Maine State Bar Association

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COMMENTARY

FEATURES

DEPARTMENTS

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Building on the Past and Envisioning the Future: A Look Ahead

There is no question that 2020 was a challenging year for all of us. Some of us lost loved ones. Many of us have struggled with depression or anxiety. Most of us have been forced to change how we work. It is important to acknowledge those challenges and struggles.

At the same time, it's important to celebrate the things that went well. Different groups within our profession made enormous efforts to keep us all going.

The Judicial Branch issued a flurry of orders in an effort to balance the needs of justice with public safety. Deadlines were extended and temporary rules were issued to allow as much of our profession as possible to continue operating. There are certainly strong opinions within our profession about some of those decisions, but the Judicial Branch is to be commended for its quick efforts and hard work in a very complex and unprecedented situation.

The members of the Maine Bar rose to the occasion by adapting to an entirely new way of practice. Almost all of our practices have changed. Many of us are now working from home. Those of us who are in court regularly are constrained by masks from seeing people's faces and expressions. Most of us are probably far more familiar with Zoom than we ever wanted to be.

At the MSBA, we initiated Bar Talk, a weekly videoconference to keep the Bar informed in a rapidly shifting world. We transitioned from in-person to virtual CLEs. We also took important steps towards acknowledging and starting to address racism and diversity issues. More on these efforts below.

Even with those positive notes, I'm not going to miss 2020. Let's turn to what the New Year will hopefully bring.

The MSBA Board conducted our biennial strategic planning this fall and identified three key goals for the next two years.

First, we will enact a rural practice initiative to address the aging out and general shortage of lawyers in our more rural areas. This initiative will include developing resources to help new lawyers start rural practices and retiring lawyers exit their practices. We will support the community of rural lawyers through our new message board system and explore options for direct aid or loan forgiveness for law school graduates who choose to practice in underserved areas.

Second, we will work to promote diversity, inclusivity, and equal opportunity in the Maine legal profession. That includes educational outreach to ensure that we all understand the history and the problems we will be working together to fix. Part of that will be to publish the results of a diversity survey we conducted this past fall.

More importantly, these efforts include proactive steps to increase minority representation at all levels of the legal system, including our Association. This past fall, the MSBA created a new BIPOC (Black, Indigenous, and People of Color) Lawyers Section, which is already making great strides. Hopefully, by the time you read this, the membership has approved a literal seat at the table: a new Board position to be filled by election of the BIPOC Lawyers Section members. We will actively recruit BIPOC lawyers to participate in the MSBA Leadership Academy and aim to partner with Maine Law and firms across the state to recruit BIPOC lawyers to come to Maine.

These efforts are not limited to addressing systemic and systematic racism. We will also continue our efforts to address the ongoing challenges women face in the legal profession and to ensure that all lawyers, no matter their gender identification or sexual orientation, have equal opportunity to succeed.

Third, we will continue to enhance the relevance of this Association for its members. We are fortunate: the MSBA has the highest participation rate of all voluntary bar associations in the nation. That's because the MSBA has historically provided strong reasons to become and remain a member.

I think of the value of this community as having four aspects. Being a member of the MSBA should help make each of us smarter, happier, more collegial, and more efficient as lawyers. Those four themes will drive the MSBA's programming this year.

Smarter lawyers know the substantive and procedural law to help clients. They are familiar with what is going on in the legal community. They are confident and effective.

Happier lawyers enjoy what they do and strike a good balance between work, hobbies, families, and friends. They take steps to avoid the pitfalls of depression, overwork, and addiction that many of us struggle with. They make our community enjoyable.

Collegiality is a core value of Maine lawyering. Despite representing clients with differing interests (or who just hate each other's guts), collegial lawyers are able to work together, respect the other's arguments and positions, and avoid making the professional personal.

Efficient lawyers are able to take all of these traits and make a living at the profession. These skills help us reduce legal costs to our clients and increase our earnings.

We will use each of the four issues of the *Maine Bar Journal* in 2021 to highlight one of these themes. This issue will focus on the "smarter" theme, featuring articles on substantive issues of law. I invite you to consider submitting an article that addresses any of these themes.

Hopefully our efforts will help each of you feel like you have become at least a little bit smarter, happier, more collegial, or more efficient this year. I am excited about all of these initiatives and to see what 2021 will bring. There will still be heartache and hardship as a result of the pandemic. In the face of those challenges, let us work together to continue to rise to the occasion.

Over the course of this year, please do not hesitate to contact me directly with ideas, concerns, or suggestions for the Association. We are here to work on your behalf. Happy New Year, and may 2021 be an improvement on last year!

QUICK FACTS

Why do you belong to the MSBA?
One of the best parts about practicing in Maine is a collegial bar. In an age where "lawyering" often means sitting in front of computer screens, the MSBA gives me connections to other lawyers that I would not get otherwise.

What the best thing about being an attorney?
People come to you looking for help in a complex area where they can't help themselves. Sometimes – not always – we can help them. That's a great feeling.

What's the most challenging aspect of being an attorney?
The work never stops. There's always another email to answer or brief to write. It can be hard to turn it all off and relax!

What is your proudest career moment?
I don't generally do family law, but I had a case where there was a dispute between parent and child. It was ostensibly about money, but it was about much more than that, of course. After a really moving mediation where Rob Hatch did a great job, we got to the point where all the claims got dismissed. The two parties didn't immediately reconcile, but that meeting gave them a chance to step back and think about priorities. It was a great reminder that litigation is about resolving disputes, and sometimes the best way to do that is not in front of a judge.

If you weren't an attorney, what would you be? I would be a high school math teacher. I was a math teacher for several years before law school and I really enjoy working with kids.

What is something most people don't know about you?
I am Scoutmaster for Troop One in Portland. We were one of the first coed Scouts BSA troops in the nation and we take teenagers out into the woods and teach them about leadership all year around. It's great fun.

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

Maine Bar Leadership

Maine State Bar Association (MSBA)

Happy New Year! It's that time of year again when I have the distinct honor and pleasure to introduce the MSBA's new leadership. Here are the members of your Board of Governors (BOG) for 2021. Please take a moment to reach out to your district representative or any of the officers—they would love to hear from you! Let your Governor know how we are doing, what we could do better, and what you'd like to see from your professional association.

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New England Bar Association (NEBA)
NEBA is an organization comprised of the six bar associations of the New England states: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. NEBA, incorporated in 1971, was formed to advance and promote the general welfare of the component state bar associations and of the individual members in those states.

The NEBA Board of Directors, which has representation from all six bar associations, typically holds two director meetings per year, and an annual meeting in the fall at which members of all associations are invited to attend. Responsibility for planning and hosting the annual meeting rotates between the six states. Rhode Island will host the 2021 Annual Meeting at the Bristol Harbor Inn on October 28-30, 2021. We encourage you to attend this fun and informative conference!

Your current Maine representatives on the NEBA Board are:
Immediate Past President Virginia E. Davis (ggpitney@gmail.com)
Director (term exp. 2021) Jonathan M. Dunitz (jdunitz@verrill-law.com)
Director (term exp. 2022) James B. Haddow (jhaddow@pmhlegal.com)
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MSBA Staff
The MSBA staff stands ready to serve you in 2021. We are dedicated to providing you with member services and benefits that support your successful law practice.

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Please be sure to visit www.mainebar.org to learn more about our services, to register for CLE and other programs, and to catch up on section, committee and other legal community news and events. Don't hesitate to contact a staff member if you have any questions about our services or if you have any ideas for new services or benefits. This is *your* membership organization, so let's work together to ensure that you have the services you want!

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

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Anticipating COVID-19 Litigation Through the Causation Lens

Almost one year into the novel coronavirus (COVID-19) pandemic, we revisit some of the initial assumptions that we made regarding legal liability deriving from reactions to the pandemic. Early in the pandemic, many feared an avalanche of litigation that would follow the spread of the virus. On the other hand, many lawyers expressed skepticism that the pandemic would create the tidal wave of cases that others had anticipated, given the many hurdles plaintiffs would face in recovering damages for COVID-19 injuries. One of the primary hurdles cited as evidence for this skepticism was the challenge to prove causation. Absent unusual circumstances, where a plaintiff can eliminate other sources of transmission or exposure (such as a plaintiff who lives in a residential care facility), it seemed unlikely that one could identify any one exposure source as the legal cause of a COVID-19 infection and related injury. This article reflects on what we have learned about COVID-19 considering three potential sources of causation evidence and how public-health agencies' efforts to fight the virus may aid future plaintiffs. We then discuss some of the challenges that lie ahead for plaintiffs' attorneys. Through the lens of causation, we reflect on the fear of cascading pandemic-related litigation and whether those fears are overstated.

Sources of Causation Evidence

In mounting a response to the virus, public health authorities have employed several efforts, including social distancing, mask requirements, testing mandates, and contact tracing, which collect some information to trace infections. Private businesses and other entities have themselves undertaken many of these same efforts on a smaller scale. Some of these methods may have the inadvertent effect of providing would-be plaintiffs with sources of data on which they may rely as causation evidence regarding the potential source of infection.

Contact Tracing

The Maine Center for Disease Control (CDC) and many private businesses employ widespread contact tracing and notification systems to alert people who are potentially exposed and the source of a potential exposure. Public health officials' contact tracing is an effort to collect a record of who was at a location and with whom each person had close contact on a particular date and time through interviews with individuals who test positive.[1] Businesses, public entities, colleges and universities, and other organizations gather contact tracing data on a smaller scale to trace the movements of visitors, students, and employees in their facilities.[2] These efforts typically consist of collecting contact information when making reservations or appointments or requiring an individual to fill out a sign-in sheet with contact information when visiting.[3] If the entity is notified of a positive case, it can provide that data to the Maine CDC or contact those whom they suspect may have been exposed.

The methods vary and they are not designed to identify the source of an infection. But current efforts at contact tracing do one thing that makes it far more likely that an individual who experiences serious harm from the virus would seek legal redress: it identifies in the contacted person's mind a particular place, or source of infection within a short time frame after potential exposure. Once an individual receives the call from a Maine CDC contact tracer, from an employer, or a business telling them they may have been exposed and they need to get tested, it creates the impression that the source of the exposure has been identified. Whether the identified source may become the legal "cause" of virus contraction depends primarily on the level of community spread of the virus and the contacted individual's conduct. For much of the summer,

One of the chief difficulties for plaintiffs in establishing causation is that, even if the rates of community transmission in the plaintiff's area are low, the virus can move among people who show no symptoms at all.

Maine was extraordinarily fortunate to experience low levels of community spread, thereby limiting many competing sources of infection. As we have seen in recent months, when the rates of transmission outpace available contact-tracing resources, contact tracing efforts may also be limited.

A poignant example of this dynamic, a late summer wedding, has elevated a small Maine town of 4,500 people to prominence in state, national, and international news.[4] At least one uninvited guest—COVID-19—took part in the now-infamous wedding in Millinocket. According to the Maine CDC, this led to several COVID-19 outbreaks in different parts of the state, including cases in a nursing home and a in a jail more than one hundred miles from the wedding venue. State officials continue to report an increasing number of positive COVID-19 cases–now nearly 200–and several deaths directly linked to the event, which has now led to one of the earliest COVID-19 civil complaints in the state.[5] While the Maine CDC's contact tracing efforts are by no means a forensic analysis, we have learned that when community spread is low, tracing a single source of infection may be easier than initially thought. It becomes more difficult to demonstrate legal liability for outbreaks that are temporally and geographically remote, but in instances with low community spread, plaintiffs may rely on contact tracing to show causal links between infection events, which may be difficult to refute if defendants are not able to point to alternative sources of infection.[6]

Widespread Testing

The other major public health effort to fight the pandemic that will have a likely impact on potential plaintiffs' COVID-19 claims is widespread and rapid testing. At the moment, most public health authorities and businesses are relying on two types of testing to determine whether a person has COVID-19: diagnostic tests, which include a so-called rapid test and a polymerase chain reaction (PCR) viral test, both of which use a nasal swab test to measure for an active infection. There has also been use of a "serological" or antibody test, a blood test, which screens for the presence of the body's immune response to COVID-19, which can be evidence of a past infection.[7] Neither test currently collects genetic material of the virus, which we will discuss momentarily. However, a test recently approved by the Food and Drug Administration would identify the presence of the disease from respiratory specimens and would collect genetic material.[8]

Despite some early challenges in manufacturing enough tests and constraints for laboratories to generate results quickly, there has been a strong public-health focus on increasing the speed and ease with which individuals can obtain a test and receive their results. Now, testing is more widely available, with many private colleges and schools requiring student and faculty testing, requirements for testing before certain airline or interstate travel, and some employers requiring workers to be tested. Receiving rapid test results creates a close temporal relationship between the suspected source of exposure and an active infection, limiting the opportunity for individuals to go about their daily lives and encounter potential alternative sources of infection. Although there are questions about the accuracy of the tests—particularly rapid diagnostic tests, those who test positive are instructed to self-quarantine and identifying the presence of the virus quickly—often before the onset of symptoms—can also limit other potential sources of exposure for would-be plaintiffs.

Deep Sequencing of Virus Genetics

Another way potential plaintiffs may be able to establish a link between virus infections is through an analysis of the virus's genetic material, or so-called "deep sequencing." The novel coronavirus, or "SARS-CoV-2," has been shown to mutate as it moves between people and species throughout the globe. Geneticists can sequence the genome found within the virus's RNA through a process known as deep sequencing. The RNA strand in the SARS-CoV-2 virus has been found to consist of 30,000 individual parts (nucleotide base pairs) that are

represented by one of four letters. As the virus moves through a portion of the population, it makes small variations, changes in one or two letters in the entire chain of 30,000, which allow scientists to trace infections. [9] The extent of virus mutation, or lack thereof, provide the basis for matching an infection to a source or a common shared source.[10]

Over time, mutations within the virus can become more pronounced and more localized. While as of today, it seems this technology is unlikely to be effective to trace local infections in areas with a high rate of community spread, where an individual has traveled to a new area and brought a unique strain of COVID-19 with them, genetic deep sequencing could readily distinguish the new strain from existing strains in a community.[11] Most recently, this has been used to identify also more contagious variants of the virus as has been detected in the United Kingdom. In other words, the virus's genetic code may look very different in Germany, for example, than it looks in the United States.[12] This technology may pinpoint several differences in the genetic code to suggest the source of any one particular infection is different from others, which may aid plaintiffs in tracing to a single source. Whether there will be differences in the genetic code for an infection in Bangor, for example, as opposed to Sanford, remains to be seen.

Genetic deep sequencing was recently used to determine whether two *New York Times* journalists were infected with COVID-19 while traveling on Air Force One, coinciding with the late October 2020 COVID-19 outbreak at the White House.[13] Geneticists sequenced the infections of the two journalists; by matching several unusual mutations within the virus genome, which proved to be a rare strain, the scientists determined "with a very high probability" that the two journalists were infected from the same source.[14] The study stopped short of concluding that the infection originated from White House personnel, however, as the White House did not permit sample collection.

Opportunities to Refute Causation

Notwithstanding the increasing prevalence of these tracing efforts, proving causation remains challenging. The obstacles to identifying the infection source can be myriad. One of the chief difficulties for plaintiffs in establishing causation is that, even if the rates of community transmission in the plaintiff's area are low, the virus can move among people who show no symptoms at all. While a plaintiff may be able to show a likely source, based on their limited movements and low known rates of community transmission, there is always the specter that an undetected, asymptomatic carrier could have been the actual cause of the plaintiff's infection. Only a positive test activates official contact tracing measures; the prevalence of infectious asymptomatic carriers, therefore, precludes a significant percentage of cases from ever engaging with public health officials[15] or being tested. Epidemiologists have also recently traced particular strains of the virus from college campuses to nursing home deaths.[16]

Given the current technologies, genetic sequencing may also prove too difficult for many plaintiffs. The costs for these tests are yet unknown, and although an individual may sequence his or her own infection, there would need to be at least some comparator genetic material to establish a link between infections. Also, sequencing would need to take place quickly after infection. Unlike many other diseases that are the subject of litigation (HIV, for example), where the infection remains present and testable in the body for a period of years or until treated, a COVID-19 infection may disappear from the body quickly after a person is no longer infectious.[17] Accordingly, the genetic material that must be analyzed may only be available for a short period of time-weeks or months—after someone is infected. Moreover, while deep sequencing may provide a correlation between infections, it is an open question whether an expert may be able to conclude that a particular individual infected another by a preponderance, or whether they may have only shared the same source of infection.[18] If

later technologies employ the widespread use of genetic analysis for COVID-19 testing, this could become a much stronger tool for would-be plaintiffs.

Even if all evidence gathered from these data sources infer a correlation between an infection and a source, proximate cause issues would not be eliminated for cases in which plaintiffs would still have to prove that infection resulted from the defendant's *negligence*. Identifying a single source of infection may not be enough if plaintiffs cannot show that the failure to follow prevailing health and safety guidelines would have prevented their infection. For example, even following all health and safety guidelines may not prevent asymptomatic carriers from entering undetected and infecting others. Moreover, the CDC has said that COVID-19 infections can result from direct contact with an infected person, contact with an infected surface, or through the inhalation of airborne virus particles that stay suspended for several hours.[19] Will future plaintiffs be able to show that following the public health guidelines would have prevented their infection? It also remains unclear what the long-term effects of infection may be, and therefore what damages may result. Apart from potential claims relating to deaths from the virus, we are still learning what long-term physical limitations may result from COVID-19 infections.

Conclusion

While traditional defenses of comparative fault or intervening causes remain for defendants in COVID-19 cases, prevailing public health efforts could give plaintiffs a unique advantage in identifying and showing a source of infection with COVID-19. In many instances, the three sources of causation evidence we have discussed may work together to establish a sufficient link for would-be plaintiffs to meet the preponderance causation standard. A contact tracing system may indicate to a person that he or she should be tested. Capturing a positive result from a rapid test could help a plaintiff's case both because memories about a person's movements are fresh and because there may be less time for intervening events to create exposure to infection from another source. Obtaining a test and receiving results quickly should cause those who have the disease to self-quarantine, further limiting alternative exposure sources. If COVID-19 testing that relies on genetic material becomes more common, plaintiffs may trace infections through deep sequencing analyses. Although the early fears of an avalanche of litigation have likely been overstated, there may at least be a snowstorm.

ENDNOTES

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16. Craig S. Richmond, et al. *SARS-CoV-2 sequencing reveals rapid transmission from college student clusters resulting in morbidity and deaths in vulnerable populations*, MedRxIv (2020), www.medrxiv.org/content/10.1101/2020.10.12.20210294v1, (last visited February 3, 2021).

17 Evidence of an active COVID-19 infection can only be collected during a short window of time, typically within two to fourteen days of the initial infection. The presence of COVID-19 antibodies, which provide evidence of a past

infection, fade from the body in as little as seventy-three days. Conversely, antibodies from Ebola and SARS remain in the body for ten years and three years, respectively. *See* Rapid Decay of Anti–SARS-CoV-2 Antibodies in Persons with Mild Covid-19 | NEJM, , https://www.nejm.org/doi/full/10.1056/nejmc2025179 (last visited Sep 25, 2020); Recovery From Ebola, Centers for Disease Control and Prevention (2019), https://www.cdc.gov/vhf/ebola/treatment/survivors.html (last visited Sep 25, 2020); Duration of Antibody Responses after Severe Acute Respiratory Syndrome, Centers for Disease Control and Prevention, https://wwwnc.cdc.gov/eid/article/13/10/07-0576_article (last visited Sep 25, 2020).

18 Miller, *supra*.

19 Mahesh Jayaweera, *Transmission of COVID-19 virus by droplets and aerosols: A critical review on the unresolved dichotomy*, 188 Environmental Research (2020).

Ask Amy! Do you have questions about how to be happier or more productive in 2021? Send Amy your questions at amywood@amywoodpsyd.com, and she'll address them in a future column.

Maine-based psychologist AMY WOOD, Psy.D., created Law and the Good Life, a research-based attorney wellness coaching and training system designed to address the challenges of lawyering. She frequently offers CLE opportunities through the MSBA. To learn about upcoming events, visit www.mainebar.org. For more information about Dr. Wood, go to www.amywoodpsyd.com.

Sensible Multitasking: The Smart Way to Get More Done in Less Time

Imagine there's no pandemic and you're sitting in a restaurant booth enjoying lunch and catching up with a close friend you haven't seen in a while. You lean in closer as your friend begins to update you on a pressing personal problem, and just then you hear someone in the booth behind you mention the name of a colleague.

You naturally want to keep listening to your friend, but you are now also invested in being alert to any intriguing details that might come from the conversation behind you. You try to split your attention evenly so as not to miss out on anything, but within a minute you feel too distracted to pay sufficient attention to either situation. You decide to let go of the conversation behind you in favor of being there for your friend, and your focus on the person across the table is quickly restored.

What this common situation illustrates is that it's not feasible to simultaneously give your full attention to two separate activities.

Most of us have experienced such a moment or some variation on it: talking to someone at a party while also trying to make out the lyrics of a song playing in the background or taking in the audio and the visual of two separate movies on adjacent televisions on a store shelf.

Most of us also know full well that when we dilute our focus like that, we pick up only fractured bits and pieces and don't integrate the whole of anything. That's why intelligent attorneys seek quiet spaces to review complex documents, turn off their phones when meeting with clients, and minimize interfering noise when they really want to hear what someone has to say.

So why is it that – despite having learned the undeniable limits of the delicate human attention span many times over at our age – we persist in dividing our awareness between two or more activities requiring complete concentration? Why would a seemingly levelheaded adult routinely read and send text messages while driving, engage in serious cell phone conversation while walking down a busy city street, or work on a significant project via laptop while participating in a critical conference call?

Widely and repeatedly publicized hard evidence, such as increased emergency room visits caused by texting behind the wheel of a fast-moving car and having a cell phone conversation while negotiating crowded urban streets on foot, shows us that this kind of senseless multitasking doesn't work.

Otherwise sensible people act in irrational ways because they want to believe, despite their better judgment, in the false promise of misguided yet popular cultural myths. Though we know better, it's easy to convince ourselves of what we wish were true, that technology saves time by making it possible to wholly engage in two exacting endeavors at once. We don't want to face the truth that technology isn't powerful enough to expand the limited capacity of the human attention span.

Smart phones, lap tops, iPads and other technological devices are wonderful tools for making work and life more efficient, enjoyable, flexible, and manageable, but only if we use them judiciously. Judicious use means recognizing that if you use technology in ways that force you to put your attention in two places at once, you aren't saving time. To the contrary, you're wasting it.

Combining two activities requiring your total attention means doing neither activity well. Many activities, of course, can be blended for greater efficiency without compromising performance. As long as you are applying technology in ways that don't distract you from situations that require your full focus, you're engaging in what I call sensible multitasking.

6 WAYS TO SENSIBLY MULTITASK

1. Carry your laptop with you so you can read and respond to emails, work on projects, read your favorite blogs, and download music and books while you're waiting to board a flight, filling time left by a client who doesn't show up, or enduring other delays.

2. Listen to music or a book while you're driving, exercising, or cleaning the house.

3. Participate in a conference call via cell phone while taking a walk somewhere peaceful and away from traffic.

4. Enjoy casual phone conversation while you're doing the dishes.

5. Fold laundry while you're watching TV.

6. Read and respond to text messages while you're getting your hair cut or standing in the grocery store check-out line.

The main thing to consider in all this is that dividing your attention and then pulling it back and redirecting it is a stressful process that can actually make your head hurt. Pushing your brain beyond what it is meant to do will only wear you out, erode your concentration, reduce the quality of your work, and steal enjoyment from your life. You will be in a much better position to excel as an attorney thrive in a world of constant distractions if you do your best to treat your brain well.

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The Protection from Abuse Statute Should Be Protected from Abuse

Introduction

I have been a Maine lawyer long enough to remember a time when judges, attorneys and prosecutors had few tools available to curb domestic violence. The enactment of the Protection from Abuse (PFA) statute in 1995 provided an essential tool kit for protecting victims of domestic violence, especially in its most common incarnation – violence inflicted by men against their wives, domestic partners, dating partners or minor children. However, after 25 years of experience representing parties on both sides of PFA cases, I have reluctantly concluded that in many instances the statute has been misused by plaintiffs who have deployed it and has imposed unreasonable burdens upon defendants against whom it has been deployed.

In my view, this phenomenon is primarily the result of two factors: (1) the opportunities which the broad statutory definition of "abuse" offers to unscrupulous plaintiffs to game the judicial system, and (2) the accretion, through amendments, of numerous remedies that have made the PFA statute function as a legal acute-care center for the myriad social and economic problems confronting domestic violence victims, too often at the cost of imposing undue hardship upon defendants.

To be sure, the consequences of failing to grant a plaintiff a restraining order against a spouse, domestic partner or dating partner with a history of abusive behavior may prove dangerous or even fatal to the plaintiff. Approximately 43 percent of homicides in Maine in 2016 and 2017 were the result of domestic violence.[1] On the other hand, granting a restraining order on the basis of behavior that may be inappropriate, but is not abusive, can have undeservedly severe adverse consequences for the defendant. Given the incentives for plaintiffs to embellish or even invent charges of abuse, and the disincentives for defendants to fight such claims, there is too much potential for injustice.[2]

I am certainly not arguing for repeal of the PFA statute, or even for a major overhaul. I am simply proposing relatively minor amendments that would bring the legitimate interests of both sides into more equitable balance.

The PFA Statute Defines "Abuse" Too Broadly

The term "abuse" is used in the PFA statute to encompass a wide range of conduct with varying degrees of potential severity. It is defined to include acts "between family or household members or dating partners or by a family or household member or dating partner upon a minor child of a family or household member or dating partner" which involve: A. "Attempting to cause or causing bodily injury or offensive physical contact, including sexual assaults"; B. "Attempting to place or placing another in fear of bodily injury through any course of conduct, including, but not limited to, threatening, harassing or tormenting behavior"; C. "Compelling a person by force, threat of force or intimidation to engage in conduct from which the person has a right or privilege to abstain or to abstain from conduct in which the person has a right to engage"; D. "Knowingly restricting substantially the movements of another person…"; E. "Communicating to a person a threat to commit … a crime of violence dangerous to human life … [when] the natural and probable consequence of the threat, … is to place the person … in reasonable fear that the crime will be committed"; F. "Repeatedly and without reasonable cause: (1) Following the plaintiff; or (2) Being at or in the vicinity of the plaintiff's home, school, business or place of employment"; G. "Engaging in the unauthorized dissemination of [nude or sexual] private images"; or H. "Engaging in aggravated sex trafficking or sex trafficking."[3]

To the extent that any of these definitional terms are vague or ambiguous, they must be liberally construed to promote the underlying purposes of the statutory scheme, which include: (1) recognizing domestic abuse as a "serious crime" that produces "an unhealthy and dangerous family environment," results in "a pattern of escalating abuse, including violence,"

and creates an atmosphere "not conducive to healthy childhood development"; (2) allowing family and household members "to obtain expeditious and effective protection against further abuse"; and (3) "reducing the abuser's access to the victim and addressing related issues of parental rights and responsibilities and economic support so that victims are not trapped in abusive situations by fear of retaliation, loss of a child or financial dependence."[4]

The PFA statute's definition of "abuse" encompasses many offenses that would be chargeable under the Maine Criminal Code. These include: assault and aggravated assault;[5] sexual assault;[6] criminal threatening;[7] terrorizing;[8] stalking;[9] sex trafficking;[10] and unauthorized dissemination of certain private images.[11] However, the definition is broad enough to also include conduct that neither rises to the level of criminal culpability nor poses an appreciable risk to the life, health or safety of those in the defendant's family or household.

Not only is "abuse" broad in definitional scope, it is longitudinally unlimited. There is no statute of limitation for the acts giving rise to a PFA complaint. They may stretch back in time as far the start of the relationship between the parties. This contrasts with the two-year statute of limitation for analogous civil torts, such as assault, battery and false imprisonment.[12]

Some conflict is inherent in nearly every intimate relationship. How that conflict plays out varies with the personalities of the parties and the dynamics of their relationship. It is certainly not uncommon at some point in a relationship for people to disagree so strongly that they become embroiled in a heated argument where at least one speaks in an angry tone of voice, assumes a belligerent posture, uses harsh language, or initiates non-injurious bodily contact. This happens not just in soap operas but in real life. While it may be inappropriate, upsetting, unhelpful and immature, it should not be equated with domestic violence.

The PFA definition of abuse extends to "[a]ttempting to cause or causing …. offensive physical contact"[13] and "placing another in fear of bodily injury through any course of conduct, including, but not limited to … harassing or tormenting behavior."[14] The terms "offensive," "harassing" and "tormenting" are not specifically defined by the PFA statute and are susceptible to broad interpretation.

Suppose, as a hypothetical, that an argument breaks out between A and B. During the course of the argument, A shouts in an angry tone of voice and pokes B with an index finger, making light physical contact with B but causing no injury, pain, mark or loss of balance. Suppose further that B is a sensitive individual who is frightened by A's behavior. Finally, suppose that A has never committed or threatened an act of violence against B and does not intend to do so in this instance. Under current law, these facts are sufficient to justify a finding of abuse. Indeed, A does not even have to make physical contact with B. Arguing with B, yelling at B, and kicking B's car in frustration is enough to warrant a finding of abuse if A's actions are found to have caused B to fear for B's safety.[15] Even if we posit no physical contact between A and B's person or property, behavior by A that includes taunts, insults or profanity-laced curses directed at B could theoretically suffice to constitute "harassing" or "tormenting" behavior and justify a finding of abuse by A.

Suppose, alternatively, that A pushes to fend off B after B tries to slap A in a fit of anger. B files a PFA complaint, but A chooses not to file one. It is unclear whether, in the PFA proceeding, A could invoke the doctrine of self-defense from the Criminal Code to justify A's own use of non-deadly force in countering B's attempted use of non-deadly force.[16] Although the PFA definition of abuse refers to violations of certain statutory criminal offenses or incorporates the Criminal Code's language describing those offenses, it does not, with one exception (a parent's or guardian's right to use reasonable force on a child to prevent or punish a child's misconduct), expressly import into the PFA statute the related justifications for the use of force which would be available as defenses under the Criminal Code.[17] In this hypothetical, therefore, an act of self-defense that could justify A's acquittal in a criminal case might afford A no defense in a PFA case.

The definition of abuse also includes "[c]ompelling a person by force, threat of force or intimidation to engage in conduct from which the person has a right or privilege to abstain or to abstain from conduct in which the person has a right to engage."[18] The term "intimidation" is likewise quite broad.

While the PFA statute does not define "intimidation," civil case law does. "Intimidation is not restricted to 'frightening a person for coercive purposes,'" but can also extend to using economic leverage to impose one's will upon another. [19] Intimidation in this broader sense could potentially encompass attempts by A to impose fiscal discipline on a shopaholic spouse, B, by, for example, discontinuing automatic paycheck deposits into the parties' joint account, transferring funds from their joint account into A's individual account, cancelling credit cards to which B previously had access, or limiting B to a fixed allowance. B could argue that B has a right to spend marital funds and that A's attempt to restrain B constitutes compulsion through intimidation, and hence abuse, even if the funds all derive from A's paycheck and B's spending risks insolvency for the marital estate. This

statutory interpretation seems to be supported by a 2019 PFA amendment, An Act to Provide Relief to Survivors of Economic Abuse,[20] which allows the court to make an explicit finding of economic abuse and which defines "economic abuse" to include, among other things, "withholding access to money or credit cards."[21]

While the expansion of the statutory definition of "abuse" to include compulsion by non-physical intimidation was designed to get at the controlling behaviors that are often symptomatic of batterers, as illustrated by the "Power and Control Wheel" created by the National Center on Domestic and Sexual Violence,[22] not all controlling people are batterers, and not all controlling actions are abusive. The definition is broad enough to sweep in not just threats or acts of violence, but also a wide range of nonviolent conduct that can occur in marriages and relationships marked by strong lifestyle disagreements or personality differences.

In short, terms like "offensive," "harassing," "tormenting" and "intimidation" simply make it too easy to conflate domestic drama with domestic abuse. Based on a similar rationale, the Law Court, in *Henriksen v. Cameron,*[23] set a high standard for proving the tort of intentional infliction of emotional distress in a suit between spouses in order to discourage "excessive and frivolous" litigation.

The Statutory Remedies Are Too Broad

An array of remedies may be granted by the court both at the preliminary and final stages of a PFA proceeding.

At the preliminary stage, the court can issue an order imposing a number of restraints on the defendant's conduct which comprise the core protections afforded to the plaintiff. It can temporarily enjoin the defendant from: A. "Imposing a restraint upon the person or liberty of the plaintiff"; B. "Threatening assaulting, molesting, harassing, attacking or otherwise disturbing the peace of the plaintiff"; C. "Entering the family residence or the residence of the plaintiff"; D. "Repeatedly and without reasonable cause: (1) Following the plaintiff; or (2) Being at or in the vicinity of the plaintiff's home, school, business or place of employment"; E. "Taking, converting or damaging property in which the plaintiff may have a legal interest"; F. "Having any direct or indirect contact with the plaintiff"; G. "Engaging in the unauthorized dissemination" of nude or sexual private images of the plaintiff, and H. "Destroying, transferring or tampering with the plaintiff's passport or other immigration document in the defendant's possession."[24]

If there appears to be a "heightened risk" to the plaintiff or a minor child, the court may also temporarily bar the defendant from possessing a firearm, bow, longbow or other dangerous weapon for the duration of the temporary order.[25]

A PFA final order can, and usually does, include the core remedies available under a temporary order, but can also augment these measures with remedies designed to make the defendant more economically secure and to address collateral issues.[26] Furthermore, the court may make special findings that the defendant "presents a credible threat to the physical safety of the plaintiff or a minor child residing in the plaintiff's household" or that the defendant has committed "economic abuse,"[27] findings which have particular implications, respectively, for a prohibition against the possession of weapons,[28] and for an award of damages.[29]

In a final PFA, the court is authorized, *inter alia,* to: grant the plaintiff exclusive possession of, and exclude the defendant from occupying, a residence the defendant owns or leases either individually or jointly with the defendant;[30] divide the parties' personal property, household goods and furnishings;[31] direct the termination of any insurance policy owned by the defendant that insures the plaintiff's life;[32] award temporary parental rights with respect to the parties' minor children;[33] compel the defendant to undergo mental health counseling;[34] order the defendant to pay temporary support (when a legal obligation of support exists) to the "dependent party," for a child in the dependent party's custody, or both;[35] award monetary damages for losses suffered by the plaintiff as a result of the defendant's conduct;[36] award reasonable attorney's fees to the prevailing plaintiff;[37] and provide for the care, custody or control of any animal belonging to either party or to a child living in the household.[38] About the only thing the court cannot do is to issue an order affecting title to real property.[39]

These remedies can impose unfair burdens on defendants, and their very availability leads some plaintiffs to bring baseless complaints. The following are examples of how PFA remedies may create injustice:

The award of temporary custody of minor children to the plaintiff

In a temporary order, a judge can issue *ex parte* orders awarding custody of minor children and prohibiting the defendant from entering the family residence.[40] In addition, if minor children are the named plaintiffs, a temporary order can prevent the defendant from having any "direct or indirect" contact with the minor children. In a final order, a judge can award "some or all temporary parental rights and responsibilities with regard to minor children or … temporary rights of contact with regard to minor children, or both, under such conditions that the court finds appropriate as determined in accordance with the best interest of the child … ."[41] The latter power, however, is subject to the restriction that "[t]he court's award of parental rights and responsibilities or rights of contact is not binding in any separate action involving an award of parental rights and responsibilities …"[42]

These provisions can be highly prejudicial to a defendant who is currently involved in, or about to become involved in, a custody battle with the plaintiff. While the custody awarded under a PFA proceeding is intended to be superseded by District Court Family Division orders in divorce and family matter cases, the reality is that stability in a child's life is considered a key factor in the "best interest of the child" analysis, and hence is of great importance in deciding the child's ultimate residence.[43] A pattern that is established temporarily for minor children in a PFA proceeding can rapidly solidify through enrollment in school, child care, extra-curricular activities and adjustment to the home and neighborhood of the parent with whom the child lives. A PFA custody order can thus shape the contours of a subsequent Family Division order relating to final parental rights and responsibilities.

There is little risk to the plaintiff in bringing an unfounded PFA complaint to gain a tactical advantage in a custody battle. The non-prevailing plaintiff can be ordered to pay attorney's fees in a PFA case "only if a judgment is entered against the plaintiff after a hearing in which both the plaintiff and the defendant are present and the court finds that the complaint is frivolous…"[44] In a related divorce or family matter case, a "parent's prior willful misuse of the protection from abuse process … in order to gain tactical advantage in a proceeding involving the determination of parental rights and responsibilities" may be considered as a factor in determining an award of parental rights and responsibilities under the "best interest of the child" standard. However, "willful misuse" of the PFA process becomes probative only if it is "established by clear and convincing evidence, and it is further found by clear and convincing evidence that … willful misuse tends to show that the acting parent will in the future have a lessened ability and willingness to cooperate and work with the other parent in their shared responsibilities for the child."[45]

Given the high threshold that has to be met before a court can award the defendant attorney's fees or draw an adverse inference regarding the plaintiff's parental rights, it will be a rare case in which sanctions are imposed on the plaintiff to punish deliberate misuse of the PFA process. Thus, the existence of such sanctions provides little deterrence value. Moreover, because of the pressure on defendants to enter into consent orders (discussed in Section 4), there are few opportunities for defendants to test the merits of plaintiffs' claims, let alone their good faith in asserting them.

The defendant's ejection from the defendant's own real estate

A judge may issue a temporary *ex parte* order prohibiting the defendant from "[e]ntering the family residence."[46] The court can issue a final order "[g]ranting … possession of the residence or household to one party [and] excluding the other," where "one party has a duty to support the other or their minor children living in the residence or household and that party is the sole owner or lessee," even if the parties are unmarried.[47]

This provision enables the court to protect the plaintiff and the plaintiff's children from suddenly being rendered homeless where the defendant is the owner or lessee of their residence. However, both on an interim and final basis, the defendant can thereby be ejected from the defendant's own property for the duration of the PFA order. Worse, the plaintiff is under no obligation to contribute to the cost of maintaining the property, and the defendant does not even have the right afforded a landlord to inspect the condition of the premises upon reasonable advance notice to a tenant.[48] The result is that the defendant can be left financially responsible for a property the defendant owns or leases, including payment of mortgage, taxes, rent, insurance and/or utilities, without having the means to ensure its proper upkeep. This impairs the defendant's property rights[49] and creates a financial temptation for the plaintiff to assert spurious claims of abuse.

The award of money damages against the defendant without right of jury trial

A 2019 amendment to the PFA statutes gives the court sweeping authority to order the defendant to pay "monetary relief to the plaintiff for losses suffered as a result of defendant's conduct," which "includes but is not limited to loss of earnings or support, reasonable expenses incurred for personal injuries or property damage, transitional living expenses and reasonable moving expenses."[50]

No ceiling is set for the damages permitted under this provision, and, although claims for damages are ordinarily presumed to be subject to the constitutional right to a jury trial, the PFA statute does not offer that option to the defendant.[51] Moreover, the statute expressly reserves to the plaintiff the right to "seek monetary relief through other actions as permissible by law." Thus, the defendant is apparently not shielded from further actions for damages by the doctrine of *res judicata*, which prevents a defendant from being subjected to serial lawsuits by the same plaintiff for claims arising from the same transaction or occurrence.[52] As a result, the plaintiff could, for example, seek damages from the defendant in a PFA proceeding for health care expenses incurred for physical or emotional injuries the defendant is alleged to have inflicted on the plaintiff, and then sue the defendant in a separate tort action in Superior Court for emotional distress, pain and suffering, permanent impairment and punitive damages.[53]

The Inadequacy of Due Process Protections

To achieve its stated goals, the PFA statutory scheme provides a two-step process that favors speed and simplicity.

An adult acting on his or her own behalf or on behalf of a minor

may seek relief under the PFA statute by filing a complaint alleging abuse on forms provided by the court and without payment of any filing fee.[54] The complaint can be filed in the District Court where either party lives or where the plaintiff previously lived if the plaintiff moved to avoid abuse.[55] The complaint must be signed under oath.[56]

After the complaint is filed, a judge reviews it on an *ex parte* basis, without prior notice to the defendant. The judge may, for good cause shown (defined as "immediate and present danger to the plaintiff or minor child"), enter a temporary order restraining the defendant from certain acts, as well as granting parental rights and responsibilities regarding minor children of the parties or minor children living in the household where the defendant has resided.[57] The temporary order remains in effect pending a final hearing.[58] The defendant is then served by a law enforcement officer with the complaint, summons and temporary order.

A final hearing must be scheduled within 21 days of the filing of the complaint, although the defendant, upon two days' notice, can appear and move for dissolution or modification of the order, which motion is to be heard and decided as "expeditiously as the ends of justice require."[59] If the final hearing is continued beyond 21 days, the court may make or extend such temporary orders as it considers necessary.[60]

If the plaintiff defaults by failing to appear, does not prevail on the merits, or voluntarily dismisses the complaint, the court enters an order of dismissal. For a final PFA order to issue, either the plaintiff must prove the allegations of abuse by a preponderance of the evidence or the parties agree to a consent order without findings of abuse.[61] If the court finds that the plaintiff has committed the alleged abuse or approves a consent agreement it can issue a final PFA order for a period of up to two years.[62] Upon motion of the plaintiff, the court can subsequently extend the order's duration "for such additional time as it deems necessary to protect the plaintiff or minor child from abuse" without any showing of new acts constituting abusive conduct.[63]

A violation by the defendant of any of the remedies in a protection order which prohibit physical force, threats of force, harassment, entry into the plaintiff's residence, direct or indirect contact with the plaintiff, intimidation, stalking, sex trafficking, and unauthorized dissemination of private images is treated as either a Class "D" criminal misdemeanor or Class "C" felony.[64] A violation of remedies relating to property and money is treated as a civil contempt.[65]

In my experience, PFA proceedings resemble an automotive assembly line. While the statute provides the defendant a number of due process protections on paper, these are more effective in theory than in practice.

Complaints and orders utilize standardized forms consisting largely of checklists. In busier courts, like Portland and Lewiston, numerous cases are usually scheduled for final hearing on the same assigned half day with only one or two judges available to handle them. These hearings are not preceded by discovery[66] or pretrial conferences. Presiding judges routinely encourage the defendant to consider agreeing to the most common form of resolution, a consent order without findings of abuse, usually recessing so that such an agreement can be reached with the plaintiff through an intermediary. The defendant is apt to accept this option as a welcome escape hatch without truly appreciating the direct or collateral consequences of a final PFA order and with only minimal warnings of these consequences.[67] Contested hearings, when they do occur, often last an hour or less. Cases expected to last longer than a few hours typically require a postponement, special scheduling and a trip back to court for the defendant.

The defendant, if impecunious, does not have the right to an appointed attorney. Defendants are usually unrepresented and either have to present their own defense or rely upon pro bono lawyers if available. By contrast, the Cumberland Legal Aid Clinic provides free student lawyers for many plaintiffs who do not have retained attorneys in in Cumberland, York, Sagadahoc and Androscoggin Counties, and organizations under the umbrella of the Maine Coalition to End Domestic Violence provide advocates to assist plaintiffs in courts throughout the state**.** Court clerks are also required to provide written contact information to plaintiffs for resources from which they may receive legal or social service assistance.[68]

The meat of the PFA complaint consists of the plaintiff's sworn statement in narrative form. Since the statement is typically handwritten and composed without the assistance of an attorney, it may be only barely comprehensible or even legible. In the absence of pretrial discovery, it can be difficult to divine the factual basis – who, what, when, where and how – of the plaintiff's allegations in advance of the presentation of the complainant's testimony. This makes it challenging for the defendant to evaluate the strength of the plaintiff's case, marshal evidence and prepare a defense. Furthermore, without the benefit of a statute of limitation, the defendant may be foreclosed from presenting evidence relating to remote events from witnesses who have died, disappeared or moved away or whose memories have faded.

It does not take much evidence to win a PFA case. As I once heard a judge bluntly phrase it, "If I believe one percent of what the plaintiff has alleged, I can make a finding of abuse and issue an order."

Although the plaintiff has the burden of proof, in my experience it is usually the plaintiff, not the defendant, who gets the benefit of the doubt based on the "better safe than sorry" principle. Nor does the relief granted, where there is a finding of abuse, tend to be carefully calibrated to the facts of the case. Ordinarily it consists, at a minimum, of the core statutory restraints (set forth in a checklist on a standard form order) and lasts for a period of two years.

While most judges briefly articulate from the bench the reasons that underlie their decisions following the close of evidence at the final hearing, they rarely make detailed written findings of fact and conclusions of law. Such findings, together with any motion to alter or amend the judgment, must be requested by the defendant within 14 days of the entry of judgment.[69] Appeals to the Law Court have to be filed within 21 days of the entry of final judgment.[70] Given that most defendants are *pro se*, they are unlikely to be aware of their right to file motions for findings, motions to alter or amend judgment, or appeals, let alone the mechanisms or time limits for availing themselves of those rights.[71]

No person should be deprived of "life, liberty or property without due process of law."[72] Due process in a civil case is a flexible concept, but the degree of due process is generally proportional to the nature of the private interest at stake, the risk of erroneous deprivation of that interest, and the probable value, if any, of the additional procedural safeguards.[73] In light of the array of injunctive restraints, deprivations of parental, liberty and property rights, and monetary damage awards to which the defendant can be subjected and the potentially severe collateral consequences that can flow from a final order in favor of the plaintiff, it is not unreasonable to expect that the PFA procedures should be more deliberative and the defendant afforded greater due process.

The Collateral Consequences of a PFA Order

Beyond the fact that the statutory PFA remedies are far-reaching, the very existence of a PFA order can profoundly impact the defendant in collateral ways. As the Law Court stated in *Chretien v. Chretien*, "The ongoing effects of a protective order--even one that has expired--can arise in various contexts, including family law proceedings, … and employment, housing, and educational opportunities,…"[74] The collateral consequences can include the following:

- A PFA order may bar the defendant from possessing a firearm under federal and state law.[75]
- A criminal conviction for violation of a PFA order can result in the deportation of a defendant who is an alien under federal immigration law.[76]
- A PFA order can lead to the suspension or revocation of professional licenses or otherwise endanger the occupation of those who require security clearances and background checks to obtain or maintain employment by suggesting untrustworthiness and lack of fitness.[77] As a result, the mere threat to file a PFA may be used for the purpose of extortion.[78]
- Where the parties have minor children in common, a PFA order makes it difficult to navigate the already fraught task of co-parenting without placing the defendant at risk of running afoul of the order.
- A finding of abuse can be a significant factor in the final determination of parental rights in a divorce or family matters contest.[79] Even without a finding of abuse, preliminary custody, when awarded to the plaintiff in a temporary order, may give the plaintiff a tactical advantage in Family Court.
- If the plaintiff has ulterior motives for seeking the order, such as vindictiveness or a desire to acquire a bargaining chip in a divorce, the plaintiff can effectively use the order to obtain concessions from the defendant or, with virtual impunity, lure the defendant into committing violations by initiating contact with the defendant.[80]
- If the defendant violates the order in a minor way or for a well-intentioned reason, the defendant nonetheless faces warrantless arrest, criminal prosecution and potential incarceration of up to 364 days for a Class "D" misdemeanor.[81]

Suggested Amendments to the PFA Statutes

There is no single fix to the problems discussed in this article, and any legislative changes should be proceeded by a careful statistical study as to the number, nature and disposition of cases on the PFA dockets over a multi-year period. However, the following suggested amendments to the statute would, in my view, help correct imbalances in the current law:

- Eliminate or more precisely define vague terms in the definition of "abuse," including "offensive," "harassing," "tormenting," and "intimidation," in order to ensure that conduct found to violate the statute is sufficiently abusive to warrant judicial intervention.
- Allow the defendant to assert the right of self-defense in a PFA case based upon allegations of assault or aggravated assault.
- Impose a statute of limitation for acts underlying the allegations of abuse.
- Provide additional due process rights to the defendant, including: the right to appointed counsel for indigents as in child protective custody cases (a right which should be extended to both parties);[82] the right to request reasonable pretrial discovery; the right to receive written warnings of the significant adverse direct and collateral consequences of a PFA order, and the right to be given written notice of the procedures and time limits for requesting written findings of fact and conclusions of law, for moving to alter or amend the judgment, and for filing an appeal.
- Remove the court's authority to award monetary damages to the plaintiff or alternatively allow the defendant to elect a jury trial as to damage issues and foreclose the plaintiff from bringing subsequent lawsuits against the defendant for claims arising out of the same occurrence.
- Remove the court's authority to grant the plaintiff temporary exclusive occupancy of a residence which is solely owned or leased by the defendant, except where the parties are married and the remedy is one which could be

awarded in a divorce action, or alternatively authorize the court to order the plaintiff to contribute a reasonable sum towards the cost of maintaining the premises or to impose other reasonable conditions on the plaintiff's continued right of occupancy.
- Give the court discretionary authority to award attorney's fees against a non-prevailing plaintiff based on multiple factors such as the plaintiff's ability to pay, bad faith in bringing the complaint and any history of prior misuse of the PFA process.
- Authorize Family Division judges to consider "willful misuse" of the PFA process as a factor in determining parental rights without requiring proof by clear and convincing evidence or proof that such misuse demonstrates a lessened willingness to cooperate in sharing responsibilities for the minor child.

Even in the absence of legislative amendments, changes to administrative procedures and judicial practices could enhance the quality of PFA decisions. The following are suggested changes to practices and procedures:

- Court clerks should automatically provide the presiding judge with a list of past or present divorce, family matter, PFA or criminal cases involving one or both parties, and the judge should review these cases to determine if they provide contextual information that has potential relevance to the pending PFA case.[83] If the plaintiff, for instance, is a non-custodial parent who is obligated to pay child support under an interim order in a contested family matter case, this may suggest that the PFA complaint is being used as a mechanism to quickly gain custody of the minor child and avoid a support obligation. Likewise, if the plaintiff claims the defendant is an abuser but has a criminal history of domestic violence against the defendant, this may suggest the plaintiff's complaint is designed to intimidate the defendant. With electronic filing of court documents on the near horizon, it will become a simple matter to access case files in any courthouse in the state with just a few keystrokes.
- In courts with busy dockets, more judicial time should be allocated for final PFA hearings.
- The judge should treat with skepticism allegations of abuse dating back more than two years before the filing of the PFA complaint, except to the extent that they may constitute evidence, under Maine Rule of Evidence 404(b), of motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident.[84]
- Wherever possible, the judge should leave decisions regarding custody of minor children, possession of property or money damages to divorce, family matter or tort cases, where these issues can be fully fleshed out in light of all relevant evidence.
- The court system, through videos or written materials, should provide more robust warnings to defendants as to the consequences of a final PFA order.
- The judge, upon rendering a final order with a finding of abuse, should advise the defendant of the right to request findings of fact and conclusions of law, to file a motion to alter or amend the judgment, and to file an appeal.
- Where a PFA case has been dismissed on its merits as frivolous, the judge, in addition to awarding attorney's fees against the plaintiff, should issue written findings which will provide historical context for judges considering future cases involving the same plaintiff.

Conclusion

While it is important that the PFA process be efficiently and effectively used to protect the victims of domestic abuse, it is also necessary to protect against its misuse and to ensure that the rights of defendants are protected. Any form of well-intentioned social legislation, such as that represented by the PFA statutory scheme, may be exploited by some litigants to pursue improper goals or to seek remedies for problems extraneous to the statute's fundamental purpose. Bringing more clarity and fairness to the statutory scheme and building in deterrents to prevent its exploitation will help preserve the PFA law for use by those who really need it.

ENDNOTES

1. The 12th Biennial Report of the Maine Domestic Abuse Homicide Review Panel (2018).
2. Of necessity, the conclusions I draw in this article are based upon my own professional experience and anecdotal evidence from colleagues rather than on published data. While there is a trove of statistics on domestic violence generally (see, e.g., the Maine Coalition to End Domestic Violence website, mcedv.org), the Maine court system does not publish detailed statistics on PFA cases. The only data available shows the total number of case filings per fiscal year for the past five years (FY15 –FY 19). http://www.courts.maine.gov/news_reference/stats/index.html. In evaluating the effectiveness and fairness of the system, it would be helpful to know, for instance: the percentage of complaints brought respectively by men, women and adults on behalf of children; the proportion of cases concluded by an order finding abuse versus those resolved by a consent order, default, voluntary dismissal, dismissal for failure to appear or dismissal on the merits; and the number of orders that include the issuance of child custody or support orders, bans on the possession of weapons, grants of exclusive possession of residential premises or personal property, and awards for monetary damages or attorney's fees. One thing the data do make clear, however, is the increasing frequency of PFA filings. As of FY 2019, they had become the most frequently filed category of cases in the District Court Family

Division.
3. 19-A M.R.S. §4002(1)(A)-(H).
4. 19-A M.R.S. §4001(1)-(3).
5. 17-A M.R.S. §§207, 207-A, 208.
6. 17-A M.R.S., ch.11.
7. 17-A M.R.S. §§209, 209-A.
8. 17-A M.R.S. §§210.
9. 17-A M.R.S. §§210-A, 210-C.
10. 17-A M.R.S. §§852, 853.
11. 17-A §511-A.
12. 14 M.R.S. §753.
13. 19-A M.R.S. §4002(1)(A). The criminal definition of simple "assault" also contains the words "offensive physical contact," §17-A M.R.S. 207, but prosecutions for assaults involving minimal physical contact with the victim are at least constrained by the exercise of prosecutorial discretion.
14. 19-A M.R.S. §4002(1)(B).
15. *Smith v. Hawthorne,* 202 ME 149 ¶6, 804 A.2d 1133,1136-7.
16. 17-A M.R.S. §108(1). On the other hand, it is clear that the plaintiff's "use of reasonable force in response to abuse by the defendant" does not affect the plaintiff's right to relief. 19-A M.R.S. §4010(3).
17. The exception is 17-A M.R.S. §106, which justifies the use a reasonable degree of force by parents to prevent or punish misconduct by their minor children.
18. 19-A M.R.S. §4002(1)(C).
19. *Pontbriand v. Blue Cross/Blue Shield,* 562 A.2d 656, 659 (Me 1989), citing *Taylor v. Pratt,* 135 Me. 282, 195 A. 205 (Me. 1937).
20. PL 2019, Ch. 407; 19-A M.R.S. §4007(1).
21. 19-A M.R.S. §4002(3-B).
22. ncdsv.org.
23. 622 A.2d 1135, 1139 (Me. 1993).
24. 19 M.R.S. §4006(2) & (5).
25. 19-A M.R.S. §4006(2-A).
26. 19-A §4007(1)(E)-(O).
27. 19-A §4007(1). A finding of a "credible threat" without the predicate finding of "abuse" is insufficient to support the issuance of a PFA order. *Chretien v. Chretien,* 2017 ME 192, 170 A.3d 260.
28. 18 U.S.C. §922(g)(8)(C)(i).
29. 19-A M.R.S. §4007(K).
30. 19-A M.R.S. §4007(E)(1).
31. 19-A M.R.S. §4007(F).
32. 19-A M.R.S. §4007(F-1).
33. 19-A M.R.S. §4007(G).
34. 19-A M.R.S. §4007(H).
35. 19-A M.R.S. §4007(I).
36. 19-A M.R.S. §4007(K).
37. 19-A M.R.S. §4007(L)
38. 19-A M.R.S. §4007(N).
39. 19-A M.R.S. §4007(4).
40. 19-A §4006(5) & (5)(C).
41. 19-A §4007(G).
42. 19-A M.R.S. §§4007(G), 1653(5-A).
43. 19-A M.R.S. §1653(3)(D), (E) & (G).
44. 19 M.R.S. §4007(L-1).
45. 19-A §1653(3)(O); *Campbell v. Campbell,* 604 A.2d 33, 37 (Me. 1992).
46. 19-A §4006(5)(C).
47. 19-A M.R.S. §4007(E)(1).
48. 14 M.R.S. §6025(1).
49. The remedy provided by 19-A M.R.S. §4007(E) is broader in scope than other statutory obligations for the support of minor children. A parent's obligation to support his minor children is enforceable solely through payment of child support under the Maine Child Support Guidelines, pursuant to 19-A M.R.S. §2001 *et seq.* Section 4007(E) of Title 19-A more closely resembles the marital property and spousal support provisions that can be imposed in a divorce proceeding. During the pendency of a divorce, a court may grant one spouse temporary possession of real estate owned by the other, 19-A M.R.S. §904(5). In a final divorce judgment, if the family home is marital property, the court may award the home or the right to live in it for reasonable periods to the spouse having custody of the children. 19-A M.R.S. §951-A(1)(C). Even if the home is non-marital, the spouse who owns it may be ordered to assign rights in the real estate to the other spouse for a period of time as a form of alimony. 19-A M.R.S. §951-A(7). Thus, 19-A M.R.S. §4007(E) has expanded the concept of alimony and marital property from a divorce context to situations in which the parties are not married but have children together.
50. 19-A M.R.S. §4007(K).
51. Constitution of Maine, Art. I, Sec. 20; *North School Congregate Housing v. Merrithew,* 558 A.2d 1189, 1190. Pursuant to M.R.Civ.P. 80L, this right is available even in cases filed in Small Claims Court.
52. "A plaintiff who splits his cause of action either as to relief sought or as to theories of recovery will find that his entire cause of action has merged into the initial judgment. The issues which should have been litigated initially cannot be litigated subsequently." *Kradoska v. Kipp*, 397 A. 2d 562, 569. (Me. 1979).
53. In the alternative, if 19-A M.R.S. §4007(K) is treated as analogous to the criminal restitution paid to a victim, it should be subject to the limitation imposed upon an award of restitution under the Criminal Code, which requires that the offender have the present and future financial ability to pay restitution. 17-A M.R.S. §1(C).
54. 19-A M.R.S. §4005(1)-(4).
55. 19-A M.R.S. §4003.
56. 19-A M.R.S. §4005(5).
57. 19-A M.R.S. §4006(1)-(5).
58. 19-A M.R.S. §4006(2) & (6).
59. 19-A M.R.S. §4006(7).
60. 19-A M.R.S. §4006(8).
61. 19-A M.R.S. §4007(1).
62. 19-A M.R.S. §4007(1) & (2).

63. 19-A M.R.S. §4007(2). Unless otherwise indicated, an order based on a voluntary dismissal by the plaintiff is without prejudice. 19-A M.R.S. §4007(8); M.R.Civ.P. 41(a)(1) & (2). If the plaintiff's complaint is dismissed on the merits after hearing or if a protection order is issued and expires, any future PFA between the same parties will have to be based on new facts that have arisen since the dismissal or expiration. *Gehrke v. Gehrke*, 2015 ME 58 ¶17-19, 115 A.3d 1252, 1256-7; *O'Brien v. Webber*, 2012 ME 98 ¶9-10, 48 A3d 230, 232.
64. 19-A M.R.S. §4011(2); 19-A M.R.S. §4007(1)(A)-(E), (G), (P) & (Q); 17-A M.R.S. §1604(C) & (D). A record of two or more prior convictions for violating a protection order increases the offense from a misdemeanor to a felony.
65. 19-A M.R.S. §4011(2); 19-A M.R.S. §4007(1)(F), (F-1) & (H)-(O); M.R.Civ.P. 66. Although violation of a PFA custody order is technically a criminal offense under §4007(1)(G), such orders are often replaced by divorce or family matter parental rights and responsibilities orders and violations, and as a practical matter, are typically addressed through the contempt process.
66. Pretrial discovery mechanisms are not expressly provided for by the PFA statutes, although arguably they may be available under 19-A M.R.S.§4010(1), which states, "Unless otherwise indicated in this chapter, all proceedings must be in accordance with the Maine Rules of Civil Procedure."
67. The sole warning required by statute is that the final order conspicuously notify the defendant of the criminal violations with which he can be charged for violations of a protection order. 19-A M.R.S. §§4007(3), 4011. These include warrantless arrest and prosecution for a Class "D" misdemeanor for a simple violation or a Class "C" felony for reckless acts committed in connection with a violation or where there are prior convictions for violations of PFA orders. 19-A M.R.S. §4010(3)-(5); 17-A M.R.S. §1604(C) & (D). The State of Maine Judicial Branch publishes a guide to the PFA process, which is written in simple language that can be readily understood by a non-lawyer. However, its explanation of the consequences of a PFA order is skimpy and only mentions the impact on the defendant's right to possess firearms and the potential for arrest and criminal prosecution for violations of the order. "Guide to Protection from Abuse & Harassment Cases" (June 2018), Part A(9), (13), (19) & (20).
68. 19-A M.R.S. §4006(2)(C).
69. M.R.Civ.P. 52(b) and 59(e).
70. M.R.App.P. 2B(c)(1).
71. The Guide to Protection from Abuse & Harassment Cases makes no mention of these rights.
72. Constitution of Maine, Art. I, Sec. 6-A.
73. *Adoption of Riahleigh M.*, 2019 ME 24 ¶16-17, 202 A.3d 1174, 1180-1; *Matthews v. Eldridge,* 424 U.S. 319, 335 (1976).
74. *Chretien v. Chretien,* 2017 ME 192 ¶9, 170 A.3d 263, 262.
75. 18 U.S.C. §922(g)(8)(C)(i); 14 M.R.S. §§4004(2-A), 4007(A-2).
76. 8 U.S.C. §1227 (a)(2)(e)(11).
77. *Board of Overseers of the Bar v. Carey,* 2019 ME 136, 215 A.3d 239.
78. *See, e.g., Shea v. Este*, CV-2019-27 (Aroostook County Superior Court 2019), a malicious prosecution action to recover damages for wrongful use of a PFA proceeding to threaten the defendant's professional licensure.
79. 19-A M.R.S. §1653(1)(B) & §(3)(L) & (M).
80. "Criminal sanctions may not be imposed upon the plaintiff for violation of a provision of the plaintiff's order for protection." 19-A M.R.S. §4007(8). Thus, the defendant faces criminal punishment for initiating contact with the plaintiff but not vice versa. Since the court cannot issue a mutual order of protection or restraint to prevent the plaintiff from contacting the defendant, 19-A M.R.S. §4007(7), and since a PFA order can only be modified by legal process, 19-A M.R.S. §4007(8), thereby preventing the defendant from invoking a defense of express or implied consent to contact, the plaintiff can violate the no-contact provisions of a PFA order with impunity.
80. 19-A M.R.S. §4011(1) & (3); 17-A M.R.S. §1604(D). The criminal offense of violating a PFA by initiating direct or indirect contact with the plaintiff does not distinguish between a defendant who threatens, harasses or stalks the plaintiff and one who, for example, responds to a phone call, email or text initiated by the plaintiff or who enquires about the plaintiff's health after finding out the plaintiff has suffered a severe injury or become seriously ill.
82. 22 M.R.S. §4032(G).
83. A list of such cases is supposed to be, but is not always, provided by the plaintiff as part of the PFA Complaint.
84. Maine Restyling Note to M.R. Evid. 404 (November 2014); Adviser's Note to former M.R.Evid. 404 (Feb. 2, 1976).

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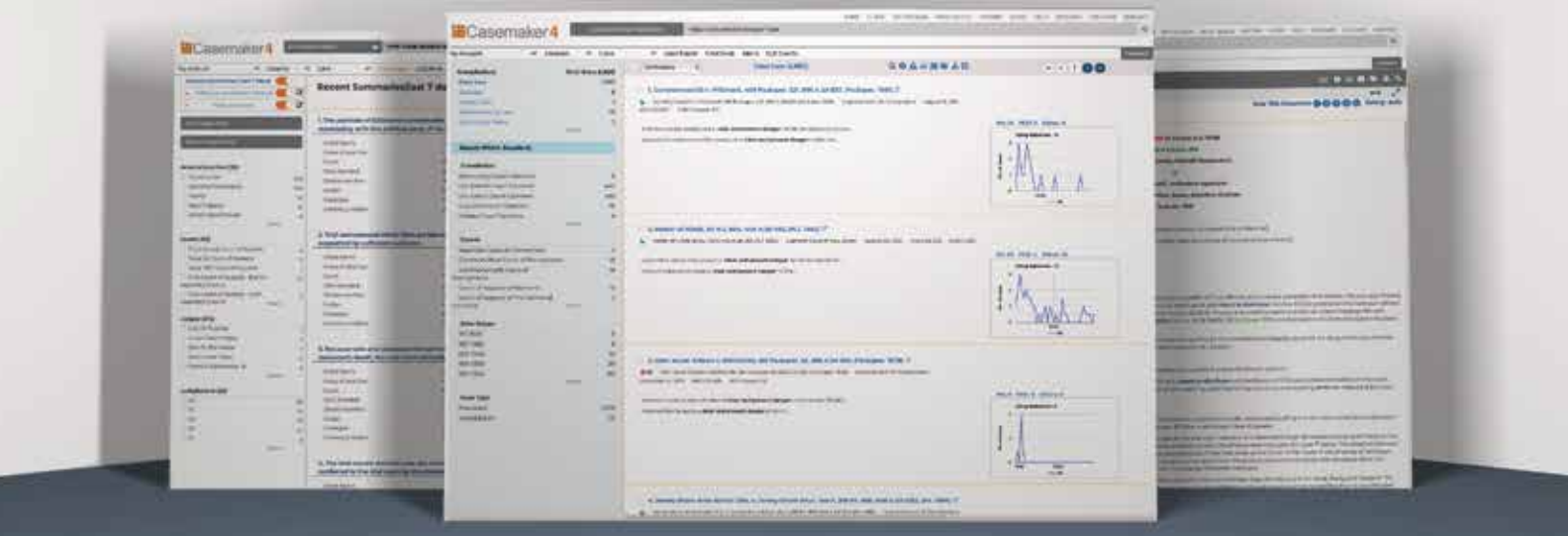

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Law Court: Standing Fells Tree Removal

During the "dog days" of an unusual Maine summer, the Law Court issued arguably the most significant land use decision of 2020. In *Tomasino v. Town of Casco*, the Court held that a deeded right-of-way over an abutter's property was insufficient "right, title, or interest" to establish administrative standing to obtain a permit to remove three trees along the right-of-way.[1]

Tomasino announced a new standing rule that is likely to burden property rights, complicate municipal practice, and result in more contentious, protracted litigation. The opaque factual record and tortured procedural history beg questions about what went wrong, but those will be left for another day. More important is what *Tomasino* means going forward, namely: (a) understanding the Law Court's legal conclusions and holding, (b) the reasoning and authority for the decision, (c) suggestions for reform, and (d) practical advice for navigating easement disputes to avoid costly and undesirable outcomes.

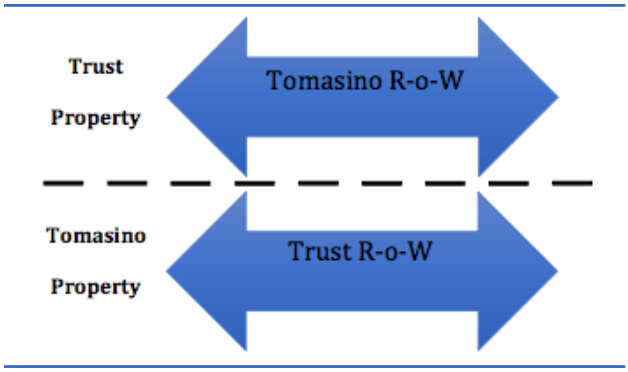
BACKGROUND

Facts and Procedural History

The Tomasinos applied for a permit from the Code Enforcement Officer ("CEO") to remove three trees along a right-of-way to their waterfront property on Sebago Lake in Casco, Maine.[2] The right-of-way in question granted mutual and reciprocal rights, allowing each landowner to pass over a 6-foot strip on the other's land.[3] As illustrated in Figure A, the northern boundary line (dotted) served as the centerline of a 12-foot wide easement area straddling the two properties.

The CEO issued the permit and the abutting landowner ("The Trust") appealed to the Zoning Board of Appeals (ZBA), which vacated the permit.[4] Following a Rule 80B appeal to the Superior Court and remand back to the ZBA,[5] the ZBA concluded that the permit was improperly issued because two of the three trees were partially outside the right-of-way area and, as to the third, "[t]he easement is unclear as to the rights

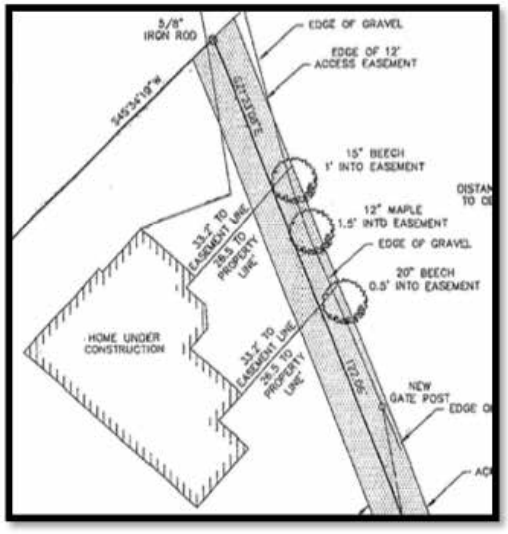
Figure A: Relative Rights Illustrated



of the parties to cut trees without the other party's permission ... ."[6] (See Figure B, depicting tree location.[7])

The ZBA granted the Trust's appeal, concluding that the Tomasinos lacked sufficient right, title, or interest to support the permit. The Tomasinos appealed that decision to the Superior Court and then to the Law Court, which ultimately affirmed.

Figure B



KEY TAKEAWAYS

1. Easement litigation can be costly, uncertain, and bad for neighbor relations
2. Standing for a municipal permit requires a sufficient property interest to use the permit
3. *Tomasino* case principles likely apply to Planning Boards, not just Zoning Boards of Appeal
4. Draft easements that specifically and clearly identify purpose, location, rights & maintenance responsibilities
5. Develop alternative strategies to achieve mutually beneficial results (Rule 1 above)

Deeded Right-of-Way Does Not Necessarily Establish Standing

The issue before the Law Court was whether the ZBA erred in concluding that the Tomasinos "failed to demonstrate that minimum right, title, or interest in the property on which the three trees are located."[8] The Court affirmed the ZBA's decision noting that "the scope of the Tomasinos' deeded easement over the Trust's property is not established in this record."[9] Emphasizing that the Tomasinos' deed did not expressly state that the easement included the right to remove trees, the Court further stated that construing deeds presented "matters that are well outside the Board's jurisdiction, authority, or expertise, which is instead limited to the interpretation and application of ordinance provisions."[10]

The Law Court also criticized the Tomasinos for not obtaining a declaratory judgment in a separate lawsuit or as an independent claim before the Superior Court in the Rule 80B appeal.[11] The Court declared as a policy concern that a municipal zoning case was "not the proper forum for a private property dispute between neighbors, and a private property dispute between neighbors is precisely what was before the Board here."[12] The Court concluded that "in the face of a dispute between private property owners, [the right, title, or interest] requirement is not met by an easement whose parameters have not been factually determined by a court with jurisdiction to do so."[13]

Right-of-Way Rights

To unpack *Tomasino*, a quick refresher on real property concepts is helpful. An easement is "[a]n interest in land owned by another person ... ."[14] A "right-of-way" is one of the most common types of easements,[15] defined as "[t]he right to pass through property owned by another."[16] A right-of-way is not fee title but falls squarely within the definition of a "right" or "interest" in property. The owner of the easement is referred to as the dominant estate, while the fee title owner of the property is the servient estate.[17] Although a right-of-way constitutes a property interest that is located on the face of the earth, a critical but common misconception is to confuse the intangible "right" with the physical "way," path, strip, road, or area over which that right passes.[18] The two may diverge with unexpected results.[19]

The right-of-way in *Tomasino* was created by deed.[20] To discern the constellation of rights that come with a deeded easement, courts consider the language of the deed, the purposes of the easement, the circumstances at the time the rights were conveyed, "as well as use of the easement and acts acquiesced to during the years shortly after the original grant."[21] There must be ambiguity before a court will interpret the deed relying on extrinsic evidence.[22] A rather curt right-of-way conveyance has, however, been deemed a sufficient latent ambiguity to look beyond the four corners of the deed[23] when interpreting the scope of an otherwise facially unambiguous right-of-way.[24]

Because a right-of-way represents simultaneous and potentially conflicting interests in the same land area, the law imposes flexible standards to balance competing rights: the servient estate cannot "unreasonably interfere" with the dominant estate's exercise of rights.[25] The dominant estate may exercise rights "incidental" or "necessary" to the use and enjoyment of the easement without unreasonably burdening or damaging the servient estate.[26]

Unlike paving,[27] storing lumber,[28] installing utilities,[29] or placing a dock,[30] Maine law does not require that a deeded right-of-way expressly state that the easement holder can remove trees; that right may be implied. The Law Court has not squarely adjudicated the issue.[31] Absent express terms in the deed, the general rule across jurisdictions[32] is that the easement holder may remove trees located within the easement if the trees unreasonably obstruct or interfere with the use of the right-of-way.[33]

The Law of Standing Doctrine

The doctrine of "standing" is based upon the principle that only parties with an adequate threshold injury or interest may participate and seek remedies from a decision maker.[34] Although standing has been described as "jurisdictional," the concepts of standing and "jurisdiction" are distinct and require precise language sometimes lacking in case law.[35] Standing is tricky—the Law Court has acknowledged that "the case law

of 'standing to sue' amounts to 'confused logic-chopping about bewildering technicalities.'"[36]

Standing for purposes of administrative law is based upon statute or ordinance.[37] Maine's Administrative Procedures Act requires that a party be "aggrieved," which case law defines as a "particularized injury."[38] Casco's ordinance requires that an applicant for a shoreland zoning permit "show evidence of right, title or interest in the property ... ."[39] The ordinance defines "aggrieved party" as: (1) a property owner "affected by" a permit denial or grant; (2) an abutter to land to which a permit or variance has been granted; or (3) "any ... person" that can show "particularized injury" flowing from a permit or variance grant.[40]

To have standing for a permit, an applicant must demonstrate a "legally cognizable expectation" to use the property in the manner the permit would allow.[41] This does not require an irrefutable right or even a present interest; a mere contingency or expectation is adequate. For example, both a contract to convey real estate conditioned upon subdivision approval[42] and a pending adverse possession claim have been held adequate "cognizable" interests to establish administrative standing.[43]

ANALYSIS

Tomasino's New Standing Rule

The critical legal conclusion in the case was that the Tomasinos did not have standing, in part because the ZBA lacked jurisdiction to adjudicate the scope of the Tomasinos' right-of-way.[44] This surprising conclusion is at odds with the ordinance,[45] statutes,[46] and case law.[47] Further surprising was the adoption of a new standing rule given the factual record.

The Tomasinos asserted that tree removal was necessary for their certificate of occupancy, not that the trees in fact interfered with or obstructed their right-of-way.[48] Further, there was confusing, conflicting evidence as to where the trees were located.[49] The Tomasinos thus clearly failed to meet their burden to prove that they had the right to remove the trees. The Law Court could have affirmed on that narrow basis. But rather than premise the decision on the factual record,[50] the Court went further. The Court held that absent a declaratory judgment finding that tree removal was within the scope of their easement rights, the Tomasinos lacked administrative standing for the permit. In so holding, the Court questioned the ZBA's jurisdiction to construe the deed and entertain the permit in the first place.[51] This is problematic for at least three reasons.

First, the ordinances do not support the Court's standing conclusion. The Tomasinos satisfied threshold standing contemplated by the ordinance: the Tomasinos' deed *would* constitute "*evidence*"[52] of a right and interest in the property (albeit the scope was disputed) and they were clearly "aggrieved" as a party defending a permit decision against the Trust's appeal.[53] Yet the Court declined to apply the ordinance standards, holding instead that "[w]hatever minimum 'right, title or interest' is required by ordinance ... we conclude that, in the face of a dispute between private property owners, that requirement is not met by an easement whose parameters have not been factually determined by a court with jurisdiction to do so."[54] As noted by Justice Connors in dissent, by discarding the ordinance, and requiring a Superior Court adjudication, the Court would appear to require conclusive or unchallenged proof to exercise a right in the property, rather than mere "evidence" or a "colorable" basis.[55] The latter, "colorable" standard, generally satisfied by a deed, or anticipated legal right, had been the prevailing standard in Maine municipal and administrative law.[56] *Tomasino* thus creates a new rule.

Second, the Law Court premised the decision on jurisdictional grounds, holding that interpretation of the scope of a deeded right-of-way presented issues "well outside the Board's *jurisdiction*, authority, or expertise, which is instead limited to the interpretation and application of ordinance provisions."[57] Although the Court has elsewhere cautioned against conflating "jurisdiction" with "standing,"[58] *Tomasino* is not so circumspect. This jurisdiction conclusion is at odds with the ordinance and statute: the ZBA has jurisdiction to hear appeals from CEO permit decisions;[59] the applicant's deed is the most probative evidence of right, title, and interest and the ZBA is required to apply that standard;[60] and the ZBA has jurisdiction by statute to consider documentary and testimonial evidence to make findings of fact.[61]

Third, the new rule is in tension with case law. In *Rancourt*, the Law Court affirmed a decision of a ZBA considering evidence and construing the scope of a right-of-way without comment or concern about jurisdiction.[62] In *Southridge Corporation*, the Court held that the *mere possibility* that the applicant may obtain the requisite right, title, and interest through pending adverse possession litigation was sufficient to have standing to apply for a permit.[63] *Tomasino* neither expressly overrules these cases nor articulates what a ZBA can consider or should do in the next case.

Tomasino Has Legal, Practical, and Policy Implications

As a matter of law, a right-of-way holder has a cognizable interest connected to the property, at least sufficient to invoke the board's jurisdiction, to present evidence of her specific scope of rights.[64] Adjudicating the scope of an easement, reasonableness of a use, and burdening all present questions of fact.[65] Zoning boards of appeal have jurisdiction to consider documentary and testimonial evidence and find facts by statute,[66] and have in other cases construed the scope of a

right-of-way based on the deed and extrinsic evidence.[67] But *Tomasino* holds differently and is therefore poised to impact future controversies.

If property rights are disputed, what is sufficient for administrative standing and what are the limits of board jurisdiction? Attorneys and boards may struggle to apply *Tomasino* and question whether a board has jurisdiction to interpret deeds and consider extrinsic evidence about scope, and how municipal review coincides with Superior Court jurisdiction.

This is not a speculative concern—municipal jurisdiction and easement interpretation post-*Tomasino* is already being litigated in Maine.[68] Within weeks, *Tomasino* was invoked by parties opposed to a proposed salmon farm under review before the Belfast Planning Board. The abutters moved to stay the application review on the basis that the board was without jurisdiction absent a decision from the Superior Court construing the applicant's easement rights.[69] Although the abutters have so far been unsuccessful, they pressed arguments that find direct authority in *Tomasino*.

Moreover, there are practical and policy problems with *Tomasino*'s holding that an easement holder may have to first obtain a declaratory judgment confirming her rights before she has right, title, and interest to obtain a permit. It seems onerous to sue the neighbor as a precondition where the deed impliedly (but not explicitly) grants those rights. It is also inefficient to require time-consuming and costly collateral litigation to "prove" standing where a permit may be unopposed or a zoning board can consider evidence and make findings bearing on the scope of deeded rights in the first instance.[70]

The Law Court's rationale for announcing a new standing rule turned largely upon concerns about litigating a private property dispute in a municipal forum and the limits of board expertise.[71] Neither of those concerns justifies raising the bar to administrative standing for easement holders.

Private Property Disputes Are Inherent to Municipal Adjudication

Tomasino chided the applicants for litigating a private property dispute in a municipal forum. Indeed, private property owners ought not enlist municipalities to do their bidding for them. An example is a landowner that encourages an ordinance change to regulate some discreet conflict they have with their neighbor. Imagine a landowner urging the municipality to pass an ordinance that would apply town-wide for their own private interests.[72] The concern highlighted in *Tomasino* is thus a worthy one.

In reality, municipal public hearings in which neighbors speak against an applicant's land use *are* an active or brewing private property dispute. Private property disputes are inherent to municipal board adjudication, particularly when an application is controversial in the neighborhood. Maine case law is replete with examples of abutters participating in municipal board hearings and appeals from those decisions on the basis that a proposed land use would adversely affect their private property.[73] What can that be called, except litigation of a private property dispute in a municipal forum?

Boards Construe Technical Information, Including Deeds

Municipal boards routinely construe technical information because of the subject matter they adjudicate. Board members may not be deed experts, but neither are they necessarily experts in planning, engineering, surveying, building codes, fire safety, or other technical fields. Boards regularly scrutinize plans and take testimony from technical experts in land use applications and make findings based on that evidence.[74] Such technical information is a material part of their jurisdiction to apply ordinances, such as site plan review. Municipal ordinances are laws, and while boards may seek the assistance of town counsel, they must render legal judgments notwithstanding they are not legal experts, and ordinances can be notoriously unclear.[75]

Tomasino appears to allow, or even require, a board to revoke a permit if the right and interest inquiry calls for deed construction, ostensibly because the subject is beyond the board's expertise. Such a rule does not reflect actual practice given that boards construe deeds, and the line between appropriate and inappropriate deed construction in adjudicating standing is unclear. It is also very inefficient.

Easement Rights Burdened by Rule

The strategic implications of the decision are manifest. A neighbor opposed to a land use for private reasons can now potentially leverage the ZBA hearing to block the application on the basis that there are unresolved deed questions, even when the applicant in fact has the right, and even where the neighbor's contention is baseless. The rule thus ironically enlists the municipality in furthering one private objective in exchange for another. If the neighbor can kick up enough dust around right, title, and interest, then the ZBA would be prudent to decide against the easement holder, citing *Tomasino*. To play on the classic metaphor of property rights as a bundle of sticks, talk about a stick in the spokes!

Tomasino says that the applicant's recourse is to obtain a declaratory judgment and to then go back to the ZBA. But a permit holder cannot simply obtain a judicial opinion construing a deeded easement as easily as pulling a ticket at the deli counter. Real estate practitioners can attest that

a seemingly straightforward declaratory judgment action is rarely, if ever, simple or quick. Three years from filing to judgment is not an unreasonable estimate, based on the *pre-COVID* pace of civil property disputes through the state court system, never mind with the current backlog.[76] The suggested recourse is inefficient, costly, and more burdensome than the Law Court acknowledges. It is real, cold comfort if the Superior Court holds, after years of litigation and attendant costs, that the applicant had that right all along.

Procedurally, requiring the applicant obtain a declaratory judgment has the rights and remedies backwards. A permit does not necessarily mean that a land use is lawful. The neighbor contesting the use should be the party marching off to Superior Court[77] for injunctive or monetary remedies, and, depending on the circumstances, an award of attorney fees and costs.[78] A board decision does not necessarily limit the neighbor's independent right to pursue and obtain those remedies.[79]

A Simpler Solution for Boards

If boards now have limited authority to construe deeds, then literature published by the Maine Municipal Association (MMA) provides a solution that would avoid entanglement in the merits of a private property dispute, while restoring clear, ordinance-based administrative standing and jurisdiction rules. The MMA's Board of Appeals Manual contains instructions and sample language for boards to use "where title to the land, boundary location or other title problem has been raised by a third party."[80] The MMA language neutrally concludes that ordinance standards have been met; clearly states that the permit is not a title decision; warns the applicant that title issues, if any, may need resolution before relying on the permit; and presumably leaves the parties to resolve their private dispute separately.[81] The ZBA could thus uphold the permit noting that the ordinance was met but that a third party challenged right, title, and interest, teeing the issue up for the Rule 80B appeal.

As applied to *Tomasino*, the ZBA could have concluded the deeded right-of-way constituted "evidence" satisfying standing, and upholding the permit stating explicitly the ordinance was met but that a third party had challenged the scope of deeded rights. This would have left the Trust to appeal and seek a declaratory judgment in Superior Court. Such an agnostic decision would have avoided the need for multiple hearings, wherein the board struggled to resolve hotly contested factual and legal issues. This approach would likely be easier to apply, obviate the need to wade into the disputed property issues, and leave resolution of the actual controversy to the private parties.

Neighbors, Easements, and Dispute Resolution

It is unclear what efforts, if any, the parties undertook to resolve their tree dispute before involving the Town and going to the ZBA. There must have been a "win-win" arrangement that would have allowed the Tomasinos to remove the trees in exchange for compensation or replanting. The cost and time invested no doubt would have been far less than the cost of three appearances before the ZBA, two trips to the Superior Court, and an appeal to the Law Court, over the course of three years. One also wonders whether the parties will ever return to something resembling the lakeside peace they likely had before.

Counsel often explain to their clients that litigation is, by nature, very uncertain. Easements and right-of-way disputes are probably among the least predictable legal disputes. The intended purpose and scope of an easement, the reasonableness of an implied use, potential overburdening, and the balancing of competing interests in land, all implicate factual issues that are largely left to a decisionmaker's judgment of credibility and weight.[82] Reasonable minds can differ. Moreover, a best-case result may be fleeting: one study concluded approximately 50% of trial court easement decisions are vacated on appeal.[83]

Client management is critical. Clients may be overly confident about what their deeded rights are, and what "everyone understood" about the conveyance. Upon research into the title record, gathering evidence, speaking to witnesses, and building a case, that certainty can become muddled. Poor outcomes can follow even in strong cases after investing substantial time and money. Given the uncertainties, best practice is to encourage clients to speak with their neighbors to get out in front of a dispute before it boils over. Waiting until lawyers are involved and appearing before a municipal board or going to court may be too late. By then, the emotional throes of litigation may have already numbed rational thinking, precluding economic decisions in the parties' best interests.

CONCLUSION

It remains to be seen whether *Tomasino* will mark a sea change and how the case will be interpreted by boards and courts. The Law Court announced legal rules with prospective application for administrative standing and jurisdiction in municipal disputes; the same outcome could have been reached premised emphatically on the particular facts and record, but that road was not taken. While practitioners may now find themselves busy filing companion declaratory judgment actions when applying for municipal permits, many applicants may not have the resources to prove that they are "right" about their rights. Administrative standing should be a low threshold so that parties can have their day before the board. When rights are not burdened by onerous threshold requirements, and the evidence is considered, justice is more likely to follow.

ENDNOTES

1 *Tomasino v. Town of Casco*, 2020 ME 96, ¶ 15, 237 A.3d 175.
2 *Id.* ¶ 3. The Code Enforcement Officer administers timber and vegetation removal permits pursuant to the Town's Shoreland Zoning Ordinance. *See* Casco, Me., Code §§ 215-9.29, 215-9.36(C)(1) (June 14, 2017), https://ecode360.com/attachment/CA3638/CA3638-215a%20Table%201%20Shoreland%20Use%20Table.pdf (last visited Dec. 28, 2020).
3 The deeded right-of-way states: "a right of way over a strip of land six (6) feet in width, Northeasterly of and adjoining the first course above described and subject to a right of way over a strip of the above described land six (6) feet in width Southwesterly of an adjoining said first course, said strips together making a twelve (12) foot right of way for the benefit of the above described premises and the premises Northeasterly thereof extending southeasterly from the road shown on said plan the entire length of the first course above described." Warranty Deed, Kane to Tomasino, Ex. A, Cumberland County, Me. Registry of Deeds, Book 33522, Page 264.
4 *Tomasino*, 2020 ME 96, ¶ 3, 237 A.3d 175. Casco's ordinances grant the Zoning Board of Appeals jurisdiction to hear appeals from decisions of the Code Enforcement Officer, including permitting decisions. *See id.*; Casco, Me., Code §§ 22-9, 215-9.36(G)(1)(a) (June 10, 2009), https://ecode360.com/31324515
(last visited Dec. 28, 2020).
5 In the first appeal to Superior Court (Cumberland County, *Horton, J.*), the court remanded the appeal back to the ZBA for further findings. *See Tomasino v. Town of Casco*, No. AP-18-60, 2019 Me. Super. LEXIS 40 at *16-17 (March 11, 2019); M.R. Civ. P. 80B(m) (allowing the Superior Court to remand a Rule 80B appeal back to the municipality for further action).
6 *Tomasino*, 2020 ME 96, ¶ 6, 237 A.3d 175.
7 Figure B has been extracted and enlarged from a plan that was presented to the ZBA and included in the administrative record. Record, *Tomasino v. Town of Casco*, AP-18-60, at 25, Ex. E (Sept. 13, 2018).
8 *Tomasino*, 2020 ME 96, ¶ 6, 237 A.3d 175.
9 *Id.* ¶ 7.
10 *Id.*
11 M.R. Civ. P. 80B(i).
12 *Tomasino*, 2020 ME 96, ¶ 8, 237 A.3d 175.
13 *Id.* at ¶ 15. In dissent, Justice Connors accepted that the submission of a deed with a right-of-way over the area in question was a sufficient showing of right, title, or interest to establish standing. *Id.* ¶ 29 (Connors, J., dissenting).
14 Easement, Black's Law Dictionary 585 (9th ed. 2009). For an exceptional work of scholarship on Maine property law, roads, and easements, *see* Hermansen & Richards, *Maine Roads and Easements*, 48 Me. L. Rev. 197 (1996) (3d ed. 2007).
15 Easement, Black's Law Dictionary 585-86 (9th ed. 2009).
16 Right-of-way, Black's Law Dictionary 1440 (9th ed. 2009) (the term "right-of-way" has various meanings: (1) "[t]he right to pass through property owned by another;" (2) "[t]he right to build and operate a railway line or a highway on land belonging to another, or the land so used;" and (3) "[t]he strip of land subject to a nonowner's right to pass through.").
17 Easement, Black's Law Dictionary 586 (9th ed. 2009).
18 Cunningham, *How to Draft an Easement*, MSBA CLE: Maine Roads and Easements, Ch. 3 at 3-3 (Oct. 21, 2011).
19 *See id.* Defining the easement location when this happens is fact-dependent and complex. *See* Hermansen & Richards, *supra* note 14 at *76-89(2007).*
20 *Tomasino*, 2020 ME 96, ¶ 2, 237 A.3d 175. The language of the Tomasino deed appears in note 3, *supra*.
21 *Sleeper v. Loring*, 2013 ME 112, ¶ 18-20, 83 A.3d 769.
22 *See Gravison v. Fisher*, 2016 ME 35, ¶ 39, 134 A.3d 857.
23 *See McGeechan v. Sherwood*, 2000 ME 188, ¶ 24, 760 A.2d 1068; *Snyder v. Haagen*, 679 A.2d 510, 513 (Me. 1996) (describing latent ambiguity).
24 *See, e.g.*, *Sleeper*, 2013 ME 112, ¶ 19, 83 A.3d 769 ("Thus, the language of the deeds may be unambiguous so far as it goes, but it does not go far enough in respects that are critical to the evaluation of the full scope, contemplated by the parties, of the use to be made of the right of way." (citation omitted) (quotation marks omitted)).
25 *See, e.g.*, *Flaherty v. Muther*, 2011 ME 32, ¶ 63, 17 A.3d 640.
26 *See, e.g., Mill Pond Condo. Ass'n v. Manalio*, 2006 ME 135, ¶ 6, 910 A.2d 392; *Gutcheon v. Becton*, 585 A.2d 818, 822 (Me. 1991) ("In general, a person who possesses an easement over another's property can exercise his right only in a reasonable manner."); *Badger v. Hill*, 404 A.2d 222, 227 (Me.1979).
27 *Davis v. Bruk*, 411 A.2d 660, 666 (Me. 1980) (declining to overrule as obsolete *Littlefield v. Hubbard*, 120 Me. 226, 230, 113 A. 304, 306 (1921)). "[A]n easement for a right of way, without more, does not permit the grantee to 'disturb the soil upon the fee' of the owner of the servient estate." *Id.*
28 *Kaler v. Beaman*, 49 Me. 207, 208 (1860) (easement provided dominant estate "the right to the free and unobstructed use of the road, as a way, for the accommodation of his mill privilege, but not to be used as a place of deposit for lumber or other materials ... .").
29 33 M.R.S. § 458 (2020) (legislatively precluding an implied right to install utilities on a right of way for conveyances from January 1, 1990 forward by requiring such a right be expressed explicitly in the deed).
30 33 M.R.S. § 459 (2020) (legislatively precluding an implied right to install a dock on a right of way for conveyances from January 1, 2018 forward by requiring such a right be expressed explicitly in the deed). For conveyances prior to the statute's January 1, 2018 effective date, Maine law provides that a deeded right-of-way can be sufficient as a matter of law to install a dock, provided that right was

intended by the parties and the surrounding circumstances. *See, e.g.*, *Sleeper*, 2013 ME 112, ¶¶ 19-22, 83 A.3d 769; *Badger*, 404 A.2d at 224-27.

31 In *Brooks v. Bess*, 135 Me. 290, 291, 195 A. 361, 361 (1937), the Law Court held that tree growth removed by the right of way owner to clear room for a "modern motor drive snow plow" rendered the owner liable to the fee owner for the value of the timber. The case was more concerned with entitlement to the wood, than the act of removing trees, as the Court noted that "[i]t is not claimed that the defendant did not have the right to cut and remove this growth." *Id.* Yet the Court's statement of law that "title to these trees was in the [title owner of the land], subject, however, to the right of cutting and removal in order to make possible the enjoyment of the easement," is in accord with the rule across jurisdictions, *see infra* note 32. *Brooks*, 135 Me. at 292, 195 A. at 362.

32 *See, e.g.*, *County of Westchester v. Greenwich*, 793 F. Supp. 1195, 1215 (U.S. Dist. Conn. 1992)*; Rothman v. Rothman*, 1998 Conn. Super. LEXIS 1583, at *6 (June 8, 1998); *Duresa v. Commonwealth Edison Co.*, 807 N.E.2d 1054, 1063 (Ill. App. Ct. 2004); *Farmer v. Kentucky Utilities Co.*, 642 S.W.2d 579, 581 (Ky. 1982); *Maasen v. Shaw*, 133 S.W.3d 514, 520 (Mo. Ct. App. 2004); *Arcidi v. Town of Rye*, 846 A.2d 535, 543 (N.H. 2004); *Delaney v. Gurrieri*, 451 A.2d 394, 395 (N.H. 1982) (affirming decision that found removal of trees by dominant estate holder exceeded the scope of their right-of-way because the trees did not unreasonably interfere with use of right-of-way and tree removal to improve view of pond was not permissible under the deed language at issue); *Kell v. Appalachian Power Co.*, 289 S.E.2d 450, 456 (W. Va. 1982); *McMillion v. Wills*, 11 S.E.2d 108, 108 (W. Va. 1940).

33 *Cf. King v. Welch*, No. CV-16, 2020 Me. Super. LEXIS 7, at *17 (Feb. 18, 2020) (concluding trees and fence "have not materially impaired or unreasonably interfered with access to the lots."); *see also Kerr v. Jennings*, 886 S.W.2d 117, 125 (Mo. Ct. App. 1994) (surveying treatises).

34 *See Bank of Am., N.A. v. Greenleaf*, 2014 ME 89, ¶ 7, 96 A.3d 700; *Friends of Lincoln Lakes v. Town of Lincoln*, 2010 ME 78, ¶ 14, 2 A.3d 284.

35 *See, e.g., Homeward Residential, Inc. v. Gregor*, 2015 ME 108, ¶¶ 17-19, 122 A.3d 947.

36 *Walsh v. Brewer*, 315 A.2d 200, 206 n.2 (Me. 1974) (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. of Chicago L. Rev. 601, 628 (1968).

37 *Lindemann v. Comm'n on Governmental Ethics & Election Practices*, 2008 ME 187, ¶ 9, 961 A.2d 538 ("Whether a party has standing depends on the wording of the specific statute involved." (citation omitted) (quotation marks omitted)).

38 *Id.* ¶ 14 (citing 5 M.R.S. § 11001). The Law Court has defined "particularized injury" to be a property interest directly or indirectly affected by a permit or some other "economic interest" in the controversy, which places a litigant on a footing distinct from the public at large. *See Nergaard v. Town of Westport Island*, 2009 ME 56, ¶¶ 16, 18, 973 A.2d 735.

39 Casco, Me., Code § 215-9.36(C)(2).

40 *See* Casco, Me., Code § 215-2.1 (June 10, 2009), https://ecode360.com/31322737 (last visited Dec. 31, 2020).

41 *Murray v. Lincolnville*, 462 A.2d 40, 43 (Me. 1983).

42 *Id.* at 41, 43-44.

43 *Southridge Corp. v. Board of Envtl. Protection*, 655 A.2d 345, 348 (Me. 1995) ("We fully acknowledge that it is possible that Cormier may not prevail in his adverse possession claim to the Southridge property. Should this happen, his permit might be revoked. This possibility, however, neither deprives Cormier and those he represents of their current interest in the land nor their administrative standing.")

44 *Tomasino*, 2020 ME 96, ¶ 7, 237 A.3d 175.

45 *See* Casco, Me., Code § 215-2.1.

46 *See* 30-A M.R.S. § 2691(3)(d) (2020) (zoning boards of appeal have power to hear evidence and to make factual findings as part of their adjudicatory authority).

47 *Southridge Corp.*, 655 A.2d at 348 (concluding the mere expectation of prevailing in collateral litigation that may award title was sufficient for standing to apply for permit); *Rancourt v. Town of Glenburn*, 635 A.2d 964-65 (Me. 1993) (zoning board of appeals had jurisdiction to hear evidence, construe deed, and decide scope of easement rights).

48 *Tomasino*, 2020 ME 96, ¶ 3 & n.1, 237 A.3d 175. Even assuming that the trees implicated the occupancy permit, the ordinance requirements would not control whether the Tomasinos had a legal right, superior to the Trust, to remove the trees. Also, it is unclear why the Tomasinos did not simply expand the gravel drive slightly further onto their land, outside the easement area, to avoid the trees entirely.

49 *Id.* ¶ 4 & n.3.

50 *See Tomasino*, 2020 ME 96, ¶ 7, 237 A.3d 175 ("As the Board found, the scope of the Tomasinos' deeded easement over the Trust's property is not established in this record; as an evidentiary matter, the language of the deeds does not disclose whether and to what extent the easement includes the right to remove trees ... .").

51 *Id.* (discussing board jurisdiction).

52 Casco, Me., Code § 215-9.36(C)(2) (emphasis added).

53 *See* Casco, Me., Code § 215-2.1.

54 *Tomasino*, 2020 ME 96, ¶ 15, 237 A.3d 175 (citation omitted).

55 *Id.* ¶¶ 18, 28, 237 A.3d 175(Connors, J., dissenting) (quoting Casco, Me., Code § 215-9.36(C)(2)).

56 *Id.* ¶ 28 (Connors, J., dissenting); *see also Southridge Corp*, 655 A.2d at 348 (the mere expectation that the applicant will obtain the requisite right, title, and interest through pending adverse possession litigation is a sufficient "legally cognizable expectation" to use the property in the manner the permit would allow); Maine Municipal Association, *Manual for Local Land Use Appeals Board*, 18-19 (Feb. 2017) (describing that a permit applicant must have a "legally cognizable expectation" to use the property in the manner sought by the permit).

57 *Tomasino*, 2020 ME 96, ¶ 7, 237 A.3d 175 (emphasis

added).

58 "We have recognized before that the words 'jurisdiction' and 'jurisdictional' are understood to have many, too many, meanings, and that courts have been less than meticulous in using the terms. The word 'jurisdiction' most properly encapsulates only prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority. We have stated before that standing issues are 'jurisdictional,' but that observation is shorthand for the statement that standing affects a party's capacity to invoke a court's jurisdiction ... ." *Gregor*, 2015 ME 108, ¶¶ 17-18, 122 A.3d 947 (citations omitted) (quotation marks omitted).

59 *See* Casco, Me., Code § 215-9.36(G)(1)(a).

60 Casco, Me., Code § 215-9.36(C)(2).

61 *See* 30-A M.R.S. § 2691(3)(d).

62 *Rancourt*, 635 A.2d at 964-66.

63 *Southridge Corp*, 655 A.2d at 348.

64 *Tomasino*, 2020 ME 96, ¶ 28, 237 A.3d 175 (Connors, J., dissenting); *Southridge Corp*, 655 A.2d at 348; c*f. Greenleaf*, 2014 ME 89, ¶ 17, 96 A.3d 700 (plaintiff bank lacked ownership interest in the subject mortgage and accordingly lacked standing to invoke the District Court's jurisdiction to foreclose).

65 *See supra* notes 32-33.

66 *See* 30-A M.R.S. § 2691(3)(d).

67 *Rancourt*, 635 A.2d at 965-66.

68 *Mabee v. Board of Environmental Protection*, AP-20-3 (Me. Super. Ct. July 14, 2020) (order dismissing Rule 80B petition).

69 *See Mabee v. Board of Environmental Protection*, AP-20-3 (Me. Super. Ct. July 13, 2020), (Pet'rs' Mot. Stay.)

70 30-A M.R.S. § 2691(3)(d); *Rancourt*, 635 A.2d at 965-66.

71 *Tomasino*, 2020 ME 96, ¶¶ 8-9, 237 A.3d 175.

72 Town of Waterford, Planning Board Minutes of July 17, 2019 (a property owner complained about neighbor's dock and asked the Town to amend the ordinances to restrict dock length), https://www.waterfordme.org/government/boards_and_committees/planning_board/july_17.php.

73 *See, e.g.*, *Wister v. Town of Mt. Desert*, 2009 ME 66, ¶¶ 12-13, 974 A.2d 903; *Nestle Waters N. Am., Inc. v. Town of Fryeburg*, 2009 ME 30, ¶¶ 5, 38, 967 A.2d 702; *Sawyer v. Town of Cape Elizabeth*, 2004 ME 71, ¶ 9, 852 A.2d 58.

74 *See* 30-A M.R.S. § 2691(3)(d).

75 *See, e.g.*, *Desfosses v. City of Saco*, 2015 ME 151, ¶ 12, 128 A.3d 648 ("[T]he provisions of the Ordinance that purport to explain the appellate jurisdiction of the City's Planning Board present an imbroglio of confusion and contradiction.").

76 *See* State of Maine Judicial Branch, *COVID-19 Phased Management Plan* (version 5, issued Nov. 3, 2020) (outlining judicial resource impacts, case prioritization, and delays well into 2021), https://www.courts.maine.gov/covid19/covid-management-plan.pdf.

77 *Tomasino*, 2020 ME 96, ¶ 29 & n.7, 237 A.3d 175 (Connors, J., dissenting).

78 For example, if trees are cut unlawfully (without right

or authority) Maine law allows for the owner of the trees to recover the market value of the lost trees or the diminution in value of the real estate from which the trees were taken, with double or treble damages depending on the circumstances. *See* 14 M.R.S. § 7552(4) (2020). There are also express provisions that allow the owner to recover professional costs, including attorney fees. *Id.* § 7552(1)(E), (5).

79 Although *res judicata* has been applied to municipal adjudications, a neighbor would likely need to have participated at the municipal level for the doctrine to apply. *See North Berwick v. Jones*, 534 A.2d 667, 670 (Me. 1987). This issue is a question of litigation strategy. For the Trust in *Tomasino*, it appears that the Trust would be able to assert issue or claim preclusion offensively if, in the future, the Tomasinos seek a declaratory judgment for tree removal because they lost on that issue and failed to bring a separate claim in the prior litigation. Had the Trust lost at the ZBA level, then they could have brought independent claims as part of a Rule 80B appeal to construe the deed and the parties' rights, and to award damages or injunctive relief if the Trust were to prevail.

80 Maine Municipal Association, *Manual for Local Land Use Appeals Board*, 339 (Feb. 2017) (uppercase removed).

81 *Id.*

82 *See supra* notes 32-33.

83 *See* Robillard et al., *Clark on Surveying and Boundaries* 175 (7th ed. 2020).

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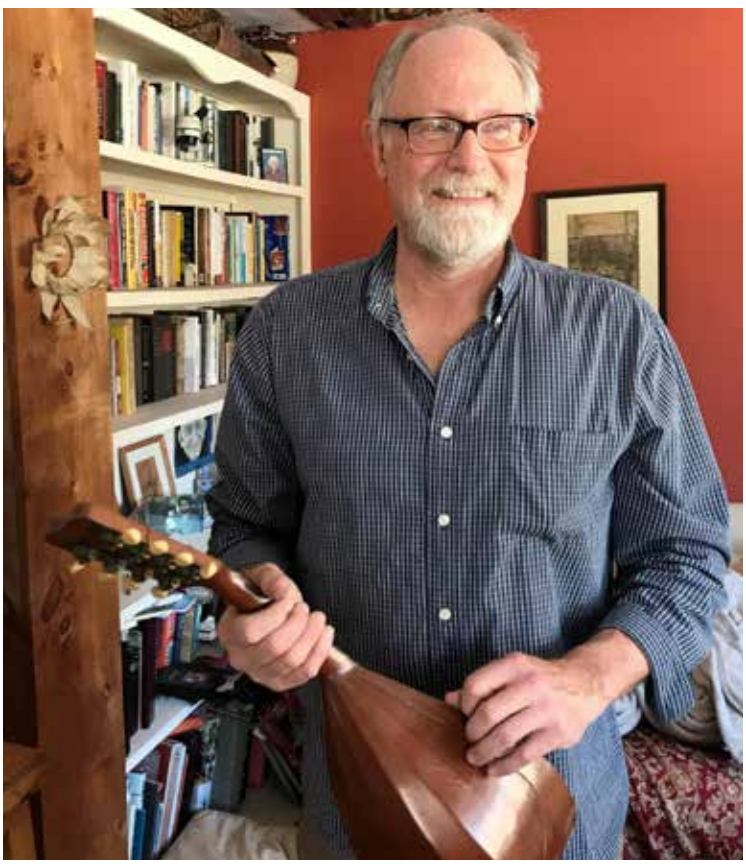
BEYOND THE LAW: BEN DeTROY

Bill Monroe, the father of Bluegrass music, once remarked that "bluegrass has brought more people together and made more friends than any music in the world." For Ben DeTroy, Monroe's statement rings true. Not long after trading in his violin for a mandolin during his school days, DeTroy became deeply interested in bluegrass, a unique alchemy of American roots music, European folk traditions, and jazz influences. Although DeTroy's enjoyment and skill when playing the mandolin are obvious, it is equally clear that bluegrass has provided him with a platform to share with others and pursue creative interests with his friends. Bill Monroe would approve. DeTroy, who otherwise maintains his law practice at O'Leary & DeTroy in Auburn, sat down with the Maine Bar Journal to discuss his pastime.



How did you get interested in the mandolin?

Well, I played violin for a few years in high school. And I always liked plucking the violin. The bow hand was a little rough for me. One day a girl in the orchestra named Melissa said: "You know, you really like plucking. Why don't you get a mandolin?" At the time, I was a sophomore in high school and never really considered this. This girl also told me that there was a guy selling old mandolins, which are called potato bugs or potato bellies. They have rounded backs. This sparked my interest. So, I bought this old potato bug and I played along with Jimi Hendrix records and the Doors, who I loved. I was about 15 when I discovered a bluegrass album from Flatt and Scruggs that belonged to my older brother Peter. I was really taken by the music.

Growing up in your household, did you have jam sessions among your siblings?

I played a lot with my brother Matthew. He is number four and I am number six among the siblings. We have a very musical family and have had many family jam sessions. We all would sing Kingston Trio songs, or my mother and father would sing some German folk songs. Music was a big part of our family and it really was a blast.

Photo courtesy of Ben DeTroy.

Do you have one mandolin or more than one?
Oh yeah, I have many mandolins, about a dozen.

What is your oldest mandolin?
My oldest mandolin is 100 years old – a Gibson A-Junior, the original mandolin that I started learning to play bluegrass on. This model was made at the old Gibson factory in Kalamazoo, Michigan. I think I bought it for $35 at a secondhand shop. I have had it repaired over the years and it now has some fiberglass on the backside. I do not play it as much anymore, but it has a nice old-timey sound to it. The sound reminds me of the Civil War era.

How about the newer mandolins that you play?
I have two mandolins that I play regularly. The first is a mandolin made by a guy in Thomaston. It's called a Phoenix Mandolin and it's more of a bluegrass mandolin. I play that one if I am playing acoustically. I also have a Rigel mandolin that I can plug in. I won that one in 2003 in a raffle at an amazing bluegrass festival called Grey Fox in New York. When we play with a drummer, sometimes you need a little extra juice, so I will use the Rigel mandolin to plug in.

Can you tell our readers about the history of mandolins in this country?
Mandolins used to be very popular in this country, especially in New England. There were mandolin orchestras about 100 years ago in almost every small community; mandolins, mando-viols, mando-cellos. It was a thing. They play old-time music like A Bicycle Built for Two. Then, Bill Monroe added some real umph to the music by using the "chop" method of strumming. It is not an open chord, but more of a chop that is almost like the way a rock guitar is played, as were his leads.

It's percussive.
Precisely. Monroe put a band together, the Bluegrass Boys. Flatt and Scruggs actually played for him way back then and that has to be the greatest band of all time. People just went wild for the music. And, as much as we talk about the instrumentation, Bluegrass really is a vocal music. I am good for about a half dozen instrumental songs before I need somebody to sing up there.

With respect to your own playing, do you have any particular influences?
Initially, my favorite was a guy named Frank Duffy. He played in an amazing Bluegrass band called The Seldom Scene. They were out of the Washington, D.C./Maryland area. And then later, I got into Sam Bush. These guys are phenomenal players.

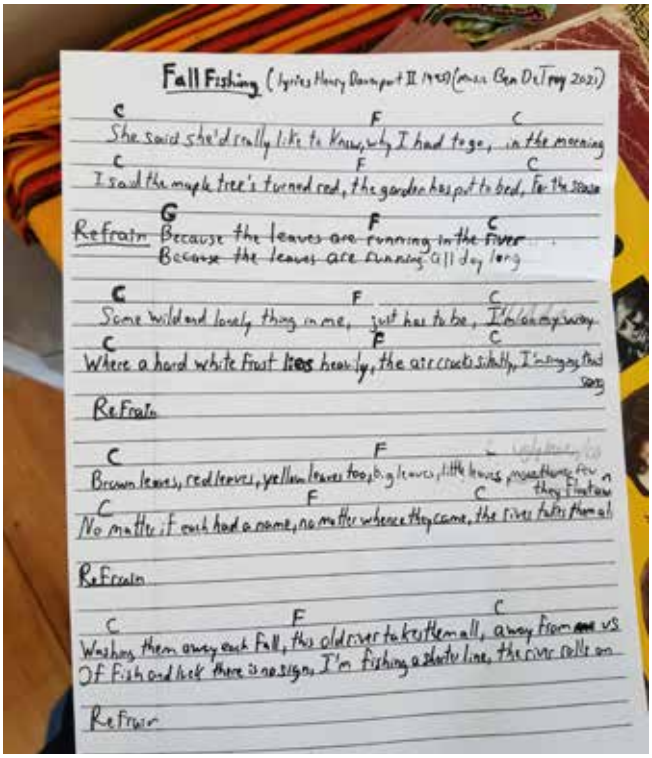
Who would you recommend to our readers if they wanted to learn more about Bluegrass music?
A current band that I love is a duo called Mandolin Orange. Also, The Seldom Scene. Everything that The Seldom Scene did from, I would say, the late '70s through the early 2000s, is, by and large, fantastic. The band still is around today, but it's a different configuration. In its prime, The Seldom Scene had true all-stars: the best mandolinist, the best bass player, one of the best Banjo players, the best dobro player, because there was no Jerry Douglas at that point.

Please tell our readers about your band.
It's called Bald Hill, which is where I live in New Gloucester. The members all come from New Gloucester, with the exception of our bass player, Rod Pervier, from Pownal. We almost didn't let him in for that reason! Pervier works in clinical engineering. Our primary singer is Renee St. Jean,

a neuromuscular therapist. She has a great voice and a true ability to play and entertain people. The solos are done by another guitarist, Chris Ricardi, a scientist, and me. My close friend Hal Phillips, a journalist, sings and plays guitar. I also play fiddle in the band sometimes. Occasionally we will have a drummer, but that is less often these days. We are going back to our acoustic roots. The band goes back 20 years with various friends. It was not Bald Hill during that entire period, but we have been playing together in one form or another for a long time.

I watched a YouTube clip of your band playing in an impressive setting. Where did that concert take place?

That's the Franco-American Heritage Center, which was the old St. Mary's Church in Lewiston. It is a neo-Gothic church, and it is just gorgeous. Outside of a larger gig like this, we play a fair number of bars where people appreciate music. The kind of places where people can actually hear each other.



Does your band play original music?

Yes, we do some originals. I wrote a song that we play. And we also play music written by others, but with our interpretations. There is a lot of really wonderful music coming out of the Americana movement. I mentioned Mandolin Orange, for example. We play a lot of the music that we grew up with. In addition to our take on Bluegrass standards, we do a Jimi Hendrix song and songs by the Grateful Dead, too. In a way, Bluegrass is like jazz; there is a canon of music that everyone

knows, but there are different ways of playing it. They both are improvisational music. Also, we all love harmonizing, which is a cool thing about Bluegrass music. Harmonies are a really important part of the whole Bluegrass experience.

Any notable experiences playing music?

As far back as I have been playing, I have been going to Bluegrass festivals. When I was 17, I went to a festival on Ralph Stanley's homestead in the far western corner of Virginia. I went there with a good friend of mind and we returned a couple years in a row. At the festivals, you see all these living legends and you can approach them. I played in a parking lot with Bill Monroe. Mind you, there were about 30 other mandolinists playing at the same time. But it was great fun. One of my highlights occurred about 10 years ago. I was at a phenomenal bluegrass bar in the South. It was an open mic night with a house band. They welcomed me on stage as the mandolin player from Maine, which must have been different for them. The banjo player in the house band actually had been in Bill Monroe's Bluegrass Boys. So, I was playing on stage with this great band and then suddenly off to my side, I hear what seemed like a freight train of fiddle playing heading my way. The guy was wildly sawing away on his fiddle and it was exhilarating. Turns out that the guy was the fiddle player for Steep Canyon Rangers, Nicky Sanders. He was incredible, and it was cool to share the stage with him.

What is it about playing music that gives you enjoyment?

I find that relating to people on a different level is very enjoyable. Certainly, there's some element of recapturing the sort of music-filled fun times with our family. But music also can be unpredictable and exciting. People who love music get a different look in their eyes sometimes. When you're playing, you can see there's something going on there that hits you right in the heart. I really love it.

Has there been any overlap with your legal world and your interest in music?

There are some attorneys that I go against in cases who have heard me play. Or, I would see other attorneys at hearings and they would say, "Hey Ben, you were really great at that show!" My clients are generally like, "What the heck is that about?" Also, one year, I played at the Norman, Hanson & DeTroy summer party. It was at Thomas Point and my brother Peter

came up to sing. The place went crazy. Peter was such a fun guy.

Your brother Peter is very sorely missed. It must have been wonderful to grow up together.

It was. Peter really was a hero to me and important in my life. He is the reason that I came to Maine and became a lawyer. He also was supportive of my interest in music.

Here is the question that we ask everyone who appears in this column: what is the best advice you have received?

Recently, I spent some time looking for a letter from my mother that she gave me when I was about 16 years old. I was going through some challenging times. And she wrote me this letter that basically stated that I needed to be the person that I wanted to be. Her message was that it is work to become the person that you want to be. To become yourself, you have to work at it. That is something that has stayed with me through the years. It is possible to be upset with the world or frustrated by hassles, but they are really inconsequential in the grand scheme of things. There is a big, beautiful world out there and so much to enjoy.

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

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

Maine Justice Foundation Maintains Steady Course as Pandemic Impacts Civil Legal Aid

Where were you in the middle of March 2020 when the world as we know it literally changed overnight? I am certain I will never forget that moment when my children's schools shuttered unexpectedly, worldwide travel came to a halt with many people racing to airports to get back to their homelands before borders locked down, and the many "non-essential" businesses that fuel our economy were forced to close or operate with drastic restrictions.

Indeed, the biggest one-day drop in the history of the Dow Jones Industrial Average happened on March 9. April continued the run of can-you-believe-it devastating news and numbers. Schools, courts and businesses were almost completely closed down during a wild spring of calamity. The Transportation Safety Administration reported that passenger traffic on some days in April had dropped by as much as 95 percent compared to a year earlier. By early May, unemployment claims were "literally off the charts," according to Bank of America's head US economist, with the *New York Times* noting the loss of "20.5 million jobs as the unemployment rate jumped to 14.7 percent, the worst devastation since the Great Depression."[1] In our own neighborhoods, we saw restaurants and many other services fighting to survive as walk-in customers disappeared almost overnight.

May I take a leap here and say that we are all looking forward to 2021, albeit with cautious optimism? 2020 was a year like no other in our lifetimes, and it unfolded like scenes in dystopian movie – with a pandemic that spread sickness, death, and economic devastation around the world like wildfire.

Amazingly, parts of the economy and our lives have begun some level of recovery, and vaccines are beginning to arrive, although whether we can call the speed of distribution "warp speed" remains to be seen. The COVID-19 numbers continued to skyrocket after the holiday season, and the winter weeks and months ahead will surely remain difficult. Some of us will suffer the loss of a job or the closure of a business, or the serious illness of a loved one—each bringing its own sense of devastation and loss.

What does this mean for those who depend on civil legal aid for their life and death matters?

The need for civil legal aid in Maine is growing because poverty in Maine is rising dramatically. Between February and December 2020, Maine had a net loss of over 48,000 jobs. Although the unemployment rate stabilized and even showed modest improvement in October and November, the true number may be twice the reported figure because so many Mainers have stopped looking for work and are uncounted by the unemployment rate.[2] Anecdotal but consistent evidence from local food banks indicates that food insecurity and hunger are increasing.

More Mainers are also at serious risk of eviction, a frequent cause of need for civil legal aid. The extension of a federal moratorium has delayed but will not stop a potential flood of evictions. There is a growing backlog of thousands of eviction cases. As of this writing, the U.S. Centers for Disease Control has extended the moratorium to March 31.

While the pandemic has heightened demand for legal services, and strained the legal aid providers' budgets, the funding picture is mixed. I wrote to you in July about legal aid funding and can provide this update. First, the 2020 Campaign for Justice achieved a much better result than we thought possible when the economy was falling through the floor last April; I will report further on that below.

May I take a leap here and say that we are all looking forward to 2021, albeit with cautious optimism?

Second, income from a significant source of funds for legal aid providers in Maine, Interest on Lawyers' Trust Accounts (IOLTA), appears to be stabilizing after a precipitous downward slide.[3] IOLTA funds decreased sharply last spring as the Federal Reserve dropped interest rates to near zero. Nothing affects IOLTA income in Maine as directly and immediately as a change in interest rates because banks respond by lowering rates on all interest-bearing accounts. IOLTA accounts are no exception. IOLTA revenue began dropping in May and by the end of June, it was 39 percent lower than the previous June. From April to September of 2020, IOLTA revenue declined by 27 percent from the same period in 2019.

In response to rapidly decreasing IOLTA revenue last spring, the Foundation instituted an emergency reduction in our budgeted IOLTA grants to the legal aid providers, resulting in a 6.25 percent reduction for our fiscal year 2020. The declines in IOLTA revenue could have been worse, and the numbers appear to be stabilizing and modestly growing again, potentially due to a red-hot market in residential real estate and rising law firm receipts as businesses acclimate to our new remote economy. While these factors may have helped to stave off even steeper declines in IOLTA revenue, interest rates are likely to remain very low for the foreseeable future, with no incentive for banks to pay higher rates in the near term.

Third, the Maine Civil Legal Services Fund collected and distributed $1.27 million from court fees, fines and penalties in 2019. Recent statutory changes going into effect in 2020 increased the percentage of court fees to be placed in the Fund and added a surcharge on debt collection. However, the widespread closure of Maine's courts due to the pandemic resulted in a decrease of deposits to the Fund. Disbursements to the legal aid providers totaled only $1.13 million in 2020.

In the face of this mixed news, the pandemic continues to add unexpected costs to the legal aid providers' budgets. A few illustrative examples follow:

- At the Cumberland Legal Aid Clinic, increased reliance on phones, videoconferencing, and mail has added time and expense for the faculty and student attorneys to stay in touch with clients. With many proceedings, especially family law, being held via telephone and videoconference, they also take additional steps to ensure that clients have access to the technology they need to participate.
- The Helpline at Legal Services for the Elderly (LSE) is now receiving up to 500 calls per month, a significant increase. LSE is also seeing an increase in reports of domestic violence, as some seniors remain trapped in unsafe living situations.
- Maine Equal Justice has taken on significant work in policy areas that were not previously a focus because of new and pressing needs created by COVID-19. This is especially true in the areas of unemployment, housing affordability and tenant rights.
- The pandemic required Immigration Legal Advocacy Project (ILAP) to create a multilingual online intake system, as well as new self-help guides and client education materials on its website. In addition, ILAP attorneys now conduct virtual outreach events to share updates with Maine's immigrant communities and service providers.

Support through the federal Paycheck Protection Program allowed legal aid providers to fill some of these gaps, but the picture for 2021 is uncertain.

The Maine Justice Foundation manages Maine's IOLTA program efficiently, and we encourage financial institutions to support legal aid by offering higher interest rates on eligible accounts. Additionally, and as you will see below, the total donated to the Campaign for Justice in 2020 increased, with all the pieces in place for a strong effort in 2021 as well.

Campaign for Justice Raises $621,682 for Civil Legal Aid

One of the great innovations of the Maine Bar was the creation of the Campaign for Justice in 2004. The Campaign for Justice is the annual giving campaign for members of the Maine Bar to contribute to the six legal aid providers.

In 2004, leaders of Maine's legal community approached the legal aid providers with the idea for a collaborative fundraising campaign. The providers – and the Bar – responded by creating the Campaign for Justice. This appeal reaches out to members of the Maine Bar for annual gifts to the providers, replacing the providers' separate appeals to lawyers. Volunteer leaders govern the Campaign and solicit gifts, providing a vital ingredient to the Campaign's success. The Maine Justice Foundation operates the Campaign.

This successful collaboration has greatly increased the Maine Bar's awareness of and support for civil legal aid: the dollar amount of gifts from the Bar to the six providers has risen more than seven-fold since the Campaign for Justice began.

The Bar gave $621,682 to the 2020 Campaign for Justice. This is five percent increase over the 2019 Campaign and an extraordinary result in a year that, as I noted above, was extremely challenging for law firms, courts, legal aid providers and most importantly the growing number of Mainers who need civil legal aid.

On behalf of those Maine people and of the legal aid providers, we thank the 1,550 members of the Bar who gave so generously. All of the donors to the Campaign for Justice deserve special thanks for helping us to maintain and even increase the amount raised. You have truly risen to the many challenges that 2020 presented. The Campaign exists and thrives only because of the Bar's deep commitment and generosity.

We want to recognize the attorneys whose time and leadership made this success possible. We extend our profound gratitude to 2020 Campaign Co-chairs David Pierson of Eaton Peabody and Sally Mills of Hale & Hamlin for the hundreds of hours they contributed and their steadfast leadership, to which the Maine Bar has enthusiastically responded. We also wish to express our sincere gratitude to:

- Jerry Crouter, Chair of the "Big 7" Division.
- Miles Archer of Unum, chair of the Corporate Champions Division.
- Justices Bruce Mallonee and Thomas Warren, Judge Peter Darvin, and Magistrate Judge Lindsay Cadwallader.
- Bill Harwood and Bill Knowles of Verrill, David Sherman of Drummond Woodsum, Leslie Silverstein, Esq., Nancy Wanderer, and Ezra Willey of Willey Law Offices, who all served on the Governance Committee of the Campaign in 2020.

This spring we will publish the annual report of the Campaign with more details about the results from 2020. Look for it online at www.campaignforjustice.org.

We are also delighted to announce the Co-Chairs of the 2021 Campaign for Justice: Cesar Britos of Unum and David Soley of Bernstein Shur. Cesar and David are longtime champions of civil legal aid and bring incredible enthusiasm and experience to the Campaign. We are fortunate to have their advocacy, hard work, and commitment for the coming year.

Honorary Life Fellows

The Bar Fellows of the Maine Justice Foundation constitute an honorary society of professional recognition for Maine attorneys. To earn election, the Fellows have distinguished themselves in their legal practice and have supported the mission of the Foundation: to ensure that all Mainers, regardless of means, have access to our system of civil justice.

The Foundation instituted the Bar Fellows in 1991 to provide a base of financial support for the Foundation's operations, should income from IOLTA prove insufficient. The Fellows' financial support over that time has allowed us to succeed admirably in that aim. The Foundation places the Fellows' donations of $1,500 in an endowment, which now stands at $1.18 million. Each year income from the endowment allows the Foundation to work on access to justice projects for which we have no other source of support.

Honorary Life Fellows of the Foundation have made an additional commitment of at least $1,500 to the Bar Fellows Fund. We thank the following for making generous pledges as Honorary Life Fellows in the last year:

Timothy P. Benoit, Esq.
Fred W. Bopp III, Esq.
Hon. Peter G. Cary
Edgar S. Catlin III, Esq.
Hon. Charles L. Cragin
Jared des Rosiers, Esq.
Edwin A. Heisler, Esq.
Cathy Lee, Esq.
Malcolm Lyons, Esq.
Patricia A. Peard, Esq.
Dana E. Prescott, Esq.
Hon. Paula D. Silsby
Hon. Susan Sparaco
Nelson A. Toner, Esq.
Fredda F. Wolf, Esq.
Judith Fletcher Woodbury, Esq.

We also the welcome the following new Bar Fellows from the last year:

Matthew J. Monaghan, Esq.
Dan Rosenthal, Esq.
Hon. Leigh Ingalls Saufley

David S. Turesky, Esq.
Dave Canarie, Esq.
Peter J. Guffin, Esq.
Anne H. Jordan, Esq.
Donald Grey Lowry, Esq.
Jane Skelton, Esq.
Daniel J. Stevens, Esq.

Maine Justice Foundation Welcomes New Board Members

The work of increasing access to justice only happens because of the dedication of attorneys who volunteer their time on nonprofit boards, state commissions and as *pro bono* counsel. The Maine Justice Foundation is fortunate to benefit from the governance of a talented and expert Board of Directors. The Board recently elected the following Directors:

Timothy Pease: Tim is the Vice President for Legal & Regulatory Affairs at Versant Power in Bangor. He previously practiced law with Rudman Winchell, and in 2013 joined Versant Power as corporate counsel. In college he was a member of the Air Force ROTC program. Following graduation, he was commissioned as a Second Lieutenant and served on active duty in a variety of locations until 1996. Tim holds a degree in Political Science from the University of Maine and a Juris Doctorate from the Seattle University School of Law. A native of Appleton, he lives in Hampden with his family.

Camrin Rivera: Camrin Rivera is a second-year law student at the University of Maine School of Law. Originally from Salt Lake City, Camrin came to Maine Law with a strong interest in the school's Refugee and Human Rights Clinic and Maine's tight-knit legal community. While at Maine Law, he has volunteered with both the Cumberland Legal Aid Clinic and the Refugee and Human Rights Clinic, and he is a Co-Chair for the Maine Association for Public Interest Law (MAPIL) organization. During the summer of 2019, Camrin interned at Pine Tree Legal Assistance in the Family Law and Victim's Rights Unit. These experiences solidified his professional mission to increase access to free legal services and inspired him to apply for the law-student representative position on the Maine Justice Foundation Board. When not busy with his studies, Camrin and his husband spend time cross-country skiing with Tucker, their five-year-old hound dog.

Anna Turcotte: Anna Astvatsaturian Turcotte is an author, lecturer, business leader, and human rights advocate. She is an Armenian refugee from Baku, Azerbaijan. After fleeing Baku in the fall of 1989 due to ethnic cleansing of Armenians, Anna and her family spent three years in Armenia as refugees before coming to United States in 1992. Anna received Bachelor of Arts degrees in English & Literature and Philosophy & Religion, with a minor in Russian Language and Literature from the University of North Dakota. She received her Juris Doctor degree from the University of Maine School of Law. In 2004, Anna was one of the first Americans to clerk at the International Criminal Court in The Hague, Netherlands. In 2012 Anna published her book, titled "Nowhere, a Story of Exile," which she wrote at the age of 14. Anna is the recipient of Mkhitar Gosh Medal, the Republic of Armenia's highest civilian honor, awarded by President Serge Sargsyan for her exceptional achievements. Since 2015 she has served on the Westbrook Maine City Council and is currently a Vice President of the Council. Anna has a 16-year career in banking regulatory compliance and risk management, currently as a Vice President, Senior Risk Manager at Androscoggin Bank. Anna lives in Westbrook with her husband John and their son and daughter.

The Board also wishes to recognize the outstanding contributions of **Bill Harwood**, whose two-year term as President ended in December. Bill led us expertly and tirelessly during a time of transition and of financial challenges. He pushed for and actively led numerous important efforts, including the search for and transition to a new Executive Director, increased funding for the Frank M. Coffin Family Law Fellows at Pine Tree Legal Assistance, the creation of the Honorary Life Fellows of the Foundation, and a new governance structure for the Campaign for Justice. Bill's diligence and hard work are a surprise to no one familiar with his career-long dedication to access to justice. We are equally delighted to welcome as President, attorney H. Lowell Brown of Bath.

We also note with sadness the passing of Jon R. Doyle, Esq. on January 30 at his home in Richmond. In his 60-year career in the practice of law, Jon provided pro bono counsel to many clients throughout Maine and generously supported the cause of access to justice as a Bar Fellow, through the Campaign for Justice and as a founding donor of the foundation's LGBTQ Justice Fund. We extend our sympathy to Jon's family, friends and colleagues.

ENDNOTES

1 www.CNBC.com, March 9, 2020; New York Times, May 8, 2020; www.tsa.gov/coronavirus/passenger-throughput.
2 Maine Department of Labor news release, December 18, 2020.
3 IOLTA benefits six providers of civil legal aid in Maine: Cumberland Legal Aid Clinic at the University of Maine School of Law; Immigrant Legal Advocacy Project; Legal Services for the Elderly; Maine Equal Justice; Pine Tree Legal Assistance; and Volunteer Lawyers Project. Since 1985, the Maine Justice Foundation has managed over $29 million in IOLTA funds.

WILLIAM C. NUGENT, ESQ. is director of the Maine Assistance Program for Lawyers & Judges. Bill can be reached at maineasstprog1@myfairpoint.net.

Gimme a Break! Efficient and Effective Methods of Stepping Back from Stress and Resetting Your Day

We have all had those days. Probably lots of them. Days when multiple deadliness, obligations and interruptions – all of which seem to demand our immediate attention – suck us into a vortex of stress and anxiety that taxes our concentration and equilibrium. Not to despair. It is a perfectly natural reaction to sensory overload. The human brain is designed to focus on one task at a time. For the most part, "multitasking", as the term is commonly understood, is an oxymoron – essentially a neurological impossibility.[1]

Whenever we reach the point where it feels as if we can't think straight it's time to take a break and reset our brains. The break doesn't need to take up much time. It doesn't necessarily require leaving our chair. Here are some suggested activities. They have been shown to be effective for recentering concentration and emotions. They should allow anyone to return to their tasks with a clearer head and quieter mind.

Take a five-minute time out.
Research has shown that meditating for as little as a few minutes can lower blood pressure, respiration and heart rate. It also enhances the brain's ability to focus.[2] The process is simple. Find a quiet place (or as quiet as possible). Turn your cellphone to silent. Press the Do Not Disturb button on your landline (if you still have one). Lower the lights, if you can. Sit comfortably in a chair and close your eyes. Take three deeps breaths, inhaling for a count of three and exhaling for the same. Then breathe normally and focus your attention on your breathing. Extraneous thoughts will wander through your mind. That is perfectly normal. Try not to get carried away by them. You will never eliminate those random thoughts entirely. Simply endeavor to bring your attention back to your breathing every time your mind begins to wander. Initial attempts at this exercise will likely make those five minutes feel more like 30. Don't get discouraged. The exercise will become easier over time.

If meditating in silence doesn't seem to work, you might find guided meditations helpful. There are many free apps available for guided meditations. Insight Timer is an excellent app with thousands of guided meditations ranging from one minute to two hours. The meditations are cross-referenced by duration, subject, and soundtrack (spoken word, sounds of nature, music, etc.). It takes only seconds to find short meditations accompanied by nature sounds, soft music or quiet instruction.

"Music hath charms to sooth the savage breast, to soften rocks or bend the knotted oak." William Congreve, *The Mourning Bride*
Music possesses strange powers. The fact that sounds alone can bring us to tears, compel us to dance, or even march off to battle, has intrigued philosophers and scientists for centuries. For the purpose of resetting our concentration the "why" is not as important as the "how." And the how is simple: just set aside five or 10 minutes, put on the headphones, and listen to whatever music you feel would be helpful at that moment. It is not difficult to become absorbed by a piece of music. Accordingly, music breaks are a good option for those who find meditation difficult. Music can also be used in conjunction with meditation.

Whenever we reach the point where it feels as if we can't think straight it's time to take a break and reset our brains.

Hit the road.
The hippocampus plays an important part in the functioning of memory. Neuroscientists agree that a regular physical exercise regimen is beneficial to the development of brain cells in the hippocampus. Recent research has demonstrated that moderate exercise of short duration can have an immediate beneficial impact on the hippocampus and short-term memory. A joint study by researchers in Japan and the U.S. found that 10 minutes of exercise performed at a level that utilized only 30 percent of heartrate reserves (the difference between a person's resting and maximum heart rates) improved short-term memory immediately after exercise. The improvement was corroborated through short-term memory tests and brain scans demonstrating coordinated brain activity.[3] By way of comparison, a brisk walk utilizes approximately 50 percent of heart rate reserves, 20 percent above that of the study participants. Walking at a normal pace for 10 or more minutes can have a positive impact on our brains. Taking a walk also removes us from whatever environment contributed to our stressful state. Simply getting away from the office can be helpful for clearing our heads.

Be grateful.
The practice of gratitude is associated with a variety of psychological benefits. Various studies have shown a correlation between gratitude and such things as optimism, lower levels of anxiety and depression, higher self-esteem and good quality sleep.[4] Taking an occasional five-minute break to list things for which we are grateful does not constitute a formal gratitude practice. But spending time listing the things for which we are grateful serves to refocus attention from the stressors disrupting our efficiency and promotes a healthier perspective. And who knows? The exercise just might evolve into a gratitude practice.

Laugh and the world laughs with you.
Laughter may not necessarily be the best medicine, but it is certainly powerful medicine. Over the past 50 years extensive research has focused on the effects of laughter on physical and mental health. Laughter has been found to relieve stress by lowering the serum level of cortisol, the so-called "stress hormone," as well as norepinephrine, another stress-related hormone. Laughter has been shown to boost immunity by increasing immune globulin by a factor of three and interferon by a factor of 200. Laughter also acts as a vasodilator, reducing blood pressure and improving circulation. It stimulates the pituitary gland to produce endorphins that reduce pain. The field of medicine has recognized laughter therapy as an alternative adjutant treatment for stress, depression and other illnesses.[5]

Laughter can be an effective way of defusing tension. It helps people connect with one another. And it reminds us not to take ourselves too seriously. Of all the stress-relievers suggested herein, laughter probably demands the least amount of effort. The internet is a cornucopia of laugh-inducing videos and jokes. In addition to contemporary comedy, decades of classic humor are available (check out Abbott and Costello's iconic "Who's on First" sketch or Lucy's "Vitameatavegamin" commercial). Laughter is just a click away.

The next time your workday seems to overwhelm you try one of the five activities described above. Hopefully, you will find one of them to be helpful in regaining your psychic equilibrium.

ENDNOTES

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Many Times More than One in a Quadrillion

It is good practice, before submitting an expert witness report to a court, to ensure that its methodology and reasoning are sound. Consider the expert report filed in support of the complaint by the Attorney General of Texas against the states of Pennsylvania, Georgia, Michigan, and Wisconsin. This expert report purported to demonstrate that the odds that Joe Biden could *really* have received more votes than Donald Trump in four states where state officials certified that he received more votes than Donald Trump were "many times more than one in a quadrillion."[1] Curious as to how this momentous fact could have been established to a degree of confidence never before seen in American civil litigation, I read on.

The expert hired by Texas to support a lawsuit joined by over a dozen other state attorneys general and more than 100 members of Congress, but summarily rejected by the Supreme Court, was Charles J. Cicchetti, who identifies himself as an "economist" and "independent contractor." Here is how he proceeded:

> I analyzed two things that seem to raise doubts about the outcome. First, I analyzed the differences in the county votes of former Secretary of State Hillary Clinton (Clinton) compared to former Vice President Joseph Biden (Biden). Second, many Americans went to sleep election night with President Donald Trump (Trump) winning key battleground states, only to learn the next day that Biden surged ahead.[2]

So Cicchetti starts with the premise that there is something fishy ("things that seem to raise doubts about the outcome") about (1) Biden getting more votes in 2020 than Clinton got in 2016, and (2) Biden doing better with ballots counted after election day than with ballots counted on election day. To be clear: this expert report starts with the assumption that if the 2020 election was fair and free of fraud, one would expect Biden to receive the exact same percentage of the 2020 vote that Clinton received of the 2016 vote, and one would expect ballots counted after election day to favor Trump in the exact same proportion as ballots counted on election day.

Building on his mind-bending assumption that a fair election in 2020 would have produced results identical to the 2016 results, Cicchetti proceeded to "test the hypothesis that *other things being the same* [Biden and Clinton] would have an equal number of votes."[3] The key concept here is "other things being the same"—because other things are most definitely not at all the same. At the risk of stating the obvious, these were different elections, between different candidates, under different conditions! The idea of "other things being the same" across the 2016 and 2020 elections to the point that it is suspicious that their outcomes were not identical is too silly for words. But that really is Cicchetti's reasoning: Trump couldn't have lost to Biden because he didn't lose to Clinton.

The expert engaged by the Attorney General of Texas then declares that "[t]he Georgia reversal in the outcome [from Trump being ahead on election night to Biden winning] raises questions because the votes tabulated in the two time periods *could not be random samples from the same population of all votes cast*."[4] But *of course* the votes counted on and after election day are not "random samples from the same population of all votes cast." Everyone knows that the votes counted after election day were disproportionately mail-in ballots that skewed toward Biden—because Trump had urged his supporters not to vote by mail.
Cicchetti nevertheless proceeds by assuming that the two sets

of ballots *should* be identical, and then performs a statistical analysis using something called a "z-score." The z-score reveals that "the reported tabulations in the early and subsequent periods *could not remotely plausibly be random samples from the same population* of all Georgia ballots tabulated."[5] Indeed they could not be, because they self-evidently are not.

To recap, the methodology goes like this: (1) start with a preposterous assumption; (2) use math and statistics to demonstrate that the preposterous assumption is incorrect; and then (3) suggest that the explanation for the preposterous assumption being incorrect must be fraud. And since you are playing an epically weak hand, try to create a distraction with a footnote that trumpets just how definitively you have demonstrated that your preposterous assumption is wrong:

> A quadrillion is 1 followed by 15 zeros. Z equal to 10 would reject with a confidence of one in a septillion, or one followed by 24 zeros, which would be a billion quadrillion, or a trillion, trillion. As Z increases, the number of zeros increases exponentially. A Z of 396.3 [the value Cicchetti calculated] is a chance [of] 1 in almost an infinite number [of] outcomes of finding the two results being from the same population, here Georgia voters preferring a Democrat in 2016 being the same as in 2020.[6]

Here is a practice pointer: if your expert tells you that the odds of your litigation position being wrong are 1 in 1,000,000,000,000,000,000,000,000, or indeed that the true odds are almost infinitely less than that, consider the possibility that you may be engaged in stupid—or, in this case, as it turns out, worse—litigation.

ENDNOTES

1 Declaration of Charles J. Cicchetti, Ph.D., in support of Motion for Expedited Consideration of the Motion for Leave to File a Bill of Complaint and For Expedition of. Any Plenary Consideration of the Matter on the Pleadings if Plaintiffs' Forthcoming Motion for Interim Relief is Not Granted, *Texas v. Commonwealth of Pennsylvania et al.*, filed in the U.S. Supreme Court, December 7, 2020, ¶ 12.
2 *Id.* ¶ 7.
3 *Id.* ¶ 11 (emphasis added).
4 *Id.* ¶ 15 (emphasis added).
5 *Id.* ¶ 15 (emphasis added).
6 *Id.* ¶ 11 n. 3.

NANCY A. WANDERER is Legal Writing Professor Emerita at the University of Maine School of Law. For decades, she oversaw the updating of Uniform Maine Citations, and her articles on proper citation, email-writing, and judicial opinion-writing have appeared in the Maine Bar Journal, the Maine Law Review, and the National Association of State Judicial Educators News Quarterly. Off and Running: A Practical Guide to Legal Research, Analysis, and Writing, co-authored with Prof. Angela C. Arey, is being used as a textbook in first-year legal writing classes. Nancy may be reached at wanderer@maine.edu.

"So Long, Farewell, Auf Wiedersehen, Goodbye" Closing Emails Effectively

As our country figured out how to bid farewell to our 45th president, I was reminded of how difficult it is to say goodbye. In personal life, of course, it is hard to part with beloved friends and family members, especially when we don't know when, or sometimes even if, we will ever see them again. This has been especially true during the COVID-19 pandemic.

Although not so emotionally fraught, people even find it difficult to say goodbye in an email to a client or professional colleague. With friends and loved ones, we can end with "Love" or "Hugs" or "XOXOX." The best way to end a more formal, professional email, however, is more elusive. People actually disagree strenuously about which closings to use. Everyone agrees, however, that choosing the most effective sign-off depends on the purpose of the email and the relationship that exists between the sender and recipient.

Purpose of the Sign-off

Some people choose to omit the sign-off altogether, simply ending their emails with their names, initials, or nothing at all. Although this practice saves time and space, it forecloses a valuable opportunity to communicate with the recipient of an email. Because emails are intended to be concise, every word counts. A final word or phrase that helps to foster a relationship or motivate the recipient to perform a requested action can be a crucial part of the email. The sign-off also signals the end of the message, making clear that the email is complete.

How to Choose the Best Sign-off

Choosing the best sign-off requires some thought. Some people routinely use the same sign-off, regardless of the content or tone of the email. Some of these commonly used, all-purpose sign-offs are "Regards," "Sincerely," and "Best." "Thank you" is often used, also, even in situations when there may be nothing to be thankful for.

Some commentators promote the use of "Best" and its variations, such as "Best wishes," "All the best," or "Regards," which has similar variations like "Best regards" and "Warmest regards." Although most find these sign-offs to be safe and acceptable, some advocate for something more meaningful, like "Thanks" or "Thank you," but only in the proper circumstances.

The key to choosing the most effective sign-off is determining the relationship the sender has with the recipient. If the email is going to a stranger, a more formal sign-off like "Best," "Regards," or even "Sincerely" works well. If the email is a reply to a stranger's email, it may be best to follow the stranger's lead and use the sign-off he or she used.

When writing to a colleague who is also a friend, "As always," is appropriate, reminding the colleague that you have an established relationship that is not going to change. This is a also a good time to use the friendlier version of more formal

closings, like "Warmest regards." Generally, though, it is better to err on the side of formality. Even if the colleague is a friend, the communication has a professional purpose and should not be a place for clever closings like "Chao."

When to Close with an Expression of Gratitude

The results of a 2017 survey of over 350,000 email threads showed that email closings expressing gratitude delivered higher response rates.[1] Comparing the most common email closings produced the following results:[2]

Email Closing	Response Rate
Thanks in advance	65.7%
Thanks	63.0%
Thank you	57.9%
Cheers	54.4%
Kind regards	53.9%
Regards	53.5%
Best regards	52.9%
Best	51.2%
Baseline (all emails in sample)	47.5%

These findings reaffirm a 2010 study published in the *Journal of Personality and Social Psychology*, titled "A Little Thanks Goes a Long Way,"[3] where 69 college student participants got one of two emails asking for help with a cover letter. Half received an email that ended with "Thank you so much!" The other half got the same email, but without the expression of gratitude. The study found that recipients were twice as likely to offer assistance when they received the email that included "thank you."[4]

Some commentators warn that using "thank you" may not be the best way to end an email if there is nothing to be thankful for, other than the fact that the recipient of the email took the time to read it. In a recent article in the *ABA Journal,* the authors point out the "fine line between a polite 'Thank you' and a "Thanks for nothing."[5] Recognizing that closing an email with an expression of gratitude will continue to be a popular practice, they advise writers to think about why they are choosing that sign-off to maximize their chances of using it well.[6]

Five Factors to Consider when Choosing a Sign-off

To help decide which sign-off to use, the following five factors should be considered: (1) professionalism, (2) tone, (3) purpose, (4) situation, and (5) custom.[7]

Professionalism

When writing to a client or colleague, thanking them for the time and attention they are giving to your email is always appropriate. Especially if the email requests a decision or assistance of any kind, simple courtesy suggests an acknowledgment of the recipient's time and trouble. "Thank you in advance" is an excellent way of closing such an email.

Tone

The context of an email determines the tone to be used when signing off. If the sender has asked for something, thanks should be expressed. If not, the closing could be something simple like "Best regards." If the email had emotional content, such as an apology or expression of regret, the closing should reflect the same tone as the email. A non-standard closing might be most appropriate, such as, "With sincere apologies" or "Regretfully."

Purpose

The purpose of an email should match the tone, both in the content and the closing. If the purpose is to solicit action or further discussion, it is best to express gratitude in the closing ("Thank you") or anticipation of future connection ("Looking forward to our next discussion").

Context

Context is crucial.[8] The sender should consider the relationship with the recipient of the email and tailor the closing accordingly. That means the closing will be more informal when setting up a lunch date to discuss business with a friend ("See you soon") or more deferential when dealing with a client or boss ("Thank you for your consideration"). When ending an email to a relative stranger, it is always safe to mirror that person's preferred sign-off ("Sincerely"). When writing to a friend, a slightly affectionate closing is always welcome ("Warmly").

Custom

Some closings are not intended to be functional, but simply customary. You can never go wrong with an old stand-by like "Best," "Regards," or even "Thank you." These are the staples of email culture and, "for that reason, like a soft form of *stare decisis*, we may stick close to them, so we don't needless rock the boat or breach various email norms that may exist in certain organizations, communities, or relationships."[9]

My Own Farewell—But Only for a Little While

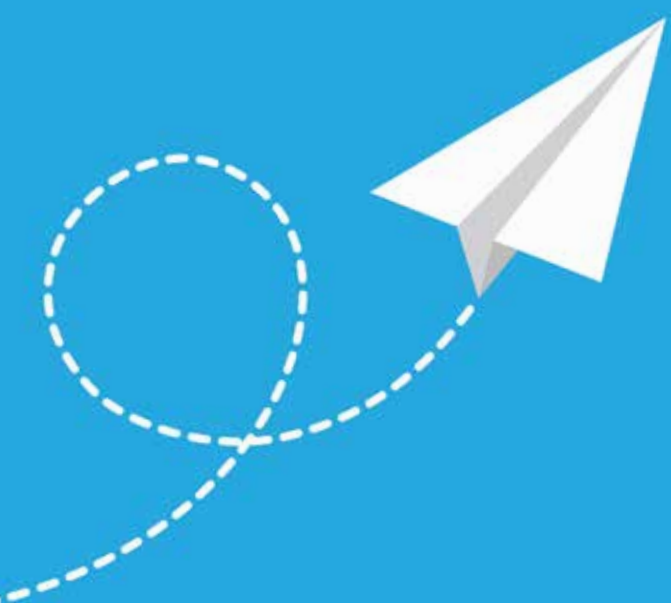
In a few weeks, I will be having surgery on my arthritic right

thumb. Twenty years of writing tiny, purple comments on countless student memos and briefs have finally taken their toll. Following the surgery, my right hand will be immobilized in a cast for six weeks, after which I will need to undergo additional weeks of physical therapy before I can type again. For these reasons, I need to take a break from writing my *Res Ipsa Loquitur* column, probably just for one issue of the *Maine Bar Journal*.

To end this column, I am having no difficulty in thinking what to say in closing. Thank you all so much for your loyal readership over the past five years. I especially want to thank the readers who have written to me seeking further discussion of the topics in my columns and also those who have sent me ideas for future columns. To all of you, including the silent readers from whom I have never heard, "Thank you."

ENDNOTES

1 *How to Close an Email,* https://blog.boomerangapp.com/2017/01/how-to-end-an-email-email-sign-offs/.
2 *Id.*
3 *See generally* Adam Grant & Francesco Gino, *A Little Thanks Goes a Long Way: Explaining Why Gratitude Expressions Motivate Prosocial Behavior*, 98 Journal of Personality and Social Psychology 946 (June 2010).
4 *How to Close an Email*, *supra* n. 1.
5 Michael Zuckerman, Jamie Hwang & Connor Cohen, *Thanks for nothing: When should lawyers end an email with 'thank you'?*, https://www.abajournal.com/columns/article/thanks-for-nothing-when-should-lawyers-end-an-email-with-thank-you.
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*



Troubh Heisler is very pleased to announce that Daniel "DJ" Kramer has joined our firm. Mr. Kramer earned his B.S. in Finance from Northern Illinois University and his J.D. from The John Marshall Law School in Chicago. He is admitted to practice in Illinois and Maine. Mr. Kramer is a general practice attorney focusing primarily on real estate, zoning/land use, estate planning and administration, business entities, and general civil litigation. Mr. Kramer recently relocated to Maine from the Midwest. He is excited to join Troubh Heisler and looks forward to providing legal services to the citizens of Maine.

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Troubh Heisler is very pleased to announce that Jessica L. Maher has joined our firm. Ms. Maher earned her B.S. from Johnson State College in Vermont, an M.P.A. from the University of Vermont and her J.D. from Suffolk Law School. She is admitted to practice in both Maine and Massachusetts. Ms. Maher practices primarily in the areas of civil litigation, labor and employment, municipal, estate planning and probate, corporations/LLCs, and real estate. In addition to representing individual and small business clients, Ms. Maher is counsel to the Fraternal Order of Police.

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EVAN J. ROTH After nearly 20 years in Portland as an assistant U.S. attorney, Evan is now an administrative judge for the Merit Systems Protection Board in Denver. He can be reached at evan.j.roth@icloud.com.

My object of living is "to unite [m]y avocation and my vocation"

My object of living is "to unite [m]y avocation and my vocation" Garcetti v. Ceballos, 547 U.S. 410, 432 at n.3 (2006) (Souter, J., dissenting) (quoting Robert Frost, Two Tramps in Mud Time, Collected Poems, Prose, & Plays 251, 252 (R. Poirier & M. Richardson eds. 1995)).

When a government employee speaks out on a matter of public interest, does the First Amendment protect that speech? Or is the government allowed to impose discipline if it is unhappy with the content?

The answer is: it depends.

Prior to *Garcetti v. Ceballos*, in the context of teachers who spoke out about various public issues, the Supreme Court seemed to be expanding First Amendment protection. In one case, *Pickering v. Board of Education,* 391 U.S. 563 (1968), the Court concluded the First Amendment protected a teacher who wrote a letter to her local newspaper about a school funding issue. In another case, *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), the Court likewise found the First Amendment protected a teacher who complained to her principal about racial hiring practices.

But in *Garcetti v. Ceballos,* the Supreme Court took a different approach. Writing for a 5-4 majority, Justice Kennedy concluded the First Amendment did not protect communications in the course of official duties. Specifically, in *Garcetti,* the government was allowed to discipline Los Angeles County Deputy District Attorney Richard Ceballos, who wrote a hotly disputed memo to his supervisors regarding his belief there were misrepresentations in a search warrant affidavit.

For Justice Kennedy, the key distinction was that the First Amendment protected the teachers in *Pickering* and *Givhan* because they were commenting in their personal capacities about topics that were outside their job descriptions (hiring practices and school funding). In contrast, in *Garcetti*, there was no First Amendment protection because Ceballos wrote his memo in his official capacity overseeing the reliability of search warrant affidavits.

In *Garcetti,* Justice Souter dissented because, perhaps, Ceballos was speaking in both capacities at the same time. In support of that duality, Justice Souter relied on the Robert Frost poem, quoted above, about how some seek to unite their avocation with their vocation.

The poem was clearly a Souter favorite because he quoted it again upon his 2009 retirement from the Court (Adam Liptak, "Poetry, as Souter Takes Leave," N.Y. Times, June 29, 2009). Indeed, at the retirement party, the other Justices celebrated Souter's decision to retire to New Hampshire's land of "easy wind and downy flake," a phrase they borrowed from another Robert Frost poem, "Stopping by Woods on a Snowy Evening."

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

JEST IS FOR ALL

By Arnie Glick

"I guess I just wasn't meant to be a tough negotiator because as soon as an acceptable offer is made, I start purring."

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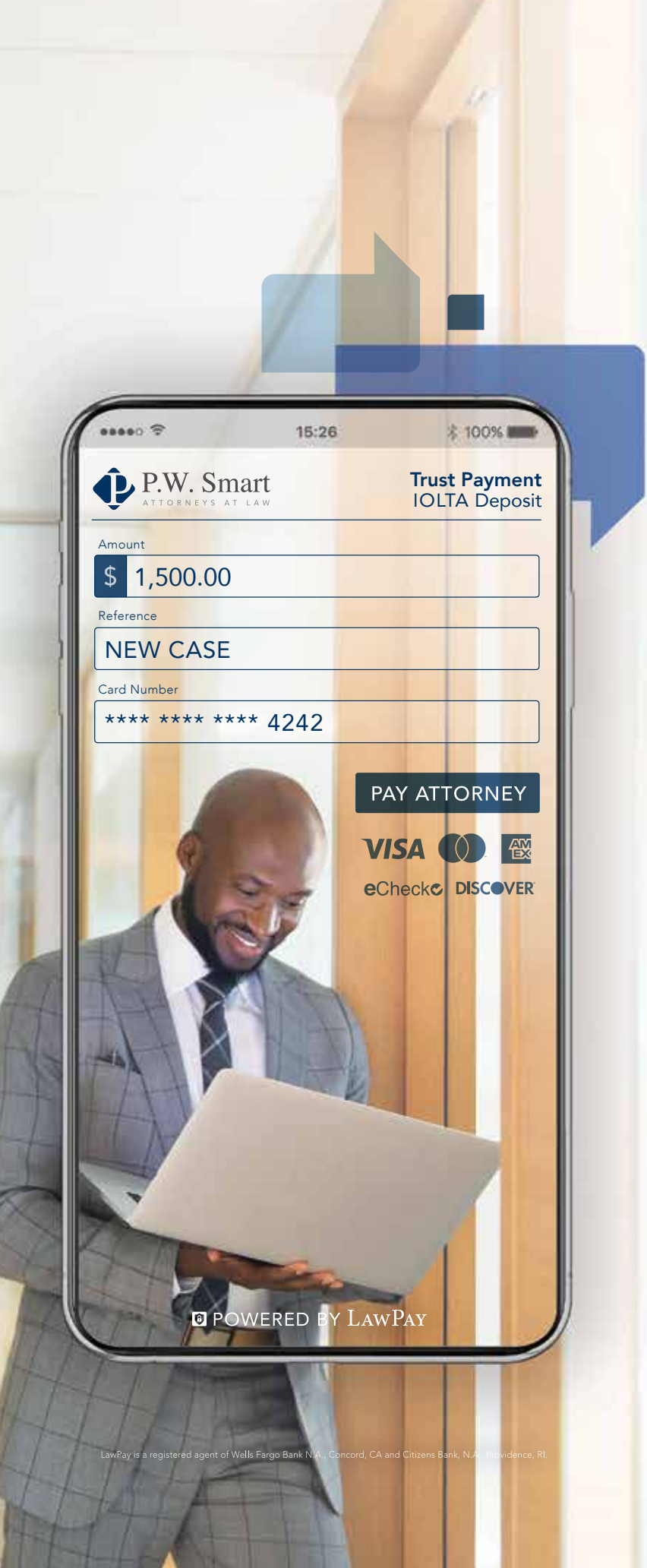

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