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MAINE BAR JOURNAL

From the Executive Director | Angela P. Armstrong

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Change Starts With Us. Let's Lead By Example.

Big social problems can feel implacable. After all, what difference can any one of us really make in tackling national or global issues like climate change or income inequality? It is easy — too easy — to succumb to resignation in the face of such problems. I am here to suggest to you that there is one problem that you, as a Maine lawyer, can help solve.

For decades, law has been primarily the province of white men. That's for a wide variety of reasons, but it is not because white men are somehow inherently better at being lawyers. The historical arc that brings us to where we are today is important and interesting, but set that aside for a minute. Rather than talking about where fault lies, or who is complicit or innocent, let us focus right now on how we can shape the future. The key question is: What can and should each of us do to address this artificial imbalance? How can we increase the number of lawyers from historically underrepresented populations?

A note: when I talk about historically underrepresented populations, I am talking about people from all populations whose representation within the legal field is out of proportion to the population as a whole, including (but of course not limited to) people who are women, Black, LGBTQ+, Native American, or disabled.

I think we often forget how significant a role we have as lawyers in society. We wield enormous financial, persuasive, and social power. Lawyers have been influencers long before that term became a meme. With that power comes responsibility. We have the ability to shift society and the obligation to make good use of that ability.

Once we recognize that the current demographics are imbalanced, I submit that we have an obligation to take affirmative steps to address that problem. Each of us should be doing whatever we can to recruit members from historically underrepresented populations and make our profession welcoming to them. But, Kelly, I hear you say: What can I do? My heart's in the right place, but my days are already full and I'm not convinced anything I do will make a difference.

Here are some specific things that every one of us can do.

- Hire candidates from historically underrepresented populations to increase diversity. Don't allow "fit" to serve as an excuse to only hire people you are comfortable with.
- Make a point of referring potential clients to lawyers from historically underrepresented populations.
- When choosing a mediator, choose somebody from a historically underrepresented population.
- Consider ways in which the practice of law creates

obstacles for lawyers from historically underrepresented populations and work to remove them. For example, consider that women bear a disproportionate amount of the work in child-rearing, which creates tension with many of our "traditional" ways of practicing law. Acknowledge that our Black colleagues experience racism on a regular basis and learn more about what you can do to fight back against racism.

- Be an active bystander: intervene when you hear or see harmful language or actions.
- Recognize that we do not live in a society limited to two genders. In writing and speaking, strive to use genderneutral language. "He" is not gender-neutral.
- Take the time for self-examination, to understand our own biases and assumptions.

These ideas are just the tip of the iceberg, but they are a good start. Remember that it is not enough to simply say that we welcome lawyers from historically underrepresented populations. We must take affirmative steps, such as those set forth above, to truly make our profession one in which members of historically underrepresented populations would want to work.

Some might say that affirmatively choosing members of historically underrepresented populations over others is unfair. That is too narrow a focus. I have purposely defined a historically underrepresented population in an objective manner, as a group that is not proportionately represented within the bar. History has weighed the scales against members of historically underrepresented populations, as evidenced by the demographics of the bar. In affirmatively making more of an effort to choose members of historically underrepresented populations, we are simply adding counterweights to those imbalanced scales to offset the forces of history.

We have made great strides over the years and decades to address inequality. That struggle is not over. Only Maine lawyers – that's us – have the power to make the Maine legal community more accessible to all comers. I invite each of you to consider what steps you will take to make a difference.

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ANGELA P. ARMSTRONG is the Maine State Bar Association's executive director. She can be reached at aarmstrong@mainebar.org.

Guidelines of Professional Conduct Bring Collegiality to the Bar

I hope you are getting the opportunity to take some much-needed and well-deserved time off from Zoom meetings, and enjoying time with your community, family, and friends. As I have done with my previous two columns this year, I'm keeping with President Kelly McDonald's theme of the values of belonging to your MSBA community. Part three of those values is helping attorneys be more collegial. We are lucky that the Maine Bar is known for its collegiality—for working together, respecting the opposing argument, and keeping things professional, despite representing clients with differing interests.

The MSBA provides numerous services and opportunities that result in a more collegial and understanding bar:

- Ethics CLE seminars
- CLE seminars related to harassment and discrimination
- Silent Partners Program
- MEBarConnect
- Participation in Well-Being Week in Law, which includes a social well-being component
- Articles and wellness tips in the Maine Bar Journal and The Supplement throughout the year
- Networking events and programs through Zoom and, hopefully, back in person this fall

Originally adopted by the Board of Governors on March 1, 2012, and updated in 2018, the MSBA's Guidelines of Professional Conduct acknowledge a commitment to the highest standards of conduct for Maine attorneys, and serve as a reminder to both attorneys and their clients that the pursuit of justice is achieved through respectful civil discourse. These Guidelines are posted in all the courthouses across the State of Maine.

- 1. A lawyer should act with candor, diligence and utmost respect.
- 2. A lawyer should act with courtesy and cooperation, which are necessary for the efficient administration of our system of laws.
- 3. A lawyer should act with personal dignity and professional integrity.
- 4. Lawyers should treat each other, their clients, opposing parties, the courts, and members of the public with courtesy and civility and conduct themselves in a professional manner at all times.
- 5. A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and parties in a professional manner.
- 6. In adversary proceedings, although ill feelings may exist between clients, such ill feelings should not influence a lawyer's conduct, attitude, or demeanor

towards opposing lawyers or parties.

- 7. A lawyer should not harass opposing counsel or counsel's client.
- 8. Lawyers should be punctual in communications with others and in honoring scheduled appearances. Neglect and tardiness are demeaning to fellow lawyers and to the legal system.
- 9. If a fellow attorney makes a reasonable request for cooperation, or seeks a reasonable scheduling accommodation, a lawyer shall not arbitrarily or unreasonably withhold consent.

The Guidelines are also featured prominently throughout Bar Headquarters to remind visitors and staff alike that we all benefit when we exercise civil discourse. I hope you'll join me in promoting these guidelines in your daily interactions.

As always, please contact me by phone at (207) 622-7523 or by email (aarmstrong@mainebar.org) with any ideas or concerns about the Maine State Bar Association. Thank you!

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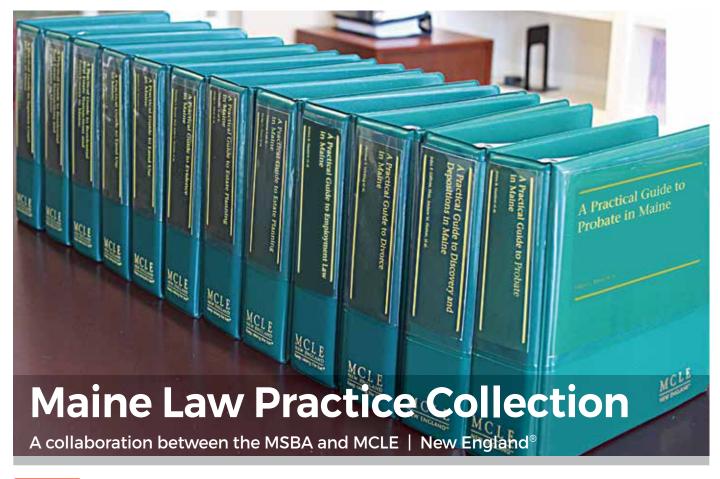
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Cross-Appeals in Maine: Making Sense of the Law

Recent decisions by the Law Court have raised questions concerning whether a litigant must file a notice of cross-appeal merely to argue a judgment should be affirmed based on grounds alternative to those adopted by the trial court. Maine Rule of Appellate Procedure 2C, Law Court precedent, and analogous federal practice all confirm that an appellee urging affirmance of a judgment on alternative grounds need not file a notice of cross-appeal so long as that litigant does not seek a substantive alteration in the terms of the judgment. Nevertheless, the Law Court recently created doubt on this issue by refusing to consider arguments for affirmance on alternative grounds where the appellee failed to file a notice of cross appeal. This article reviews the relevant cross-appeal rules and jurisprudence, discusses the Law Court cases that have called into question what appeared to be settled law, and urges the Law Court to clarify the law in this area as soon as possible.

The Basic Framework

A litigant may obtain Law Court review of an adverse judgment by filing a notice of appeal pursuant to Maine Rule of Appellate Procedure 2A. This simple step implicates a foundational principle of appellate review: appellate courts review lower court *judgments*, *mandates*, *decrees* or *orders*, not lower court *opinions* or *reasoning*. A litigant who does not seek any alteration to the substance of a lower court judgment may not appeal simply because the litigant does not like the trial court's reasoning. Such a litigant lacks standing because he or she has not been adversely affected by the judgment. Conversely, a party who obtains a judgment in his or her favor nevertheless *may* appeal that judgment if the party seeks to enlarge his or her rights under the judgment.

But what of the litigant who obtains a judgment and simply wishes to argue it should be affirmed without change? Such a litigant may, of course, urge the affirmance of the judgment on the precise grounds adopted by the trial court or, following a jury trial, on grounds that the evidence introduced at trial

sufficed to support the jury's verdict. Circumstances may arise, however, where a litigant who has obtained a judgment in his or her favor may seek to affirm that judgment on grounds not adopted or even expressly rejected by the trial court. Imagine, for instance, a defendant who moves to dismiss a single-count complaint on two dispositive grounds, only one of which the trial court reaches in dismissing the claim. Or imagine a defendant who prevails on a motion for summary judgment on one ground, even while the court rejects an alternative ground for summary judgment.

In Maine, Appellate Rule 2C(a)(1) addresses this issue clearly as follows (with emphasis added):

If the appellee seeks any change in the judgment that is on appeal, the appellee must file a cross-appeal to preserve that issue. The notice of cross-appeal shall be filed with the clerk of the trial court from which the appeal is taken, and shall be processed in the same manner as a notice of appeal filed pursuant to Rule 2A(b) (1). An appellee may, without filing a cross-appeal, argue that alternative grounds support the judgment that is on appeal.

The Law Court adopted Rule 2C(a) in the June 2017 revision to the Rules of Appellate procedure. The Advisory Committee's notes confirm the plain meaning of the Rule, explaining that "a cross appeal must be filed" only "if a change in the judgment is sought." The Committee observed, as discussed further below, that the Law Court historically has not "required an appellee to file a cross-appeal to preserve an argument that the judgment should be affirmed but simply contends that the same result should have been reached on alternative grounds." 6

Although there is no analogous rule in the Federal Rules of Appellate Procedure, the same precept was adopted federally by the Supreme Court in 1924 in an opinion authored by Justice Louis Brandeis and affirmed in 2015 in an opinion authored by Justice Antonin Scalia. Some federal courts of appeals have applied the rule not only by allowing appellees to urge alternative grounds for affirmance of a judgment but also by dismissing as unnecessary cross-appeals filed solely to preserve the right to make such arguments. Accordingly, appellees in federal court may advocate for affirmance on grounds not considered or even rejected below, so long as the appellee seeks no change to the terms of the judgment. Although the question of whether an appellee seeks a change in the judgment may become a murky question in unusual circumstances, there is nevertheless no ambiguity at the federal level that a cross-appeal is not required to urge affirmance of a judgment on alternative grounds. Although the question of a judgment on alternative grounds.

Undoubtedly, the basis for both the Maine and the federal rule owes much to the standing principle discussed above: if an appellant cannot obtain review where he or she does not seek to alter the terms of a judgment, then it follows there should be no requirement that an appellee, who similarly seeks no alteration in the judgment, file a notice of cross-appeal.

Recent Law Court Cases - Cross Appeal or No?

Prior to the adoption of Rule 2C(a)(1) in 2017, there were two incompatible strands of Law Court precedent regarding the necessity of cross appealing to preserve an alternative argument. The Rule's 2017 amendment was intended to resolve, and should have resolved, the conflict arising from the two strands of case law.

The first strand, expressly endorsed in the Advisory Committee's notes to the 2017 amendment and exemplified by Scott Dugas Trucking & Excavating, Inc. v. Homeplace Bldg. & Remodeling, Inc. ¹¹ and Harris v. Woodlands Club, ¹² holds that there is no need to cross-appeal to preserve an alternative argument. In Scott Dugas, the Superior Court granted the defendant's motion to dismiss trustee process even while

rejecting the defendant's argument that the plaintiff untimely served the trustee process.¹³ Plaintiff appealed; the defendant did not cross-appeal. The Law Court held that "defendants need not file notice of a cross appeal in order to raise the timely service issue on appeal" because it was an "alternative ground" to defend the judgment. 14 Harris also reflects this rule. In that case, plaintiffs appealed the Superior Court's judgment denying their common law trespass claim. The defendant cross-appealed a portion of the Superior Court's "reasoning supporting its conclusion that no common law trespass occurred."15 The Law Court explained that, when "an appellee has prevailed in the forum from which a case is appealed, the appellee need not cross-appeal if it argues in favor of affirming the decision in every respect but simply contends that the same result should have been reached through different legal reasoning."16

The second strand, reflected in *Langevin v. Allstate Ins. Co.*¹⁷ and *Maine Today Media, Inc. v. State*, ¹⁸ took a contradictory approach. In *Langevin*, the Superior Court granted summary judgment for the defendant, even while rejecting the defendant's argument that an insurance policy contract exclusion applied. ¹⁹ After the plaintiff appealed, the Law Court refused to reach the contractual exclusion argument because the defendant "did not file a cross-appeal" and therefore "failed to preserve its argument." ²⁰ Likewise, in *Maine Today Media*, the Law Court found that the defendant did not "preserve[] for appellate review" two arguments that the Superior Court had rejected below even while entering judgment for the defendant, because the defendant "did not appeal those portions of the court's decision." ²¹

The 2017 amendment should have sufficed to resolve these conflicting decisions, and the Law Court's 2018 decision in *Argereow v. Weisberg* seemed to confirm that it had.²² In that case, the Superior Court granted a motion to dismiss while accepting some but not all of the defendant's arguments;

after the plaintiff appealed, the defendant filed a cross-appeal to preserve its alternative arguments. Recognizing the defendant's "desire to be cautious" in light of *Maine Today Media* and *Langevin*, the Court expressly stated that the "cross-appeal was unnecessary" and "clarif[ied]" that the *Harris* rule controlled.²³ Unfortunately, this short-lived clarity ended with Law Court decisions in two recent challenges to decisions by the Secretary of State validating signatures gathered in support of a citizen initiative and people's veto: *Reed v. Secretary of State*²⁴ and *Jones v. Secretary of State*.²⁵

In Reed, a Rule 80C petitioner challenged the Secretary's determination that proponents of an initiative had gathered enough signatures to place the initiative on the ballot, while the initiative proponents intervened to defend the Secretary's decision. The Superior Court rejected the challenge and affirmed the Secretary's decision, while declining to reach the intervenors' argument that the Secretary should not have stricken certain signatures based on statutes that intervenors contended were unconstitutional.²⁶ The Superior Court's decision not to reach the intervenors' argument was appropriate as, having sustained the Secretary's decision that the petition had received the constitutionally-required minimum number of signatures, there was no need to rule on arguments that sought only to add to the signature total. The petitioner appealed and no party filed any cross-appeal. The Law Court affirmed the Superior Court's judgment but declined to reach intervenors' renewed constitutional argument. Although the Law Court could have followed the approach of the Superior Court by finding the intervenors' argument to be moot, it nevertheless rejected the argument because "none of the parties who appealed" had raised the argument.²⁷ In other words, the intervenors' failure to crossappeal foreclosed consideration of their argument.

In *Jones*, the Superior Court entered judgment for a Rule 80C petitioner in another signature challenge, this time reversing the Secretary's determination even though it rejected some of petitioner's arguments.²⁸ After the Secretary appealed, the Law Court reversed while refusing to "entertain [petitioner]'s argument that the Superior Court erred" in affirming the validity of certain signatures because he "did not file a cross-appeal and therefore cannot raise claims of error."²⁹ Once again, a litigant who prevailed in the Superior Court was foreclosed from advancing alternative grounds to affirm the judgment because he failed to cross-appeal.

Reed and Jones thus put the issue of cross-appeals back in limbo, and are wrongly decided. Notably, neither decision cites Rule 2C(a)(1). Instead, both cases rely on Johnson v. Home Depot USA, Inc., 30 but misread it. In Johnson, the Law Court found that the appellee had waived its rights for failure to cross-appeal because it was seeking to modify a judgment—a classic situation where a cross-appeal is necessary. 31 But neither appellee in Reed

or *Jones* sought to modify a judgment; each asked only for affirmance on alternative grounds. After the 2017 amendment and *Argereow*, it should have been clear that there is no need to cross-appeal to preserve such arguments. Instead, the rule applied in *Maine Today Media* and *Langevin* has risen like a phoenix from the ashes.

Legal and Practical Problems from the Law Court's Precedent in Reed and Jones

The rule espoused in *Reed* and *Jones* raises a number of legal problems. First, it conflicts with the text of Rule 2C and the Advisory Committee notes. Second, by ignoring *Argereow*, *Reed* and *Jones* resurrect the conflict between the *Harris* and *Scott Dugas* line of cases and the *Maine Today Media* and *Langevin* line of cases. Third, the rule in *Reed* and *Jones* creates tension with the foundational principle discussed above: there is no standing to appeal absent some injury from the judgment. ³² Accordingly, if an individual is not aggrieved by a judgment, it is questionable whether a cross-appeal is even permissible, much less required. Indeed, as noted, federal courts of appeals will dismiss cross-appeals filed in these circumstances because they are unnecessary. Neither *Reed* nor *Jones* grapples with these legal issues.

Reed and Jones do not simply raise legal problems, serious as they are; instead, they also create practical problems by complicating appellate procedure. Most notably, the requirement to crossappeal to preserve an argument raises questions about the notice of appeal. When one is cross-appealing an aspect of a judgment, it is relatively straightforward to identify the aspect of the judgment being appealed. But how does one adequately specify an "issue" or an "argument" that is being cross-appealed? Moreover, because the filing of a cross-appeal increases the permissible length of briefs under Rule 7A(f)(1), increasing the frequency of cross-appeals will lead to more extensive briefing. Such a result should not be encouraged, given the increased litigation costs and burden on the Court.

Finally, as the law now stands, it is less than clear what the cross-appeal rule is. Rule 2C and *Argereow* say one thing, while *Reed* and *Jones* say another. This lack of clarity creates potential malpractice exposure to the litigator who does not cross-appeal. Unfortunately, the safest practice, until the Law Court addresses the issue, is to cross-appeal to preserve alternative arguments, specifying those alternative arguments as best one can.

Conclusion

Because the cross-appeal rule set forth in *Reed* and *Jones* is legally unsound and practically problematic, both cases (along with the *Maine Today Media* and *Langevin* line of cases) should be overruled expressly. The Law Court should take the next available opportunity to clarify its cross-appeal jurisprudence and reaffirm the plain terms of Rule 2C.

ENDNOTES

1 Jennings v. Stephens, 574 U.S. 271, 277 (2015) ("This Court ... does not review lower courts' opinions, but their judgments.") (emphasis in original).

2 In re Johnna M., 2006 ME 46, ¶ 7, 903 A.2d

3 Me. Cent. R.R. v. Dep't of Transp., 2005 ME 1, ¶ 5, 863 A.2d 278.

4 Cianchette v. Cianchette, 2020 ME 101, 237 A.3d 210 (cross-appeal to challenge postjudgment interest calculation).

5 M.R. App. P. 2C restyling notes, June 2017, Me. Judicial Branch website/Rules & Administrative Orders/Rules (last visited April 10, 2021).

6 *Id*.

7 United States v. Am. Ry. Express Co., 265 U.S. 425 (1924); Jennings v. Stephens, 574 U.S. 271 (2015).

8 Cooper Indus., Ltd. v. Nat'l Union Fire Ins. Co., 876 F.3d 119, 126-27 (5th Cir. 2017).

9 Vanda Pharms. Inc. v. West-Ward Pharms. Int'l Ltd., 887 F.3d 1117, 1139 (Fed. Cir. 2018).

10 15A Wright, Miller & Cooper, Federal Practice and Procedure § 3904 (2d ed. 2020).

11 651 A.2d 327 (Me. 1994).

12 2012 ME 117, 55 A.3d 449.

13 Scott Dugas, 651 A.2d at 328.

14 *Id.* at 329.

15 Harris, 2012 ME 117, ¶ 16 & n.8.

17 2013 ME 55, 66 A.3d 585.

18 2013 ME 100, 82 A.3d 104.

19 Langevin, 2013 ME 55, ¶ 6 & n.4.

20 Id.

21 Maine Today Media, 2013 ME 100, ¶ 28 n.17.

22 2018 ME 140, 195 A.3d 1210.

23 Id. ¶ 11 n.4.

24 2020 ME 57, 232 A.3d 202.

25 2020 ME 113, 238 A.3d 982.

26 The Superior Court opinion does not mention these arguments, although they were briefed. See Reed v. Sec'y of State, No. BCD-AP-20-02, 2020 WL 2106818 (Apr. 13, 2020).

27 Reed, 2020 ME 57, ¶ 12 & n.11 (emphasis added).

28 Jones, 2020 ME 113, ¶ 1 n.1.

29 Id.

30 2014 ME 140, 106 A.3d 401.

31 *Id.* ¶¶ 4-5 & n.1 (citing authority).

32 Adoption of Paisley, 2018 ME 19, ¶¶ 23-24, 178 A.3d 1228.



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FEATURE | AMY WOOD



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There is no question you could use a vacation. Problem is you can't take a vacation right now. You have clients to deal with, meetings to attend, billable hours to log – and you can't possibly leave your job with so much happening.

Until you can find time to really break away, the solution is to escape in small doses – we're talking five minutes or less – right where you are at work. Even if you're smack in the middle of your busiest workday ever, a creative little respite can wake you up, spark fresh ideas, and fuel your productivity.

Here are some mini vacations you can enjoy on the job – all designed to do what real vacations do: refresh and revitalize you so that you can come back to your work with renewed energy and enthusiasm:

- 1. **GO OUTSIDE**. Research shows that just a minute or so in fresh air, especially in sunshine, can boost your mood. There's something about looking up at the sky, taking in the splendor of trees and flowers, feeling even a slight breeze on your skin, that grounds and uplifts us. The more nature you can expose yourself to the better, but stepping out into an urban atmosphere will also do the trick.
- 2. **WATCH SOMETHING FUNNY.** One of the most efficient ways to transport yourself out of workplace drudgery is to get yourself laughing. YouTube is your "go to" place for amusing animal videos, scientifically proven to lighten things up. Clips of your favorite comedians, outtakes from your favorite sitcoms, whatever whacky stuff you're into it all takes the edge off.
- 3. **MOVE YOURSELF WITH MUSIC.** The right rhythm can rouse you, inspire you, and encourage new ideas. So keep a playlist of your favorite "feel good" songs handy on your phone, and put your earphones in and listen when you need an invigorating time-out.



- 4. **SEND A THANK YOU TEXT OR EMAIL.** A sure way to unplug from your work routine is to put your attention on someone else, particularly someone who has brightened your life in some way. Reaching out with a simple, unexpected message of gratitude I feel lucky to have you as my friend, thanks for being so much fun to hang out with, that sort of thing will bring levity to you and your recipient.
- 5. **STRETCH**. Especially if you do a lot of sitting at work, getting out of your chair and moving a bit can revitalize your body, mood and mind. Simply stand up, reach your arms above you, interlock your fingers and turn your palms toward the ceiling. Now take a deep breath, exhale, repeat. Doing this whenever you feel sluggish will keep you stimulated throughout the day.

TALK TO SOMEONE ABOUT SOMETHING OTHER THAN WORK.

Though it seems contradictory, walking away from your desk and seeking out a colleague – or, if you're working remotely, calling a friend just to chat – will make you more productive. Real conversation, as opposed to emailing and texting, injects connection and fun into your workday – both of which improve the quality of your work.

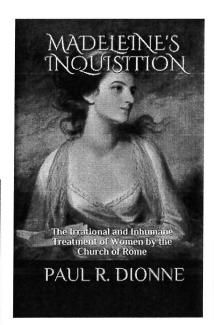
- 7. **TAKE A SHORT WALK**. A brief stroll around the office or, better yet, outdoors, increases your blood flow and gives you a change of scenery both of which make you more alert and creative and better able to solve problems upon your return to work.
- 8. **APPRECIATE**. It's a scientific fact that people can't think or feel anything negative when placing their focus on that for which they're grateful. This means that if you want to airlift yourself right out of a low mood at work, all you



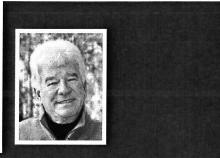
have to do is make a list of what you appreciate. About your job, about yourself, about your boss, about your office – the categories are endless. Even if you hate where you work, you'll be able to think of something (your paycheck, the experience you're gaining, the resilience you're building, the cool coffee place down the street) to appreciate, and pretty soon you'll have a fresh, optimistic perspective to bring back to your work.

VISUALIZE YOUR PERFECT VACATION.

Probably the easiest way to escape where you are is to sit back in your desk chair, relax, close your eyes, and conjure up where you'd be right now if you could go on a real vacation. Imagine a place where you can totally immerse yourself in the moment, unwind, and truly forget about your troubles. Where are you? What sounds do you hear? What's the temperature? Who is with you? What colors are most vivid? The more fully you picture the setting, the more deeply you can retreat into it, and the more you will feel like you've benefitted from your inner journey. And the biggest benefit of this one? The more you rehearse your ideal vacation in your mind, the more likely it is to happen.



A New Novel by Paul Dionne



About the book:

Madeleine Moreau, poverty stricken and alone, struggles to provide for herself and her children, her future bleak, foreboding and empty. She draws strength in her darkest hour when the Monsignor of Paris charges her with witchcraft and threatens to tear her family apart. The novel follows the lives of Madeleine Moreau and her antagonist, the Monsignor of Paris... Marc Moreau, Madeleine's husband, and his journey home from Russia following Napoleon's defeat... Madame Leblanc and her disavowal of aristocracy for the cause of liberty... Michel Bois, a popular French sculptor, who forsakes Madeleine for the salvation of France... and the two young priests, whose lives are changed by the chronicles of witchcraft, the vestiges of the Inquisition

and the inhumane treatment of women by the Church – bringing them

to moral crossroads where each must choose his or her own destiny.

Influenced by the enlightened philosophers of the times, these characters uncover the bigotry of the Church, suffer religious persecution and experience the horrors of war.

${\it Background:}$

As an avocation, for over twenty years, the author has researched the role of women in the Early Church and the scandal of their subordination in the rise of Christianity. This resulted in his first work entitled *The Priestess and the Pope*.

Madeleine's Inquisition, a sequel, bolsters the already persuasive case of the leadership role of women and sets forth the injustice, superstition and the inhumanity of the Church towards women.

As a decorated combat veteran, the author felt compelled to deal with the horrors and the aftermath of war in an era plagued by constant wars.

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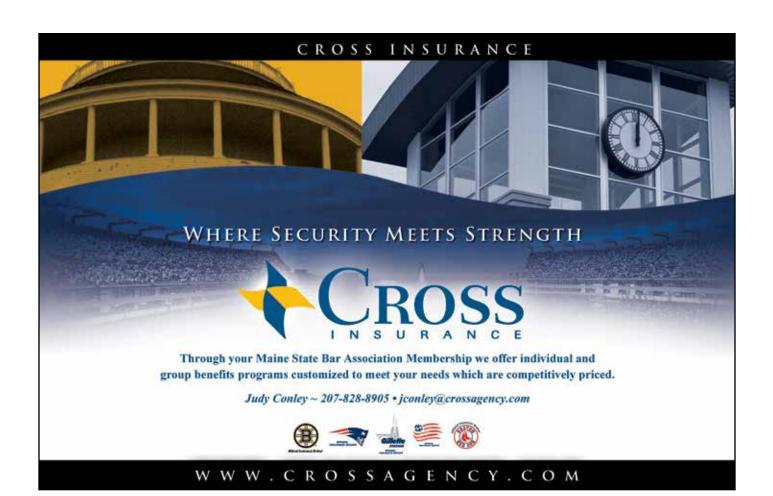
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The Protection from Abuse Statute Should Be Protected

January 25, 2021, saw Maine's first domestic violence homicide of the year, a murder suicide in New Sharon.² On March 10, 2021, a domestic violence incident resulted in a hostage standoff in Livermore Falls.³ March 27, 2021, brought news of a murder of a woman in York Beach; the father of her child has been arrested.4 Every year, approximately half of the homicides in Maine are the result of domestic violence.⁵ One quarter of the children in foster care cannot return home due to domestic violence risk factors.6 One in four women is likely to experience physical abuse, sexual abuse, or stalking from her partner in her lifetime.⁷ These figures are even higher for Black and Indigenous women and women of color. Black women face disproportionally high rates of intimate partner violence, rape, and homicide.8 More than half of Indigenous women have experienced sexual violence and/or domestic violence, and Indigenous women are more than ten times as likely as non-Indigenous women to be the victim of homicide.9 Those women are our sisters, mothers, daughters, and friends.

Attorney Elliott Epstein's article in winter edition of the *Maine Bar Journal* (Vol. 36, No. 1) advocates for changes to the Protection from Abuse (PFA) statute. ¹⁰ In Epstein's view, the statute imposes an unreasonable burden upon defendants and incentivizes false claims by plaintiffs. He sees a "phenomenon" of misuse of the PFA statute by plaintiffs that is so widespread that, he argues, many current statutory remedies for victims of domestic violence should be eliminated, and the burden of proof for a plaintiff to prove domestic abuse should be increased. The article features anecdotal complaints about the PFA statute but does not address the research that debunks claims of systemic misuse and does not acknowledge the reports and studies that have prompted the continued progression of Maine's domestic violence laws. While these anecdotal concerns

may reflect the perceptions of certain PFA defendants, they are not a reasonable basis for drawing the conclusion that sweeping reforms are needed to Maine's carefully crafted PFA statute. The article leaves the impression that the protection from abuse system is replete with false accusations, innocuous behavior being mischaracterized as abuse, and inappropriate relief being granted to plaintiffs without regard to its impact on defendants. That is not an accurate account of how the PFA statute operates and fails to appreciate the very real and intentional role the PFA statute plays in addressing the epidemic of domestic violence in Maine.¹¹

This is not the first time Maine's legal profession has had this discussion. An article in the Spring 2011 edition of the Maine Bar Journal called for further restrictions on the ability of a plaintiff to obtain a protection order, such as raising the standard of proof to clear and convincing evidence.¹² Then, as now, the evidence offered in support of the proposed changes to the PFA statute was anecdotal. A response published in the Bar Journal that same year pointed out that in fact a comprehensive study of the protection from abuse process in the Maine courts had found no systemic misuse of the PFA process.¹³ The Maine Commission on Domestic and Sexual Abuse reported to the legislature in 2010, after conducting a study that included stakeholders from a variety of fields, including the Maine Association of Criminal Defense Lawyers, that "[t]here is no evidence that indicates widespread abuse of the protection from abuse system by malicious use by plaintiffs or retaliatory use by perpetrators."14 There is no reason to believe that the answer to the question of whether there is systemic misuse of the PFA statute has changed or that the reasons for the many enhancements to the PFA statute are no longer valid.



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There Is No Credible Evidence of Systemic Misuse Resulting in Unfair Outcomes for Defendants

The main purpose of the protection from abuse process is to provide expeditious and effective protection against further abuse. 15 As with any process that offers an opportunity for ex parte relief, there is the potential for mischief. 16 But the suggestion that there is systematic misuse by applicants is not only explicitly contradicted by the study on this issue as reported to the legislature in 2010, it is also not supported by the experience of the professionals who work within this system, including those who are best positioned to offer valuable perspective on these issues - Maine's judicial officers. The 2010 study included a survey of Maine's judicial officers, who responded that malicious use by plaintiff "occurred rarely," and when it did, it could be dealt with by the use of existing sanctions, which are discussed in greater detail below.¹⁷ It is also important to note that judges have the discretion to decline to issue an order where they find there is no need for protection, even when the defendant's actions technically fit within the statutory definition of abuse. The article gives the mistaken impression that the court plays no role in determining whether an order should issue, and that judges' hands are tied with respect to the remedies to which the plaintiff may be entitled. In fact, the PFA statute is structured in such a way that all available relief is discretionary; there is not a single remedy available in the PFA statute to which a plaintiff is automatically entitled upon a finding that a defendant has committed abuse or other qualifying conduct.

"The Protection from Abuse Statute Should Be Protected from Abuse" offers a series of hypotheticals that are disconnected from the reality of why plaintiffs seek protection from Maine courts. In the collective experience of the authors of and contributors to this article, who have worked on thousands of protection cases over the past ten years, no one has ever obtained a PFA order based on "profanity-laced curses" or "strong lifestyle disagreements or personality differences," as the March article suggests. 18 Plaintiffs do not get orders "on the basis of behavior that may be inappropriate, but it is not abusive."19 Nor do they get orders simply because their abusers are trying to "impose fiscal discipline on a shopaholic spouse," unless that "discipline" includes violence or threats of violence.²⁰ By creating the impression that the abusers are just misunderstood regular guys who are being victimized by vindictive women, the article mischaracterizes the problem of domestic abuse and obscures the real need for victims of violence to obtain protection from further harm. The article also downplays the discretion courts have to determine the merit of protection from abuse claims and to reject non-meritorious claims.

The 130th Maine Legislature recently considered the question of whether there is systemic misuse of the PFA statute again. A 2021 bill was brought forward on behalf of a PFA defendant whose personal experience with the PFA system made him

feel that reforms were needed to the protection from abuse system. The legislature considered whether there was a need to further study the issue of whether there was systemic misuse of the PFA process. ²¹ The Joint Standing Committee on Judiciary unanimously voted down that suggestion. As part of that process, the Governor's Office testified that: "[t]he protection order process is critical in saving lives in Maine and the proper avenue to address 'misuse' is through the judicial process, not a study."²² The Maine Judicial Branch also responded to the bill's request for a study and concluded that the appropriate recourse for any alleged misuse is the judicial process. ²³

Sufficient Protections Already Exist Against Misuse of the Protection From Abuse Process

Existing statutory protections and the judicial process itself are adequate to address misuse of the PFA statute when it does occur. Some of these statutory and process protections warrant highlighting as part of any conversation about the "fairness of the statutory scheme." First, judges have discretion to address the unique facts and circumstances of each case and can tailor any relief to those individual circumstances. Second, litigants have the right to appeal the court's decision to directly challenge any process or application of the statute that the claimant believes was unfair, unjust, or unwarranted. Third, issues of parental rights and responsibilities must be determined *de novo* in a subsequent family matter case.²⁴ Finally, recognizing the summary nature of the proceeding, the protection from abuse process can only temporarily allocate parental rights and property between the parties.

Added to those are several other protections that are also designed to safeguard the rights of defendants and ensure integrity of the process. Every applicant is required to file a separate affidavit that attests to their understanding that filing a false statement in a protection from abuse case constitutes perjury and can be prosecuted as a crime.²⁵ Each complaint is reviewed by a judge for sufficiency of the pleadings to establish a prima facie case before a temporary order is issued. The cases are scheduled to come before the court within three weeks of any temporary order being issued, and often the final hearing takes place much sooner. There is also a process by which defendants may file a motion to dissolve a temporary order, which is then scheduled to be heard within two days. The defendant's attorney's fees and court costs can be assessed against a plaintiff who has been found to have filed a frivolous complaint.26 Additionally, filing a frivolous petition for the purpose of obtaining a "tactical advantage" in a family court case can result in an explicit finding that can be used by the defendant against the applicant in family court.27

It is also important to note that a plaintiff's inability to successfully prove allegations asserted in a PFA complaint does not necessarily mean that the allegations were false or malicious. Neither does the filing of a complaint that does not actual-

ly meet the eligibility requirements of the statute constitute evidence of malice or misuse of the process. The overwhelming majority of complaints are filed by *pro se* litigants without the benefit of legal counsel. Our courts are well positioned to evaluate whether a particular applicant has filed false allegations and should be held accountable for having done so under existing laws, or whether an applicant simply failed to meet their burden of proof to support the issuance of a final order.

Evidence-Based Research, Multi-Disciplinary Studies, and Case Reviews Have Supported and Continue to Support the Progression of Maine's PFA Statute

Reports of the Maine Commission on Domestic and Sexual Abuse, the Maine Homicide Review Panel, and other groups (many of which are cited herein), have long identified the most pressing needs related to domestic abuse, and continue to offer extensive, detailed recommendations for how best to address those needs. These recommendations include:

- Enhancing systemic supports²⁸ for those impacted by domestic violence
- Funding and providing ongoing training
- Using validated risk assessment tools
- Achieving greater consistency in referrals to the Child Protective system
- Funding early childhood intervention
- Creating multi-lingual and multicultural resources
- Multi-system training on non-fatal strangulation
- Access to legal services
- Training on domestic violence for Guardians ad Litem ("GALs") and judges
- Increasing funding for experts and GALs in domestic violence cases
- Supporting supervised visit and exchange centers
- Coordinating the relinquishment of firearms²⁹

Importantly, the various reports and studies on domestic abuse and violence in Maine call for increased access, remedies and education to help ameliorate the impact of domestic abuse and violence on individuals and within our community at large. And none of them identify the issue of systemic misuse of the protection from abuse system as a pressing problem that needs to be addressed. This includes the reports of the entity statutorily charged with advising the executive, legislative, and judicial branches of Maine's government regarding issues of domestic and sexual abuse.³⁰

Maine's Legal Community Could Look to Existing Recommendations to Identify Other Pressing Needs

The following steps could immediately be taken to enhance Maine's civil justice response to domestic abuse and violence.

► Training for Courts and Court Related Professionals

In 2019, a multi-year study on custody outcomes concluded that women who allege domestic abuse and violence in family court lose custody to their alleged abuser at disproportionately higher rates than women who do not.³¹ This includes cases where the court found the abuse allegations to be credible, yet custody was awarded to the abuser. The study's data indicate widespread gender bias in courts' handling of abuse claims – but in the opposite direction from what Epstein suggests. The report recommends extensive training for courts and affiliated professionals.³² Several multi-disciplinary reports issued here in Maine over the last few decades have similarly noted insufficient training for guardians *ad litem*, judges, and other court-related personnel.³³ Coordinated, sustained training for these professionals will require prioritized resources.

► A Clearer and More Expedient Path for Parents to Protect At-Risk and Neglected Children

Maine does not have a process for a concerned parent to seek emergency custody of their children when the other parent has neglected the children or put them in danger, but their behavior does not yet rise to the level of "abuse" as defined in the protection from abuse statute. As the Abuse Commission's 2010 report indicates, any "misuse" of the protection from abuse process is related to this critical gap in our family court system. The 2010 report also notes that our family courts are under-resourced and, as a result, are unable to provide timely responses to the interim needs of families who are navigating the process of separating. Either of these two pathways, a process for emergency custody or better resourcing of the family courts, could help redirect any improper PFA filings to an appropriate place.

► Continued Focus on Ensuring a Path for Economic Stability Post-Separation

As noted in "The Protection from Abuse Process Should Be Protected From Abuse," in 2019, in response to "A Report on the Impact of Economic Abuse on Survivors of Domestic Violence in Maine,"36 Maine's 129th Legislature codified a definition of "economic abuse" in Maine's PFA statute and expanded the short-term financial relief available to survivors through this process.³⁷ The data from this report demonstrates that survivors are in need of more economic supports offered as remedies in the PFA statute, not less.³⁸ In the study reviewed by the legislature, 81 percent of survivors reported that economic abuse acted as a barrier to their separating from the person abusing them. A full 85 percent of survivors with children reported that economic abuse impaired their ability to provide for their children's basic needs. A majority of survivors reported long-term impacts on employability, housing, credit and debt. The list goes on. There is undeniably a clear reciprocal relationship between domestic violence and economic instability - abuse creates economic instability. In turn, econom-

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ic instability reduces the safe options for survivors and makes them more vulnerable to continued violence and isolation. This is precisely why the legislature has long supported, as a core purpose of the protection from abuse process, addressing related issues of economics to ensure that victims are not trapped in abusive situations by fear of financial dependence.³⁹ The breadth of the remedies available through the PFA process, with which the Epstein article takes particular umbrage, is intentional, has been supported by studies and reports such as this economic abuse report, and is necessary to effectuate the statute's purpose.

Decisions Must Be Based on Data

In 2020, according to the Maine Judicial Branch, 5,233 complaints for protection from abuse were filed in Maine's district courts. In those cases, 4,637 temporary orders were issued (89 percent of complaints filed), and 2,294 final orders were issued (44 percent of complaints filed). 40 Judges reviewing these complaints are clearly screening them carefully, and not, as the March article suggests, approving them like an "automotive assembly line." ⁴¹ During that same time period (2020), more than 12,000 survivors of domestic abuse and violence reached out for help through Maine's domestic violence resource centers. 42 Many survivors don't or can't reach out for years, as they have told researchers, domestic violence advocates, and resource centers again and again. As a result, this figure underestimates how many in our state are being abused. Based on data from the Maine Prosecutors Association, there are approximately 4,000 defendants charged each year in our criminal courts with having committed crimes against a family or household member. 43 On average, according to Bureau of Justice Statistics and surveys by the National Domestic Violence Hotline, only about half of all victims of domestic abuse and violence will reach out for criminal justice system intervention.44

"The Protection from Abuse Process Should Be Protected From Abuse" suggests that the PFA process unfairly holds to account those who (the article claims) have unjustly been found to have perpetrated abuse and violence against their families. This flies in the face of existing data and Maine's legislative policies created in response to domestic abuse and violence in Maine. The facts simply do not support this argument of misuse of the processes by applicants in practice.

Domestic violence is a real problem in Maine, as it is throughout the country. The data indicate that our courts see only the tip of the iceberg. Given the role of domestic abuse and violence as a driver of crime and homicide in Maine, not to mention the consequences that ripple through our children's lives, the real need is for *more* safety and support for survivors and their children, not greater protections for the accused. Most acts of domestic abuse and violence have no outside witnesses, and evidence can be difficult to obtain. But that does not diminish the validity of survivors' claims and should not prevent our courts from crediting and appropriately responding to their testimony about their own experiences. Maine's courts are well equipped to handle individual cases in which protection orders turn out not to be warranted without stripping survivors of the carefully crafted protections codified by the legislature to protect those who are the most vulnerable, at what may be the most dangerous time in their lives.

ENDNOTES

- 1 The authors would like to recognize and thank Tina Schneider, Esq., of the University of Maine School of Law Cumberland Legal Aid Clinic, VLP *Pro Bono* Panel Lawyer Peter Goldman, Esq., and Faye Luppi, Esq., of the Cumberland County Violence Intervention Partnership for their contributions to this article.
- 2 Katharine England, *New Sharon Investigation*, Maine State Police, Department of Public Safety (Jan. 26, 2021), https://www.maine.gov/dps/msp/media-center/public-releases/new-sharon-investigation.
- 3 Donna M. Perry, *Hostage taker's death ends Livermore Falls standoff*, Sun Journal (Mar. 9, 2021), https://www.pressherald.com/2021/03/09/livermore-falls-family-reunited-after-hostage-situation/.
- 4 Katharine England, *Short Sands Beach Murder*, Maine State Police, Department of Public Safety (Mar. 27, 2021), https://www.maine.gov/dps/msp/taxonomy/term/2.
- 5 In 2016 and 2017, 43% of homicides were the result of domestic violence. "Voices Against Violence: The 12th Biennial Report of the Maine Domestic Abuse Homicide Review Panel" (Oct. 2, 2018), https://www.maine.gov/ag/docs/DVHRP-FinalReport%2010.2.2018.pdf. In 2014 and 2015, 52% of homicides were the result of domestic violence. "On the Path of Prevention: The 11th Biennial Report of the Maine Domestic Abuse Homicide Review Panel" (June 2016), https://www.maine.gov/ag/docs/2016%20Report%20of%20 the%20Domestic%20Abuse%20Homicide%20Review%20 Panel.pdf.
- 6 Maine Department of Health and Human Services, Office of Child and Family Services, "Maine Family First Prevention Services Plan" (February 2021), https://www.maine.gov/dhhs/sites/maine.gov.dhhs/files/inline-files/Maine%20Family%20 First%20Prevention%20Services%20State%20Plan%20 FINAL%202.1.2021.pdf.
- 7 National Center for Injury Prevention and Control, Division of Violence Prevention, "National Intimate Partner and Sexual Violence Survey: 2015 Data Brief Updated Release," (Nov. 2018), https://www.cdc.gov/violenceprevention/pdf/2015databrief508.pdf.
- 8 Susan Green, *Violence Against Black Women Many Types*, *Far-reaching Effects*, Institute for Women's Policy Research (Jul. 13, 2017), https://iwpr.org/iwpr-issues/race-ethnicity-gender-and-economy/violence-against-black-women-many-types-far-

reaching-effects/.

9 NCAI Policy Research Center, "Research Policy Update: Violence Against American Indian Women and Girls," National Congress of American Indians (Feb. 2018), https://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief__FINAL_2_1_2018.pdf. 10 Epstein, "The Protection from Abuse Statute Should Be Protected from Abuse," 36 Me. Bar J. 17 (2021).

11 The purposes of the PFA statute explicitly include: to recognize domestic abuse as the serious crime it is, one that produces an unhealthy and dangerous family environment that can culminate in intrafamily homicide, and to provide a way for victims of abuse to obtain expeditious and effective protection against the person abusing them in a manner that provides for physical, emotional, and financial security. See 19-A M.R.S. § 4001(1)-(4) (2020). The statute has been modified extensively over the last three decades to reflect the growing understanding of the dynamics of domestic abuse to ensure our courts have the discretion within the PFA process to effectively address victims' immediate needs, the temporary resolution of which are essential to accomplishing these purposes. In evaluating the "fairness of the statutory scheme" of the PFA statute, it is certainly appropriate to ensure adequate due process to both parties. However, it would be contrary to the very clear purposes of the PFA statute to conflate a need for due process with a desire to balance the needs of those who have been harmed against the interests of those who have caused that harm.

12 Michael J. Waxman, *Children's Voices and Fathers' Hearts:* Challenges Faced in Implementing the 'Best Interest' Standard, 26 Me. Bar J. 71 (2011).

13 Malinda Ellwood, Safety As Priority: Understanding The Connection Between Protection Orders And Family Matters, 26 Me. Bar J. #3 (2011).

14 Maine Commission on Domestic and Sexual Abuse, "Report to the Joint Standing Committee on Judiciary, Pursuant to LD 1143, 'Resolve, Directing a Study of Domestic Violence and Parental Rights and Responsibilities'" (Feb. 2010), http://lldc.mainelegislature.org/Open/Rpts/hv6626_22_m2r47_2010.pdf.

15 19-A M.R.S. § 4001(1)-(4) (2020).

16 In one extreme example, in a recent case where representation was provided by a *pro bono* attorney through the Volunteer Lawyers Project, the domestic violence survivor, after obtaining a protection order, had 16 separate legal actions filed against her by her abuser and family in two counties, including 12 complaints for protection orders, all of which were dismissed by the court, as were the FED and criminal complaints filed by the abuser and his family.

17 Maine Commission on Domestic and Sexual Abuse, "Report to the Joint Standing Committee on Judiciary, Pursuant to LD 1143, 'Resolve, Directing a Study of Domestic Violence and Parental Rights and Responsibilities'" (Feb. 2010), http://lldc.mainelegislature.org/Open/Rpts/hv6626_22_m2r47_2010.pdf.

18 Epstein, "The Protection from Abuse Statute Should Be Protected from Abuse," 36 Me. Bar J. 17, at 18-19.

19 *Id.* at 17. 20 *Id.* at 18.

21 Resolve, To Conduct an Independent Examination of the Protection Order System to Determine whether There Is Systemic Misuse by Applicants: Hearing on LD 579, Before the J. Standing Comm. on Judiciary, 130th Legis. 1 (2021).

22 Resolve, To Conduct an Independent Examination of the Protection Order System to Determine whether There Is Systemic Misuse by Applicants: Hearing on LD 579, Before the J. Standing Comm. on Judiciary, 130th Legis. 1 (2021) (Testimony of Tim Feeley, Deputy Legal Counsel, Office of Governor Janet T. Mills), http://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=145727.

23 "The due process ensured by both the United States and Maine Constitutions and utilized by the courts provides fairness in terms of procedure. Parties to a case who are concerned about the outcome of that case have an absolute right to appeal the grant or denial of a protection from abuse order to ... the Law Court." Resolve, To Conduct an Independent Examination of the Protection Order System to Determine whether There Is Systemic Misuse by Applicants: Hearing on LD 579, Before the J. Standing Comm. on Judiciary, 130th Legis. 1 (2021) (Testimony of Julia Finn, Legislative Analyst on behalf of the Maine Judicial Branch), https://legislature.maine.gov/testimony/resources/JUD20210316Finn132602939192597081.pdf.

24 19-A M.R.S. §1653(5-A) (2020). 25 19-A M.R.S. § 4005(5) (2020); se

25 19-A M.R.S. § 4005(5) (2020); see also "Maine Judicial Branch Packet for Filing Complaint for Protection from Abuse" at pg. 2 (requiring a sworn declaration from a plaintiff), https://www.courts.maine.gov/forms/pdf/packets/email-pfa-packet.pdf; Maine Judicial Branch, Administrative Office of the Courts, "A Guide to Protection from Abuse & Harassment Cases," at pg. 1 (advising on the penalty for making a false statement), https://www.courts.maine.gov/forms/pdf/packets/email-pfa-packet.pdf.

26 19-A M.R.S. § 4007(1)(L-1) (2020).

27 19-A M.R.S. § 1653(3)(O) (2020).

28 Decreasing barriers to community resources and public benefits, increased availability of safe and affordable housing, and more consistent screening for and documentation of abuse by health care professionals are examples of systemic supports. 29 Maine Commission on Domestic and Sexual Abuse, "Report to the Joint Standing Committee on Judiciary, Pursuant to LD 1143, 'Resolve, Directing a Study of Domestic Violence and Parental Rights and Responsibilities'" (Feb. 2010), http://lldc.mainelegislature.org/Open/Rpts/hv6626_22_m2r47_2010.pdf.

30 The Maine Commission on Domestic and Sexual Abuse,

19-A M.R.S. § 4013.

31 *See* Meier, Joan S. and Dickson, Sean and O'Sullivan, Chris and Rosen, Leora and Hayes, Jeffrey, Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations, GWU Law School Public Law Research Paper No. 2019-56, GWU Legal Studies Research Paper No. 2019-56 (2019), Available at SSRN: https://ssrn.com/abstract=3448062 or http://dx.doi.org/10.2139/ssrn.3448062.

33 See Maine Commission on Domestic and Sexual Abuse, "Report to the Joint Standing Committee on Judiciary, Pursuant to LD 1143, 'Resolve, Directing a Study of Domestic Violence and Parental Rights and Responsibilities'" http://lldc.mainelegislature.org/Open/Rpts/ (Feb. 2010), hv6626_22_m2r47_2010.pdf; "Honoring Lives, Working Towards Change ... Domestic Violence Homicides in Maine: The 7th Report of the Maine Domestic Abuse Homicide Review Panel" (March 2008), https://www.maine.gov/ag/dynld/documents/Domestic_Abuse_Homicide_ReviewPanel.pdf; wants to see me dead: The 8th Report of the Maine Domestic Abuse Homicide Review Panel" (January 2010), https://www. maine.gov/ag/dynld/documents/8th%20Report%20of%20 the%20Maine%20Domestic%20Abuse%20Homicide%20 Review%20Panel.pdf; "Building Bridges Towards Safety and Accountability to End Domestic Violence Homicide: The 10th Report of the Maine Domestic Abuse Homicide Review Panel" (April 2014), https://www.maine.gov/ag/dynld/ documents/10th%20Biennnial%20Report%20-FINAL%20 4-23-14-condensed.pdf; "Voices Against Violence: The 12th Biennial Report of the Maine Domestic Abuse Homicide Review Panel" (Oct. 2, 2018), https://www.maine.gov/ag/docs/ DVHRP-FinalReport%2010.2.2018.pdf; "20 Year Lookback (1998-2020): The 13th Report of the Maine Domestic Homicide Review Panel" (March 2021), https://www.maine. gov/ag/docs/DAHRP-Report-for-Posting-ACCESSIBLE. pdf; Maine Department of Health and Human Services, Office of Child and Family Services, "Office of Child and Family Services Report on October 2020 Child Welfare Forums" (December 8, 2020) at 5, available at: https://library.childwelfare.gov/cwig/ws/library/docs/gateway/Record; jsessionid=365D534287729FCED2717B56AB5D0FAD?r=0&rpp=-10&upp=0&w=+NATIVE%28%27de%3D*%22Family+engagement%22*+and+de%3D+*%22Permanency%22*++and++year+%3E+2013%27%29&m=1&order=+NA-TIVE%28%27year+%2F+descend%27%29&.

34 Maine Commission on Domestic and Sexual Abuse, *supra*, at 33, n. 12.

35 Id.

36 See "A Report on the Impact of Economic Abuse on Survivors of Domestic Violence in Maine," presented to the Maine Joint Standing Committee on Judiciary (February 7, 2019), https://www.mcedv.org/wp-content/uploads/2019/02/Economic-Abuse-Report_FINAL.pdf.

37 P.L. 2019, ch. 407, § 1 (2020).

38 In his article, Epstein argues that economic provisions in the PFA statute are unfair to defendants, including specifically the potential removal of the defendant from real estate he may own but shares as a residence with plaintiff, and the potential for defendant to be required to pay money damages and/or support to the plaintiff and minor children during the pendency of the order.

39 19-A M.R.S. § 4001(3) (2020).

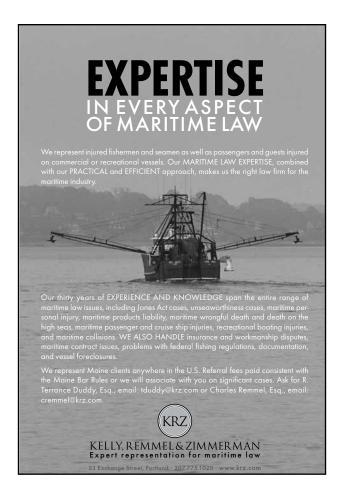
40 "2012-2020 PFA Filings, Temporary Abuse Orders and Permanent Orders with Firearms Prohibition Orders," provided by the Maine Judicial Branch to the Maine Commission on Domestic and Sexual Abuse (January 8, 2021).

41 Epstein, *supra* n. ___, at 21.

42 "The Maine Coalition to End Domestic Violence: 2020 Annual Report," https://www.mcedv.org/wp-content/up-loads/2020/12/2020-Annual-Report-FINAL.pdf (2020).

43 "DV Cases Year over Year Comparison," data provided by the Maine Prosecutors Association to the Maine Coalition to End Domestic Violence (October 27, 2018).

44 "Survivors of Domestic and Sexual Violence are at Heightened Risk Now, and Will Remain So Long After the Current Crisis" (April 16, 2020), http://www.4vawa.org/ntf-actionalerts-and-news/2020/4/16/survivors-of-domestic-and-sexual-violence-are-at-heightened-risk-now-and-will-remain-so-long-after-the-current-crisis.





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Preparing for an Extended Absence: Advice for the Solo Attorney

Given how difficult it can be to try and take a planned absence, such as a long vacation or maternity or paternity leave, it's no wonder that having to cope with the consequences of an extended unplanned absence, perhaps due to the sudden onset of a serious health issue, can catapult the best of us into crisis mode. In short, an extended absence can be problematic to say the least. The good news is that it needn't be this way. Regardless of the reason behind an extended absence, the accompanying headaches some solos experience can be minimized with a little proactive planning.

The place to start is to find another lawyer willing to act as your backup attorney. If your practice is comprised of several practice areas, you may need to have more than one backup attorney. For some solos, this person may be the same person who has already agreed to assist in the winding up of your practice in the event of your death or disability. Now, understand that a backup attorney's responsibilities during your absence do not include maintaining your practice. A backup attorney is only there to assist any of your clients with an unforeseen legal emergency. Knowing this may make the process of finding a backup attorney a bit easier.

Beyond just naming a backup attorney there are several other things you might do in terms of proactive planning. Consider providing notice of the existence of and reason for a backup attorney in your fee agreements so that clients are aware that you have taken steps to protect their interests in the event of an emergency. Maintain a Current Office Procedures manual that outlines your calendaring system, conflict system, active file list, open and closed file systems, accounting system, and any other key system. This can help a backup attorney come up to speed as quickly as possible in the event of an emergency. Of utmost importance is always keeping critical systems such

as the calendar and conflict systems current and making sure that all files are thoroughly documented and updated.

With the above in place, preparing for a planned absence is relatively straight forward. Here are six key things you will need to take care of:

- All clients will need to be notified as far in advance as possible. This notification should include the name and contact information of your backup attorney and a brief explanation of the limited role of a backup attorney. Think about notifying clients verbally as well as in writing to make sure no one falls through the cracks. This will also give your clients the opportunity to ask questions or express any concerns. Of course, depending upon the nature of your practice, courts and professional contacts such as lenders or realtors may also need to be notified.
- Prepare a case status summary for each open file. If ever called upon, your backup attorney will be most appreciative.
- 3. Create a master list of active client names that includes contact information, the type of matter, and where and how each file can be located and accessed. Commit to making sure your calendar is kept current, then let your backup attorney know how to quickly find and access both this list and your calendar. Also make sure you have ready access to both during your absence.
- Make arrangements for mail collection, acceptance of service, bill payments, and the processing of payments received.



- 5. Decide how and under what circumstances someone can reach you in the event of an emergency and share that information with whoever might need it.
- 6. Finally, just before leaving, place an out-of-office sign on the door and change your voicemail and email out-of-office messages as called for noting if or when a response can be expected.

Depending upon the circumstances behind an unplanned absence, the time you have to work through these six steps may be far shorter; but they remain the key items you should try to accomplish. Of course, it's the possibility of having no one available to assist you with your practice if you ever have to take an extended unplanned absence that underscores the importance of naming a backup attorney long before his or her services might be needed.

If you happen to be a solo lawyer who has employed one or more staff, things should be a bit easier because someone familiar with your practice would be available to handle the day-to-day administrative functions of your practice during your absence. This person would also be able to assist your backup attorney, as necessary. Here, the proactive planning piece includes identifying the person you wish to have in charge during your absence, putting together a list of instructions for this individual, and introducing this individual to your backup attorney in order to establish a baseline working relationship. In addition, make certain all staff are on message with what clients are to be told about your absence and plan to ensure that staff continue to receive regular paychecks.

Even if you have no staff, you might consider temporarily hiring a staff person, if the circumstances surrounding your

absence allow for it. Yes, a step like this will take some advance planning and require time for any necessary training; but it is doable, particularly if you previously took the time to develop and maintain an office procedures manual as recommended above.

In conclusion, I will readily admit that many solos do have long and successful careers without ever needing the help of a backup attorney. And I can appreciate that following through on some of the initial proactive planning steps may take some time; but I encourage you to not let either truth be what prevents you from committing to doing so. As I see it, it's all about making it possible to take care of you and your support systems by way of a planned absence and your practice and clients if you are ever forced to deal with an unplanned absence. That's one heck of a good reason if you ask me.

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BEYOND THE LAW: TRAVIS BRENNAN

New England's volunteer firefighting brigades have deep roots that extend back to the time before the founding of the United States. In 1631, the devastation and disruption caused by fire were serious enough for John Winthrop, Governor of the Massachusetts Bay Colony, to institute a total ban on thatched roofs and wooden chimneys. By 1717, a volunteer firefighting company was formally organized in Boston, requiring members to bring two buckets (for water) and two large bags (to salvage property) to every fire call. In the years that followed, the tools and techniques to fight fires have become far more sophisticated, but the nation's reliance on volunteers to fight and prevent fires has remained unchanged. In Maine, more than 70 percent of all fire departments are fully volunteer brigades. In his community of Hebron, Travis Brennan has answered the call as a volunteer firefighter to provide aid to his own neighbors in the face of real danger. Brennan, who otherwise practices law at Berman & Simmons in Lewiston, met with the Maine Bar Journal to discuss his involvement in this area.

Please tell our readers about your activities as volunteer firefighter in Hebron, Maine.

I began working as a volunteer firefighter for the Town of Hebron back in the spring of 2019. It has been about two years now. My wife is a teacher at Hebron Academy, which is a boarding and day school about 50 minutes away from Portland. We previously lived in Portland all of the year but found the commute to Hebron and Lewiston was challenging. We made the decision a few years ago to move to the school during the school year. That is how I ended up in Hebron with my wife and daughter.

Does Hebron maintain an entirely volunteer firefighting department?

Hebron is a fully volunteer department. That means that everyone has a pager. If a call comes in for the Town of Hebron, the Oxford County dispatch will send the word to our pagers, which will notify us of the nature of the call and location. People respond as they can.

How many volunteer firefighters are there in Hebron's fire department?

At present, there are about 10-12 volunteer firefighters. The department gets about 50-60 calls each year.

There are no casual firefighters; it is a solemn calling. What attracted you to this activity?

I first became involved in volunteer firefighting back in 2001, when I was an undergraduate student at Bowdoin College. I was inspired in large part by the 9/11 attacks



and seeing the twin towers go down. This had a monumental impact on everyone who watched the events of that day. Following the 9/11 attacks, I witnessed friends join the military and go off to Afghanistan. I also knew people who found other ways to respond to the attacks. For me, I had always been drawn to the fire department. I went down to the local fire station in Brunswick and asked if I could become involved as a volunteer firefighter. They welcomed me and that was the launching point for me.

When you first started out, did you receive specialized training?

Every town is slightly different in terms of how they organize their departments. Brunswick has what I would consider to be a hybrid department. It has full-time firefighters, supplemented by call firefighters or volunteers that respond as they are able to on a call-by-call basis. When I joined the department in 2001, I was able to take a Firefighter I course. The course ran roughly every weekend for a year, and focused on several different modules. These included the ladder module, the hose module, the ventilation module, the search and rescue module, and so on. At the end of the course, there is a practical test and a written test. I took those tests in 2002 and passed, obtaining my Firefighter I certification.

Were there any other students who joined you as a volunteer firefighter?

One of my very close friends from college also had an interest in volunteer firefighting. We joined the department at the same time and took the Firefighter I class at the same time. I also simultaneously took an EMT-Basic class so that I could do emergency medicine as well.

In those early days, did you find it challenging to respond to emergency calls?

I think the training is helpful in the sense that it changes your perspective when encountering stressful, unusual, or life-threatening situations. You are taught to respond actively, rather than passively. It is a natural response to retreat from a structure that is on fire. However, the training allows you to become more active in difficult situations and to turn *into* the situation.

I imagine that with experience and training, you may see a burning building in a way that is very different from a lay person.

It is interesting you say that. I think about things in a different manner. When there are different seasons or weather conditions, I think of wildfire danger and brush fires that will break out in the spring. In the winter months, with snow or ice, I am thinking of cars that go off the road, motor vehicle collisions, and downed power lines. The experience does provide a different framework for viewing events.

I heard that recently in Maine, there has been a challenge recruiting new volunteer firefighters. Is this something that has affected Hebron or surrounding departments?

The statewide trend is that many departments have been growing smaller. This can occur as people get older and retire from their careers as volunteer firefighters. In general, there have been fewer replacements for those retiring volunteers, so many departments in the state need an influx of new members.





Serving as firefighter involves putting your own life at risk. What drew you to this activity rather than a different pastime?

For me, it is the ability to help others and provide immediate assistance to those in need. It is a very direct relationship. As an attorney, I can work on a case for many years. During that time frame, goals and outcomes can be accomplished, but often at an incremental pace. But when the pager from dispatch goes off, you know you are heading out to try to attain a positive outcome in the moment. Whether it is a serious car collision with life-threatening injuries, or a house is burning, it is extremely meaningful to me to contribute in some way.

Also, I would be remiss if I did not add is that I am extremely appreciative to my wife for her support of my involvement in the fire department. She is in the house when the pager goes off. When she hears sirens blaring, she is aware that there may be a serious incident or emergency that needs to be addressed. I do not think it is the easiest on her or my daughter when I must leave the house and we do not have contact for several hours, but she and my daughter are great supporters. It is a shared endeavor.

Any particular rescue efforts that have made a mark on you?

Many of the situations that stay with you are those that do not turn out as hoped. There are times when you wish you could have gotten to a patient earlier or that the circumstances were different.

How do you process those situations internally?

All fire departments offer programs where firefighters can speak to someone following traumatic calls. I think everyone deals with that and processes those things differently. I have tremendous respect and admiration for the full-time firefighters, EMTs, and paramedics who handle these challenging situations most of their working hours.

Any calls with positive outcomes that are gratifying to you?

One call that sticks out was during my time as an EMT. We responded to a call from a young woman who complained of headaches and had a history of headaches. The patient was close to declining transport and we were about to leave, but something did not feel right. We persuaded her to accept transport to the hospital and about halfway to Maine Medical Center, she exhibited stroke-like symptoms. Sure enough, by the time we arrived, classic stroke symptoms, such as paralysis, were more evident. We later learned that she made a great recovery. I think back on that one and feel happy that we worked with her to seek care from the hospital.

Are there any special protocols or procedures that you use when there is a fire in Hebron?

Whenever you respond to a fire, there is usually the first person on the scene that commands the approach, but it can be quickly transferred to someone else. A firefighter is designated as the incident commander for the fire scene. That person has to make judgment calls about whether there's going to be an interior fire attack, how water supply is going to be acquired and used, how many additional incoming units are needed, and the type of units, such as ladder trucks or



pumpers. And all these decision may be affected by whether or not occupants are believed to be in the building.

If it is confirmed that there are no occupants in the building, the approach may be more defensive in nature. In any fire, there are numerous hazards, including electrical risks and burn hazards. However, if it is believed that there are individuals in the structure, the strategy may become more targeted and aggressive.

Are there any special techniques that you use to try to shift the location of the fire, such as opening up a hole in the roof?

There are several ventilation strategies that have to be carefully considered. If they are not used carefully, they can have the opposite effect of shifting the fire to the area where you are sending in firefighters or other individuals. It also is important to keep in mind how much water is used to fight a fire. When you pour thousands of gallons of water on a structure, it has significant weight. This causes an increased risk of collapse. Also, garages are a total unknown. They can contain unspent fireworks, unused paints, and other potential accelerants that are not something you want to encounter in a fire.

And all these different factors need to be considered in a very short amount of time.

This is true. I have been doing this for a fair amount of time, but I still am constantly amazed by the other people that I work with. Many of these people have been volunteer firefighters for decades and they have gained very extensive knowledge through hands-on experiences. It is humbling and also an opportunity to be able to learn from them.

Let me ask you the question that we pose to everyone who is profiled in this column. What is the best advice that you have ever received?

The best advice that I have ever received comes from my parents. It applies to my work as a volunteer firefighter and my work as an attorney. It is to pursue the things that you are passionate about in life. This advice has served me well. Working in the fire department and in EMS, you see how fragile life is. It is a great reminder that while you are full of life, it is important to pursue those things that are meaningful to you.

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.





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ACCESS TO JUSTICE | MICHELLE GIARD DRAEGER AND MATHEW SCEASE



MICHELLE GIARD DRAEGER is the Executive Director of the Maine Justice Foundation as of May 2020. A native of Maine, much of Michelle's career has been spent in public service including Pine Tree Legal Assistance, the U.S. Securities and Exchange Commission in Washington DC and Boston, and serving as an Assistant United States Attorney for the District of Maine.



MATHEW SCEASE is Development Director at the Maine Justice Foundation.



Racial Justice Fund Grantees Pursuing Diverse Initiatives to Benefit Mainers Statewide

The Maine Justice Foundation's Racial Justice Fund awarded its inaugural grants in April to six Maine nonprofits committed to projects aimed at addressing systemic racism in Maine. We are honored to showcase their work and highlight how we can expand the definition and administration of justice in Maine. The Maine Justice Foundation spoke to each of the six organizations to learn about what motivates them, how they want to impact their constituents, and where their biggest challenges are right now.

Greater Portland Immigrant Welcome Center: "Immigration brings young, motivated, skilled people here."

Reza Jalali, Executive Director of the Greater Portland Immigrant Welcome Center, came to the United States of America in 1985 from Kurdish territory in Iran via India, where he was pursuing his education. "I came to Maine with two degrees, but I have since gotten two more!"

In that way, he sees himself as typical of most recent immigrants to Maine. "Today's immigrants are highly educated and multi-lingual, and that is exactly what Maine needs. Our biggest challenge is really changing the narrative to one that immigration is good for Maine. We are an aging state, and immigration brings young, motivated, skilled people here."

Started in 2017 by Francophone asylum seekers, the Center's goal is to create a welcoming and accepting place for the professional needs of immigrants. Located on Preble Street in Portland, the Center expanded to a second floor in 2018 to make room for the iEnglish language lab, which the foundation's Racial Justice Fund is supporting. The language

lab also teaches customer service and other skills.

"English language proficiency continues to be a huge barrier to immigrants here," Jalali says.

The Center also has a co-working hub, an entire floor which is dedicated to collaborative efforts and businesses that welcomes nonprofits whose missions align with the Center's. The hub contains seven or eight office spaces and about 25 desks.

"Immigrants start businesses at a higher rate than other Americans," Jalali says. "Part of the reason, I think, is that they have a harder time being hired. Immigrants are not only starting businesses but creating jobs."

Civic engagement is an important goal of the Center. Jalali says, "We want immigrants to feel a sense of belonging in their communities." He feels that it is good for Maine: "A good democracy is an inclusive democracy. With 50,000 immigrants in Maine, it is critical that we help them get engaged and for their voices to be heard. It is time to change the narrative that immigrants are here to receive welfare."

Most of Maine's immigrants are BIPOC and always face some degree of anti-immigrant sentiment, often with racist undertones. "The dangerous part is that it has receded [since the presidential election], but it can always resurface. We need to be vigilant." Jalali sees social justice as a priority for young immigrants. "They are self-identifying as BIPOC, not primarily as immigrants. Many of the protest leaders last summer in Portland were immigrants or children of immigrants. I'm hopeful when I look at young leaders."

Find the Center online at www.welcomeimmigrant.org.

Downeast Diversity podcast, sponsored by Healthy Acadia: "Why can't we tell our own story the way we want to tell it?"

When Alyne Cistone left her native Kenya, her grandmother told her that she could connect with and organize people in any culture because there are three universals: food, music, and love for the arts. Cistone, who now lives in Bar Harbor, put the advice to use in her work for causes such as Amnesty International, an AIDS service organization and the Schoodic Institute at Acadia National Park.

She credits this path to her parents, teachers, and professors. "They recognized in me what I wasn't seeing then but that I see now: a deep compassion for others and desire to make their lives better."

Cistone's latest project is a podcast, Downeast Diversity, telling the stories of BIPOC Mainers like herself. "It's always been the white man telling our story. Why can't we tell our own story the way we want to tell it? I felt scripted half of the time," she says. The inspiration behind Downeast Diversity is simple: "A moment where we can all just appreciate our humanity with beautiful storytelling and by learning about each other. That's all it is meant to be: to appreciate everyone as people."

Cistone's spring has been filled with organizing and producing the first episodes. "The heavy lifting is the production and editing piece," she says. "Finding topics, narrowing down guests and speakers, scheduling the speakers."

The learning curve has been steep: "I had a lot to learn about producing a podcast. The biggest challenges I have are financing and human resources." Cistone needs, and gets, a lot of help, and she would like to be able to pay some of the volunteer labor: "I could use one more hand on deck."

"In the fight for racial equity, there are those that make the noise, and then there are the people who then say, 'Now what?' I'm one of the latter. Now that the noise is gone, what's the best thing I can do to change the mindset?"

Visit Healthy Acadia online at www.healthyacadia.org and find Alyne Cistone online at her consulting practice at www.globaltidesllc.com.

League of Women Voters' Neighbor to Neighbor Project: "She didn't vote because she didn't feel like she knew enough."

The League of Women Voters' Neighbor to Neighbor project starts with a fundamental question: "Why do certain neighborhoods participate [in voting] more than other neighborhoods?" asks Lado Lodoka, program director.

The project's goal is to increase voter participation in lowincome, BIPOC and immigrant neighborhoods. Lodoka says that in poor communities, day-to-day needs, like securing food and day care, are much more prioritized than voting or policy, although both have a huge impact on the person's life and activities.

Executive Director Anna Kellar says: "Sometimes we're helping people to solve specific barriers—like how to register—but much of the work is happening at that deeper psychological level about why your vote matters. We had one canvasser talking to a working-class white person: she didn't vote because she didn't feel like she knew enough and was afraid that she would make a mistake."

"We are starting the work late," Lodoka says. "There are a lot of excuses people give as to why they are not voting or registering. So, we need to reach people earlier in their lives. If you understand the concept of citizenship, then there is no excuse not to vote."

In 2020, the project worked in neighborhoods from Kittery to Waterville. The project is a nonpartisan, educational effort to encourage voting, not to advocate for specific candidates or causes. They look for subsidized housing and partner with local housing agencies. Kellar says, "The housing providers like Avesta have been great partners and very welcoming."

Of the impact they hope to have, Lodoka says, "Hopefully everyone will know that their civic responsibility is as important as their family responsibility."

Kellar hopes that over the long term that they will see less disparity in voting participation between high and low-income areas. Falmouth typically has about 85 percent voter turnout,

while just a few miles away in Portland's low-income Parkside neighborhood, turnout is only about 50 percent. "We see this big correlation between income and voter turnout," Kellar says.

Between elections, the project is working with property managers to find a way, as Lodoka says, "to go out there biweekly and keep contacting and engaging the communities, even when an election is far away." Kellar adds that the group tried a wide variety of tactics to increase turnout and now are analyzing what worked.

The Maine League of Women Voters is online at https://www.lwvme.org/.

Maine Inside Out: "How can we create community when we can't be together?"

Maine Inside Out began 12 years ago when its three cofounders were organizing theater workshops and performances at the Long Creek youth detention center in South Portland. Featuring audience participation and a focus on social change, it quickly gained traction with performances in schools, at the Maine Legislature and in Washington, DC.

Maine Inside Out strives to keep youth out of incarceration, which is a traumatizing experience.

"They are damaged even before they go in," co-executive director Bruce King says. "To give youth a sense of community and belonging is at the root of our work." The group also seeks to impact the greater community and, beyond that, to see changes in policy.

King says, "We started as theater for non-theater individuals." He argues that the work connects powerfully with its audiences because it is accessible to laypeople, and the plays, stories and poems are primarily about the emotional and personal impact of incarceration. "The micro and macro are connected. The individual stories can demonstrate what is going on across the system."

Maine Inside Out's work has shifted in the last couple of years, in part due to COVID-19 and in part to other circumstances. "Fewer youth are being incarcerated, so that's part of the gap

we try to fill. Kids are being sent back to the community [from incarceration] with no resources."

"We do still work with individuals behind the fence in facilities but don't currently have programs where our staff are going in beyond the visiting room," King continues. "We've had participants join us via phone and mail and email from Mountainview and county jails. We've even had a few call in and read their poetry during our open mics."

But in the pandemic year they were faced with the question, "How can we create community when we can't be together?" as King puts it.

Additionally, "With Covid, we found a much greater need. The housing crisis is walloping us. The housing shortage is huge." The group holds workshops every week, having switched to more writing and virtual or socially-distanced workshops because they cannot do theater. They are trying to support participants "across the digital divide" by providing devices when possible.

Maine Inside Out has community programs active in Lewiston, Portland, Biddeford, and Waterville. They hope to have a physical space soon in Lewiston, which could have a performance space, a gathering space, and a kitchen. They plan to start creating new in-person plays in the fall.

The Foundation's Racial Justice Fund is supporting Maine Inside Out's BIPOC affinity group. "We are deeply committed to anti-racist work," King says.

Maine Inside Out has not had a presence in the Long Creek center for a while. The legislature passed a measure closing Long Creek, but Governor Mills has vetoed it [as of June 25]. King says, "Community-based solutions and reinvestment are what we need. This [closure of Long Creek] would signal a shift."

Read about Maine Inside Out's founding at www.maineinsideout.org/our-story.

Sunlight Media Collective: "The land and water is not something that is to be used and controlled. It is a Relative."

The story of the Wabanaki peoples who inhabited Wabanakeag, now called Maine, begins many thousands of years ago, but for today we can start with a letter sent in 2012. In that year Maine Attorney General William Schneider wrote to the Penobscot Nation's Chief and Tribal Council asserting that the water around the Nation's islands in the Penobscot River was not part of the Nation. So the Nation took the State of Maine to court, a case that is now *Penobscot Nation v. Frey*.

In 2014, Meredith DeFrancesco and Maria Girouard cofounded Sunlight Media Collective, a group of Wabanaki and non-Indigenous activists and media professionals. Girouard, who is a Penobscot historian, decided to put together a history of the river and the dispute from the tribal perspective. The result was the documentary film *Penobscot: Ancestral River*, *Contested Territory*.

The film was nominated for a New England Emmy Award in the category of Best Documentary of 2015 by the Boston chapter of the National Academy of Television Arts and Sciences. Penobscot Nation Tribal Member Dawn Neptune Adams narrated the film.

"I've been an Indigenous and environmental activist since 1998, and that started in Huntington Beach, California," Adams says. She came back to Maine in 2009 and is now an activist, racial justice consultant, and a journalist at the collective.

"There's a lot of colonial language used in mainstream media," Adams says. "SMC [Sunlight Media Collective] does a lot of de-colonizing of narratives, and our goal first and foremost is to amplify Indigenous voices and Wabanaki perspectives. But, another big part of what we do is to bring people together, and that was a result of the Penobscot River documentary. That was huge. Back when Maria, Meredith and other members of the newly formed collective were feverishly making the documentary, the goal was to get the information to our supporters that they needed to know. There is always so much to know. The documentary got our message out, and it has had a ripple effect."

An example of the collective's work to de-colonize language is the return of Kuwesuwi Monihq (Pine Island), ancestral land of the Passamaquoddy Tribe, earlier this year. The collective made a documentary short, in Adams' words "with, for and by the Passamoquoddy people." The return of the island made international news.

"The Passamaquoddy People view the island as a lost Relative, and that is how the video portrayed the return. *The Hill, Nation, [Boston] Globe,* and *Guardian* used language that was the opposite of that: 'Passamaquoddy people *regain control* of an island in Maine.' The land and water is not something that is to be used and controlled. It is a Relative."

The collective's self-defined portfolio is wide-ranging. They produce long and short-form documentaries and news coverage, often in solidarity with other racial and social justice groups. They are working on a long-term project on the Penobscot River. In 2019 the Legislature enacted a Task Force on Changes to the Maine Indian Claims Settlement Act. The collective filmed and transcribed all the task force's hearings over 18 months.

Adams says, "Often, our work involves covering things that Wabanaki people are opposed to, such as pollution. The story about Kuweuwi Monihq was a rare chance to cover a celebration of something positive."

Ultimately the collective's goal is sharing the tribal perspective that, as Adams puts it, "Wabanaki sovereignty is inherent and can be neither bestowed nor revoked by any settler-colonial government. We're not asking for our sovereignty back. We've always had it. We're asking for it to be respected and recognized."

Watch *Penobscot: Ancestral River, Contested Territory* online at www.sunlightmediacollective.org.

The Third Place: "Bringing people together to build social capital is the first step."

Adilah Muhammed helped start The Third Place during a difficult time: "We were founded in late 2016. It was after the [presidential] election, and the black community in the Portland area felt like we had to organize, and we felt under attack."

The Third Place's goal is to keep BIPOC professionals in Maine by connecting inside and outside of the workplace. "I've seen so many people leave Maine," Muhammed says, because they feel isolated and unsupported.

"We started off as a co-working space because no one had

resources or a place to meet. We operated informally and were not even incorporated until 2020."

After beginning in Portland, Muhammed decided to bring this model to the whole state, starting with the larger cities. There is now a group in Lewiston. She is also creating groups by sector, for instance by bringing together and networking BIPOC health workers in one group and attorneys in another. The groups address specific complaints and workplace issues; they also identify barriers to staying in Maine and help match newcomers to mentors.

A group from the environmental sector is discussing topics ranging from climate change to clean water to conservation. "I'm really happy with where the [environmental] group is going," Muhammed says, especially since "'The Way Life Should Be' doesn't resonate with BIPOC people who don't have access to the outdoors."

Much of the work consists of simply bringing people together. In the summer, after a year of lockdown and isolation, she's finding it critical to make the meetings social, such as organizing a Juneteenth celebration that also served as an ad hoc focus group.

The challenge now is that "we don't have a staff." Muhammed is launching The Third Place while she works full time as a strategic planning consultant. Muhammed says, "Our website needs improvement. It needs to be more interactive and responsive, so we can get new BIPOC professionals in Maine immediately plugged into a network."

"There are so many layers," Muhammed says.
"I'm trying to find a very simplified way to deal with a very complicated issue. And bringing people together to build social capital is the first step."

Get plugged in at www.thethirdplace.me.

Campaign for Justice Kicks Off in 2021

The doors to our state and federal courthouses do not always open wide enough to admit everyone. Left outside are poor and vulnerable Mainers who cannot afford an attorney for life-changing legal needs such as immigration, protection from abuse, financial exploitation, or foreclosure.

Maine has a robust community of legal aid attorneys working for and with the Cumberland Legal Aid Clinic, Immigrant Legal Advocacy Project, Legal Services for the Elderly, Maine Equal Justice, Pine Tree Legal Assistance and Volunteer Lawyers Project.

The Campaign for Justice is your opportunity to support these six civil legal aid providers with one gift. The Co-Chairs of the 2021 Campaign are Cesar Britos of Unum and David Soley of Bernstein Shur. They share a deep commitment to legal aid and the right of all Mainers to have access to the justice system.

"Much has changed in Maine since my days as a legal aid attorney," Cesar says. "However, the challenges for the most vulnerable Mainers have persisted, intensifying with the COVID pandemic. Fortunately, Maine's legal services providers have persisted, too! They have stepped up their already outstanding efforts and now, more than ever, need the support of Maine's legal community. The Campaign for Justice is an exceptional opportunity to show them our support by making a financial contribution. This year I am proud to lead the way with David Soley, my Co-Chair."

David adds, "While the shock of living and working in a COVID world has now mostly worn off, the six legal aid providers we help support with the Campaign for Justice are still facing unprecedented levels of need. As Cesar and I move forward with the 2021 Campaign efforts, we will look for your guidance and support to help alleviate as much as we can."

Maine's Bar has always responded very generously to this need, giving \$626,000 in 2020. This year the Campaign is off to a strong start. To all who have given already, thank you.

If you have not yet given to the 2021 Campaign, please do so today at www.campaignforjustice.org or mail your gift to: Campaign for Justice, 40 Water Street, Hallowell, ME 04347.

ETHICS IN PRACTICE | PAUL MCDONALD



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The Lawyer's Duty Of Confidentiality: Current, Former, and Prospective Clients

Every lawyer knows (or should know) that their duty of confidentiality to their client is a bedrock principle of legal ethics.¹ However, some may be less than familiar with the scope of the information subject to that duty and its application to former and even prospective clients.

A lawyer's duty of confidentiality is owed not just to current clients; the rule extends to former clients and prospective clients, as well. Moreover, there are subtle but important differences in the extent of the duty owed, depending upon whether the client is a current, former, or prospective client. The definition and scope of what constitutes confidential client information that is subject to this duty can also differ depending upon the status of the client.

Scope of the Lawyer's Confidentiality Obligation: Client Confidences and Secrets

A lawyer's duty of confidentiality is not coextensive with the scope of the attorney-client privilege. In fact, it is broader and is not subject to the same exceptions.

The attorney-client privilege is a rule of evidence, not ethics.² Its scope is limited to confidential *communications* between lawyer and client or the client's authorized representative.³ Moreover, the communication must be "made to facilitate the provision of legal services to the client and... not intended to be disclosed to any third party other than those to whom the client revealed the information in the process of obtaining professional legal services."⁴

In contrast, the lawyer's confidentiality obligation to their client, which is codified at Rule 1.6(a) of the Maine Rules of Professional Conduct, is as follows:

(a) A lawyer shall not reveal a *confidence* or secret of a client unless, (i) the client gives informed consent; (ii) the lawyer reasonably believes that disclosure is authorized in order to carry out the representation; or (iii) the disclosure is permitted by paragraph (b) (emphasis added).

A "confidence" is information protected by the attorney client privilege. A "secret" is any other information relating to the representation if (i) its revelation is reasonably likely to harm a material interest of the client; or (ii) the client has instructed the lawyer not to reveal it. Under this definition, information that qualifies as a client secret need not be communicated to the lawyer by the client or their representative, as would information subject to the attorney-client privilege.

Is the Fact of the Representation and Identity of the Client Confidential?

The ABA and a number of state ethics regulatory bodies have issued opinions declaring that even client identity is protected under Model Rule 1.6. ABA Formal Opinion 480, issued by the ABA Standing Committee on Ethics and Professional Responsibility, states, in pertinent part, that:

[I]nformation about a client's representation contained in a court's order, for example, although contained in a public document or record, is not exempt from the lawyer's duty of confidentiality under Model Rule 1.6. The duty of confidentiality extends generally to information related to a representation whatever its source and



without regard to the fact that others may be aware of or have access to such knowledge.⁸

There does not appear to be any guidance on whether the teachings of ABA Formal Opinion 480 would be followed in Maine. Nevertheless, prudence counsels that a lawyer should carefully consider whether or not to disclose or confirm the identity of a client or the nature of the representation to a third party without having obtained informed consent to do so from the client. While these considerations apply in all circumstances, they are particularly important to consider when seeking a conflict waiver from another client. In those circumstances, prudence again may counsel that a lawyer first receive from the client seeking the waiver consent to reveal her/his/its name and the extent to which the lawyer can disclose the nature of the representation.

The Duty Not to Disclose Client Confidential Information Extends to Former Clients

Maine Rule of Professional Conduct 1.9 deals with duties to former clients. Subsection (c) distinguishes between the lawyer's *disclosure* and *use* of confidential information of the former client.

Rule 1.9(c)(2) extends the lawyer's duty of confidentiality set forth in Rule 1.6 to former clients: a lawyer may not "reveal confidences or secrets of a former client except as these Rules would permit or require with respect to a client." Thus, notwithstanding termination of an attorney-client relationship, a lawyer still owes the same obligation to preserve the former client's confidential information that the lawyer had during the attorney-client relationship.

A Lawyer May Never Use a Former Client's Confidential Information to the Disadvantage of the Former Client Unless the Rules Specifically Allow It or It Otherwise Becomes "Generally Known"

Rule 1.9(c)(1) deals with the use of confidential information of a former client to the former client's disadvantage and permits it only under two sets of circumstances. ¹⁰ First, a lawyer may do so when other Rules of Professional Conduct so allow. Rule 1.6(b) lays out the list of circumstances in which client confidences may be revealed and used. ¹¹ Second, subsection 1.9(c)(1) permits use of a former client's confidences "when the information has become generally known." ¹²

"Generally Known" Information Is a Narrower Category Than "Publicly Available" Information

The phrase "generally known" is not defined in the Maine Rules of Professional Conduct. However, in December 2017, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 749, which provides helpful guidance.

After canvassing case law and opinions from various state bar regulators, ABA Formal Opinion 749 concludes that "information is generally known within the meaning of Model Rule 1.9(c)(1) if (a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client's industry, profession, or trade."¹³ The Opinion goes on to caution that:

[T]he fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known for Model Rule 1.9(c)(1) purposes. Information that is publicly available is not necessarily generally known.¹⁴

Therefore, once an attorney-client relationship is terminated, the lawyer should treat the duty to preserve the former client's confidential information as unchanged unless an issue arises that could permit disclosure under Me. R. Prof. Conduct 1.6(b) (e.g., the former client asserts a claim against the lawyer). Moreover, a lawyer should never make any use of a former client's confidences and secrets to the disadvantage of the former client unless (i) the above exception applies or (ii) the lawyer represents another client adverse to the former client and use of the former client's confidential information has become "generally known" and may be of use to the current client.

Duty of Confidentiality to Prospective Clients

Who is a "prospective client"? A prospective client is a person who discusses and/or provides information to a lawyer regarding the possibility of forming a client-lawyer relationship with respect to a matter. ¹⁵ A person who initiates a mere casual conversation or one for the purpose of conflicting the lawyer from representing an adverse party will not be considered a prospective client. ¹⁶

Prospective Clients' Confidential Information Must Be Protected to the Same Extent As That of Former Clients

Me. R. Prof. Conduct 1.18(b) imposes a duty of confidentiality with respect to "information learned in the consultation." ¹⁷ Under this rule, the scope of information required to be kept confidential may be less broad than it is for current or former clients, which includes all client secrets that the lawyer may learn of, regardless of the source. ¹⁸

The Rule prohibits a lawyer from revealing or using such information, "except as Rule 1.9 would permit with respect to information of a former client." Rule 1.9, in turn and as discussed *supra*, allows for disclosure only if another Rule permits it and allows for the use of such information to the disadvantage of the former client only if another Rule permits it or the information has become generally known. ²⁰

Practical Application

In an attempt to pull the above discussion together into a few points for practical application, I offer the following:

- Absent informed client consent or an express exception found in the Rules of Professional Conduct, a lawyer is obliged to keep confidential every confidence or secret they learn about a client, regardless of the means by which the lawyer came to know if it.
- This obligation continues after termination of the attorney-client relationship unless another Rule of Professional Conduct permits the disclosure.
- No use should be made of a former or prospective client's confidential information to their disadvantage unless Rule 1.6(b) of the Rules of Professional Conduct permits it or the information is generally known; the ABA has taken a restrictive view of what constitutes generally known information.

ENDNOTES

- 1 The oft-quoted rationale for the requirement that a lawyer maintain client confidences is "to encourage full and frank communication between attorneys and their clients." *Upjohn v. United States*, 449 U.S. 383, 389 (1981).
- 2 See Me. R. Evid. 502.
- 3 *Id.* 502(b)(1).
- 4 Id. 502(a)(5).
- 5 Me. R. Prof. Conduct 1.6(d).
- 6 Id.
- 7 ABA Formal Opinion 480.
- 8 Me. R. Prof. Conduct 1.9(c)(2).
- 9 Me. R. Prof. Conduct 1.9(c)(2).
- 10 Me. R. Prof. Conduct 1.9(c)(1) states:
 - (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use confidences or secrets of a former client to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known.



11 Me. R. Prof. Conduct 1.6(b) provides:

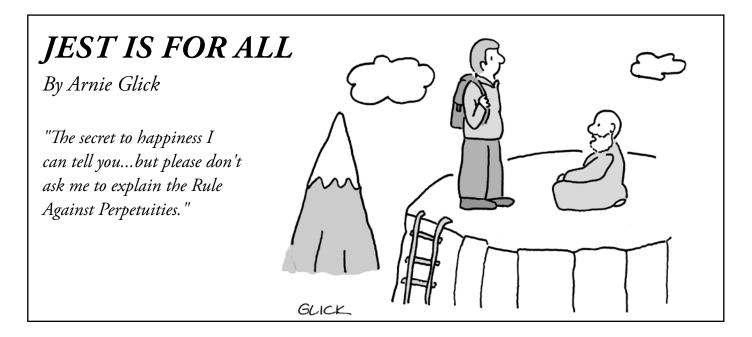
- (b) A lawyer may reveal a confidence or secret of a client to the extent the lawyer reasonably believes necessary:
- (1) to prevent reasonably certain substantial bodily harm or death;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's professional obligations;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) in connection with the sale of a law practice under Rule 1.17A or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected

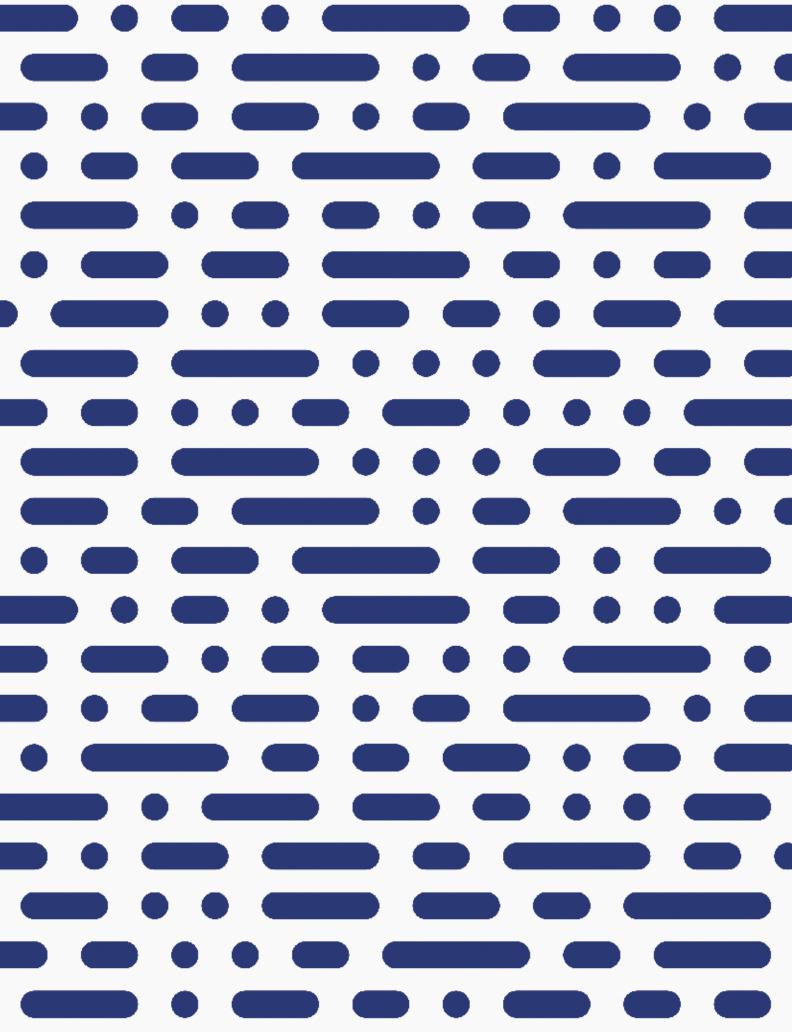
client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction; or (7) to comply with other law or a court order.

- 12 Me. R. Prof. Conduct 1.9(c)(1).
- 13 ABA Formal Opinion 479.
- 14 Id.
- 15 Me. R. Prof. Conduct 1.18(a).
- 16 Id. Official Comment 1.
- 17 Me. R. Prof. Conduct 1.18(b) states that:
 - (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

The scope of information subject to this rule is facially more restricted than the scope encompassed by Rule 1.6: the duty set forth in Rule 1.18(b) is limited to "information learned in the consultation"; the duty set forth in Rule 1.6 pertains to all client confidences and secrets.

- 18 Compare Me. R. Prof. Conduct 1.6(d).
- 19 Me. R. Prof Conduct Rule 18(b).
- 20 Me. R. Prof. Conduct 1.9(c)





RES IPSA LOQUITUR | NANCY WANDERER



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Dots And Dashes: the Morse Code of Punctuation

Communication has always been essential to society. Ancient civilizations used drumbeats or smoke signals to exchange information over long distances. In the early 1790s, the semaphore, consisting of a series of hilltop stations with large, movable arms, was used to signal letters and numbers, seen by other stations through telescopes. Such methods were unreliable, however, because they required an uninterrupted line of sight between receptor points and were dependent on the weather. A better method of transmitting information was needed to facilitate reliable long-distance communication.¹

During the 1830s and 1840s, Samuel Morse and other inventors developed the telegraph, which revolutionized long-distance communication by transmitting electrical signals over a wire laid between stations.² Using a code consisting of dots and dashes, telegraph operators could send complex messages across telegraph lines. By 1866, telegraph lines stretched across the Atlantic Ocean from the United States to Europe.³ Although the telegraph and the Morse Code were later supplanted by the telephone, fax machine, and electronic communication, dots and dashes laid the groundwork for those later innovations.⁴

The Dots and Dashes of Legal Writing

Just as dots and dashes facilitate communication over long distances, dots and dashes can assist the legal writer in communicating effectively on paper. Specifically, attorneys need to know how to use ellipses, hyphens, en dashes, and em dashes correctly in their written communication. These seemingly innocuous punctuation marks, if used skillfully, can make a difference in the clarity and polish of a legal memorandum or brief

Dots: Ellipses (...)

An ellipsis is a set of three dots or periods (. . .) signaling an

omission. Although some people omit the spaces before, after, and between the dots (...), that practice is incorrect except when a dot is adjacent to a quotation mark, in which case there should be no space (..."). In informal writing, people use ellipses to represent thought trailing off: *If only I had*... Oh well, it's too late now. An ellipsis can also show hesitation: She wasn't really ... well, she thought she ... I just don't know. Some people throw them into sentences indiscriminately, replacing the periods at the ends of sentences and other punctuation marks. In formal writing, this is not acceptable.

Ellipses are most often used within quoted material. The following two excerpts from *Ruth Bader Ginsburg: A Life* by Jane Sherron DeHart will provide a basis for examples showing how to use ellipses in quotations.

Excerpt 1

Nor was this the only hint that the Law School, like the rest of the university, still remained male turf. Cornell's library had separate entrances for men and women, but Lamont, the undergraduate library at Harvard where old periodicals were kept, was designated for men only. The restriction meant little until Ginsburg's second year, when late one night she needed to use the collection of aging magazines and journals to check a footnote in an article. She pleaded with the guard to bring the journal to the door; she just needed to take a look at it, she explained. He refused. In the end, she had to ask a male classmate to do the job.⁶

Ellipses at the Beginning of a Quotation

Do not place an ellipsis at the beginning of a quotation to indicate the omission of material. You can use brackets to

change the capitalization of the first word of the quotation to match the surrounding material. In the following examples, taken from Excerpt 1, the words "Nor was this the only hint that" are omitted. The first letter of the word "the" has been placed in brackets and capitalized to match the rest of the sentence.

Correct: "[T]he Law School, like the rest of the university, still remained male turf."

Incorrect: ". . . the Law School, like the rest of the university, still remained male turf."

Quotations Placed in the Middle of a Sentence

When inserting a quotation into a sentence, use three dots with spaces before, after, and between each dot. Do not use an ellipsis at the beginning or end of the quoted material, even if the beginning or end of the original sentence has been omitted.

Correct: In those days, Harvard Law School "still remained male turf" despite the ever-increasing number of women enrolling.

Incorrect: In those days, Harvard Law School ". . . still remained male turf" despite the ever-increasing number of women enrolling.

Incorrect: In those days, Harvard Law School "still remained male turf..." despite the ever-increasing number of women enrolling.

Quotations Placed at the End of a Sentence

When placing an ellipsis at the end of a sentence to indicate the omission of material that comes after the quote, use a three-dot ellipsis plus a sentence-ending period, adding up to four dots.⁷

Correct: "She pleaded with the guard to bring the journal to the door; she just needed to take a look at it"

Incorrect: "She pleaded with the guard to bring the journal to the door; she just needed to take a look at it . . .".

Omitting an Entire Paragraph of a Quotation

When omitting one or more entire paragraphs, indicate the omission by placing an ellipsis, followed by a period, on a separate line. In Excerpt 2, below, a paragraph has been omitted.

Excerpt 2

When Ginsburg's turn came, she was barely able to finish her opening statement before interruptions began. Was this to be Kahn redux? The first question went to the heart of the equality debate. Were women the "same" as men and therefore fungible in terms of the law or were they sufficiently "different" to require different treatment? Did women really need to be on juries for the accused to have a trial of peers because "the new theory was that there is very little difference between men and women"?

. . . .

Asked about the present status of the ERA, she replied that there were still five states to go in addition to the two states that had rescinded while only three had ratified. Eager to steer the discussion away from ratification, she returned to the basic arguments of opposing counsel with respect to jury exemptions.⁸

Ellipses for Omitted Material within a Single Quoted Sentence

Use an ellipsis to show omission within a quotation. Omit any punctuation on either side of the ellipsis unless it is necessary to make the shortened quotation grammatically correct.

Correct: "Cornell's library had separate entrances for men and women, but Lamont . . . was designated for men only."

Incorrect: "Cornell's library had separate entrances for men and women, but Lamont, . . . was designated for men only."

Dashes: Hyphens, En Dashes, and Em Dashes

A **hyphen** (-) is a punctuation mark that is used to join words or parts of words. It is not interchangeable with other types of dashes.⁹

A **dash** is longer than a hyphen. An **em dash** (—) is a long dash, commonly used to separate extra information or mark a break in a sentence. It is about as wide as an upper-case M. An **en dash** (—) is longer than a hyphen and shorter than an em dash. About as wide as an upper-case N, the en dash is used to mark ranges.¹⁰

Hyphens (-)

The shortest of the dashes, hyphens link words and parts of words. They can combine two or more words that describe a noun, connect prefixes, and break up a word at the end of a text of line.

Use a hyphen to join two words serving as a single adjective before a noun.

Examples: dog-friendly hotel, expensive-looking jacket.

If the same two words appear after the noun, do not join them with a hyphen.

Examples: We stayed at a hotel that was dog friendly. I tried on a jacket that was expensive looking.

Do not use a hyphen with a compound modifier that consists of an adverb ending in -ly plus a participle or adjective. The -ly is sufficient to show that the two words are one unit of meaning.

Examples: a superbly cooked dinner, a highly respected physicist.

When you have a compound modifier that is interrupted by another word that is not part of the modifier, use a suspended hyphen.¹¹

Examples: two- or three-week vacation, upper- and lower-bunks.

Use a hyphen when spelling out compound numbers.

Example: sixty-nine.

Use hyphens when writing out someone's age.

Example: 46-year-old son.

Use hyphens to create compound verbs.

Examples: window-shop, speed-skate.

Use a hyphen with the prefixes "ex" (meaning former), "self," and all"; with the suffix "elect"; between a prefix and a capitalized word; and with figures or letters. 12

Examples: ex-wife, self-assured, mid-January, all-inclusive, president-elect, T-shirt, pre-World War II, mid-1960s.



Other prefixes, including "anti," "co," "inter," "multi," "semi," and "re" do not usually take a hyphen, but you may want to consult a dictionary to be sure.

Examples: antitrust, cofounder, interfaith, multinational, semiannual, redistribute.

Use a hyphen to avoid confusion or an awkward combination of letters.¹³

Examples: re-cover a sofa (without the hyphen, the word would be "recover," to get better); co-own (without the hyphen, the word would be "coown").

Use a hyphen to divide words at the end of a line if necessary, and make the break only between syllables. Divide already hyphenated words only at the hyphen.

Examples: pref-er-ence, call-ing, mass-produced.

Em Dashes (--)

Em dashes are used to add emphasis by setting off a word or a clause in the middle or at the end of a sentence.

Em dashes in pairs can be used to draw special attention to parenthetical information.

Example: The new teacher—who was about a head taller than her predecessor—was gentle and kind.

A single em dash can be used like a colon to add explanatory or amplifying information, especially when the information is surprising.¹⁴

Example: When I opened the cupboard door, there it was—my long-lost, cast-iron frying pan.

En Dashes (-)

The en dash, which is shorter than the em dash and longer

than the hyphen, is used for one purpose only—to indicate a range of numbers or a span of time. The en dash means "to" or "through." A hyphen should not be used in place of an en dash. ¹⁵

Correct: January 6–18, 1975; pp. 48–59; 1965–1969; 9:00–11:00 a.m.

Incorrect: January 6-18, 1975; pp. 48-59; 1965-1969; 9:00-11:00 a.m.

Mastering the Code

When I was a Girl Scout in the 1950s and 1960s, I remember the thrill of communicating in rudimentary Morse Code with my friends. I think I even earned a merit badge for my efforts. Yet, I have no memory of learning anything in my English classes about using dots and dashes to communicate effectively in writing. We did learn a bit about hyphens, but em dashes, en dashes, and ellipses were a mystery to me until I began teaching legal writing at the University of Maine School of Law. I certainly noticed them in people's writing, but their use seemed totally random and idiosyncratic.

This column is dedicated to Samuel Morse, who invented a code using dots and dashes that enabled people to communicate clearly, across long distances, without words. That code allowed families to get news about loved ones, helped far-flung businesses to complete transactions expeditiously, and, most importantly, saved countless lives through the international signal for help (SOS): dot-dot-dot, dash-dash-dash, dot-dot-dot.

I do not expect this column to save any lives, but I do hope it has proved helpful to anyone who has wondered, like I did, whether rules exist for using the dots and dashes of legal writing. Who knows, maybe the skillful use of a dash or an ellipsis will contribute to the successful appeal of a wrongful conviction or the creation of a law that restores the protections in the Voting Rights Act. As a legal writing teacher who believes in the power of punctuation, I am ever hopeful.



ENDNOTES

- 1 See generally Morse Code & the Telegraph, https://www.history.com/topics/inventions/ telegraph.
- 2 *Id*.
- 3 *Id*.
- 4 *Id*.
- 5 ThePunctuationGuide.com, *Ellipses*, https://www.thepunctuationguide.com/ellipses.html.
- 6 Jane Sherron De Hart, Ruth Bader Ginsburg: A Life 58 (2018).
- 7 Authorities differ on where to put the sentence-ending period. I favor the example I have identified as correct above.
- 8 DeHart, supra note 6, at 238.
- 9 What's the Difference Between Dashes and Hyphens? Grammarly, https://www.grammarly.com/blog/hyphens-and-dashes/.
- 10 The following articles provide guidance on how to insert em and en dashes in Microsoft Word documents. Avantix Learning Team, How to Insert an Em or En Dash in a Word Document (4 Ways), https://www.avantixlearning.ca/microsoft-word/how-to-insert-an-em-dash-or-en-dash-in-a-word-document 4-ways/; Computer Hope, How to Insert an En Dash or Em Dash in Microsoft Word, https://www.computerhope.com/issues/choo1084.htm.
- 11 *Love the Em Dash*, Grammarly, https://grammarly.com/blog/hyphens-and-dashes/. 12 *Id.*
- 13 *Hyphen Use*, Purdue OWL, https://owl.purdue.edu/owl/general_writing/punctuation/hyphen_use.html.
- 14 Supra note 8.
- 15 I am able to type an en dash on my MacBook Air by hitting the Option key, followed by the Hyphen key. The instructions provided in the articles provided in footnote 6 should be helpful for people with other keyboards.

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Another Lawyer's Story

He said to me, quoting the Grateful Dead, "What a long, strange trip it's been." I remarked that I couldn't disagree. His journey began years ago.

Carl (not his real name) was in his mid-40s and had practiced law for almost 20 years. He was a competent litigator, well-liked by his peers. He appeared to be an easy going, up-beat individual. He was noteworthy for being remarkably empathetic. Clients and friends thought him a very understanding person to whom it was easy to relate. He looked to have a robust practice. From the outside it seemed that Carl was doing just fine. On the inside, however, it was a very different story.

Carl grew up in a community where "looking good" was a high priority. Problems or difficulties were to remain strictly within the family. Reputation trumped just about everything. The public image of Carl's family belied a difficult home situation. His mother suffered from significant emotional problems, which resulted in a chaotic home life with little emotional equilibrium. Carl entered adulthood "looking good" but also carrying some significant psychological baggage.

As he moved through this 20s and 30s, Carl frequently encountered periods where he was unable to enjoy life. He often berated himself for being unhappy because objectively at least, he had no reason to be down. It sometimes felt as if a cloud was hanging over him. During these periods the simplest tasks often seemed to be overwhelmingly difficult. He couldn't get out of his own way. These episodes would last for days or sometimes weeks. Over time they became more frequent and began to interfere with his law practice. Phone messages went unreturned, status reports were late, client billing was neglected. No clients had been harmed, but his practice was headed in that direction. He gradually gained a reputation as a lawyer who always asked for extensions of time to designate experts, respond to discovery or file briefs. Since he was well-liked, opposing counsel rarely objected. Most thought that

Carl's busy practice was the reason he needed additional time. No one was aware that he was struggling just to keep his head above water. They didn't know that he was suffering from major clinical depression. For quite a while Carl was unaware as well.

Whenever he encountered a depressive episode Carl was unsparingly critical of himself. He considered his difficulties to be a sign of moral weakness, and he began to hate himself for it. A profound sense of shame began to grow. Self-loathing is a common characteristic of depression. It can usurp a great deal of emotional energy that might otherwise be channeled in more positive directions. It often leads to a self-fulfilling prophecy: I am basically worthless. Therefore, I deserve to feel this way. When such thoughts often become overwhelming they may increase the risk of self-harm. Carl never seriously contemplated taking his life, but there were occasions when he went to bed thinking that it would not be such a bad thing if he never woke up.

Throughout these difficult times Carl never failed to put on his public face: that of a friendly and easy-going fellow. He made a concerted effort to maintain that persona. He learned the masquerade as a child, and it had become second nature to him. Developing into a Janus was a survival skill. At a deep emotional level Carl had convinced himself that everyone would be horrified if they ever saw his "real self." He feared that he would end up friendless and alone. Carl already felt a deep loneliness because he believed his friendships had been forged under false pretenses. He wasn't the person his friends believed him to be. He would later describe depression as the loneliest disease in the world.

The fear and shame that so often attends major clinical depression drives many into a state of emotional isolation. That in turn can lead to the belief that one's situation is completely unique: "No one else could possibly feel as bad about themselves as I do. No one could possibly understand me".

The fear and shame that so often attends major clinical depression drives many into a state of emotional isolation. That in turn can lead to the belief that one's situation is singular: "No one else could possibly feel as bad about themselves as I do. No one could possibly understand me".

There finally came a point where Carl began to think that the cause of his struggles might be organic and not the result of a flawed character. He wondered if other people felt as miserable as often as he did. He knew about clinical depression, but until then had never considered the diagnosis might apply to him. He discussed his concerns with his primary care physician who immediately referred him to a psychiatrist. He began taking antidepressant medication. After several weeks he noticed an improvement in his mood. His lows became less frequent and severe. Carl was finally on the road to recovery, but he had a way to go.

Carl began a course of talk therapy with a licensed counselor. That process helped him uncouple his moral judgement from his disease and enabled him to address his depression objectively. He also came to understand that, while it had been harmful, his depression had been somewhat beneficial as well. His struggles enabled him to better understand the difficulties and problems encountered by others. His disease had honed his innate empathy. Most important was understanding that his "public face" was not a masquerade after all. It was a much more authentic part of him than the horrible creature conjured by his depression. His friendships were not based on pretense after all.

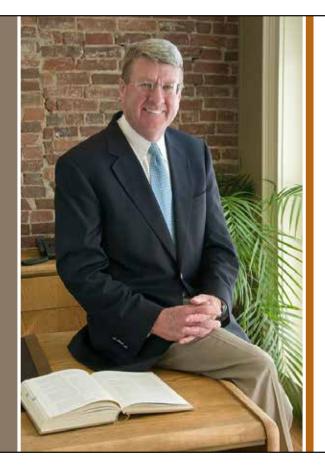
The next step in his recovery occured when Carl contacted MAP. The program was about to initiate a support group for attorneys dealing with clinical depression. Carl signed up. He approached the group's inaugural meeting with a degree of trepidation. When he entered the meeting room, he immediately recognized a colleague he had known for years who said, "You are the last person in the world I expected to see here!" The comment confirmed how effective Carl's "public face" had been. But he had found a place where he could put down his mask. The group created a safe environment in which the members could freely talk about their challenges and fears confidentially and without judgement. They each came to understand that their depression was not unique. Other lawyers' experiences were very much like their own.

They were not alone. Most important was the realization that they had found people in whom they could confide and who would wholeheartedly support their journey to recovery.

Over time Carl has been able to bring his depression under control. The dark cloud has largely dissipated. He has learned how to manage his depression effectively. He still takes antidepressants and understands that his is a chronic condition that requires monitoring. Whenever he feels his depression rising, he takes appropriate steps to address it. He is a happier person and continues to love his work. Carl also became a MAP volunteer. Over the years he has provided peer support to many lawyers, law students and judges who, like him, have battled depression.

Unfortunately, clinical depression is all too common in the legal profession. The 2016 ABA/ Hazelden-Betty Ford survey of lawyers and judges found that 28 percent exhibited elevated levels of depression. Sadly, most cases go untreated. The reasons vary. Some attorneys are fearful that word of their condition will adversely impact their practice. Others, as Carl once did, see it as an admission of moral weakness. Many others do not realize they have depression. Still others believe that their ability to solve their clients' problems proves that they can solve their own. Law students are often concerned that receiving treatment for mental health will adversely affect their chances of admission to the bar, which is untrue.

Fortunately, the stigma associated with depression is fading in the legal community. Depression is a treatable disease. There is no reason to shun treatment. Anyone seeking more information about depression will find the Institute for Well-Being in Law (*lawyerwellbeing.net*) and the website/blog *lawyerswithdepression.com* to be excellent resources. Of course MAP is always available to confidentially provide information concerning mental health matters. Feel free to contact us at maineasstprog1@myfairpoint.net.





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EVAN J. ROTH After nearly 20 years in Portland as an assistant U.S. attorney, Evan is now an administrative judge for the Merit Systems

Protection Board in Denver. He can be reached at evan.j.roth@icloud.com.



"... [P]eople understand one another with difficulty unless talking face to face."

Kleindienst v Mandel, 408 U.S. 53, 776 n.2 (Marshall, J., dissenting) (1972) (quoting Albert Einstein, as quoted in Developments in the Law—The National Security Interest and Civil Liberties, 85 Harv.L.Rev. 1130, 1154 (1972)).

In the 1960s, Ernest Mandel was the editor-in-chief of the Belgian Socialist weekly *La Gauche*. Mandel was a self-described "revolutionary Marxist" and a prominent advocate for world communism. By statute, however, anyone who advocated communism was prohibited from entering the United States, unless the Attorney General granted a discretionary visa.

In 1962, the Kennedy Administration's Attorney General (Robert F. Kennedy) authorized a visa, which allowed Mandel to enter the United States as a journalist. In 1968, the Johnson Administration's Attorney General (Ramsey Clark) authorized a second visa, which allowed Mandel to lecture at various American universities. In 1969, however, the Nixon Administration's Attorney General (John Mitchell) denied a third visa, which prohibited Mandel from entering the country to lecture at more American universities.

A lawsuit was filed by the American scholars who invited Mandel to speak. Those scholars insisted they had a First Amendment right to hear Mandel's lectures, and the government was interfering with free speech by denying Mandel's visa.

The Supreme Court disagreed. Writing for the majority, Justice Blackmun did not view the case through a First Amendment lens. Instead, he focused on the more tangible principle that the government has nearly unlimited authority to decide who may (and who may not) enter the country. Essentially, for Justice Blackmun, this was a dispute about permission to cross the border, not censorship.

In dissent, Justice Marshall saw it quite differently. From Justice Marshall's perspective, this case was not about access to Mandel's books and ideas. Instead, Justice Marshall insisted that, for First Amendment purposes, a visa should have been granted because there was no substitute for Mandel's in-person lectures. In support of the unique importance of face-to-face communication, Justice Marshall turned to Albert Einstein, as quoted above.

Disclaimer: The views expressed are those of the author and do not necessarily represent the position of the Merit Systems Protection Board or the United States government.



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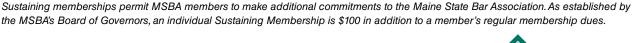
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