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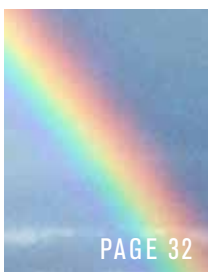

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ON THE COVER: Image: iStock

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THE PRESIDENT'S PAGE:

Fostering Communication in Print and in Person

I was hoping that, following the last issue of the Maine Bar Journal (I'm thinking of Jon Mermin's article, "Three Ways of Looking at a President"), we could begin to explore a wider dialogue among all members of the Bar, perhaps by generating a lively Letters to the Editor section of the Journal. Although that did not happen, I still think it is a good idea. In today's world, communication is the key to most endeavors. As lawyers and counselors at law (don't ever forget that last part), we are expected to communicate truthfully and, hopefully, intelligently with clients and with the court (Remember Jon's column, "What Judges Want," in the Summer/Fall 2016 issue?). But let's not forget the importance of communicating with each other.

There are numerous legal issues confronting today's Bar—and that means us. Examples include: access to justice (see the article by Justice Mead in this issue), electronic filing, electronic discovery, privacy, transparency, qualification to practice, mandatory pro bono, and a host of other issues, not the least of which is what role your bar association should play. Should we be more active in regard to social issues? Legislative issues? We are, first and foremost, a trade association, but our Mission Statement, as I reminded you in the last issue, and as David Webbert reminded all of us at Sugarloaf, includes support of "the public interest in a fair and effective system of justice." All of these issues cry out for better discussion and effort to find solutions; that is, we need that dialogue among all of us.

The MSBA Board of Governors has recently been involved in many discussions about significant issues facing the legal community both locally and nationally. In one instance, we issued a statement opposing the elimination of funding for the Legal Services Corporation. More recently, we wrote to the Joint Standing Committee on Appropriations and Financial Affairs, urging them to fully fund the Maine Commission on Indigent Legal Services. I fully expect we will face other issues as the year progresses, and I assure you that we will continue to advocate for Maine attorneys and access to justice for all Mainers. If you want to share your opinion on these matters or others, please reach out to your Governor, Angela Weston, or me.

Although I obviously encourage you to consider to all of these matters, I am also mindful that simply having fun together can foster communication among us. As you read this, we'll be wrapping up another year of networking, CLE, and enjoying time with old and new friends alike at the 2017 Annual Bar Conference and 125th anniversary celebration. It was my honor to recognize our 50-year Life Members, and to recognize the graduates of this year's Leadership Academy. Immediate Past President Steve Nelson presented the John W. Ballou Award – the Association's most prestigious award – to Justice Donald G. Alexander. The Women's Law Section also presented the Caroline Duby Glassman Award to Justice Rebecca A. Irving, and the Volunteer Lawyers Project presented its VLP

Director's Award to Michael J. Levey. This year's meeting was unique not just because we celebrated a milestone anniversary, but because we also partnered with the Maine Judicial Branch, which sponsored special programming on Thursday about interpersonal violence. I'd like to thank the Judicial Branch for making this programming free to all Bar members. Our anniversary celebration included a fantastic performance by The Capitol Steps, fireworks, and s'mores. The Capitol Steps last performed for the MSBA at the Annual Meeting in 2000 in Portland.

If you weren't able to join us at Sugarloaf this year, we look forward to welcoming you there next year from June 20-22. Between now and then, we have many other opportunities to communicate with each other in person. Mark your calendars now for the Technology & Law Practice Management Institute on Sept. 27 at the Augusta Civic Center and Legal Year in Review on Nov. 16, also at the Augusta Civic Center.

Thank you, and now let's all get back to work.

I fully expect we will face other issues as the year progresses, and I assure you that we will continue to advocate for Maine attorneys and access to justice for all Mainers.

Maine State Bar ASSOCIATION 1891-2016
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FROM THE EXECUTIVE DIRECTOR:

Casemaker: The MSBA's Exclusive Online Legal Research Tool

By Angela P. Weston

Since 2003, the Maine State Bar Association has provided Casemaker as an exclusive member benefit. This nationwide legal research system has become a valuable tool for attorneys in their research. And, today's Casemaker has evolved dramatically from the one introduced 14 years ago. We know some of our members who use Casemaker regularly wholeheartedly endorse it. What we don't is how the rest of our members feel. Have you taken the opportunity to learn what Casemaker offers? What has been your experience with the product? I'd like to take this opportunity to outline the features and benefits of Casemaker and encourage you to learn more. And, I'd like to hear from you about your experience with this member benefit.

Who Is Casemaker?

Casemaker is the company that created the concept of providing comprehensive legal research as a member benefit for bar associations. The company was created by the Ohio State Bar Association for its own members in recognition of the need to provide attorneys, especially those in solo practice and small firms, with a reliable and affordable alternative to online legal research. Now, approximately two dozen state bar associations use Casemaker, with nearly 300,000 attorneys utilizing its services every month.

What Does the Casemaker Library Contain?

The Casemaker legal research system includes libraries from all 50 states, the District of Columbia, and federal libraries. Each Casemaker library contains at a minimum a statutory code, all of the appellate cases, an administrative code, constitution, legislative acts, state register (if one exists), and court rules. Many of the libraries contain other types of data such as opinions of the attorney general, administrative decisions, trial cases, journals, and law reviews. The Maine library contains: Maine administrative code, Maine attorney general opinions, Maine case law, the Maine Constitution, federal and state court rules, Maine session laws, Maine revised statutes, Superior Court decisions, workers compensation decisions, and more.

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"Casemaker is an invaluable MSBA member benefit. Over the years it has saved me and my clients thousands of dollars in legal research expenses while meeting our research needs. I encourage all members who are concerned about their expenses to take advantage of the valuable member benefit." DAVID LEVESQUE, ESQ.

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If you don't use Casemaker, I encourage you to take this opportunity to familiarize yourself with one of the MSBA's most valuable member benefits. Then, let me know what you think. We are always evaluating the benefits we offer to our members to ensure they are relevant and provide value. If you already use Casemaker, I'd like to hear from you, too. Tell me about your experience. Do you use it exclusively, or do you pair it with other research tools? Are you happy with the product? How long have you used Casemaker? How often do you use Casemaker? Please, be in touch! You can reach me at aweston@mainebar.org or (207) 622-7523. I look forward to hearing from you.

ANGELA P. WESTON *is the Maine State Bar Association's executive director.*

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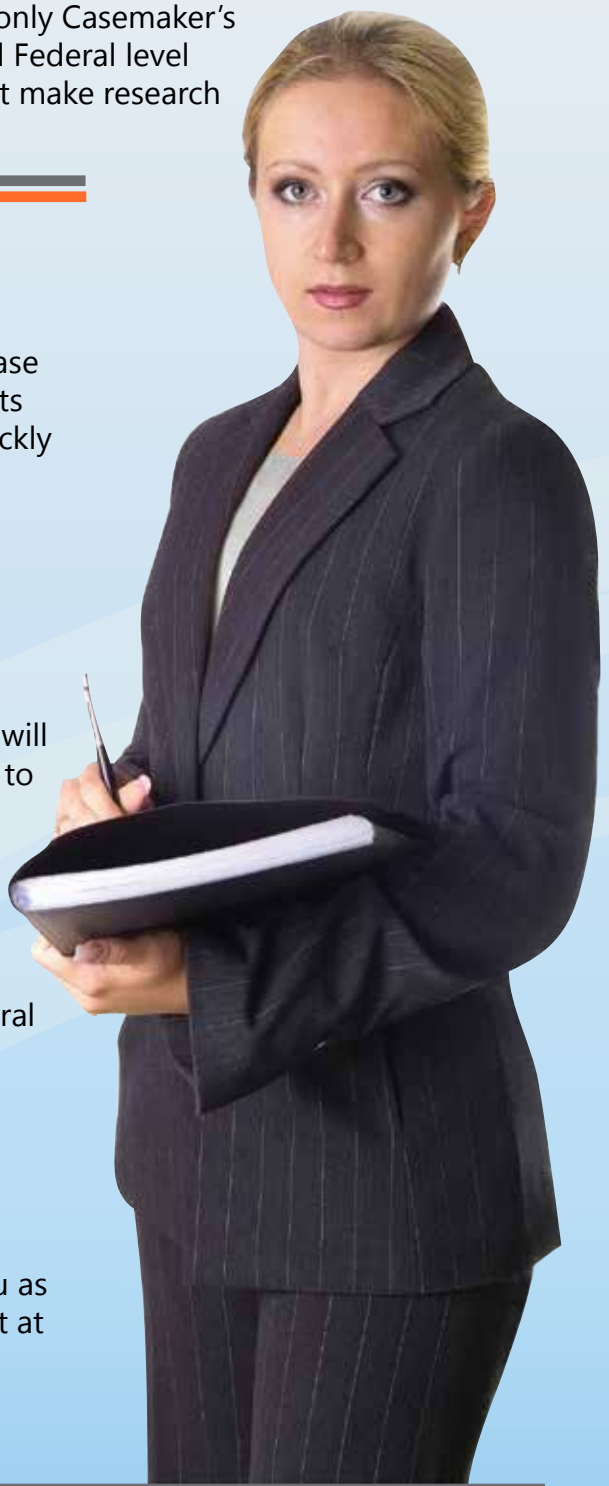

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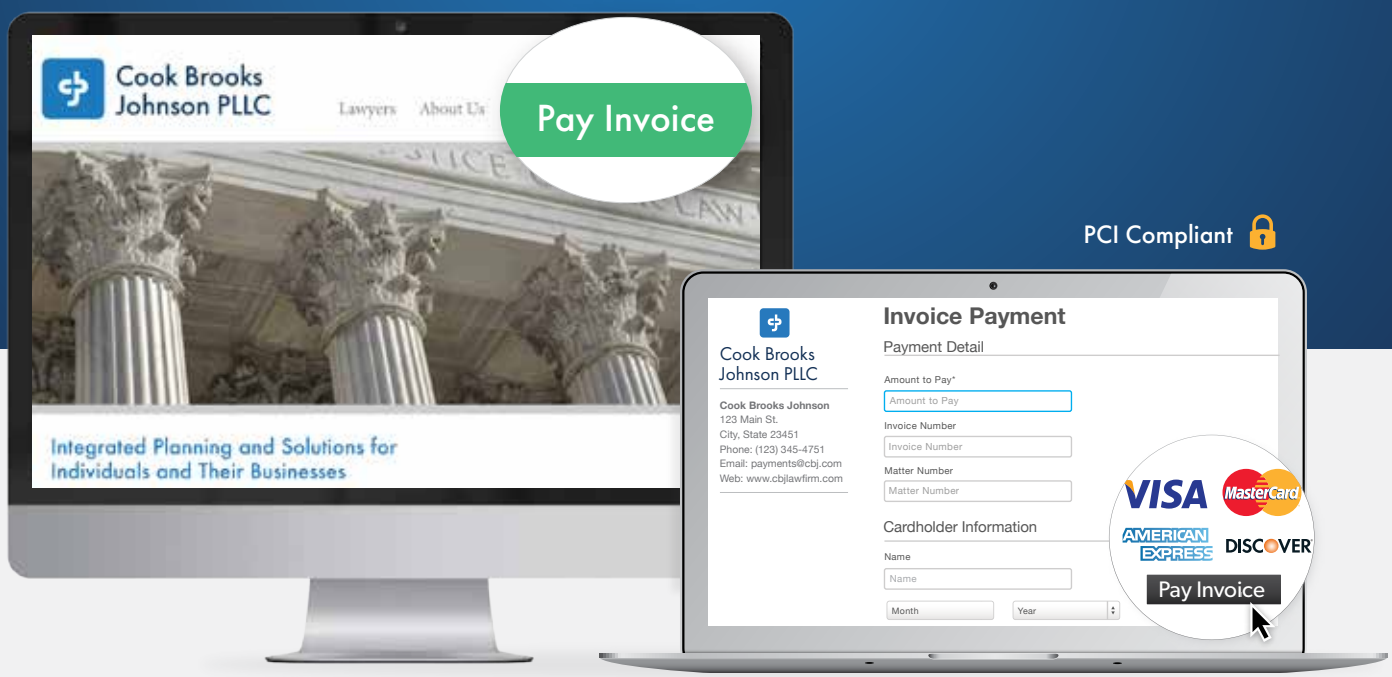

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Something Erie This Way Comes:

The Dueling State and Federal Law Governing Personal Jurisdiction

By Nolan L. Reichl

Some litigators may believe that they intuitively *know* the concept of "personal jurisdiction," which conjures familiar phrases like "minimum contacts" and "continuous and systematic" activities. But not all aspects of personal jurisdiction are settled or straightforward, as is perhaps best demonstrated by cases involving diversity jurisdiction.[1] In the U.S. District Court for the District of Maine (District Court), a confusing body of law emerges from the entangled relationship between the text of Maine's long-arm statute; the Law Court's application of that text and its efforts to examine personal jurisdiction under the Due Process Clause; and the District Court's own application of a separate Due Process Clause analysis.

The Law Court has not addressed whether its personal jurisdiction analysis is constitutional in nature or merely statutory. The distinction has important implications for practice in the District Court, as a federal court sitting in diversity is bound to apply the Law Court's interpretation of state statutes (such as Maine's long-arm statute) but not the Law Court's interpretation of the U.S. Constitution (including the Due Process Clause, which defines the boundaries of a federal court's authority to exercise personal jurisdiction). Nevertheless, the issue remains unaddressed and unresolved. Additionally, the concept of general jurisdiction appears to have little relevance in District of Maine diversity cases involving non-resident defendants.

Despite the seeming familiarity of personal jurisdiction, practitioners should review the concept's fundamental principles and understand how certain complex issues arise out of those principles. This article seeks to assist in that effort.

The Role of State Law in Federal Court Personal Jurisdiction Analysis

Under *Erie R.R. v. Thompson*,[2] a federal court sitting in diversity jurisdiction applies the substantive law of the forum state. State law thus supplies the rule of decision with respect to traditional common law theories, such as contract law or tort law, as those claims arise in federal courts sitting in diversity. Perhaps less intuitively, *Erie* also requires a federal court sitting in diversity to look to the law of the forum state when considering the limits of the federal court's own exercise of personal jurisdiction.[3] A federal court therefore "cannot exceed the jurisdictional reach of the courts of the forum in which they sit."[4] The forum state's so-called 'long-arm statute', as interpreted by the forum state's own courts, thus provides one limitation on a federal district court's ability to exercise personal jurisdiction over a non-resident defendant in a diversity action.[5]

While the jurisdictional authority conferred by state law binds a federal court sitting in diversity, it does so only to the limits of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[6] In *International Shoe Co. v. Washington*, the Supreme Court held that those limits require that a defendant "have certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[7] The interplay between the state law governing jurisdictional reach, on one hand, and federal constitutional limits on state law, on the other hand, thus *permits* a state to restrict its own courts' jurisdictional reach as much as the state may like, but *prohibits* a state from expanding its courts' jurisdictional reach beyond the limits of the Due Process Clause.

For example, Maine may repeal its existing long-arm statute, stripping Maine state courts of authority over non-residents, but Maine may not enact a long-arm statute that authorizes Maine state courts to exercise personal jurisdiction over all persons residing in the United States, including persons who have no contacts with Maine. Again, to the extent Maine sets statutory or common law limits on personal jurisdiction that do not go to the limits of the Due Process Clause, such limits would bind federal courts of the District of Maine when those courts sit in diversity.

Specific Jurisdiction vs. General Jurisdiction

As a matter of federal constitutional law, the "minimum contacts" analysis devised by *International Shoe* has evolved into two distinct forms of personal jurisdiction: specific jurisdiction and

general jurisdiction.[8] Under the former concept, a court may exercise personal jurisdiction where there exists a sufficient nexus between the plaintiff's claims and the defendant's activities in the forum state.[9] Under the latter concept, a court may exercise personal jurisdiction where the defendant's contacts with the forum state are so "continuous and systematic" that a corporate defendant can be "fairly regarded as at home" in the forum or that a natural person can be said to be domiciled in the forum.[10] Both forms of jurisdiction, however, do nothing more than articulate the minimum contacts necessary for a court to exercise personal jurisdiction in a manner that does not offend the Due Process Clause. Practitioners should not confuse these two concepts with affirmative grants of jurisdictional authority that provide federal courts with the power to exercise personal jurisdiction. In a diversity case, that power arises only from state law.

Maine's Long-Arm Statute

Maine's long-arm statute serves as the starting point for understanding the scope of authority provided to Maine state courts with respect to the exercise of personal jurisdiction over non-residents and, accordingly, to federal courts sitting in diversity.[11] Maine's long-arm statute grants state courts authority to exercise personal jurisdiction over non-resident defendants where those defendants engage in any of the following activities:

- "The transaction of any business within this State";
- "Doing or causing a tortious act to be done, or causing the consequences of a tortious act to occur within this State";
- "Contracting to insure any person, property or risk located within this State at the time of contracting";
- "Conception resulting in parentage within the meaning of Title 19-A, chapter 61";
- "Contracting to supply services or things within this State";
- "Maintaining a domicile in this State while subject to a marital or family relationship out of which arises a claim for divorce, alimony, separate maintenance, property settlement, child support or child custody; or the commission in this State of any act giving rise to such a claim";
- "Acting as a director, manager, trustee or other officer of a corporation incorporated under the laws of, or having its principal place of business within, this State"; or
- "Maintaining any other relation to the State or to persons or property which affords a basis for the exercise of jurisdiction by the courts of this State consistent with the Constitution of the United States."[12]

The last of these activities is hardly a specific activity but, rather, a catchall provision designed so that the long-arm statute will be interpreted as broadly as the Due Process Clause permits.[13]

Maine's long-arm statute also includes the following: "Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section."[14] While the Law Court has not addressed this subsection of the long-arm statute, the United States Court of Appeals for the First Circuit has interpreted the provision to mean that Maine state law does not permit the exercise of general jurisdiction over non-residents.[15] In other words, the law binding federal courts in the District of Maine holds that Maine law authorizes personal jurisdiction only where the claims at issue arise out of the specific bases for jurisdiction asserted by the plaintiff under the long-arm statute.

Lastly, the Law Court has interpreted and applied Maine's long-arm statute. These Law Court decisions comprise Maine law just as much as the long-arm statute itself does, and bind the District Court when it considers the limits of judicial authority granted by Maine law for purposes of personal jurisdiction.[16]

The Due Process Clause in Law Court Jurisprudence

Just as federal courts must consider whether the application of Maine's long-arm statute under a given set of facts comports with the Due Process Clause, Maine state courts apply the same analysis in state court cases. The Law Court has not adopted the Supreme Court's Due Process Clause analysis, however, either with respect to "specific" or "general" jurisdiction. On the contrary, the Law Court has crafted its own, unique personal jurisdiction test: "Due process is satisfied when: (1) Maine has a legitimate interest in the subject matter of the litigation; (2) the defendant, by his or her conduct, reasonably could have anticipated litigation in Maine; and (3) the exercise of jurisdiction by Maine's courts comports with traditional notions of fair play and substantial justice."[17] If the plaintiff can establish the first two elements, then the burden shifts to the defendant to "demonstrate the negative" as to the third element.[18]

Maine state courts apply the foregoing test, but the District Court does not, even in diversity jurisdiction cases. The reason being is that *Erie* requires a federal court to apply state law in diversity jurisdiction cases, but it expressly excludes from that rule "matters governed by the Federal Constitution or by acts of Congress," such that a federal court sitting in diversity is not bound by state court interpretations of the U.S. constitution or statutes.[19] Maine federal courts sitting in diversity therefore are not bound by Maine's three-part personal jurisdiction analysis. On the contrary, they must apply the Supreme Court's test, as applied and interpreted by the First Circuit.

Where Things Get Complicated

Judge Hornby's decision in *Maine Helicopters, Inc. v. Lance Aviation, Inc.* illustrates many of the problems that have emerged

from the closely intertwined relationship between the state and federal law governing personal jurisdiction.[20]

The case involved a Maine corporation's purchase of a helicopter from a Florida seller, and featured all of the hallmarks of a close personal jurisdiction question, with significant contacts occurring in both Maine and Florida. Judge Hornby began his personal jurisdiction analysis by correctly observing that *Erie* requires federal courts to first examine the authority provided by state law with respect to the exercise of personal jurisdiction. He also noted that, when analyzing state law, federal courts should pay close attention to what state courts actually do, noting that the Law Court "*says* that its statutory analysis tracks the [D] ue [P]rocess [C]lause …, but … it is important … to examine what the Maine cases *actually hold* before turning to the federal analysis."[21] The crucial observation here is that a federal court cannot determine the true reach of Maine's long-arm statute without identifying how the Law Court actually applies the statute in specific factual scenarios, regardless of (a) what Maine's long-arm statute may proclaim and (b) whether the Law Court may characterize its interpretations of the long-arm statute as reaching the limits of the Due Process Clause.[22]

Judge Hornby correctly constructed the doctrinal framework, but his review of specific Law Court decisions focused almost exclusively on cases decided on the basis of the Law Court's three-prong Due Process Clause test, rather than an analysis of the scope of Maine's long-arm statute.[23] As noted above, however, Law Court interpretations of the Due Process Clause do not bind Maine's federal courts under *Erie*, and so Law Court personal jurisdiction decisions that turn only on the application of the Due Process Clause should not control how Maine federal courts sitting in diversity should approach a personal jurisdiction question.

But should Judge Hornby have relied on the Law Court's cases in the way that he did? It depends on how you interpret the Law Court's decisions. On one hand, the Law Court has stated on numerous occasions that the Due Process Clause alone controls its jurisdictional analysis and, as the cases listed in *Maine Helicopters* demonstrate, the vast majority of its personal jurisdiction decisions turn solely on this apparent constitutional analysis.[24] On the other hand, the long-arm statute itself requires Maine courts to apply the Due Process Clause analysis. So, when the Law Court analyzes personal jurisdiction under its Due Process Clause test, should its decisions be treated as pure constitutional decisions that do not bind federal courts under *Erie*? Or, because Maine's long-arm statute requires the constitutional analysis, should the Law Court's decisions be treated as instances of statutory interpretation that do bind federal courts under *Erie*? The author is not aware of a case that has addressed the question directly, but *Maine Helicopters* could be interpreted as implicitly endorsing the latter approach.

The significance of this issue was clear to Judge Hornby. The Law Court's application of the Due Process Clause may diverge from the federal district courts' reading, leading to inconsistent application of federal constitutional standards between the two jurisdictions. Thus, "if the Maine reading [of the Due Process Clause] should turn out to be narrower [than that provided by federal court decisions], a plaintiff should not obtain wider personal jurisdiction in a diversity case, merely by bringing its case in federal court."[25] In *Architectural Woodcraft Co. v. Read*,[26] one of the cases Judge Hornby discussed in *Maine Helicopters*, the Law Court denied personal jurisdiction in a case that likely merited it, thus presenting a live example of Judge Hornby's concern. The Law Court's use of a personal jurisdiction test that differs noticeably – if not significantly—from the one employed by the District of Maine and the First Circuit Court of Appeals suggests that inconsistent applications of the Due Process Clause will occur.

A Way Forward

All of the foregoing suggests the following:

First, the Law Court should clarify whether it considers its Due Process Clause analysis in personal jurisdiction cases to be an exercise of constitutional or statutory interpretation. If the former, then federal courts in Maine should regard Law Court decisions as persuasive authority only and proceed directly to applying the existing federal Due Process Clause test when considering personal jurisdiction questions. If the latter, then Maine federal courts must determine whether Maine law would permit the exercise of personal jurisdiction under the factual scenario at hand by closely analyzing analogous Law Court decisions. Where the Law Court would not authorize personal jurisdiction, the inquiry should end. Where the Law Court would authorize personal jurisdiction, the federal court then should determine whether the exercise of such jurisdiction comports with the First Circuit's Due Process Clause test.[27]

Second, the Law Court should consider abandoning its three-part Due Process Clause test and adopting the Due Process Clause test used by the Supreme Court and First Circuit. Consistent with the express terms of Maine's long-arm statute, the Law Court must look to the Due Process Clause when considering personal jurisdiction. The Law Court would be wise to consider deferring to Maine's federal courts when applying federal constitutional law and standards.[28] The Law Court's adoption of the federal test also would reduce the likelihood of inconsistent rulings between the two fora and, thus, reduce incentives for forum-shopping.

Third, and finally, there appears to be little doctrinal or practical role left for the concept of general jurisdiction in diversity cases.[29] Maine's long-arm statute expressly disavows the concept and so jurisdiction over a non-resident defendant may be obtained only where the plaintiff brings a cause of action arising out of the specific activities enumerated in the long-arm statute. For instance, Maine's long-arm statute likely would not permit the exercise of personal jurisdiction over a non-resident defendant who owns property and a business in Maine with respect to an action arising out of a tort committed by that defendant outside of Maine and unrelated to the property or the business. Further, the Supreme Court's recent jurisprudence restricts the exercise of general jurisdiction only to those scenarios where a corporate entity can be said to be "at home" or where an individual maintains his or her domicile.[30] In short, cases should be few and far between where general jurisdiction will be relevant in Maine federal courts.[31]

Conclusion

Personal jurisdiction necessarily will persist as a foundational concern in any litigation. Practitioners who consider the issue to be simple, clear, or well-settled, however, may find themselves stumbling into unanticipated traps. In diversity jurisdiction cases in particular, the impact of *Erie* continues to reverberate. Practitioners should not neglect the on-going dialogue between state and federal law that gives shape to the law of personal jurisdiction in diversity cases.

NOLAN L. REICHL *is a partner at Pierce Atwood LLP, where he specializes in complex commercial and appellate litigation.*

[1] Federal courts must validly exercise personal jurisdiction in federal question cases as well, but this article focuses only on diversity jurisdiction cases.

[2] 304 U.S. 64 (1938).

[3] *American Exp. Intern., Inc. v. Mendez-Capellan*, 889 F.2d 1175, 1178 (1st Cir. 1989).

[4] *Id*.

[5] *Id*. (quoting *Mangual v. General Battery Corp.*, 710 F.2d 15, 18 (1st Cir. 1983)).

[6] *See, e.g., Baskin-Robbins Franchising LLC v. Alpenrose Dairy, Inc.*, 825 F.3d 28, 35 (1st Cir. 2016).

[7] *Id*. (internal quotations and brackets omitted) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

[8] *See Daimler AG v. Bauman*, 134 S.Ct. 746, 753-58 (2014) (reviewing case law arising out of *Int'l Shoe*).

[9] In the First Circuit, courts will determine specific jurisdiction *vel non* by analyzing: "'(1) whether the claim directly arises out of, or relates to, the defendant's forum state activities; (2) whether the defendant's in-state contacts represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary preserve before the state's courts foreseeable; and (3) whether the exercise of jurisdiction is reasonable.'" *Baskin-Robbins*, 825 F.3d at 35 (quoting *C.W. Downer & Co. v. Bioriginal Food & Sci. Corp.*, 771 F.3d 59, 65 (1st Cir. 2014)).

[10] *Goodyear Dunlop Tires Operations, S.A. v. Bauman*, 594 U.S. 915, 924 (2011). The Supreme Court returned to general jurisdiction in *Daimler*, where it reaffirmed and further explained the holding in *Goodyear* as it applied to corporations.

[11] 14 M.R.S. § 704-A. Maine's long-arm statute applies to all persons "whether or not a citizen or resident of this State," and thus, by its plan terms, applies to Maine residents. As this article focuses on the typical scenario where a Maine resident plaintiff seeks to subject a non-Maine resident defendant to the jurisdiction of Maine's federal courts on the basis of diversity jurisdiction, it does not consider whether, in some source of law other than the long-arm statute, Maine state law imposes any limitation on the authority of Maine courts to exercise personal jurisdiction over Maine residents. Were such a limitation to exist, however, it would bind federal courts sitting in diversity jurisdiction just as the long-arm statute does. Such a limitation would be relevant in diversity cases featuring a non-resident plaintiff and a resident defendant.

[12] 14 M.R.S. § 704-A(2).

[13] The statute expresses this intention clearly: "This section, to insure the maximum protection to citizens of this State, shall be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the United States Constitution, 14th amendment." *Id*. § 704-A(1).

[14] *Id*. § 704-A(4).

[15] *See Lorelei Corp. v. County of Guadalupe*, 940 F.2d 717, 720 (1st Cir. 1991) (noting that § 704-A(4) "provides only for the exercise of 'specific' jurisdiction"); *Danton v. Innovative Gaming Corp. of Am.*, 246 F. Supp. 2d 64, 68 (D. Me. 2003) ("The Maine long-arm statute provides only for the exercise of specific jurisdiction.").

[16] *Erie*, 304 U.S. at 78 ("whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern").

[17] *Fore, LLC v. Benoit*, 2012 ME 1, ¶ 7, 34 A.3d 1125 (quoting *Estate of Hoch*, 2011 ME 24, ¶ 25, 16 A.3d 137).

[18] *Id*. at ¶ 10.

[19] *Erie*, 304 U.S. at 78 ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."). *See also John Doe CS v.*

Capuchin Franciscan Friars, 520 F. Supp. 2d 1124, 1135 (E.D. Mo. 2007) ("If there is a federal constitutional issue, a federal court has the duty to make its independent inquiry and determination.") (internal quotes and brackets omitted); *RAR Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1275-76 (7th Cir. 1997) ("When determining whether state courts would have jurisdiction, however, federal courts are under no obligation to defer to state court interpretations of federal law. Although state court precedent is binding upon us regarding issues of state law, it is only persuasive authority on matters of federal law.") (internal cites and quotations omitted); *U.S. v. Bedford*, 519 F.2d 650, 655 n.3 (3rd Cir. 1975) ("It is a recognized principle that a federal court is not bound by a state court's interpretation of federal laws … .").

[20] 563 F. Supp. 2d 292 (D. Me. 2008).

[21] *Id*. at 294-95 (emphasis added).

[22] As Judge Hornby noted in *Maine Helicopters*, leading treatises recommend the same approach. *Maine Helicopters*, 563 F. Supp. 2d at 295 n.5 (citing to 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1068 (3d ed. 2002) for the view that federal courts should consult state court decisions to determine the reach of a state long-arm statute).

[23] One of the cases that Judge Hornby discussed, *Murphy v. Keenan*, 667 A.2d 591 (Me. 1995), perhaps serves as an exception. There, the Law Court commingled its Due Process analysis with an analysis of the long-arm statute.

[24] *See, e.g.*, *Fore*, 2012 ME 1, ¶ 4, 34 A.3d 1125 ("Maine is limited only by the due process clause and not by the language of the long-arm statute"). Nevertheless, the Law Court on occasion appears to conduct purely statutory analyses of the long-arm statute. *See, e.g., Estate of Hoch*, 2011 ME 24, ¶¶ 22-24, 16 A.3d 137 (separately analyzing reach of long-arm statute); *Von Schack v. Von Schack*, 2006 ME 30, ¶¶ 6-10, 893 A.2d 1004 (same); *Hawley v. Murphy*, 1999 ME 127, ¶¶ 5-6, 736 A.2d 268 (same). There is no question that these decisions bind federal courts' interpretation of the long-arm statute, but they do not reflect the Law Court's typical approach to personal jurisdiction cases.

[25] 563 F. Supp. 2d at 295.

[26] 464 A.2d 210 (Me. 1983).

[27] *See supra* n.9.

[28] The extent to which the so-called reverse-*Erie* doctrine compels the Law Court to apply federal court personal jurisdiction jurisprudence, or the manner in which such a compulsion should manifest itself, is worthy of further study but not addressed here. *See generally* Kevin M. Clermont, *Reverse-Erie*, 82 Notre Dame L. Rev. 1 (2006) (discussing reverse-*Erie* doctrine). Rather, the Law Court should adopt the federal court test as a matter of prudence and out of recognition of the federal courts' special role in interpreting federal law.

[29] General jurisdiction will remain relevant in diversity cases involving non-resident plaintiffs and resident defendants. In such cases, general jurisdiction will provide a clear basis for personal jurisdiction. So long as the defendant truly is domiciled or "at home" in Maine, however, there should be little dispute in such cases over personal jurisdiction. And if such a dispute were even a dim possibility, the plaintiff may avoid Maine as a forum in the first place. Either way, general jurisdiction likely will not give rise to a contested issue.

[30] *See supra* n.9.

[31] It theoretically may be possible that Maine's long-arm statute would provide grounds for the exercise of personal jurisdiction over a non-resident and that the exercise of that jurisdiction would meet the constitutional general jurisdiction test articulated by *Goodyear* and *Daimler*. Such a scenario necessarily would involve a set of facts so unusual, and perhaps unique, that the possibility only underscores how diminished lies the role of general jurisdiction in cases involving non-resident defendants.

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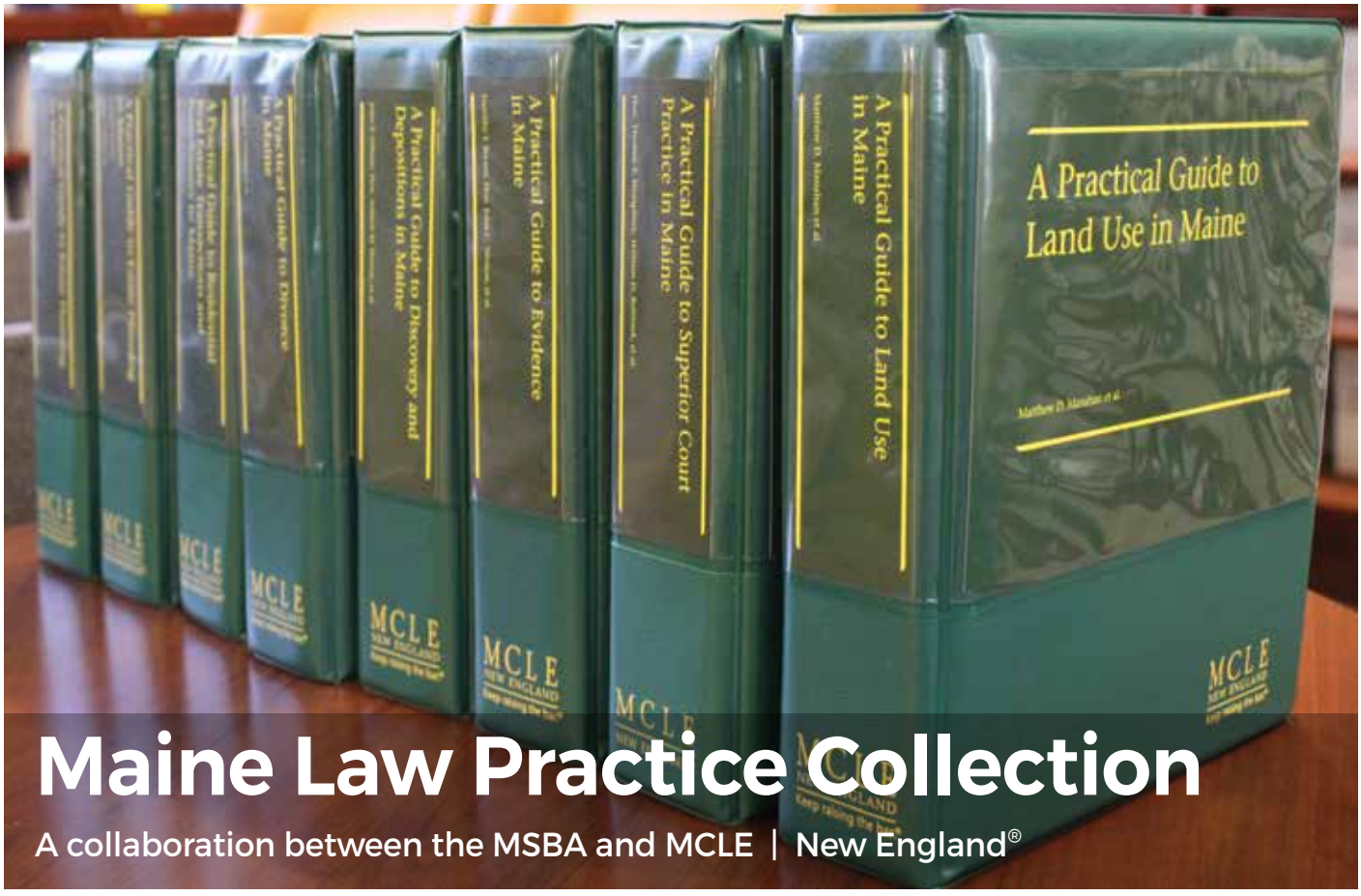

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Kristen Lindquist and Paul Doiron on the Megunticook River. Photo: Jim Dugan

Kristen Lindquist and Paul Doiron: Two writers, one commitment to community

Mainers by birth, poet Kristen Lindquist and her husband novelist Paul Doiron have worked for nonprofits and understand the need for giving. They also share a love of place.

The Camden couple has established a bequest that will benefit the Knox County Fund. The work of the committee that oversees the fund influenced the direction of their bequest. "They take their responsibility as grantmakers seriously," says Lindquist, "and are aware of needs across the county."

Lindquist and Doiron hope their modest estate will grow a lot larger over time. The point is, they say, you don't have to be wealthy to be thinking about a legacy.

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The Grand Bet of Justice Ruth Bader Ginsburg

By Judge Kermit V. Lipez

We are on the eve of a Presidential election[1] that, among other things, will have a profound effect on the future of the Supreme Court of the United States. I would like to focus on one member of that Court–Justice Ruth Bader Ginsburg.

This past summer, as many of you no doubt recall, Justice Ginsburg made some controversial comments about Donald Trump, telling an interviewer that she did not want to think about the prospect of Trump defeating Hillary Clinton.[2] She promptly apologized, calling her remarks "ill-advised" for a judge.[3] This past weekend Justice Ginsburg made news again. During an interview about a new book of her writings that has just been published, she said that "I think it's dumb and disrespectful" for San Francisco 49ers quarterback Colin Kaepernick, and other professional football players, to refuse to stand for the national anthem.[4] I am sure that this comment will generate controversy as well.

Intriguing as these comments are coming from a Supreme Court justice, they say nothing about the significance of Justice Ginsburg's career, and they are not the reason I have chosen her as my subject. Justice Ginsburg is the first Jewish woman on the Supreme Court and only the second woman. She is a seminal figure in American law. And some of the details of her life–the family tragedies, her experience of Judaism, the obstacles she faced as a woman, the goal of her revolutionary legal work, the threats she perceives to her legacy, and her refusal to retire, as some had urged–all of those details provide an inspirational story of particular relevance on Yom Kippur.

Early Biography

Ruth Bader Ginsburg was born in Brooklyn in 1933. Her mother, Celia Amster, was, as Justice Ginsburg puts it, "conceived in the Old World and born in the New World"[5]–New York–four months after her family fled the Austro-Hungarian Empire. Her father, Nathan Bader, came to the United States from a shtetl near Odessa at age 13.

When Ruth was two, her older sister Marilyn died of meningitis.[6] The day before her graduation from James Madison High School in Brooklyn, Ruth's mother died after a long battle with cervical cancer.[7] When friends and family gathered at Ruth's house to pray, she was upset that only men could participate in the minyan.[8] Earlier, she had been unhappy with her exclusion from the Bar Mitzvah studies of the boys.[9]

Ruth's mother had been critical to the survival of her father's fur business. Now the business failed, and, Justice Ginsburg recalls, her father "was no longer able to contribute to the temple. And so our tickets for the High Holy Days were now in the annex, not in the main temple. That whole episode was not pleasing to me at all."[10] These early experiences in Judaism, with exclusions based on gender and wealth, "kept her from fully embracing Jewish observance."[11]

Ruth also knew that, as a Jew, she faced exclusions outside of Judaism. The best schools in the country had quotas for the Jews that they would admit. Hence, she says, "the Jewish children of her generation knew that they had to be among the brightest."[12] Ruth was a superb student. That success won her admission to Cornell, with its quota for Jews. Once there, she found that the Jewish women had all been assigned to rooms in one section of a dormitory.[13] She chose government as her major, and, shocked by the excesses of Senator Joseph McCarthy's Subcommittee on Investigation, she decided to become a lawyer. Like many Jews who choose law as a profession, she saw it as "a bulwark against the kind of oppression Jews have encountered and survived throughout history."[14]

At Cornell, she met Marty Ginsburg, one year ahead of her. Their relationship began, Ruth recalls, one "long, cold week at Cornell."[15] Then, says a friend, Marty "wooed and won her by convincing her how much he respected her."[16] Ginsburg started at Harvard Law School while Ruth finished her senior year at Cornell. They were married in June 1954, days after Ruth graduated. She also had been admitted to Harvard Law School, but she had to defer her admission because Marty, who had been in the Reserve Officers Training Corps in college, had been assigned to the Fort Sill Army Base in Oklahoma.[17] They had their first child, Jane, while living in Oklahoma. Still determined to join Marty at Harvard Law School, Ruth had to secure readmission. She did, starting at Harvard Law in the fall of 1956.[18]

In her second year of law school, Marty was diagnosed with testicular cancer. He had radical surgery and daily radiation for six weeks. The prognosis was bleak. Sleeping

about one or two hours a night, Ruth pursued her own studies while supporting Marty by typing up the notes of classmates for him and taking dictation from him for his papers. Although they had the help of a nanny, Ruth also was spending hours taking care of Jane each day. Marty survived, graduated, and got a job as a tax attorney at a firm in New York. To keep the family together, Ruth transferred to Columbia for her final year of law school.[19]

Obstacles

During these formative years of study, and in the teaching career that followed, Justice Ginsburg faced daunting obstacles as a woman. At Harvard Law School she was one of nine women in a class of over 500.[20] At a dinner hosted for these women early in their first year, Dean Erwin Griswold provocatively asked each of them how they could justify taking the place of a man. Unsettled by the question, Ginsburg dissembled, saying to Griswold: "I wanted to know more about what my husband does. So that I can be a sympathetic and understanding wife."[21]

Justice Ginsburg did far more at Harvard than please her husband, becoming one of two women to make the Law Review. She repeated that success at Columbia, tying for first in her class. Even so, she saw sign-up sheets for interviews with New York law firms that explicitly said the interviews were for men only. Despite her stellar academic record, she did not receive a single job offer from a New York law firm.[22]

With the encouragement of professors and their strong letters of recommendation, she sought a clerkship with Justice Felix Frankfurter and Judge Learned Hand, two of the great judges of that period. They refused to hire her because they were not comfortable hiring a woman. She eventually got a much less prestigious clerkship after her professor promised the judge that he would provide a male replacement if she did not work out.[23]

Interested in a teaching position, Justice Ginsburg discovered that Columbia had no place for her, even though there were no women on the faculty. When she did get a teaching job at Rutgers in 1963, along with another woman, the *New York Star Ledger* ran a headline: "Robes for Two Ladies." Describing the women as "slim, attractive," it noted that "from their youthful appearance, they could easily be taken for students."[24]

Litigation Strategy

While she was at Rutgers, Justice Ginsburg became a volunteer lawyer with the New Jersey branch of the American Civil Liberties Union. There she read letters from women complaining about their experiences with gender discrimination that reflected, in different forms, her own experiences. For example, one wrote that she could not add her family to her health insurance because the company assumed only married men had dependents; another, a teacher, wrote that she was forced to leave her job when she showed her pregnancy.[25]

Urged by her female students, Justice Ginsburg developed the first course at Rutgers on women and the law. In preparation, she read every federal decision and every law review article on women's status.[26] The picture was disheartening. For years, the law of the Supreme Court had expressed a paternalistic view of women that emphasized the need to protect them from evil influences and preserve their central role in home and family life.[27]

To give one example, Michigan had a law that prohibited women from being barmaids unless they were the wives or daughters of the owners of the bar.[28] Justice Felix Frankfurter, the same Justice who had refused to offer Justice Ginsburg a clerkship because he did not hire women, had written in 1948 that Michigan's law did not violate the Equal Protection Clause of the Constitution "since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures."[29]

This equal protection doctrine was a major impediment to changes in the second-class status of women in this country. So, through her association with the ACLU, Justice Ginsburg filed a brief with the Supreme Court in 1971 in a case challenging an Idaho law that stated explicitly that "males must be preferred to females" in the administration of estates.[30] Idaho justified the law as an administrative convenience. If a man and a woman filed competing claims to be the administrator of an estate, the statutory preference allowed probate judges to avoid time-consuming hearings on the competing claims of relatives. In her brief, Justice Ginsburg challenged this flimsy justification for the dismissive treatment of women. As she wrote:

> The time is ripe for this Court to repudiate the premise that, with minimal justification, the legislature may draw "a sharp line between the sexes," just as this Court has repudiated once settled law that differential treatment of the races is constitutionally permissible . . . .[31]

To the delight of Justice Ginsburg and her colleagues, the Supreme Court agreed with this argument in an opinion written by Chief Justice Burger:

> To give a mandatory preference to members of either sex over members of the other, [Burger wrote], merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . .[32]

This decision was a big deal. The Supreme Court had never applied the Equal Protection Clause in this way to a claim of gender discrimination. Buoyed by the decision, and seeing the opportunity to challenge similar federal and state laws, Justice Ginsburg, now teaching at Columbia Law School, conceived and co-founded in 1972 the Women's Rights Project of the American Civil Liberties Union, which became the vehicle for her revolutionary work challenging gender discrimination.[33] In six cases that she argued before the Supreme Court between 1972 and 1978, she challenged federal and state laws that had the same defect as the Michigan law dealing with bartending by women. In the guise of being more protective of women than men, they actually reflected a demeaning stereotype of women that harmed both men and women. Ironically, in the first case that she argued, as she discovered years later, Justice Harry Blackmun, who graded lawyers in his diary on their performance, indulged in a stereotype when he described Justice Ginsburg as "very precise female" and gave her a C+.[34]

This "very precise female" won five of the six cases she argued before the Supreme Court. Looking back on her successes in these cases, Justice Ginsburg summarized them this way:

> In the 1970's, the law books, state and federal, were just riddled with differentiations based on gender. There was this "separate spheres" notion. A woman's sphere was the children and the home, men's was the outside world. There were so many things that were just off limits to women. Our objective in the 1970's was to end the sex role stereotyping. The law should deal with a person, a spouse, a parent -- not a mother or wife. It took ten years, but almost all of the explicit gender base classifications are gone.[35]

Becoming a Judge

Justice Ginsburg's success before the Supreme Court made her a candidate for a federal court of appeals judgeship when Jimmy Carter became President in 1977. At that time, remarkably, there was only one woman federal appeals court judge in the country. Knowing that the President wanted to improve that number, Justice Ginsburg applied for a position on the District of Columbia Circuit Court of Appeals. Her application stalled, in part because President Carter, to his great credit, promptly appointed ten other women to the courts of appeal. Then Barbara Babcock, an Assistant Attorney General, later a Stanford law professor, wrote a strongly worded memo to Attorney General Griffin Bell: "I cannot exaggerate the feeling among women lawyers that all increases in numbers or victories are pyrrhic if Ruth is not appointed. It will be viewed as a slap in the face that a woman who is so well qualified, and, more than any woman applicant in the country, has paid her dues, is not chosen."[36] Finally, she was chosen, and she began her work on the Court of Appeals in June 1980, at the age of 47.

In June 1993, Justice Byron White resigned from the Supreme Court, giving President Clinton the opportunity to make his first appointment to the Court. Mario Cuomo, Clinton's favorite, declined the nomination minutes before the President was about to offer it to him.[37] As a second choice, Justice Ginsburg appealed to the President because of her historic work on gender discrimination. In his remarks announcing her nomination at a Rose Garden ceremony, President Clinton said that "she is to the women's movement what former Supreme Court Justice Thurgood Marshall was to the movement for the rights of African-Americans."[38]

In her remarks at the Rose Garden ceremony, Justice Ginsburg thanked the women's movement for opening doors for her, and the civil rights movement of the 1960s, which had inspired the women's movement. As the second woman nominated to the Supreme Court (the first being Sandra Day O'Connor), she commented on the importance of her nomination: "The announcement the President just made is significant . . . because it contributes to the end of the days when women, at least half of the talent pool in our society, appear in high places only as one-at-a-time performers."[39] She concluded with a tribute to her mother, "the strongest and bravest person I have known, who was taken from me much too soon . . . . I pray that I may be all that she would have been had she lived in an age when women could aspire and achieve and daughters are cherished as much as sons."[40]

At the Senate confirmation hearing that followed the Rose Garden ceremony, Justice Ginsburg spoke openly of her Jewish heritage. In her statement to the Senate Judiciary Committee, she noted that her "parents had the foresight to leave the old country, where Jewish ancestry and faith meant exposure to pogroms and denigration of one's human worth."[41] When Senator Kennedy asked her about experiences that would sensitize her to racial discrimination, she drew again on her Jewish heritage:

> Senator Kennedy, I am alert to discrimination. I grew up in World War II in a Jewish family. I have memories as a child, even before the war, of being in a car with my parents and passing a place in [Pennsylvania], a resort with a sign out front that read: "No dogs or Jews allowed." . . . One couldn't help but be sensitive to discrimination living as a Jew in America at the time of World War II.[42]

After her confirmation by the Senate, with only three dissenting votes, Justice Ginsburg spoke to the American Jewish Committee of the relevance of her Judaism to her work on the Supreme Court:

> I am a judge born, raised and proud of being a Jew. The demand for justice runs through the entirety of the Jewish tradition. I hope, in my years on the bench of the Supreme Court of the United States, I will have the strength and courage to remain constant in the service of that demand.[43]

The Supreme Court

Justice Ginsburg has shown that courage throughout her years on the Supreme Court. Although she has been fiercely protective of women's rights she has a philosophy of inclusiveness that is not limited to women. To explain that philosophy, she often quotes the opening words of the Constitution: "We the people of the United States, in order to form a more perfect union." Then she notes that originally "We the people" left out a lot of people. "It would not include me," she says, "or enslaved people or Native Americans."[44] She has made it her life's work to achieve that inclusiveness.[45]

To her consternation, however, a narrow majority of justices on the Supreme Court has adopted decisions in the past decade that, in her view, threaten the inclusiveness that has been won. In response, she wrote scathing dissents that became most notable in the 2012-2013 term of the Supreme Court, when she read several dissents from the bench, an unusual practice that reflects the anger of the dissenter.[46] She was particularly vehement in her denunciation of the majority for declaring invalid Congress's reauthorization of a key provision of the Voting Rights Act of 1965–described by her as the nation's signal piece of civil rights legislation.[47] "Hubris," she said, "is a fit word for today's demolition of the [Voting Rights Act]."[48] Invoking Martin Luther King's "I Have a Dream" speech, she said the majority's decision jeopardized what was "once the subject of a dream"[49]–"to secure to all in our polity equal citizenship stature, a voice in our democracy undiluted by race."[50] Quoting Dr. King's words–"[T]he arc of the moral universe is long, but it bends toward justice," she then added a pointed qualifier: if there is "a steadfast national commitment to see the task through to completion."[51]

Seeing the Task Through to Completion

That phrase–"seeing the task through to completion"–captures the essence of Justice Ginsburg's approach to her life and work. In 1999 she was treated for colorectal cancer. In 2009 she had surgery for pancreatic cancer. Both cancers were diagnosed early and treated successfully. In 2014, after experiencing lightheadedness and shortness of breath during her daily physical workout–Justice Ginsburg is devoted to pushups–she received a stent implant.[52] Given this history and her age, many who shared her judicial philosophy urged her to resign so that President Obama could appoint her successor before he left office. As precedents, they cited Justice David Souter, who resigned in 2009 when he was only 69 years old, and Justice Stevens, who resigned in 2010 at the age of 90.[53]

There is no doubt that Justice Souter and Justice Stevens cared about their successors. Indeed, Justice Stevens has said explicitly that it is appropriate for justices to think about their successor when deciding to retire. As he has put it: "If you're interested in the job and in the kind of work that's done, you have to have an interest in who's going to fill your shoes."[54]

Justice Ginsburg would agree. Even before the recent comments about Donald Trump, she expressed enthusiasm for the idea of the first female president. And she added: "There will be a president after this one, and I am hopeful that that president will be a fine president."[55] Appointed by President Bill Clinton, a Democrat, she is surely hopeful that her successor will be appointed by another Democrat. She understands the consequences of a different outcome. But she has been willing to make a grand bet that the achievements of a lifetime of work as a lawyer and judge will not be undone by a new president who, in addition to appointing Justice Scalia's successor, may have to replace Justice Kennedy, who is 80, Justice Breyer, who is 78, and, yes, Justice Ginsburg herself, age 83.

So why did she make this grand bet if the consequences of losing are so great? I suggest that there are a number of reasons. Justice Ginsburg must enjoy being on a court with two other women. Remarkably, despite the great achievements that brought her to the Supreme Court, she struggled to be taken seriously in the Court's conference room, where she sometimes experienced what happened to her so often in the '60s and '70s–she would say something worthwhile that did not receive any attention until a man said exactly what she had said. As she put it: "When I would say something [in the Conference Room] –and I don't think I am a confused speaker, it isn't until somebody else says it that everyone will focus on that point."[56] With three women now speaking in the conference room, the men have to listen.

Also, Justice Ginsburg likes the image of three women sitting on the Court's bench. After Justice O'Connor left the Supreme Court, Justice Ginsburg was the only woman on the court from 2006 to 2009. She felt lonely, and she said her position as the only woman on the court "projected altogether the wrong image because I am rather small. We come out on the bench and there were these eight well-fed men and this tiny little woman. It didn't look right."[57] At the moment, there are only five well-fed men on the bench. The optics are much better.

Depending on the outcome of the election, Justice Ginsburg could have more power on the Court than ever before. With an appointment by a President Clinton to replace Justice Scalia, a majority of the justices would be Democratic appointees for the first time in almost fifty years.[58] If, as a

result, Chief Justice Roberts finds himself more often in the minority with his three conservative colleagues, Justice Ginsburg, as the senior associate justice on the Court, would have the power to assign the majority opinion to any member of the majority, including herself. She has never had the opportunity to do that in her twenty-three years on the Court. It is a power of considerable significance. As Professor Akhil Amar of Yale Law School has put it, "We may have, de facto, the first female chief justice."[59]

Then there is the familiar and, for Justice Ginsburg, disturbing suggestion of sexism in the calls for her to retire. There were not similar calls for Justice Breyer, now 78, to retire so that President Obama could nominate his successor. True, Justice Breyer has not had her health issues, but, by all accounts, Justice Ginsburg is fine now and works as hard as ever. She said she will know when it's time to go: "When I forget the names of cases that I could once recite at the drop of a hat, I will know."[60] Yet, as a woman, she is more readily seen as weak and vulnerable. I suspect she has no patience with that view.

Indeed, Justice Ginsburg has spent a lifetime proving that she is stronger and better than anyone else. In pursuit of a legal career, she says, "I had three strikes against me: . . . I was Jewish. I was a woman and I was a mother. . . . [I]f a door would have been open a crack in either of the first two cases, the third one was too much."[61] Ultimately, these strikes were not too much only because Justice Ginsburg resolutely overcame them.

So, if you have spent a lifetime breaking down barriers, if you have achieved extraordinary success against great odds, if you have repeatedly overcome personal tragedies and institutional bias, if you love what you do and know that you do it well, if you see threats to the work of a lifetime, how can you be expected to just walk away when, despite the actuarial tables, you still feel at the height of your powers?

I think that question answers itself. I understand Justice Ginsburg's decision to remain on the Court. With all of the power that she still possesses, personally and institutionally, she wants to protect and advance her goals of inclusiveness. In that pursuit, she acknowledges that she draws on her Jewish heritage. In her chambers at the Supreme Court, she describes having on her walls three different artists' renditions of the Hebrew words from Deuteronomy–"zedek, zedek, tirdof" –"Justice, justice shall you pursue."[62] "These words," she says, "are ever-present reminders of what judges must do that they may thrive."[63]

We have these words from Deuteronomy in our prayer book at the beginning of a prayer entitled "The call to justice." In words that reflect Justice Ginsburg's vision of inclusiveness, the prayer tells us to love your neighbor as yourself; love the stranger as yourself; give of your bread to the hungry; bring the poor that are cast out into your house.[64] Despite its title, this prayer is more than just a call to justice. Instead, we must have, in the words of the very next prayer in our prayer book, the

strength, determination and will power,
To do instead of only to pray,
To become instead of merely to wish.[65]

I have always felt that there is a call to action in our High Holiday services. We take stock, acknowledge our shortcomings, seek forgiveness, and restore our souls. Then, in the words and example of Justice Ginsburg, we can "see through to completion" the tasks that matter to us. She is an inspiration for us on Yom Kippur because the tasks that mattered to her were so consequential for women and other groups excluded from opportunity and power in our society. With strength, determination and will power, she pursued and continues to pursue her vision of justice so that we may all thrive. Hopefully, guided by our own inclusive vision of justice, we will persevere as tirelessly and effectively in our tasks as Justice Ginsburg has in hers.

JUDGE KERMIT V. LIPEZ *graduated from Haverford College in 1963 and Yale Law School in 1967. He earned his LL.M. from the University of Virginia School of Law in 1990. Judge Lipez participated in the U.S. Department of Justice Honors Program as a Staff Attorney in the Civil Rights Division from 1967 to 1968. He then served as Special Assistant and Legal Counsel to Maine Governor Kenneth M. Curtis from 1968 to 1971 and as a Legislative Aide for United States Senator Edmund S. Muskie from 1971 to 1972. Judge Lipez worked in private practice in Portland, Maine from 1973 to 1985, before he was appointed Justice of the Maine Superior Court, where he served from 1985 to 1994. In 1994, he was elevated to the Maine Supreme Judicial Court, where he served until he was appointed to the First Circuit Court of Appeals in 1998.*

1 When I gave this talk on October 12, 2016, during the Yom Kippur service at Congregation Etz Chaim in Portland, we were on the eve of the Presidential election.We now know that Justice Ginsburg lost the bet I describe.We do not yet know the full consequences of that loss.

2 Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a 'Faker', He Says She Should Resign*, CNN (July 13, 2016), http://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker.

3 Michael D. Shear, *Ruth Bader Ginsburg Expresses Regret for Criticizing Donald Trump*, N.Y. Times, July 16, 2016, at A1 (Available at: http://www.nytimes.com/2016/07/15/us/politics/ruth-bader-ginsburg-donald-trump.html).

4 Ariane de Vogue, *Ruth Bader Ginsburg on Kaepernick Protests: 'I Think It's Dumb and Disrespectful'*, CNN (Oct. 12, 2016), http://www.cnn.com/2016/10/10/politics/ruth-bader-ginsburg-colin-kaepernick.

5 Robert Barnes, *Ginsburg is Latest Justice to Reflect on Faith*, Wash. Post (Jan. 15, 2008), http://www.washingtonpost.

com/wp-dyn/content/article/2008/01/14/AR2008011402290.html.

[6] Irin Carmon & Shana Knizhnik, Notorious RBG: The Life and Times of Ruth Bader Ginsburg 26 (2015).

[7] *Id.* at 26-27.

[8] *Id.* at 28.

[9] *Id.*

[10] Abigail Pogrebin, *In Chambers with Ruth Bader Ginsburg*, Moment, Feb. 1 2006, at 34 (Available at: http://www.momentmag.com/wp-content/uploads/2013/03/In-Chambers-with-Ruth-Bader-Ginsburg.pdf).

[11] *Id.*

[12] Barnes, *supra* note 4.

[13] *Id.*; Carmon & Knizhnik, *supra* note 5, at 29.

[14] Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, Remarks for Touro Synagogue (Newport, Rhode Island): Celebration of the 350th Anniversary of Jews in America (Aug. 22, 2004) (Available at: https://www.supremecourt.gov/publicinfo/speeches/sp_08-22-04.html).

[15] Carmon & Knizhnik, *supra* note 5, at 31.

[16] *Id.*

[17] *Id.* at 31-32.

[18] *Id.* at 32-33.

[19] *Id.* at 36-37.

[20] Ruth Bader Ginsburg, Judge, United States Court of Appeals for the District of Columbia Circuit, Rose Garden Address Accepting United States Supreme Court Nomination (June 14, 1993) (Available at: http://www.americanrhetoric.com/speeches/ruthbaderginsburgusscnominationspeech.htm); Carmon & Knizhnik, *supra* note 5, at 17, 34.

[21] Carmon & Knizhnik, *supra* note 5, at 34.

[22] *Id.* at 38-39.

[23] *Id.*

[24] *Id.* at 46-47.

[25] *Id.* at 48-49.

[26] *Id.* at 49.

[27] *Id.* at 59.

[28] *Goesaert v. Cleary*, 335 U.S. 464 (1948).

[29] *Id.* at 466.

[30] *Reed v. Reed*, 404 U.S. 71 (1971).

[31] Carmon & Knizhnik, *supra* note 5, at 56-57.

[32] *Reed*, 404 U.S. at 76.

[33] Carmon & Knizhnik, *supra* note 5, at 44-46.

[34] *Id.* at 46.

[35] Nadine Epstein, *Ruth Bader Ginsburg: "The Notorious RBG"*, Moment (May 4, 2015), http://www.momentmag.com/ruth-bader-ginsburg-notorious-rbg-interview.

[36] Carmon & Knizhnik, *supra* note 5, at 82.

[37] *Id.* at 78.

[38] William J. Clinton, President of the United States, Rose Garden Address Nominating Ruth Bader Ginsburg to the United States Supreme Court (June 14, 1993) (Available at: http://www.presidency.ucsb.edu/ws/?pid=46684%20).

[39] Carmon & Knizhnik, *supra* note 5, at 79-80.

[40] *Id.* at 80; Ginsburg Address, *supra* note 19.

[41] Malvina Halberstam, *Ruth Bader Ginsburg*, Jewish Women's Archive Encyclopedia, http://jwa.org/encyclopedia/article/ginsburg-ruth-bader (last visited Oct. 10, 2016).

[42] *Id.*

[43] *Id.*

[44] Carmon & Knizhnik, *supra* note 5, at 12.

[45] *Id.* at 12-13.

[46] *Id.* at 3-5.

[47] *Shelby County v. Holder*, 133 S. Ct. 2612, 2644 (2013) (Ginsburg, J., dissenting).

[48] *Id.* at 2648.

[49] *Id.* at 2652.

[50] *Id.* at 2651.

[51] *Id.* at 2645.

[52] Carmon & Knizhnik, *supra* note 5, at 152, 156-57.

[53] *See, e.g.*, Randall Kennedy, *The Case for Early Retirement*, The New Republic (Apr. 28, 2011), https://newrepublic.com/article/87543/ginsburg-breyer-resign-supereme-court.

[54] Adam Teicholz, *John Paul Stevens: Okay to Consider Politics in Retirement Decision*, ABC News via This Week (April 20, 2014), http://abcnews.go.com/blogs/politics/2014/04/john-paul-stevens-ruth-bader-ginsburg-asked-my-advice-on-retirement.

[55] Carmon & Knizhnik, *supra* note 5, at 171.

[56] *Id.* at 142.

[57] Epstein, *supra* note 34.

[58] Adam Liptak, *Court Leader or Leading Dissenter? Chief Justice's Fate Tied to Election*, N.Y. Times, Sept. 25, 2016, at A1 (Available at: http://www.nytimes.com/2016/09/26/us/politics/supreme-court-chief-justice-john-roberts.html).

[59] *Id.*

[60] Carmon & Knizhnik, *supra* note 5, at 171.

[61] Stephanie B. Goldberg, *The Second Woman Justice*, ABA Journal, (Oct. 1993), at 41

[62] Ruth Bader Ginsburg, Associate Justice of the United States Supreme Court, Capitol Rotunda Remarks on the 2004 Holocaust Days of Remembrance (Apr. 22, 2004) (Available at: https://www.ushmm.org/remember/days-of-remembrance/past-days-of-remembrance/2004-days-of-remembrance/ruth-bader-ginsburg).

[63] *Id.*

[64] The New Mahzor: For Rosh Hashanah and Yom Kippur 852 (Sidney Greenberg comp., Jonathon D. Levine ed., The Prayer Book Press 1995).

[65] *Id.* at 853.

A Primer About Long-Term Disability (LTD) and Individual Disability (ID) Claims

Andrew J. Bernstein, Esq.

Serious illness or injuries can happen at any time to anyone. And while those unexpected hardships can interrupt your life and leave you out of work for months or years, long-term disability benefits, which pay you up to 2/3rd of your income, and individual disability benefits, which pay you a specific dollar amount each month as a benefit, can give you financial stability during a difficult time.

Studies show that nearly 1 in 4 Americans will suffer a disabling condition in their lifetime. In some instances, the disability lasts only a relatively short period of time. Unfortunately in many situations the disability is long-term or permanent.

At the Law Offices of Joe Bornstein, we see firsthand hard-working Mainers who have become disabled and are unable to return to work. Often times the hardship on an individual or family can be overwhelming, both physically and emotionally.

Many Mainers have long-term disability insurance coverage through their employers or have purchased individual disability insurance policies to protect lost income in the event of an unexpected injury or illness.

Individuals who file long-term disability benefit and individual disability benefit claims with their insurance companies often find the claim process overwhelming and difficult to manage especially when confronted with a wrongful denial of their claims. Many of our clients have faced this situation.

At our law firm, attorney Andrew Bernstein has over 20 years of long-term disability and individual disability insurance claims experience. During his career, Andrew has successfully represented disability insurance companies in claims disputes and litigation in Maine and across the country. Andrew now focuses his experience and expertise to representing Mainers whose disability insurance claims have been wrongfully denied.

Most LTD policies coordinate benefits with Social Security Disability Insurance Benefits (SSDIB). Our experienced SSA Disability Team can help with this important coordination of benefits.

The vast majority of individual disability policies do not reduce the disability benefits paid to Mainers by Social Security Disability benefits.

Representation of our clients with LTD and ID claims is handled on a contingent fee basis. An attorney fee is only charged if our client prevails on his or her claim. **No attorney fee is charged if our client receives no benefits.**

Frequently Asked Questions

What is long-term disability insurance?

Long-term disability (LTD) insurance is coverage many Mainers have through their employers. For the first 24 months after disability and the policy's waiting period, an LTD policy pays a benefit which is a percentage of your income when you stopped working. After 24 months of LTD benefits have been paid, you are entitled to continuing LTD benefits if you're unable to perform any occupation that you have the training, education or experience to perform.

What is individual disability insurance?

Individual disability (ID) insurance is coverage many Mainers have under an individual disability insurance policy the individual has purchased directly from an insurance agent or broker. Unlike long-term disability benefits, which pay a person a percentage of your income, individual disability benefits pay you a specific dollar amount each month, based on what you purchased.

How do I receive benefits and for how long will payments continue?

Both LTD and ID benefits are paid directly to you for as long as your plan considers you disabled or you reach your maximum period of payment, whichever comes first. Most LTD policies have a defined benefit period of time, such as to age 65. Most ID policies have a defined benefit period of time, such as to age 65, or for life.

When should I or my disabled client hire an attorney?

It's never too early to contact an attorney to represent you in your disability case. **However, it is absolutely critical that if your LTD or ID claim is denied initially, that you hire an attorney IMMEDIATELY AFTER THIS DENIAL to represent you in the appeal of that denial decision which the insurance company will require or offer to you.** Having an attorney by your side helping you prepare and file this appeal gives you the best chance of success in this appeal.

Am I guaranteed coverage?

Most LTD policies purchased by employers for their employees automatically cover all full-time employees. For these policies, full-time employment is the only requirement for coverage.

ID coverage can only be obtained by completing an application for an ID policy. The insurance company then must decide, based on the information in the application and answers to the medical questions whether or not to accept the individual's application and issue a policy to that person. The insurer does not have to automatically accept an ID application and issue a policy.

Does workers' compensation affect benefits?

LTD benefits may be reduced if you are receiving income from other insurance policies, retirement or government programs. However if an employee is hurt off the job, workers' compensation will not cover the worker and LTD insurance begins after a short-term disability policy has run out (generally three to six months).

What can a long-term disability and individual disability attorney do for me or my disabled client?

Most LTD insurance policies are governed by the Employee Retirement Income Security Act (ERISA), a federal law that provides specific procedures and time limits for filing LTD claims. Most ID policies are governed by state law. A lawyer experienced with LTD and ID claims will know how to abide by the ERISA rules and help you in the following areas:

- Working with your physicians to obtain supportive opinions about your work-related limitations while ensuring your claim contains all relevant medical evidence.
- Knowing the right questions to ask your doctors, rather than relying on the paperwork provided by your insurance company. A critical component of your appeal for LTD benefits is the information obtained from your treating physician.
- Hiring vocational experts to testify about the requirements of your position and/or the overall labor market.
- Acting as your representative with the LTD carrier or plan administrator. In addition to obtaining persuasive evidence of your disability, your attorney will also act on your behalf, file the initial application and appeals in a timely manner, conduct settlement negotiations, and if necessary, bring a lawsuit in federal court.

If you've been injured or disabled and denied LTD or ID benefits, call the Law Offices of Joe Bornstein for a free and confidential evaluation. Don't let a missed deadline or improperly completed form keep you from getting the justice you deserve.

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Volunteer Lawyers Project Launches Online *Pro Bono* Legal Advice Software

By Juliet Holmes-Smith

The Volunteer Lawyers Project has a new *pro bono* service that will only work with your help. The program is described below, but I am going to start with an email sent out by Michael J. Levey, Esq., of Levey, Wagley & Putman, P.A. in Winthrop, as an encouragement to his colleagues to sign up:

> Hello recipients,
>
> I am forwarding the Maine Volunteer Lawyers Project's newest idea for *pro bono* opportunities. It's unbundled. It's the easiest one around. You can help an eligible person by providing, via email, an answer to a question asked by the client. You can do it from your house, virtually at your convenience, for example when you can't sleep at night. Or when you are looking for something to do to avoid yard work.
>
> Consider it.
>
> Don't however, do it as a substitute for other *pro bono* services that you provide! It is supposed to add, not detract from the bar's assistance to low income Mainers.
>
> Thanks.

Mike knows how to pitch! Now here are the important, but drier, details:

The Volunteer Lawyers Project has started a "soft launch" of the Maine page of Free Legal Answers at https://maine.freelegalanswers.org/. Free Legal Answers is a virtual *pro bono* legal advice clinic. Qualifying users, who are screened for income eligibility, post their civil legal question to their state's website. Users then get an email alert when their question receives a response. Attorney volunteers, who must be authorized to provide *pro bono* assistance in their state, log in to the website, select questions to answer, and provide legal information and advice for civil legal questions. No criminal law questions will be allowed. All questions and answers are stored privately on the site without public viewing access.

Before an attorney answers any question, they will have the client and the opposing party's information to check for conflicts. Under Maine law (RPC 1.2(c) and 6.5), because of the *pro bono publico* nature of the limited scope representation provided through this program under the administration of the VLP, conflicts only exist if they are "actual" conflicts, but any attorney will have the opportunity to use their full conflict procedures if they choose.

Free Legal Answers is a project of the American Bar Association's Standing Committee on *Pro Bono* and Public Service. The software is very well designed, easy to use, and the ABA is providing it to us for free. The ABA also carries malpractice insurance for the limited representation provided through the site by properly registered attorneys.

Through June, the Maine site will be available to attorneys only. Please explore how the site works, read the frequently asked questions and consider registering. When enough Maine attorneys have registered on the site, we will be opening it up to low income clients across the state to ask questions. You can still register any time after June.

In our rural State of Maine, this *pro bono* service will fill a gap for people who otherwise would have difficulty accessing legal help. The service will be advertised and available in libraries across Maine, and while this service is not the same as providing full representation, experience in other states has shown that many people are able to get meaningful help through Free Legal Answers. Additionally, the web site provides links to other legal resources in Maine, and, once the service is established, the Volunteer Lawyers Project will provide further referrals for clients who access help through Free Legal Answers but who clearly need more extensive representation.

Please take 10 to 15 minutes to register and explore the site. If you go to https://maine.freelegalanswers.org/ and click on "Volunteer Attorney Registration" this will take you to a detailed explanation of how the site works for lawyers, including a link for frequently asked questions. Registering on the site does not commit you to answering questions, but once we open it up I hope you will be there to provide a little more access to justice in Maine.

Once the site is open to clients, you, as a registered volunteer attorney, can read questions from a list that is divided into substantive areas. You can then choose to answer a question or leave it on the list for someone else. The site will automatically track your pro bono hours if you wish. You will be able to provide *pro bono* service to Maine people with low incomes wherever and whenever you have an Internet connection.

In October of this year we will start providing extended representation to users of the site. Look for our kick-off events in Portland on Oct. 24th, and Bangor on Oct. 26th.

Please contact me if you have any questions or comments, the Maine page is new and we need to know what you think.

JULIET HOLMES-SMITH *is executive director of the Volunteer Lawyers Project. She can be reached at jholmes-smith@vlp.org.*

Maine Justice Foundation Forms LGBT Justice Fund

By Arnold C. Macdonald

About two years ago, responding to market forces that resulted in the halving of IOLTA revenues since the financial crisis of 2008-9, the Maine Justice Foundation (then the Maine Bar Foundation), decided to change its name and expand its mission to include building endowments to fund legal services and the work of Maine's legal services providers. These endowments take the form of large and planned gifts to support the work of the Foundation (thereby freeing up more of the Foundation's annual revenues to support legal services), the work of particular legal aid providers, or justice issues important to the donors creating the funds. With all sources of funding for equal justice now under siege, donors can build funds and establish legacies to ensure the long-term protection of justice issues of importance to them.

Inspiration for the New LGBT Justice Fund

One of the first new funds, the LGBT Justice Fund, shows perfectly how concerned people can ensure advocacy and focus on issues of great importance that might not otherwise be funded. Maine Justice Foundation President Bill Robitzek started the fund to honor and support his daughter, Laura, and her wife, Sarah, as they move to Maine.

Each of the other founders of the LGBT Justice Fund has joined based on their personal experience or that of loved ones, and the knowledge that the struggle for equal rights did not end with gay marriage. My own inspiration comes from the lives of my sister, sister-in-law, and cousin, but also having watched the repressed and less than full lives of late "bachelor" and "spinster" relatives.

My sister has had great business and personal success guided by a core value that everyone deserves to be loved. Her leadership has been invaluable to me both as a lawyer and in navigating my own family life. I have learned so much from Amy and her wife Fran, beginning with Amy's early activism in the AIDs movement in Boston and highlighted by the celebration of her marriage two years ago to Fran, her partner of 20 years.

I am also inspired by my cousin Jennifer Macdonald who was a pioneering conceptual artist exploring sexuality and gender identity, among other things. Staying with her in New York during a college summer internship did much to open my mind after a sheltered childhood.

Continuing Struggle for Many LGBT Mainers

There is no doubt that the solemnity of marriage vows can take a relationship to a new level. It also adds legal benefits, which, in the interest of fairness, society must make available to all. Happy as we were when marriage equality became the law of the land, we know that for those who believe that everyone deserves to be loved, the struggle continues. We see it in the homelessness of LGBT youth, increases in bullying, higher poverty rates among LGBT people, and the many issues elderly LGBT people face

with housing, health care, and other fundamental legal issues.

LGBT youth are especially vulnerable. Rejected by their families they face the loss of a stable home, health care and other essentials. Even when families accept them and provide a loving home, at-risk youth find a world that is discriminatory and dangerous. LGBT youth and the children of LGBT parents experience harassment and discrimination in institutions like schools and welfare programs. LGBT teens and young adults have one of the highest rates of suicide attempts.

Aging LGBT individuals and couples can face social and geographic isolation, declining health, the risks of financial fraud and elder abuse, the complexities of the health care system and the availability of services to help them stay safe in their homes and communities. These concerns are compounded by fears their sexual orientation will affect the personal care and other services they need, both at home and in an assisted-living or nursing home setting.

LGBT seniors are more likely to be poorer and less financially secure than non-LGBT seniors. Lack of relationship recognition has had a huge negative financial impact on all LGBT Americans, particularly LGBT seniors who have faced a lifetime of discrimination and unequal treatment.

From domestic violence and custody battles to evictions and restraining orders, most Americans have no idea that there is no constitutional right to a lawyer for vital civil matters. And while these situations can be devastating for anyone, it's particularly tragic for LGBT people living in poverty. Poverty issues have a disproportionate impact on LGBT people. Today, we can help make sure that every LGBT person has access to justice.

LGBT Justice Fund: Mission and Management

Laws only matter if they are upheld and enforced. That's why I helped create the LGBT Justice Fund. The Fund's mission is to provide legal assistance to try to ensure that low income and vulnerable LGBT Mainers can always get access to justice--if they have a custody dispute, if they face eviction, or if they lose a job to discrimination.

When you're poor, it is hard to find justice. I have seen that first-hand through my work for the Maine Justice Foundation and *pro bono* work for the providers. Providing access to justice is the mission of the Foundation and the six civil legal aid providers that it supports. But when you are poor and LGBT, finding justice is more difficult—and even dangerous.

This endowment will fund nonprofit programs that address the civil legal aid needs of LGBT Mainers. Funding for collaborations with organizations that provide education to support and advance that community will also be considered. The LGBT Justice Fund will be pooled and invested with all the funds of the Maine Justice Foundation. The Foundation's investment policy will guide the investment management of the Fund. It is designed to last for generations.

Become a LGBT Justice Fund Founder

Bill Robitzek and I share that we are Bar Fellows, have been presidents of the Maine Justice Foundation, and are active in the Campaign for Justice and have been inspired by LGBT people who are dear to us. I am grateful that Bill created the LGBT Justice Fund, and my wife Liza Moore and I are honored to be co-founders.

Bill wants to build a significant endowment and invites you to join co-founders Teresa Cloutier, Jon R. Doyle, Sarah McDaniel, Jodi Nofsinger, and my wife Liza and me to ensure civil legal aid and advocacy for Maine's most vulnerable LGBT people now and for decades to come.

For more information, please contact any of the founders or Matt Scease, Development Director, Maine Justice Foundation at mscease@justicemaine.org or (207) 622-34377.

ARNIE MACDONALD *is a shareholder at Bernstein Shur. He was the 2014 chair of the Campaign for Justice. Arnie can be reached at amacdonald@bernsteinshur.com.*

When Nonprofit Boards Come Calling

By Mark Bassingthwaighte

Look, I get it. An opportunity to sit on the board of a local nonprofit is finally yours for the taking. Better yet, it's a charitable cause you strongly believe in, the opportunity will allow you to get your name out there, and one would expect that the new contacts made will lead to new clients down the road. Your desire is to accept because the bottom line is that you will be able to give back to the community in a meaningful way in exchange for the marketing and business benefits of your donated time. Works for me as long as you remember our ethical rules are in play and, as a director of a nonprofit, so too are certain duties.

Before discussing the consequences of accepting this opportunity, let me share one thought which can make life so much easier. Sitting on a nonprofit board starts to get messy when the attorney board member wears two hats. In a number of situations the nonprofit is seeking attorney board members because the board hopes to have the attorney handle a little legal work on a *pro bono* basis. There is an obvious solution here that allows you to avoid so many of the issues I'm about to discuss. Keep it clean. Say no to sitting on the board and offer to serve as outside counsel on a *pro bono* basis instead. The opportunity to give back to the community remains and you have not lost the marketing and business benefits of being involved with the nonprofit.

That said, the title of board member is enticing so let's talk about the issues and we'll start with your duties. The duties of an attorney-director are codified in some states and arise from common law obligations in others. There are duties of care, loyalty, and obedience and be aware that the attorney-director will often be held to a higher standard than non-attorney directors due to the fact that he or she is an attorney. At its most basic level, the attorney-director must be willing and able to devote sufficient time and attention to the matters of the nonprofit in order to ensure that all duties and responsibilities are discharged in good faith. In addition, the director must always act in the best interests of the nonprofit as well as be obedient to the organization's founding principals. Stated another way, directors of nonprofits can be sued by donors for failing to hold true to the nonprofit's mission. I share all this because the decision to sit on a nonprofit board is one not to be taken lightly.

As a risk management and ethics guy, however, I'm more concerned about our rules of professional conduct and how they play out in this setting. At the outset, many of the concerns I'm about to discuss can be easily avoided if you limit your participation to serving solely as a director *and* commit to never giving the nonprofit *any* legal advice, other than perhaps identifying situations where legal advice should be obtained. While not completely risk free, this approach will help minimize the concerns.

Regardless, the reality is many attorney-directors will wear two hats by agreeing to serve as a board member and to provide legal advice and/or services to the nonprofit. The consequence of making this decision is that the issues of independence, conflicts of interest, and attorney-client privilege must now be addressed. We'll start with a few questions. What if you are asked to put your attorney hat on for the purpose of taking an action on the nonprofit's behalf related to an issue that you opposed while wearing your director hat? In short, how can you as an attorney-director maintain professional independence and responsibly voice objections while serving on the board of a client? Navigating these waters can be problematic to say the least; but let's cut to the chase. Never allow yourself to become a rubber stamp for the decisions of the board because sometimes what's good for business doesn't jibe with what the law requires.

Now let's add conflicts into the mix. Can you vote as a director on your own legal advice? I would encourage you not to; but wouldn't abstaining from voting as a director be a disservice to the nonprofit, particularly if this were to occur on a regular basis? What if the board decides to sue another client of your firm? What if you make charitable donations to the nonprofit and shortly thereafter you are hired by the board? While having some type of conflict of interest policy in place with the board can help, and I would strongly encourage you to see this is done, it will be

an imperfect solution.

And finally, there is the attorney-client privilege problem. As an attorney-director many of your conversations will include business and legal advice. How will others know when are you wearing your attorney hat and when are you wearing your director hat? While you may try to address the problem by specifically noting in board minutes that your advice is strictly legal advice, if non-privileged business advice is also part of the discussion you haven't accomplished much. Making matters worse, there can be confidentiality problems because outside donors may have certain rights to review the board minutes and/or non-attorney directors may disclose the communication for business reasons. Either way, privilege is lost. This is why it is so important for the attorney-director to fully inform the client and the board of the potential risks relating to loss of privilege and this should always be done in writing.

Please understand that my intent in sharing this cursory overview of the risks associated with sitting on nonprofit boards is not about trying to talk you out of agreeing to do so. It's quite the opposite actually. I would encourage you to participate if and when these kinds of opportunities arise. Speaking personally, I do believe that giving back to the community in this fashion is a wonderful gift for an attorney to give. All I am trying to do is to see that you are informed in order to help you make decisions about how to give back in a way that will hopefully garner the greatest rewards for all involved. Now that you know what you need to think about, go for it. Go out and make the world a better place. It really can be a fun gig.

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

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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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Justice for All: News and Information from the Maine Access to Justice Community

By Justice Andrew M. Mead

"Injustice anywhere is a threat to justice everywhere."

—MARTIN LUTHER KING, JR.

In late January, members of the legal services community and the populations that they serve were shocked to learn that the continuing viability of the federal Legal Services Corporation had been placed in jeopardy when a preliminary outline of President Trump's anticipated budget included the LSC on a list of government-supported agencies proposed for elimination.

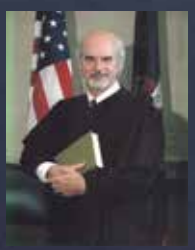
The Legal Services Corporation was created in 1974 with bipartisan support in Congress. President Richard M. Nixon said this in support of the proposed legislation:

> Two years ago I proposed the creation of a Legal Services Corporation as a means of delivering high quality legal assistance to those who would otherwise be unable to afford it. The need still exists, and today I am once again asking the Congress to establish this corporation.
>
> I firmly believe that we must provide a mechanism to overcome economic barriers to adequate legal assistance.
> . . . .
>
> [W]e have learned that legal assistance for the poor, when properly provided, is one of the most constructive ways to help them to help themselves. During this period, we have also learned that justice is served far better and differences are settled more rationally within the system than on the streets. Now is the time to make legal services an integral part of our judicial system.
>
> America's system of law now requires equal treatment for all in our courts of criminal justice. It is no less important that equal access be afforded those who seek redress through our civil laws.
>
> We propose no special favors for any group in our society, nor do we seek to mandate the use of the legal system to the exclusion of other social institutions as instruments of social progress. We propose, simply, to protect and preserve a basic right of all Americans.

In the forty-three years since President Nixon made that still-compelling argument for equal access to justice, various groups and political constituencies who oppose furnishing civil legal services to America's impoverished and underserved populations have tried to eliminate the Legal Services Corporation by attacking both the philosophical justification for its existence and its government funding. None of those efforts have been wholly successful, and the Corporation remains a major source of support to organizations providing basic civil legal services.

Despite some initial optimism that the inclusion of the LSC on the list of targeted government entities would be withdrawn, the president's formal budget request, issued in early May, did include a provision providing for the total defunding of the LSC. Such a drastic step would destroy a vital pipeline of resources serving the country's neediest populations, and threaten the very existence of many civil legal services organizations. Pine Tree Legal Assistance, one of Maine's principal civil legal aid providers, would see its budget reduced by 24 percent if this aspect of the President's budget is adopted by Congress—a devastating cutback as PTLA celebrates the fiftieth year of its existence.

The Maine Justice Action Group calls upon all Maine lawyers and others who are committed to civil access to justice to contact their congressional representatives and urge them to oppose efforts to eliminate the Legal Services Corporation, and insure that it will continue to support what President Nixon so correctly recognized to be "a basic right of all Americans."



JUSTICE ANDREW M. MEAD *is an Associate Justice of the Maine Supreme Judicial Court and serves as Chair of the Maine Justice Action Group.*

Thanks to civil legal aid…

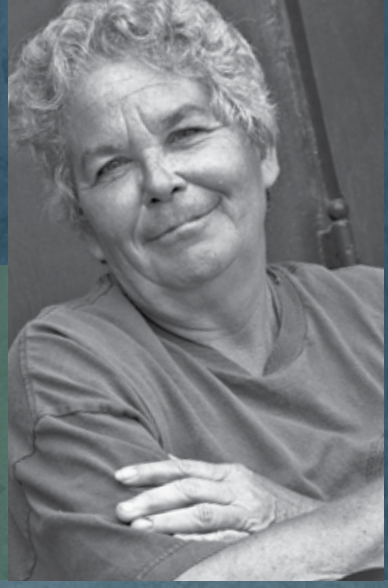
- Jocelyn was finally able to feel safe again in her own home, and her student attorney was able to guide her through the process of filing a permanent Protection from Abuse order against her abusive husband, as he repeatedly violated the temporary order she had filed on her own.
- Dot, an 81-year-old woman, was able to receive back pay of nearly $47,000 for her husband's social security and military retirement benefits, after years of non-payment following a difficult divorce.
- Charlotte in Aroostook County, 74 years old and legally blind, writes: "I have lived in my home for over 50 years. I have always done my best to pay my bills on time but for two years in a row I couldn't afford to pay my property taxes. I asked for an abatement and it was denied. A legal aid attorney appealed the decision and won. It made my life a lot less stressful. I am sure I would have lost my home if I had not gotten help."
- In spite of being married to a U.S. citizen, Xiuhong's immigration case took over thirteen years because of immigration backlogs and government errors. With ILAP's representation Xiuhong was finally granted legal permanent residency last year.
- Paula, an 86 year old woman, was terrified that she and her disabled son would be turned out of the home they had occupied for fifty years, when a bank commenced foreclosure proceedings on a reverse mortgage that she had used to make much needed repairs. She sought help from a legal services attorney, who pursued advocacy and mediation to end the threat of homelessness.

And there is so much potential to do more.

The civil legal aid community is proud of the economic impact reported in this research. It shows that providing low-income clients a voice in the legal system is not only the fair thing to do but that it also benefits Maine's economy in amounts far greater than what it costs. Yet we know that only a small fraction of those who need these services receive them, due to the limited resources available. If all these needs were met, the economic benefits found in Dr. Gabe's study would be many times greater!

The unmet need, and thus the potential for far greater benefit, exists even though Maine's providers work hard to deliver services efficiently, as Justice Mead has observed:

"Maine is extremely fortunate to have a core group of six civil legal services organizations who collaborate, cooperate, and share resources toward their common goal of providing access to justice for thousands of our neediest residents. The willingness of the providers to work together to avoid duplication of effort and leverage their varied expertise and experience, produces great efficiency in delivery of services. The providers routinely cross-refer cases to each other and share telephone and technology resources. The end result is a well-coordinated network of civil legal services providers who are able to extend their very limited resources to reach the maximum number of recipients."
– Andrew Mead, Associate Justice, Maine Supreme Judicial Court and Chair, Justice Action Group



"I HAVE BEEN LIFTED UP BY YOUR HELP. BEFORE THIS, I FELT INVISIBLE AND WITHOUT A VOICE. THANK YOU."

"I KNEW I HAD RIGHTS, BUT I HAD NOBODY TO REPRESENT ME. IT FELT SO GOOD TO HAVE A LAWYER FOR THIS, AND I'M REALLY HAPPY ABOUT THIS PROGRAM."

Economic Impact of Civil Legal Aid Services in Maine

"WITHOUT THE ATTORNEY, I HAD NO CLUE WHAT I WAS DOING."

Prepared for Maine's

JUSTICE ACTION GROUP

November 2016

Summarizing a Report by: Todd Gabe, Ph.D., Professor of Economics at the University of Maine.

Funders: Maine Justice Foundation, the Fisher Foundation, Lanham Blackwell & Baber

SUPREME QUOTES *By Evan J. Roth*

***Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990) (Rehnquist, C.J.) (quoting W. Shakespeare, *Othello*, Act III, scene 3).**

In libel law, when a newspaper publishes an article accusing someone of perjury, does it matter whether the article may be characterized as mere "opinion"? No, explained Chief Justice Rehnquist, writing for the majority in *Milkovich v. Lorain Journal Co.*

The underlying controversy began at a Maple Heights High School wrestling meet in Cleveland on February 8, 1974, when unruly fans attacked and injured members of a rival team. The Ohio High School Athletic Association disciplined the Maple Heights team and its coach, Michael Milkovich, but a state court overturned the discipline. The next day, the local newspaper published an article accusing Milkovich of lying during the state court proceedings. According to the article, Milkovich falsely testified that he was "powerless to control the crowd" when, according to the article, Milkovich was actually ranting and raving and egging on the crowd. When Milkovich sued the paper for defamation, his case was dismissed on summary judgment on the grounds that the article was constitutionally-protected "opinion."

The Supreme Court disagreed. After surveying the previously-established categories of First Amendment protection, the Court declined to create a new category for matters of "opinion." While recognizing the First Amendment's "vital guarantee of free and uninhibited discussion of public issues," Chief Justice Rehnquist explained that there was "another side to the equation"—that society has a strong interest in "redressing attacks upon reputation." To illustrate the value of one's reputation, the Chief Justice offered Iago's observations to Othello, quoted above.

Who steals my purse steals trash;

'Tis something, nothing;

'Twas mine, 'tis his, and has
been slave to thousands;

But he that filches from me
my good name

Robs me of that which not
enriches him,

And makes me poor indeed.

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.*

BEYOND *the* LAW

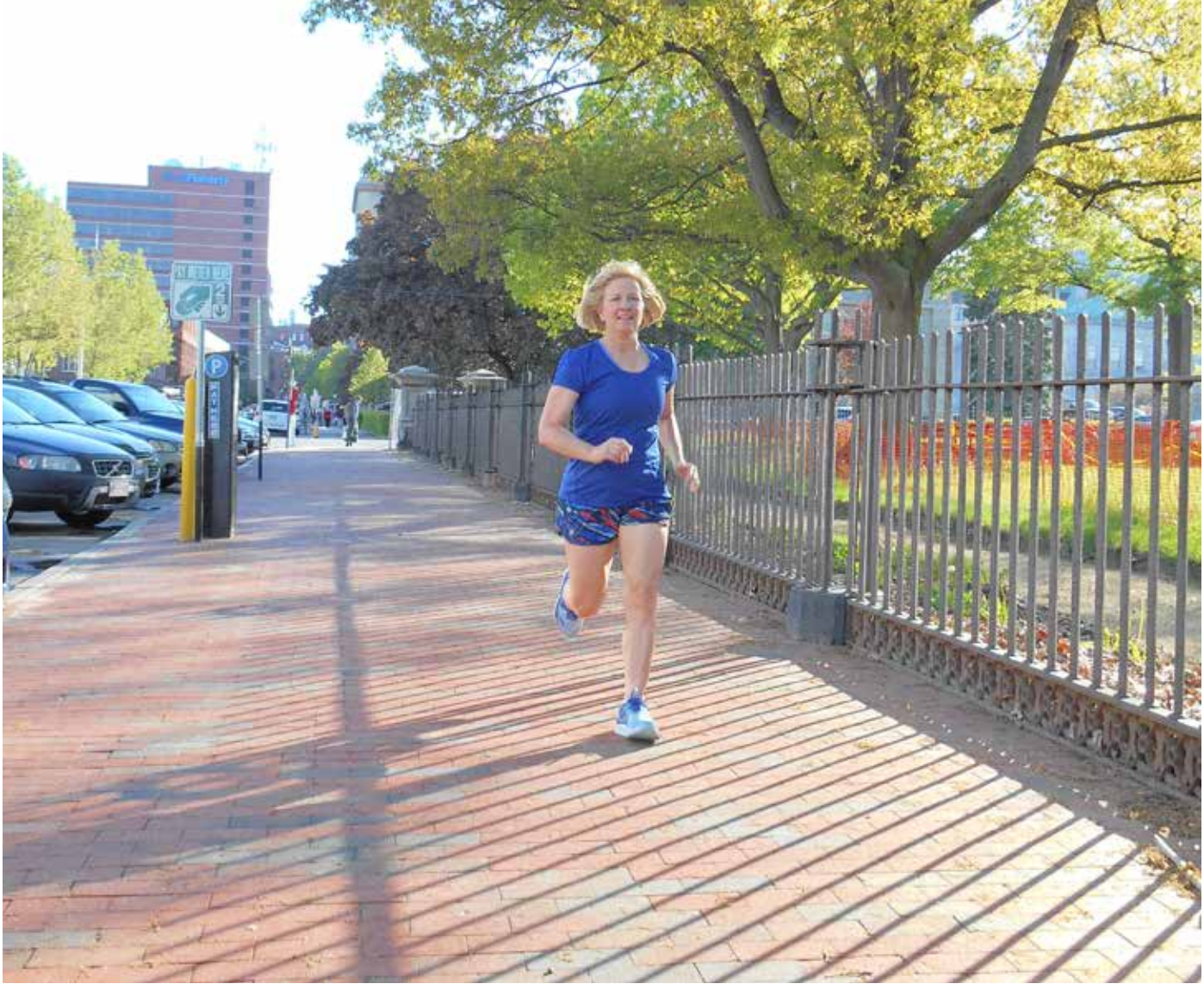
Diane Dusini

Interview and photos by
Daniel J. Murphy

A wise observer once remarked that "a good laugh and a long run are the two best cures for anything." If true, Diane Dusini has a clean bill of health. Although Dusini's family law practice can be contentious at times, she radiates an unmistakable enthusiasm for what she does. Her avid interest in running, consistently pursued day after day, has helped her maintain balance in her life and has created opportunities to connect with other people in meaningful ways. Dusini, who practices law at Mittel Asen, LLC, in Portland, sat down with the Maine Bar Journal to discuss her interests.

Please tell us about your interest in running.
I got my start in running many years ago because I had family members who ran. I started out with running as a stress release and because I love to be outside. Running is a great way to get outside, breathe some real air, hear birds, and reconnect with nature. I am not a fast runner, but running is a passion that I have incorporated into my life. When I was younger, my career objectives were either go to law school or to be a park ranger. The park ranger idea was just about my love of being outside. I have never been and will never be a treadmill runner.

Do you have any particular places where you like to run?
I started running in law school. During that period, I lived in downtown Portland. I would run in-town. I now live in Scarborough and I am more likely to be seen out in the areas of Route 77 and Black Point,



but I'll run anywhere. It's the best way to explore a new city or new place you are visiting because it slows down the way you see the world. At least at my pace!

What is it that you love about running?

All you need is a pair of shoes! That's what I love about running. It doesn't require that I actually make it to the gym on time. It can be social, such as a distance run at a conversational pace. It is like a two-for-one, running and catching up with a friend. I have friends now where our tradition is every Sunday we get together and we do our "long run." Depending on who's there, we will adjust the distances and speeds. We also alternate who cooks breakfast afterwards. It is a great way to incorporate exercise into your social life. You have good long conversations on a really long run that you just don't have time for otherwise.

How often do you run each week?

These days, I have transitioned into doing triathlons. Usually, I only run three days per week. I also try to fit in three bike rides, two swims and a strength-training session. My other hobby is that I love to cook. Hopefully they balance each other out!

Have you completed any marathons?

I have done four marathons, including one on my honeymoon! We went to Athens, Greece, for our honeymoon. It happened to be the 2500th anniversary of the original marathon, so I ran the Athens Marathon, while my husband ran the 10K race. This marathon was really enjoyable because, unlike the U.S., where more than 50% percent of marathoners are women, there was a very low percentage of female runners in Greece. I had a pink tank top on and, as I ran, I'd hear all these Greek women clapping for me. They would say "Go pink lady!! Go pink lady!!" It was great fun.

Beyond The Law features conversations with Maine lawyers who pursue unique interests or pastimes. Readers are invited to suggest candidates for Beyond The Law by contacting Dan Murphy at dmurphy@bernsteinshur.com.

It is amazing how [running] can decompress the dynamic of opposing counsel and litigation. It's a healthy way to spend time with somebody on a different level that makes you more civil and cooperative.

Any other memorable runs for you?
I have a brother who lives in Vienna, Austria. He asked me if I would train remotely with him for the marathon in Vienna and then travel there to run it together. I also have done races in Chicago and in Washington. They have all been great, but Athens was the most memorable because the finish line is located in the original Olympic stadium.

Are there ever some days where you do not feel a strong motivation to run?
Most mornings!

How do you push through in those situations?
The usual way for me is to just put on my shoes and go outside. I tell myself that if I still feel bad, I can just turn around and come home after 10 minutes. And I never turn around to come home. Because in the first 10 minutes, you've worked out the kinks, your brain is relaxing, and life is good. If you can get out the door, you're there!

Tell us about your involvement in the Rock Lobster Relay race.
Rock Lobster Relay! I was approached by a group of law students to participate. It's a 200-mile relay race from Bar Harbor to Portland. Most teams have 12 members. Each person is assigned three legs for the race and you cannot switch your legs. Our team took off at 6:30 a.m. on a Saturday morning and we reached Portland the next day around 3:00 p.m. The team ran for 33 hours, including through the night! My three legs were very enjoyable, so I cannot complain. But it is challenging because you are sleeping in the van, which is driving. Then the van drops you off and you run your leg, which is between four-to-nine miles per leg. You hope the van is at your end point when you are ready to hand off to the next runner, who hops out of the van. You just piggyback your way all the way down the line. It was a blast! We also raised some money for the Cumberland Legal Aid Clinic. I will be back in the van again this year and hope to raise more money.

Has there been any overlap between your legal world and your pastime of running?
Absolutely. When I was on the Board of Governors of the Maine State Bar Association, there were several of us at the meetings that would go out and run together. Also, there are a couple of times where I have had opposing counsel in tough cases and we will meet up and take a run. It is amazing how this can decompress the dynamic of opposing counsel and litigation. It's a healthy way to spend time with somebody on a different level that makes you more civil and cooperative. You see other lawyers in a different light when you do something outside of the law with them.

Also, a few years ago, a large group of lawyers started a running program inside of Long Creek Youth Development Center for incarcerated teenagers. I was involved with the startup of this program. We got permission to go in to start a running program. The program took incarcerated kids to run 5K races, Beach to Beacon, and the Maine half-marathon. We had all levels of runners, from good athletes all the way down to kids who were new to sports. The whole goal really was to focus on getting kids to develop what we call "Legal Leisure Time." This means finding a way to tap into a healthy community when you get out of the center. We tried to demonstrate that there are things you can do that are cheap and available in a healthy way. We also tried to give kids some mentors. When you are training and running a half marathon, there is a lot of conversation time. We did that for three years and it was a very successful program. I'm sorry that it doesn't exist anymore because it was extremely well received both within the facility and by the kids. In fact, I am still in touch with some of those kids! That's the most gratifying overlap between my legal life and running.

What's the best advice you have ever received?
The best advice I have ever received was from an older lawyer to a younger lawyer. That was to learn when to sit down and shut up. To this day, I will think of it when I am in a courtroom. Judge Peter Goranites also reminded me that you don't get bonus points for repetition.

DANIEL J. MURPHY *is a shareholder in Bernstein Shur's Business Law and Litigation Practice Groups, where his practice concentrates on business and commercial litigation matters.*

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"I have been accused of trespassing, but I can't help it -- I'm a free-range chicken."

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