each other as individuals, they learned how the other person did business, and developed productive relationships that resulted in better outcomes for their principal parties. With the retirement of management and union attorneys, changes in bargaining agents through Board elections, business agent elections and/or reassignments in recent years, the long-standing relationships are gradually disappearing. New relationships take substantial time to develop.

A good deal of credit for the improvement in the labor relations climate is due to the Board's ever-expanding body of case law. Early on, the Board looked to the National Labor Relations Board and the federal courts for guidance in interpreting the parallel provisions of Maine law. During my tenure, the Board has increasingly relied on its own precedents for applying the law to new situations. With the introduction of the Board web site in 1995 and its searchable data base of Board decisions and judicial appellate opinions, reviewing the Board decisions, the parties have been able to readily determine their statutory rights and responsibilities and conform their conduct to scope permitted/required by the law. The web site was constructed and maintained by former Board Counsel Lisa Copenhaver and the entire public sector labor relations community owes a debt of gratitude to Lisa for this very significant contribution.

**The MLRB is a tri-partite Board, meaning each panel is made up of an employer representative, an employee representative, and a neutral member, representing the public. On some tri-partite boards, the neutral member's vote is the only one that matters, but the overwhelming majority of the MLRB's decisions are unanimous. To what do you attribute this?**

The members of the MLRB, while coming from partisan backgrounds or, in the case of the Board Chair and Alternate Chairs, representing the public interest, are appointed by the Governor, confirmed by the Maine Legislature and serve four-year terms. The statutory scheme is designed to promote the independence of the members and I believe this is the primary reason for the rarity of dissenting opinions over the years. During my tenure the members of the Board have always looked to the law, precedent, and the public interest in reaching their decisions, regardless of their backgrounds.

## **In your view, what characterizes healthy and productive labor relations?**

When initiating bargaining, the parties should both acknowledge that, regardless of their differences, they all are seeking to find what is best for the sustainability of the enterprise. Open and candid communications are essential to success. Unlike the private sector, where much corporate financial and production information is confidential and disclosure can result in competitive disadvantage in the marketplace, such information is readily accessible in the public sector. Early in each round of bargaining, negotiating parties who are able to agree on the current cost of wages and benefits for the unit employees find it much easier to negotiate their successor agreement.

## **What behaviors or characteristics have you seen damage labor relations?**

The most harmful behavior to successful labor relations is the failure to treat the people on the other side of the table with dignity and respect. This includes demonizing the chief spokesperson for the other party or attributing various proposals to the other spokesperson or bargaining team, rather than seeing those positions as stemming from the unit employees or the public employer. Other injurious conduct includes negotiating without clear authority from one's principal party. This can lead to a negotiator/bargaining team reneging on an earlier tentative agreement and disrupting the balance in the give-and-take of the negotiations to date.

## **What words of wisdom would you share with your successor?**

Always safeguard the integrity and independence of the agency. The perception and fact of neutrality are essential to the success of the agency in fulfilling the statutory mission.

When dealing with new and unimagined claims, read the statute again and look to its language and intent in reaching a decision.



**KATY RAND** is a partner with Pierce Atwood, LLP, in Portland. Her client work primarily involves employment law, with a focus on discrimination, harassment, retaliation, and wage and hour issues. She can be reached at [krand@pierceatwood.com](mailto:krand@pierceatwood.com).

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Paula Silsby served as the United States Attorney for the District of Maine from 2001 to 2008. Prior to her appointment as United States Attorney, she served as an Assistant United States Attorney handling both civil and criminal cases, including stints as Senior Litigation Counsel and Chief of the office's Criminal Division. As a government attorney, Paula lectured within the United States Department of Justice on the topics of workplace harassment and discrimination and served as an Equal Employment Opportunity (EEO) investigator. Paula is a graduate of Mount Holyoke College and the University of Maine School of Law and served as a law clerk to Justice Harry P. Glassman in the Maine Superior Court. She is a Director of Gorham Savings Bank, a Trustee of the Maine Community College System, a Member of University of Maine School of Law Foundation Board, a Member of the Margaret Chase Smith Foundation Board and a Member of Maine Early Learning Investment Group. She has been an Adjunct Professor of Law at the University of Maine School of Law and a trial practice instructor at Harvard Law School. Paula is admitted to the practice of law in the federal and state courts of Maine. With her association to the Firm, Paula rejoins former colleague Jay P. McCloskey, her predecessor as United States Attorney for Maine.

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## ACCESS TO JUSTICE By Mathew Scease

# Thank Your Bank (or Credit Union!): Supporting Civil Legal Aid

Where lawyers bank is vitally important to the ability of all Mainers, regardless of income, to get legal representation and access our system of civil justice. This is at the core of America's promise of "justice for all."

Without taxing the public, and at no cost to lawyers or their clients, Maine and every state in the U.S. and every province in Canada have programs that pool Interest on Lawyers' Trust Accounts (IOLTA) to provide civil legal aid to the poor and support improvements to the justice system.

Today, 41 Maine banks and credit unions take part in IOLTA. We are grateful for their participation. IOLTA provides critical, year-after-year funding for civil legal services for low-income Mainers.

Based on Rule 6 of the Maine Bar Rules promulgated by the state's Supreme Judicial Court, IOLTA accounts must earn comparable interest rates generally available to similarly situated non-IOLTA accounts. Participating financial institutions in Maine generously waive fees on IOLTA accounts and several generously pay above the comparable rates.

### The History of IOLTA

In the early 1980s, new laws and rules allowed for the creation of IOLTA programs, through which small amounts of client funds and client funds held by lawyers for a very short time could be placed in single, pooled, interest-bearing accounts and used for charitable purposes. IOLTA has been a critical, ongoing source of funding for civil legal aid in Maine for the past 30 years, as well as in the other 49 states plus the District of Columbia, the Virgin Islands, Canada, and Australia.

But when federal interest rates declined to practically zero in the Great Recession of 2008 and 2009, funding for legal aid in Maine was decimated. Maine's IOLTA revenue started dropping in 2008, from a high of \$1.48 million in 2007, and didn't stop until it bottomed out at \$653,333 in 2015.

The uptick in interest rates has seen IOLTA revenue increase to \$744,028 last year, and thanks in part to a recent comparability survey, we project that IOLTA income will exceed \$850,000 this year.

Where lawyers bank is vitally important to the ability of all Mainers, regardless of income, to get legal representation and access our system of civil justice. This is at the core of America's promise of "justice for all."

## Financial Institutions Going Above and Beyond to Support Access to Justice

Sixteen of the participating financial institutions pay interest rates on IOLTA accounts that go above and beyond the basic comparability requirements in Rule 6. The following banks and credit unions deserve special recognition and thanks:

### Prime Partners pay 2 percent interest:

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- Kennebec Savings Bank
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- Rockland Savings Bank, FSB
- SIS Bank
- The County Federal Credit Union

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- Bank of America, N.A.

- Damariscotta Bank & Trust Co.
- Gorham Savings Bank
- Katahdin Trust Company
- Machias Savings Bank
- NBT Bank, N.A.
- Saco & Biddeford Savings Institution
- Skowhegan Savings Bank
- University Credit Union

For a complete list of all financial institutions that take part in IOLTA, visit [www.justicemaine.org/iolta/](http://www.justicemaine.org/iolta/).

## How Lawyers Support Access to Justice

Maine's legal community supports access to justice in many ways—and does so generously: the Campaign for Justice, Katahdin Council, Volunteer Lawyers Project, Coffin Family Fellowship Program, Bar Fellows, and other *pro bono* legal work. Maine lawyers are generous in their contributions of money and time to help poor and vulnerable Mainers who need help in civil legal matters.

# Recognizing the Champions of Access to Justice among the Maine Bar

The Directors of the Maine Justice Foundation are pleased to honor three outstanding Maine lawyers who are champions of civil legal aid. They have furthered our mission to ensure that all Mainers have access to the courts and legal representation.

### HOWARD H. DANA, JR., AWARD: TO PROF. E. JAMES BURKE, UNIVERSITY OF MAINE SCHOOL OF LAW.

In 1984, the then-Maine Bar Foundation established an award to be presented annually to a Maine lawyer to recognize significant contributions to enhance access to civil legal assistance

for poor and vulnerable Mainers and outstanding service in the advancement of the Foundation's goals. In 1988, this award was named for Justice Howard H. Dana, Jr., a Foundation leader and dedicated advocate for equal justice for Maine people.

**Prof. Burke** has over 40 years of courtroom experience and is a valued mentor at the law school's Cumberland Legal Aid Clinic. From 1975 to 2006, Jim was in private practice in Lewiston, covering a wide range of legal matters and was counsel in over 40 reported cases. At the School of Law, he works in both the General Practice Clinic and the Prisoner Assistance Clinic. He has served as President and Treasurer of the Androscoggin County Bar Association and twice as President of the Maine Civil Liberties Union.

The Foundation honors Jim's four decades of exemplary legal practice, his work providing access to justice to incarcerated Maine people and mentoring future attorneys through the

Cumberland Legal Aid Clinic, and his advocacy for access to legal services in rural Maine.

### THOMAS P. DOWNING JR. AWARD: TO ROBYN MERRILL OF MAINE EQUAL JUSTICE.

A graduate of Cheverus High School, Brown University, and Georgetown Law, Thomas P. Downing, Jr. was one of the first attorneys hired by the fledgling Pine Tree Legal Assistance in the late 1960s. In the early 1970s, Tom worked at the Maine Legislature's nonpartisan Office of Legislative Assistants, where he met and married his co-worker Diana Scully. Their son James was born in 1984.

In the summer of 1985, Tom was diagnosed with brain cancer, and he died that November. Tom's family decided to create the Downing Fund and Award to recognize legal aid staff dedicated to access to civil justice for Mainers who are vulnerable and affected by poverty.

There is a relatively easy way to do more: Please check to see how the rate paid by your financial institution on your IOLTA account(s) compares with rates paid by others. If it is not a Prime Partner or Index Rate Institution:

- Ask your bank or credit union to consider increasing its IOLTA rate, or
- Seriously consider transferring your IOLTA account to a financial institution that is a Prime Partner or Index Rate Institution.

If your bank or credit union is a Prime Partner paying 2 percent interest, this generates 10 times more IOLTA revenue than if it pays only 0.2 percent.

### The Need for and Impact of Civil Legal Aid

IOLTA helps poor and vulnerable Mainers get civil legal aid, which provides access to safety, shelter and economic security. The need is real for those who cannot afford a lawyer when they are faced with an abusive spouse, an unscrupulous landlord or an indifferent bureaucracy.

Almost a quarter of a century ago, the 1990 Maine Commission on Legal Needs, chaired by Senator Edmund Muskie, found that

Maine's legal aid providers were able to provide for only 23 percent of the people eligible for and in need of their services.

Sadly the "justice gap" between need and resources still opens wide before poor and vulnerable Mainers. A 2013 report from Maine's Justice Action Group found that for each person who receives civil legal aid, four are turned away; and that in the previous four years, the number of Mainers in poverty had grown, while those served by civil legal aid providers had dropped

Thank you for taking the time to reflect on how you support access to justice through your IOLTA accounts. Thank you to the banks and credit unions who support civil legal aid. If you have questions or suggestions about IOLTA, please contact Diana Scully at [dscully@justicemaine.org](mailto:dscully@justicemaine.org).



**MATHEW SCEASE** is development director at the Maine Justice Foundation. He can be reached at [mscease@justicemaine.org](mailto:mscease@justicemaine.org).

In memory of Tom, the Foundation recognizes **Robyn Merrill's** leadership of Maine Equal Justice, including her heartfelt and persistent advocacy on behalf of Maine people affected by poverty who would not otherwise have access to legal representation.

Robyn joined Maine Equal Justice in 2009 and became Executive Director in 2014. A 2008 graduate of the University of Maine School of Law, Robyn also has a master's degree in social work from the University of New England. Robyn served as a clerk for the Maine Superior Court and with the Cumberland Legal Aid Clinic. For seven years, she worked as a social worker, providing therapeutic care and direct support for children and adolescents with developmental and behavioral issues living in residential and foster care.

Most recently, Robyn and Maine Equal Justice have led a successful advocacy campaign on several fronts to expand Medicaid to provide health care to more low-income Mainers.

### NEW LAWYER AWARD: TO **ARI SOLOTOFF OF BERNSTEIN SHUR.**

With the New Lawyer Award (also fondly known as the "Arnie Award" for Bernstein Shur attorney Arnie Macdonald), the Foundation has since 2011 recognized outstanding lawyers, licensed to practice in Maine for fewer than ten years, who: exemplify the ideals of increasing access to justice; make outstanding and recognized contributions to the legal profession and public good through *pro bono* service or other contributions; and demonstrate a strong commitment to the objectives and purposes of the Foundation.

**Ari Solotoff** is an Associate at Bernstein Shur in Portland. Ari focuses his practice on creative and corporate clients as well as nonprofits and public charities. Ari received his J.D. from the University of Maine School of Law, magna cum laude, in 2015. He was Managing Editor of the Maine Law Review; served as a Judicial Intern for Justice Jon D. Levy and for Peter Fessenden; and was a Judicial Extern with Judge Kermit Lipez.

Ari is a former member of the Maine Justice Foundation's Board of Directors, where he served on the Executive Committee and chaired the Governance Committee. At Bernstein Shur he received the 2016 Barnett I. Shur Civil Award in recognition of his exemplary community service. In recognition of his commitment to the ideal of access to justice for all Maine people, exemplary *pro bono* practice, and service to the Foundation, the Directors are delighted to honor Ari with the New Lawyer Award.



## SUPREME QUOTES *By Evan J. Roth*

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### "When you got nothing, you got nothing to lose."

*Sprint Communications, Co., L.P. v. APCC Services, Inc., 554 U.S. 269, 301 (2008) (Roberts, C.J., dissenting) (quoting Bob Dylan, Like A Rolling Stone, on Highway 61 Revisited (Columbia Records 1965)).*

Before cellphones became ubiquitous, there was a time when long distance calls were made on payphones using discount access cards from companies like Sprint. When that happened, Sprint was required to compensate the payphone operator. But since each individual transaction was so small, payphone operators assigned collection rights to companies called aggregators, who received a fee for their collection services, while handing over any recovery to the payphone operators. In 2003, in response to an aggregator lawsuit, Sprint moved to dismiss on the grounds the aggregators lacked standing. The Supreme Court ruled 5-4 the aggregators had standing. Chief Justice Roberts dissented.

According to Chief Justice Roberts, standing should have been denied because the aggregators did not even have a "dollar or two" at stake in the litigation. His fear was that, if courts were to hear lawsuits by companies with no stake in the outcome, then lawsuits would be transformed into "a marketable commodity," assignable to anyone.

Considering the aggregators had "nothing to gain," and pointing out the "legal difference between something and nothing," Chief Justice Roberts rolled out Bob Dylan's famous truism, quoted above.



**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](mailto:evan.j.roth@icloud.com).*





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May 31 Ethical Issues & Implications on Lawyers' Use of LinkedIn  
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SAVE THE DATE:

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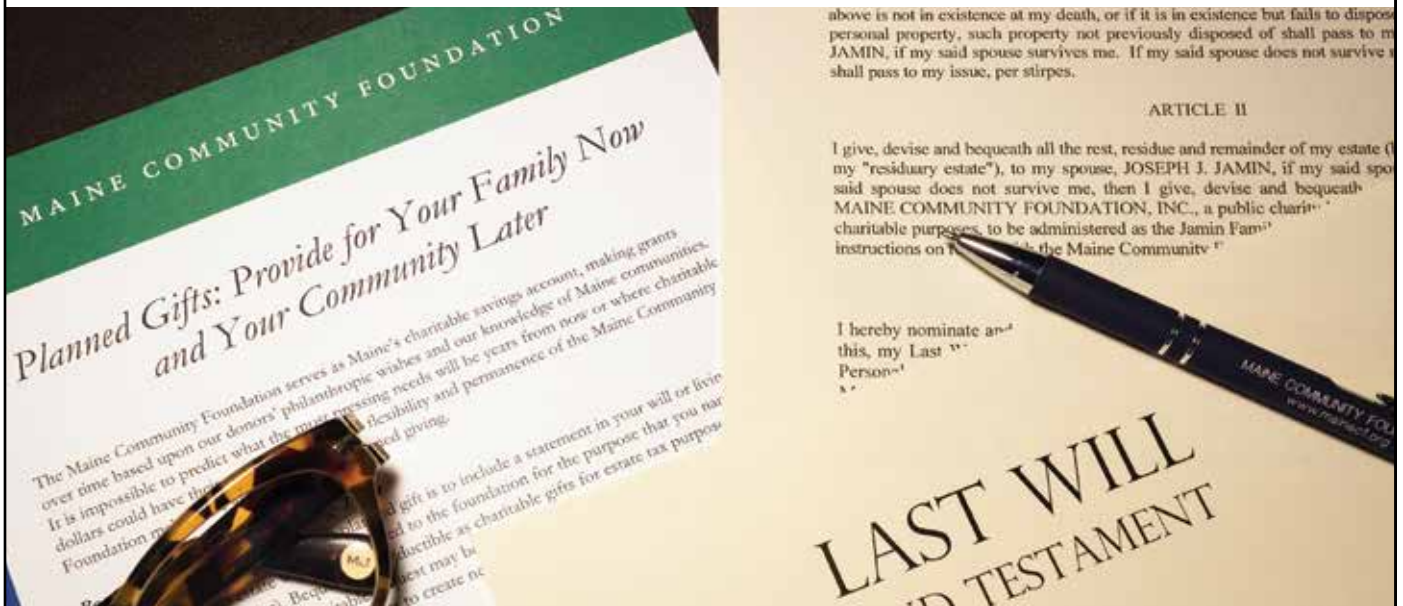
The MSBA's Silent Partners program offers low-key assistance to lawyers in dealing with problems in substantive and administrative areas of the law where there may be a lack of familiarity or comfort, where some help and guidance would benefit both the practitioner and the client.

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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**Contact:**

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Director of Gift Planning  
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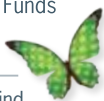
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