

Maine State Bar Association

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Connection, Community & Unity: Looking Ahead to Summer

Spring is finally here – daffodils and tulips are poking up in our perennial gardens and the magnolia tree in front of my house is in full bloom, which means it is time for me to write to you about our Summer Bar Conference and our activities over the winter.

Summer Bar Conference. We remain on track to host the 2022 MSBA Summer Bar Conference on June 15-17 at the Harborside Hotel, Spa & Marina in Bar Harbor. This is our first in-person meeting in over two years. The room block we set aside at the Harborside quickly sold out (even after we negotiated with the hotel to expand the number of rooms available twice) and so it appears that you are as enthusiastic to attend as we are! If you were unable to reserve one of the rooms at the Harborside, please do not let that deter you from attending – there are many other excellent hotels, inns, and B&Bs in the immediate neighborhood. If you are looking for a recommendation for other accommodations, please contact me directly and I am happy to help.

The mission of the MSBA is to promote the honor, dignity and professionalism of lawyers, advance the knowledge, skills, and interest of its members, and support the public interest in a fair and effective system of justice. In line with our mission to “support the public interest in a fair and effective system of justice,” we have focused in recent years on promoting diversity and inclusivity in our leadership, membership, and programming. With this goal in mind, we have organized three of the CLE sessions at the Summer Bar Conference as a Seminar on Indigenous and Tribal Law, including a 90-minute plenary session titled “The Dangers of Divergence: A Look at the Consequences of Maine’s Unique Relationship with Tribal

Nations.” The presenters for these sessions include Native American scholars from the University of Maine, Native American attorneys, and Eric Mehnert, the Chief Judge of Penobscot Nation Tribal Court.

In addition to the Seminar, the Summer Bar Conference includes 21 other CLEs, including sessions on:

- recent PFAS regulation, legislation, and litigation
- how, when and why to focus group your case before trial
- energy prices and electric utility rates (presented by Public Advocate William Harwood)
- animal welfare law
- changes to Maine’s protection from abuse law and process
- recent development in Maine real estate law, and
- ethics (including H&D credits)

On Thursday evening, instead of a formal dinner, we have arranged for an evening cruise on Frenchman Bay for all who would like to attend. We will complete the Conference with the biennial Caroline Duby Glassman Award Lunch on Friday, which is hosted by the Women’s Law Section, who will on Friday honoring Deirdre Smith (the 2020 recipient of the Glassman Award) and Aria Eee (the 2022 recipient). I hope to see you there.

Legislative Recap. During each Legislative session, we focus our efforts on supporting or opposing bills that we believe are within the scope of our mission and/or that would have significant impact on the practice of law in Maine. During this



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session, the Legislature acted on several of our priorities, but fell short on others. If you are curious about the positions the MSBA has taken during the second session of the 130th Maine Legislature, all our written testimony on the items described below can be found on the MSBA website. Please feel free to contact me any time if you have questions about our public policy advocacy or if you think there is a subject matter affecting the practice of law that we are not covering and should be.

I would like to personally thank Jim Cohen and Clara McConnell (our government relations attorney and consultant) for all the public policy work they do on our behalf and for their thoughtful counsel. During the Legislative session, we issue our weekly Legislative Update to all our members by email on Monday mornings, which includes a comprehensive legislative database covering all the bills we have identified that are of interest to the MSBA and its sections.

MCILS. To our great disappointment, and despite the advocacy of the MSBA and legislators from across the political spectrum, the Governor and Legislature did not fund the Maine Commission on Indigent Legal Services (MCILS) at the level requested by MCILS Executive Director Justin Andrus. During the 2020-21 session, the MSBA worked to support a \$9 million increase in funding for MCILS, which, among other things, included an increase in the hourly rate for appointed attorneys from \$60 to \$80. In March of this year, the MSBA and others testified in favor of an additional \$8 million in funding for MCILS, and the Judiciary Committee agreed, recommending to the Appropriations Committee

funding to:

- raise the rate for MCILS rostered attorneys from \$80/hour to \$100/hour
- fund a geographically limited public defender office pilot project in the Kennebec-Somerset prosecutorial district
- create a team of rural public defenders, employed by MCILS, to be deployed to underserved regions in the state
- reimburse MCILS-rostered attorneys for legal research fees and training programs for MCILS attorneys

However, this funding did not materialize in either the Governor's supplemental budget or on the appropriations table, with the exception of \$1.24 million that was appropriated at the last minute to allow MCILS to hire five attorneys to service as a rural public defender unit and \$275,000 to reimburse rostered attorneys for online legal research. Despite this setback, we will continue working to convince the state to adequately fund MCILS and for the resources necessary for Maine attorneys to provide constitutionally required legal representation for indigent Mainers in criminal matters.

Civil Legal Aid. The MSBA testified in support of LD 1326, a bill carried over from the prior session which would provide an ongoing appropriation to support the civil legal aid organizations in Maine, such as the Maine School of Law's Cumberland Legal Aid Clinic, Legal Services for the Elderly, and Pine Tree Legal Assistance. The Appropriations



Committee decided to add \$1.3 million to the ongoing baseline budget for civil legal aid.

Probate Courts. In 2021, the Legislature created a Commission to study the probate court system and to report back to the Judiciary Committee on whether the probate court system should be incorporated into the Judicial Branch. The Commission delivered its report this legislative session, recommending that the state transition to a new probate system within the Judicial Branch over a period of four years. Those recommendations became LD 1950. After canvassing our members, we decided not to take a position on this bill, but were able to provide the Judiciary Committee with data describing the level of support of our members on each of the Commission's recommendations and comments on the proposals in general (anonymous, of course). Despite passing the Legislature, LD 1950 included a substantial fiscal note and has not been funded by the Appropriations Committee as of the time of this writing. As far as we can tell, it is very unlikely that LD 1950 will be funded before adjournment, but we suspect the effort to merge the probate courts into the judicial branch will be revived in the near future.

Remote Notarization. In 2021, the Legislature passed a bill that directed the Secretary of State to study and report back with recommendations for implementing remote and online notarization in Maine. The Secretary of State convened a group of stakeholders, including the MSBA, who proposed draft legislation to accomplish this goal. The draft legislation ultimately took the form of LD 2023, and was enacted and signed by the Governor.

CLAC Satellite Program in Aroostook County. We testified in favor of LD 1924, which establishes a rural practice clinic in Aroostook County as a three-year pilot project of the existing

Cumberland Legal Aid Clinic (CLAC) at the Maine School of Law. This bill was enacted by the Legislature and signed by the Governor. Funding for the first two years of the pilot project will be provided by a payment of \$680,000 to the University of Maine System from the funds received by the Attorney General for antitrust enforcement and enforcement of the Unfair Trade Practices Act. We will work to ensure that the program receives full funding for the third year of the pilot program.

Judicial Evaluations and Recommendations for Since January 2022, we testified in favor of the reappointment of Justices William Stokes, Thomas Warren, Wayne Douglas, Bruce Mallonee, and Michaela Murphy, as well as Judges Deborah Cashman, Bruce Jordan, Susan Oram, Peter Goranites, and Rae Ann French. We also testified in favor of the nomination of Justice Rick Lawrence to the Maine Supreme Judicial Court. The MSBA sends surveys to all practicing lawyers in Maine to evaluate trial court judges in the sixth year of every judge's term. These evaluations are used to determine the MSBA's support of or opposition to the nomination of a judge and, in turn, to make recommendations on the nomination to the Governor and the Judiciary Committee.

Bar Talk. We continue to host Bar Talk via Zoom, generally on the second Wednesday of each month at 11 AM. You can also find these shows on our YouTube channel. I really enjoyed our recent conversations with Leigh Sauflay, the Dean of the Maine School of Law, Secretary of State Shenna Bellows, Darcie McElwee, U.S. Attorney for the District of Maine, and Maine CDC Director Dr. Nirav Shah. We're scheduling guests for the summer and fall so please continue to tune in!





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

Bring on the MSBA Summer Bar Conference!

I recently returned from a trip to New York where I attended the West Point Women's Conference at my alma mater. The purpose of the conference was to bring together the 5,000+ women who have graduated from the United States Military Academy (USMA) and are currently leading the way as leaders in the military, the private sector, and the public sector. It was an academic and professional event for these academy graduates as well as Army personnel, cadets, staff and faculty, scholars, and distinguished guests to review and discuss the current Army and the role of women in the Army along with other career, health, and life topics.

I had the opportunity to meet some amazing women who are breaking down barriers to create new opportunities for females in the military and other professions, to reconnect with many of my 1995 classmates, and to visit with my own daughters who are current cadets at USMA in the classes of 2022 and 2024. I can't begin to tell you how energizing, uplifting, and plain old "good for my soul" it was for me to attend this event. We discussed important world topics, celebrated our successes, reminisced, laughed until our bellies hurt, and even cried. It demonstrated to me how desperately we need these in-person interactions with not only our family members, but also our friends and colleagues.

This leads me to the importance of your attendance at the MSBA's upcoming 2022 Summer Bar Conference—our first in-person membership meeting since the pandemic! If you haven't already done so, mark your calendars for June 15-17 and join us in Bar Harbor. We are so pleased and excited to offer you an opportunity to get away from your office and the never-ending Zoom meetings, attend quality CLE programming, visit beautiful Bar Harbor, and get back together with your friends and colleagues. It is shaping up to be a terrific event!

We're kicking things off with a reception on Wednesday evening complete with stunning views of picturesque Frenchman's Bay. CLE programming begins on Thursday morning with numerous topics from which to choose, including employment law, fee arbitration, animal law, implicit bias in mediation, workers' comp, PFAS regulation, real estate law, litigation, and indigenous tribal law—just to name a few. There is something for everyone! After a day of expanding your legal knowledge and fulfilling your annual CLE requirements, we'll wind down with a relaxing sunset picnic dinner cruise! On Friday, there will be more CLE programs to attend with topics such as trademark law, protection from abuse law, mentoring and professionalism, business law, court access, focus groups for trial, divorce, and animal welfare. And last but not least, we close out the conference with the Caroline Duby Glassman Award Lunch sponsored by the Women's Law Section, where we'll recognize the 2020 awardee, Deirdre Smith, and the 2022 awardee, Aria Eee.

As you can see, the MSBA staff and leadership has been working hard to make this a fun, informative, and revitalizing affair—all we need is you! Please make this 'Welcome Back' event a success by joining us for the 2022 Summer Bar Conference. I promise you won't be disappointed!

As always, if you have any ideas or concerns about the Summer Bar Conference or the MSBA generally, you can contact me by phone at (207) 622-7523 or by email (aarmstrong@mainebar.org) with any ideas or concerns. Thank you!





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

Filming the Police As Citizen-Journalists— A Tale of Two Heroes: What They Did, Why They Could Do It, and the Consequences for the Racial Divide In This Country*

I. Introduction

On Yom Kippur I gave a talk at the Etz Chaim synagogue in Portland, Maine, discussing a decision I wrote about 10 years ago for the First Circuit, *Glik v. Cunniffe*.¹ Although discussing an appellate opinion during a religious service on the holiest day of the year might seem an odd choice, I thought it was appropriate for several reasons. The *Glik* decision helped establish the right of a bystander in Minneapolis to take the shocking video of Officer Derek Chauvin killing George Floyd. That video, and others like it, have changed the nature of policing in this country, and they have intensified the debate about racial injustice.

We say this prayer on Yom Kippur:

Justice, justice shall you pursue, that you may
live; do good and not evil, that you may live.

The *Glik* case, and its implications, are all about justice—for individuals treated unjustly by the police, for those challenging the conduct of the police in the courtroom, and for a Black minority struggling with racism in this country. These issues are closely connected. As I explain those connections, I wish to emphasize that I have enormous respect for police officers and the indispensable work that they do. But I cannot tell the story that I wish to tell without casting a harsh light on some aspects of police work.

II. The Heroes

There are two heroes in this story. The first one is Darnella Frazier, the African-American teenager, 17-years-old at the time, who video-recorded the murder of George Floyd on May 25, 2020, in Minneapolis. Frazier was walking to a local convenience store, Cup Foods, with her nine-year-old cousin to get some snacks. She lived nearby and had made that walk many times over the years. As Frazier and her cousin approached the store, they walked past a parked police car. Behind that car, Derek Chauvin and three other police officers had surrounded Floyd. As Frazier later described it at Chauvin's trial, she saw "a man on the ground and . . . a cop kneeling down on him."² Not wanting her cousin to see "a man terrified, scared, begging for his life," Frazier walked her cousin to the store entrance. She then stayed outside because "it wasn't right." She could tell that Floyd "was suffering, he was in pain." So "I opened my phone and started recording because I knew if I didn't, no one would believe me."³ Twenty seconds after she started recording, Floyd said, "I can't breathe." Frazier filmed the scene for nine minutes and 20 seconds until Floyd, already dead, was carried away by medics.⁴

So why was Darnella Frazier able to record that scene? The officers knew that she had her smartphone trained on them. They surely would have preferred to stop the recording. In the not-too-distant past, they would have stopped her, on the theory that she was interfering with their work. But they were not able to stop her because of the second hero in this story.

* This article originally appeared in *The Journal of Appellate Practice and Process* Vol. 22, No. 1 (Winter 2022) and has been reprinted with permission.

His name is Simon Glik, a Jewish, Russian immigrant from Moscow who came to this country decades ago and now practices law in the Boston area.⁵ Frazier and Glik are connected by the *Glik* decision. In my 36 years as a judge—state, federal, trial, and appellate—I have written approximately 1,500 opinions. The decision I wrote connecting Glik and Frazier is surely the most important opinion that I have ever written, and it will probably remain so.

Glik's story begins on the evening of October 1, 2007, when he was walking by the Boston Common, the oldest public park in America.⁶ The Boston Common is an iconic public space and the setting for protests and celebrations from colonial times to the Civil Rights era. Protests continue to be held there. It is a quintessential setting for the exercise of free speech and public assembly.⁷

On his walk, Glik noticed three police officers arresting a young man on the Common.⁸ Then he heard a bystander say, "You are hurting him, stop."⁹ Concerned that the officers were using excessive force to make the arrest, Glik stood about 10 feet from the officers and began recording video footage of the arrest on his cellphone.¹⁰

After placing the suspect in handcuffs, one of the officers turned to Glik and said, "I think you have taken enough pictures."¹¹ Glik replied: "I am recording this. I saw you punch him."¹² Another officer then approached Glik and asked if his cellphone recorded audio.¹³ When Glik said it did, the officer arrested him for unlawful audio recording in violation of the Massachusetts wiretap statute.¹⁴ Glik was taken in cuffs to the South Boston police station,¹⁵ where the police confiscated his cellphone and a computer flash drive and held them as evidence.¹⁶ Later, the police added charges of disturbing the peace and aiding in the escape of a prisoner.¹⁷

The prosecution soon withdrew the escape charge.¹⁸ A Boston municipal judge then dismissed the disturbing-the-peace and wiretap charges.¹⁹ Angered by the contrived charges, Glik filed a federal civil rights lawsuit in February 2010 against the arresting officers and the City of Boston, claiming that the arrest had violated his First Amendment rights.²⁰

III. Qualified Immunity

Relying primarily on the doctrine of qualified immunity, the defendants moved to dismiss the complaint because, in their words, "it is not well-settled that [Glik] had a constitutional right to record the officers."²¹ After the district court denied their motion, the defendants immediately appealed, again re-

lying on qualified immunity.²² The officers claimed that they could not be sued for damages because they could have reasonably believed that Glik did not have a First Amendment right to record their conduct.²³

The doctrine of qualified immunity, which applies to government officials generally, was in the news recently because of a police reform measure—the George Floyd Justice in Policing Act—that was under consideration by Congress.²⁴ The doctrine "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly, and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."²⁵ Largely along party lines, Democrats pushed to eliminate the doctrine in its application to the police because they believe that it supports bad police behavior. Republicans resisted the reform measures, believing that qualified immunity gives the police important protections.²⁶

In its application, the qualified immunity defense poses two questions. First, did the government officials violate a constitutional right of the plaintiff; second, was that right clearly established at the time so that the officials should have known that what they did to the plaintiff was wrong.²⁷ If either question is answered no—there was no violation of a constitutional right, or the right was not clearly established at the time of the violation—the defendants are entitled to immunity from any claim for damages.

IV. The *Glik* Decision

The Boston police officers wanted our panel to focus first on the clearly established law question, arguing that even if they had violated Glik's First Amendment rights, his right to record their conduct was not clearly established at the time of his arrest.²⁸ This approach—assuming that the right at issue exists but then deciding that it was not clearly established—would have allowed the officers to prevail without our court ruling that Glik had a First Amendment right to record their conduct.²⁹ The Supreme Court has explicitly permitted courts to take this approach.³⁰ But we wanted no part of it here. The First Amendment issue at the heart of the case was too important to avoid.

By its terms, the language of the First Amendment only prohibits laws "abridging the freedom of speech, or of the press."³¹ It says nothing about the gathering or dissemination of information by the public. But the Supreme Court long ago established that "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit gov-

ernment from limiting the stock of information from which members of the public may draw.”³² Also, the Supreme Court had established that “[t]here is an undoubted right to gather news from any source by means within the law.”³³ Citing that authority, I wrote a decision for our panel concluding that “[t]he filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles.”³⁴

We also made the important point that the public’s right of access to information is co-extensive with that of the press, and that changes in technology had blurred the lines between private citizens and journalists.³⁵ As we said in a prophetic statement:

The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.³⁶

Having decided that Glik had a First Amendment right to record the arrest on the Boston Common, we then had to decide if his right was clearly established in the First Circuit when the Boston police officers arrested him. (The First Circuit includes Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico.) There is an important connection between the constitutional question and the clearly established question. If there is abundant law supporting the conclusion that the conduct of government officials violated the Constitution, the clearly established question becomes easier to answer affirmatively.

I would not say that we found abundant law in *Glik* supporting the right to record. There were the general First Amendment principles I have mentioned about the right to gather information on the work of government officials, available both to journalists and private citizens. There were two court of appeals decisions concluding, with scant analysis, that an individual has a First Amendment right to record police conduct in public places.³⁷ And, importantly, we had a First Circuit precedent that said, again with scant analysis, that a self-styled journalist, arrested for filming members of a local commission conferring in the hallway outside the location of a public meeting, had been exercising a First Amendment right to film.³⁸ Although the defendant officers in the *Glik* case had cited two other court of appeals decisions holding that the right to film the work of police officers in public was not

clearly established, one of those opinions was an unpublished per curiam decision with no precedential force, and the other involved a traffic stop, characterized by the court as an inherently dangerous situation. That description did not apply to the arrest on the Boston Common.³⁹

So the question was whether these sources of law would have given reasonable police officers in the First Circuit, confronted with Glik’s video-recording, fair warning that he had a First Amendment right to film their conduct. If so, the officers would not be entitled to immunity for their unconstitutional conduct in arresting Glik.

In answering this fair warning question, we found notable the brevity of the analysis in our First Circuit case, and in the precedent of the other two circuits agreeing that the First Amendment provides a right to film the public conduct of government officials. As we saw it: “This terseness implicitly speaks to the fundamental and virtually self-evident nature of the First Amendment’s protections in this area.”⁴⁰ We also gave considerable weight to the clear language in our own precedent, which stated that, because the plaintiff’s journalistic activities “were peaceful, not performed in derogation of any law, and *done in the exercise of his First Amendment rights*, [the officer] lacked the authority to stop them.”⁴¹

We therefore disagreed with the Boston police officers’ assertion that, at the time of Glik’s arrest, there was no clearly established First Amendment right in the First Circuit to record police officers carrying out their public duties. Rather, our own precedent and the self-evident nature of the First Amendment right at issue led us to conclude that “the state of the law at the time of [Glik’s arrest] gave the [police officers] fair warning that [their] particular conduct was unconstitutional.”⁴² In practical terms, our decision meant that Glik’s lawsuit for damages against the Boston police officers would continue.

V. The Consequences of the Right to Record for the Police

The *Glik* decision was a big deal. An editorial in *The New York Times* described it as a “strong opinion” protecting the right to video-record the activities of police officers in public.⁴³ It noted that “[t]he officers tried to turn Mr. Glik’s exercise of his rights into a crime. By turning his cellphone camera on them, he held them accountable for their conduct.”⁴⁴ Law journals and media bloggers said that the decision established that there was now a clear constitutional right to record public activities of the police.⁴⁵ As one commentator put it:

The *Glik* case was sort of a turning point, because it was a very clear opinion. The First Circuit really grounded its recognition of

this First Amendment right in a long tradition of First Amendment activity in public places . . . And so it was a very powerful statement that yes, we should recognize this right. And other courts started to pick up on that⁴⁶

Indeed, three other federal circuits have followed the *Glik* decision, making it broadly applicable in the country.⁴⁷ Although the Supreme Court has never ruled that there is a First Amendment right to record the work of the police in public, I doubt that the Court would rule otherwise, given the grounding of the right in well-established First Amendment principles.⁴⁸

Still, it is increasingly important that the Supreme Court address this issue.⁴⁹ There is now a backlash in some quarters against the right to record the public work of the police. In 2021, Miami Beach passed an ordinance designed to curb such recording by making it a crime to stand within 20 feet of officers with the “intent to impede, provoke or harass” them.⁵⁰ That ordinance was eventually suspended after all 13 people arrested under it were young Black men or women.⁵¹ Eight of them had been recording police officers.⁵² This data underscores the importance that members of the Black community attach to their right to record the work of the police.

Indeed, if one recalls the video of the police beating of Rodney King, a Black man, in Los Angeles in 1991,⁵³ it is easy to understand the significance of this right to record for the Black community. Shown on our television screens, that video transfixed the country because of its brutality and the novelty of its public airing. However, we only saw the beating because of the happenstance that a Sony Handycam, hardly a ubiquitous item, was in the hands of a plumber, who recorded the encounter and then, sensing its implications, sent the tape to a local television station.⁵⁴

Darnella Frazier did not have to rely on a television station to air her video. She posted it herself on Facebook at 1:46 a.m., four hours after George Floyd was pronounced dead at the County Medical Center.⁵⁵ She included this caption: “They killed him right in front of cup foods over south on 38th and Chicago!! No type of sympathy [two broken-heart emojis] #POLICEBRUTALITY.”⁵⁶ Local protests against police brutality began later that day and soon erupted around the country. The four officers shown on the video were quickly fired.⁵⁷

Now, in the smartphone and social media era, it is no longer happenstance that Darnella Frazier, Simon Glik, or others like them, have the tools to be citizen-journalists exposing police misconduct. Those tools are everywhere. Indeed, in recog-

nition of that reality, and to their credit, the police in many places have begun to use body cameras to record their own work.⁵⁸ Those body cameras can confirm the good work that most police officers do, tell the rest of the story if a bystander video tells only part of it, and enhance the accountability of the police to the public.

The right to record articulated in *Glik*, and the technology now available for the exercise of that right, have also fundamentally changed the way police conduct is evaluated in the courtroom. Traditionally, trials have been the re-creation through courtroom testimony of events outside the courtroom. Although testimony remains important, smartphone videos now bring those events into the courtroom to confirm or contradict the live testimony. Commentators have long noted that juries usually favor a police officer’s version of events over that of a civil rights plaintiff or a criminal defendant.⁵⁹ But, as one commentator has put it, “[v]ideo footage often goes a long way in narrowing or eliminating this built-in credibility gap.”⁶⁰ Put bluntly, as another commentator has stated, “a camera can mean that there is no ambiguity about what happened.”⁶¹

The Derek Chauvin murder trial proves the power of that observation. In the hours following George Floyd’s death, the Minneapolis Police Department issued a press release, later withdrawn, titled, “Man Dies After Medical Incident During Police Interaction.”⁶² The release explained that officers responded to a report of a “forgery in progress,” and that “[o]fficers were advised that the suspect was sitting on top of a blue car and appeared to be under the influence.”⁶³ The release added that Floyd “physically resisted officers” and “appeared to be suffering medical distress,” prompting them to call for an ambulance.⁶⁴

Incredibly, the release implied that the officers tried to help Floyd. It said nothing about the use of physical force by the officers. Yet we now know from Darnella Frazier’s video what actually happened. Of course, there were other witnesses to the actions of Chauvin and the other officers, and some of those witnesses testified at Chauvin’s trial.⁶⁵ In an earlier era, in the absence of Frazier’s video, Chauvin’s trial would have become a credibility contest between Chauvin, the other officers on the scene, and the civilian witnesses. The outcome of that trial might have been different than the trial dominated by Frazier’s searing and unambiguous video.

VI. Larger Consequences

To be sure, Frazier’s video is only one of the most dramatic of numerous, widely disseminated videos taken by citizens in recent years recording police violence against Black men. Recall

the video taken by a bystander on Staten Island in 2014 of a police officer using a chokehold on Eric Garner, who died after repeating the phrase “I can’t breathe” 11 times.⁶⁶ It is an inescapable fact that Black men in particular often experience the police, and the criminal justice system, differently than white men. Bryan Stevenson, a distinguished criminal justice advocate and the head of the Equal Justice Initiative, an organization dedicated to saving the lives of death row inmates, many of them Black men, puts it this way:

Our society applies a presumption of dangerousness and guilt to young black men, and that’s what leads to wrongful arrests and wrongful convictions and wrongful death sentences, not just wrongful shootings [of suspects by police]. There’s no question that we have a long history of seeing people through this lens of racial difference. It’s a direct line from slavery to the treatment of black suspects today, and we need to acknowledge the shameful of that history.⁶⁷

As Stevenson suggests, there is a link between the abusive treatment of Black suspects by the police and the long history of racial oppression in this country, beginning with slavery. Hence, it is no surprise that videos of that abusive treatment shown on television and the internet have inspired a larger debate about the ongoing impact of that cruel history on Black Americans. Unfortunately, it is much more difficult to be Black in America than it should be.

In her riveting book, *Caste: The Origins of Our Discontents*, Isabel Wilkerson describes the vulnerability of the Black community to premature death. She notes these facts:

- In 2015, Black people were five times more likely to be killed by police than white people.⁶⁸
- The average white American at age twenty-five is likely to live five years longer than the average Black American.⁶⁹
- During the pandemic, Black Americans and Latino Americans died at higher rates than white Americans, in part because of their concentration in jobs at the bottom of the hierarchy, where high levels of public contact put them at greater risk of contracting COVID-19.⁷⁰

There are other disproportionately harsh fates:

- Black Americans are incarcerated in state prisons at nearly five times the rate of white Americans.⁷¹

- In 2019, Black people accounted for just 13 percent of the U.S. population but nearly 40 percent of people experiencing homelessness.⁷²

- Black men are ten times more likely than white men to be victims of firearm homicides in the United States.⁷³

There is a striking underrepresentation of Black people in positions of power:

- In the business world, there are only five Black CEOs running a Fortune 500 company, making up just one percent of the list.⁷⁴
- In the military, more than seventy years after the Armed Forces were integrated and despite a military force that is seventeen percent Black, there is not a single Black officer among the top twenty-five officers on the staff of the Joint Chiefs.⁷⁵

These statistics are only illustrative of the extent of Black disadvantage in this country. I could fill pages with similar statistics involving such critical issues as educational opportunity,⁷⁶ income levels,⁷⁷ and wealth accumulation.⁷⁸

And then there are these implacable realities: the rising threats of domestic terror from white supremacist groups, the modern incarnations of the Ku Klux Klan;⁷⁹ the shocking campaigns in many states to disenfranchise minority voters, with their echoes of the Jim Crow era;⁸⁰ the dismissive attitude held by many toward reparations proposals to address historical wealth and opportunity gaps for members of the Black community;⁸¹ and the angry resistance to instruction in our public schools on the history of racism in this country, on the theory that it imposes on our children an unfair sense of guilt.⁸² Of course our children are not responsible for the sins of the past. But we are all responsible for understanding those sins and dealing with their consequences.

Sadly, these problems are not new. In *Caste*, Wilkerson describes how a 16-year-old African-American girl won an essay contest in the spring of 1944 when she answered with a single sentence the question of “what to do with Hitler after the war?”: “Put him in a black skin and let him live the rest of his life in America.”⁸³

If this 1944 answer seems dated, consider what President Biden said last year when he traveled to Tulsa, Oklahoma, to acknowledge the riot and massacre that occurred in that city 100 years ago because a Black neighborhood dared to be prosperous. The President minced no words:

[W]e must address what remains the stain on the soul of America. What happened [here] was an act of hate and domestic terrorism with a through line that exists today still. Just close your eyes and remember what you saw in Charlottesville four years ago on television. Neo-Nazis, white supremacists, the KKK coming out of those fields at night in Virginia with lighted torches—the veins bulging on their [necks]—as they were screaming. Remember? Just close your eyes and picture what it was. . . . I didn't realize hate is never defeated; it only hides. It hides.⁸⁴

Strikingly, President Biden draws on unforgettable images of the neo-Nazis marching in Charlottesville to capture the urgent need for renewed attention to the problem of racial injustice in this country. Darnella Frazier's video of the murder of George Floyd, and others like it shown on television and the internet, serve the same purpose: they force millions of us to confront the dangerous realities of the Black experience in America. They make it difficult to look away.

VII. Conclusion

Of course, the videos taken by Darnella Frazier and Simon Glik were not inevitable. They could have looked away. They could have kept on walking. But they did not, and that is why they are heroes. They saw people suffering at the hands of the police and they felt an obligation to act, whatever the risks to themselves, by making a record of what they saw. For her heroism, Frazier was awarded a special citation by the Pulitzer Prize Board “[f]or courageously recording the murder of George Floyd, a video that spurred protests against police brutality around the world, highlighting the crucial role of citizens in journalists’ quest for truth and justice.”⁸⁵ Glik received a settlement of \$170,000 from the City of Boston, and he changed police behavior when the City created a training video instructing police officers not to arrest people who openly record what the police are doing in public.⁸⁶ Most importantly, Glik’s heroism led to the court decision that said Darnella Frazier had a First Amendment right to be the citizen-journalist honored by the Pulitzer Board.

The examples of Frazier and Glik should be instructive for us, even if the consequences of our actions are more modest. We, too, should not walk away in the face of injustice. We should follow the command in Leviticus: “Do not stand idly by while your neighbor’s blood is shed.”⁸⁷ Elie Wiesel has elaborated on this command:

When you hear of a person or a group being persecuted, . . . [w]hen there is something wrong in the community around you—or

far [a]way—do not stand idly by. You must intervene. You must interfere.⁸⁸

As I have suggested, the problem of racial injustice in this country demands our intervention, our interference. There is so much unfinished business that requires our attention and our action. We should pledge that we will not “stand idly by.” That biblical command is the burden and blessing of our humanity.

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- 29 See *id.*
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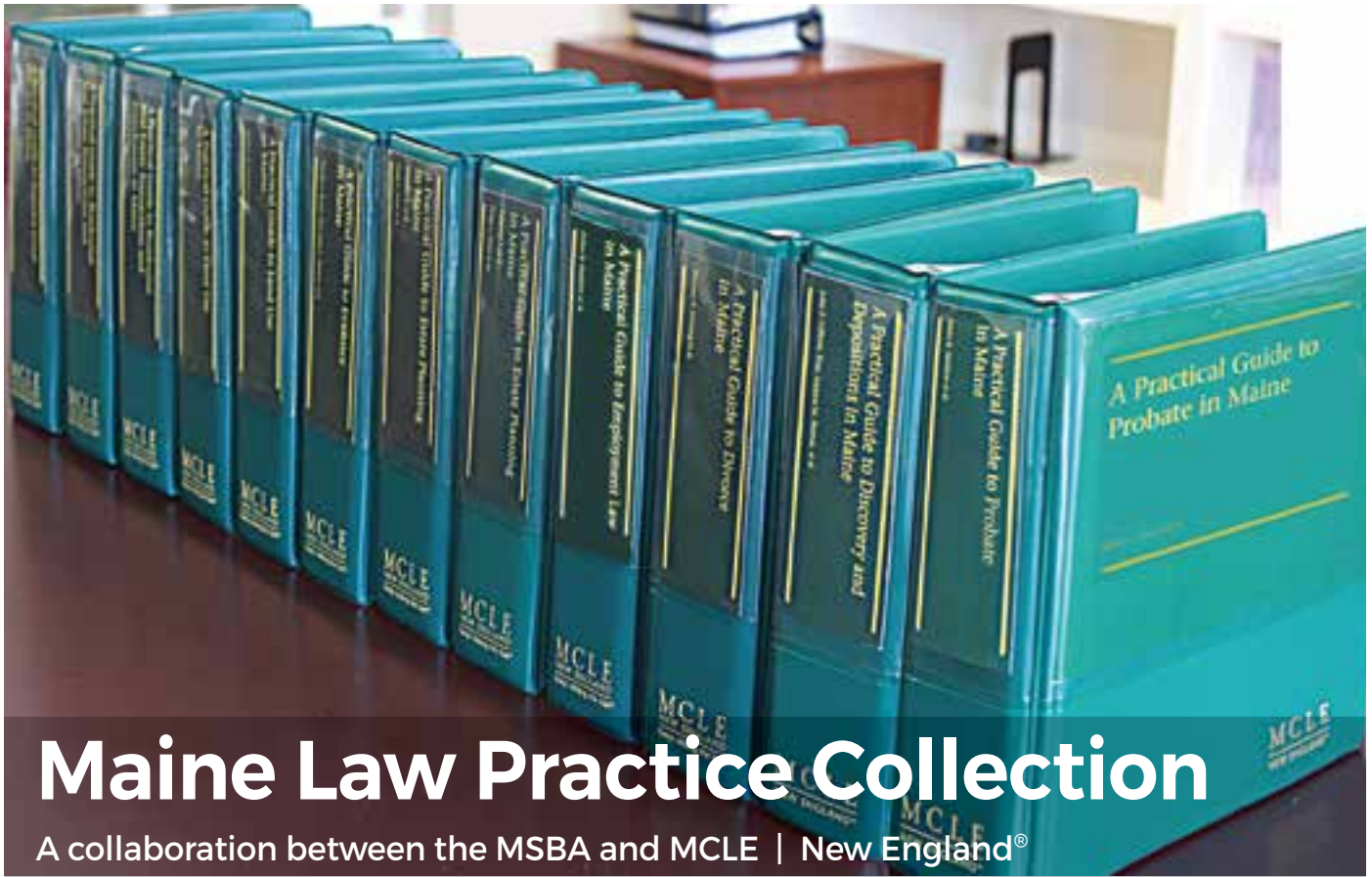


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Law Court's Decision Regarding Physician-Patient Privilege Has Far-Reaching Implications for Civil and Criminal Cases

Introduction

In *The Estate of Carol A. Kennelly v. Mid Coast Hospital*, the Law Court's four judge majority considered the merits of an interlocutory appeal and held that Maine Rule of Evidence 503 (physician-patient privilege)¹ bars parties from obtaining redacted medical records of nonparties during discovery.² At first glance, practitioners may overlook this decision and conclude that its application is limited to only a narrow subset of medical malpractice cases. A closer look at the *Kennelly* decision, however, demonstrates that it has far reaching consequences for many different case types, both civil and criminal.

In *Kennelly*, the Law Court made a threshold determination to consider the substantive issues arising from a discovery dispute in the Superior Court even though the case had not gone to trial (i.e., there was no final judgment). The Court's creation of an exception to the final judgment rule in this case creates an opportunity for future parties to exploit this exception and bring more interlocutory appeals. Not only does this have the potential to ensnare the Law Court in countless future discovery disputes, which historically have been resolved by the trial court, it risks delay and inconsistent application of the law.

The Court's holding that redacted medical records of nonparties are not discoverable for any purpose, because they are privileged pursuant to Maine Rule of Evidence 503 creates new law in Maine that is inconsistent with the established practice of exchanging records with sensitive information either in redacted form or subject to a protective order. Moreover, the decision that redacted medical records of nonparties cannot be used in litigation in Maine runs contrary to a comprehensive state and federal statutory and regulatory framework, which expressly allows such records to be

produced in litigation subject to a court order. Even absent a court order, state and federal statutes and regulations authorize hospitals and medical providers to use de-identified records for *any* use. Because the Court's decision is based on Maine Rule of Evidence 503 it affects civil and criminal cases alike.

This article explores (I) the factual and procedural background giving rise to the appeal, (II) the key conclusions in the Law Court's decision, and (III) the broad implications of the decision.

I. Factual and Procedural Background Giving Rise to the Appeal

A. Medical Malpractice Claim Arising from a Gallbladder Removal Surgery

On September 2, 2015, a surgeon at Mid Coast Hospital (Mid Coast), misidentified critical anatomy during a gallbladder removal surgery (laparoscopic cholecystectomy). The surgeon's error caused her to cut the Plaintiff's common bile duct, which caused the plaintiff to leak bile into her abdomen. As a result, the plaintiff had to undergo a complex surgery to repair her biliary system.

For well over a decade, there has been a consensus among general surgeons about the safest way to remove a patient's gallbladder. This approach, referred to as the "critical view of safety" (CVS), requires a surgeon to clearly identify biliary anatomy before clipping and cutting such anatomy. The CVS technique has been recommended by leading medical societies; adopted by major medical textbooks, including the American College of Surgeons; and promoted in peer-reviewed publications as the safest technique.

Mid Coast conceded that the surgeon failed to obtain the CVS before she clipped and cut the plaintiff's biliary anatomy. The surgeon testified that she used her own surgical technique to remove gallbladders. The surgeon also testified that gallbladder removal surgeries were the most common type of operation that she performed.

Mid Coast's designated standard of care expert testified that he personally uses the CVS technique and that he teaches all his residents and fellows to use the CVS technique. He further testified that the CVS is the standard of care for surgeons practicing in any major city, such as New York, Boston, or Chicago; however, he does not believe knowledge of the CVS has spread to places like Maine to the extent that it has become standard of care. In other words, Mid Coast's expert believes that the applicable standard of care depends on a surgeon's level of familiarity with the CVS.

Because the surgeon equivocated on whether she was trained in the CVS and used the CVS in other surgeries, plaintiff sought redacted operative reports from both before and after the plaintiff's surgery to assess whether the surgeon used the CVS in other gallbladder removal surgeries. If the surgeon had used the CVS technique in prior surgeries, it would demonstrate she had knowledge of the technique and raise questions about why she did not use the technique in plaintiff's surgery. Moreover, if the surgeon used the CVS in other gallbladder surgeries that would constitute evidence that, under the formulation of Mid Coast's own expert, the surgeon breached the standard of care in plaintiff's surgery. To the extent those records contradicted the surgeon's assertion that she always used her technique when removing gallbladders, they could be used to impeach the surgeon at trial.

B. The Superior Court Ordered the Production of Redacted Operative Reports of Nonparties

Mid Coast objected to producing any operative reports on the basis that even redacted operative reports were protected from production pursuant to state and federal law and the physician-patient privilege. After a hearing on plaintiff's motion to compel the production of redacted operative reports, the Superior Court (Cumberland County, *Walker J.*) issued an order on October 15, 2018, compelling Mid Coast to produce redacted operative reports of nonparties from before and after the plaintiff's surgery.³ Justice Walker's 13-page order fashioned a remedy that balanced plaintiff's need for the requested documents with the privacy rights of non-party patients:

Each redacted record shall include only the year of the surgery, the name of the surgeon . . . the name of the procedure, and a portion of the section labeled "operative

procedure" (*i.e.*, all information other than the year, the name of the surgeon, the name of the procedure, and a portion of the "operative procedure" will be redacted). The "operative procedure" section shall be provided only to the point in the surgery where the gallbladder was removed. To the extent there is any identifying information, (*e.g.*, name, date of birth, age, sex, race) in the "operative procedure" section, such information shall also be redacted. The [c]ourt is satisfied that these significantly redacted records will not identify any non-parties and that their identification will not be able to be discerned from the records or otherwise.. . .

. . . . [A]ll records produced by this Order shall be used by Plaintiff solely for the purpose of prosecuting her claim before the court. Plaintiff's counsel shall not attempt to identify persons whose identities have been redacted and shall not provide copies to anyone, other than expert witnesses in the case.⁴

Contrary to the defendant's argument, Justice Walker concluded that the plaintiff's efforts were "[m]ore than a mere fishing expedition for irrelevant surgical errors in other surgeries," but instead sought "*to better establish what procedures would be consistent with the applicable standard of care and whether the procedure [the surgeon] used in Plaintiff's surgery breached that standard.*"⁵

On November 5, 2018, Mid Coast filed an interlocutory appeal with the Law Court.⁶

II. The Law Court Considered the Merits of the Interlocutory Appeal and Ordered That Redacted Medical Records of Nonparties Are Privileged From Production

The case was initially argued on March 5, 2019, before Chief Justice Saufley and Justices Alexander, Mead, Jabar, Humphrey, and Hjelm. When the case was argued again on July 15, 2020, the Law Court's composition had changed with the retirement of Justice Alexander and Chief Justice Saufley's appointment as Dean of the University of Maine School of Law. On September 29, 2020, the Law Court issued a decision vacating the Superior Court's order to compel the production of redacted operative reports.⁷ The four-judge majority included Acting Chief Justice Mead and Justices Humphrey, Horton, and Hjelm (active retired). Justice Jabar issued a dissent. Justices Gorman and Connors recused themselves.

The Law Court first addressed whether Mid Coast's appeal was interlocutory.⁸ Although the Court found that the appeal from the Superior Court's discovery order was interlocutory, the Law Court concluded in a footnote that the death knell exception to the final judgment rule applied: "that as to the medical records of nonparty patients, which may be subject to the physician-patient privilege, the death knell exception to the final judgment rule applies, and we proceed to address all issues pertaining to those records."⁹

Next, the Law Court analyzed whether the operative reports that plaintiff sought were relevant. The Court concluded the redacted operative reports sought prior to plaintiff's surgery were reasonably calculated to lead to the discovery of admissible evidence.¹⁰ The Court, however, concluded the operative reports after plaintiff's surgery were "unlikely to lead to the discovery of admissible evidence" because those reports "had no bearing" on whether the surgeon was aware of the CVS technique when she performed plaintiff's surgery.¹¹ Therefore, the Court concluded that the Superior Court committed clear error with respect to this subset of operative records.¹²

The Court then analyzed whether state and federal regulations and laws preclude the production of redacted operative reports as Mid Coast had argued.¹³ The Court concluded that Maine law and HIPAA permit a hospital like Mid Coast to produce medical records if they do not identify the patient or if the disclosure is directed by a court order.¹⁴ The Court noted that Maine law and HIPAA "speak in terms of confidentiality rather than *privileges*."¹⁵ Although confidential medical records could be produced pursuant to Maine law and HIPAA, the Court next discussed whether the medical records were protected from production by the physician-patient privilege in M.R. Evid. 503.¹⁶

The Court stated that Maine Rule of Evidence 503 protects confidential communications "between or among" the patient and the health care professional.¹⁷ The Court first concluded "unredacted patient records are privileged and not discoverable."¹⁸ The Court then considered whether redacted patient records are privileged.¹⁹ The Court found "in a majority of states that have addressed the issue, once such identifying information has been redacted, the physician-patient privilege no longer protects nonparty medical records from disclosure."²⁰ Other states adopted the position that "redaction of a nonparty's personally identifying information is deemed insufficient to protect the nonparty's privacy interests, so that the physician-patient privilege continues to prevent the disclosure of *all* portions of nonparty patient records even when the records have been significantly redacted."²¹ In adopting the latter approach, the Court reasoned that the "potential evidentiary value of patient information

is outweighed by the benefit and critical importance of encouraging a trusting relationship between patient and physician vital for full and effective treatment."²²

Although the Court noted that Rule 503 did not define "communications,"²³ the Court concluded the operative notes constituted "communications" between the surgeon and her patients:

these operative notes themselves constitute *confidential communications*—records created by the surgeon to inform her patients and their other treatment providers about the techniques used during surgery, the outcome of the procedure, any challenges encountered during the operation, and anything else relevant to the procedure or associated medical care and treatment.²⁴

The Court further stated the operative notes "were part of the ongoing confidential dialogue among the physician, the patient, and other providers."²⁵ In the opinion of the Court, to permit production of redacted nonparty operative reports "would erode the necessary trust between physician and patient and impede the delivery of effective physical, emotional, and mental health services—the very purpose of the privilege."²⁶ Therefore, the Court vacated the Superior Court's order compelling the production of the redacted operative reports.

Justice Jabar dissented on the basis that Rule 503 did not preclude the disclosure of relevant and redacted medical records of a nonparty patient: "*I would follow the near unanimous approach of other jurisdictions that have considered this issue and hold that relevant health information that does not identify the patient is not privileged.*"²⁷ Justice Jabar observed that once medical records are redacted they are no longer considered "confidential" pursuant to state and federal law. Justice Jabar concluded that the Court "should not interpret Rule 503 as preventing disclosure of nonidentifiable health information because such an interpretation conflicts with the Legislature's policy, which does not prevent disclosure of nonidentifiable health care information."²⁸ Justice Jabar highlighted the disconnect that "*pursuant to HIPAA and the Maine statute, the hospital could produce these records (properly redacted) to the estate, or to anyone that requests them, but under the Court's holding these same records could not be produced to the litigants because Rule 503 prohibits disclosure.*"²⁹

III. The Law Court's Decision Has Broad Implications

The Law Court's decision has broad implications extending beyond the confines of medical malpractice cases. The decision

(A) threatens to erode the final judgment rule, (B) conflicts with federal and state laws that allow de-identified health information to be used by anyone for any purpose, (C) creates an expansive interpretation of “communications” under Maine Rule of Evidence 503, and (D) likely affects the criminal prosecution of certain case types.

A. The Law Court’s Decision Weakens the Final Judgment Rule

To be cognizable, appeals must be from a final judgment.³⁰ A judgment is considered final “only if it disposes of all the pending claims in the action, leaving no questions for the future consideration of the court.”³¹ “Generally, discovery orders are interlocutory and not appealable: the aggrieved party must seek relief in appeal from the final judgment.”³² Although appellate courts typically do not review discovery orders prior to a final judgment, the Law Court has recognized “a few narrowly defined exceptions to the final judgment rule,” including the “collateral order” and “death knell” exceptions.³³ The Law Court’s willingness to consider the *Kennelly* interlocutory appeal arising from the Superior Court’s discovery order creates an exception that threatens to swallow the final judgment rule.

i. The Collateral Order and Death Knell Exceptions to the Final Judgment Rule.

The Law Court “has consistently followed the [collateral order] rule adopted by the United States Supreme Court” in *Cohen v. Benefit Indus. Loan Corp.*, 337 U.S. 541 (1949).³⁴ Pursuant to *Cohen* and its progeny, the “collateral order” exception allows for an appeal from an interlocutory order where “(1) that order involves a claim separable from [and] collateral to the gravamen of the lawsuit; (2) it presents a major and unsettled question of law; and (3) there would be irreparable loss of the rights claimed in the absence of immediate review.”³⁵ In determining whether appeals satisfy the “irreparable loss” factor, appellate courts must “look to categories of cases, not to particular injustices.”³⁶ The consistent application of the collateral order exception across a given category of cases creates predictability and discourages futile interlocutory appeals.

Both the United States Supreme Court and the United States Court of Appeals for the First Circuit have rejected the argument that production of ostensibly privileged documents constitutes an “irreparable harm” under *Cohen*.³⁷ In *Mohawk Indus. v. Carpenter*, the United States Supreme Court considered whether a disclosure order issued by the District Court that required the production of documents arguably covered by the attorney-client privilege qualified for immediate appellate review pursuant to the collateral order exception to

the final judgment rule.³⁸ While “readily acknowledg[ing] the importance of the attorney-client privilege” to the American justice system, the Supreme Court in *Mohawk Industries* explained that the “crucial question . . . is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders.”³⁹

Applying this test to the attorney-client privilege, the Supreme Court determined that “collateral order appeals are not necessary to ensure effective review of orders adverse to the attorney-client privilege.”⁴⁰ Rather, “[a]ppellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.”⁴¹ Importantly, the Supreme Court acknowledged that the final judgment rule would not prevent attorney-client communications from being erroneously produced in some cases. The Supreme Court concluded, however, that this did not justify interlocutory appeal, because “deferring review until final judgment does not meaningfully reduce the ex ante incentives for full and frank conversations between clients and counsel.”⁴²

Since *Mohawk Industries*, the Law Court has held that the compelled production of purportedly privileged information is not a valid basis for interlocutory appeal. In *In re Motion to Quash Mercy Hosp. Evidence*, 2012 ME 66, 43 A.3d 965 (Saufley, C.J.), a hospital filed an interlocutory appeal on the basis of statutory privileges protecting sentinel event notifications, reports, and professional competence review records. The Law Court held that, under *Mohawk Industries*, “*Mercy’s* appeal must be dismissed as an interlocutory appeal to which no exception to the final judgment rule applies.”⁴³

As in other jurisdictions, the Law Court has applied the rule in *Mohawk Industries* where a non-party may be injured by a lower court’s ordering the production of privileged material, as long as a litigant has standing and incentive to appeal the final order.⁴⁴ While this remedy is imperfect, courts have consistently refused to consider how the application of a remedy available at final judgment might create “particular injustices” in a specific case.⁴⁵

The death knell exception is “closely related” to the collateral order exception.⁴⁶ It applies “where the issue pressed on appeal would be effectively mooted and substantial rights of a party would be irreparably lost if review were to be delayed until final judgment.”⁴⁷ “Put differently, where an interlocutory order has the practical effect of *permanently foreclosing relief on a claim*, that order is appealable.”⁴⁸

ii. The Law Court's Decision Threatens to Erode the Final Judgment Rule.

Other than a conclusory statement in a footnote that the production of redacted medical records of nonparty patients are subject to the death knell exception to the final judgment rule, the Law Court provided no analysis as to why the death knell exception applied. The Law Court made no attempt to distinguish how the physician-patient privilege that was implicated by the production of redacted operative reports in *Kennelly* was distinguishable from the production of documents arguably covered by the attorney-client privilege in *Mohawk Industries* or the statutory privileges protecting sentinel event notifications and reports and professional competence review records in *In re Motion to Quash Mercy Hosp. Evidence*.

It is unclear from the Law Court's decision how the substantial rights of nonparties would have been irreparably lost by the production of redacted operative reports. Patients cannot be identified based on the intraoperative description of their gallbladder.⁴⁹ Thus, the risk that nonparties' privacy interests would be irreparably lost if the Law Court deferred its decision until after a final judgment appears theoretical at best. There would appear to be far less risk of irreparable loss of rights to nonparties in *Kennelly* where the production of redacted records was involved compared to *Mohawk Industries* where the attorney-client privilege was directly implicated by the production of unredacted records or *In re Motion to Quash Mercy Hospital Evidence* where the production involved unredacted sentinel event notifications protected by a statutory privilege.

The *Kennelly* appeal exemplifies why interlocutory appeals in discovery disputes are almost universally rejected by appellate courts. First, the record was not developed for appellate review. The Law Court raised the specter that patients' privacy rights could be irretrievably lost with the production of redacted operative reports, but the Court did not have a single operative report—either redacted or unredacted—in the record to evaluate this risk. Thus, the Court was left to hypothesize about risks, which is precisely what the final judgment rule seeks to avoid.⁵⁰

Second, interlocutory appeals cause delay and thwart judicial economy. The Defendant filed a notice of appeal just after discovery closed in the case. At that point, this case had spent nearly three years traveling through Maine's prelitigation screening panel process and the Superior Court process. This interlocutory appeal assured that a any trial would be delayed indefinitely. The case was pending in the Law Court for nearly two years.

Third, the Law Court's creation of an exception to the final judgment rule for this discovery dispute threatens to entangle the Law Court in future discovery disputes where a privilege is implicated. The decision raises serious questions as to whether the Court can develop a principled rationale for declining to consider future interlocutory appeals that involve a discovery dispute that implicate an evidentiary or statutory privilege.⁵¹ In the interim, it would appear that there are endless opportunities for parties to challenge discovery orders that implicate an evidentiary or statutory privilege. Time will tell whether the Law Court will be inundated with interlocutory appeals from discovery disputes that arguably implicate a privilege. It also remains to be seen whether parties will file more interlocutory appeals to delay trials. At a minimum, it seems likely that more interlocutory appeals will follow to better clarify the new final judgment rule in the aftermath of the *Kennelly* decision.

B. The Law Court's Decision Conflicts with State and Federal Law

The Law Court's ruling that redacted operative reports are privileged and cannot be discovered or used as part of the truth-seeking function of the judicial process directly conflicts with state and federal laws and regulations. Regulations interpreting HIPAA outline several situations in which a health care provider can disclose protected health information without a patient's consent, including for public health activities (a medical provider can share with the CDC information about a patient's positive Covid-19 test result), for health oversight activities like audits or investigations of the providers, and to law enforcement.⁵² Section 164.512 governs "Uses and disclosures for which an authorization or opportunity to agree or object is not required." Pursuant to § 164.512(e)(1)(i), a health care provider is authorized to disclose health information, including unredacted health information, in the course or any judicial or administrative proceeding "[i]n response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order."⁵³

Similar to federal law and that of other states, Maine has its own health care information confidentiality statute, 22 M.R.S. § 1711-C. The statute's general confidentiality provision provides in relevant part that "[a]n individual's health care information is confidential and may not be disclosed other than to the individual by the health care practitioner or facility except as provided" in certain specified circumstances.⁵⁴ Section 1711-C(6) authorizes a health care provider or facility to disclose health information, including unredacted health information, without a patient's authorization. Specifically, section 1711-C(6)(F-1) authorizes a health care provider to

disclose health information “[a]s directed by order of a court.”⁵⁵ Although a court may choose to place certain limits and restrictions on the health information that it orders disclosed, neither § 1711-C(6)(F-1) nor HIPAA require that a court de-identify health information before it is produced.

Even without judicial intervention and a court order, federal law permits the use of de-identified medical records for any purpose, including business endeavors, comparative effectiveness studies, policy assessment, and life sciences research.⁵⁶ Federal regulations provide a list of “identifiers” that must be “removed” for a medical record to be considered “de-identified,” including, among others, “[n]ames,” “[a]ll elements of dates,” “telephone numbers,” “electronic mail addresses,” “social security numbers,” “biometric identifiers,” and “[f]ull face photographic images and any comparable images.”⁵⁷

Both federal and state privacy law categorically reject the notion that there is a privilege in de-identified medical records. Pursuant to HIPAA, Maine hospitals can de-identify health care information and use it for myriad purposes *without* the consent of its patients. Maine hospitals can sell de-identified health information to marketing companies or researchers; they can use it to refine their business; they can post it online or share it with whomever they want. Although de-identified health care information can be used for any number of transactions and activities that directly benefit a hospital or medical provider, the Law Court’s decision holds that this same de-identified health care information cannot be discovered during litigation under any circumstances. This decision is at odds with a comprehensive statutory and regulatory framework created by the Maine Legislature and Congress that carefully balances patients’ privacy interests with the truth-seeking function of the judicial process.

The Law Court’s concern that the production of de-identified operative reports would “erode the necessary trust”⁵⁸ that is essential to the delivery of medical care, is overstated and contrary to the expectation that is clearly articulated to patients when they first obtain medical treatment. One of the first documents that a patient receives when they see a new provider is a Notice of Privacy Practices (NPP). The NPP tells patients how the provider may use and share their health information and it must be given by law.⁵⁹ Therefore, patients have a clear expectation that their health information may be used and shared in a variety of ways without their consent. Mid Coast’s own NPP informs its patients that their medical information may be shared during judicial proceedings in which they are not parties.⁶⁰

C. The Law Court’s Expansive Interpretation of “Communication”

The physician-patient privilege in Maine protects *only* “confidential communications” between patients and physicians. “*With almost unanimity*, the courts . . . protecting physician-patient ‘confidential communications’ hold that when adequate safeguards ensure the anonymity of the patient, relevant, nonidentifying information is not privileged.”⁶¹ As the Supreme Court of Utah recently explained, the near universal rule is premised on the recognition that any concern about the disclosure of privileged communication ceases when the parties are de-identified: “Without an identified individual connected to a diagnosis, the diagnosis contains nothing more than medical terminology.”⁶² Likewise, all three Maine Superior Court Justices who have considered the issue have determined that redacted medical records do not constitute “confidential communications” pursuant to M.R. Evid. 503.⁶³

The Law Court’s conclusion that operative reports are “part of the ongoing confidential dialogue among the physician, the patient, and other providers,” is an expansive interpretation of the word “communication.”⁶⁴ Quite literally, there is no communication between a patient and a physician during surgery, because the patient is anesthetized. Again, the Court’s stated concern that permitting the production of redacted nonparty operative reports will have a chilling effect on peoples’ decision to seek medical treatment seems speculative. Would patients forego common surgical procedures for fear that a redacted portion of their operative note that describes an organ could be produced in a future court proceeding? This rationale seems questionable given that thousands of Mainers see medical providers every day despite the fact that providers inform patients that their health information can be used in a variety of ways without their consent. Moreover, Maine’s Legislature and Congress have already weighed these policy considerations in crafting and implementing laws and regulations that allow for the disclosure of patient’s protected health information.

More commonly, Maine Rule of Evidence 503 applies to protect incriminating statements or admissions a party makes when seeking medical attention. For example, an emergency department physician who is treating a patient for altered mental status, slowed breathing, and bradycardia, may ask the patient whether they have taken any recent drugs or medications. If the patient responded by telling the physician she was taking heroin that statement would fall squarely within the confines of Rule 503: (1) a confidential communication, (2) made by the patient, (3) for the purpose of diagnosing or treating the patient. In this context, the privilege enables a patient to communicate directly with his or her medical provider without fear that such statements

could inculcate the patient. In *Kennelly*, the redacted operative reports would not contain communications between the patient or physician that were made for purposes of diagnosing or treating the patients.

D. The Kennelly Decision's Application to Criminal Cases

The Law Court's decision presumably applies to both civil and criminal cases. The holding from the *Kennelly* decision likely applies in the context of criminal matters, including domestic violence cases where the victim is uncooperative and in certain types of health care fraud cases.

In some domestic violence cases, the victims are uncooperative with the State. In those instances, if the State proceeds to prosecute, they may obtain the uncooperative victim's medical records so that portions of the record can be entered in evidence to prove elements of the crime, including the nature and extent of the victim's injuries. The Law Court's decision in *Kennelly* suggests that the State is now precluded from subpoenaing the abused spouse's medical records pursuant to M.R. Crim. P. 17(d) or seeking to introduce such records in evidence if they were somehow obtained by other means. Although M.R. Crim. P. 17(d) permits the prosecution to subpoena privileged records in certain instances, the trial court should not order the disclosure of the records unless "*the requested information is likely to be admissible at trial.*" M.R. Crim. P. 17(d). Additionally, Rule 17(d) contemplates that the trial court will protect a "*nonparty's privileges.*"

In a criminal case, an uncooperative victim is a nonparty, because the State does not represent victims of crimes. Pursuant to *Kennelly* an uncooperative victim in a criminal case appears to have the same privilege interests in their medical records as the nonparty patients who underwent surgery at Mid Coast. Moreover, an uncooperative victim may also be able to assert the patient-physician privilege to prevent his or her treating provider from testifying for the State. In light of this decision, it remains to be seen whether Mid Coast and other medical providers throughout Maine will assert the patient-health care professional privilege on behalf of uncooperative victims in domestic violence cases.

Another issue raised by the *Kennelly* decision relates to the prosecution of health care related crimes, including cases that involve improper dispensing of medications and fraudulent billing. For example, the medical records of nonparty patients are essential for the State to prosecute a medical provider for fraudulently billing health insurance or improperly dispensing prescriptions. The Law Court's decision in *Kennelly* creates doubt as to whether the State can obtain and use the privileged medical records of nonparty patients.

Conclusion

The full ramifications from the *Kennelly* decision will become more apparent in the coming years as both the bar and the judiciary begin to use this decision in civil and criminal cases. In the meantime, the *Kennelly* decision raises several unanswered questions. Can any party who believes a discovery order adversely affects their statutory or evidentiary privilege (attorney-client, spousal, religious, trade secret, etc.) assert an interlocutory appeal from the trial court to the Law Court? Will the Law Court clarify further in future cases how and why the death knell exception applies to redacted operative reports of nonparties? How will the *Kennelly* decision affect the prosecution of certain criminal cases? Will Rule of Evidence 503 be amended in the future to bring it in accord with State and federal laws and regulations? Will the Law Court reconsider and overrule *Kennelly* in a future case? Time will tell.

ENDNOTES

- 1 Maine Rule of Evidence 503 is titled "Health Care Professional, Mental Health Professional, and Licensed Counseling Professional Patient Privilege." This privilege is referred to as the physician-patient privilege herein.
- 2 2020 ME 115, 239 A.3d 604.
- 3 *Kennelly v. Mid Coast Hospital*, CV-16-471 (Me. Super Ct., Cumberland Cty., Oct. 15, 2018) (Walker, J.).
- 4 *Id.*
- 5 (emphasis added).
- 6 On November 16, 2018, Carol Kennelly died.
- 7 2020 ME 115, ¶ 40.
- 8 Mid Coast also appealed on an interlocutory basis challenging the Superior Court's order compelling Mid Coast to produce the surgeon's personnel file. The Law Court concluded that this portion of Mid Coast's appeal did not "fall within an exception to the final judgment rule." *Id.* ¶ 9, note 5.
- 9 *Id.* ¶ 9, note 5.
- 10 *Id.* ¶ 12-13.
- 11 *Id.* ¶ 14.
- 12 *Id.*
- 13 *Id.* ¶ 16.
- 14 *Id.* ¶ 17.
- 15 *Id.* ¶ 18.
- 16 *Id.* ¶ 18-19.
- 17 *Id.* ¶ 23.
- 18 *Id.* ¶ 28.
- 19 *Id.* ¶ 30.
- 20 *Id.* ¶ 33.
- 21 *Id.*
- 22 *Id.* ¶ 34.
- 23 *Id.* ¶ 30.
- 24 *Id.* ¶ 38.

25 *Id.* ¶ 39.
 26 *Id.* ¶ 40.
 27 *Id.* ¶ 41 (emphasis added).
 28 *Id.* ¶ 49.
 29 *Id.* (emphasis added).
 30 *State v. Black*, 2014 ME 55, ¶ 8, 90 A.3d 448 (quotation marks omitted).
 31 *Bond v. Bond*, 2011 ME 105, ¶ 5, 30 A.3d 816 (quotation marks omitted).
 32 *Lewellyn v. Bell*, 635 A.2d 945, 946 (Me. 1993) (quotation marks omitted).
 33 *Pierce v. Grove Mfg. Co.*, 576 A.2d 196, 197 (Me. 1990) (relying on Supreme Court case law in interpreting the death knell exception).
 34 *See Boyle v. Share*, 377 A.2d 458, 460-61 (Me. 1977); *see also Lord v. Murphy*, 561 A.2d 1013, 1015 (Me. 1989).
 35 *Pierce*, 576 A.2d at 200.
 36 *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988).
 37 *See Mohawk Indus. v. Carpenter*, 558 U.S. 100, 107 (2009); *see also United States v. Gorski*, 807 F.3d 451, 459 (1st Cir. 2015) (explaining that, under *Mohawk Industries*, “**parties are categorically barred from appealing privilege-related disclosure orders under the collateral order doctrine**” (emphasis added)).
 38 *Mohawk Indus.*, 558 U.S. at 107.
 39 *Id.* at 108-09.
 40 *Id.* at 108.
 41 *Id.* at 109.
 42 *Id.* (emphasis added).
 43 *Mercy*, 2012 ME 66, ¶ 3, 43 A.3d 965 (emphasis added); *see also Black*, 2014 ME 55, ¶ 11, 90 A.3d 448 (dismissing appeal as interlocutory where Defendant claimed evidentiary privilege and that State illegally obtained his medical records because Defendant “would lose no substantial rights by awaiting final judgment”); *accord Harris v. State*, 420 Md. 300, 323 n.22 (Md. 2011) (“*Mohawk Industries* is instructive, if not binding, because it explores the meaning of the *Cohen* test, which we have obviously incorporated into our case law” in interpreting the common law collateral order doctrine); *Kan. Med. Mut. Ins. Co. v. Svaty*, 244 P.3d 642, 656 (Kan. 2010) (citing *Mohawk Industries* for the proposition that the **patient-physician privilege** did not justify an interlocutory appeal).
 44 *See, e.g., Mercy, supra*; *Kan. Med. Mut. Ins. Co.*, 244 P.3d at 656.
 45 *Van Cauwenberghe*, 486 U.S. at 529.
 46 *Bond*, 2011 ME 105, ¶ 11.
 47 *Lewellyn*, 635 A.2d at 947 (quotation marks omitted).
 48 *Bond*, 2011 ME 105, ¶ 8, 30 A.3d 816 (quoting *Fiber Materials*, 2009 ME 71, ¶ 14, 974 A.2d 918 (emphasis added)); *see also Share v. Air Props. G., Inc.*, 538 F.2d 279, 282 (9th Cir. 1976) (“The death knell doctrine . . . **is concerned with survival of the basic cause of action**, not merely a right collateral thereto, and is grounded on the notion that a sentence

of death should not be passed on a cause of action by only one judge.” (emphasis added)).

49 *Lewellyn*, 635 A.2d at 947.

50 *State v. Carillo*, 2018 ME 84, ¶ 8 (concluding that Defendant’s “general assertions . . . do not constitute the specific demonstration of irreparable loss that is required to abandon our otherwise well-settled application of the final judgment rule to denials of motions to disqualify”).

51 *See Mohawk Indus. v. Carpenter*, 558 U.S. 100, 106 (2009) (stressing that exceptions to the final judgment rule “must ‘never be allowed to swallow the general rule’” (citation omitted)).

52 45 C.F.R. § 164.512.

53 (emphasis added). *See e.g., McGee v. Poverello House*, 2018 U.S. Dist. LEXIS 189174, at *11 (E.D. Cal. Nov. 5, 2018) (ordering production of patient’s medical records pursuant to § 164.512(e)(1)(i)); *Black*, 2014 ME 55, ¶ 10, 90 A.3d 448 (“HIPAA does not protect a patient’s interest in the confidentiality of her or his medical records if those records have been obtained pursuant to a court-ordered warrant.”).

54 *Id.* § 1711-C(2).

55 *See also Black*, 2014 ME 55, ¶ 10, n.2, 90 A.3d 448

56 *See* 45 C.F.R. § 164.514(a)-(b); *see also* U.S. Department of Health & Human Services, *Guidance Regarding Methods for De-Identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule*, <https://www.hhs.gov/hipaa/for-professionals/privacy/special-topics/de-identification/index.html>. In other words, because HIPAA only prohibits the “[w]rongful disclosure of individually identifiable health information,” 42 U.S.C. § 1320d-6, where there is no reasonable basis to believe that the de-identified record could be used to identify the patient, the record cannot be “wrongfully disclosed” pursuant to HIPAA. *See, e.g., United States ex rel. McDermott v. Genentech, Inc.*, No. 05-147-P-C, 2006 U.S. Dist. LEXIS 90586, at *39 (D. Me. Dec. 14, 2006) (“HIPAA does not preclude a health care provider from disclosing the ‘what, when and where . . .,’ so long as the patient is not identified or identifiable as a result of the disclosure.”); *Caines v. Addiction Research & Treatment Corp.*, No. 06 Civ. 3399, 2007 U.S. Dist. LEXIS 23130, at *1 (S.D.N.Y. Mar. 20, 2007) (observing that “[i]t is a routine matter in litigation for courts to require production . . . of records that reflect medical treatment of non-parties, sometimes with the identities of the patients redacted” and that doing so “is fully consistent with the privacy provisions of HIPAA”). HIPAA authorizes a health care provider to disclose individually identifiable health information without a patient’s authorization to carry out treatment, payment, or health care operations. 45 C.F.R. § 164.506. HIPAA also authorizes medical providers to disclose health information without a patient’s authorization for purposes of public health and research. *Id.* at § 164.512.

57 45 C.F.R. § 164.514(b)(1).

58 *Kennelly*, 2020 ME 115, ¶ 40, 239 A.3d 604.

59 45 C.F.R. § 164.520.

60 See Mid Coast – Parkview Health, *Assuring your privacy*, available at <http://www.midcoasthealth.com/Connections/pdfs/2013-Privacy-Practices.pdf>, at 3.

61 *Wipf v. Altstiel*, 888 N.W.2d 790, 792 (S.D. 2016) (emphasis added) (collecting cases); see also *In Re Rezulin Prods. Liab. Litig.*, 178 F. Supp. 2d 412, 414 (SDNY 2001) (ordering discovery of redacted non-party medical records, and noting that “[a]lmost all have ruled in favor of discovery in such circumstances”); *Bennett v. Fieser*, 152 F.R.D. 641 (D. Kan. 1994) (“**The vast majority of states** that have addressed this issue have held that non-party patient medical records are discoverable and do not violate the physician-patient privilege where there are adequate safeguards to protect the identity of the non-party patient.” (emphasis added)).

62 *Staley v. Jolles*, 230 P.3d 1007, 1011 (Utah 2010); see also *Rezulin Prods. Liab. Litig.*, 178 F. Supp. 2d at 414 (noting that “[a] scrap of paper upon which a physician . . . wrote only the word ‘indigestion’ (a diagnosis) or ‘aspirin’ (a treatment) or ‘malingering’ (an evaluation) would . . . be privileged. The . . . rulemakers could not possibly have so intended”).

63 See *Balian v. Kamm*, 1987 Me. Super. LEXIS 376, at *3-4 (Me. Super. Ct., Penobscot Cty., Dec. 22, 1987) (Chandler, J.); *McCain v. Vanadia*, CV-16-117 (Me. Super. Ct., Penobscot Cty., Aug. 7, 2017), at *10 (Murray, J.); *Kennelly v. Mid Coast Hospital*, CV-16-471 (Me. Super. Ct., Cumberland Cty., Oct. 15, 2018) (Walker, J.).

64 2020 ME 115, ¶ 39, 239 A. 3d 604.



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Is There a Reason to Tinker with Maine's CLE Requirement? Yes, several.

A registered, non-exempt Maine attorney is required to earn and report to the Board of Bar Overseers a minimum of 12 credit hours of approved continuing legal education (CLE) per calendar year. Credit hours may be earned by various means,² but credit hours earned by “self-study programs”³ are limited to three specific activities and capped at five (5) credit hours. The basis of the cap is unclear, but, more importantly, these limitations are inequitable to practitioners in rural areas with limited ‘live’ CLE options and exclude activities that fall within the clear purpose of Maine’s continuing legal education requirement.

Practical considerations, judicial commentary, and an analysis of the continuing legal education requirements from other states lead to the conclusion that the time is right for a change. The Maine Bar Rules should be amended to:

1. Establish a technology specialty credit hour from one of the 10 general credit hours to improve the technological competence of Maine lawyers;
2. Recognize and encourage community-related activities for CLE credit;
3. Remove the cap on credit hours earned by self-study programs and allow specialty credit hours to be earned by online CLE programs that have an interactivity component; and
4. List in one section all activities eligible for CLE credit.⁴

Amendments to the Maine Bar Rules would require a draft of the proposed revisions be presented to the Board of Bar Overseers (preferably with the support of the Maine State Bar Association) and then be submitted to and considered by the Maine Supreme Judicial Court. This article aims to open the discussion and begin the process.

The Purpose and Requirements of Continuing Legal Education

The purpose of Maine’s CLE requirement is clear: “The purpose of minimum continuing legal education (MCLE) requirements is [1] to promote and sustain competence and professionalism and [2] to ensure that attorneys remain current on the law, law practice management, and technology in our rapidly changing society.”⁵ The chart below illustrates the requirement that attorneys earn 12 MCLE credit hours per calendar year unless an exemption applies. Those 12 credit hours consist of two specialty credit hours and another 10 general credit hours derived from a combination of self-study programs (capped at five (5) credit hours)⁶ and other in-person learning activities.⁷

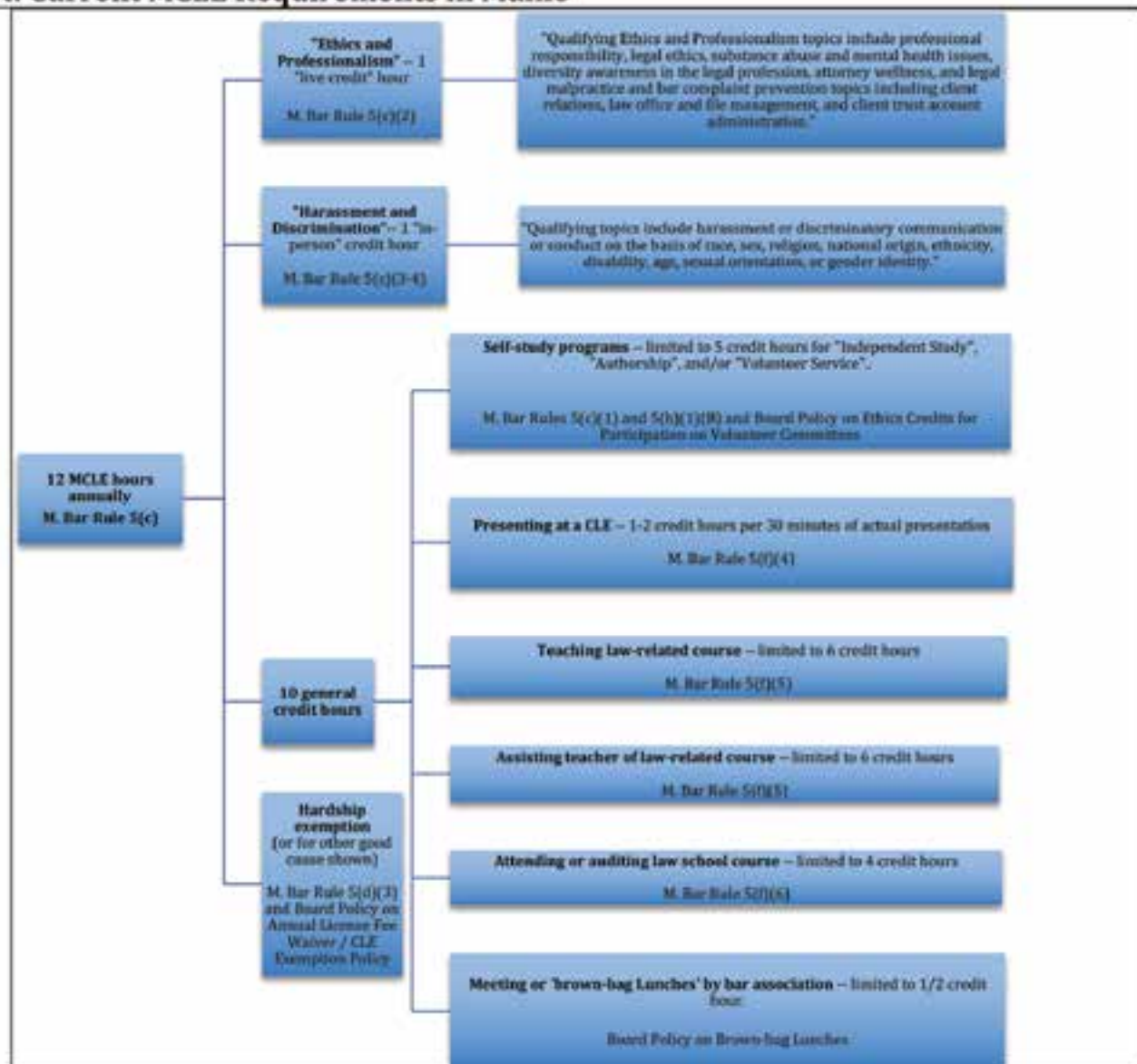
A survey of the CLE requirements from other states identified several activities worthy of CLE credit that are currently omitted from Maine’s requirements. That exercise also revealed that some areas of the Maine Bar Rules should be updated and modernized. The following analysis summarizes the need (1) for a required technology credit, (2) to recognize and encourage community-related activities, (3) to eliminate the cap on self-study programs, and (4) to provide a cumulative list of CLE activities in one section.

1. Establish a Technology Specialty Credit Hour

Some Maine attorneys may avoid or limit their use of technology, but there is no denying that technology has changed the landscape that affects attorneys and the practice of law (especially during the COVID-19 pandemic). Does that mean that a Maine attorney has an ethical duty to maintain technology competence? The answer should be a resounding YES,⁸ but the current CLE requirements fail to emphasize the need for proficiency with technology.

In 2012, the American Bar Association approved changes to the Model Rules of Professional Responsibility⁹ “to make clear

Chart: Current MCLE Requirements in Maine



that a lawyer's duty of competence requires keeping up to date with relevant technology in the practice of law.¹⁰ Since then, 40 states have adopted the duty of technology competence,¹¹ the states of Florida¹² and North Carolina¹³ also revised their CLE requirements to include a technology component, and New York is considering the first-ever cybersecurity CLE requirement, with a decision expected in 2022.¹⁴ Yet one legal commentator maintained in 2019 that "Maine has done neither – it has adopted neither the duty of technology competence nor mandatory tech[nology] CLE."¹⁵

The Maine Board of Overseers of the Bar recognized the importance of technology and practice management and

arranged for discounted consulting services with Red Cave Law Firm Consulting,¹⁶ which also provides CLE programs¹⁷ and helpful articles on law practice management advice.¹⁸ But what about the rules? Rule 1.1 of the Maine Rules of Professional Conduct on competency does not refer to technology,¹⁹ but the Professional Ethics Commission read a technology competency into Rule 1.1 and stated that "[a] **baseline understanding of, and competence in, the technology used in the practice of law must be maintained by every lawyer.**"²⁰ The Maine Bar Rules (including the Reporter's Notes) contain only a single, passing reference to the word or concept of technology in Rule 5(a) in relation to the purpose of continuing legal education:

Yes, some attorneys may be reluctant to embrace technology, but, as COVID-19 has shown, the present-day practice of law demands technological competency. And if a reminder is needed, just recall the Florida attorney who was unable to turn off a 'cat filter' while on a Zoom call with the court and opposing counsel.



“to ensure that attorneys remain current on the law, law practice management, and technology.”²¹

Rule 5(a)'s reference to “technology” could refer to an aspirational goal for technology competency,²² but that would be unsettling. Can it *really* be said that the stated purpose of MCLE contains three aspirational goals (law, law practice management, and technology), without any requirement for continuing education on one of them?²³ The operative word “ensure” means “to make sure, certain, or safe”²⁴ and, for MCLE purposes, to *make sure* attorneys remain current on the law, law firm management, and technology.

The practice of law is replete with situations that depend on an attorney's technological competency – electronic filing, client confidentiality, electronic communications, cybersecurity, electronic discovery, social media, and the list goes on. And for the avoidance of doubt, technological competency is not just to an attorney's own technology but to the client's technology as well.²⁵ Yes, some attorneys may be reluctant to embrace technology, but, as COVID-19 has shown, the present-day practice of law demands technological competency. And if a

reminder is needed, just recall the Florida attorney who was unable to turn off a 'cat filter' while on a Zoom call with the court and opposing counsel.²⁶

As for those attorneys that rely on a member of staff for electronic filings in state and federal court, as well as that in state agencies, that too can be fraught with peril. It is highly doubtful that a court or state agency would be sympathetic to an attorney's late filing that was due to a staffing issue, such as the member of staff was on vacation, in a car accident, infected with COVID-19, had child care issues, etc.²⁷ “[C]ourts place blame for mistakes on the attorneys of record, and blaming other staff will not insulate attorneys from adverse court decisions or having to tell clients that they missed a deadline.”²⁸ A recent federal trademark case from the Northern District of Illinois further illustrates the widely held view that technological competency should be mandatory and that inadequate competency can have disastrous results. “Courts are showing less patience with counsel who plead ignorance regarding ESI [electronically stored information] or technology in general.”²⁹ In this trademark case, the court excoriated former defense counsel, made clear that ‘amateur hour’ for attorneys has been over for a long time,³⁰ and granted various forms of sanctions, including ordering eight (8) hours of mandatory CLE.³¹

In sum, change is needed. Technology has permeated every aspect of the practice of law. The Maine Bar Rules are too passive and do nothing to forestall amateurish competency on technology. Maine Bar Rule 5(c) should be amended to require technological competence by (1) re-allocating one of the 10 general credit hours to be a technology specialty credit hour to improve the technological competence of Maine attorneys and (2) incorporating provisions that define “technology training” and “technology training program”, similar to that used in North Carolina.³²

2. Community-related Activities Should Be Recognized and Encouraged

Maine attorneys often undertake unpaid community service and leadership roles that provide real and significant contribu-

tions to local communities, not to mention professionalism, civility, and justice. This public service assists in maintaining the public's confidence in the legal profession³³ and furthers the purpose of the continuing legal education requirement, but such activities are, for the most part, presently ineligible for CLE credit. This is an inequity that should be corrected.

Some may argue that recognizing and encouraging community-related activities for CLE credit would be (a) outside the scope of the Maine Bar Rules and (b) unrelated to an attorney's practice of law or the delivery of legal services. This type of argument is misplaced and overlooks the precedent set by M. Bar R. 5(c)(3) to recognize and avoid harassment and discrimination ("H&D") and the aspirational goal of public service embodied in Rule 6.1 of the Maine Rules of Professional Conduct.

Maine is the only state that requires an attorney to earn at least one specialty credit hour for H&D.³⁴ Nonetheless, many would maintain that the H&D credit is related to the practice of law and delivery of legal services, in part, because harassment and discrimination impacts the practice of law and law firm management. If CLE credit can be applied to the "recognition and avoidance" of certain inappropriate and/or discriminatory activities related to the practice of law, then – by parity of reasoning – CLE credit can and should be applied for the "recognition and encouragement" of community-related activities related to the practice of law or the delivery of legal services.

Of course, not all community-related activities should be eligible for CLE credit, but there are various community-related activities that could be considered.³⁵ For present purposes, however, there are three noteworthy activities that should be eligible for CLE credit: town government, quasi-judicial boards, and Katahdin Counsel. Maine Bar Rule 5(h) should be amended to recognize and encourage more attorneys in Maine to undertake these community-related activities that were not previously eligible for CLE credit:

A. Municipal Governing Body – There are nearly 500 municipalities in Maine. An attorney serving on the town or city council or board of selectmen of a municipality (governing body) takes an oath of office³⁶ and provides a critical role in maintaining municipal governance. A governing body typically meets outside of office hours in the evening at least once a month and frequently much more often. The time and effort to prepare for and attend such meetings is substantial. An attorney that serves on a governing body for at least six (6) months per calendar year should be eligible for three credit hours.

B. Quasi-Judicial Board of a Municipality – A municipality's Planning Board, Zoning Board of Appeals (ZBA), and Board of Assessment Review are quasi-judicial bodies and board members are required to take an oath of office.³⁷ A Planning Board is generally charged with maintaining the land use ordinance, maintaining the Comprehensive Plan, and reviewing land development applications. The other two boards also regularly hold adjudicatory hearings to make findings of facts and conclusions of law in order to issue decisions. Service on such boards is useful real-world training and experience for practicing lawyers. Each of these boards meet outside of office hours in the evenings once or twice a month, but, as with serving on a governing body, a substantial amount of time and effort is required to prepare for and attend board meetings. Further, volunteer service on a quasi-judicial board is similar to "volunteer service" of a board, commission, or committee established by the Court, which is already eligible for CLE credit.³⁸ For these reasons, service on a municipality's quasi-judicial board for at least six months per calendar year should be eligible for three credit hours.

C. Katahdin Counsel – The Katahdin Counsel Recognition Program established an annual process for recognizing and honoring an attorney who has completed 50 or more pro bono hours in a calendar year.³⁹ The program seeks to encourage attorneys to provide pro bono services for Maine's low-income residents. An attorney recognized as Katahdin Counsel during a calendar year should be eligible for three (3) credit hours. There are 11 states that allow CLE credit for pro bono activities so this is not unprecedented.⁴⁰ The Justice Action Group Committee dealing with pro bono issues is also considering a proposal for attorneys to earn one credit hour for three hours of pro bono performed, with a maximum of three credit hours available.

3. Remove the Cap for Self-Study Programs

As per Maine Bar Rule 5(c)(1), a maximum of five credit hours may be earned through "self-study programs" and that leaves a minimum balance of seven credit hours that need to be earned by other CLE-eligible activities. The crux of the issue is whether there should be a cap on credit hours earned through any of the three categories of "self-study programs." There are compelling reasons why that cap should be eliminated. First, the Maine Bar Rules (nor the Reporter's Notes) do not identify a special need for live or in-person credit hours as compared to that earned by "self-study programs". Indeed, the temporary or permanent elimination of the live or in-person requirement is not unprecedented. There is no CLE require-

ment in Maryland,⁴¹ Massachusetts,⁴² Michigan,⁴³ South Dakota, and Washington, D.C.⁴⁴ Other states, including Maine,⁴⁵ have temporarily suspended the live credit hour requirement in response to the Coronavirus Disease 2019 pandemic.⁴⁶ Moreover, New Hampshire eliminated the “live” credit requirement in 2016 on the basis that “a lawyer should be able to self-interpret, and choose to devote time and money to” CLE courses.⁴⁷ Maine should do the same.

Second, the cap imposes a disparate impact between Maine attorneys practicing in rural, remote communities as compared to attorneys practicing in urban communities. Simply put, attorneys in rural areas endure a greater administrative burden as compared to that of their colleagues in urban areas, e.g., longer travel times to CLE locations and fewer programs being available.⁴⁸

Third, the cap has a practical effect of discouraging “authorship” and “volunteer service” activities because the cost, time, and effort to earn, at most, five credit hours is disproportionate to credit hours earned by “independent study”. Less time and effort is needed to earn credit hours by “independent study” than that earned by “authorship” or by “volunteer service”.

Lastly, a growing trend of state bars have permanently eliminated the live credit hour requirement and now allow all or a portion of credit hours to be earned by distance learning CLE programs, e.g., Georgia, Iowa,⁴⁹ Kansas,⁵⁰ and North Carolina.⁵¹ The State Bar of Georgia, for example, implemented a rule⁵² that permanently eliminated the live credit hour requirement based on practical considerations, which are also present in Maine:

“to allow lawyers more flexibility, to lower costs for lawyers by reducing travel-related expenses for attorneys who live in remote locations or far from learning centers, and to allow lawyers more opportunity to participate in courses that directly interest them.”⁵³

This distance learning rule should require interaction with the presenter, other attendees, or the educational software.⁵⁴ Such interaction may be via pop-up boxes during the program, periodic quizzing, response tracking, web logs, video monitoring, time recorders, final tests, user navigation monitoring, and user prompts. Some form of interactivity component could improve the quality of “self-study” programs to approximate that of a “live” program.

If the cap is removed, then a subsequent issue arises: whether the live and in-person specialty credit hours for ethics and H&D (as required M. Bar R. 5(c)(2-4)) should or should not be preserved. As a general proposition, all specialty credit

hours should have an interaction component and modern online CLE programs can provide that. Thus, the Maine Bar Rules should be amended to allow specialty credit hours to be earned by online CLE programs that have an interactivity component, which would, by necessity, remove the “live” and “in-person” limitations contained in Maine Bar Rule 5(c)(2-4).

4. *List all Activities Eligible for CLE Credit Hours in One Section* Maine Bar Rule 5(f) is entitled, “Accumulation and Computation of Credits”, but that section includes paragraphs on CLE-eligible activities for presenting at an accredited program, teaching a law-related course, and attending a course at an ABA-accredited law school. These paragraphs appear to be misplaced, and, as a housekeeping matter, should be relocated to Maine Bar Rule 5(h)(B) as additional examples of activities that may qualify for CLE credit. Other states use a similar format that include sub-headings to identify the CLE-related activity, e.g., New York.⁵⁵

Conclusion

The time is nigh. Technological competence, public engagement, lowering costs, and allowing greater flexibility, among others, are legitimate and pragmatic reasons why the Maine Bar Rule 5 should be amended and modernized, especially with respect to technological competence.⁵⁶ Whether there is a groundswell of support to move these proposals to the next step in the process is a different matter.

ENDNOTES

1 The author is a member of the Maine Bar Journal’s Editorial Advisory Committee, a member of the Town of Cape Elizabeth’s Planning Board (and, previously, a member of the Board of Zoning Appeals), and of the Maine State Bar Association. The opinions expressed in this article are solely that of the author and, as such, those opinions do not necessarily reflect that of the Maine Bar Journal (“MBJ”), MBJ’s Editorial Advisory Committee, the Town of Cape Elizabeth or its quasi-judicial boards, or the Maine State Bar Association.

2 See, e.g., (a) ‘live programs’ under M. Bar R. 5 (h)(1)(A), and (b) presenting at an accredited program, teaching a law-related course, or attending a course at a law school as set out in M. Bar R. 5(f)(4-6).

3 Programs that qualify for self-study credit are pre-recorded programs, authoring a published article, or law-related volunteer service. See M. Bar R. 5(h)(1)(B)(i-iii).

4 For example, M. Bar R. 5(f)(4-6) relates to earning CLE credit hours by presenting at an accredited program, teaching a law-related course, or attending a course at a law school. M. Bar R. 5(h)(A)(B)) also sets out credit hours earned via live and self-study programs.

- 5 See M. Bar R. 5(a).
- 6 See M. Bar R. 5(c)(1) and 5(h)(1)(B).
- 7 The phrase “in-person learning activities” is meant to include presenting at an accredited program, teaching a law-related course, or attending a course at a law school as set out in M. Bar R. 5(f)(4-6).
- 8 See Ambrogio, *Another State Adopts Duty of Technology Competence for Lawyers, Bringing Total to 40* (March 24, 2022), available at <https://www.lawnext.com/2022/03/another-state-adopts-duty-of-technology-competence-for-lawyers-bringing-total-to-40.html>; see also Me. Prof. Ethics Comm’n, Op. No. 220 (April 11, 2019).
- 9 See Comment 8 of Rule 1.1 of the ABA’s Model Rules of Professional Responsibility Conduct, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/.
- 10 See Amolsch and Smith, *Ethics: Keeping Up with Ever Evolving Technology, They Didn’t Teach that in Law School*, pp. 1 & 12 (Oct. 16-18, 2019), available at https://www.americanbar.org/content/dam/aba/events/franchising/2019_annual_meeting/w24.pdf.
- 11 See Ambrogio, *Another State Adopts Duty of Technology Competence for Lawyers, Bringing Total to 40* (March 24, 2022), available at <https://www.lawnext.com/2022/03/another-state-adopts-duty-of-technology-competence-for-lawyers-bringing-total-to-40.html>; see also Correia, *Legal Tech Goes Boom: What Does That Mean for Lawyers?* (March 13, 2022), available at <https://mainelawpracticemanagement.blogspot.com/2022/03/legaltech-investment.html>.
- 12 See Comment on “Maintaining Competence” to Rule 4-1.1 of the Rules Regulating the Florida Bar, available at https://www-media.floridabar.org/uploads/2022/02/Ch-4-2022_08-FEB-RRTFB-2-17-2022.pdf.
- 13 North Carolina requires 12 credit hours for continuing legal education, which includes specialty credit hours for professionalism, technology, and substance abuse / mental health. See 27 N.C. Admin. Code 1D.1518(a)(2), 1D.1501(c)(19) (technology training), and 1D.1602(e) (technology training program).
- 14 See Esquire Deposition Solutions, *New York Weighs First-Ever Cybersecurity CLE Requirement* (March 22, 2022), available at <https://www.esquiresolutions.com/new-york-weighs-first-ever-cybersecurity-cle-requirement/>; see also *Committee on Technology and the Legal Profession of the New York State Bar Association, Report Recommending that the Attorney Continuing Legal Education Biennial Requirement be Modified to Require that the Ethics and Professional Requirement include for Four Years One Credit on Cybersecurity* (January 27, 2020), available at <https://nysba.org/app/uploads/2020/06/3.-Report-and-recommendations-of-Committee-on-Technology-and-the-Legal-Profession-Agenda-Item-9-with-comments.pdf>.
- 15 See Ambrogio, *Maine’s New CLE Rule Gives a Tepid Nod to Technology Competence* (May 20, 2019), available at <https://www.lawnext.com/2019/05/maines-new-cle-rule-gives-a-tepid-nod-to-technology-competence.html>; but see Me. Prof. Ethics Comm’n, Op. No. 220 (April 11, 2019).
- 16 See Board of Overseers of the Bar, *News: Law Office Management Services Now Available* (undated), available at <https://www.mebaroverseers.org>.
- 17 See, e.g., MSBA, *When the camera is on: Best Practices for Zoom Trials* (June 9, 2021), available at <https://www.mainebar.org/events/EventDetails.aspx?id=1512400&group=>.
- 18 See Red Cave Law Firm Consulting, *Maine Law Practice Management* (undated), available at <https://mainelawpracticemanagement.blogspot.com>.
- 19 Comment 6 of Rule 1.1 of Maine Rules of Professional Conduct is nearly identical to Comment 8 of Rule 1.1 of the ABA’s Model Rules of Professional Conduct, but Comment 6 specifically excludes the critical reference to ‘technology’.
- 20 See Me. Prof. Ethics Comm’n, Op. No. 220 (April 11, 2019) (emphasis added).
- 21 See M. Bar R. Rule 5(a).
- 22 See Ambrogio, *Maine’s New CLE Rule Gives a Tepid Nod to Technology Competence* (May 20, 2019) (emphasis added), available at <https://www.lawnext.com/2019/05/maines-new-cle-rule-gives-a-tepid-nod-to-technology-competence.html>.
- 23 Compare, for example, the expressed “aspirational goals” of M.R. Prof. Conduct Rule 6.1 with the text of M. Bar R. 5(a).
- 24 See *In Re Equifax Inc. Customer Data Security Breach*, 999 F.3d 1247 (11th Cir. 2021) (quoting Ensure, Merriam-Webster’s Unabridged Dictionary, <https://unabridged.merriam-webster.com/unabridged/ensure> (last visited June 2, 2021)).
- 25 See, for example, *DR Distributors LLC v. 21 Century Smoking, Inc.*, 513 F. Supp.3d, 839, 927 (N.D. Ill. Jan. 18, 2021) (“Counsel have a duty to know and understand their clients’ ESI systems and storage. *HM Elecs., Inc. [v. R.F. Techs., Inc.]*, Case No. 12cv2884,] 2015 WL 4714908, at *21-22, 2015 U.S. Dist. LEXIS 104100, at *57-58 [(S.D. Cal. Aug. 7, 2015)]”).
- 26 Fowler, *How to turn on – and off! – a Zoom cat filter* (Feb. 10, 2021), available at <https://www.washingtonpost.com/technology/2021/02/10/zoom-cat-filter/>.
- 27 See Stewart and Mills, *For The Defense*, p. 28 (*New Risks Every Litigator Should Know*,) (June 2011), available at <https://www.jonesday.com/files/Publication/efd9d946-2272-4493-9bb6-312e53bb8419/Presentation/PublicationAttachment/9398f37a-c4a0-4338-8a4e-35cdf2d69900/FTD-1106-StewartMills.pdf>.
- 28 *Id.*
- 29 *DR Distributors LLC*, 513 F. Supp.3d at 863-64 (N.D. Ill. Jan. 18, 2021) (quoting Jonathan Redgrave, Victoria Redgrave, Karen Hourigan, Monica McCarroll & France Jaffe,

Expectations of Conduct by Counsel, The Federal Judges' Guide to Discovery 16-7 (2d ed. 2015).

30 *DR Distributors LLC*, 513 F. Supp.3d at 863-64 (N.D. Ill. Jan. 18, 2021) (quoting Donald R. Lundberg, Electronically Stored Information and Spoliation of Evidence, 53 Res Gestae 131, 133 (2010) ("It is no longer amateur hour. It is way too late in the day for lawyers to expect to catch a break on e-discovery compliance because it is technically complex and resource-demanding.")).

31 See *DR Distributors LLC*, 513 F. Supp.3d at 863-64 (N.D. Ill. Jan. 18, 2021).

32 See 27 N.C. Admin. Code 1D.1518(a)(2), 1D.1501(c) (19), and 1D.1602(e).

33 See M. Bar R. 5(a).

34 See M. Bar R. 5(c)(3).

35 For example, community services eligible for CLE credit could include service on the Maine State Bar Association's Board of Governors, service as an officer or director of a County Bar Association, participating in a moot court program, and assisting organizations that provide legal services to those with limited access to justice such as Volunteer Lawyers Project, Immigrant Legal Advocacy Project, Pine Tree Legal Assistance, and Legal Services for the Elderly. Each of these activities are clearly related to the practice of law and the bar associations are dedicated to improving, promoting and serving those involved in the practice of law.

36 For example, Gorham Charter, Sec. 1007 adopted Nov. 7, 1967, as amended, available at https://www.gorham-me.org/sites/g/files/vyhlf4456/f/uploads/town_charter_revised_nov_3._2020.pdf.

37 See, for example, section 5-47 of Article VIII of the Administrative Code for the Town of Kennebunkport, available at <https://ecode360.com/37510830>.

38 See M. Bar Rule 5(h)(1)(B)(iii) (volunteer service).

39 See *Maine Judicial Branch, Katahdin Counsel Recognition Program* (undated), available at <https://www.courts.maine.gov/katahdin/index.html>.

40 States that allow CLE credit for pro bono activities are Alabama, Arizona, Arkansas, Colorado, Delaware, Louisiana, Minnesota, New York, Nevada, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Washington, West Virginia, Wisconsin, and Wyoming. See ABA, *CLE Credit for Pro Bono* (undated), available at https://www.americanbar.org/groups/probono_public_service/policy/cle_rules/.

41 See Comment [6] to Rule 19-301.1 of the Maryland Rules of Professional Conduct.

42 See ABA, *Massachusetts CLE Requirements and Courses* (undated), available at <https://www.americanbar.org/events-cle/mcle/jurisdiction/massachusetts/>.

43 See ABA, *Michigan CLE Requirements and Courses* (undated), available at <https://www.americanbar.org/events-cle/mcle/jurisdiction/michigan/>.

44 See ABA, *Washington, D.C. CLE Requirements and Courses* (undated), available at <https://www.americanbar.org/events-cle/mcle/jurisdiction/washington-dc/>.

45 See PMO-SJC-1 issued on March 30, 2020 (as amended by PMO-SJC-11 on February 23, 2021), which was rescinded by PPMO-SJC-1(H) on July 16, 2021. For a list of COVID-19-related orders from the Maine Supreme Judicial Court, see <http://www.cleaves.org/COVIDorders.htm>.

46 States with temporary changes are Arizona, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. See ABA, *MCLE Rules Changes* (undated), available at https://www.americanbar.org/events-cle/mcle/mcle_rules_suspensions/.

47 See Hilliard, *NHMCLE Update: Rules and Requirements Have Changed*, NH Bar News (Oct. 19, 2016), available at <https://nhba.s3.amazonaws.com/wp-content/uploads/2020/04/14110540/Bar-News-2016-Rule-Change-with-logo.pdf>.

48 The "lack of access to quality CLE programming" by attorneys in rural areas was recently identified and addressed in Idaho. See Hirschi, *October 19, 2020 letter to Utah Bar Members*, 33 Utah B.J. 59 (Nov/Dec 2020), available at https://www.utahbar.org/wp-content/uploads/2020/11/Nov-Dec_2020_FINAL.pdf.

49 See Iowa Judicial Branch, *News & Announcements* (undated), available at <https://www.iowacourts.gov/opr/attorneys/attorney-practice/continuing-legal-education/>.

50 See Rule 804(a), Administrative Order 2021-RL-062 (Rules Relating to Continuing Legal Education) (June 1, 2021), available at <https://www.kscourts.org/KSCourts/media/KsCourts/Orders/2021-RL-062.pdf>.

51 See North Carolina State Bar, *Frequently Asked Question*, available at <https://www.nccle.org/for-sponsors/faq/>.

52 See State Bar of Georgia, *State Bar Handbook*, Rule 8-106(15) (Distance Learning CLE), available at <https://www.gabar.org/handbook/index.cfm#handbook/rule231>.

53 See State Bar of Georgia, *Permanent CLE Regulation Changes Approved by CCLC – No Limit on Distance Learning CLE* (undated), available at <https://www.gabar.org/membership/cle/index.cfm>.

54 See State Bar of Georgia, *State Bar Handbook*, Rule 8-106(16) (Interactivity Requirement for Approval of Distance Learning CLE), available at <https://www.gabar.org/handbook/index.cfm#handbook/rule231>.

55 See 22 NYCRR section 1500.22(d-m) (listing various formats and activities eligible for CLE credit), available at <http://www2.nycourts.gov/sites/default/files/document/>

56 For ease of reference, the proposed amendments discussed in this article are:

1. Amend M. Bar R. 5(c) to (1) re-allocate one of the 10 general credit hours to be a technology specialty credit hour to improve the technological competence of Maine attorneys and (2) adopt provisions that define “technology training” and “technology training program”, similar that used in North Carolina;
2. Amend M. Bar R. 5(h) to recognize and encourage more attorneys in Maine to undertake these community-related activities that were not previously eligible for CLE credit, i.e., activities relating to a municipal governing body, quasi-judicial boards, and Katahdin Counsel;
3. Amend M. Bar R. 5(c)(1) to remove the cap on self-study credit hours and M. Bar R. 5(c)(2-4) to allow specialty credit hours be earned by an online CLE program that have an interactivity component; and
4. Amend M. Bar R. 5(f)(4-6) to list in one section all activities eligible for CLE credit hours, which would include the content of M. Bar R. 5(f)(4-6) and the proposed community-related activities, as discussed above.

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A CONVERSATION WITH: SHAMARA BAILEY

The Maine Bar Journal recently asked Shamara Bailey, a solo practitioner in Patten, about her life and experience practicing law in Maine. This is the first in a series of periodic profiles featuring members of the Maine State Bar Association.

What led you to come to Maine to begin or further your career?

I first came here to attend Law School. As a veteran, I was offered an in-state tuition scholarship if I attended the law school in Portland. Following graduation, I decided to stay.

Describe your proudest career moment, or a moment that helped define who you are as a BIPOC (Black, Indigenous, and People of Color) lawyer.

I once worked at a law firm where the owner told me, "If you had dreads, I would not have hired you because dreads are nasty and always look unkempt. Black football players with dreads should not be allowed to play in the NFL because their dreads are nasty, and they should all have buzz cuts." I resigned from that job immediately. I used those racist remarks as motivation to eventually start my own law practice. This has been the proudest career moment for me thus far as a BIPOC lawyer.

If you weren't an attorney, what would you be?

I'd be a medical doctor.

What motivated you to become an attorney?

Growing up in Jamaica, it was my dream to move to the United States. My parents were already living here, and I wanted to reunite with them. The first attempt by my father for our reunification in the United States was unsuccessful. On the second attempt, he hired an immigration attorney, and his efforts were successful. It was then at the age of 12, I decided I wanted to become an immigration attorney to help families like mine.

What book, website, or other resource would you recommend to MSBA members interested in BIPOC issues and why?

The New Jim Crow by Michelle Alexander. *Tears We Cannot Stop* by Michael Eric Dyson. 13th (documentary film) on

YouTube. *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* by Douglas A. Blackmon and *The Color of Law: A Forgotten History of How Our Government Segregated America* by Richard Rothstein. Each of these books help readers understand how racial violence has been legitimized through the criminal justice system and through discriminatory legislative policies. There is a facade that once slavery was abolished, Black people were freed. The authors show how slavery was redesigned through the criminal justice system. Currently, Maine is the whitest state and when it is not, it is usually the second whitest state in the United States. A 2020 survey by the Board of Overseers of the Bar and the Maine State Bar Association revealed that 99 percent of its members are white, and the state only had 29 practicing attorneys who identified as BIPOC. It could be said that a lot of white attorneys in Maine have limited exposure and interaction with Black people, Black history, and Black culture. For those who are interested in BIPOC issues, these books are about Black people, history, and culture. Additionally, the authors explain why white people should not be satisfied with the status quo in our culture as racism is a threat to democracy.

How would you say law school prepared you to deal with issues of race and anti-racism issues in your career, if at all?

Professor Anthony Farley, of Albany Law School, did an excellent job preparing myself and my BIPOC classmates on what to expect and how to deal with race and anti-racism as BIPOC attorneys. The class Prof. Farley taught, *The New Jim Crow*, focused on racism within the judicial system. All books required for the course were written by BIPOC authors, some who are attorneys. The authors shared stories of racism they faced in the legal profession and how they navigated around the racism they faced within the profession. One book that was most impactful for me during the course was, *Justice While Black: Helping African-American Families Navigate and Survive the Criminal Justice System* by Robbin Shipp. It was impactful

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for me because the author, a former defense attorney, provided practical advice to Black families on how to navigate through the justice system during a time of crisis.

What might someone be surprised to know about you?

I was a part of a security element for Oliver North during his visit to the Philippines where I was deployed. Also, it is said that it is almost impossible to kill a bamboo plant, and yet, one died on my watch.

How does your MSBA membership keep you connected to the legal community?

I am a part of several sections within MSBA, those groups allow me to interact with other attorneys I would not normally interact with daily.

What is anti-racism, and how would you encourage an attorney to engage in anti-racism?

I agree with Malini Ranganathan who defined anti-racism as, "taking stock of and eradicating policies that are racist, that have racist outcomes." The first step for the attorney is to acknowledge that racism exists and comes in many forms. I would encourage any attorney to speak up when they encounter racism. And most importantly, serve as an avenue of education.

What advice do you have for a new BIPOC lawyer considering a career in Maine?

I would advise the new BIPOC lawyer to connect with other BIPOC attorneys who have been practicing in Maine for insights.

William Howell *MBA, ASA, CPA/ABV/CFF* 603.232.7791

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ANGELA STINCHFIELD is employed by the Maine Justice Foundation as the Director of the Campaign for Justice. For thoughts or suggestions on the Campaign, you can reach her at astinchfield@justicemaine.org.



MICHELLE 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. She may be reached at mdraeger@justicemaine.org.

Creative Solutions for the Campaign for Justice

“True freedom requires the rule of law and justice, and a judicial system in which the rights of some are not secured by the denial of rights to others.” – Jonathan Sacks

2022 marks the 18th year that the Campaign for Justice embarks upon its mission of justice for all. As a collaborative annual fundraising effort for members of the Maine Bar in support of civil legal aid efforts, the Campaign sees firsthand the impact of disparities in our justice system. And while some of the faces change with the years that pass, the commitment of the Campaign to support access to justice for all Mainers—regardless of their age, race, gender, background, or income—remains the same.

It is certainly true that much has changed in recent years, and honestly much of that change feels foisted upon us by the circumstances of a global pandemic. The efforts of the Campaign for Justice, once led by volunteers inside their workplaces, at events, and in face-to-face conversations, has, like much of the world, shifted to a virtual atmosphere. Administered by the Maine Justice Foundation, the Campaign for Justice itself has been entirely remote for over two years now.

What has not changed, however, is the drastic need for the support of the Campaign for Justice. One point where that need is increasingly urgent is in the area of elder abuse. In testifying recently in support of increased funding for legal aid, Jaye Martin, executive director of Legal Services for the Elderly (LSE), described the case of Joe, a WWII veteran who was

isolated and financially exploited by his daughter after his wife died. He tolerated the emotional abuse and only sought help after his daughter refused to give him access to his own funds so he could have spending money for food or gifts for his grandchildren. After getting legal help to stop the exploitation, Joe was able to get back to playing cards with friends, buying things for his grandkids, and eating an occasional pizza. “The problem,” Jaye shares, “is that there is a rapidly growing number of ‘Joes’ out there who are not getting the help they need.”

LSE is not alone in these observations. The six legal aid providers supported in part by the Campaign for Justice (Cumberland Legal Aid Clinic of the Maine School of Law, Immigrant Legal Advocacy Project, Legal Services for the Elderly, Maine Equal Justice, Maine Volunteer Lawyers Project, and Pine Tree Legal Assistance) echo the pleas of Maine's vulnerable populations. In some ways, handling many of the unique needs in civil legal aid matters in a virtual capacity has only exacerbated their issues—and has focused a bright spotlight on gaps that already existed. According to one study by Legal Services Corporation, just over seven out of ten low-income households (defined as 125 percent of the federal poverty level) experienced at least one civil legal problem in the past year. Of those problems reported, 86 percent received inadequate or no legal help. Many of these cases, in areas like domestic violence, veterans' benefits, disability access, housing conditions, and health care, simply needed the attention of a legal professional for resolution. But there are not enough resources to go around.

Campaign Results



Ben Marcus



Gigi Sanchez

Mainers pride themselves on their independence and resourcefulness, and that is the reason the Campaign for Justice succeeds in its goals each year: because Maine attorneys rise to the occasion to take care of their neighbors.

Maine's legal aid providers can provide dozens of examples of these types of cases. Take for example, "Mary." She woke up one cold morning in March to find she had no heat in her home. A new landlord had purchased the property in December and was trying to get Mary to sign a new lease that would require her to pay for the heat for the whole house, which included her unit and her upstairs neighbor's unit as well. The new landlord tried to avoid providing heat for the home by not filling the oil tank. Mary awoke to an unpleasant surprise: there was no heat or hot water because they had run out of fuel.

Mary called Pine Tree Legal Assistance and spoke with a paralegal. She explained what was happening and, within a few hours, a PTLA attorney contacted the landlord and explained that this violated several statutes. The landlord arranged for a

fuel truck to come to the home and fill the tank that day, and Mary will not be on the hook for all the home heating costs in the future.

Equal justice under law only works if everyone can access the system, regardless of how much money they have. The system is stacked against people who do not have legal representation. Mary had spent weeks of time trying to resolve the lease issue before the heat went out. With the help of her local Pine Tree Legal Assistance office, she was able to gain a resolution to the issue within a day.

Mary's housing dispute is unfortunately one of many such examples where simple legal aid intervention produces a swift result. Unfortunately, most cases do not get the attention they need because of limited resources.

As the needs of Maine's legal aid providers have risen over the years, so too have the goals of the Campaign, and members of the Maine Bar have responded admirably.

As the needs of Maine's legal aid providers have risen over the years, so too have the goals of the Campaign, and members of the Maine Bar have responded admirably. Former 2021 campaign co-chair, David Soley of Bernstein Shur, commented upon completion of the 2021 Campaign that he was amazed at the response of Maine's attorneys when he reached out regarding the Campaign. Not one single person, he commented, was unhappy to take his call. Everyone was overwhelmingly supportive of his efforts to raise money for civil legal aid in Maine and thanked him for his work on the Campaign for Justice.

Mainers pride themselves on their independence and resourcefulness, and that is the reason the Campaign for Justice succeeds in its goals each year: because Maine attorneys rise to the occasion to take care of their neighbors. Last year, in 2021, a full 28 percent of the Maine Bar participated with a gift to the Campaign.

Simply asking for gifts from Maine attorneys is not enough to fill the need year after year, however, so innovative ideas and solutions are always at the forefront. Raising money for the Campaign for Justice in the midst of the pandemic has taken much planning and creativity on the part of its volunteer leaders and champions. Take, for example, the Maine State Bar Association's New Lawyers Section, which volunteered last year to raise awareness of Campaign efforts amongst newer lawyers as well as raise money by hosting the first-ever Relay for Justice Virtual 5K. As a weekend-long and virtual event, participants could register and complete the race in a manner that suited them, and fees from the race, as well as other independent donations to the Relay, supported the Campaign.

In more geographic efforts, a local bar association generously offered to donate fees raised from CLE classes throughout the year in 2021 to the Campaign for Justice.

Other groups have stepped up in new and interesting ways as well. One leading law firm has offered a unique matching gift program incentive for its attorney employees: for anyone who makes a new or increased gift to the Campaign for Justice in 2022, the firm will match their gift dollar for dollar, up to a total firm donation of \$7,500. Encouraging new people to become familiar with the efforts of the Campaign, or previous supporters to give more generously, is the crux of their strategy and a brilliant way to leverage existing support for growth.

We now move into 2022, cautiously hopeful that we have entered a new phase of pandemic life. Now in year three of

our virtual existence, the Campaign for Justice will continue to work with its dedicated volunteers to find inventive ways to engage Maine's attorney population and raise critical funds for the six civil legal aid providers it helps support.

Miles Archer of Unum, a longtime Campaign for Justice volunteer who heads up in-house counsel efforts, observes: "The pandemic has had some obvious impacts on what was already a growing need for access to justice in Maine. The impact was much broader, though, as it disrupted everyone's daily life in a variety of ways, not just the less fortunate. That actually helped reinforce the need for communities to come together to support one another. We've had to grow. We've had to change. And the Campaign for Justice offered those of us in the legal community a way to contribute to that support in a meaningful way."

Miles cited the efforts of some companies to promote philanthropy-based virtual events as one viable way the Campaign can continue to further its cause.

As 2022 progresses, so too shall the Campaign and our dedication to our mission of justice for all. Our methods of function and the manner in which we elevate our cause may change, but our commitment is unwavering. Our goal in 2022 is to raise \$680,000 for the six legal aid organizations we help support, and to have a full thirty percent of the Maine Bar participate in our efforts. This year's co-chairs, Ben Marcus of Drummond Woodsum, and Gigi Sanchez of Roach, Ruprecht, Sanchez & Bischoff, PC, are already off to an auspicious start. As Ben said: "We are all privileged to practice law together in Maine, which is why we need to remember those who need, but cannot afford, our services." We hope that you will find their outreach efforts throughout the year insightful and informative.

As always, we are incredibly thankful for the scores of volunteers who make our efforts possible. Your tireless dedication to helping us level the playing field for all Mainers is truly an inspiration. We are so grateful for what you do. The dedication of Maine's legal community to access to justice for all our fellow citizens is unparalleled. In the past five years alone, we have collectively raised and shared over \$3,100,000 with the six civil legal aid providers we help support through gifts to the Campaign for Justice. All of us at the Maine Justice Foundation want to thank you for your enduring commitment to this cause. We look forward to another record-breaking year in what will certainly be a time of historic need. Please join us in our mission at campaignforjustice.org.



PAUL MCDONALD is a shareholder and the general counsel of Bernstein Shur Sawyer & Nelson. In addition to his commercial and business litigation practice, Paul represents lawyers in ethics, risk management, and malpractice matters. He can be reached at pmcdonald@bernsteinshur.com.

Rule 1.5: Reasonable Fees (And So Much More)

Successful lawyers devote sufficient time and careful attention to collecting the fees and expenses they have billed to their clients. Unfortunately, too many spend precious little time considering whether the amount of such fees and expenses or the arrangement(s) for payment of those amounts are ethically permissible in the first instance. Maine Rule of Professional Conduct 1.5 sets forth those ethical standards. The Rule is densely packed, and all Maine lawyers are well advised to take the time to ensure that their fees and fee agreements meet with its requirements.

“Unreasonable” Fees and Expenses Are Prohibited

Rule 1.5 is bottomed on a facially straightforward ethical standard: “A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”¹ The test for unreasonableness is an objective one, made from the standpoint of “a lawyer of ordinary prudence.”² Thus,

“A fee or charge for expenses is unreasonable when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or expense is in excess of a reasonable fee or expense.”³

The Factors Bearing on Reasonableness of Fees

So, what are the factors that the hypothetical lawyer of ordinary prudence should consider in reaching their determination of reasonableness? Rule 1.5 specifically enumerates ten of them, however, the list is not exclusive.⁴ These include:

(i) The time/labor involved, novelty/difficulty of the issues, and the required skill level;

- (ii) Whether the engagement precludes other employment by the lawyer;
- (iii) The range of fees customarily charged in the locality for similar legal services;
- (iv) The responsibility assumed, the amount involved, and the results obtained;
- (v) The time limitations imposed by the client or circumstances;
- (vi) The nature and length of the professional relationship with the client;
- (vii) The experience, reputation, and ability of the lawyer(s);
- (viii) Whether the fee is fixed or contingent;
- (ix) Whether the client has given informed consent to the fee arrangement; and
- (x) Whether the fee agreement is in writing.⁵

Subsection (11) of the Rule adds, as a catch-all: “any other risks allocated by the fee agreement or potential benefits of the fee agreement, judged as of the time the fee agreement was made.”⁶

Under Rule 1.5, the reasonableness of a lawyer’s fee is determined on a client-by-client and matter-by-matter basis. Therefore, best practices counsel against a “set it and forget it” approach. The recommended approach is to consider at the commencement of the engagement whether the fee could be justified as reasonable if a fee dispute were to arise at a later point in the engagement.

Expenses Charged Must Be Reasonable

While Rule 1.5 requires that both fees and expenses be reasonable, the enumerated factors determining reasonableness refer, explicitly or implicitly, only to fees. However, Official Comment 1 states that a lawyer may obtain reimbursement

for in-house services such as copying or telephone charges “by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reflects the cost incurred by the lawyer.”⁷ Additional guidance concerning reasonableness of expenses can be found in The ABA Committee on Ethics and Professional Responsibility Formal Opinion 93-379. Among other things, Formal Opinion 93-379 warns that under Rule 1.5:

- (i) "A lawyer may not charge a client for overhead expenses generally associated with properly maintaining, staffing, and equipping an office";
- (ii) "A lawyer may recoup expenses for in-house expenses such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other similar services, so long as the charge reasonably reflects the lawyer's actual cost for the services rendered"; and
- (iii) "A lawyer may not charge a client more than disbursements for services provided by third parties like court reporters, travel agents or expert witnesses."⁸

Formal Opinion 93-379 concludes its analysis of these issues by warning that:

"[I]n the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services."⁹

The Fee Arrangement Must Be Timely Communicated to the Client

Rule 1.5 is clear that the terms and conditions relating to the fees and expenses charged by the lawyer must be communicated to the client and that the preferred method of such communication is a writing.¹⁰ That communication must be made “before or within a reasonable time after commencing the representation,” unless the client is one regularly represented by the lawyer and the engagement will be on the same basis or rate.¹¹

It is worth noting that one of the additional factors bearing on the question of reasonableness of a fee included in Maine's version of Rule 1.5—which is not included in the ABA Model Rule—is whether the client has given informed consent to

the fee arrangement.¹² Accordingly, prudent practice counsels that in any engagement with a new client, or an existing client for whom the payment terms are non-identical to a prior representation, the lawyer should explain the basis of the fee arrangement clearly and completely in writing and obtain—also in writing—the client's acknowledgment of their understanding and agreement to such terms.

A related issue concerns mid-stream changes in a fee arrangement, such as might occur when there is a change from an hourly to a contingent fee arrangement or when a client who has not complied with an hourly fee arrangement grants the lawyer a security interest in property of the client. In these circumstances the change could qualify as a “business transaction” with the client, which would be governed by the requirements of Rule 1.8(a).¹³ Be sure to consult both Rule 1.5 and 1.8 whenever considering a change to an existing fee agreement.

Contingent Fees: Must Be in Writing and Signed by the Client, Contain Required Information, and Are Prohibited in Certain Matters

A contingent fee is one “contingent on the outcome of the matter for which the service is rendered.”¹⁴ Rule 1.5 requires that all contingent fee arrangements “shall be in a writing signed by the client” and goes on to enumerate certain terms that must be included therein.¹⁵ These required terms include:

- (i) The percentage(s) the lawyer will receive in the event of settlement, trial or appeal;
- (ii) Expenses that will be deducted from the recovery and whether such deduction will be before or after the contingent fee is calculated; and
- (iii) Identification of any expenses for which the client will be liable whether or not the client is the prevailing party.¹⁶

A “general form” of a contingent fee agreement, providing a skeleton template, is included as an attachment to the Comments to the Rule.

Contingent fee arrangements are prohibited in certain types of matters. These include:

- (i) Certain family law matters (*e.g.*, marital, child custody and support, paternity and emancipation);
- (ii) Criminal defense cases; and
- (iii) Estate administration if the fee is based on a percentage of the value of the estate.¹⁷

Division of Fees with an Unaffiliated Lawyer Is Permissible Under Certain Conditions

Rule 1.5(e) prohibits lawyers from sharing fees with a lawyer who is not in the same firm unless certain criteria are met.¹⁸ This issue typically arises in the context of a referral of a contingent fee matter to a trial specialist in the relevant area of law. Division of the fee is permissible if (a) the client consents to the employment of the other and the terms of the fee split after full disclosure, which must be confirmed in writing; and (b) the total fee is reasonable.¹⁹ A lawyer who refers a matter to another lawyer, whether or not they will obtain a share of the fee, has an affirmative obligation to refer to a lawyer whom they reasonably believe is competent to handle the matter.²⁰

Non-Refundable Fees Are Permissible, Subject to Certain Conditions

Like all fee arrangements, a nonrefundable fee that is earned before any legal services are rendered must be reasonable.²¹ Rule 1.5(h) adds several safeguards to ensure the client understands the nature of this type of fee arrangement. Thus, a lawyer cannot accept a nonrefundable fee unless the lawyer confirms to the client, in writing before or within a reasonable time after the engagement, the non-refundability of the fee and the services that will be provided to the client.²² Prospective waivers of the client's right to challenge such a fee are prohibited unless the waiver is part of an agreement that resolves a dispute over the reasonableness of a nonrefundable fee and (a) the client is represented by separate counsel in that regard or (b) the lawyer advises the client of the desirability of seeking separate counsel and is given a reasonable opportunity to do so.²³

Summary and Prudent Practice Tips

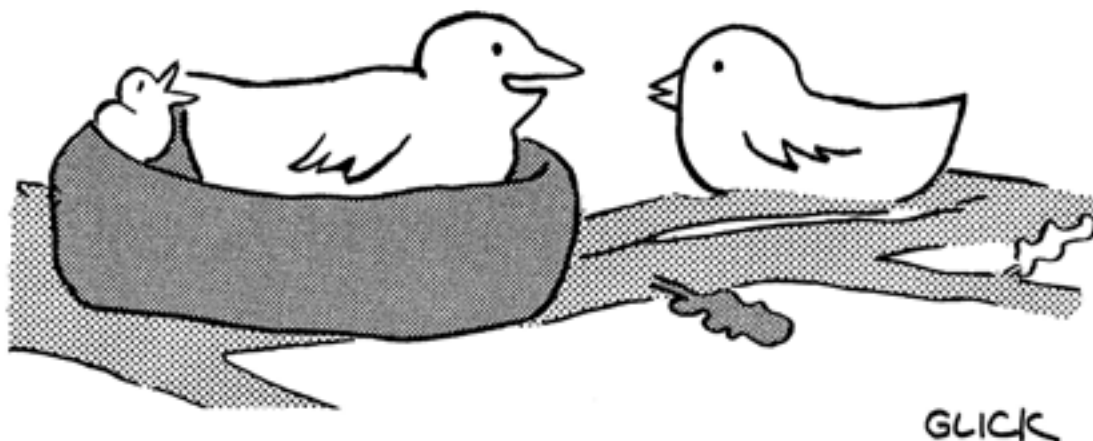
Rule 1.5 addresses many aspects of ethical fee arrangements between lawyer and client. While every engagement is unique and requires consideration of whether Rule 1.5's provisions apply, some general and practical principles can be stated. The lawyer's fee, in whatever form it is earned, must be reasonable. A lawyer should consider, in every engagement, application of the reasonableness factors enumerated in subsection (a)(1)-(11) of the Rule. Unless the matter involves an existing client and the fee is in the same amount previously charged, you should confirm the fee arrangement to the client—and do it in writing to avoid misunderstanding later on. Lawyers who enter into a contingent or nonrefundable fee agreement, make a midstream change in a fee agreement, or seek to share fees with another lawyer need to make sure to dot their I's and cross their T's. Finally, marking up expenses, even, if it could be justified as permissible under the Rule, should be avoided. Any profit the lawyer might earn is almost surely offset by potential reputational harm and the risk of a later bar complaint.

ENDNOTES

- 1 Me. R. Prof. Conduct 1.5(a).
- 2 *Id.*
- 3 *Id.*
- 4 *Id.* and Official Comment 1. Note also, that Maine Rule 1.5 contains three additional factors for determining reasonableness beyond the eight factors set forth in ABA Model Rule 1.5.
- 5 *Id.* R. 1.5(a)(1)-(10).
- 6 *Id.* R. 1.5(a)(11).
- 7 *Id.* Official Comment 1.
- 8 The ABA Committee on Ethics and Professional Responsibility Formal Opinion 93-379, p.1.
- 9 *Id.* p. 7.
- 10 Me. R. Prof. Conduct 1.5(b). As discussed *infra*, a contingent fee arrangement *must* be in writing.
- 11 *Id.*
- 12 *Compare* Me. R. Prof. Conduct 1.5(a)(9) and ABA Model R. Prof. Conduct 1.5(a). "Informed consent" is defined in Me. R. Prof. Conduct 1.0(e) as follows:
"Informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. Whether a client has given informed consent to representation shall be determined in light of the mental capacity of the client to give consent, the explanation of the advantages and risks involved provided by the lawyer seeking consent, the circumstances under which the explanation was provided and the consent obtained, the experience of the client in legal matters generally, and any other circumstances bearing on whether the client has made a reasoned and deliberate choice."
- 13 Me. R. Prof. Conduct 1.8(a).
- 14 R. 1.5(c).
- 15 *Id.*
- 16 *Id.*
- 17 *Id.* R. 1.5(d).
- 18 *Id.* R. 1.5(e).
- 19 *Id.*
- 20 *Id.* Official Comment 7; *see also* Me. R. Prof. Conduct 1.1: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
- 21 *Id.* R. 1.5(h).
- 22 *Id.* R. 1.5(h)(1).
- 23 *Id.* R. 1.5(h)(2).

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By Arnie Glick



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Eloquent Imagery: The Art of Persuasion Part I

Throwing out preclearance [in the Voting Rights Act of 1965] when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.

—Justice Ruth Bader Ginsburg¹

Lawyers and judges have long used figurative language to explain their analyses and support their judgments. The doctrine of *stare decisis*, under which “a court must follow earlier judicial decisions when the same points arise again in litigation,”² is the bedrock of our legal system. Lawyers and judges rely on comparisons to precedent cases when making arguments or rendering judgments in current cases. In making those comparisons, they often use similes or metaphors to paint word pictures that illuminate their reasoning.

Justice Ruth Bader Ginsburg cut to the core of her dissent in *Shelby County v. Holder* by comparing the Majority’s opinion to “throwing out your umbrella in a rainstorm because you are not getting wet.”³ Rather than writing page after page of legal analysis, she summed up her criticism in a simile that made her point clear and unforgettable: In *Shelby County*, the Court was gutting the Voting Rights Act of 1965, which had worked so well for decades when its protections were still vitally needed. Because everyone knows what it is like to be caught in the rain without an umbrella, people could easily relate to her comparison and understand the point she was making.

During oral argument in *United States v. Windsor*,⁴ Justice Ginsburg used another highly effective word picture to describe the two-tiered marriage system that existed in our country. Marriage between a man and a woman, she said, was treated as a “full marriage,” while marriage between two members of the same sex was regarded as a “sort of skim-milk marriage.”⁵ Her use of a simile comparing two things most

people have encountered in everyday life—whole milk and skim milk—made her point more forcefully than any analysis of equal-rights jurisprudence could have done.

Metaphors are also commonly used to illustrate legal reasoning and even to describe our legal system itself. A metaphor is “an applied comparison between two things of unlike nature that yet have something in common.”⁶ Metaphors, like similes, “provide concrete images that make it easier to think about and manage abstract or unfamiliar concepts.”⁷ This use of similes and metaphors was recognized over two thousand years ago by Aristotle, who proclaimed that analogies “give names to nameless things.”⁸

Some examples of legal concepts that are portrayed metaphorically include long-arm statutes, balancing tests, piercing the corporate veil, and sunset provisions. Metaphors have also been used to describe aspects of our legal system, like forum-shopping, a hung jury, and a hot bench. Each of these metaphors provides a concrete image to illustrate an abstract concept. Statutes do not actually have long arms, but calling them “long-arm statutes” helps to explain how they enable the law of one state to apply to a person in a different state, even a far-distant one.

I will be exploring the use of similes and metaphors in a two-part series of *Res Ipsa Loquitur* columns. In this column, I will focus on similes. In my next column, I will write about metaphors.

Using Similes in Legal Argument

Similes, like those used by Justice Ginsburg, are often used in briefs, oral argument, and judicial opinions to provide concrete images that help to clarify abstract or unfamiliar concepts. Because of the American legal system’s reliance on pre-

Lawyers and judges have long used figurative language to explain their analyses and support their judgments. The doctrine of *stare decisis*, under which “a court must follow earlier judicial decisions when the same points arise again in litigation,”² is the bedrock of our legal system.

edent and *stare decisis*, case-based analogies, a special kind of simile, have played a vital role in shaping law and developing legal principles.⁹

An analogy is “a non-identical or non-literal similarity comparison between two things, with a resulting predictive or explanatory effect.”¹⁰ Drafting a case-based analogy involves comparing or distinguishing the “concrete image” of a precedent case to the “unfamiliar concept” of an undecided present case.¹¹ The purpose of case-based analogies is to establish the predictive or explanatory effect the legal writer is seeking. The purpose of case-based analogies in a brief is to persuade the court by explaining why precedent cases predict the outcome sought by the advocate in the current case. Judges use case-based analogies to justify the legal basis for their opinions, showing how they comport with *stare decisis*.

The Cognitive Science of Similes

According to cognitive scientists, humans “make sense out of new experiences by placing them into categories and cognitive frames called schema or scripts that emerge from prior experience. A schema is an image that a person can easily visualize. A script is an event or sequence of events with which a person is familiar.”¹² When providing a case-based analogy, two domains are established: “a source and a target. The source is the schema or script; . . . the target is the abstract or unfamiliar concept—the new legal concept the judge must learn and apply, or the new case the judge must decide.”¹³ If the case-based analogy is effective, the judge will understand the relationship between the precedent cases and the present case—whether that means finding desired similarities or distinctions between the two cases—and apply that understanding to reach the desired outcome.

To use case-based analogies effectively, an advocate must choose appropriate precedent cases and explain their relationship to the present case in ways that help the judge make the connection between the source (the precedent cases) and the target (the abstract or unfamiliar concept). In choosing precedent cases and explaining their relationship to the present case, advocates need to be aware of both “surface features” (facts from both the precedent case and the present case) and “relational features” (underlying features, which may be inferred, that link the precedent case and the present case in significant

ways).¹⁴ Relational features often include the effect the facts have on the parties or the law. Even if the facts in the two cases are dissimilar, similar harm to the public might occur, or the same purpose underlying the applicable statute might be furthered, under both sets of facts.¹⁵

Writing Effective Case-based Analogies

In effective case-based analogies, an advocate carefully explains the relevant details of the precedent case, focusing on what aspects of the precedent case relate to the present case. In doing so, she must draw explicit factual comparisons or distinctions, indicating how those similarities or differences are significant to the desired outcome of the case. Advocates should not rely simply on the surface features of the facts, but also the relational features that may be inferred.¹⁶ Even when the facts from the precedent case and the present case do not line up, an advocate may be able to point out how both sets of facts further the same public policy.

Psychological studies suggest that people under time-induced stress, like busy judges, notice surface similarities more readily than relational similarities.¹⁷ However, research has shown that strong relational similarities make more effective analogies.¹⁸ Thus, creating a persuasive analogy between a precedent case and the present case requires a focus on the relational similarities rather than on the surface similarities between the two cases. To achieve this, an advocate must demonstrate that *why the facts matter* is more important than *what the facts actually are*.

In his article, *Persuading with Precedent: Understanding and Improving Analogies in Legal Argument*,¹⁹ Jacob M. Carpenter provides the following hypothetical situation to illustrate how persuasive analogies can be drawn between a precedent case and a present case, even when the facts, on the surface, seem dissimilar.

A man is arrested for burglary after breaking into a homeless woman’s car and stealing her gun. The burglary statute in the jurisdiction requires a person to break into a “dwelling” with the intent to commit a crime. In this case, all the elements of the statute are met except for the “dwelling” requirement. To find him guilty of burglary, the homeless woman’s car must be a “dwelling.”

Precedent exists involving seasonal cabins, which were held to be dwellings, and unoccupied rental properties, which were held not to be dwellings. In another precedent, a person's car, which was broken into while it was parked outside his home, was held not to be a dwelling for purposes of the burglary statute.

A prosecutor attempting to persuade the judge that the homeless person's car was a dwelling must consider and highlight relational similarities underlying the facts in the precedent cases and the present case. On the surface, the precedent case that seems most similar is the case involving the car parked outside the home. Both cases involve cars that were broken into. The precedent cases involving homes that were broken into seem very different on the surface. Not only did they involve houses, not cars, but the victims of those crimes were *homeowners*, not *homeless people* like the victim in the present case.

However, a skilled prosecutor may be able to show that the precedent cases involving homes are analogous to the present case by steering the judge away from the obvious surface facts and showing the relational similarities between the two sets of facts. He must also show that the precedent involving the car parked outside the home is actually very different from the present case.

To focus on relational similarities, the prosecutor must not think about what the facts are, but what it is about the facts that matters. He must consider what it is about a home that makes it a dwelling. A home is a dwelling because it is a person's primary shelter, where he keeps most of his belongings, and where he sleeps at night. In the present case, those are exactly the ways the homeless woman was using her car when it was broken into. The way she used her car is what matters and not the fact that it is a car. Focusing on the way she used her car makes it more like the facts in the precedent cases involving homes than the precedent case involving the car parked outside a home. Thus, the relational similarities between the precedent cases involving homes as dwellings and the present case in which a car became a dwelling place make those cases more controlling than the precedent about the car parked outside the home.²⁰

Although relational similarities may seem obvious once they are identified, advocates should not assume that judges will spot them without assistance. Surface similarities are generally more obvious and may not support an argument as well as deeper, relational similarities. In the example involving the car, surface similarities might even lead to an opposite conclusion. For these reasons, advocates must take the time to consider relational similarities between precedent cases and present cases and carefully explain them to judges who may not

have the time to ponder these similarities. It is not enough to just describe the facts in a precedent case and assume the judge will make the desired connection. Thus, a well drawn analogy in legal writing must always go beyond discussing the facts in precedent cases. It must lay out the relational similarities and explain why they are significant.

Constructing a Winning Legal Argument

A strong legal argument begins with identifying the issue, determining the controlling statute or common-law principle to be applied, finding analogous cases, and comparing or distinguishing those analogous cases to show how the law supports a particular outcome. Identifying and explaining relational similarities and distinctions between analogous cases and the present case can make the difference between a winning and a losing brief. Given the central role of *stare decisis* in our legal system, case-based analogies are critical. Although they may not be as vivid and memorable as Justice Ginsburg's umbrella or skim-milk analogies, case-based analogies go right to the heart of the law and provide judges with the proof they need that precedent favors the outcome being sought.

ENDNOTES

- 1 Shelby County v. Holder, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).
- 2 *Stare Decisis*, *Black's Law Dictionary* (10th ed. 2014).
- 3 570 U.S. at 590 (Ginsburg, J., dissenting).
- 4 570 U.S. 744 (2013) (challenging the Defense of Marriage Act).
- 5 <https://www.theguardian.com/world/2013/mar/27/ginsberg-doma-marriage-skim-milk>.
- 6 Jacob M. Carpenter, *Persuading with Precedent: Understanding and Improving Analogies in Legal Argument*, 44 Cap. U. L. Rev. 461, 464 (2016) (quoting Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 199 (2d ed. 2008)).
- 7 *Id.* (quoting Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 Washburn L.J. 275, 278-79 (2011)).
- 8 *Id.*
- 9 *Id.* at 461.
- 10 *Id.* at 464.
- 11 *Id.* at 465.
- 12 *Id.* (internal citations omitted).
- 13 *Id.* (internal citations omitted).
- 14 *Id.* at 467.
- 15 *Id.*
- 16 *Id.* at 473.
- 17 *Id.* at 480.
- 18 *Id.* at 481.
- 19 *Id.* at 481-82.
- 20 *Id.*

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How To Get Real Help From Overblown Self-Help Hype

Most attorneys who come to me for coaching are not new to the concept of tending to their personal and professional improvement. After all, attorneys are ambitious people, and they understand that they are responsible for reducing stress, achieving goals, and becoming more fulfilled at work and home. The problem is that, as a completely exasperated new client of mine recently put it, “I listen to self-help podcasts, watch motivational videos, try all the strategies – and nothing is working.”

I always tell my clients who are stuck that there is no shortage of personal and professional growth advice out there, but most of it is simplistic and idealistic. Everywhere we look – the internet, the bookstore, the grocery store check-out line – carefully crafted headlines fight to sell us on the implausible yet tempting idea that we can have, be, and do whatever we want if we just apply “these three secrets” or “those five easy steps.” We fall for it because, even though we know better, we want to believe in quick fixes and instant gratification.

Thankfully, the solution here is not to give up on empty transformation and reinvention rhetoric but to take it with a grain of salt and extract the wisdom it offers. Rather than reject it as snake oil, you can turn self-help hype into real help by applying common sense to the pumped-up promises.

Here are three examples of how trendy self-help fluff can become solid counsel:

The hype: *The outcome you want will manifest if you envision it.*

Real help: Imagination alone will not make things happen, but it can help. Picturing a promotion when you’re not applying yourself won’t get you very far. But ask any successful athlete and they will tell you that they win more than they lose because they deliberately visualize the results they want as they train. If you focus your mind on what you desire *and* work hard to bring your goal to fruition, you are more likely to be successful.

The hype: *You can catapult yourself to the next level by talking ‘as if’ you are already there.*

Real help: Saying affirmations – telling yourself you are capable and confident in this or that area when you don’t feel that way — will indeed move you steadily where you want to go. But here’s the catch: your affirmations can’t be too big a stretch. If you’re up to your ears in debt, your brain will reject



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David J. Backer, Esq.
Drummond Woodsum
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"I am swimming in money" but "My financial decisions are improving" will likely bring about better spending habits. Likewise, "I'm learning to enjoy moving my body" will be more motivating than "I love working out six days a week" if you've just decided to get off the couch and exercise.

The hype: *Positive thinking makes life pain-free.*

Real help: There is no question that glass-half-full people have it made. It follows that those who complain less than others are more fun to be around and attract better opportunities. But let's be clear: optimism will make you more resilient in the face of failure, disappointment, and heartache, but not immune to the curveballs all adults – and particularly highly stressed attorneys – are dealt. Optimism is about taking in the whole picture, embracing the good *and* the bad, and choosing to focus on what's going well over what's wrong. Whether you're sizing up a tough case, your shot at partnership, or a half-baked self-improvement suggestion, you're bound to fare better if you practice a hopeful perspective.



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

The coordinator has a list of attorneys associated with organizations, sections, and committees who are willing to provide help. The program provides confidentiality recognized by M.R. Prof. Conduct 1.6(b)(4).

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The Tiger King Trial: Murder for
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June 27
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Guide to Judicial Misconduct | 2.0
ethics

June 30
Identifying & Combatting Gender Bias
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June 15-17
Summer Bar Conference

Harborside Hotel, Spa & Marina,
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July 13
5th Annual CLE by the Sea: NE Solo
& Small Firm Conference
Blue Ocean Event Center, North Salis-
bury, Mass. | 9.5

SAVE THE DATE

Sept. 12-13
Family Law Institute
Augusta Civic Center

Nov. 17
Legal Year in Review
Augusta Civic Center

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ADDRESS SERVICE REQUESTED

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The MSBA is committed to serving our members as well as supporting our employees during these uncertain times. In order to minimize physical contact, the MSBA office is open to the public on a limited basis. However, the staff is working and is available to assist you. Please continue to contact us through email, telephone, and regular mail. Thank you.

MAINE STATE BAR ASSOCIATION

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