THE QUARTERLY PUBLICATION OF THE MAINE STATE BAR ASSOCIATION
VOLUME 25 ⩓ NUMBER 4 ⩓ FALL 2010

MAINE BAR JOURNAL

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VOLUME 25 ■ NUMBER 4 ■ FALL 2010

MAINE BAR JOURNAL

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COMMENTARY

DEPARTMENTS

On the cover: Edward T. Gignoux United States Courthouse, Courtroom No. 2, located in Portland, Maine. Photo by Hannah E. Hungerford.

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FEATURES

The Blank Page

My last President's page. I have to confess that I really struggle with writing my President's Page. In fact, I struggle so much with my President's Page that I have felt compelled to introspect why I struggle about my President's Page (by the way, I admit this time of reflection also provided me with a welcomed opportunity to procrastinate even further with my drafting). And, while I am not always the epitome of self-awareness, the answer I have arrived upon is . . . the Blank Page.

You are likely asking "What does she mean by the Blank Page?" And, my fellow MSBA-er, I mean simply that . . . a blank page of paper upon which I can write whatever I want. Even as I draft these words, a sense of dread washes over me because, as I realized during my period of introspection/procrastination, I am, as an attorney, rarely asked to write about whatever I want. Rather, although the subject matter of my cases varies, they all come with a defined universe of facts and precedent from which the "Issues Presented" arise, clients are advised and I advocate. With the Blank Page of my President's Page, I am essentially adrift and, might I add, publicly adrift, because my ultimate product will be published.

by Gigi Sanchez

As my mind sorts through the infinite number of possible topics, I continue to hear the one question that I have been asked by many … "What is it like to be President of the MSBA?" Ah, at last, an Issue Presented! And, while I acknowledge the question was often posed as small-talk, I want/hope to provide meaningful insight here because my term is a reflection of the issues facing the MSBA and legal practice in Maine today.

In response to the question, I provided during conversations many anemic adjectives (e.g. interesting, busy, great) which are insufficient for this Page. Indeed, because the Presidency is shaped by the current issues before you and the people with whom you work along the way, I find that the only way to convey accurately the experience is through a Recap. The Recap is the darling of Bar Presidents confronted with drafting their final page and also provides the picture that a thousand adjectives could not paint. So I will now provide a brief Recap of a few recent events by using another beloved technique of lawyers . . . the bullet point.

- **MSBA Budget Process:** The MSBA Executive and Financial Committees begin to review the following year's budget in July/August. As anyone who has ever put a budget together knows, the budget process provides unique insight into any organization's past performance, present opportunities and future objectives; the MSBA budget is no exception. A review of the budget shows the challenges of our economy but also the commitment of the MSBA to our members and justice in Maine. For example, Casemaker™ is our single largest expense, but every officer and Governor remain committed to providing this "free" member benefit to our attorneys regardless of the size of their practice. The MSBA's continued support of the Justice Action Group reflects our commitment to Maine's legal providers and the Courts during these difficult times. LRIS's success year in and year out reflects the dedication of MSBA's Penny Hilton and participating attorneys to the delivery of affordable legal representation, while the proposed underlying budgets from MSBA Sections and Committees demonstrate the enthusiasm and innovation of our members to advance the quality of their legal practice and interests of their peers. To see all these things come together and be shaped by the visions of MSBA's Executive Director Julie Deacon, Deputy Executive Director Angela Weston, Administration and Finance Director Lisa Pare, CLE Director Linda Morin-Pasco, MSBA Treasurer Diane Dusini and President Elect Dave Wakelin, makes you very proud of the Maine bar.

- **MSBA Board of Governors' Retreat**: Starting in September, Julie, Dave Wakelin and I began working with a facilitator from the American Bar Association to conduct a full day retreat of the Board of Governors to define Board responsibilities and the need for strategic planning. I then observed what I have seen on an almost daily basis for years – the remarkable depth of knowledge and management skills of Julie Deacon. With Julie's guidance, we held our full Board retreat in November. It was so impressive to see the Governors' dedication to the Maine bar. A unified view of the importance of the MSBA remaining relevant was formed and the membership will reap the benefits as our Board and Sections become more engaged in membership value, technology, access to justice, etc.

- **Coffin Fellowship:** As President of the MSBA, I am honored to also sit on the Maine Bar Foundation board. I serve on the Coffin Fellowship subcommittee as part of my MBF board duties. Fellow subcommittee members are Charlie Miller of Bernstein Shur, Nan Heald of Pine Tree, Juliet Holmes-Smith of VLP and Calien Lewis, Executive Director of MBF. For two days, we jointly interviewed candidates for the fellowship. As the interviews progressed, we were amazed by every candidate's intelligence and the achievements of these new lawyers and law students. And, as if this wasn't enough, I was also impressed once again by the astute judgment and experience of my fellow committee members. It was humbling to watch Nan, Charlie, Juliet and Calien as they discussed the importance of this fellowship to Maine citizens and their gratitude to the firms that participate in the fellowship. This synergy creates a bright future for the Maine legal profession.

The above events are just a few recent examples of what it is like to be President of our Bar Association. Unfortunately, they are only the tip of the iceberg. For the last 17 years, I have practiced in the same building as 100 attorneys more or less. I have immense respect for the attorneys with whom I work, and that respect is, of course, a component of my respect for the Maine lawyer. This being said, however, my experiences and relationships with MSBA staff, fellow attorneys and judges (many who I would not have met if I had not been an MSBA officer) is the true gift of my term as President. These individuals and their dedication keep our bar from going adrift and, fortunately, make it very easy and an honor for me to fill this blank page.

And the Vincent goes to …

From left: Paul McDonald, Chief Justice McKusick, and Daniel J. Murphy at the 2010 MSBA Summer Meeting in Bar Harbor.

Martha Mickles photo.

Presented annually by the Maine Bar Journal Editorial Advisory Committee, the Vincent L. McKusick Award—the "Vincent," as former Chief Justice McKusick, its presenter, prefers to call it—honors the author of the best article published in the Maine Bar Journal during the preceding year, as judged by the committee. The selection criterion is simple: the winning article is the one that best enhances the understanding of the law of this state, by an author "who has best demonstrated the commitment to practice-based legal scholarship as exemplified by Chief Justice McKusick."

The award consists of a specially commissioned sculpture of an open book, and it is engraved each year with the winner's name. The sculpture is on display at Bar headquarters.

This year's Vincent recipients are Paul McDonald and Daniel J. Murphy of Bernstein, Shur, Sawyer & Nelson, whose winning article, "*Recovery of Lost Profits Damages: All Is Not Lost,*" was published in the summer 2009 issue. Paul McDonald and Dan Murphy are Shareholders in Bernstein Shur's Litigation Practice Group, of which Paul is also the Chairman.

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C09-1005-035 (07/10)

Closing the Justice Gap: *Cy Pres* Awards

by Sarah Ruef-Lindquist

The term "*cy pres*" is an abbreviation of a French phrase meaning "as close as possible." It refers to a doctrine often used to construe wills and trusts where the expressed intent of the donor has become frustrated, such as when a named charitable beneficiary no longer exists at the time the gift to the beneficiary matures. See *In re Estate of Frederick M. Thompson*, 414 A.2d 881 (Me. 1980) and *Lynch v. South Congregational Parish of Augusta*, 109 Me. 32, 82 A. 432 (1912) and Title 18-B M.R.S. section 413(1).

When residual funds in class action, bankruptcy, probate and other types of court cases are unclaimed or cannot be distributed to the class members or beneficiaries who were the intended recipients, the *cy pres* doctrine and Maine law allow courts to distribute these funds to appropriate charitable causes.

Some states have approached the use of *cy pres* through court rules or laws. Illinois, Indiana, North Carolina and Washington have done so, with a certain percentage designated for bar foundations that fund legal services.[1]

With the endorsement of the Maine Trial Lawyers Association and the Maine State Bar Association, the Maine Bar Foundation (MBF) has formed a special committee that is seeking to promote *cy pres* as an opportunity to provide additional funds to the legal aid organizations that the MBF supports without a rule making it mandatory. Similar efforts are taking place in Philadelphia, Texas and New York State.[2]

Cy pres awards help the MBF to expand the capacity of our *pro bono* and legal aid system, serving those who otherwise would not have access to legal services in critical areas such as housing, employment, immigration, domestic relations and abuse, age and poverty-related matters.

To help close the justice gap, courts across the country have begun to make *cy pres* awards to programs that provide legal services to the poor. Since these programs help protect the rights of those who are unrepresented, as is often the case with class action plaintiffs, they are seen as meeting the next best use standard of *cy pres*.

As President of the MBF, I believe that our *cy pres* plan represents the development of an exciting program that will help fund critical legal services to poor and disadvantaged Mainers, without raising taxes or reducing support for other important programs.

In endorsing the report and recommendations of the special committee, the Trial Lawyers, State Bar and Foundation are committed to a three-part action plan to help create a *cy pres* program in Maine. This includes:

- developing a *cy pres* manual for distribution to the bench and bar;
- serving as a resource in providing information and identifying appropriate groups to receive funding; and
- working with the MBF to assist in the distribution of *cy pres* monies.

The MBF is the charitable and philanthropic arm of the State Bar, which helps fund programs that facilitate the delivery of civil legal services to those in need. Foundation funding comes from the Interest on Lawyer Trust Account Program ("IOLTA") private contributions of lawyers, law firms, corporations and others.

The primary funding stream for civil legal services in Maine, IOLTA, has been significantly impacted by the sharp drop in interest rates. Taken together, the funding provided by MBF and other resources available to the legal service providers do not come close to adequately funding legal services to the poor. At current funding levels, some of Maine's legal aid nonprofits, like Pine Tree, are able to meet the needs of only about 25 percent of low-income Mainers.

"Our commitment to formulating a sound and responsible *cy pres* program is part of a longstanding state bar tradition of seeking to ensure equal access to the justice system for all, regardless of income," said Gigi Sanchez, President of the Maine State Bar Association. She added that, "Advocating on behalf of greater state and federal government funding of civil legal aid continues to be one of our highest legislative priorities to ensure no one is left behind, unable to have their day in court."

Speaking on behalf of the Maine Trial Lawyers Association as its President, Kennebunk attorney Peter Clifford noted, "The Maine trial bar is uniquely situated to identify opportunities in litigation cases where the Bar Foundation would be an appropriate recipient of funds that cannot otherwise be distributed to their intended recipients, especially in class action litigation. While we are not required to ask the Court to name the Maine Bar Foundation by rule or statute, it will make sense in many cases to ask the Court to pay those funds over to the Maine Bar Foundation to support legal services to Maine's poor."

For more information about *cy pres* awards and/or the Maine Bar Foundation, contact Executive Director Calien Lewis at MBF's offices in Hallowell, (207) 622-3477.

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1. For example, Illinois's Code of Civil Procedure establishes a presumption that any residual funds in class actions settlements or judgments will go to organizations that improve access to justice for low-income Illinois residents. 735 ILCS 5/2-807.

2. New York's State Bar Association recommended the application of *cy pres* to support programs providing legal services to the poor, in a special report issued by the Special Committee on Funding for Civil Legal Services. www.probono.net/ny/news/article.101400-State_Bar_Association.

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PS Form **3526,** September 2007 *(Page 2 of 3)*

Maine's New Limited Liability Company Act

Article 1 in a Series of 3

by Kevan Lee Deckelmann
Christopher McLoon
Aaron M. Pratt

This article is the first of three articles about Maine's new Limited Liability Company Act, 31 M.R.S.A § 1501 *et seq*. (the "New Act"). In this Article, we will describe and discuss why we formed a committee to draft the New Act, foundational principles of the New Act, and the elements and mechanics of forming a limited liability company ("LLC") under the New Act. Upcoming articles will address other key provisions of the New Act, including provisions about apparent and actual authority of members, managers and officers; duties, liabilities and indemnification of managers and officers; transferrable interests; dissociation; and entity dissolution.

The New Act differs significantly from the current Maine LLC Act, 31 M.R.S.A. § 601 *et seq*. (the "Current Act"). Our goal in drafting these articles is to guide you through these differences.

Background – Why a New LLC Act?

When the Current Act was enacted in 1993, business practitioners seldom used the LLC. Several factors account for this fact. The LLC was a new concept, and most business lawyers were not familiar with it. Additionally, while states were enacting LLC legislation at a rapid clip, the LLC was not available in every state, and some practitioners felt that it would be unwise to use an LLC in a state that had not enacted LLC legislation.

While business law factors influenced the pace of the LLCs early popularity (or lack thereof), the income tax issues surrounding LLCs' probably had the greatest influence. At the time, the income tax treatment depended on a four-factor test that measured whether an LLC was more like a corporation or a partnership. If the LLC had more corporate characteristics than partnership characteristics, it would be treated as a corporation for income tax purposes. Faced with this test, and knowing that most taxpayers using an LLC would want the LLC to be treated as a partnership, states (including Maine) adopted LLC statutes with partnership characteristics.

By 1997 all states had adopted LLC legislation, and business lawyers were becoming familiar with LLCs. These developments contributed to the growing popularity of the LLC. However, no one thing did as much for increasing the popularity of LLCs as the issuance of the so-called "check-the-box" regulations. These regulations, issued by the Treasury Department, adopted a very different approach to determining the tax treatment of LLCs. Under this approach, a domestic LLC with two or more members is a partnership, unless an election is made to treat the LLC as a corporation. A domestic LLC with one member is treated as a disregarded entity unless a corporate election is made.

Practitioners responded to the check-the-box regulations proclaiming that the LLC would be the entity of choice for non-publicly-traded business ventures. The popularity of the LLC skyrocketed. At the same time, LLC law developed remarkably. Jurists, legal scholars and commentators produced opinions, articles, and treatises creating and developing both consensus and debate on key legal issues. Moreover, in the last five years, the National Conference of Commissioners on Uniform State Laws and the American

Bar Association's Business Section have produced new model LLC Acts.

The Current Act reflects some of these developments, but not all. While the Current Act reflects some of the best thinking of the time when it was enacted, it is fundamentally at odds with current law and scholarship. For this reason, the authors of this article and 34 other Maine business lawyers formed a committee to draft a complete revision of the Current Act. This committee, the LLC Act Drafting Committee of the Maine State Bar Association's Business Section (the "Drafting Committee"), began work on revisions in October, 2008. Initially, we reviewed several LLC Act models to find the appropriate base from which we would draft our proposal. The models we reviewed include the Revised Uniform Limited Liability Company Act (the "Uniform Act"), the ABA Prototype Limited Liability Company Act draft as of August, 2008 (the "Prototype"), and several LLC Acts from other states, notably Illinois, Colorado, Massachusetts, Texas, and Delaware. Based on our review, we determined to use the ABA Prototype as a base. Though it was still in draft form, the ABA Prototype was, in our view, substantially complete. Knowing that the Prototype was a work in progress, we checked it against the Uniform Act, which was then in final form and current Maine law. Using this process, we are confident that using the Prototype as a base was a good choice, but it is important to note that the final version of the New Act (as defined below) includes many provisions from the Uniform Act where the Drafting Committee thought that such provisions were more consistent with other entity statutes in Maine.

Our choice to use the Prototype as the base was influenced largely by our view of developments and trends in LLC law and scholarship. Many of the developments in LLC law and scholarship – and much of the academic debate – focused on the extent to which LLC law should reflect the contractual nature of the LLC. Both the Uniform Act and the Prototype reflect the view that an LLC is a contractual entity. They differ, however, on the standards by which contractual provisions should be reviewed by courts. The Prototype adopts the approach taken by the Delaware Limited Liability Company Act. Under this approach, ordinary contract principles apply to determine whether provisions of an operating agreement will be respected. So, for example, a provision will not be enforced if it is found to be unconscionable.[1] Alternatively, the Uniform Act supplies a new standard for construing some operating agreement provisions, notably the provisions that permit parties to alter duties. This standard – a manifestly unreasonable standard – and how it is applied are described in detail in the Uniform Act. The Drafting Committee determined that applying this additional standard imposes unnecessary restrictions on the ability of the parties to contract freely and chose to not include such restrictions in the New Act.

The Drafting Committee members nearly unanimously supported the view that it is better to allow co-venturers to tailor their contract to their business deal under ordinary contract principles. Imposing additional standards creates uncertainty in results and provides opportunities for disgruntled members or former members to attempt to alter the intended result.

The Drafting Committee members were not persuaded by arguments that imposing additional review standards is necessary to protect unrepresented or unsophisticated co-venturers. There are equitable remedies available under current contract law to protect these parties. Also, the Drafting Committee saw no reason why an LLC operating agreement should be treated differently than other contracts, such as contracts for the sale of real estate. Further, the Drafting Committee were persuaded that those seeking to shift risks bear a burden to make such risk-shifting provisions crystal clear to the other parties in order to ensure that those provisions will be enforced. As such, there seems to be little risk of slipping one by a party that takes time to read the document. Finally, the operating agreement is, like any other contract, a legal document. The Drafting Committee members are not persuaded that, as a matter of policy, we should deprive co-venturers the opportunity to tailor their contract to their particular business deal to protect the person who agrees to be bound by contracts without taking care to understand their consequences. Again, there are equitable contract principles to protect the truly innocent.

Introduction to the New Act

The New Act takes effect July 1, 2011. It is fundamentally different from the Current Act.[2] The primary difference is the predominant role that the limited liability company agreement (the "LLC Agreement") (referred to as the operating agreement in the Current Act) takes in the New Act. Under the Current Act, an LLC can be formed without an operating agreement, and the Current Act limits the ability of the members to tailor the operating agreement to reflect the basis for formation and/or the negotiated terms of each business union. The New Act conditions the formation of an LLC on the existence of an LLC Agreement and allows the members maximum flexibility in structuring their relationship by limiting the mandatory provisions of the New Act.

Any discussion of the New Act should begin with how certain key terms are defined in the New Act. For example, the definitions of "limited liability company" and "limited liability company agreement" differ from their predecessor definitions. Under the Current Act, a limited liability was simply defined as "an organization formed under this chapter" and encompassed within its scope the term "domestic limited liability company," which is occasionally used in the Current Act to differentiate the term from a foreign limited liability company.[3] In contrast, however, the definition of "limited liability company" under the

New Act, in addition to providing that it is an entity formed in accordance with the New Act, emphasizes that an LLC must have at least one member and an LLC Agreement. This definition tracks the formation requirements in the New Act.[4] The new definition encompasses those entities formed under the New Act or the Current Act.

The term "limited liability company agreement", of course, did not exist in the Current Act; its role is served by the "operating agreement," which is succinctly defined in the Current Act as "an agreement among all of the members of a limited liability company governing the conduct of its business and affairs."[5] Its updated counterpart is more expansive, incorporating within its scope any agreement, regardless of how it is referenced or whether it is oral or written, provided such agreement is by and among the members of an LLC and governs its affairs and activities.[6] It also removes any doubt that an LLC Agreement is valid, appropriate and enforceable even if there is only one member of the LLC, and concludes that the term as used throughout the New Act includes any amendments to the LLC Agreement.[7]

The Importance of the LLC Agreement

The New Act elevates the status of the LLC Agreement, giving it a central role in the existence and operation of each LLC. Under the New Act, an LLC cannot be formed without an LLC Agreement.[8] This is a major departure from the Current Act. Under the New Act, the LLC Agreement can be oral, but the mere requirement that one exist at the time of formation provides a legal backstop for practitioners to strongly encourage clients to memorialize their agreements in writing at the outset, and to have the sometimes difficult and complex conversations about the current and future relationships members have with one another and the LLC prior to drafting and finalizing each LLC Agreement. Under the New Act, with very few limited exceptions (all of which are clearly set forth in a single section, §1522), the LLC Agreement can modify the provisions of the New Act governing the relations among members and between the members and the limited liability company, making it the primary document addressing the affairs of the LLC. It is distinct from the Current Act not only because it spotlights the LLC Agreement at center stage, but also because it is precise about when and where the LLC Agreement does not and cannot trump the New Act. Rather than preface certain sections with "[e]xcept as provided in the operating agreement," we elected to forego the ambiguity and confusion the presence (or absence) that preamble sometimes generates and state the following only once:

> *Agreement Governs. Except as otherwise provided in subsection 3 and section 1522, the limited liability company agreement governs relations among the members as members and between the members and the limited liability company.*[9]

Because the LLC Agreement plays such a paramount role, subchapter 2 of the New Act (§§ 1521-1524) is of central importance. It establishes the LLC Agreement as the determinative document with respect to the rights and obligations of the members and transferees of membership interest(s) in the LLC. Subchapter 2 of the New Act also permits members to shape duties, define liability for breach of fiduciary duty and establish whether and what extent members and officers can and will be indemnified against liability for actions and omissions arising from their company relationships.

The firm emphasis on the LLC Agreement is indicative of the view that the LLC, like other unincorporated organizations, is a contractual entity. The New Act allows and facilitates parties and their counsel to mold provisions to the contours of a particular deal or venture and the interests of its participants, their relationships to one another and to the LLC. Ordinary contract principles and equitable doctrines apply to the LLC Agreement, and therefore inhibit the ability of one party to unfairly disadvantage another. In this way, the LLC Agreement looks, acts and is like any other contract.

The preceding paragraphs make it clear that the overarching theme of the New Act is the power accorded the LLC Agreement. The default rules of the New Act apply only if and when the LLC Agreement cannot or does not otherwise address an issue with regard to the affairs of the members and the members and the LLC. Section 1521 sets forth the scope of the LLC Agreement and qualifies the power of the members to form a binding agreement by providing that the members may not eliminate the implied contractual covenant of good faith and fair dealing; otherwise, the members are free to expand upon, limit or even eliminate the duties and liabilities flowing therefrom in the LLC Agreement.[10]

As noted above, § 1522 sets forth those discrete areas where the New Act expressly trumps the LLC Agreement with regard to members relations with one another and with the limited liability company. Namely, the LLC Agreement may not vary the LLC's distinction from its members as a separate legal entity,[11] and as such may not vary the ability for the LLC to sue and be sued.[12] It may not override the applicability of Maine law,[13] seek to restrict the rights of any person other than a member or transferee[14] or alter the power of the Kennebec County Superior Court to compel the execution and/or delivery of limited liability company records to the Office of the Secretary of State.[15] Just as the LLC Agreement cannot eliminate the implied contractual covenant of good faith and fair dealing, it cannot vary the liability of a member acting in bad faith to the LLC and/or the other members of the LLC for money damages.[16] Finally, the LLC Agreement is prohibited from waiving the necessity that a membership contribution (or obligation to make a membership contribution) be in writing[17] or that the LLC wind up its business in accordance with § 1597 of the New Act after filing

articles of dissolution.[18]

With respect to the admission of new members under the Current Act, currently practitioners advise their clients to have each new member sign a counterpart signature page to the existing operating agreement or have each current and new member execute an amended and restated operating agreement. While this will continue to be the best practice under the New Act, the unwaivable language of § 1523(2) of the New Act, which establishes that any person who is admitted as a member to the LLC becomes a party to the LLC Agreement, is intended to make clear that a member is, upon admission – however established, bound by and may enforce the LLC Agreement. This provision echoes the preceding subsection, § 1523(1), which provides that each LLC is a party to its own LLC Agreement, regardless of whether it is a signatory to or has otherwise manifested assent to such agreement.

The LLC Agreement may also provide for the manner in which the LLC Agreement may be amended. Under both the New Act and the Current Act, unless otherwise provided for in the LLC Agreement[19] or the operating agreement,[20] respectively, amendment of such agreement requires the unanimous consent of all members.[21] The New Act differs from the Current Act in that it expressly provides that the LLC Agreement may grant rights (but not obligations) to non-members.[22] In other words, the LLC Agreement may have third party beneficiaries, as with any other contract.

Formation

The formation provisions of the New Act closely follow the approach of the Delaware Limited Liability Company Act. Under the New Act, an LLC is formed when it has at least one member,[23] an LLC Agreement exists[24] and the certificate of formation (the articles of organization under the Current Act) has been executed and filed with the office of the Secretary of State.[25] The form required by the Secretary of State will differ slightly from its predecessor. Each certificate of formation must include the (a) name of the limited liability company,[26] (b) the required information with respect to the appointment of a registered agent and (c) any other information the members "determine to include."[27]

The existence of a properly completed and executed certificate of formation on file in the office of the Secretary of State is notice to the world that an LLC Agreement exists for such entity seeking to comply with the formation provisions of the New Act.[28] Failure to properly complete or execute a certificate of formation means that no such entity exists in the eyes of the state, and therefore its members do not have the benefits of the statute, including the protections of limited liability.

One significant change from the Current Act is that the New Act separates or de-links actual authority from apparent authority. Under the Current Act, the articles of organization required each LLC to be identified as "member run" or "manager run." The effect of this designation was to establish whether the members or the managers had authority to act to bind the LLC. LLCs formed under the New Act will no longer be identified as either member run or manager run. Consistent with the central role of the LLC Agreement under the New Act, the LLC Agreement, and not the certificate of formation, will designate who has the authority to act on behalf of the LLC. The Drafting Committee was concerned, however, that since the LLC Agreement will not be filed with the Secretary of State, a third party will not be able to determine who has authority to act on behalf of the LLC without reading the LLC Agreement. To allow third parties to be able to determine who has apparent authority to act on behalf of an LLC without having to request and then read the LLC Agreement, the New Act provides that any member, manager, president or treasurer has apparent authority to bind the LLC unless a statement of authority setting forth the specific individuals or offices that have authority to bind the LLC has been filed in the office of the Secretary of State.[29] As a result, to limit the individuals and offices that will be deemed to have authority to act on behalf of the LLC, the members are advised to file a statement of authority in the office of the Secretary of State at the time the certificate of formation is filed. The statement of authority is a new form that will be generated by the office of the Secretary of State pursuant to the New Act. It is a form that can be filed at the time of formation or at any time during the company's existence.[30] The statement of authority will supersede the presumption that any member, manager, president or treasurer has apparent authority to bind the LLC and will provide conclusive evidence of authority to bind the LLC when someone gives value in reliance on the grant of authority, unless such person has knowledge in contradiction to the purported authority.[31] A statement of authority can also be amended or cancelled by filing the appropriate form with the office of the Secretary of State.[32] A person named in a statement of authority can also file a statement of denial by filing the appropriate form with the Secretary of State and copying the LLC.[33] The Drafting Committee strongly recommends that practitioners file a statement of authority at the time the certificate of formation is filed limiting the individuals or offices that have apparent authority to act on behalf of the LLC.

No Shelf LLCs

One of the main formation questions that faced the Drafting Committee was whether to allow "shelf LLCs" or LLCs to be formed without members and without an LLC Agreement. For the reasons discussed below, the Drafting Committee adopted the view followed by the majority of states, including Delaware, and the statute requires an LLC to have at least one member and an LLC Agreement at the time of formation.[34] The Drafting Committee decided that shelf LLCs were unnecessary in Maine and could result in unintended consequences if adopted.

While most states require an LLC to have at least one member at the time of formation, a few states and the Uniform

Act permit shelf LLCs.[35] Under these statutes, an LLC becomes a legal entity upon the filing of certificate of formation or articles of organization with a state and it exists without having members or a limited liability company agreement. As a result, these states and the Uniform Act provide that LLCs are formed by statute rather than through an agreement of the members making LLCs more like corporations than other unincorporated entities.[36]

The primary reason for allowing shelf LLCs appears to stem from concerns about issuing third party legal opinions.[37] Supporters of the shelf LLC concept argue that due to inefficiencies at local filing offices, it is advisable in some circumstances to file organizing documents before the composition of ownership and the LLC Agreement have been agreed upon.[38] In such a case, if shelf LLCs are not permitted by statute, the organization of the LLC may be defective.

The Drafting Committee did not believe that the problem of an inefficient filing office was issue in Maine. On the contrary, the office of the Maine Secretary of State allows for an LLC to be formed and effective on the same day the filing is made.

The Drafting Committee did acknowledge that opinion issues could arise if the filing was made prior to the LLC having members or an LLC Agreement, but did not believe that allowing shelf LLCs was the most efficient way to solve the problem raised. Instead, the Drafting Committee addressed the concern about issuing third party legal opinions in the formation provisions of the statute.[39] The statute provides that an LLC is only formed when there has been substantial compliance with the requirements in the statute.[40] As a result, the LLC is not formed upon filing the certificate of formation, but on the latest to occur of the filing of the certificate, the existence of an LLC Agreement and having one or more members. A practitioner may file the certificate of formation prior to the LLC having at least one member and an LLC Agreement, but the LLC is only formed when there is compliance with all of the requirements of the statute. For opinion purposes, the valid formation opinion should then relate to the date that there has been substantial compliance with the New Act.

More fundamentally, the Drafting Committee was concerned that shelf LLCs could undermine fundamental aspects of the LLC as an unincorporated entity, namely, the ability to choose who the members will be and the freedom of the members to negotiate their own agreement without intervention of third parties and mandatory rules. If LLCs were permitted to be formed by an incorporator without the need of members or an LLC Agreement, the LLC would be structurally indistinguishable from a corporation. The committee was concerned that without a clear differentiation between corporations and LLCs, a court would question the public policy rationale for allowing members of an LLC greater flexibility in creating and organizing their relationships than shareholders of a corporation.[41]

In addition, the committee in drafting the New Act embraced the principal that LLCs, unlike corporations, are products of the agreement among the members and not of statute. As a result, the New Act enforces the concept that LLCs are formed by and operated in accordance with the agreement between the members.[42] The limited liability company agreement is the central document for an LLC. As a result, it is antithetical to allow an LLC to be formed without at least one member and without a limited liability company agreement.

Overall, the committee determined that the reasons for adopting shelf LLCs could be addressed by other means and that shelf LLCs could cause more problems than they would solve.

No Maine Series LLCs

Another question that faced the Drafting Committee was whether to allow series LLCs to be formed in Maine. The series LLC is a type of LLC whose formation documents establish one or more designated series of members, managers, interests, or assets.[43] The series LLC type that has generated the most interest is a series LLC with one or more designated asset series. In such an LLC, one or more members may be associated with one or more asset series, but not any other. For example, assume A, B, and C are members of ABC LLC, a series LLC. A and B, and not C, may be associated with the assets of Series 1, but C and B, not A, may be associated with Series 2. If the LLC follows statutory requirements, the series LLC statutes provide that the assets and liabilities of one series are segregated from the assets and liabilities of the other series.

The unique structure of the series LLC is particularly best suited for mutual funds and investment funds. The series LLC format allows for the parent LLC[44] to file a single registration under the Investment Company Act of 1940, and then establish separate funds using the various underlying series. So, instead of making multiple SEC filings, the mutual fund makes one filing, saving the mutual fund a lot of money.

There are other uses of the series LLC, but none is as fitting as the fund use. Moreover, each other use of the series LLC has significant risks.[45] There are risks that a court in a jurisdiction that does not have a series LLC statute, or otherwise respect the series LLC form, will allow creditors of one series access to the assets of another series, ignoring the series LLC "liability shield" between series. There are risks that bankruptcy laws will be applied not to the series *per se*, but rather to the LLC in general, because the series is not a "person" under the Bankruptcy Act.

There also are additional burdens to forming and maintaining a series LLC. Internal records need to be maintained for each series. The LLC Agreement should define and prescribe duties, liability, and indemnification for the managers of each series separately. Each series should have its own allocation, distribution and liquidation provisions as well.

Last, but not least, there are significant tax issues. While the Treasury Department has issued proposed regulations[46] that, if finalized, would establish

that each series of a series LLC would constitute a separate business entity for tax purposes, there remain significant unanswered questions. Further, we still do not know how states will treat each series for income tax purposes.

The uncertainties surrounding the series LLC, the fact that the most suitable uses of a series LLC are not common in Maine, and the fact that Delaware has the series LLC available in its LLC Act for those who want a series LLC all lead the Drafting Committee to decide against including the series concept in the New Act. The Drafting Committee did, however, include language in the New Act that is intended to allow a series LLC to register to do business in Maine as a foreign LLC. So, a person who wishes to use a series LLC to do business in Maine may form a Delaware series LLC and register one or more of the series in Maine, each as a foreign LLC.

Conclusion

The New Act emphasizes that LLCs, like other unincorporated organizations, are contractual entities formed by an agreement among the members. The cornerstone of this effort is the focus on the LLC Agreement. As provided in subchapter 3 of the New Act, an LLC cannot be formed until all of the following occur: (a) a certificate of formation is filed with the office of the Secretary of State, (b) the LLC has at least one member and (c) an LLC Agreement exists. In addition, the terms of the LLC Agreement, and not the New Act, govern the relations among the members as provided in subchapter 2 of the New Act. If practitioner chooses to forego reading the New Act in its entirety, every attorney in the State of Maine whose practice touches limited liability companies should read subchapter 2. It is the heart of the New Act.

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1. See *Barrett v. McDonald Inv., Inc.,* 2005 ME 43, 870 A.2d 146.

2. While the New Act fundamentally differs from the Current Act in significant ways, many of its provisions perfectly or near perfectly continue the provisions of the Current Act. For example, most of the administrative provisions, all of which are set forth in subchapter 13 (§§ 1661-1680), are substantively drawn from the Current Act. Other areas will also look familiar to practitioners.

3. 31 M.R.S. § 602(8). See also *Id.* at § 602(6) (§ 1502(11) in the New Act) for the definition of "foreign limited liability company," which will be discussed in a later article in this series.

4. *Id.* at 31 M.R.S. § 1502(14). See also the discussion of formation below.

5. 31 M.R.S. § 602(13).

6. *Id.* at § 1502(15).

7. *Id.*

8. *Id.* at M.R.S. § 1531(B). See also § 1523(3) regarding the ability for the initial members to enter into an agreement that springs into action as the LLC Agreement upon the fulfillment of the other formation requirements, namely, the filing of the certificate of formation (the Articles of Organization under the Current Act) pursuant to § 1531(A).

9. *Id.* at § 1521(1).

10. The only exception to this other than the prohibition against eliminating the implied covenant of good faith and fair dealing found in 31 M.R.S. §§ 1521(3)(B) and 1522(2) is found is § 1611, which addresses specific fiduciary duties relative to low profit limited liability companies. Low profit limited liability companies together with a more extensive discussion of fiduciary duties will be discussed at length in a subsequent articles in this series.

11. 31 M.R.S. § 1522(A).

12. *Id.* at § 1522(B).

13. 31 M.R.S. § 1522(C) references the applicability of Maine under § 1506.

14. 31 M.R.S. § 1522(D).

15. 31 M.R.S. § 1522(E) addresses the court's power under § 1677 with respect to administrative issues.

16. 31 M.R.S. § 1522(F).

17. *Id.* at § 1522(G).

18. *Id.* at § 1522(1)(H).

19. *Id.* at § 1524(1).

20. 31 M.R.S. § 651(2) and (4).

21. 31 M.R.S. § 1556(3)(B) (regarding the New Act) and § 653(2)(A) (regarding the Current Act).

22. *Id.* at § 1524(1) and (2).

23. *Id.* at § 1531(1)(C).

24. *Id.* at § 1531(1)(B).

25. *Id.* at § 1531(1)(A).

26. *Id.* at § 1531(1)(A)(1). As required under the rules promulgated pursuant to the Current Act, the name must be sufficiently unique to be approved by the office of the Secretary of State.

27. *Id.* at § 1531(1)(A)(3).

28. *Id.* at § 1531(3).

29. *Id.* at § 1541(4).

30. *Id.* at § 1542.

31. *Id.* at § 1542(3).

32. *Id.* at § 1542(2).

33. *Id.* at § 1543.

34. See Del. Code Ann. Tit. 6 § 18-101 (6) and § 18-201.

35. See Uniform Act § 201.

36. For a discussion of the perceived shortcomings of the RULLCA shelf LLC provisions, See Larry E. Ribstein, An Analysis of the Revised Uniform Limited Liability Company Act, Illinois Law and Economics Research Paper Series, Research Paper No. LE07-027, http://papers.ssrn.com/pape.tar?abstract_id

37. Robert R. Keatinge, Shelf LLCs and Opinion Letter Issues: Exegesis and Eisegesis of LLC Statutes, 23-2 Pubogram 15 (2006).

38. *Id.*

39. 31 MRSA § 1531.

40. 31 MRSA § 1531(2).

41. *Id.* at 16.

42. See 31 MRSA § 1502(14); 31 MRSA § 1531(1).

43. See Del. Code Ann. Tit. 6 § 18-215(a).

44. For convenience, we describe the series LLC in this article as having a "parent," and series that underlie the parent. However, it's not clear that the "parent" is an entity with superior ownership of the series, as this terminology implies. The Delaware series LLC statute (6 Del. Code Ann. Tit. 6 § 18-215), upon which most of the other series LLC statutes are based, uses the terms the "series" and the "limited liability company generally."

45. For a more complete discussion of the risks associated with a series LLC, see McLoon and Callaghan, "The Dangerous Charm of the Series LLC" __ Me. Bar Journal 226 (Fall 2009).

46. Prop. Treas. Reg. § 301.7701-1, 75 F.R. 55699 (2010).

The well of Courtroom No. 2.

The Virtues of Judge Hornby's Courtroom No. 2

by A.J. Hungerford
Photos by Hannah E. Hungerford

Have you ever entered a courtroom and felt like you were in a chapel, temple or mosque? In the front of every courtroom is the bench, a raised altar from which the judge dispenses justice like a preacher offering a sermon about the reckoning. Even if you have never felt spiritual in court, it is impossible not to sense the solemnity of whatever occasion brought you there. At the start of a trial or hearing you might be nervous, goaded on by anticipation and adrenaline. For you and your client are now at the mercy of external forces, which makes the courtroom setting different than just about any other.

When you set foot inside the United States District Courthouse at the corner of Federal and Market Streets in Portland, Maine, you pass through an Italian Renaissance Revival edifice faced with granite similar in style to the nearby 1872 U.S. Custom House and 1912 Portland City Hall. Construction of the courthouse ended in 1911, with enclosure of the U-shaped structure completed during the Great Depression in 1932. Listed in the National Register of Historic Places in 1974, the building was renamed fourteen years later in honor of the legendary federal judge, Edward T. Gignoux, who presided over, among other cases, the State of Maine's multi-million dollar land dispute with the Passamaquoddy and Penobscot Tribes.[1]

Walk up the elliptical marble staircase past Courtroom No. 1, an elegant neoclassical chamber with molded plaster and bronze chandeliers, then tread down the marble and terrazzo hallway through the tall oak doors into Courtroom No. 2, which was necessitated by Congress adding a second judicial slot in Portland in 1990. Physically, you are above what was once the post office, and in what was two floors of cramped governmental offices beset by asbestos and lead paint. This modern, open space was designed by Boston architect Andrea Leers under the watchful eye of U.S. District Court Judge D. Brock Hornby and the U.S. General Services Administration. Ms. Leers' firm, Leers Weinzapfel Associates, spent three years renovating the entire courthouse.

U.S. District Courthouse at the corner of Federal and Market Streets in Portland.

The walls in Courtroom No. 2 – slabs of soft granite with a pink hue quarried from Deer Isle – are punctuated by windows overlooking the Cumberland County Courthouse, Lincoln Park, and the back of the Portland Fire Station. Behind you is a balcony, rarely used due to security reasons and lack of handicap access. In front of you is a marvelous brass horseshoe railing with oak tables in the well that have open shelves underneath for books etc. so that counsel will not feel restricted by having to pull open a drawer. These tables were modeled on desks in London's Central Criminal Court known as the Old Bailey. The wooden jury box is to the far left and immediately to your right is another wooden box for the press, rarely used these days due to the demise of newspapers and the traditional media. A skylight opens the ceiling above the aubergine-carpeted floor.

Prisoners enter the courtroom through a door on the front right side and may not immediately look up if they are speculating about their own fate and freedom. However, as a visitor your eyes likely will be drawn to the top of three walls wrapped by a brilliant image, 4 ½ foot high and 105 feet long, manifested in a *secco fresco*, i.e., three dried skim coats of plaster covered with overlapping water-based pigment. According to a plaque on the wall, the artist, Dorothea Rockburne, based her work on a portion of Ambrogio Lorenzetti's fourteenth century fresco, The Virtues of Good Government, displayed in the Palazzo Publico in Siena, Italy, where an elected body, The Council of Nine, presided over the city-state.[2] The allotted budget for the artwork in the courthouse is mandated by law and represented 0.5 percent of the total esti-

Conference room/library in Judge D. Brock Hornby's chambers.

mated construction budget.

Essentially, Rockburne transposed an allegory from the Middle Ages into twentieth century luminescent geometry. A patriarchal figure holding a shield emblazoned with the Virgin Mary became a red outline of a circle filled with blue surrounded by a white halo – to some, an all-knowing eye balancing opposing interests; to others, just a sphere. On the right, a floating angel with raised open hands, who represents hope, is depicted as a green square and a seated woman below personifying magnanimity is reformulated into a magenta and yellow trapezium. On the left, a floating angel carrying the cross, who represents faith, is transformed into a purple rectangle and a seated woman below personifying prudence is shown as a red and white diamond.

Judge Hornby was pleased with Rockburne's substitution of humans with forms because it is inherently egalitarian and in contrast with Courtroom No. 1's more historical approach. In fact, in the new courthouse, the only human form in the room is a bust of Asher Ware, a U.S. District Court Judge in Maine from 1822-1866. In the end, Judge Hornby hoped that the new courtroom would have a democratic feel and it is hard not to conclude that this aim was achieved.

While present in Courtroom No. 2, it is easy to forget you are in a fortress-like building with cameras monitored by federal marshals watching your every move. Still, Leer designed this courtroom for trials, which meant creating sufficient space to accommodate lots of people ranging from the lawyers to the press. However, in recent years, the jury trial has almost faded away.[3] Few parties have the time or resources to risk judgment by a random body drawn from the community. In a given year, Judge Hornby may only preside over 6-8 jury trials for civil or criminal matters. He spends much more time now, sitting in front of his computer in chambers drafting summary judgment orders with the help of a law clerk. He also spends more time in the courtroom presiding over criminal sentencing or Markman patent hearings, which may

Above: Judge D. Brock Hornby in his robing room.

Below: A glimpse of Judge Hornby's chambers.

Bust of Asher Ware, a U.S. District Court Judge from 1822-1866.

View of Courtroom No. 2 from the bench.

seem arcane to the uninitiated. Who could have predicted the sea change in litigation practice? Judge Hornby noted the following:

> In the twenty-first century, the federal district courts' primary roles in civil cases have become law exposition, fact sorting, and case management – office tasks – not umpiring trials. In criminal cases, the judges' work remains courtroom-centered but, instead of trials, it has become law elaboration and fact finding at sentencing, supervising federal offenders after prison, and safeguarding the integrity of a criminal process that sends defendants to prison without trial. In 2007, that is the federal district courts' business. Trials as we have known them, and unfettered sentencing discretion, are not coming back.[4]

Security at the federal courthouse has tightened greatly in the wake of the terrorist attacks that occurred on September 11, 2001. This, in turn, has deterred the public and court-watchers from sitting in on court sessions. Occasionally, family and friends show up to attend someone's naturalization ceremony. Even lawyers, who used to learn from watching their more experienced peers practice the art of courtroom maneuvering, no longer come in to observe because of time constraints and pressures associated with the billable hour. The media still appear in front of the courthouse at the end of a big trial with television cameras, but the newspapers have shrunk their staff to the point that only a few reporters now cover the legal beat. Perhaps proceedings will eventually be aired over the Internet much like C-SPAN broadcasts legislative hearings on cable television?

For the foreseeable future, however, judges will be going into granite-and-mortar courtrooms. Judge Hornby offered the following comment about the intersection between his chambers and Courtroom No. 2:

> The adjacent closet is where I don my judicial robe to transition from office surroundings (electronic case files, statutes and cases) to the courtroom's vibrant and graceful art and architecture. Stepping into that magnificent yet inclusive public setting reminds me that as a federal judge I act not as an individual but as an institutional representative, and that the business to be conducted is critically serious, exercising the judicial power of the Republic's third branch of government.

Similarly, each of us who walks into Courtroom No. 2 – judge, clerk, attorney, litigant, prisoner, or observer, alike – must make our own transition and peace with the Republic's third branch. Go see it for yourself.

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1. Joint Tribal Council of the *Passamaquoddy Tribe v. Morton*, 388 F. Supp 649 (D. Me. 1975) (order ruling that the Indian Nonintercourse Act established a trust relationship between the federal government and the Passamaquoddy Tribe) *aff'd*, 528 F.2d 370 (1st Cir. 1975).

2. *See generally* Randolph Starn, Ambrogio Lorenzetti: The Palazzo Pubblico, Siena, (1994) (noting that Lorenzetti's masterpiece appears in the meeting room known as Sala dei Nove , i.e., Room of the Nine).

3. D. Brock Hornby, *Summary Judgment Without Illusions,* 13 Green Bag 2D 273, 276 (2010)("About 2% of federal civil cases reach trial.").

4. D. Brock Hornby, *The Business of the U.S. District Courts*, 10 Green Bag 2D, 453, 468 (2007).

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Learning from the Best, the Brightest, and the Kindest: An Interview with the Honorable D. Brock Hornby

by Hon. Christina Reiss
Photos by Hannah E. Hungerford

The State of Maine has the immense good fortune to have the Honorable D. Brock Hornby administering justice in its courts since 1982. At this point, there is no hyperbole in calling Judge Hornby a judicial icon. Last year, he deservedly received the Edward J. Devitt Distinguished Service to Justice Award – the highest honor a federal judge can receive – in recognition of his significant contributions to the administration of justice, the advancement of the rule of law, and the improvement of society as a whole. He has authored scores of influential opinions and articles, chairs the Judicial Conference's Committee on the Judicial Branch, and has served on important committees and panels too numerous to mention. He is widely recognized as one of the most well-respected and well-liked judges in the United States.

When people speak of Judge Hornby, certain topics are unavoidable. Using the Maine lexicon, you immediately discover that he is wicked smart. And even more remarkable, he is smart in all the ways a person can be smart: book smart, common sense smart, well read smart, emotionally smart, feel-of-the-case smart, culturally smart, and common man smart. As Judge Robert Katzmann of the Second Circuit Court of Appeals recently observed, "Brock has one of the most powerful analytical minds I have ever encountered as well as masterful and extraordinary organizational skills." But this is only part of the picture. According to Magistrate Judge John Rich, "what people remember the most about Judge Hornby is his profound kindness." And it's true, he is not only someone that you like, he is someone you want to be like. I will add one more unavoidable topic: his genuineness. This is the real deal. He is the same down-to-earth person that his parents raised in humble circumstances on the Canadian prairies without a hint of the pretentiousness, egotism, or arrogance that often comes with the heights he has scaled.

Judge D. Brock Hornby in his chambers.

During the Maine Supreme Judicial Court's 1989-90 term, I had the privilege of clerking for then Associate Justice Hornby. I was later an associate at "his" firm, Perkins, Thompson, Hinckley and Keddy in Portland, Maine. Over the years, I have kept in touch with him, knowing that I had crossed paths with someone special who could teach me to be a better clerk, a better lawyer, a better judge, and a better person. On the occasion of Judge Hornby's taking senior status,

I have asked him all the nosy questions that I would pester him with if I once again had the pleasure of working with him in the courtrooms of Maine.

Tell me about your childhood.

I was born in Brandon, Manitoba, a small town on the Canadian prairies. My father (along with his two brothers and my cousin, all the males in two generations but for me) was a Pentecostal preacher. When I was five, my dad accepted a call that he move to a new pastorate, in London, Ontario. That is where I grew up and went to college, although we returned West to the Brandon area virtually every summer for family vacations. My father died when I was thirteen (he was only forty one).

When my father died, my mother was devastated emotionally. Her only profession had been to participate in my dad's ministry. Now she had two children to support. At the time, my sister was a college freshman living at home and I was a high school student. My sister and I were the first generation in our family to attend college. Our home had been the parsonage owned by the church and so we had to move out for the new minister. My mother had to purchase even our furnishings from the church. She had no occupational skills, but she took typing courses and real estate courses, and became a real estate agent for a couple of years, then a receptionist/typist in a doctor's office. With the help of a small life insurance policy from my dad's death, she was able to purchase a home for us and support us. I remember her working evenings and weekends in the real estate business. I worked part-time to help out (paying for my own clothes, etc.), first as a drugstore delivery boy, then as a morning newspaper carrier, then as a rug salesman in a local department store. I learned to admire my mother's courage and flexibility, and I learned the need for hard work. I continued to go West in the summers to be with old friends and to work in a creamery in Brandon. I lived at home until I finished college (I obtained scholarships and financial aid to help pay), then moved to Cambridge, Massachusetts to attend Harvard graduate school.

What is the most satisfying thing about being a judge?

The sense of contributing to the stability of the community and the United States by resolving disputes and imposing sentences in a manner that people accept; knowing that the lawyers and parties, win or lose, felt that they were heard and treated fairly; and watching and talking to jurors and learning that their faith in federal justice is restored by watching a real trial in contrast to entertainment and media portrayals.

What is the most difficult thing about being a judge?

Without a doubt, sentencing. It is difficult to alter someone's life in that manner and even more difficult to see the effects of the crime on the defendant's victims, and the effects of the sentence on the defendant's innocent family members and others.

Do you think the practice of law has changed since you entered the profession? If so, how?

Yes, I believe that law has become more difficult and complex. I also believe that the economics of being a lawyer are far more demanding. Lawyers seem to deal with more stress and obtain less satisfaction from their practices than earlier generations.

What person or persons or event has had the biggest impact on you?

My parents; certain of my teachers (elementary, high school, college and law school), the Judge for whom I clerked, Judge John Minor Wisdom, and the Maine Judge whom I admired most, Judge Edward Thaxter Gignoux.

If you had not become a judge or lawyer, what other careers do you think you might have pursued?

I was embarking upon the study of archaeology in graduate school at Harvard University before I switched to law. I learned to read parts of the Code of Hammurabi in the original cuneiform!

What do you think are the most important qualities for a judge? How about for a lawyer?

For a judge, fairness, patience, listening skills, ability to maintain control of a courtroom calmly, and a stiff dose of humility. For a lawyer, industry, balance, good judgment, and the ability to maintain a distance from the client and the case.

You appear to strike an excellent work/life balance. Do you have any suggestions on how to achieve the proper balance?

The balance shifts over time, and it is important to recognize that shift (e.g., it is different when one's children are small from after they leave for college). In the same vein, one can work very long hours if that commitment can be offset by carefree vacation time (Blackberries are threatening the latter). If you enjoy your work, as I do, that too can shift the balance. Everyone must find the balance that is correct for him/her. (Don't rely on your parents' or mentors' examples: times and family roles change.) But no one can work all the time. Those who do so risk losing their perspective and sense of priorities.

What is the best advice you have received as a judge?

Sadly, judges seldom receive advice.

What advice, if any, would you give to a new lawyer? How about to a new judge?

To a new lawyer, work hard but read broadly outside the law (advice that University of Maine School of Law Dean Edward Godfrey also used to give). To a new judge, in your early days and weeks on the bench, take notes of all the things that seem strange, perverse or wrong about court processes, because before you know it, they will become second nature and you will no longer be able to critique them. Remember how difficult

it was to practice law. Be kind. Bite your tongue. Engage in courtroom humor only at your own expense.

Most cases, criminal and civil, are resolved by agreement rather than trial. Do you expect this trend to continue? If so, do you think it is a beneficial trend?

I think it will continue. I understand (and I share) the trial lawyers' and trial judges' regret at the decline in trials – they are my favorite part of the job – but on the whole I think it is a salutary trend, at least on the civil side. Trials are satisfying for judges and lawyers, but clients generally abhor the uncertainty and the all-or-nothing outcome.

There are some civil disputes that have public implications and should go publicly to a judge or jury (e.g., civil rights; accusations of police brutality; some product safety issues), but many are simply private disputes and can be better and less expensively resolved by compromise or mediation.

For criminal trials, it is a more difficult question. If I thought that there were guilty pleas where a defendant might have won acquittal, then I would be concerned. But despite recent national news media accounts about serious federal prosecutorial misconduct, I have not personally seen incidents that give me concern. I don't know that the decrease of criminal trials is an improvement, although it is true that the government could not afford to prosecute as many cases if more defendants insisted on trial, so it may be necessary. Certainly, the Sentencing Guidelines and the benefits that come to a defendant from cooperating with the government have led to a higher proportion of guilty pleas. It is therefore important to take seriously the Federal Criminal Procedural Rule 11 colloquy, to ensure that each guilty plea is voluntary and informed, and has a factual basis. Finally, although trials have declined, we federal judges spend far more time now on the sentencing process itself.

Do you think your career has changed you as a person? If so, how?

Yes, in two ways. As my family knows (sometimes it frustrates them), I have learned to reserve judgment on many of the important public issues of the day, so that I do not pre-judge and can consider freshly the arguments presented to me if the matter comes to me for decision as a federal judge. Second, I have become much more aware of my and my family's good fortune as I see the extraordinary tribulations that some people confront – to mention just three examples, victims whose lives have been up-ended by a defendant's criminal behavior, in ways that can never be restored; motivated, hard-working and otherwise honest aliens who have come here illegally, hoping to get a green card and to support their families, but must be imprisoned and deported back to the poverty of their home countries; defendants whose presentence reports recount for me how the deck was stacked against them from childhood, in how they were treated as children and the destructive influences to which they were exposed.

Is judicial isolation real? If so, how do you address it?

It is very real. My own method has been to develop close professional and social relationships with other federal judges around the country, with former law clerks of the judge I clerked for, Judge John Minor Wisdom, (these clerks live elsewhere and do not practice before me), with classmates from college and law school who likewise are elsewhere, and most importantly, with family.

In your opinion, what is the biggest challenge the legal profession faces today?

I don't know the biggest. But there are many. Just a few are: the challenges of e-discovery; how to deal with the mountains of digital data that are out there, in terms of preservation, review and disclosure; providing legal services to the poor and the middle class, especially in an environment where law has become in some ways just another business focused on the bottom line and without the "guild" protections of an earlier era that allowed lawyers to see themselves more as professionals with attendant responsibilities; and dealing with the ever-increasing complexity of law and regulation.

In your opinion, what is the biggest challenge the federal judiciary faces today?

The lack of public understanding of the role of the Third Branch, and the lack of public knowledge of what we do. Most people's beliefs about judges come from Hollywood and talking-head television shows. Many have no idea of the difference between state and federal judges. Many courtrooms across the country (mine included) seldom see a journalist any more, seldom see court watchers any more, and seldom see lawyers who are not actually involved in the case being tried or argued. We are becoming invisible except for the highest profile trials. (A notable exception is Bangor where the *Bangor Daily News* still devotes a reporter to federal court coverage.) This problem, largely attributable to the economics of newsgathering and of law practice, as well as courthouse security which deters some visitors, is exacerbated in the era of the "new media," where many, especially young people, rely on other devices for their information gathering, whether social networking sites, Twitter, or otherwise. The federal judiciary must find a way to reach out. A primary reason for what we do is deterrence and if people don't know what we do, how can there be deterrence? And as Justice Brandeis famously observed, sunshine is the best disinfectant. Federal judges, like all public officials, need scrutiny of what they do. And finally the Republic depends upon public understanding of all three branches.

Do you think taking "senior status" will affect your day-to-day activities as a United States District Court judge? If so, how? What new activities and challenges do you plan to take on?

I didn't take senior status to cut back on my professional activities. I took it in order to create a vacancy so that the President could find a worthy younger person to have this opportunity and experience. I am in good health, I love what I do, and for the foreseeable future, I plan to continue doing what I have done. I am not yet looking for new activities and

challenges. Beyond my Maine caseload, including multi-district litigation cases, I have the challenges of chairing the Judicial Branch Committee at the Chief Justice's request, sitting on the Council of the American Law Institute that publishes the Restatements of the Law, serving on the Committee on Science, Technology and Law for the National Academies, the desire to write about some of the insights I have gained during twenty years as a federal trial judge (and before that, as a Maine Supreme Court Justice and Magistrate Judge). If those run out, I have been requested by some district courts and circuit courts to visit. So I have plenty to do.

How did you choose Maine?

I was an up-and-coming law professor at the University of Virginia in early 1973, and had just received promotion and tenure when I received a telephone call from Francis Shea, founding partner of Shea and Gardner in DC, a firm that then did a lot of the federal appellate work in the country (and a healthy dose of maritime work). He told me that he had dinner the evening before with several federal circuit judges (probably at a judicial conference), including Judge Wisdom for whom I clerked, and had asked if any of them had a clerk who might be looking to practice. Judge Wisdom responded that he had a clerk who ought to practice and gave him my name. It made me sit up and think that maybe I should consider practice. I had gone from law school to clerkship to academia, partly because I was not yet a citizen and in those days could not be admitted to the bar until I became a citizen, which I did in 1973. I interviewed at the firm, liked it a great deal, and my wife Helaine and I considered seriously whether we wanted to raise a family in DC or its environs (Helaine was then pregnant with our first-born). We looked as far as Harper's Ferry as a place from which to commute, but then we decided to look farther and took the summer of 1973 to drive along the East Coast looking at possible places to live and raise a family. We thought Boston was a likely candidate, the city where we met, fell in love, and lived the first year of our marriage. But we kept driving north and east, and found that we loved Portland, Maine. After a couple of days, we took the ferry (it was then the Bolero) to Yarmouth, Nova Scotia. At the time, John Dean was spilling his guts on television about the Nixon White House and Watergate. We watched until the signal became too weak. No one else on the ferry cared, but we were fixated, and when we got to Yarmouth we stayed glued to the television in our hotel. Upon returning to Portland, we spent longer in the city (staying at the Eastland Hotel), and fell in love with the Portland area and what we saw as its potential.

The entrance to Judge Hornby's chambers.

When we returned to Virginia, I called Judge Wisdom and he called Judge Gignoux (I had met Judge Gignoux in New Orleans when he came down to help out in the district court, at the same time as his name was being mentioned for the Supreme Court, the seat that went to Justice Blackmun), and Judge Gignoux recommended several law firms. I came back to Portland, interviewed with several firms, and accepted an offer from Perkins, Thompson, Hinckley, Thaxter and Keddy. Sidney Thaxter was Judge Gignoux's brother-in-law. Then I went back to Virginia and told the Dean, Monrad Paulsen, that I was leaving at the end of the academic year. He was aghast. Helaine and I nonetheless returned to Portland in May 1974, and bought the house in which we still live (coming from Virginia, we had no idea how much it would cost to heat). I came back in July to take the bar examination, and we moved in September, and raised both our children here. We love Portland, and we love Maine. It was the best decision we ever made.

When did you first think you might like to become a lawyer? What convinced you to pursue that profession?

While I was a graduate student at Harvard and living in a dormitory, I took my meals with other graduate students and law students at Harkness Commons. I always thought that the law students had the most interesting things to talk about, and I engaged in their discussions. I had always loved to debate, from childhood through college. So that was the intellectual component. Then at Thanksgiving that year, one of my classmates invited me to White Plains, New York to his home for Thanksgiving (Canadian Thanksgiving was earlier, on American Columbus Day, and I had nowhere to go in late November). We had a double date in Manhattan, and when we visited the penthouse apartment of one of our dates, I was overwhelmed by what seemed opulent to a young Canadian (me), and learned that her father was a lawyer. That was the economic component. Another night that weekend at a party, I discovered that young women

were interested in me when they heard I went to Harvard, until they learned that it was Harvard Graduate school, whereas they remained interested in others who went to Harvard Law School. That was the romantic component. All told, I decided I needed to give law a chance! I took the LSAT, applied to Harvard, and was admitted. It was a great decision.

What has been the most memorable event of your legal career?

Perhaps September 11, 2001. At the time I was on the Judicial Conference of the United States, and that morning I and twenty-five other federal judges were with Chief Justice Rehnquist in the Supreme Court of the United States at our semi-annual meeting. I was sitting only one seat removed from Chief Justice Rehnquist. We had expected Senator Schumer to speak to the Conference but were told at the last moment that he would not appear because a small plane had flown into the World Trade Center. At the time we thought it was probably an accident. Then another visitor arrived (I forget whether a Senator or Congressman) from another state, announced that a second plane had done the same, and that it appeared to be an act of terrorism. I watched the U.S. Marshal's deputies deliver a series of notes to the Chief Justice while the proceedings continued, and finally the Chief Justice announced that we must evacuate the building. When I exited the building with other federal judges, we could see smoke rising in the distance. We thought it was from downtown D.C. (it was actually the Pentagon). The streets were thronged with people running and television cameras were everywhere taking pictures. No traffic could move. Four of us walked down to Union Station, and then took a very roundabout way back to our hotel, thinking to avoid what we (wrongly) thought was happening downtown. As we heard garbled news about what had happened, including references to terrorists being on a flight out of Portland, Maine, I became increasingly concerned because I knew that my wife Helaine had been scheduled to fly out of Portland on business at about the same time as the hijackers. Eventually I reached her by cell phone and learned that she had left on an earlier flight and was safe. The federal judges who served on the Judicial Conference were stranded in DC because all flights were grounded. The judiciary eventually was able to arrange vans, some going south, some west. Our Circuit Executive was able to confirm that Amtrak was resuming service. So I got on a train a day or two later, reached my wife by cell phone, she joined me in Philadelphia (she had been in Harrisburg, Pennsylvania), and we took the train. Pulling into Newark we could see the plume of smoke still rising from the World Trade Center. When we reached Boston, we got a bus the rest of the way home. I declined to talk to the people at the car rental agency where my wife had parked her car because by then I had heard that the hijackers also went through that agency, and I had no idea whether there would ever be any proceedings in federal court in Portland. (There weren't.) I had to empanel a jury for a lengthy criminal trial a few days later. When I asked if any juror could not serve the required three weeks, not a single juror raised a hand, an unheard-of experience in empanelling a jury. The jury engaged in lengthy deliberations following the trial, despite the concern of many citizens about the security of federal buildings. The commitment of American citizens immediately after that event was demonstrable and memorable. Like others, I wish that we could recapture some of that sense of unity as Americans, rather than fixate on our fractious partisan divisions.

You clerked for the famed Judge Wisdom, how would you describe that experience?

It was life-altering. The Judge and his wife Bonnie became lifelong mentors and examples. There is not time to list all the ways. Here are just a few.

a. Seeing their care for the young people who served as law clerks, both while we were there and thereafter, and how they mentored us professionally and socially (during that year, Bonnie taught me how to eat an artichoke and appreciate opera, among other things).

b. Learning firsthand the social and personal security costs to even an establishment judge who enforced the rule of law in the deep South as it pertained to desegregation.

c. Seeing the Judge's commitment to law, to justice, to the English language and to clear expression.

d. Travelling in the region and seeing firsthand the nature of life in Louisiana and Mississippi in 1969 and 1970, fifteen years after *Brown v. Board of Education.*

What have been the unexpected pleasures of the position?

a. Law clerks. The opportunity to work with dedicated young people who are committed to the law, to mentor them, maybe excite them about a legal career, and then to maintain lifelong relationships with them has been an unsung perquisite of being a judge.

b. The lay participants. Hearing from defendants whom I have sentenced or private litigants in my court (not a lot of either, but enough to notice), telling me what mattered at their hearing or sentencing, learning of their progress, and realizing the importance to them of the judge's fairness and careful listening.

c. Jurors. Talking with jurors after a trial, finding them sometimes in tears because of the impact of their decision, seeing how seriously they took their responsibility, learning from them how their faith in American justice had been restored because the process was so different from its portrayal in the entertainment and news media.

d. National administration responsibilities. I did not realize that administration would be part of

the position, but it has been very rewarding to work with judges from around the country, with dedicated staff at the Federal Judicial Center, and with the Administrative Office of the U.S. Courts on issues that affect the federal judiciary as a whole. One of my favorites is the judges and journalists program where, in collaboration with the First Amendment Center, we bring together judges and journalists to discuss the issues that unite them and the issues that divide them, and to learn better ways of getting information about courts to citizens without impinging upon judicial ethical rules.

e. Swearing in new citizens. The unalloyed joy at citizenship ceremonies, where everyone is a winner and no one is a loser, is a wonderful antidote to the ordinary court proceeding where someone goes away unhappy. It is heartening to see the variety of organizations that appear in order to welcome new citizens, and to enjoy the opportunity to have high school students participate (e.g., singing or playing the national anthem and other patriotic music).

f. Court-appointed lawyers. Seeing the professional commitment of court-appointed criminal defense lawyers, many of whom work their hearts out on behalf of their clients. Often they know that obtaining an acquittal or a dismissal of the charges against their clients is not possible, but they ensure that their clients receive fair treatment, and the best disposition possible under the circumstances, and they keep the criminal justice system honest. From time to time, I hear court personnel marvel at how hard these lawyers work on behalf of their clients, despite the limited financial rewards.

In Conclusion

Judge Hornby will inevitably work as hard as a senior status judge as he always has—seemingly effortlessly juggling numerous weighty responsibilities while remaining close to family and friends and taking the time to truly listen and understand. It is clear that he has the ability to pause and reflect along the way, learning and growing from his own experiences and those of the people who appear before him. For Judge Hornby, the focus has always been on the journey not the destination. How lucky the State of Maine has been to be part of his life's work.

The Hon. Christina Reiss is the U.S. District Court Judge for the District of Vermont. Judge Reiss clerked for Judge D. Brock Hornby in 1989.

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

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"Spyer" Beware: The Pitfalls of Using Social Networking Sites to Research Employees

by Katy Rand

As those who attended the Federal Judicial Conference last month were made well aware, the emergence of social networking technology has created a unique set of challenges for attorneys and clients. These challenges are particularly acute in the employment context. As more and more information becomes available on the Internet, including information individuals voluntarily publish about themselves on social networking sites, employers are increasingly turning to the Internet as a source of information about employees and applicants. Lawyers play dual roles: as counselors to clients and often employers themselves. Whichever hat is on, they should be aware of the upside and downside to using social networking sites to dig up information on applicants and employees, and be aware of what precautions they can take to minimize the risk – for themselves or their clients – that curiosity will lead to litigation.

The lure is obvious. An employer who checks out an applicant's or employee's Facebook page may find provocative or inappropriate photographs, content about drinking and/or drug use, bad-mouthing of current or previous employers, discriminatory comments, sharing of confidential employer information, and misrepresentations about qualifications. Hiring and training new employees is expensive. So, to the extent an employer finds information on-line that causes it to reconsider what would have been a bad hiring decision, the Internet is a valuable source. But using social networking sites to research job applicants and employees is not without its risks.

As all employers know, some information about applicants is off-limits. Employers may not ask applicants for photographs or for their date of birth, race, religion, etc. These questions are not business related and cannot lawfully bear on an employer's decision to hire or not hire the candidate. Although use of social networking sites or the Internet generally to research job applicants or employees is not banned by any law, when an employer does so it can learn things about the applicant or employee that it would never have asked directly, and may wish it didn't know.

Most Facebook profiles have pictures, many members identify themselves with a particular religion and/or political affiliation, and some members discuss aspects of their personal life, including their sexual orientation, medical condition, etc. An employer that learns an applicant is homosexual based upon what it learns on the applicant's Facebook page and that then decides not to hire the applicant for reasons having nothing to do with the applicant's sexual orientation cannot later defend a discrimination lawsuit on the ground that it did not know the applicant was homosexual.

In addition to discrimination suits, curious employers may face invasion of privacy or federal statutory claims, particularly if they gain access to an employee's social networking site through pretext. A relatively recent case in the U.S. District Court in the District of New Jersey is illustrative.

In *Pietrylo v. Hillston Restaurant Group*, a waiter named Pietrylo created a MySpace page and private group that could be accessed by invitation only.[1] According to Pietrylo's initial posting, the purpose of the group was to "vent about any BS we deal with [at] work without any outside eyes spying on us." "Let the s**t talking begin," he announced. Pietrylo gave access to his co-workers, who used the page to gripe about their employer, joke about customers and managers, make sexual commentary, and even refer to illegal drug use. When one of the restaurant managers learned about the private

page, he asked a restaurant greeter to turn over her password. She did, and the manager logged on. Needless to say, neither he nor the other members of management with whom he shared the page were pleased with what they found.[2]

Shortly thereafter, Pietrylo and another employee who had posted on the site were fired for exhibiting behavior inconsistent with the restaurant's core values: professionalism, positive mental attitude, aim to please approach, and team work.[3] These now former employees brought claims under the federal Stored Communications Act (SCA)[4] and for invasion of privacy, among others.

It is illegal under the SCA to access "without authorization" a facility through which an electronic communication service is provided. There is no statutory violation if access was authorized "by a user of that service with respect to a communication of or intended for that user. . . ."[5] However, the restaurant was unsuccessful in securing summary judgment because, although an employee gave management her password, the employee testified she was fearful she would "have gotten in trouble" if she didn't do what her boss asked, creating an issue of fact about whether her consent was coerced.[6] The jury resolved that issue in favor of the plaintiffs, returned a verdict in their favor on the SCA claim, and also found that the restaurant acted maliciously, leading to a punitive damage award four times the amount of compensatory damages awarded by the jury.[7]

New Jersey, like Maine, recognizes the common law tort of intrusion upon seclusion, which requires the plaintiff to prove that his solitude or seclusion or private affairs were infringed in such a manner as would highly offend a reasonable person.[8] As with the SCA claim, the restaurant's motion for summary judgment on this claim was denied because the legitimacy of the co-worker's consent was at issue, and because the question of the reasonableness of the plaintiffs' expectations of privacy was held to be a question of fact for the jury. Although the jury ultimately found in the restaurant's favor on this claim, another jury may well have concluded otherwise.

Although not at issue in *Pietrylo*, employers monitoring employees' social networking posts should also be mindful of Section 7 of the National Labor Relations Act,[9] which gives non-supervisory employees the right to engage in "concerted activities for the purpose of engaging in collective bargaining or other mutual aid or protection," and prohibits employers from interfering in employees' Section 7 rights. The National Labor Relations Board is apparently tuned in to this application of Section 7, as it recently accused a company of illegally firing an employee for engaging in harsh and profane criticism of her supervisor on her Facebook page after her supervisor made a work-related decision she disagreed with.[10] The employee's words allegedly provoked supportive posts from her co-workers, transforming an arguably individual gripe into, the NLRB will argue, protected concerted activity.

Notwithstanding the risks associated with researching job applicants or employees on the Internet, there are things an employer can do to minimize these risks. First, a consistent and well-documented hiring process goes a long way toward defending hiring decisions as based upon business-related criteria. In addition, if an employer wants to use social networking sites to learn more about applicants or employees, it should consider having a non-decisionmaker conduct the search and report to the decisionmaker only that information which does not bear on the applicant's membership in a protected class and/or protected activity. Moreover, employers who use the Internet to research candidates or employees need to be aware that information found on-line may not be accurate. Finally, employers should stick to simple Internet searches, which reveal public information, and avoid using pretext (e.g., posing as someone they are not) to gain access to an applicant's or employee's social networking page. *Pietrylo* teaches that, given the perceived imbalance of power between manager and employee, it is risky for an employer to even ask an employee to voluntarily allow access to what would otherwise be private in cyberspace.

In the end, fair and defensible employment decisions are made based on criteria that are consistently applied and job-related. Whatever the source of the information employers use to make these decisions – as long as they do not engage in slippery or underhanded tactics to get it – following this basic rule will do much to protect their decisions from second-guessing by applicants, employees, and/or the juries.

Katy Rand is a graduate of the University of Maine School of law and an associate in Pierce Atwood's Labor & Employment Group, where she routinely represents employers dealing with discrimination, harassment, retaliation, and wage/hour issues. Katy can be reached at 207-791-1267 or krand@pierceatwood.com.

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1. 2008 WL 6085437 (D.N.J. July 25, 2008).
2. 2008 WL 6085437 at **1-2.
3. *Id.*
4. 18 U.S.C. §§ 2701-11.
5. 18 U.S.C. § 2701(c)(2).
6. 2008 WL 6085437 at *4 (D.N.J. July 25, 2008).
7. 2009 WL 3128420 at *1 (D.N.J. Sept. 25, 2009).
8. Both New Jersey and Maine cite the Restatement (Second) of Torts § 652B for support, e.g., *Bisbee v. John C. Conover Agency Inc.*, 186 N.J. Super. 335, 339, 452 A.2d 689 (App. Div. 1982); *Knight v. Penobscot Bay Med. Ctr.*, 420 A.2d 915 (1980).
9. 29 U.S.C. §§ 157, 158.
10. Steven Greenhouse, *Company Accused of Firing Over Facebook Post*, N.Y. Times, Nov. 8, 2010, *available at* http://www.nytimes.com/2010/11/09/business/09facebook.html?_r=1&emc=eta1 (last visited Nov. 9, 2010).

Maine's Uniform Power of Attorney Act

by J. Colby Wallace

The Maine Uniform Power of Attorney Act[1] (the "Act"), which became effective on July 1, 2010,[2] represents a significant change in Maine law regarding what are commonly called financial powers of attorney, durable or otherwise. Even though the provisions of the Act apply in various ways to powers of attorney executed prior to the Act's effective date,[3] powers of attorney executed before July 1, 2010 that comply with the former law, continue to be valid and usable.[4] As stated in the general uniform comment of the Act, the utility of powers of attorney "is evidenced by the widespread use of durable powers in every jurisdiction, not only for incapacity planning, but also for convenience while the principal retains capacity." Following a 2002 study that showed an erosion of uniformity across jurisdictions, the Uniform Law Commission, the drafters of the uniform law from which the Act is derived, set out to "strike a balance between preserving powers of attorney as a flexible, low cost method of surrogate decision making and deterring financial abuse perpetrated through misuse of powers of attorney."[5] This article focuses on the provisions of the Act requiring an express grant of authority from the principal to the agent[6] and how those provisions can affect transactions by agents depending upon how closely the agent is related to the principal. In particular, this article analyzes Section 5-931 of the Act. For a detailed discussion of the entire Act, practitioners should review the Maine State Bar Association's June 4, 2010 seminar available via webcast.[7]

The provisions in the Act requiring an express grant of authority from the principal to the agent represent a significant change in Maine law. Under prior law the only authority needing a specific grant by the principal to the agent in a financial power of attorney was the authority of the agent to make gifts to the agent or others.[8] The Act continues this special treatment of gifting powers by establishing parameters for any gifts made[9] and by addressing the gifting power in various provisions throughout the Act.[10] Beyond gifting, however, the Act in Section 5-931(a) expands the areas where a principal must make an express grant of authority to the agent.

Under Section 5-931(a) of the Act, an agent under a power of attorney may do the following on behalf of the principal only if the power of attorney expressly authorizes it: create, amend, revoke, or terminate an *inter vivos* trust; make a gift; create or change rights of survivorship; create or change a beneficiary designation; delegate authority granted under a power of attorney; waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; exercise fiduciary powers that the principal has authority to delegate; or disclaim or refuse an interest in property, including a power of appointment.[11]

The Uniform Law Commission understood that granting these particular powers to an agent may be risky, but that "such authority may nevertheless be necessary to effectuate the principal's property management and estate planning objectives."[12] Stated differently, given the various asset types in a typical portfolio, an agent without these powers could not adequately manage a principal's financial affairs. At the same time, these powers are important enough to require a principal's special consideration. For example, it seems that increasingly a large portion of a principal's financial holdings consists of retirement type assets that require regular attention to the terms of multiple beneficiary designation forms. Section 5-931(a)(4) of the Act enables the principal to clarify that his or her agent may change a beneficiary designation form. The ability to change this aspect of a principal's estate plan may be very important and could not be accomplished if the document simply grants the agent the general authority under Section 5-945 to attend to retirement plans. The grant of this specific power under Section 5-931(a)(4) must be expressly stated by the principal as with the other specific powers in Section 5-931(a).

A related issue to these specific powers is the agent's ability to effectuate self-dealing transactions, which in many circumstances is a power that is useful for the principal's estate planning needs. Under prior law an agent could not make a gift to himself without an express grant of authority allowing it.[13] Prior law made no distinction between a related or unrelated agent when contemplating the power to make gifts to the agent or others, but the Act does make such a distinction regarding gifts and the other transactions listed under Section 5-931(a). An unrelated agent is "an agent that is not an ancestor, spouse, registered domestic partner or descendant of the principal."[14] Even if the principal has authorized the agent to complete the transactions listed in Section 5-931(a), an unrelated agent may not effectuate a transaction listed in Section 5-931(a) that benefits the agent unless the power of attorney specifically states that the agent may do so.[15] A related agent, however, may effectuate a transaction

listed in Section 5-931(a) that benefits the agent even if the power of attorney is silent on the matter.[16]

To understand how these requirements operate on the ground, it is helpful to view them through the prism of agents who are either unrelated or related to the principal. Take, for example, the agent, who is not related to the principal, acting under a power of attorney in which the principal incorporated by reference all powers authorized under the Act from Section 5-934 through 5-947.[17] In addition to these powers, suppose the principal expressly authorized all acts listed under Section 5-931(a) of the Act. Even with such an expansive power of attorney, an unrelated agent would not, for example, be authorized to change the principal's solely owned bank account into a joint account with the agent.[18] That agent would, however, be able to change the principal's solely owned bank account into a joint account with the agent if the principal simply inserted the following language into the power of attorney: "my agent may exercise authority hereunder to create in my agent, or in an individual to whom my agent owes a legal obligation of support, an interest in my property."[19]

Depending upon the circumstances of each situation, the practitioner needs to consider whether this language should be inserted into the power of attorney where there is an unrelated agent. For example, should the long term unregistered domestic partner who is being named agent of the childless principal be granted this ability to self-deal? Probably. Should the neighbor or friend whom the principal has named as agent have the ability to self-deal? Probably not.

On the other hand, an agent who happens to be the son of the principal operating under an identical power of attorney as presented above would be authorized to effectuate transactions to or for the benefit of the agent even if the language allowing self-dealing from Section 5-931(b) of the Act is not included in the document. Unless the principal states otherwise in the power of attorney, a child agent will be able to execute any transaction listed in Section 5-931(a) of the Act for the benefit of the agent.[20] Under these circumstances, the practitioner must determine with the principal whether to remove the related agent's statutory ability to self-deal. Of course, in all circumstances, if the agent breaches fiduciary duties his actions are subject to review and will create substantial liability.[21]

These provisions requiring an express grant of authority by the principal to enable the agent to do various acts as well as to allow agent self-dealing, highlight the areas where many family fights originate. That is, one child having the authority to manage and transfer the principal's property to benefit himself or herself to the detriment of other children and then actually doing it. The Uniform Law Commission sums it up best when commenting on Sections 5-931(a) and (b) of the Act when it states: "[i]deally, these are matters about which the principal will seek advice before granting authority to the agent."[22] It is up to the practitioner to supply that advice.

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1. See 18-A M.R.S. § 5-901.
2. See 18-A M.R.S. § 5-964.
3. See 18-A M.R.S. § 5-963.
4. See 18-A M.R.S. § 5-906(b).
5. Linda S. Whitton, Presentation, The New Uniform Power of Attorney Act: Balancing Protection of the Principal, Agent, and Third Persons, U. Miami School of Law 41st Heckerling Institute on Estate Planning at ¶ 900 (2007).
6. The Act uses the term "agent" as opposed to "attorney-in-fact." See 18-A M.R.S. § 5-902(a) and Unif. cmt.
7. Maine State Bar Association's Continuing Legal Education Program: *Maine's New Uniform Power of Attorney Act* presented on June 4, 2010, may be found in the Elder Law subject area *available at* http://www.legalspan.com/mainebar/catalog.asp (last viited Nov. 30, 2010).
8. "An attorney-in-fact is not authorized to make gifts to the attorney-in-fact or to others unless the durable financial power of attorney explicitly authorizes such gifts." 18-A M.R.S. § 5-508(b) (repealed).
9. 18-A M.R.S. § 5-947(b) states:
An agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if known by the agent and, if unknown, as the agent determines is consistent with the principal's objectives based on all relevant factors, including: (1) The value and nature of the principal's property; (2) The principal's foreseeable obligations and need for maintenance; (3) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer and gift taxes; (4) Eligibility for a benefit, a program or assistance under a statute, rule or regulation; and (5) The principal's personal history of making or joining in making gifts.
10. Practitioners should examine and understand the interplay between 18-A M.R.S. §§ 5-931(a)(2), 5-931(c), 5-931(d) and 5-947.
11. 18-A M.R.S. § 5-931(a).
12. 18-A M.R.S. § 5-931 Unif. cmt.
13. See 18-A M.R.S. § 5-508(b) (repealed).
14. 18-A M.R.S. § 5-931(b).
15. See "[U]nless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, registered domestic partner or descendant of the principal may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer or otherwise." 18-A M.R.S. § 5-931(b).
16. See *Id.*
17. See 18-A M.R.S. § 5-932.
18. See 18-A M.R.S. § 5-931(b).
19. *Id.*
20. See *Id.*
21. See 18-A M.R.S. §§ 5-914, 5-916 and 5-917.
22. 18-A M.R.S. § 5-931 Unif. cmt.

Introduction to Discovery and Criminal Law: Getting What You Need to Defend Your Client in Maine State Court

by Robert J. Ruffner

Why You Don't Have to Go Hunting with D.A. Jim Trotter[1]

You've just been hired to represent someone accused of a crime. You have a charging document that while technically laying out the elements of the crime does not actually help you answer the question of "what are they saying my client did?" Discovery under the Maine Rules of Criminal Procedure[2] helps a defendant and his attorney answer that question by providing access to the evidence possessed by the State. Discovery in a criminal case can take many forms, ranging from police reports and witness statements to photographs and videotapes. It may include records of prior convictions, or a certified copy of a person's driving record, expert reports or the results of scientific examinations. Your job is to get as much material from the State and other sources to cast doubt on the charges your client is facing.

Discovery by Rule

Maine Rule of Criminal Procedure 16(a), or automatic discovery, requires the State to provide your client with certain materials.[3] In general these materials constitute evidence or testimony which the government intends to admit against the defendant. The government obtains such materials in one or several of the following ways: search or seizure, wiretap, recorded conversation or the substance of any "heard" verbal communication, statements made by the defendant, and visual or voice identification of the defendant. Included in this list are all of the defendant's statements and any additional fact known to the State which is exculpatory.

The State is required to automatically "furnish" Rule 16(a) materials to the defendant. It is not sufficient for the State to make these materials available. Nor can the State charge for Rule 16(a) materials.[4]

Maine Rule of Criminal Procedure 16(b)[5] allows the defendant's attorney to request in writing certain discovery materials from the State. This "discovery upon request" includes anything which is in the State attorney's possession or control; and (1) is material to the preparation of the defense, or (2) which the State intends to use as evidence in any proceeding, or (3) belonged to the defendant. Of course, there is an exception for the District Attorney's (D.A.) work product such as written materials that reflect his thoughts and conclusions about the case.

Rule 16(b) also requires the State to disclose the following: expert reports; names, addresses and dates of birth of witnesses they intend to call; written or recorded statements of witnesses; and summaries of the same in police reports.

Practice Tip: Often the State does not routinely receive or request certain items from the police, e.g., dispatch records, 911 calls, and video and audio recording from police cruisers (in some cases police officers will record the audio even away from their cruisers, while questioning witnesses or suspects). These materials may contain criminal statements (or summaries of oral statements) of witnesses. Never assume that just because the D.A. didn't give you the 911 call or cruiser video that the material doesn't exist. If you want it, make sure you follow-up with the D.A. in writing; the D.A. handles many cases, and the materials may be buried in the files.

Discovery by Court Order

Maine Rule of Criminal Procedure 16(c)[6] allows you to move the Court to order the State to provide any grand jury transcripts or the preparation of a report of any expert witnesses it may call. Rule 16(c) also may provide you a means to force the State to disclose its theory of the case through a Bill of Particulars.

In most cases the State alleges that a crime took place on a certain date

and the reports in the discovery leave no doubt as to when and how your client is alleged to have committed the crime. Sometimes it is not so clear. For example, you may have an indictment that indicates that abuse took place over a period of months, or even years. In such cases you may consider filing a motion for a Bill of Particulars.

If the charging instrument is so broad and/or discovery so unclear that it leaves your client unable to prepare for trial,[7] the Court may order the State to set out the evidence or theory that the State will rely on at trial.[8] The Court will not order this if the discovery and charge make the State's theory clear. The State will also not be ordered to file a Bill if it cannot be any more specific than in the indictment.[9] Even if your motion for a Bill of Particulars is not granted, you may learn more about the State's case during argument. Furthermore, your motion may provide your client with some additional arguments if the State's proof at trial varies from the dates in the charging instrument and discovery.[10]

How do you actually get this stuff? The way you obtain discovery in a particular case varies based on the practices of your D.A. or by local Rule,[11] but the options are generally the same. Typically, you obtain discovery via written request, a specific follow up request and, if necessary, a motion to compel.

Most district attorneys' offices will provide discovery as soon as they receive your written request. This is true even for automatic discovery. In large part this is because the State does not differentiate between Rules 16(a) and (b), and is simply providing you with "discovery." It is also a result of under funding; they simply don't have the resources to monitor every case to see if an attorney has entered his appearance. Your discovery request makes a convenient trigger in their office workflow.

Your discovery request should be general and specific. At the very least, you should make sure you cover all of the general categories of discovery in the Rule.[12] You may want to simply copy and paste Rule 16(b) into your request. However, you also want to make sure you specifically include items which are particular to your client's case. While the maintenance logs of the Intox Machine may arguably be "material" to the defense of your OUI client, you should not assume that you will receive them as a part of automatic discovery. Your written request should mention the logs, and anything else you are looking for specifically.

Rob Ruffner, left, arguing in court. Photo courtesy of Sun Journal.

When can you get discovery? The Rule[13] states that Rule 16(a) discovery must be provided "within a reasonable time." For Rule 16(b) discovery, the State "shall allow access at any reasonable time." There are additional requirements in misdemeanor cases. In those matters Rule 16(a) discovery must be provided within 10 days of arraignment, while Rule 16(b) discovery shall be "provided" within 10 days of the request.

In practice when you receive discovery depends on which D.A.'s office you are dealing with. Some will provide discovery immediately and even have it ready for initial appearance or arraignment. Others won't have a copy for the defendant, or counsel, until after the initial court appearance.[14] The manner in which you receive discovery varies also. Many offices will hold discovery for pick up by local attorneys and mail it to others.

After you receive your initial discovery, you will likely find that you don't have everything you asked for. Perhaps you requested 911 recordings or photographs that are not included in your discovery from the State. At this point you will want to contact the D.A. If the D.A. fails to cooperate, follow up with a letter which will help at the hearing on the motion to compel that you are about to file.

Rule 16(d) Sanctions

If your D.A. won't give or hasn't given you what you are entitled to even after you asked, and asked again, it's time to file a motion. While discovery motions should not be needed to obtain Rules 16(a) and (b) discovery, sometimes, in some places, they are necessary. A motion for sanctions under Maine Rule of Criminal Procedure 16(d)[15] allows the Court to order the State to provide the requested discovery. It may be that the State provides the discovery before the hearing date is set. In most other cases the State will agree to an order to produce the discovery requested without a hearing. If an agreement cannot be reached, the Court will grant the motion provided the items fall within the broad scope of the discovery rules and are in the State's possession or control. This includes materials in the possession of the police department or other investigating agencies.[16]

Practice Tip: Even if you know you are dealing with a D.A., who won't give you a copy of your client's statement just because it happens to be on a DVD, it still helps your motion to compel disclosure to say, "I asked for it, and then I asked for it again." Also, document everything! Who, and how often, you asked can make a big difference when you request that the Court

exclude a piece of undisclosed evidence at trial.

Discovery by Statute

In addition to the Rules of Criminal Procedure, there are many statutes which provide an attorney the opportunity to obtain information from the State. They range from access to agency records to a chance to question a witness in your case under oath before trial.[17]

If your case involves the Maine Department of Health and Human Services, you may be able to gain access to the Department's file through a motion to the Court, known as a Clifford Order. Under Title 22 Maine Revised Statutes, section 4008(3)(B), the Court may order an "in camera" review of the DHHS file.[18] If the Court determines that access to the records is necessary to resolve the instant case, the parties will be allowed to review those records and to obtain copies.

You can also generate additional discovery under certain statutes. In a drug case for example, under Title 17-A M.R.S., section 1112, you can request that a "qualified witness testify as to the composition, quality and quantity of any drug or substance at issue" in the case. You not only have the option to make the State put on an expert witness, but you are entitled to its expert reports and more under Rule 16(b).

Informal Discovery from the State

Operating Under the Influence. In many criminal cases, especially OUI,[19] law enforcement officers are trained in various specialized investigatory techniques. In Maine, most officers received their training at the Maine Criminal Justice Academy.[20] If your client is charged with OUI, you may want to check if the officer(s) received proper training and whether that training is current. You can also obtain a copy of the same manual that was used to train the officer. This can be great source material for cross-examination.

Another avenue for discovery in OUI cases is the administrative hearing.[21] When you request the administrative hearing you should also ask for copies of the police reports and test results relevant to that hearing, which will then be provided to you. Furthermore, the hearing affords an opportunity to question the officer (or other witnesses) under oath. This testimony may be useful at a suppression hearing down the road, or simply provide a prior statement for cross examination at trial.

Protection orders. Our clients are often served protection from abuse[22] or harassment[23] complaints by the complaining witness in the criminal case. These clients are entitled to a hearing, providing you the opportunity to question the witness under oath. Also, there is nothing to stop you from subpoenaing the investigating officers as witnesses. Since you will want a transcript later on, make sure you request that the matter be recorded in writing well before the hearing.[24]

Pleadings. Affidavits in support of warrantless arrests[25] and search warrants[26] are another avenue of informal discovery. Though they could be specifically drafted documents[27] limited to setting out probable cause, Maine Rule of Criminal Procedure 4A affidavits are typically the same police reports that would eventually be disclosed through the normal discovery process. There are circumstances where you may need to obtain the reports faster than the State is willing to provide them. That first meeting with a client at the jail can be made much more productive with a quick stop at the clerk's office to get the complaint and affidavit on your way.

Practice Tip: Don't forget to carefully review the complaint or indictment. The actual charging document is often the only available source of discovery initially in a criminal case. This is especially true if your local prosecutor is too busy or declines to provide you with Rule 16 discovery early on.

Prior Convictions. Maine Rule of Evidence 609 allows for the use of certain prior convictions to impeach the credibility of a witness.[28] The State is unlikely to provide you with the prior convictions of any of its witnesses, even if the State was the one to convict them. However, through the State Bureau of Identification, you can order a criminal records' check for any witness, including your own, so long as you have a name and date of birth.[29] Two important limitations to keep in mind: you will only get conviction information from Maine, and only if the State has it on record. The State may have records that you are unaware of, either because this information hasn't made it into the SBI system yet, or because it has run an NCIC[30] check. Therefore, you may want to file a formal request with the State to provide you with this information. If the State declines, you may choose to include this as part of your motion to compel. Keep in mind, Rule 16(b) was amended in 1991 to include the names and dates of births of the State's witnesses precisely so you can conduct your own background check. Be prepared to show the court why it is reasonable in your case to require the State to run an NCIC check and share it with you.[31]

The U.S. Constitution

Don't forget to cite the U.S. Constitution when drafting your discovery requests. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the U.S. Supreme Court held that irrespective of good or bad faith, due process requires that evidence favorable to a defendant be provided where such evidence is material to either guilt or punishment. In *Giglio v. United States*, 405 U.S. 150, 155 (1972), the U.S. Supreme Court brought within the due process requirements enunciated in *Brady* the right of defendants to secure from the prosecution disclosure of material affecting the credibility of government witnesses, such as plea agreements, promises of leniency, inducements to testify and financial assistance offered by the government. In *United States v. Bagley,* 473 U.S. 667, 676 (1985), the Court reaffirmed *Giglio* and held there is no difference between exculpatory and impeachment evidence for *Brady* purposes. Disclosure of *Giglio* impeachment material is governed by the same legal principles which apply to basic *Brady* material. *Giglio* is merely a subset of *Brady* material. It's good prac-

tice to include a reference[32] to *Brady* in your discovery requests.

I always try to tell my clients that the law is more of an art than a science; there often isn't a right answer. This article barely touches the surface of discovery in criminal cases. New attorneys and innovative practitioners bring fresh ideas and approaches to the practice every day. It is beyond the scope of these pages to capture them all here. Always remember, there is no single approach which will work best everywhere in Maine. In the end, the best practice is to practice. Get to know your local Assistant D.A.s and their staff. Find out how they deal with discovery. We may disagree with how they interpret Rule 16 but they don't make their policies secret. If you know their procedure, you will know whether the next step to getting the information you need is via a friendly phone call or a fiery motion. And getting the information our clients need is what it is really all about.

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1. Jim Trotter, III is the district attorney character portrayed by the late actor Lane Smith in the comedy, *My Cousin Vinny*. The following dialog is taken from that movie:

> *Mona Lisa Vito:* You're goin[']hunting?
> *Vinny Gambini:* That's right.
> *Mona Lisa Vito:* Why are you going hunting? Shouldn't you be out preparing for court?
> *Vinny Gambini:* I was thinking last night. If only I knew what he knows, you know? If he'd let me look at his files; oh boy.
> *Mona Lisa Vito:* I don't get it. What does getting to Trotter's files have anything to do with hunting?
> *Vinny Gambini:* Well, you know, two guys, out in the woods, guns, on the hunt. It's a bonding thing, you know; show him I'm one of the boys. He's not gonna let me look at his files, but maybe he'll relax enough to drop his guard so I can finesse a little information out of him.

Later in the movie . . .

> *Mona Lisa Vito:* Don't you wanna know why Trotter gave you his files?
> *Vinny Gambini:* I told you why already.
> *Mona Lisa Vito*: He has to, by law, you're entitled. It's called disclosure, you [########]! He has to show you every thing, otherwise it could be a mistrial. He has to give you a list of all his witnesses, you can talk to all his witnesses, he's not allowed any surprises. *[Vinny has a blank look on his face.]*

My Cousin Vinny (20th Century Fox 1992) *available at* http://imdb.com/title/tt0104952/quotes (last visited Nov. 22, 1010).

2. The Unified Criminal Dockets (UCD) in Cumberland County and Bangor each have their own version of the Rules of Criminal Procedure. They may vary wildly from the Maine Rules of Criminal Procedure, particularly in the area of discovery. For example, the Cumberland County UCD Rules eliminate the distinction between Rules 16(a) and 16(b) discovery and also greatly accelerate the time by which the State must provide discovery. Unless specifically mentioned, all references to "the Rules" refer to the Maine Rules of Criminal Procedure and not the local UCD Rules.

3. M.R. Crim. P. 16(a), regarding automatic discovery, states as follows:
(1) *Duty of the Attorney for the State*. The attorney for the state shall furnish to the defendant within a reasonable time:

(A) A statement describing any testimony or other evidence intended to be used against the defendant which:

(i) Was obtained as a result of a search and seizure or the hearing or recording of a wire or oral communication;

(ii) Resulted from any confession, admission, or statement made by the defendant; or

(iii) Relates to a lineup, showup, picture, or voice identification of the defendant.

(B) Any written or recorded statements and the substance of any oral statements made by the defendant.

(C) A statement describing any matter or information known to the attorney for the state which may not be known to the defendant and which tends to create a reasonable doubt of the defendant's guilt as to the crime charged.

(D) A copy of any notification provided to the Superior Court by the attorney for the state pursuant to Rule 6(h) that pertains to the case against the defendant.

(2) *Continuing Duty to Disclose.* The attorney for the state shall have a continuing duty to disclose the matters specified in this subdivision.

(3) *Charge of a Class D or Class E Crime in District Court*. Discovery shall be provided to a defendant charged with a Class D or Class E crime in District Court within 10 days of arraignment.

4. "[T]he defendant cannot be charged a fee for the production of Rule 16(a) materials." *York County Cmm'rs v. James Boulos, Laurence A. Gardner, Matthew B. Nichols and David N. Wood,* ALFSC-CV-95-570 (Me. Super. Ct., Yor. Cty. June 26, 1996)(Crowley, J.).

5. M.R. Crim. P. 16(b), regarding discovery upon request, states as follows:
(1) *Duty of the Attorney for the State*. Upon the defendant's written request, the attorney for the state, except as provided in subdivision (3), shall allow access at any reasonable time to those matters specified in subdivision (2) which are within the attorney for the state's possession or control. The attorney for the state's obligation extends to matters within the possession or control of any member of the attorney for the state's staff and of any official or employee of this state or any political subdivision thereof who regularly reports or with reference to the particular case has reported to the attorney for the state's office. In affording this access, the attorney for the state shall allow the defendant at any reasonable time and in any reasonable manner to inspect, photograph, copy, or have reasonable tests made.
(2) *Scope of Discovery.* The following matters are discoverable:

(A) Any books, papers, documents, photographs (including motion pictures and video tapes), tangible objects, buildings or places, or copies or portions thereof, which are material to the preparation of the defense or which the attorney for the state intends to use as evidence in any proceeding or which were obtained or belong to the defendant;

(B) Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;

(C) The names and, except as provided in Title 17-A M.R.S. § 1176(4), the addresses of the witnesses whom the state intends to call in any proceeding;

(D) Written or recorded statements of witnesses and summaries of statements of witnesses contained in police reports or similar matter;

(E) The dates of birth of the witnesses the state intends to call in any proceeding. The fact that a listed witness is not called shall not be commented upon at trial.

(3) *Exception: Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the mental impressions, conclusions, opinions, or legal theories of the attorney for the state or members of his or her legal staff.
(4) *Continuing Duty to Disclose*. If matter which would have been furnished to the defendant under this subdivision comes within the attorney for the state's possession or control after the defendant has had access to similar matter, the attorney for the state shall

promptly so inform the defendant.
(5) *Charge of a Class D or Class E Crime in District Court.* Discovery shall be provided to a defendant charged with a Class D or Class E crime in District Court within 10 days of the request.
(6) *Protective Order.* Upon motion of the attorney for the state, and for good cause shown, the court may make any order which justice requires.

6. M.R. Crim. P. 16(c), regarding discovery pursuant to court order, states as follows:
(1) *Bill of Particulars.* The court for cause may direct the filing of a bill of particulars if it is satisfied that counsel has exhausted the discovery remedies under this rule or it is satisfied that discovery would be ineffective to protect the rights of the defendant. The bill of particulars may be amended at any time subject to such conditions as justice requires.
(2) *Grand Jury Transcripts.* Discovery of transcripts of testimony of witnesses before a grand jury is governed by Rule 6.
(3) *Order for Preparation of Report by Expert Witness.* If an expert witness whom the state intends to call in any proceeding has not prepared a report of examination or tests, the court, upon motion, may order that the expert prepare and the attorney for the state serve a report stating the subject matter on which the expert is expected to testify, the substance of the facts to which the expert is expected to testify and a summary of the expert's opinions and the grounds for each opinion.

7. "The purpose of a bill of particulars is to enable the defendant to prepare an adequate defense, to avoid prejudicial surprise at trial, and to establish a record upon which to plead double jeopardy if necessary." *State v. Cote*, 444 A.2d 34, 36 (Me. 1982) (citing *State v. Larabee*, 377 A.2d 463, 465 (Me. 1977)).

8. *State v. Hickey*, 459 A.2d 573, 581 (Me. 1983).

9. *State v. Varney*, 641 A.2d 185, 187 (Me. 1994).

10. *State v. Standring*, 2008 ME 188, ¶ 14, 960 A.2d 1210, 1213.

11. *See supra* note 2.

12. You may even wish to reference *Brady v. Maryland*, 373 U.S. 83,87 (1963), even though it is arguably covered by M.R. Crim. P. 16(a)(1)(C).

13. *See supra* note 2.

14. Despite the fact that automatic discovery "shall" be provided, some office will allow defendants, typically *pro se* defendants, to plead guilty without providing them with even automatic discovery. Clearly a "reasonable" time would be some time before the defendant is convicted, but that is a subject for a different article.

15. M.R. Crim. P. 16(d), regarding sanctions for noncompliance, states as follows:
If the attorney for the state fails to comply with this rule, the court on motion of the defendant or on its own motion may take appropriate action, which may include, but is not limited to, one or more of the following: requiring the attorney for the state to comply, granting the defendant additional time or a continuance, relieving the defendant from making a disclosure required by Rule 16A, prohibiting the attorney for the state from introducing specified evidence and dismissing charges with prejudice.

16. M.R. Crim. P. 16(b)(1).

17. This is not a complete list. Make sure you conduct your own research or speak with some experienced colleagues to see if there are any avenues that you may have overlooked.

18. 22 M.R.S. § 4008(3)(B).
3. Mandatory disclosure of records. The department [i.e., DHHS] shall disclose relevant information in the records to the following persons:
B. A court on its finding that access to those records may be necessary for the determination of any issue before the court or a court requesting a home study from the department pursuant to Title 18-A, section 9-304 or Title 19-A, section 905. Access to such a report or record is limited to counsel of record unless otherwise ordered by the court. Access to actual reports or records is limited to in camera inspection, unless the court determines that public disclosure of the information is necessary for the resolution of an issue pending before the courts;

19. 29-A M.R.S. § 2411.

20. 15 Oak Grove Road, Vassalboro, Maine 04989. Phone: (207) 877-8000. Fax: (207) 877-8027.

21. 29-A M.R.S. § 2483.

22. 19-A M.R.S. § 4001.

23. 5 M.R.S. § 4651.

24. Given the staffing shortages in many of our courts, don't assume that the clerk's office will have staff to spare to run the recording equipment at the last minute.

25. M.R. Crim. P. 4A. In cases where a defendant is arrested without a warrant and is detained (unable to make bail) within 48 hours of arrest, Rule 4A requires the State to prove to the Court that probable cause exists to believe that the defendant has committed the crime he is being held on.

26. M.R. Crim. P. 41.

27. Probable cause may also be proven by way of "sworn oral statement or statements." M.R. Crim. P. 4A(b)(3).

28. M.R. Evid. 609 (Impeachment by Evidence of Conviction of Crime) states, in relevant part, as follows:
(a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a specific crime is admissible but only if the crime (1) was punishable by death or imprisonment for one year or more under the law under which the witness was convicted, or (2) involved dishonesty or false statement, regardless of the punishment. In either case admissibility shall depend upon a determination by the court that the probative value of this evidence on witness credibility outweighs any unfair prejudice to a criminal defendant or to any civil party.

29. You can order an SIB records check *available at* http://www5.informe.org/online/pcr/ (last visited Nov. 23, 2010).

30. National Crime Information Center – run by the FBI – electronically compiles criminal justice information that is made available to law enforcement agencies throughout the country 24/7.

31. For example, a witness has lived out of state for a significant period of time as an adult.

32. It may be as simple as stating: "Pursuant to *Brady* and *Giglio* (cites omitted) and their progeny, the attorney for the State is obliged to turn over any material which is exculpatory or which may impeach any government witness."

Supreme Quotes

by Evan J. Roth

"Frankly, my dear, I don't give a damn."

Bethel School District Number 403 v. Fraser, 478 U.S. 675, 691 (1986) (Stevens, J., dissenting) (quoting Clark Gable, playing the part of Rhett Butler, in the film Gone With the Wind).

In the State of Washington, a Bethel High School student nominated a friend for student council with a speech laced with sophomoric sexual innuendo, such as: "I know a man who is firm – he's firm in his pants, he's firm in his shirt, his character is firm – but most . . . of all, his belief in you, the students of Bethel, is firm." Based on a school disciplinary rule that prohibited the use of "obscene, profane language or gestures," the school suspended the student for three days and prohibited him from participating as a graduation speaker. The U.S. Supreme Court upheld the school's authority to impose the discipline, but the Justices split sharply over the implications for free speech in a school setting. In a dissenting opinion, Justice Stevens used the Clark Gable quote to illustrate how some speech may be shocking to one generation but benign to another. As Justice Stevens explained, "[w]hen I was a high school student, the use of those words in a public forum shocked the Nation."

Evan J. Roth is an assistant U. S. Attorney in Portland, Maine. "Supreme Quotes" is a series examining memorable U.S. Supreme Court quotations.

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Book Review

Ordinary Injustice: How America Holds Court

Reviewed by Alan R. Nye

By Amy Bach
Metropolitan Books
$27.00, hard cover, 307 pages,
ISBN 978-0-8050-7447-5 (2009)

Attorney and journalist Amy Bach spent eight years investigating injustice in our court systems. I'm not talking about the individual instances of injustice that we've all read about in the past – false confessions, dirty cops, or the wrongful conviction of the innocent.

Instead of merely focusing on individuals, Bach investigated the systematic lapses in our court system and shows the reader how justice can fail throughout the entire legal process.

As she notes in her introduction:

> This book examines how state criminal trial courts regularly permit basic failures of legal process, such as the mishandling of a statutory allegation. Ordinary injustice results when a community of legal professionals becomes so accustomed to a pattern of lapses that they can no longer see their role in them. There are times when an alarming miscarriage of justice does come to light and exposes the complacency within the system, but in such instances the public often blames a single player, be it a judge, a prosecutor, or a defense attorney. The point of departure for each chapter in this book is the story of one individual who has found himself condemned in this way. What these examples show, however, is that pinning the problem on any one bad apple fails to indict the tree from which it fell. While it is convenient to isolate misconduct, targeting an individual only obscures what is truly going on from the scrutiny change requires. This system involves too many players to hold one accountable for the routine injustice happening in courtrooms across America.

The book is divided into four sections. The first deals with Robert E. Surrency, a public defender in Green County, Georgia who pled most of his clients guilty – even though he had little or no clear idea of the facts involved in their cases. In four years, Surrency took just fourteen of his 1493 cases to trial. From his point of view, that was acceptable because plea bargaining was "a uniquely productive way to do business."

What soon becomes apparent is that this type of defense is widely acceptable in that court system and is even applauded by certain judges there who claimed that "slow justice is no justice." Surrency was so inundated with clients that he was sometimes not even in court when his clients pled guilty – he was speaking with other defendants in the hallway while a lawyer who knew even less about the cases stood in for him.

The next section deals with Henry R. Bauer, a city court judge in Troy, New York who, despite being removed from office for judicial misconduct, was still one of the most popular men in the city. Though widely known as a congenial and decent man, and having a stellar reputation as a judge, Bauer often failed to inform defendants of their right to a lawyer; set excessive bail; coerced guilty pleas; imposed sentences so excessive as to be illegal; and convicted some defendants without their plea or a trial.

Bach explains in her book that despite these serious failures to uphold the law, most citizens and court personnel believed that Bauer's method of handling cases was preferable to a strict upholding of the law.

The lawyers didn't mind because the judge did most of their work for them, and the community didn't mind because when injustice in the lower courts is ostensibly aimed at keeping the streets safe and the system moving, the only people who suffer are the poor and the neglected -- in short, the lower class.

The problem was that Bauer became overzealous in his attempt to rid the area of crime: he stopped assigning lawyers to defendants who were entitled to them, and he set ridiculously high bails for many minor crimes. He did this for years and no one in the court system complained – until Eric Frazier

was sent to jail for stealing items worth $27.77 on fifty thousand dollars bond. Frazier typed a letter of complaint and sent it to the New York State Commission on Judicial Conduct. After the inquiry, Bauer was removed from office.

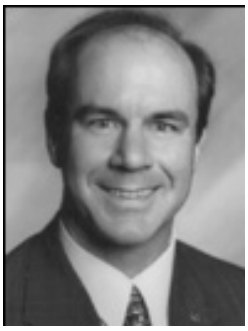
Bauer had helped clean up the city all right, but his court had regularly failed to take the elemental steps of deciding which defendants needed a lawyer, what had happened in the case, and whether a crime had actually occurred. And almost no attorney in Troy was willing to admit it. This was a tight-knit community; no one wanted to fess up. In the end, friendship and affability trumped the protection of rights.

Without going into detail, the next section is about a prosecutor in Mississippi who routinely declines to pursue significant criminal matters. One of the cases involved the statutory rape of an eleven-year-old girl. The final section deals with a Chicago prosecutor, his investigators and an entire court system that operates together to achieve a wrongful conviction. Even when it is clear that the conviction was improper, many in the system refused to believe it and failed to take steps to ensure that justice was done.

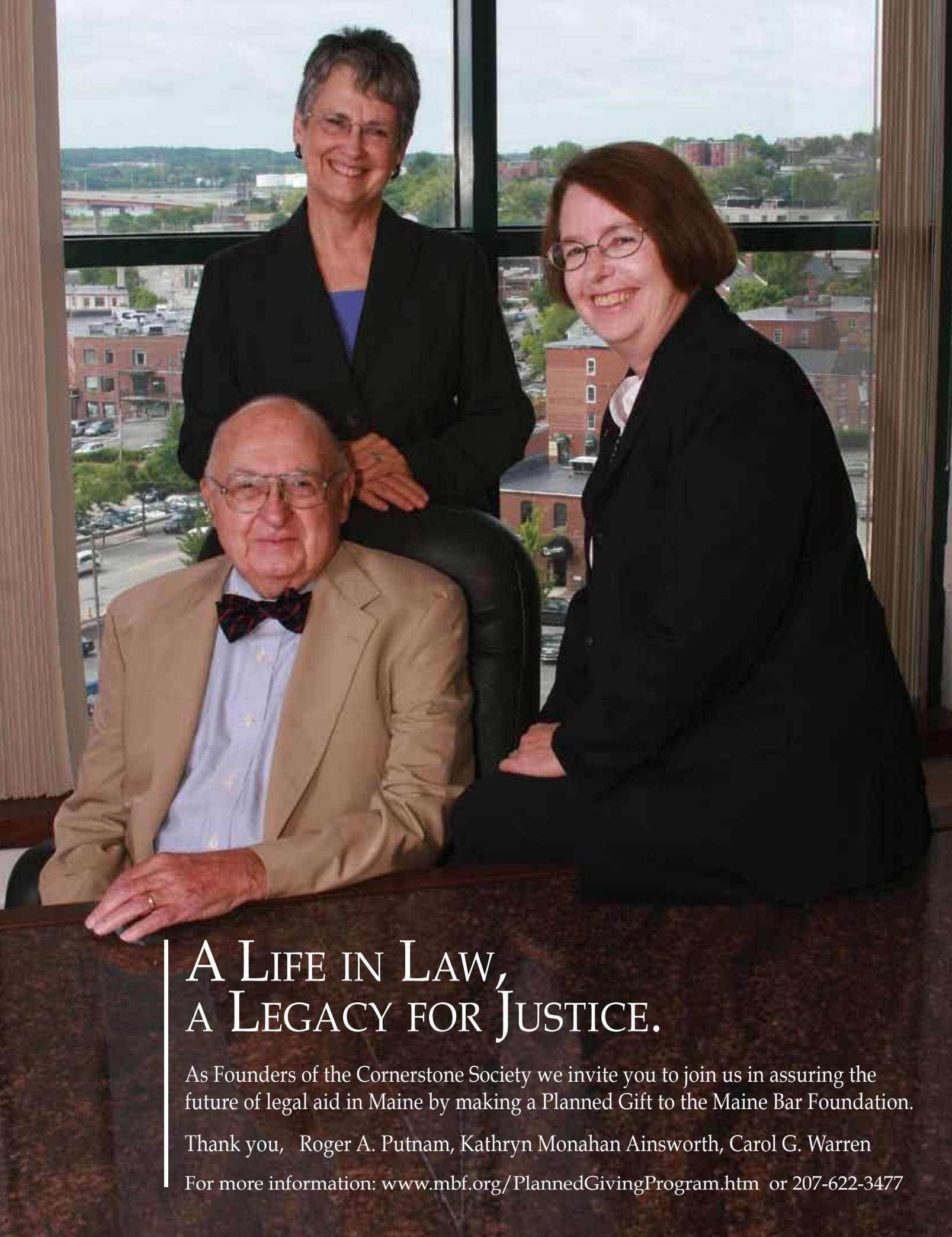
Bach's book is a wake up call to those who are in any way a part of the criminal justice system: judges, clerks, prosecutors, investigators, defense lawyers, jurors and court personnel. Our criminal system of justice is based on adversarialism. Many of the problems highlighted in this book are a result of people in the system failing to aggressively assert the constitutional rights afforded to defendants.

Collegiality and collaboration are considered the keys to success in most communal ventures, but in the practice of criminal justice they are in fact the cause of system failure. When professional alliances trump adversarialism, ordinary injustice predominates. Judges, defense lawyers, and prosecutors, but also local government, police, and even trial clerks who processed the paperwork, decide the way a case moves through the system, thereby determining what gets treated like a criminal matter and what does not. Through their subtle personal associations, legal players often recast the law to serve what they perceive to be the interests of the wider community or to perpetuate a "we've-always-done-it-this-way" mind-set. Whether through friendship, mutual interest, indifference, incompetence, or willful neglect the players end up not checking each other and thus not doing the job the system needs them to do if justice is to be achieved.

Ordinary Injustice is an eye-opening exposé that every judge, prosecutor and criminal defense attorney should read.



Alan R. Nye is an attorney in Portland and practices in the areas of business law, real estate, Internet law and family matters. He is a frequent writer and lecturer and his book reviews and articles have been published in the ***Maine Bar Journal, Maine Lawyer's Review***, the ***Portland Press Herald*** and other local and national publications. He can be reached at anye@alannye.com.



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Beyond the Law: Jon Doyle, Truck Enthusiast

Interview and Photos by Daniel J. Murphy

"Every mile in winter feels like two," goes an old saying. However, for Jon Doyle of Richmond, the opposite must be true. Doyle's longstanding interest is the restoration of antique snow plow trucks, and winter is when he gets to enjoy the fruits of his labor. Touring the large garage and truck yard adjacent to his home, Doyle passes a gleaming, recently restored snow plow truck and then leads the way to a hulking, triangular wedge plow that towers several feet over his head.

Back in the garage, a new candidate for restoration – a Walter snow plow truck – is just commencing its transformation. A detailed plan of the truck's electrical system has been clamped to the passenger door, a map of sorts for the long road ahead. Doyle, who maintains a legislative and administrative law practice at Doyle & Nelson in Augusta, sat down with the Maine Bar Journal to discuss his interests.

MBJ: Please tell our readers about your interest in antique trucks.

Jon Doyle: It's a fairly unusual one. It involves the restoration of old, but not that old, antique snow plow trucks from the 1940's and 1950's. These are big, difficult and complex machines, sometimes more complex than one would think. The great thing about these trucks is that they also come with a local history. They were pretty much a big part of local culture. Back in the 40's and 50's, during the plowing, little old ladies along the route would leave cookies and hot tea in the mailboxes. That also prevented the plow guy from out of his boredom slotting the mailbox with a wing. I've plowed snow myself. If you do this all night long and you get bored, at about 3:00 in the morning, you tend to take that right wing, which is aimed toward the mailbox, and see how close you can get to swatting one of them. You don't always miss.

MBJ: When did you first start restoring trucks?

JD: Oh, I think I did my first restoration probably fifteen years ago and I have been hooked ever since. I've got a pretty good size garage and lots of nice tools. Basically with these old trucks what you're doing is problem solving by getting stuck stuff unstuck. You have rust issues in Maine, so you learn that WD-40 is really useful. It's certainly not sophisticated, but you get into the niceties of that and removing fastenings that are rusted in place after forty years.

MBJ: How many trucks do you have?

JD: I have ten of them. They have names like Oshkosh, which is familiar to a lot of people, and FWD, which is no longer made. The very best of the plow trucks ever made were from upstate New York. Walter is the name of the company and they made full-time, mechanically actuated four-wheel drive trucks. The system is similar to one that Mercedes uses today, only theirs is electrically driven. I also have some Internationals, a bunch of Ford four-wheel drive conversions done by Marmon-Herrington. Those were popular among small contractors. If you were a small contractor in Maine, you bought a Ford F-7 and beat the living heck out of it trying to plow snow in a small Maine town. If you were a municipality, you bought an Oshkosh or a Walter. The price difference was significant; the Walter trucks of the 40's and 50's cost about $50,000 at that time, while the Ford trucks were about $8,000.

MBJ: What does a typical restoration project entail?

JD: Pretty much everything from the cooling system to rebuilding the engine and brakes, and certainly work on the electrical systems. When snow plows were used here in Maine, repairs frequently got made to electrical systems

in blizzard conditions, at thirty degrees below zero. Precision was not a biggie. I've seen wires with just square knots tied in them to hook them together. So, the wiring is always a challenge that you might as well figure out when you get one of those trucks. Typically, you've got to do the brakes and fix the wiring, but probably not the engine. The radiator is usually plugged.

MBJ: With many of these trucks no longer in production, what do you do about parts?

JD: I try to find out where the old junked ones are and start there for the parts. For instance, there's an engine called a Waukesha. It isn't manufactured in the same way today, but I try to find out who has parts for those things because I sometimes have to rebuild the engine. The only thing I don't do is paint. I let a body shop do that stuff.

MBJ: Where do you obtain your trucks?

JD: I'm now in a position where people call and ask me if I would like to buy a particular snow plow. I got my first truck out of Uncle Henry's, Maine's weekly economic indicator. Two dollars and you find out how bad the economy is in Maine. It depends on how thick Uncle Henry's is and how much stuff Maine people want to unload. So, I got a lot of them out of Uncle Henry's, and I know folks that buy and sell used snow plows. They'll call me if they've got something interesting.

MBJ: How did you first become interested in truck restoration?

JD: I worked my way through college and law school working for H.E. Sargent up in Stillwater building roads, where I drove some big Mack trucks. I guess it's the boy in me, but I like the noise of the big diesels, which are frowned on today because they're smoky. I decided someday when I had a little spare time and spare money that I would revisit those and maybe restore some of them.

MBJ: What is the most rewarding aspect of your interest in truck restoration?

JD: The people that I meet. I'll take these trucks to truck shows and I'll have at least half a dozen people come up and want to talk about snow plowing in the old days. I've met some wonderful old guys who plowed snow. There was a fellow in Lincolnville, Paul Thomas. I asked him: "What was the longest stretch you have ever plowed snow?" He said: "Seventy-four hours." Think of that today! So you get a sense of the history of the plows, a history of how people coped, and an even get appreciation for what you've done. I have a truck from Sangerville, the first one I ever did actually. It was owned by a fellow who was a well known small contractor up there. One day, his family showed up at Owls Head for a truck show not knowing that truck was there. They saw it and we had a wonderful time talking. The folks who are interested in this stuff are an egalitarian bunch. It's not as with cars; the truck shows aren't judged. Somebody will roll into a truck show with a forty-year old truck that is used every day, or folks will visit like the Valpey family from New Hampshire, who come with a crew and a foreman.

MBJ: Any intersection between your interest and your legal world?

JD: I think there is. After a sometimes frustrating day at the office, particularly in the winter when the Legislature is here, I can go home and work on one of those old trucks in the garage. I usually do one a winter and can relax a bit because I've switched to a different mode. Typically, I'm dealing with some stubborn rusty bolt that doesn't respond to anything other than brute force. Subtitles and fine lawyerly arguments don't make any difference. It's sort of a leveling kind of an influence, I think.

MBJ: What's the best advice you've ever received?

JD: It's advice I received as a lawyer when I was a young Assistant Attorney General. George West, a wonderful lawyer who trained me, said, "Doyle, the law is like the alphabet, life is like the alphabet. Get in at letter A and go to Z. Do not jump in at LMNOPQ." I think of George daily. The other day I was working on an issue involving an action of a state department. I heard George talking to me saying, go, start at A and see if the people who issued that particular assessment had the authority to do it. And guess what, the regulations said they didn't have the authority. That's pretty good advice.

Daniel J. Murphy is a shareholder in Bernstein Shur's Litigation Practice Group, where his practice concentrates on commercial and business litigation matters.

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

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We Should All Be Judges

Rosh Hashanah Sermon at Etz Chaim

by Hon. Kermit Lipez

Let me begin by thanking Rabbi Sky for asking me to offer some remarks to the congregation at this Rosh Hashanah service. I very much appreciate the privilege. Still, this is an unaccustomed setting for me, and I did not accept Rabbi Sky's invitation immediately. But Rabbi Sky is an old pro. Anticipating my unease, he put the invitation this way: "Judge, we would like to hear your voice on Rosh Hashanah." I could not say no to that invitation.

In truth, this season of repentance and awe is not my favorite. Of course, it is not supposed to be. To quote a High Holiday Prayer Book: "One confronts this season, its stern demands, its awesome potentialities, with trepidation."[1] Agreed. There is one moment in particular that unsettles me. It is the concluding service on Yom Kippur when we must confess our sins as the gates of God's forgiveness, of deliverance from our sins, begin to close. A portion of the prayer goes like this:

> We all have committed offenses; together we confess these human sins:
>
> The sins of arrogance, bigotry, and cynicism; of deceit and egotism, flattery and greed, injustice and jealousy.
>
> Some of us have kept grudges, were lustful, malicious, or narrow minded.
>
> Others were obstinate or possessive, quarrelsome, rancorous, or selfish.
>
> There was violence, weakness of will, xenophobia.
>
> We yielded to temptation, and showed zeal for bad causes.[2]

I always have two reactions to this confession, both defensive. First, I comfort myself by noting that the prayer is a collective, communal confession. Although I am acknowledging that the listed sins can be found in the community, I am not necessarily confessing to any particular sin. The culprit could be somebody else. "I may have done some of those things," I say, "but not all of them." Second, to the extent that I may be implicated in a sin or two, I ask God to take a more balanced view of my performance. "Look at me whole," I say, "consider the totality of my record, the good and the bad. Otherwise, I cannot be judged fairly."

Photo of Etz Chaim Synagogue in Portland provided by the Maine Jewish Museum.

Hearing this defense, some of you are surely saying to yourselves: "Kermit, you sound just like a judge. Relax. You are in a synagogue. You should be praying, not bargaining. Save the judge stuff for the courtroom." Fair point. Nevertheless, I think this "judge stuff" does have value outside the courtroom. Believe it or not, there are lessons for living to be learned from judges. For example, there is no such thing as collective guilt in the courtroom. When judges sentence criminal defendants, they must assess individual culpability, and they must impose sentences that reflect the totality of a defendant's life and record. In deciding difficult cases of all kinds, judges accept that complexity is the norm, and that fair decisions require a careful analysis of conflicting facts, opinions, values, and legal principles. Although the legal process produces losers, judges know that those losers do not become unworthy of respect or sympathy. Ironically, judges are often the least judgmental of people. At the slight risk of overstatement, I think the world would be a better place if journalists, politicians, the religiously committed, and just plain folks thought more like judges, or at least some judges. Let me give you a recent example of what I mean.

Richard Goldstone is a retired justice of the Constitutional Court of South Africa. Several years ago my wife Nancy and I had the privilege of visiting with Justice Goldstone and his wife when they were in Portland, where Justice Goldstone delivered a lecture on the future of international criminal justice. Justice Goldstone is a gentle, thoughtful man who has devoted his professional life to the elimination of injustice as he sees it. As a liberal judge in the apartheid era, his work contributed significantly to the dismantlement of apartheid in South Africa.[3] He was the Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and

Rwanda. He has been active in the Jewish National Fund. He has served as president of an organization which builds schools in Israel and elsewhere, and he is a governor on the Board of Hebrew University in Jerusalem. An honorary doctorate that the university bestowed on him in 1994 cites Goldstone's "deep and personal commitment to Israel and the Jewish people."

But Goldstone is now vilified by large segments of the Jewish community in South Africa and internationally because he chaired the United Nations Commission that investigated human rights abuses by Israel and Hamas in the 2009 Gaza war. Focusing on what the commission viewed as the targeting of civilians by Israel and Hamas, which fired rockets on Israeli towns for seven years, it cited human rights abuses on both sides of the conflict.

There is reason to question Goldstone's judgment in agreeing to chair this Commission. The United Nations Human Rights Council, which launched the probe, had a record of bias against Israel. As a *Newsweek* article pointed out, the Council's resolution on the Gaza war referred to violations of international human rights law by Israel alone, not Hamas, thereby appearing to prejudice the outcome. Perhaps naively, Goldstone says that he thought leading the U.N. Fact Finding Mission on the Gaza Conflict would allow him to do something good for both sides by helping to end the targeting of civilians.

But if there is reason to question Goldstone's judgment in taking on this task, there is also reason to question the judgment of those in the Jewish community who vilify him or worse. For the first time since he faced death threats from white South Africans in the 1990s, Goldstone now lives in Johannesburg with armed guards who follow him wherever he goes. He has been denounced as a traitor to fellow Jews and the sponsor of a blood libel. The South African Zionist Federation tried to block Goldstone from attending his grandson's Bar Mitzvah in Johannesburg, only weeks after Goldstone's daughter, the mother of the Bar Mitzvah boy, had undergone reconstructive surgery following a double mastectomy. To spare his family the anguish of a demonstration in front of the synagogue, Goldstone planned to stay away from the ceremony until Jewish leaders in South Africa agreed to call off the protest in exchange for a meeting with Goldstone, which he accepted. Pointedly, at the bar mitzvah celebration, the Rabbi parted the hora circle to include Goldstone in the dancing.

The Rabbi had it right. Whatever one might feel about the merits of the United Nations report (and there are certainly problems with it), there was a grave disproportion between Goldstone's offense and the reaction of many in the Jewish community to it. He did not deserve death threats. He did not deserve to be branded a traitor. He did not deserve to have his distinguished career reduced to a caricature by those so committed to the Israeli cause that they could not see the totality of Richard Goldstone's career, including his support of Israel, or the complexity of the issues that he had tried to address in good faith.

What happened to Richard Goldstone is not an anomaly. It is a commonplace happening in today's heated political, social and religious discourse. In a style of thought anathema to judges, complex issues are reduced to simple, misleading truths of right and wrong. Those who embrace these truths demonize those who disagree and, in so doing, justify all manner of abuse. One sees this phenomenon in the so-called cultural wars in this country, in much of our political debate, and in the religious strife around the world.

I have two antidotes for this phenomenon, neither of them realistic. But I think they make a point. The first involves education, the great hope on so many fronts. Here and abroad, we should spread the gospel of the liberal arts education, much in vogue when many of us went off to college, but now less so in this increasingly utilitarian, resource poor world. As one writer has put it, the liberal arts education was "characterized by a determined inutility."[4] We studied history, literature, philosophy, music and art, engaged in passionate discussions with classmates about the meaning of life, and solemnly invoked our new buzz word – "complexity." Everything was complex – religion, relationships, historical events, literary meaning, the very act of being. Unsettled by a cascade of new ideas, deprived of certainty, we became melancholy, fatalistic. What would be would be.

Martha Nussbaum, the Chicago law professor and cultural historian, extols the liberal arts education precisely because of that unsettling effect on us.[5] Provoked by our studies, we were questioning conventional assumptions and dictates, learning to understand and appreciate world views and cultures different from our own, and becoming adults who could function, as she sees it, with "sensitivity and alertness as citizens of the whole world."[6]

When I went off to Haverford College in 1959 from the small town of Lock Haven, Pennsylvania, I needed to have my world view expanded. My idea of heavy reading was racing home on Friday after school to immerse myself in the newest Sports Illustrated, just arrived in the mail. So imagine my surprise when I immediately encountered in my freshman English course a book that probed the dark side of small town life. The book was Sherwood Anderson's *Winesburg, Ohio*, a collection of connected short stories about sad figures blighted by life in a small Ohio town.

I was mesmerized by those stories. There was much in them that evoked feelings about my own small town experience. But I was particularly moved by the prologue to the stories, called "The Book of the Grotesque." It described the dreams of an old writer whose sleep was disturbed by a long procession of figures who were all grotesque in a particular sense. Through the words of the old writer, Anderson explained their grotesqueness in this way:

> [I]n the beginning when the world was young there were a great many thoughts but no such thing as a truth. Man made the truths himself and each truth was a composite of a great many vague thoughts. All about in the world were the truths and they were all beautiful.

> . . . There was the truth of virginity and the truth of passion, the truth of wealth and of poverty, of thrift and of profligacy, of carelessness and abandon. Hundreds and hundreds were the truths and they were all beautiful.
>
> And then the people came along. Each as he appeared snatched up one of the truths and some who were quite strong snatched up a dozen of them.
>
> It was the truths that made the people grotesques. . . . [T]he moment one of the people took one of the truths to himself, called it his truth, and tried to live his life by it, he became a grotesque and the truth he embraced became a falsehood.[7]

Anderson's profound insight has never left me. Life is far too complicated for all-embracing truths. If we live our lives by one simple truth, if we judge everyone and everything by one simple standard of right and wrong, we become one of those grotesque figures who disturbed the old writer's sleep in Anderson's prologue. The critics in the Jewish community who threatened Richard Goldstone's life, who branded him a traitor, who were prepared to demonstrate at his grandson's Bar Mitzvah, were grotesque in precisely the sense meant by Anderson. They took a truth – the importance of Israel's survival, and turned it into a falsehood – Israel can do no wrong. In trying to reduce Goldstone to a grotesque figure – one defined by a possible misjudgment rather than a lifetime of laudable work – these critics became grotesque figures themselves.

Would my freshman English course, and the description of the grotesques in *Winesberg, Ohio*, have induced a more balanced and forgiving view of Goldstone among his critics? Or, to put the question more realistically, would some rough equivalent of that educational experience, early in life, have at least taught these critics that one can make a mistake without being evil, and that zeal for a cause can turn truth into falsehood? I believe in the power of education. I believe that we benefit from an education, early in life, that forces us to question conventional assumptions, induces humility about the rightness of one's own beliefs, and fosters respect for world views and cultures different from our own. I worry that so much education today, here and abroad, closes the mind of the young and breeds a dangerous intolerance for the beliefs and practices of others. I am grateful for the privilege of a liberal arts education that made me forever wary of easy, unassailable truths.

I mentioned a second antidote for this troubling tendency in many quarters to see the world in black and white. This antidote is even more unrealistic than my liberal arts education idea. I have suggested that thinking like a judge has value outside the courtroom. Therefore, I recommend that the purveyors of simple truth spend time in the company of some judges, or at least study their work. Although judges make decisions constantly, our decisions are often preceded by what my late colleague Frank Coffin referred to as a "state of prolonged indecisiveness,"[8] with the judge making tentative, conflicting judgments as the case runs its course, before announcing the decision with a certainty that often belies the uncertainty that preceded it. In their hearts, most judges know that the decision in a close and difficult case may only be an approximation of the truth. Some cases just defy clear answers. Judges must learn to be comfortable with complexity, shades of grey, difficult choices, unsatisfactory outcomes.

I must be candid, however. For some judges, that lesson is not so easy. Like so many others, they succumb to the lure of an easy answer. Last June, retired Supreme Court Justice David Souter delivered a commencement address at Harvard that received great attention in legal circles. Unlike some of his more garrulous colleagues, Justice Souter rarely gives speeches, and he has done little or no extracurricular writing that describes his judicial philosophy. Given his famous reticence, there was some surprise that Justice Souter agreed to speak at the Harvard commencement, and there was considerable speculation about what he might say. Happily, in a beautifully crafted speech, he chose to say a lot about the folly of simplistic judging.

Justice Souter described the notion among some judges and academicians that Supreme Court Justices called upon to apply the Constitution to the great issues of the day can just read the plain text of the Constitution to make the decision. He referred to this notion of constitutional judging as the "fair reading" model of judging.[9] According to Justice Souter, "On this view, deciding constitutional cases should be a straightforward exercise of reading fairly and viewing facts objectively."[10]

Justice Souter views that model of judging as implausible. The many open ended phrases of the Constitution – due process of law, unreasonable searches and seizures, establishment of religion, freedom of speech – do not lend themselves to easy application. Moreover, the Constitution, Justice Souter notes, "contains values that may well exist in tension with each other."[11] Rather than being a simple contract, the Constitution "grants and guarantees many good things, and good things that compete with each other and can never all be realized, all together, all at once."[12] Put another way, "the Constitution embodies the desire of the American people, like most people, to have things both ways. We want order and security, and we want liberty. And we want not only liberty but equality as well. These paired desires of ours can clash, and when they do a court is forced to choose between them, between one constitutional good and another one."[13] As Justice Souter puts it again: "The Constitution is a pantheon of values, and a lot of hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is truly at odds with another."[14] Confronted with such cases, "[j]udges have to choose between the good things that the Constitution approves, and when they do, they have to choose, not on the basis of measurement, but of meaning."[15]

Trying to understand the persistent criticism of the Supreme Court

for its so-called departure from the fair reading model, Justice Souter concludes that "something deeper is involved, and that behind most dreams of a simpler Constitution there lies a basic human hunger for the certainty and control that the fair reading model seems to promise. And who has not felt that same hunger? Is there any one of us who has not lived through moments, or years, of longing for a world without ambiguity, and for the stability of something unchangeable in human institutions? I don't forget my own longings for certainty, which heartily resisted the pronouncement of Justice Holmes, that certainty generally is illusion and repose is not our destiny."[16]

Exactly right. Although we could never put it so eloquently, we were beginning to understand in those unsettling freshman encounters with *Winesberg, Ohio* and the like that certainty is an illusion and peace of mind is not our lot. Our *Sports Illustrated* world was soon gone forever, replaced by a world so complicated, so variable, that we had to accept a prolonged state of uncertainty while still finding a way to live productively and well. Hopefully, many of us have been able to do that.

Yet, as Justice Souter suggests, there was another choice available – submit to the "longing for a world without ambiguity, and for the stability of something unchangeable in human institutions." Many people chose that unambiguous world. I understand that choice. There is surely comfort in it. As a rational preference for a more secure life, there is nothing wrong with it. But the choice becomes deeply problematic if it is accompanied by an intolerance, indeed, a hatred, for those who do not share the clarity of the believer's world view. We see that intolerance in some segments of the body politic, where the rhetoric of denunciation for those with contrary views is so inflammatory that it inspires fear of physical harm. It is present in the ugly debate over the siting of the mosque and Islamic cultural center near Ground Zero. We know too well the casualties of religious extremism here and abroad. And some of the critics of Justice Goldstone, in the extremity of their anger, demonstrate the potential virulence of an inability to see the humanity of a dissenter.

I hope that the harsher critics of Justice Goldstone go to High Holiday services this year, and participate in the concluding service on Yom Kippur. If they do, they will participate in the communal confession that I quoted earlier. They will cite the sins of arrogance, bigotry, grudges, narrow-mindedness, rancor, and xenophobia. But will they see themselves in these sins, or will they be so blinded by self-righteousness that they will think these sins only apply to others?

I hope that they see themselves. Then they will feel the need to do what I do when feeling myself on trial at this time of year. They will ask to be judged individually. They will ask to be judged whole. They will ask for recognition of the totality of their performance and the complexity of their being. If they do that, and if they understand the relevance of what they seek for themselves to the treatment of their fellow human beings, the gates of deliverance on earth may open wider for all of us.

Kermit Lipez is a Judge on the United States Court of Appeals for the First Circuit.

1. Gates of Repentance ix (Chaim Stern, Editor, 1978).
2. *Id.* at 513.
3. The background in this section is drawn from a June 7, 2010 article by Dan Ephron in Newsweek: "Man in the Middle: Investigating Israel's 2009 war in Gaza made Richard Goldstone an enemy of the state."
4. Stanley Fish, *The Last Professor* (Opinionator Blog), N.Y. Times, Jan. 18, 2009, *available at* http://opinionator.blogs.nytimes.com/2009/01/18/the-last-professor/ (last visited Nov. 29, 2010).
5. Martha C. Nussbaum, Cultivating Humanity 8-11 (Harvard University Press 1997).
6. *Id.* at 8.
7. Sherwood Anderson, Winesburg, Ohio 24-25 (The Viking Press 1958).
8. Frank M. Coffin, The Ways of a Judge: Reflections from the Federal Appellate Bench 63 (Houghton Mifflin 1980).
9. Justice David H. Souter (Ret.), Remarks at the Harvard University Commencement, May 27, 2010.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*

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Dec 10 **10th Annual Employment Law Update** • Sponsored by the MSBA Employment Law Section. Live Program and Live Webcast: Hilton Garden Inn, Freeport. CLE Credits: 4.75, including 1.0 ethics/prof. resp.

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Jan. 14 **Drafting Pleadings and Motiions - 2010** • Video Replay: Maine State Bar Association, Augusta. CLE Credits: 5.75, including 1.0 ethics/prof. resp.

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Feb. 11 **Seismic Shifting: Bankruptcy in a Time of Change** • Video Replay: Maine State Bar Association, Augusta. CLE Credits: 6.0, including 1.25 ethics/prof. resp.

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April 11 **ALPS - Ethics 2011** • Live Program: Holiday Inn by the Bay, Portland. CLE Credits: 3.0 ethics/prof. resp.

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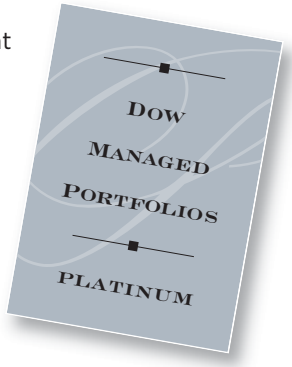

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