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Fee-Shifting Legislation: A Creative Yet Familiar Solution to Indigent Legal Access in Maine

Donald Fontaine

If the insufficiency of indigent legal services in Maine is not at the forefront of your consciousness as a practicing attorney within the state, you have likely been living atop a remote lighthouse with no direct connection to the outside world.

A new bill before 131st Maine Legislature titled "the Equal Access to Justice Act" is proposing a new but familiar approach to increasing indigent access to the legal system in Maine. Authored by Maine-native attorney Donald Fontaine and sponsored by Representative Charles Skold of Portland, the legislation would allow for fee-shifting – a practice already prevalent in areas such as labor and employment – to be utilized in civil matters more broadly.

Specifically, the bill proposes that where a low-income individual is the prevailing party in a civil suit against a private legal entity such as a corporation, LLC, or financial institution, the legal fees incurred by the indigent prevailing party will be "shifted" to the unsuccessful corporate entity. "This is a way of providing counsel to poor people that costs the government nothing," said Attorney Fontaine in a recent interview with the *Maine Lawyers Review.*

Back in 2020, Fontaine authored an article in the *Maine Law Review* titled "Fee Shifting: A Proposal to Solve Maine's Intractable Access to Justice Problem." Having completed considerable research into the shortcomings of indigent legal services in Maine, Fontaine realized two things. First, that no substantial funding changes were going to be forthcoming from the state or federal government, and second,

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Quote of the Fortnight

Let me never fall into the vulgar mistake

of dreaming that I am persecuted

whenever I am contradicted.

- Ralph Waldo Emerson, American essayist, lecturer, philosopher, abolitionist, and poet (1803-1882)

Deed Restrictions vs. Short Term Rentals

David Soley

Glenn Israel

With miles of picturesque coastline, an abundance of amazing seafood, a National Park, and countless other draws, Maine has long been a vacation destination for New Englanders and beyond. Renting a house in Maine for a summer stretch is a tradition for many, and numerous communities have been home to summer rentals for decades without major issues. But with the proliferation of self-rental sites like Airbnb, VRBO, and their kin, the short-term housing rental market has expanded exponentially, and, like with any sudden growth, it has come with a handful of issues.

Among the most prevalent, and oft-discussed issue is the use of short term rentals (STRs) as "party houses," rented out for the purpose of hosting a large party. These inevitably ran into resistance from neighbors and communities seeking to keep things quiet, and in response, Airbnb formally banned "all parties and events" at their properties around the world. *See* https://news.airbnb.com/official-codification-of-party-ban/. Locally, we've seen the regulation of STRs by cities like Portland, Rockland, and Bar Harbor; and with a STR property in Cushing, the Law Court was recently called upon to resolve a question of land use, as it pertains to short-term rentals and restrictive covenants in deeds.

The case of *Morgan, et al. v. Townsend*, 2023 ME 62, involves Erik Townsend's oceanfront property in Cushing, which he rents out as an STR. The property has two buildings – a five-bedroom, five-bathroom main house; and a two-bedroom, one-bath guest cottage with a kitchen. Townsend advertises the property as accommodating up to thirty-two people, and highlights a 900-square-foot recreation room, a hot tub, and a commercial-grade lobster cooker. Townsend began renting out the property in 2019, advertised as the "best oceanfront property for large groups on the coast of Maine!"; and between May 2019 and September 2021, the place was rented to 59 different groups of people.

In a small community like Cushing, with a population just under 1,500, the added traffic and noise did not go unnoticed or appreciated, and in June 2020, neighboring property owners Deborah and Douglas Morgan, and P. Jason Ward ("the neighbors") filed suit against Townsend. They asserted a claim of nuisance for the noise and trash generated by the rental property, and sought a declaratory judgment that Townsend was in violation of restrictions contained within the property's deed that restricted use of the property to "private residential purposes," prohibited "trade or business" from being conducted thereon, and restricted development to "a private dwelling house for use and occupancy by one family" along with any usual and customary out buildings.

After cross-claims and amended claims were filed, both sides moved for summary judgment, which the Business and Consumer Docket granted in May 2022 – in favor of the neighbors. In its decision, the BCD found that the restrictions unambiguously burdened Townsend's property, and that his pattern of short-term rentals of the property to large groups violated the restriction that it be used only for "private residential purposes." It entered a permanent injunction enjoining Townsend from using the property "in violation of the restrictive covenant," a decision which Townsend appealed to the Law Court.

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Law Court Upholds Lengthy License Suspensions

In a pair of recent decisions, the Law Court recently addressed the suspension of licenses of various varieties – driving, hunting, and guiding – and upheld lengthy suspensions in both instances, based upon the facts involved in each case.

In *Wood v. Dept. of Inland Fisheries & Wildlife*, 2023 ME 61, Daniel Wood appealed from the Commissioner of the Department of Inland Fisheries and Wildlife's suspension of his hunting and guiding licenses, after pleading guilty to a charge of reckless conduct. The charge had been reduced from the originally-charged discharge of a firearm or crossbow near a residence, levied after Wood was seen shooting a deer from a public road in Lewiston, and said deer was less than 100 yards of a residence.

After Wood pled guilty to the reckless conduct charge, the Commissioner revoked his hunting license for three years, as well as his hunting guide license. Wood first appealed the decision to the Superior Court, then the Law Court, arguing that the statutes and regulations governing licensing were overbroad and vague, and that license revocation was only mandatory if hunting was one of the elements of the crime charged. Looking to the operative statutes and finding that a license *must* be revoked after convictions under Title 17-A while hunting or pursuing game, the Law Court found suspension of Wood's hunting license appropriate, and mandatory.

As to his hunting guide license, the Law Court noted that guides are expected to have "experience based learning," and are also expected to know and follow the laws and regulations governing hunting, and since he violated State law in shooting the deer where he did, that sufficed as grounds for revocation. The Commissioner has wide discretionary authority in these instances and, given the statutes and the circumstances of the case, that authority was not exceeded, nor was it excessively delegated by the Legislature, as Wood argued. Overall, the Court found the suspensions of Wood's hunting and guiding licenses were well within the Commissioner's authority, and the standards were sufficiently clear to put him on notice that violating Maine hunting laws would put his licenses in jeopardy of lengthy suspensions.

In *State v. Santerre*, 2023 ME 63, the Law Court was called upon to address the imposition of three consecutive license suspensions, after a traffic incident where defendant fell asleep behind the wheel, and struck and killed three pedestrians. After being charged with three counts of committing a motor vehicle violation that resulted in death, Santerre admitted to all three, and the case went to sentencing.

The trial court, pointing out that "Distracted driving comes in many forms, including driving while fatigued," imposed a $5,000 fine and a three-year license suspension on each count, to run consecutively; for a total of $15,000 in fines, and a nine-year license suspension. Santerre appealed to the Law Court, arguing that the traffic accident should not have been treated as three separate incidents, and that the trial court erred in imposing consecutive, rather than concurrent, suspensions.

The Law Court found that, because Santerre's actions resulted in the deaths of three people, it was properly charged as three separate civil violations. "If a driver's violation of section 2413-A results in the deaths of multiple people, the driver violates section 2413-A multiple times."

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In Memoriam

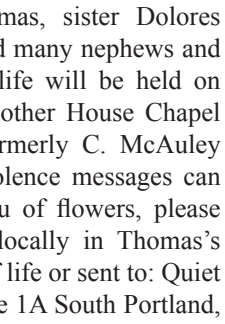
Thomas Philip Elias of Cape Neddick, passed away on Sept. 7, 2023. He was born in Lowell, MA, on June 15, 1957, to Philip Thomas Elias and Margaret Mary Elias. He leaves behind his wife, Jo Ann Jordan Elias, and their two sons, Jordan Philip Elias of Berlin, Germany, and Berkeley Thomas Elias of Biddeford.

Elias believed in second chances. With the support of his wife, he established Elias Law Offices in York, based on this principle. He fought for fairness, justice, and equity. Elias guided and defended those going through life's darkest times, providing them with light and guidance to see their way through to their second chance. The couple raised two sons, instilling in them the same values. In addition to being an impeccable attorney and an extraordinary Dad, he was a wonderful husband and a fine man.

Louise Kathryn Thomas, 71, passed away peacefully on September 3, 2023 at her home surrounded by family. A lifelong Mainer and a pillar of the Portland legal community for over 40 years, she will be missed by family, friends, and former colleagues. Thomas was born in Portland on January 5, 1952 to Dr. Joseph and Alma Thomas. She and her six siblings were raised in Westbrook, where their father worked as a research director at the S.D. Warren paper mill. Thomas was by all accounts an intelligent, precocious, and kind-hearted child with a strong sense of justice and a fiercely independent spirit. She graduated from Cornell U. in 1974, and from Maine Law in 1977. She then took a job at Pierce Atwood in Portland, where she would remain for the next four decades.

At that time, only a small fraction of Maine lawyers were women, and although Pierce Atwood is one of state's oldest and largest law firms, Thomas was just one of three female attorneys employed there. This forced her to confront and overcome many barriers as she forged a career as a litigator and became the firm's second-ever female partner. She grew into a nationally-recognized expert in energy and insurance litigation, representing a diverse range of clients that included major Maine businesses, multi-national corporations, and even the State of California.

Thomas used her platform to become a leading voice for Maine women in the legal profession. Whether it was pushing for improved maternity benefits, organizing a day care program, mentoring junior attorneys, hosting countless baby showers and luncheons, or bravely speaking her mind when others were unwilling to listen, she was never afraid to advocate for what she believed in and for those who followed in her footsteps. Thomas's impact was felt far beyond the walls of Pierce Atwood. In addition to her extensive *pro bono* work in the local community, Louise served on several advisory committees for the Maine Supreme Judicial Court and was an active member of both the Maine State Bar Association and the Maine Trial Lawyers Association. She participated in the task force that revamped Maine's code of professional responsibility between 2006-2009 and was also a driving force behind the foundation of the Maine Assistance Program for Lawyers & Judges, which supports legal practitioners struggling with substance abuse. Thomas also taught at Maine Law and presented nearly 100 continuing education courses across the country.



In 2011, she received the MSBA's Caroline Duby Glassman Award for her efforts to advance the participation and promotion of women in law. And in 2014, she was the first ever female recipient of the MTLA's League of Legends Award for her ongoing contributions to civil justice and the Maine legal community. Thomas was most fond of the time she spent doing the things she loved with her friends and family. Her many passions and hobbies included reading, attending symphony and ballet performances, hiking in Baxter State Park, camping at Millinocket Lake, birdwatching, exploring Casco Bay, and traveling to new places around the world. She was always looking for opportunities to expand her horizons, seek out new experiences, and learn new things.

Thomas also made time to give back to her community in important ways. This included her long-time patronage of local organizations focused on nature conservation, performing arts, women's issues, early childhood education, and substance abuse treatment. She helped out in less public ways, too, whether it was giving counsel to local women in difficult situations, providing a stranger a shoulder to cry on in a support group, reading with local school children, or helping a neighbor when times were tough. In May 2019, just months after retiring from the law, Louise was diagnosed with an advanced form of leukemia. She decided to fight. Thomas defied the odds and survived another four years. Her battle was rarely easy or straightforward, but she treasured the extra time she gained with her friends and family and did all she could to make the most of it. Her journey ended as she would have wanted -- on a beautiful autumn day at her home in Cape Elizabeth with family and friends. Thomas is survived by husband, Paul Beesley, mother Alma Thomas, son Eric Romeo (Ashley Flynn), son Christopher Romeo (Sasha Boheme), brother James Thomas (Katherine Prentice), sister Anne Marie Thomas, sister Dolores Torok (Ernest), sister Mary Patricia Thomas, and many nephews and nieces. A celebration in honor of Thomas's life will be held on October 20, 2023 from 2:00-5:00 pm at the Mother House Chapel of the Stevens Square Community Center (formerly C. McAuley HS), 631 Stevens Ave., Portland. Online condolence messages can be submitted at www.mainefuneral.com. In lieu of flowers, please provide new children's books to be donated locally in Thomas's name. Books can be brought to the celebration of life or sent to: Quiet Reading Time, PMB 137, 50 Market Street. Suite 1A South Portland, ME 04106-3647.

NEWS OF LAWYERS

The Maine Council on Aging (MCOA) announced the 2023 award recipients who were honored for their inspired and sustained leadership at the CHANGE AGEnt Summit, on September 27. The **2022 Lasting Legacy Award** recognizes and celebrates the sustained leadership of people whose commitment, ideals, and actions throughout their careers have brought about lasting and positive change to the lives of older Mainers. One honoree will be **Leo Delicata**, who has spent over 30 years in Maine advocating for public policy that supports healthy and secure aging, and creates equitable and just systems for vulnerable older people. A staff member at Legal Services for the Elderly, he lent his legal expertise on a broad range of topics, including real estate, taxes, health care, and the courts, and helped shape current laws providing protection from elder abuse and financial exploitation, and pathways to justice for those impacted.

Drummond Woodsum's **Stacey Caulk** has been named as Co-Leader of the firm's Land Use and Conservation practice group. Now co-led by Caulk and **David Kallin**, the Land Use and Conservation practice provides services to landowners, land trusts, conservation organizations, environmental non-profits, and local governments in their efforts to protect wild, scenic, and ecologically sensitive areas. Kallin has served as the practice group leader for over 11 years.

82 Verrill attorneys were recognized as "Best Lawyers" by *Best Lawyers® 2024*, including 10 attorneys named "Lawyer of the Year." Twelve were featured on their "Ones to Watch" list, to recognize and highlight attorneys who have only been in private practice for less than 10 years, but are already making a name for themselves.

Augusta Office

Michael V. Saxl (Government Relations Practice), *Lawyer of the Year: Gov. Relations Practice

Portland Office

David S. Abramson (Family Law, Sports Law) *Lawyer of the Year: Family Law

Eric D. Altholz (Business Organizations (including LLCs and Partnerships), Employee Benefits (ERISA) Law, Health Care Law)

Tawny Alvarez (Labor and Employment Law – Management) *One to Watch

Scott D. Anderson (Administrative / Regulatory Law, Environmental Law, Land Use and Zoning Law, Litigation – Environmental, Municipal Law) *Lawyer of the Year: Litig. - Land Use and Zoning

Charles P. Bacall (Copyright Law, Corporate Law, Trademark Law) *Lawyer of the Year: Copyright

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Deborah Firestone, Esq.
President and Executive Editor
df@mainelawyersreview.com

Regan A. Sweeney, Esq.
Vice President and Publisher
regans@mainelawyersreview.com

Contributing Writers

Erin Van Den Berghe
ev@mainelawyersreview.com

Regan A. Sweeney, Esq.
regans@mainelawyersreview.com

Mia Del Bene
Production Manager
delbene.design@gmail.com

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MAINE LAW COURT

ADMINISTRATIVE PROCEDURE
Guide / Hunting License Suspension-Revocation

Where Superior Court enters judgment upholding Commissioner's decision to suspend plaintiff's hunting and guide licenses, based on plaintiff's conviction for reckless conduct in shooting a deer from roadway and near a residence, judgment will not be overturned on appeal as error.

Daniel Wood appealed from the Androscoggin County Superior Court's entry of a judgment affirming the decision of the Commissioner of the Department of Inland Fisheries and Wildlife to revoke or suspend his hunting license for three years, and his guide license for one year. On appeal, Wood argued that the Commissioner erred in interpreting a statute as requiring mandatory revocation; the statute is unconstitutionally vague; and the Department's rules were the result of an unconstitutional delegation of authority from the Legislature.

Based upon a November 2018 incident, Wood was initially charged with discharge of a firearm or crossbow near a dwelling (Class E), 12 M.R.S. § 11209(1)(A), (2). Through a plea agreement, the charge was changed to reckless conduct (Class D), 17-A M.R.S. § 211, to which Wood pled guilty, and the original charge was dismissed. The court entered its judgment and commitment on January 6, 2022, ordering Wood to pay a $1,000 fine.

By letter dated January 25, the Commissioner informed Wood that, pursuant to 12 M.R.S. § 10902, his "privilege to obtain a hunting license and right to apply for or obtain a hunting license" was revoked until January 6, 2025, because of the conviction for reckless conduct. The letter further explained that the one-year suspension was mandatory under § 10902, and that the additional, three-year concurrent suspension was nonmandatory, but was being imposed at the discretion of the Commissioner.

Wood received a second letter, dated the same day, indicating that his "privilege to obtain a guide license and right to apply for or obtain a guide license" had been similarly revoked until January 25, 2023, due to the same conviction. Both letters informed Wood he had thirty days after receipt to request an administrative hearing.

Wood timely requested an administrative hearing as to both licenses, and a hearing was held on April 27, 2022. Wood and the game warden who investigated the 2018 incident both testified, and the Department introduced its file on the matter, including the game warden's report, without objection.

Based upon the report, Wood, a registered Maine Guide, shot a deer from a public road in Lewiston, and had been seen doing so by a witness. Subsequent measurements determined the deer was 86 feet from a residence when it was shot. Wood did not dispute that the deer was within 100 yards of a residence when he shot it, § 11209(1)(A), but argued the statutes and regulations on which his revocation was based were overbroad, vague, and standardless. He further argued that revocation was only mandatory if he were convicted of a crime that involved hunting as an element.

The Commissioner issued a written decision on May 27, 2022, in which it found that the reckless conduct conviction was "sufficient grounds for the revocation of Wood's hunting license, and of his right to apply for a hunting license;" and that § 10902 had been "properly applied." Given the circumstances, the Commissioner found an additional three-year suspension of the right to apply for a hunting license was appropriate.

Revocation of the guide license was also appropriate, the Commissioner found, because guides are required to have "experience based judgment" to ensure safety, and that guides are required to understand and abide by all laws and rules regarding the licensed activities. Wood timely petitioned the Superior Court for review, which affirmed the decisions, by judgment dated November 21, 2022. Wood timely appealed.

The Law Court noted that § 10902(4) specifically mandates that "a person's license *must* be revoked" under certain circumstances, including after convictions for offenses under Title 17-A "while on a hunting or fishing trip or in the pursuit of wild animals, wild birds or fish." (emphasis added). Similarly, persons holding guide licenses are subject to professional standards of conduct adopted by the Commissioner through the agency rulemaking process. Among the standards are requirements that guides "have experience based judgment that helps prevent unsafe situations," and that they "fully understand and abide by all state and federal laws and rules involving the activities." *See* 09-137 C.M.R. ch. 24, § 24.08(A)(3), (5).

The Court then turned to Wood's first argument on appeal -- that revocation of his hunting license was not required because the offense for which he was convicted did not include in one of its elements that he was engaged in the pursuit of a wild animal. Reviewing statutory interpretation *de novo*, the Law Court found the language of § 10902(4)(A) "very clear." It found no requirement that a predicate offense include the act of "hunting, fishing, or pursuing wild animals" as suggested by Wood, but rather the opposite: mandating a one-year suspension where a licensee is convicted of violating *any provision* of Title 17-A while on a hunting or fishing trip or in the pursuit of wild animals."

The Court found that interpretation "makes sense" in the context of § 10902, which also permits suspension when a licensed person's conduct while hunting has threatened public safety. § 10902(5). Finding "substantial evidence" that Wood was convicted of a Title 17-A offense, and that the underlying conduct occurred while Wood was engaged in the pursuit of a wild animal, the Court found the Commissioner's interpretation and application of the statute correct, as the "action revoking Wood's hunting license for the mandatory minimum one-year period was supported by substantial evidence adduced at the administrative hearing."

Wood next argued that § 10902 is unconstitutionally vague because it does not provide notice that conviction for reckless conduct can result in a mandatory hunting license revocation, and because it provides the Commissioner with such wide discretion that individuals can be targeted arbitrarily for license revocation. Reviewing constitutional interpretations *de novo*, the Law Court looked to the due process requirements within the U.S. Constitution, amend. XIV, § 1. Finding that it requires a statute to "provide reasonable and intelligible standard[s] to guide the future conduct of individuals and to allow the courts and enforcement officials to effectuate the legislative intent in applying these laws," the Law Court found the standard met here. *Me. Real Est. Comm'n v. Kelby,* 360 A.2d 528, 531 (Me. 1976).

Noting that "a person of common intelligence … would not have to guess at the statute's meaning," nor would they have to guess if it "requires revocation if a person is convicted of a crime for shooting toward a residence while hunting a deer that was less than 100 yards away from that residence." Looking to the discretionary authority of the Commissioner to add on to the mandatory suspension, the Law Court found "some guidance" provided "by the minimum revocation period of five years that applies when 'the killing or wounding of a human being has occurred.'" *See* § 10902(4)(A).

Given the statutory scheme, and the circumstances of the case, the Court found the Commissioner's discretionary authority "not so vague as to fail to provide notice or encourage arbitrary or discriminatory enforcement." § 10902(1), (2), (4)(A); *Doane v. DHHS*, 2021 ME 28, ¶ 17. "Wood has not overcome the presumption of constitutionality to demonstrate that the statute is unconstitutionally vague."

Wood next argued that the Legislature unconstitutionally

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MAINE LAW COURT

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delegated authority to the Commissioner to adopt standards of conduct, which, as applied, allowed the Department to target Wood arbitrarily for license revocation. The Court pointed to the Legislature's specific delegation of that authority, 12 M.R.S. § 12851, and the Legislature's authorizing the Commissioner to "establish standards of competency." Adopted through the rulemaking process were standards requiring guides to "have experience based judgment that helps prevent unsafe conditions," as well as "fully understand and abide by all state and federal laws and rules involving the activities in the classifications for which the Guide is licensed."

Assessing Wood's "excessive delegation" claim, the Law Court found "the Legislature acted well within constitutional bounds in delegating authority to the Commissioner to adopt competency standards through the APA rulemaking process based on the Department's expertise." Applying those standards to Wood, the Law Court found "the standards were sufficiently clear to warn of the revocation of his guide license if he either: (1) showed poor judgment ….; or (2) committed the crime of reckless conduct, 17-A M.R.S. § 211, in shooting at a deer from a public roadway and in the direction of a residence."

Judgment affirmed.

Wood v. Dept. of Inland Fisheries & Wildlife (Douglas, J.), 2023 ME 61, And-22-396, 9-5-23

On Appeal from Superior Court (Stewart, J.)

Verne E. Paradie, Jr. for Appellant.

Aaron M. Frey and Mark Randlett for DIFW.

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REAL PROPERTY RIGHTS

Short-Term Rentals

Restrictive Covenants in Deeds

Where trial court enters judgment finding that property owner violated restrictive deed covenants by renting out property for short-term rentals, and entering nonspecific injunctive relief, entry of injunction will be overturned on appeal as error, and matter remanded for issuance of more specific injunction.

Erik Townsend appealed from the Business and Consumer Docket's entry of summary judgment and injunction in favor of his neighbor-plaintiffs Debra and Douglas Morgan, and P. Jason Ward as Trustee of the P. Jason Ward Revocable Trust ("the Morgans and Ward"). On appeal, Townsend claimed the trial court erred in interpreting the restrictions in the deed to the real property involved.

Townsend, the Morgans, and Ward own three neighboring oceanfront lots in a residential subdivision in the Town of Cushing. Each lot is subject to a restrictive covenant contained in the deeds, dating back to the subdivision's creation in the 1960s, which, among other things, restricts use of the premises to "private residential purposes," prohibits "trade or business" from being conducted therefrom, and limiting construction to "a private dwelling house for use and occupancy by one family and such out buildings as are usual, customary, and appurtenant to a private residence." The restriction contains language indicating that it is intended to burden and benefit the other lots created from the same tract.

Townsend has on his lot a five-bedroom, five-bathroom main house, and a two-bedroom, one-bathroom guest cottage with a kitchen, which he advertises for rental as accommodating up to thirty-two people. The house is advertised as having a 900-square-foot recreation room, a hot tub, commercial-grade lobster cooker, a fire pit and more. Townsend himself has not lived on the property full-time since the 1970s, and had last visited it in 2019. Both the Morgans and Ward have resided primarily at their properties since 2020. Ward's property has a main house and guest house, though only the main house is winterized. The Morgans' property has a main house, as well as a garage with an upstairs bedroom and bath.

In 2019, Townsend began renting out the entire property for short intervals to one group at a time, advertised on Airbnb and VRBO as the "best oceanfront property for large groups on the coast of Maine!" Between May 2019 and September 2021, Townsend rented the property out to approximately 59 groups (up to 32 people per group), with the average group size being twelve. He did not limit rentals to family groups, nor did he inquire as to whether prospective renters were members of the same family. Townsend pays a property manager to coordinate rentals, cleaning and maintenance, reports the rental fees as income on his tax returns, and indicates the property is not for personal use. He collects Maine lodging taxes on the rental fees and remits them to the State.

In June 2020, the Morgans and Ward filed suit against Townsend seeking a declaratory judgment that he was in violation of the restrictive covenants; and claiming nuisance for the noise and trash associated with the rentals of his property. Townsend answered and later counterclaimed, alleging that the Morgans and Ward were similarly in breach of the same covenants. The Morgans and Ward amended their complaint to add a claim for injunctive relief, seeking a permanent injunction prohibiting Townsend from using his land or erecting structures in violation of the restrictive covenants.

In January 2022, the Morgans and Ward moved for summary judgment; Townsend opposed and cross-moved for summary judgment. The court entered judgment on May 9, 2022, finding for the Morgans and Ward on their claims for declaratory judgment and injunctive relief, but denied summary judgment on the nuisance claim, citing genuine disputes of material fact. The court denied Townsend's cross-motion on his counterclaim, finding he had failed to show the Morgans and Ward had violated the restriction in their own deeds. It did not reach the Morgans and Ward's defenses of laches and unclean hands.

The court found the restrictive covenant unambiguously limited Townsend's property and the structures on it to use and occupancy by one family. It found that Townsend's pattern of short-term rentals to large groups violated the requirements that the property be used for "private residential purposes," and only have a "single dwelling house for use and occupancy by one family." It further found that the Morgans and Ward had waived any claim based on the presence of two buildings on Townsend's property, and entered an injunction permanently enjoining Townsend from using the property "in violation of the restrictive covenant contained in his deed." Townsend unsuccessfully moved to alter or amend the judgment to clarify the scope of the injunction, and then timely appealed.

Reviewing what it determined was an issue of first impression – assessing the effect of a restrictive covenant that limits the use of a property upon short-term rentals through services like Airbnb and VRBO – the Law Court began with a review of the law governing the interpretation of restrictive covenants. Reviewing *de novo*, the Court first dug into the intention of the parties to the deed, and the restrictive covenants, beginning with a plain language review. It focused on three specific aspects of the restrictive covenant: (1) "[t]he premises herein conveyed shall not be used or occupied for any purpose other than for private residential purposes"; (2) "no trade or business shall be conducted therefrom"; and (3) "no building . . . other than a private dwelling house for use and occupancy by one family."

Starting with the word "private," the Law Court determined that word, in the context of the deed, limited Townsend's rental of the property to one group at a time, and that "There is no evidence that Townsend has ever violated that limitation." As for "residential purposes," the Law Court found a "slight majority" of courts interpreted that to *not* preclude short-term rentals, pointing to Montana's focus on *what* was being done at the property, not *how long*; and Maryland, which applied "residential" to "apartment buildings, fraternity houses, hotels, and bed-and-breakfasts because such structures are used for habitation purposes. The transitory nature of such use does not defeat the residential status." *Craig Tracts Homeowners' Ass'n v. Brown Drake*, LLC, 477 P.3d 283, 286-87 (Mont. 2020); and *Lowden v. Bosley*, 909 A.2d 261, 267-69 (Md. 2006). It found other jurisdictions that found short-term rentals are *not* consistent with "residential" uses and character, such as Massachusetts, Pennsylvania, and Kentucky, before turning to its own precedents.

In *Silsby v. Belch*, 2008 ME 104, the Law Court did not define the word "residential," but in *Windham Land Tr.*

v. Jeffords, 2009 ME 29, it did so in a "neutral" fashion. The Court agreed with the Land Trust in *Jeffords*, that the "residential" covenant restriction meant use as a "residence," as defined by *Webster's Dictionary*. Careful to distinguish *Jeffords* from the case at hand, the Court noted that it did not address the issue of use by overnight guests.

The Law Court found that interpreting the "private residential purposes" restriction to limit use only to those legally domiciled at the property "would impose a wholly impractical limitation on property by prohibiting the owner from inviting friends, family, and other guests to visit. Such a stance would likewise be contrary to the principle of construing restrictive covenants in favor of the free use of property." *Doyon v. Fantini*, 2020 ME 77, ¶ 8. "We therefore do not interpret the phrase "private residential purposes" in the covenant, standing alone, to prevent Townsend or any of the other lot owners from inviting overnight guests, *including paying guests*, to their properties." (emphasis added).

The Law Court stopped short of fully approving the use, however, finding a possibility that Townsend's use "could have an adverse effect on the residential character of the neighborhood and thus violate the 'private residential purposes' provision of the covenant." Determining that, however, "would entail a fact-intensive inquiry, similar in focus to the inquiry that the Morgans' and Ward's nuisance claims would have entailed had they been pursued."

Turning next to the "no trade or business shall be conducted therefrom" restriction, the Morgans and Ward argued that Townsend violated that by conducting a business akin to an unhosted

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hotel or bed and breakfast; Townsend argued that merely renting residential property is not considered engaging in commercial activity. *Silsby,* 2008 ME 104, ¶¶ 11-14. Clarifying that the takeaway from *Silsby* is that the owner of a three-unit building who rents to long-term tenants is not running a business at the property, the Law Court was careful to note a "growing trend among state and local governments" to define short-term rentals as a business activity.

The Law Court drew an illustrative parallel with garage sales – a property that holds one on a Saturday is not conducting business, but having one every weekend is operating a flea market business. Lining that up to Townsend's actions, the Law Court found his "pattern of use, maintenance, advertising, and holding out of his property brings his rentals squarely within the definition of a business, such as a hotel." As a result, it found no error in the BCD's decision that Townsend had been using the property to operate a business in violation of the covenant.

Addressing the "one family" restriction, Townsend argued that the intent was only to limit the type of structure to a single-family dwelling, as opposed to a multi-unit building; the Morgans and Ward countered that the language restricts not only on the type of structure, but its use and occupancy. The Court found the Morgans' and Ward's argument "undercut" by the fact that the "one family" restriction cannot be construed strictly or literally, as doing so would prohibit unrelated houseguests from ever staying the night. "In addition, the definition of 'family' has plainly evolved over the decades since the covenant was instituted."

Concluding that "the single-family limitation can reasonably be interpreted to indicate that at least some of the people who are occupying and using the property at any given time should be related in some way," the Law Court found no evidence that Townsend's rental groups did not meet that standard.

Viewing the restrictions as a whole, the Law Court found that Townsend was operating a business on the property, in violation of the covenant, and agreed with the trial court that the Morgans and Ward are entitled to injunctive relief to prevent future violations. Applying Rule 65(d)'s specificity requirements to the injunction, the Law Court found it didn't measure up, as it lacked "reasonable detail" to provide a clear understanding of what is allowed and what is prohibited. "We agree with Townsend that the injunction against him needs to be recrafted." Noting that the decision doesn't prohibit Townsend from renting the property, the Law Court instructed the lower court to define "short-term rental," and "set a limit, consistent with the definition, on the number of days per year that Townsend may use the property for short-term rentals," and recommended municipal ordinances and state laws, as well as state and federal tax laws, as sources of definitions. It went on to opine that an evidentiary hearing on the issue may be necessary, to solicit recommendations from the parties "on these and other aspects of the injunction, including verification procedures and requirements for enforcing, modifying, or terminating the injunction."

Injunction vacated. Judgment affirmed in all other respects. Remanded for further proceedings.

Mead, J. and Stanfill, CJ, dissenting.

Justice Mead wrote a dissenting opinion, which Chief Justice Stanfill joined. Justice Mead disagreed with "the Court's recitation of facts, identification of the issues, standards for reviewing summary judgments, identification of principles for the interpretation of deed restrictions, or well-reasoned analysis of the 'private residential purposes' and 'occupancy by one family' issues." The dissent pointed out that the record contained no information regarding the covenant grantors' intent as to whether renting the properties would be considered a "trade or business." Justice Mead focused on the covenant's use of the word "therefrom" as opposed to "therein" or "thereon," as a "subtle, but potentially significant" point – "If the grantors intended to forever bar residential rentals of the property, the deed language could have, and presumably would have, explicitly said so."

Justice Mead also noted that renting the property does not *ipso facto* establish that the owner is conducting a business prohibited under the covenant. To Justice Mead, the majority's "heavily" relying on Maine tax code provisions was misplaced; "definitions and policies underpinning state tax obligations are of little use in ascertaining a grantor's intent in creating a restrictive covenant or interpreting terms that are employed in non-tax settings."

To Justice Mead, the majority's reliance on the frequency of rentals as determinative of it being a business was misplaced, as there was "no rationale or quantitative standards for how parties and trial courts are to define what constitutes a 'trade or business' in this frequently occurring setting." He disagreed with the "eye of the beholder" test, finding it fails to provide guidance to owners of such properties, as addressed in *Silsby*, and deeming it "vague guidance" that "creates a slippery slope that can devolve into arbitrariness." He also disagreed with the majority's conclusion, and would have found that Townsend's use does *not* violate the restrictive covenant against having "a trade or business … conducted therefrom." The dissenting Justices would have vacated summary judgment, and remanded for further proceedings.

Morgan, et al. v. Townsend (Horton, J.), 2023 ME 62, BCD-22-201, 9-5-23
On appeal from Business & Consumer Docket (Duddy, J.)
Andrew W. Sparks and William J. Kennedy for Appellant.
David Soley and Glenn Israel for Appellees.

MLR #183-23 – 35 pages

CRIMINAL PRACTICE
Sentencing
Consecutive License Suspensions

Where trial court imposes penalty including three consecutive license suspensions for driving to endanger that resulted in death of three people, imposition of consecutive penalties will not be overturned on appeal as error or abuse of discretion.

Robert Santerre appealed from the Kennebec County Superior Court's imposition of consecutive license suspensions after admitting to three charges of driving to endanger, 29-A M.R.S. § 2413-A(1). On appeal, he claimed the trial court erred in its interpretation of § 2413-A(1) to permit determining that he had committed three civil violations, and that it was authorized to impose consecutive license suspensions.

At 2:00 p.m. on May 20, 2021, while operating a motor vehicle, Santerre struck three pedestrians, killing all three. Santerre had become drowsy and crossed over the double-yellow line, striking the pedestrians on the other side of the road. Law enforcement's investigation revealed no evidence that Santerre was using a phone, was impaired by alcohol or drugs, or had a medical condition affecting his ability to drive.

On December 3, 2021, Santerre was charged with three counts of committing a motor vehicle violation that resulted in death, § 2413-A(1). He admitted to all three counts, and a sentencing hearing was held. The court noted that § 2413-A(1) was created by the Legislature expressly for situations like this; and expressed a need for public safety, pointing out that "distracted driving comes in many forms, including driving while fatigued."

The court imposed a $5,000 fine, and a three-year license suspension for each of the three counts, to run consecutively, resulting in a total fine of $15,000 and a nine-year suspension. The court offered, and Santerre accepted, the option to pay $5,000 towards a victims' memorial in lieu of the full $15,000 fine. He appealed the nine-year license suspension.

On appeal, Santerre raised two challenges: first, that the trial court erred in interpreting § 2413-A by considering the accident as three separate violations, and therefore eligible for three separate penalties; and second, in finding that § 2413-A authorized consecutive suspensions based on the facts presented.

Reviewing statutory interpretations *de novo*, the Law walked through the three subsections of § 2413-A, which sets forth the offense, pleading and proof, and penalties in detail. Finding the plain language clear, the Law Court took no issue with the trial court's treatment of the incident as three separate violations: "because Santerre's traffic infractions resulted in the deaths of three people, Santerre committed three civil violations. … [T]hat separate violations may be charged for each basis of liability is consistent with analogous Maine criminal statutes and charging practices." *State v. Weddle*, 2020 ME 12, ¶¶ 3, 8. "If a driver's violation of section 2413-A results in the deaths of multiple people, the driver violates section 2413-A multiple times."

Santerre next claimed the trial court erred in imposing consecutive license suspensions, as it was not expressly authorized to do so, and had the court applied 17-A M.R.S. § 1608 factors, it would not have done so. The Law Court disagreed, noting that "trial courts have the inherent authority under common law to impose consecutive sentences or penalties in criminal and civil cases when those sentences or penalties are reasonably supported by the facts and law."

Citing to Justice Cardozo's rationale in *People v. Ingber*, 162 N.E. 87, 88 (N.Y. 1928), the Law Court held "the common-law discretionary power applies equally to civil penalties as it does to criminal punishments. … Where the Legislature has not constrained that authority, the court has inherent authority to impose consecutive penalties and punishments." The court's powers to impose consecutive sentences comes not from the Legislature, but is "implicit to the adjudicatory powers of the court," and the Law Court found the statute silent as to whether the court could impose consecutive suspensions in a case involving multiple counts. It took that to signal an intent to *not* prohibit courts from doing so in instances like this where there were multiple counts, and found no error in the interpretation of § 2413-A to permit imposition of consecutive suspensions.

Having established the authority to impose consecutive suspensions, the Court turned to whether it was an abuse of discretion to do so in this instance, acknowledging that "the trial court needed to fashion a penalty that would coerce and incentivize Santerre to comply with the law and promote public safety by preventing Santerre from driving." Regarding the need to prevent Santerre from driving for public safety reasons, as well as people's need to follow distracted driving laws, the Law Court found no abuse of discretion in its imposition of the consecutive suspensions. It held the plain language of § 2413-A authorizes consecutive license suspensions "when, in the trial court's discretion, the case presents appropriate facts for such an imposition."

Judgment affirmed.

Connors, J., concurring.

Justice Connors wrote a brief concurring opinion, in which she agreed with the trial court's decision to "stack" license suspensions, but would have arrived at the conclusion via a different route. Pointing out that "nonpenal statutes enacted for public safety, health, or welfare are liberally construed to advance their purposes," Justice Connors concluded that "the lack of a stacking provision should not be read as foreclosing stacking in circumstances where stacking is deemed necessary to protect public safety."

State v. Santerre (Jabar, J.), 2023 ME 63, Ken-22-392, 9-12-23
On appeal from Unified Criminal Docket (Cashman, J.)
Bruce W. Hepler and Benjamin E. Hartwell for Appellant.
Maeghan Maloney for State.

MLR #184-23 – 18 pages

CURRENT MAINE DECISIONS

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CRIMINAL LAW
Revocation of bail

Where facts show strong likelihood for defendant's recidivism, including violation of conditions of release and subsequent commission of violent crime, defendant's motion to amend bail denied and state's motion to revoke bail granted.

Defendant Irineu Goncalves was charged with criminal restraint, domestic violence assault, obstructing report of a crime or injury, and endangering the welfare of a child. In September 2022, Goncalves was bailed on $5,000 cash with "several special conditions, including that he not have contact with the alleged victim."

On June 14, 2023, Waterville police officer Jake Whitley arrived to a scene where he "observed the Defendant actively strangling" the alleged victim "while she lay unconscious on the ground. Officer Whitley had to physically remove the Defendant" from the alleged victim. Thereafter, Goncalves received a second set of charges under Kennebec docket number KENCD-CR-2023-1010, which included attempted murder, domestic violence assault, domestic violence terrorizing, assault on a law enforcement officer, and violating conditions of release.

Two days later, Goncalves made his initial appearance on the Motion to Revoke Bail and initially entered a denial, but changed his answer during the hearing to be an admission. He argued that bail should be set because there are conditions of release available that would ensure "(1) he [would] not continue to commit new crimes while out on bail; (2) he [would] appear in the future; (3) the integrity of the judicial process, and; (4) the safety of others in the community."

The court disagreed, however, based on the evidence presented at the hearing. "The Defendant has admitted to the allegations in the motion, and the Court is unable to find there are bail conditions that would adequately protect the community and ensure the Defendant will refrain from future criminal conduct." The court went on to cite 15 M.R.S. § 1094 in revoking Goncalves' pre-conviction bail and instructing that he continue to be held without bail.

Regarding Goncalves' second set of charges from June 2023, the court set bail at $1,000,000 cash "with special conditions of no contact with the alleged victim." During his hearing, Goncalves' requested a *de novo* review of his bail, but the court found it "should remain as set."

"The cash component is high but not in excess of what is reasonably necessary to ensure the appearance of the Defendant, to ensure he will refrain from new criminal conduct, and to ensure the safety of the public," wrote Justice Mitchell. The court noted the injuries inflicted on the victim in June 2023 when defendant was already out on bail with a no-contact condition, as well as Goncalves' receipt of a high ODARA score indicating the strong potential for recidivism. "The Court has reviewed the standards in the Bail Code and finds that no other set of conditions reasonably would be adequate to ensure the integrity of the judicial process will be maintained, and that the safety of others in the community will be protected."

Plaintiff's motion to revoke bail is granted; defendant's motion to amend bail is denied.

State v. Goncalves (Mitchell, J.) Kennebec Docket# CR-22-1576, 7-14-23
Amanda Seekins for plaintiff.
Roger F. Brunelle, Jr. for defendant.

MLR/SC#259-23 3 Pages

CIVIL PRACTICE
Judicial stay of agency action
Liquor store licensure

Where plaintiff fails to show that irreparable harm will result in absence of a judicial stay, motion to stay shall be denied.

Plaintiff Pozzi, LLC, moved for judicial stay of final agency action requesting the court stay defendant Maine Bureau of Alcoholic Beverages and Lottery Operations' issuance of agency liquor store license number AGN-2023-15198 to Energy North Inc. d/b/a Wells Clipper Mart. Pozzi appealed the decision and requested a stay "during the pendency of Petitioner's Rule 80C appeal," but the request was denied by the Bureau for failure of Pozzi "to carry its burden to demonstrate the requirements for a stay."

Thereafter, Pozzi sought a judicial stay of the Bureau's decision, asserting that the issuance of the license to Wells Clipper Mart would bar him "indefinitely from operation of a spirits business in Wells, where it made significant infrastructure investments." He also claimed that "without a stay, it [would] lose approximately $3,000,000.00 in annual sales, which would likely lead to closure of its business in Wells." Finally, Pozzi claimed the stay would prevent the Wells Clipper Mart from "obtaining a vested interest" in the license, or "gaining a competitive advantage in possible future licensing procedures."

The Bureau asserts that Pozzi has "never before operated a business in Wells" and thus its claims of lost sales was purely speculative. Additionally, it noted that staying licensure of the Wells Clipper Mart "would not enable Petitioner to sell spirits in Wells," but would only prevent the Wells Clipper Mart from doing so.

The court cited *Bangor Historic Track, Inc. v. Dep't of Agric.* (ME 2003) to define irreparable injury, and further cited *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Bishop* (ME 1993) and *Searles v. Girouard* (ME 2018) to explain that "speculative injury does not constitute irreparable harm."

The court was unpersuaded by Pozzi's first argument, writing, "Petitioner has not shown how, absent a stay, it will be barred 'indefinitely'[from operating a spirits business in Wells." Though Justice Duddy noted the limited number of licenses presently available for spirit sales in Wells, it also noted that, "there is a possibility that the Bureau will issue additional licenses in the future, which Petitioner will be able to compete for, if Wells' population reaches or surpasses 15,000." The court also pointed out that liquor licenses must be renewed annually, raising the possibility that one granted one year may not be renewed the next.

Next, the court agreed with the Bureau regarding the speculative nature of the $3,000,000 number provided by Pozzi for "loss of [] annual sales." It also found that the "prospective investments" made by him regarding a spirits business in Wells "were burdened by the possibility that no new agency liquor store license would be issued to Petitioner," meaning that he undertook the risk of those investments and it did not necessarily constitute an irreparable injury.

Finally, the court addressed Pozzi's assertion that granting of the stay would "merely return the market to the status quo that existed prior to the Bureau issuing AGN-2023-15198," but the court disagreed, acknowledging the "significant harmful consequences to Wells Clipper Mart and the public," by "depriv[ing them] of the convenience of having a sixth location licensed to sell spirits."

Plaintiff's motion for stay denied.

Pozzi, LLC v. ME Bureau of Alcoholic Beverages & Lottery Operations, et al. (Duddy, J.) Cumberland Docket# BCD-APP-23-3, 8-3-23
Pawel Binczyk for plaintiff.
Philip Mantis for defendants.

MLR/SC#260-23 6 Pages

CIVIL PRACTICE
Motion to dismiss
Amended complaint

Where plaintiff successfully pleads fraud with the required specificity to put defendant on notice, defendant's motion to dismiss shall be denied.

Plaintiff Alexis Miller purchased a non-motorized camper from defendant Camping World Camper Sales, LLC (CWCS) in July 2021 for $39,663.49. "Defendant expressly warranted that the camper was above-average quality and was in brand-new condition." Miller was up front with CWCS about her planned use of the camper and was "expressly promised that the camper was a fit."

In October 2022, Miller secured a position in Arizona and left Maine, towing her camper cross-county. During her drive, Miller "encountered many substantial and dangerous defects with the camper, which she needed to repair in Missouri, Texas, and New Mexico." At the time of the instant action, the camper was in Arizona with defects rendering it "inoperable and unrepairable." Miller subsequently demanded that CWCS "repair the camper at its sole cost or … refund the full cost of the camper paid under the contract," but CWCS has refused.

Miller brought the instant action for breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, violation of the Maine Unfair Trade Practices Act (UTPA), and fraud.

In considering her motion for

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leave to file an amended complaint (to correct title from Camping World Camper Sales to Camping World RV Sales and naming the salesperson who advised her in her purchase), the court looked to M.R. Civ. P 15 and found that Miller's proposed amendments were made in good faith and would "bring more specificity to the Complaint," satisfying the requirements of Rule 15(c)(3) regarding modification of a party's name.

Next, the court reviewed CWCS's motion to dismiss against the first amended complaint, beginning its analysis with *McAfee v. Cole* (ME, 1994) to establish that success of such a motion required there to be no doubt that plaintiff "is entitled to no relief under any set of facts that he might prove in support of his claim." Additionally, the court looked to M.R. Civ. P. 9(b) to explain that "averments of fraud or mistake" required that the circumstances around such an accusation "shall be stated with particularity." CWCS contended that Miller failed to state a claim, arguing that her claims for breach of implied warranties and violation of the UTPA were "barred by the statute of limitations," as well as that Miller had "failed to plead facts with requisite particularity to support a claim of fraud."

CWCS further argued that its contract with Miller included a one-year statute of limitations, to which Miller responded that such a provision should not be enforced as "modification of warranties are [sic] invalid as to sales of consumer goods." The court looked to 11 M.R.S. § 2-725 and 2-316(5) in determining that the parties' modification of the statute of limitations to one year was enforceable, and subsequently found that, if Miller "were to show that tender of delivery occurred within a year of [the] filing of her complaint … Counts I-V may not be time-barred." It followed that the court was unable to grant CWCS's motion as to those counts of Miller's complaint.

In considering the particularity requirement of Miller's fraud claim, the court found her assertions regarding the purchase price, various repairs during her cross-country journey, her interactions with the CWCS salesperson regarding her needs and reliance on his statements, etc., provided sufficient specificity "to put Defendant on notice of the claim against it and to meet the requirements of pleading with particularity."

Plaintiff's motion for leave to file first amended complaint granted; defendant's motion to dismiss denied.

Miller v. Camping World Camper Sales, LLC (McKeon, J.) Cumberland Docket# CV-23-74, 8-3-23
Jeffrey Bennett and Christa Vo for plaintiff.
Timothy Bryant for defendants.

MLR/SC#261-23 8 Pages

ATTORNEYS
Malpractice
CIVIL PRACTICE
Motion for summary judgment
Motion to strike affirmative defenses

Where defendant fails to show that attorney-client relationship existed, claims related to legal malpractice by plaintiff shall not succeed.

Plaintiff Attorney Stephean Chute entered into an agreement with defendant, Legal Ease, LLC, to "provide legal services to Defendants' clients on certain agreed terms" on a project-by-project basis. Chute provided such services to Legal Ease clients from January 2018 through November 2021, and submitted his work product to Legal Ease Attorney Jeffrey Bennett for final revisions, signatures, and filing. "Chute did not assume docket responsibility or enter an appearance in any trial court on behalf of any of defendants' clients."

On one particular matter, that of *Abraham v. Broaddus*, Chute began work on an opposition to motion for summary judgment after the filing deadline had passed. He knew the deadline had passed and completed additional work in an attempt to "mitigate the effect of the missed deadline and to respond to a motion for sanctions filed by the opposing party." Chute then provided those work produces to Legal Ease as was standard practice under their agreement.

Legal Ease asserts that Chute "breached an agreement to punctually provide legally sound work product by failing to timely draft the summary judgment opposition," which resulted in damage to Legal Ease and its client. This claim being one of professional negligence, the court cited *Johnson v. Carleton* (ME, 2001) and *Graves v. S.E. Downey Registered Land Surveyor, P.A.* (ME, 2005) to explain that such claims must be analyzed according to tort law principles and that exceptions to that rule are "claims regarding an express contract … such as an agreement to effect a particular outcome."

Chute had entered a Motion to Dismiss Counterclaim in 2022 under which the court had expressed that Legal Ease "[did] not having standing to assert a legal malpractice claim. Defendants have not established the existence of an attorney-client relationship between themselves and Attorney Chute…" Similarly, in the instant case, the evidence in the record showed Attorney Chute was contracted on a project-by-project basis, and no evidence was provided "that the parties had any other express contract that Attorney Chute beached. Nor [did] the record demonstrate any genuine dispute of material fact as to breach of an express term."

In Legal Ease's answer, it asserted eleven affirmative defenses including Chute's claims being "barred or estopped by unclean hands," "legal malpractice" committed by Chute, "unreasonable" time entries and invoices, and performance of "excessive and unnecessary" services. Chute moved to strike these defenses, and the court – having already found that Legal Ease's malpractice claim lacked standing – did strike those defenses that included claims related to malpractice.

However, "Attorney Chute's memorandum of law contain[ed] no legal argument regarding the remaining affirmative defenses. Accordingly, the Court [did] not consider … striking the remaining affirmative defenses."

Plaintiff's motion for partial summary judgment granted as to claims of malpractice; plaintiff's motion to strike granted as to affirmative defenses related to malpractice.

Law Office of Stephean C. Chute, et al. v. Legal Ease, LLC, et al. (Kennedy, J.) Cumberland Docket# CV-22-82, 8-4-23
Stephean C. Chute for plaintiff.
Jeffrey Bennett for defendant

MLR/SC#262-23 7 Pages

ATTORNEYS
Malpractice
CIVIL PRACTICE
Motion to dismiss

Where acts and omissions at heart of a legal malpractice claim are time-barred, defendant's motion to dismiss shall succeed.

Plaintiff Adam Wilson retained defendant, Attorney Janet Kantz, and her firm to represent him in his divorce. Wilson's ex-spouse had "shopped around" for her representation, but Wilson was assured there was no conflict with Kantz's firm. However, after retaining Kantz's firm, Wilson was notified that one of the attorneys there, Attorney Pittman, had met with the opposing party for an initial consultation and "should not be involved with the case aside from drafting, although the firm could still represent Plaintiff."

Soon after, Kantz and her firm were "unprepared for motion filing, the draft of which motion was unusable and would be unsuccessful." Following financial errors made by defendant, failure to correct statements of opposing counsel regarding Wilson's mental health, and roughly two-dozen emails regarding the case – some from the guardian *ad litem* – went unrebutted by Kantz and her firm, defendant moved to withdraw from the case citing "a fundamental disagreement between attorney and client creating unreasonable difficulty." This premise was found to be false and "created bias due to Plaintiff's mental illness."

Before the motion to withdraw took effect, a hearing was scheduled for which Kantz and her firm were unprepared. They "withheld or delayed disclosure of material facts" that Wilson needed in order to make an informed decision in the matter, and "concealed their inability to meet the Rule 60 motion deadline." After the motion took effect, Kantz and her firm stopped forwarding opposing counsel's motions and communications to Wilson, and he was sent an invoice "with several irregularities … including an item for intra-firm discussion of the conflict of interest and an item for contract drafting that did not occur. …"

Wilson alleged the actions and withdrawal of Kantz and her firm "caused injuries including 'an incurable false prejudice to Plaintiff' and 'an uncurable false benefit' to the opposing party due to the statements in the motion to withdraw, deprivation of 'a statutory right and a judicial order to file in court a formal written opposition,' violation of duties of loyalty, care, honesty, and not to engage in conflicts of interest."

Kantz asserted the alleged acts or omissions, which occurred on or before March 31, 2017, were time-barred and the court agreed. 14 M.R.S. § 752 and 753. Focusing on the allegations based on facts and occurrences thereafter, Kantz alleged the timely allegations did "not support a plausible claim for relief, in part because the exhibits they have provided show Plaintiff's allegations are false, and in part because Plaintiff has not showed causation."

The exhibits, the court found,

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which included communication between the parties, "clarif[ied] the full context of communications but [did] not show that all of Plaintiff's allegations [were] necessarily baseless." Additionally, Wilson's allegation that Kantz's withdrawal "on an insincere basis and at a poor time" caused both prejudice and economic damage.

However, the foundation of Wilson's strongest claims laid with acts and omissions that occurred before March 31, 2017, leaving only the bizarre invoice and inopportune withdrawal of Kantz from the divorce proceedings to support Wilson's allegations of legal malpractice. Based on those items alone, the court was unable to "connect" the specific occurrences to injury suffered by plaintiff.

Defendant's motion to dismiss is granted.

Wilson v. Kantz, et al. (Cashman, J.) Cumberland Docket# CV-23-131, 8-18-23.
Adam Wilson, *pro se*.
Matthew Wahrer for defendant.

MLR/SC#263-23 8 Pages

CRIMINAL LAW
Unsworn falsification
***De minimis* conduct**

Where defendant's conduct represents that which a law or statute was intended to prevent, a motion for dismissal on the grounds of *de minimis* conduct will fail.

Defendant Sean Stambaugh was charged with forgery in October 2022 for misrepresentations made on a firearm application. The charge was dismissed in April 2023 for insufficient evidence.

In February of 2023, the plaintiff State charged Stambaugh with unsworn falsification, alleging that Stambaugh, "being under arrest for a crime, did give false information concerning his name or date of birth, after having been warned it is a crime to give false information concerning his identit, with the intent to conceal his identify from a law enforcement officer." In May 2023, that charge was dismissed for "wrong subsection."

The State subsequently charged Stambaugh with unsworn falsification, this time under the correct subsection of the relevant statute, alleging that Stambaugh made "a written false statement which the Defendant did not believe to be true, on or pursuant to, a form conspicuously bearing notification authorized by statute or regulation to the effect that false statement made therein are punishable."

Stambaugh subsequently moved to dismiss this third count on the grounds of (1) prosecutorial misconduct, and (2) that the conduct was *de minimis*. Stambaugh asserts "the prosecuting attorney made a false material statement under oath in signing [] Count 2 of the complaint." The State conceded it cited the wrong subsection in its Count 2 complaint, which "[made] clear that the prosecutor could not have read *both* of those documents prior to the complaint being filed," but the State having already dismissed Count 2 rendered the issue resolved.

Regarding Stambaugh's contention that his conduct was *de minimis*, the court began its analysis by citing 17-A M.R.S. § 12 and *State v. Kargar* (ME, 1996) to define the analysis for *de minimis* conduct, explaining that, "the language of the statute expressly requires that courts view the defendant's conduct 'having regard of the nature of the conduct alleged and the nature of the attendant circumstances.'"

The law defining the crime with which Stambaugh was charged was created with the intention to prevent false information from being provided on official forms. "The reason for this is obvious, to ensure that individuals can rely upon statements on official forms in order to conduct business or transactions." Justice Nelson noted that the nature of firearms applications in particular, the information from which is utilized for background check purposes, adds to the importance of truthful completion.

"The Defendant was a convicted felon. He completed the form stating that he was not a felon. The fact that he was attempting to purchase a firearm, given the prohibition on his use or possession of firearms due to his conviction is perplexing," wrote the court. "The limited data available that might reveal the degree of culpability in the offense committed by the Defendant suggests that this was an effort to try to obtain the firearm and see what happens. The record reflects no mitigating factors regarding this particular Defendant. Likewise, the record reflects no improper motive of the complainant or prosecutor. ... This is precisely the type of conduct sought to be prevented by the law."

Defendant's motion to dismiss denied.

State v. Stambaugh (Nelson, J.) Aroostook Docket# CR-22-20403, 9-7-23.
Todd Collins for plaintiff.
Mark Perry for defendant.

MLR/SC#264-23 5 Pages

CRIMINAL LAW
Motion for contempt
Suppression of evidence
Motion for sanctions

Where court finds adequate sanctions have already been administered, motions for additional sanctions and contempt shall be denied.

Defendant Tony Jackson was charged in a five-count indictment dated May 12, 2022, which included aggravated assault, refusing to submit to arrest, endangering the welfare of a child, domestic violence reckless conduct, and domestic violence assault. A jury trial in the matter commenced in June 2023.

On August 4, 2023, Jackson moved for sanctions related to the alleged failure of State to provide discovery in accordance with the discovery rules and the alleged failure of the State to provide exculpatory information and suppression of such evidence.

Jackson contends the State "failed to provide the names, dates of birth, and addresses of witnesses whom the State intended to call at trial." He asserts the State failed to provide the alleged victim's address, the date of birth for Amy Theriault, and the identify of a custodian or qualified witness for authentication of relevant medical records.

Jackson asserts he made written discovery requests to the State in March and April 2023 in compliance with Rule 16(b)(7), and claims the State failed to respond. After emailing the State to request information regarding Amy Theriault specifically, the State responded stating that it "did not have any other address for the alleged victim as she was in DHHS custody." It stated that it would "disclose any exculpatory information if and when the State had any further communications" with Theriault.

Based on the record and the State's failure to list any custodian or qualified witness to authenticate medical records provided in the matter, the court assumed it did not intend to call such a witness and thus "there [was] no discovery violation." The State promptly provided Jackson with copies of said medical records upon its receipt of the documents in June, but Jackson contended "the copy of the records that was not certified hindered his ability to prepare for trial." The court found this contention "to be without merit."

At trial, the alleged victim testified that "she pushed the Defendant out of her room prior to him having any physical contact with her," and, at sidebar, the Defendant raised the issue of the State's failure to disclose this exculpatory information prior to trial. "At that point in the trial, the court deemed it necessary to ascertain whether the State failed to disclose exculpatory information, whether those present simply did not hear the alleged victim's statement about the push, or whether the witness may be mistaken or testifying untruthfully." After a recess, the State conceded that it had been in possession of the exculpatory information regarding the push and had failed to provide

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it to Jackson. Jackson then moved for a mistrial, which the court declared.

The court notes that, although the State failed to make Jackson aware that the victim admitted to pushing him first, Jackson was aware that the victim had pushed him first, and noted such in requesting a self-defense instruction. "The result was that the trial proceeded better than was originally expected for the Defendant, as he was unaware of the concession until the alleged victim's testimony."

"The additional delay subsequent to the granting of the mistrial has been in part due to the Defendant's desire to present the motion for further sanctions and incorporated motion for contempt for consideration. The court finds that under the totality of the circumstances, further sanction is not appropriate."

Defendant's motions for sanctions and for contempt are denied.

State v. Jackson (Nelson, J.) Aroostook Docket# CR-22-85, 9-11-23.
Christiana Rein for plaintiff.
Hillary Knight for defendant.

MLR/SC#265-23 7 Pages

SMALL CLAIMS
Jury trial *de novo*

Where defendant successfully shows that genuine issue of material fact exists in small claims action, request for jury trial shall be granted.

Plaintiff Leslie Jones initiated a small claims action against defendant, Maine Avenue Auto Sale, LLC (MAAS), in 2021 seeking judgment in the amount of $6,000. Jones alleged that, shortly after completing a purchase from MAAS, her vehicle overheated.

Following a 2022 hearing, the District Court held that Jones "had proved by a preponderance of the evidence that MAAS improperly repaired her vehicle, causing it to overheat and sustain damage." She was consequently awarded $3,500 in damages. Shortly thereafter, MAAS appealed and requested a jury trial *de novo*, alleging the District Court made errors at the hearing.

"The Superior Court has specific but limited appellate authority in small claims matters," and "[i]f the defendant demands a jury trial and the court concludes that there is a genuine issue of material fact for trial, then 'the small claims judgment becomes a nullity' and the case will be tried to a jury pursuant to M.R. Civ. P. 80L." *Cote v. Vallee* (ME 2019); *Ring v. Leighton* (ME 2019). Further, "[a] defendant requesting a jury trial must file affidavits sufficient to 'set[] forth specific facts showing that there is a genuine issue of material fact as to which there is a right to trial by jury'."

In reviewing the record and the affidavit of MAAS owner Kevin Keene, the court found a genuine issue of material fact exists as to whether the repairs performed by MAAS were the cause of Jones' vehicle overheating. Jones asserted that the overheating occurred after she brought her vehicle into MAAS's shop for repairs to the clutch. After it overheated, she learned an engine wire was unplugged. However, Keene's affidavit asserts that no work would have been done on the engine by his crew in efforts to repair the clutch.

"A jury 'must choose between [these] competing versions of the truth,'" wrote Justice Lipez. *Dyer v. Dep't of Transp.* (ME 2008). "MAAS's request for a jury trial is therefore granted."

Defendant's motion for jury trial *de novo* granted.

Jones v. Maine Avenue Auto Sales, LLC (Lipez, J.) Kennebec Docket# AP-22-12, 9-15-23
Plaintiff pro se.
Scott Hess for defendant.

MLR/SC#266-23 4 Pages

CIVIL PRACTICE
Preliminary settlement
Class action
Sixth amendment

Where proposed settlement agreement includes provision with over-broad language that would preclude class members from filing individual claims during extended stay, motion for preliminary approval of proposed agreement shall fail.

In the summer of 2022, plaintiff Andrew Robbins and other class members successfully pled their 42 U.S.C. § 1983 claim, showing they had been "denied counsel, both actually and constructively, because Maine's system is inadequate under Sixth Amendment standards." Following that holding and certification of the class, plaintiffs engaged in four settlement conferences and dozens of negotiation sessions with the defendant, Indigent Legal Services (MCILS). Through those meetings, the parties developed their proposed Settlement Agreement, and submitted the document to the court for review and preliminary approval.

The court began its discussion on the standard of review by acknowledging that the Law Court had not yet had occasion to interpret the procedures and standards for approving a class action settlement under Rule 23(e) of the Maine Rules of Civil Procedure, an issue the parties pointed out in their submission to the court. The parties appeared to agree, however, that the federal counterpart to the M.R. Civ. P. 23(e) standard should govern the instant matter, and the court concurred, finding that "federal law informs the Court's analysis under M.R. Civ. P. 23(e).

The court's role in review of the preliminary settlement agreement was to decide whether "it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing." *Anderson v. Team Prior, Inc.* (ME 2021). For final approval to be granted, the court must find that the proposed settlement is "fair, reasonable, and adequate." F.R.Civ.P. 23(e)(2). To guide its analysis of the Agreement's fairness, reasonableness, and adequacy, the court considered the four factors outlined in Rule 23(e)(2): adequate representation, arm's-length negotiations, adequacy of relief, and intra-class equity.

The court reflected briefly on the nature of the class – that of individuals, some substance users, some violent criminals, some with mental health issues – and the entitlement that all such individuals have to effective court-appointed counsel, before looking to the current structure of court-appointed counsel in Maine. "Maine's system, with the exception of five or six attorneys who are hired as 'rural public defenders,' relies exclusively on private attorneys who are independent contractors, wrote Justice Murphy. "This means that the system is entirely dependent on the willingness of [] MCILS-qualified, independent contractor attorneys to accept or not accept certain kinds of cases. And as noted, the attorneys always have the ability to simply come off the rosters and decline to accept any new cases."

Next, the court acknowledged how unusual the instant action was, as the parties requested both review of the Agreement and a further four-year extension of the existing stay on the action. "The parties are now asking the Court to extend the stay currently in place for another four years, during which time the parties agree to jointly undertake best efforts to achieve what they describe as structural changes. … The Court has concluded that the four-year stay does not, by itself, justify denial of the motion. As a fiduciary for the Class Members, however, the Court has an obligation to ensure that the procedural and substantive safeguards have been met before it can decide if this Agreement will likely be approved as fair, adequate, and reasonable."

First to consider were the procedural safeguards of adequate representation and arm's-length negotiations. The court again cited Fed R. Civ. P. 23(e)(2) to explain that, "[a]dequate representation generally means the Court must focus on the actual performance of counsel…while arm's length negotiation means that the parties have behaved as adversaries during litigation, conducted adequate discovery, and negotiated the proffered settlement with no signs of collusion." Justice Murphy found that "Class Counsel in this case are highly qualified," and noted that the court had "no concerns at all about their sincere commitment to the necessity for systemic reform of Maine's indigent defense system." The court was also persuaded that, based on the number of negotiation sessions and settlement conferences the parties had participated in, the Class had obtained the best possible agreement that could be obtained from MCILS by the time of the decision.

Next, the court considered the substantive factors of its analysis, including adequate and equitable relief for the Class. At the outset, the court noted its concern for what negative effects the proposed four-year stay may have on members of the Class. "Counsel for both parties seem to expect Class Members to wait patiently for incremental changes the parties hope will come to pass during the four year stay of litigation," wrote Justice Murphy, "even if the number of attorneys willing and able to accept appointment continue to diminish such that significant delays occur in appointment of counsel. …" The court made note of the severe shortage of attorneys, the calls made by judges and clerks "pleading with lawyers to take cases," and the apparent goals of the Agreement to improve the situation, but which still come up short in ensuring adequate representation in the interim.

"If it can be proven that indigent defendants are in fact going without representation because courts no longer have a sufficient number of attorneys to represent these Class Members, and if the situation is not promptly remedied, this would constitute a violation of the Class Members' constitutional rights. This is more than just some technical violation."

The Agreement included a clause which precluded members of the Class from filing individual claims against defendants alleging "systemic failures or deficiencies in Maine's indigent defense system occurring within the four (4)-year settlement period." This provision brought to the forefront an issue regarding the proper parties-in-interest, where the MCILS was represented by the Assistant Attorney General who took the position that "even if the State is not specifically named in the caption, he reparesented not just the named Defendants but also the State of Maine."

The issue of the proper party, as the court pointed out, would have a direct effect on what it called the "overbroad language" of the provision barring class members from individual claims. "This language, at a minimum, needs to be clarified so that a Class Member could understand what they would be up against if they brought a separate claim in a different Court alleging non-representation or any other grounds for emergency relief," wrote Justice Murphy. "In addition to being overbroad, this language requires all Class Members to give up their ability to demand systemic changes for the next four years while waiting for incremental change, and it does so without regard to the relative strengths of their claim."

The court held the parties had failed to demonstrate the Agreement would be likely to be approved as it was written. Justice Murphy noted that it needed provisions that would "provide a clear path permitting the individual Class Members during a stay – of any length – to seek emergency relief if evidence supports the claim."

"[T]he Court is simply not willing to subject Class members to the risk of losing the right to pursue those important constitution claims in this action, or in another form," wrote Justice Murphy. "What is at stake, depending on the evidence presented, could be the deprivation of the fundamental rights to due process and to liberty, and the failure on the part of the State of Maine to fulfill a core function of government."

Joint motion for preliminary approval is denied.

Robbins, et al. v. Maine Commission on Indigent Legal Services, et al. (Murphy, J.) Kennebec Docket# CV-22-54, 9-13-23
Zachary Heiden and Carol Garvan for plaintiffs.
Sean Magenis for defendant.

MLR/SC#267-23 21 Pages

continue on Page 10

MAINE **DECISIONS**

MAINE SUPERIOR COURT

CONTINUED FROM PG 9

REAL ESTATE
Construction
Site plan application

Where interpretation of the language of ordinance is supported by purpose of ordinance and documentation used in its establishment, appeal of a decision based on such interpretation shall be denied.

In 2022, defendant City of Auburn approved party-in-interest American Development Group, LLC's (ADG) site plan for Phase 1 of its multi-phase housing development along a private way in Auburn. In January 2023, ADG submitted its plan for Phase 2, which proposed to add an additional five buildings to the five multi-unit structures already approved under Phase 1. The plan was approved by the City of Auburn Planning Board in early April 2023.

Plaintiff Jeffrey D. Harmon is a direct abutter to the new ADG development, and he timely appealed the Board's decision. Harmon "contends that the development violates the front setback requirements of the city's zoning ordinance."

The ADG development is under construction in a newly rezoned district of the city. Front setbacks for the zone "must fall between 5 feet and 25 feet." In its application to the Board, ADG represented that the multi-unit buildings "would have front setbacks ranging from 8.5 feet to 15 feet." However, those measurements were taken "relative to the sidewalks that border the development's parking lots, which are located along the private way of Stable Ridge Drive." Harmon contends the zoning requirements are to be measured from the public way rather than from the private access way of Stable Ridge Drive.

The City of Auburn asserted that the measurement can be made from "public ways, any accessways, or parking lots," and provided diagrams from the zoning ordinance in support of its position. Harmon, however, pointed to the diagram's use of the word "street" in phrases like "primary street frontage" and "secondary street frontage" to support his assertion that the measurements must be taken from public ways.

In review of the zoning ordinance diagrams, the court noted that text boxes reading "Accessways and Parking Lots (TYP)" accompanied each use of the term "public right-of-way," making interpretation unambiguous in favor of the City and ADG. It also found this interpretation consistent with the Board's intentions for the purpose of the ordinance, which was "to provide equitable access to housing in walkable neighborhoods by allowing residential uses at a density driven by the form, lot size, and configuration of the lot with less minimum road frontage required and shared driveways encouraged."

By interpreting the language of the diagrams and ordinance to allow front setbacks to be measured from private access ways like Stable Ridge Drive, property owners and developers may make use of the entirety of the lot. "This not only conforms with the purpose of the ordinance by allowing the density of the development to be driven by the form and configuration of the lot," wrote Justice Stewart, "it avoids the absurd and illogical result of confining ADG's development to solely the small portion of the lot that borders Court Street."

Decision of Planning Board affirmed.

Harmon v. City of Auburn (Stewart, J.)
Androscoggin Docket# AP-23-7, 9-13-23
Kristin Collins for plaintiff.
Sally Daggett and Mark Bower for defendant.

MLR/SC#268-23 6 Pages

MAINE BOARD OF BAR OVERSEERS

In re: Thomas P. Elias (deceased) (Duddy, J.) BAR-23-021, 8-25-23, 4 pages. Order appointing Angela Thibodeau, Esq. to serve as receiver for the purposes of winding down the practice. Receiver to serve on a *pro bono* basis, and to provide a status report within 120 days.

Board v. Stephen M. Bander (Martemucci, J.) BAR-23-016, 8-29-23, 2 pages. Order of Reciprocal Discipline (M. Bar R. 26(e)) after Florida Supreme Court's May 11, 2023, Disbarment Order finding violations of Florida Bar Rules 4-1.4 (communication); 4-1.7 (conflict of interest, current clients); 4-1.8 (conflict of interest, prohibited other transactions); 4-8.4(c) (misconduct); and 5-1.1 (trust accounts). Finding such violations would be analogous with violations of M.R. Prof. Cond. 1.4, 1.7, 1.8, 8.4(c), and 1.15, the court found reciprocal discipline warranted, and ordered disbarment.

Board v. Jason R. Buckley (McKeon, J.) BAR-23-009, 9-7-23, 7 pages. Order on Motion for Sanctions (M. Bar R. 21), after April 14, 2023, service of Board's disciplinary Information on defendant, located in Bloomfield, CT. No answer having been filed, the court entered an order granting the Board's Motion for Default, and the allegations in the Information were deemed admitted. According to the Order, Buckley's license had been under administrative suspension for lack of CLEs since 2020, and in 2023, Buckley submitted proof of CLE credits to reinstate his license which included an attempt to get credit for two CLEs that ran simultaneously. Buckley indicated he was unaware that attending multiple CLEs simultaneously was a violation of the Bar Rules. Citing heavily to *Board v. Brown*, BAR-22-002, the court suspended Buckley from practice for a period of one year, finding "no reason to suspend a suspension."

Board v. Neil S. Shankman (Illegible, J.) BAR-23-013, 6-6-23, 2 pages. Order Accepting Surrender after Board's filing of Formal Disciplinary Charges Petition. Pursuant to M. Bar R. 25(d), Shankman submitted a Letter of Surrender of License, which the court accepted as of September 1, 2023.

Law Court Upholds Lengthy License Suspensions

CONTINUED FROM PG 1

Pointing to the court's inherent powers to impose consecutive sentences in a case that involves multiple counts, the Law Court found no abuse of discretion in the trial court's choice to do so, noting that it was responsible for crafting a penalty that would "coerce and incentivize Santerre to comply with the law and promote public safety by preventing Santerre from driving." Ultimately holding that the case "present[ed] appropriate facts for" imposition of consecutive suspensions, the Law Court upheld the penalty.

Justice Connors wrote a brief concurring opinion, whereby she would have arrived at the same conclusion, just via a different route, pointing out that "stacking" of penalties was not prohibited in this instance, and was therefore appropriately applied.

A summary of the Law Court's decision in *Wood v. DIF&W,* MLR #182-23, appears on page 3 of this issue. A summary of its decision in *State v. Santerre*, MLR #184-23, appears on page 5 of this issue.

-Regan Sweeney, regans@mainelawyersreview.com

CURRENT FEDERAL DECISIONS

UNITED STATES DISTRICT COURT

Bench-Bar Meeting for Portland Rescheduled

The Bench-Bar Meeting Re: Criminal Practice scheduled for October 26, 2023, in Portland has been rescheduled to December 8, 2023, at 1:30 p.m. to avoid conflicts with legal training sponsored by the Maine Commission on Indigent Legal Services.

ORDERS

United States v. Meza (Walker, J.) 1:23CR00022, 8-22-23, 3 pages. Order denying defendant's motion to dismiss on double jeopardy grounds.

Nat'l Trust for Historic Preservation, et al. v. Buttigieg, et al. (Walker, J.) 2:23CV00080, 8-22-23, 2 pages. Order denying plaintiff's motion for stay of construction activities pending appeal.

Pike, et al. v. Budd, Jr. (Walker, J.) 1:22CV00360, 8-23-23, 5 pages. Order denying defendant's motion for relief from judgment.

Impact Auto, Inc. v. Joseph Trucking, LLC, et al. (Torresen, J.) 1:22CV00176, 8-23-23, 3 pages. Order granting plaintiff's motion for default judgment, and ordering defendant to pay plaintiff $180,601.68 within sixty days.

U.S. v. Mello (Woodcock, Jr., J.) 2:20CR00072, 8-23-23, 17 pages. Order granting in part, and dismissing in part, Government's motion *in limine* to admit certain communications and related data; and denying defendant's motion *in limine* to exclude statements made by defendant.

U.S. v. Roy (Levy, C.J.) 2:15CR00029, 8-24-23, 4 pages. Order denying defendant's 18 U.S.C.A. § 3742 motion to vacate convictions.

Lowe, et al. v. Mills, et al. (Levy, C.J.) 1:21CV00242, 8-25-23, 5 pages. Order denying State defendants' motion for stay of proceedings.

Range of Motion Products, LLC v. The Armaid Co., Inc. (Levy, C.J.) 1:22CV00091, 8-28-23, 30 pages. Order granting defendant's motion for summary judgment on patent infringement claims.

Securities & Exchange Comm'n. v. Liberty, et al. (Levy, C.J.) 2:18CV00139, 8-30-23, 2 pages. Order denying defendants' objections to Magistrate's order granting plaintiff's motion to release documents.

Davis, Jr., et al. v. Theriault, et al. (Levy, C.J.) 1:22CV00275, 8-31-23, 164 pages. Omnibus Order on pending motions, issuing thirteen rulings.

Poole, et al. v. Hancock County, et al. (Levy, C.J.) 1:22CV00364, 8-31-23, 8 pages. Order adopting, in part, Magistrate's June 8, 2023, Recommended Decision, and granting plaintiff's motion for leave to amend complaint, dismissing defendant's motions to dismiss as moot, finding plaintiff has not satisfied MHSA claim requirements, and determining that a stay is warranted under the circumstances.

Hornof, et al. v. U.S., et al. (Levy, C.J.) 2:19CV00198, 8-31-23, 83 pages. Order granting Government's motion for summary judgment on intentional infliction of emotional distress claim.

Gordon v. Roberson, et al. (Woodcock, Jr., J.) 1:22CV00386, 8-31-23, 1 page. Order affirming Magistrate's August 8, 2023, Recommended Decision and granting defendants' motion to dismiss for failure to state a claim.

Wells Fargo Bank NA v. Kinnison, et al. (Torresen, J.) 2:19CV00517, 9-6-23, 7 pages. Judgment of Foreclosure and Sale for real property in Lebanon.

Englesbobb v. Maine Dept. of Corrections, et al. (Nivison, Mag. J.) 1:22CV00351, 9-7-23, 2 pages. Order granting Attorney General's motion for clarification as to defendants that remain parties.

Plourde v. Cejka, et al. (Woodcock, Jr., J.) 1:19CV00486, 9-8-23, 7 pages. Order dismissing, without prejudice, plaintiff's motion *in limine* to exclude defendants as expert witnesses.

Carleton v. Piscataquis County Jail, et al. (Woodcock, Jr., J.) 1:23CV00253, 9-8-23, 1 page. Order affirming Magistrate's August 16 Recommended Decision, and dismissing all claims except excessive force and deliberate indifference.

Batal-Scholer v. Batal, et al. (Torresen, J.) 2:21CV00376, 9-11-23, 9 pages. Order granting in part, and denying in part defendants' motion to dismiss first amended complaint.

Demmons, et al. v. ND OTM LLC (Torresen, J.) 1:22CV00305, 9-12-23, 22 pages. Order granting in part, and denying in part defendants' partial motion to dismiss counts I and II of the complaint.

U.S. v. Ross (Woodcock, Jr., J.) 1:22CR00124, 9-13-23, 4 pages. Order denying defendant's motion to review conditions of release.

U.S. v. Giambro (Singal, J.) 2:22CR00044, 9-14-23, 1 page. Pre-Hearing Procedural Order indicating September 21, 2023, hearing on motion to quash subpoena will be evidentiary, and requiring defendant and movants appear with documentation of air travel.

Easler v. U.S. (Walker, J.) 1:19CR00049, 9-15-23, 1 page. Order Accepting Magistrate's July 31 Recommended Decision, and denying petitioner's motion for *habeas* relief.

Lenentine v. Aroostook County Jail (Walker, J.) 1:23CV00208, 9-15-23, 1 page. Order Affirming Magistrate's July 21 Recommended Decision, and dismissing plaintiff's complaint.

RECOMMENDED DECISIONS

Doyle v. Maksymowicz, et al. (Cohen, Mag. J.) 2:23CV00139, 8-22-23, 4 pages. Decision recommending granting of defendants' motions to dismiss, and enjoining plaintiff from filing new cases in Maine without prior permission of court.

DeMerchant v. Maine State Prison (Nivison, Mag. J.) 1:23CV00263, 8-24-23, 3 pages. Decision recommending dismissal of complaint without prejudice.

Martin v. U.S. (Nivison, Mag. J.) 2:21CR00016, 8-24-23, 14 pages. Decision recommending dismissal of petitioner's 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence.

MacDonald v. Duddy, et al. (Nivison, Mag. J.) 2:22CV00293, 8-30-23, 5 pages. Decision after 28 U.S.C. § 1915A review, recommending dismissal of complaint.

Lobster 207, LLC v. Pettegrow, et al. (Nivison, Mag. J.) 1:19CV00552, 8-30-23, 55 pages. Decision granting motion to supplement record, recommending granting in part and denying in part of plaintiff's motion for relief.

Gladu v. Magnusson, et al. (Nivison, Mag. J.) 1:22CV00134, 8-31-23, 11 pages. Decision recommending granting of defendants' motion to dismiss.

Jordan v. Kane (Nivison, Mag. J.) 1:23CV00311, 8-31-23, 3 pages. Decision recommending dismissal of petition.

Johnson v. Trump, et al. (Nivison, Mag. J.) 1:23CV00331, 8-31-23, 3 pages. Decision recommending dismissal of complaint after 28 U.S.C. § 1915(e)(2) review.

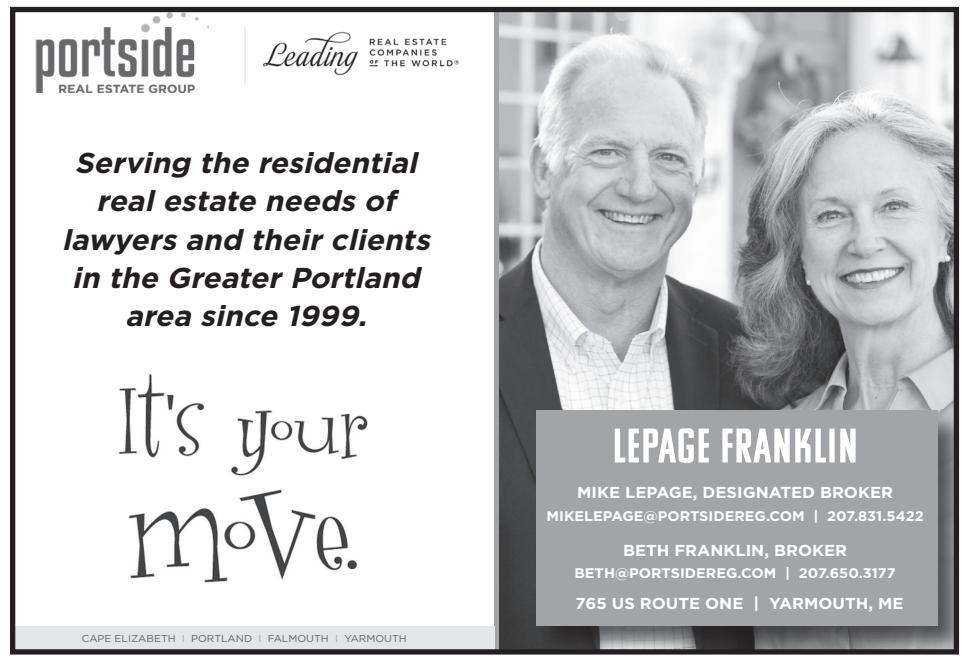
Kennaway v. Gillen, et al. (Nivison, Mag. J.) 1:22CV00036, 9-7-23, 8 pages. Decision recommending granting of defendant's motion for judgment on the pleadings.

Inman-Arbo v. State of Maine (Nivison, Mag. J.) 1:23CV00326, 9-11-23, 6 pages. Decision after 28 U.S.C. § 1915A(a) review, recommending dismissal of complaint.

Barnard v. U.S. (Nivison, Mag. J.) 1:23CV00257, 9-13-23, 4 pages. Decision after 28 U.S.C. § 2254 review, recommending dismissal of petition for *habeas* relief.

BANKRUPTCY COURT

Albert v. Nason (Fagone, J.) Adv. Proc. No.: 23-01001, 9/8/23, 13 pages. Memorandum of Decision finding that judgment debt for assault and battery is nondischargeable under 11 U.S.C. § 523(a)(6) as a debt for a willful and malicious injury.



Deed Restrictions vs. Short Term Rentals

CONTINUED FROM PG 1

On appeal, Erik Townsend was represented by Andrew W. Sparks and William J. Kennedy of Drummond and Drummond in Portland. The neighbors were represented by David A. Soley and Glenn Israel of Bernstein Shur's Portland office.

The Law Court focused on the language of the restrictions in the deed, beginning with the "private residential purposes" requirement, and looking to other jurisdictions for their holdings as to whether short-term rentals violated similar restrictions elsewhere. Finding a "slight majority" of jurisdictions that permit short-term rentals in those instances (*e.g.* Montana and Maryland), and others that don't (*e.g.* Massachusetts, Pennsylvania, and Kentucky), the Law Court determined that the restriction did not prohibit overnight guests – including those that paid. It left the door open, however, to Townsend's use possibly violating the "private residential use" restriction if the activities had an adverse impact on the residential nature of the neighborhood.

Addressing the deed's restriction against business or trade use, the Law Court drew an analogy to a garage sale – finding that holding one sale on occasion is one thing, but operating one every weekend is akin to operating a flea market. The Court found that Townsend leaned more towards the latter, as the "pattern of use, maintenance, advertising, and holding out of his property brings his rentals squarely within the definition of a business, such as a hotel." Although the Law Court ultimately agreed that an injunction was warranted, it disagreed that the one provided was adequate, and remanded for further proceedings to develop a more appropriate injunction, and "set a limit, consistent with the definition, on the number of days per year that Townsend may use the property for short-term rentals."

Justice Mead, joined by Chief Justice Stanfill, wrote a dissenting opinion, whereby he expressed concern that the majority's focus on the frequency and length of Townsend's rentals in determining whether it constitutes a business creates "an elusive standard with enormous implications for the legions of Maine property owners who derive income from the rental of their residential properties, especially in the summer months." Justice Mead further focused on the use of the term "therefrom" in the deed restriction, as opposed to "therein" or "thereon," as the drafter's intent to bar business emanating *from* the property, as opposed to rentals which occur *upon* the property.

David Soley, counsel for the neighbors, called it a "hard-fought case," with significant impacts for small, quiet communities like Cushing, and a decision that will likely often be cited going forward. "The decision shows what you *can't* do," noted Soley, "Here, it was advertised as a party house with amenities, but going forward, it will be fact-specific to each instance." At this stage, the matter is headed back to the Business and Consumer Docket for proceedings to draft a new injunction, if one cannot be agreed upon by consent.

A summary of the Law Court's decision in *Morgan, et al. v. Townsend*, MLR #183-23, appears on page 4 of this issue.

-Regan Sweeney, regans@mainelawyersreview.com

Fee-Shifting Legislation: A Creative Yet Familiar Solution to Indigent Legal Access in Maine

CONTINUED FROM PG 1

that impactful change was going to require a bit of creative legislation.

Born in Lewiston and a graduate of Cheverus High School in Portland, Fontaine spent years in the Peace Corps after graduating from Boston College and before attending Georgetown University Law Center. Upon his graduation from law school, he returned to Portland and began practicing with Pine Tree Legal Assistance (PTLA), where he ultimately became Executive Director in 1970. During his time there, he saw real, impactful change made through creative class action suits before the legislature implemented new rules around how and to whom PTLA could provide its services.

Looking for the next opportunity to support those in need, Fontaine left PTLA and opened a private practice in Portland centered around employment matters, where he worked extensively with labor unions. After more than forty years, he retired, but his passion for indigent access to legal services still burned brightly. He is currently the Executive Director of Open the Courthouse Door.

Following the publication of his 2020 article, Fontaine realized the article would probably have neither the reach nor the impact that he hoped for, and he "wanted to make it mean something." From there, it felt a natural next step to turn his proposal into legislation.

Given the many recent articles, reports, and decisions centered around the failures of the Maine judicial system to ensure Sixth Amendment rights are protected for all indigent parties in the state, it was not difficult to find support for the proposed legislation around fee-shifting. "It is a strange but common truth that societies believe simultaneously in contradictory myths," wrote Fontaine in his 2020 article. "Such is the case in America today with regard to civil justice: Americans boast that they stand equal before the law while simultaneously accepting the common quip that 'you can get about as much justice as you can afford.'"

Fontaine hopes that this fee-shifting legislation, a combination of the familiar and the creative, one which costs nothing to the government or the tax payer, will provide a significant step towards "opening the courthouse doors" to indigent parties. "We have a government divided into three parts: executive, legislative, and judiciary, but poor people don't get the judiciary," said Fontaine during our interview. "We're supposed to be the greatest democracy in the world, and yet one third of our government is unavailable to poor people."

-Erin Van Den Berghe, ev@mainelawyersreview.com

NEWS OF LAWYERS

CONTINUED FROM PG 2

Lisa S. Boehm (ERISA Law) *Lawyer of the Year: ERISA
Robert C. Brooks (Employment Law – Management, Litigation – Labor and Mgmt, Workers' Compensation Law – Employers)
Juliet T. Browne (Admin. / Regulatory Law, Energy Law, Environmental Law, Land Use and Zoning Law, Litig. – Env., Natural Resources Law) *Lawyer of the Year: Admin./Regulatory Law *and* Environmental Law
Anthony M. Calcagni, David L. Galgay Jr., James C. Palmer (Real Estate Law)
Roger A. Clement, Jr. (Bkcy and Creditor Debtor Rights / Insolvency and Reorg. Law, Bet-the-Company Litig., Litig. – Bankruptcy)
Philip M. Coffin III (Med Malpractice Law – Defendants, Personal Injury Litig. – Defendants)
James I. Cohen (Admin. / Regulatory Law, Energy Reg. Law, Gov. Relations Practice)
Kimberly S. Couch, Kenneth F. Ginder, Karen K. Hartford, Suzanne E. Meeker (ERISA)
Douglas P. Currier (Employment Law – Mgmt, Labor Law – Mgmt, Litigation – Labor and Employment)
Kelly Donahue (Intellectual Property Law, Patent Law) *One to Watch
Michael J. Donlan (Litig. – Real Estate)
Jonathan M. Dunitz (Litig. – Insurance)
Anya F. Endsley (Trusts and Estates) *One to Watch
Gregory S. Fryer (Corporate Law, Mergers / Acquisitions Law, Securities / Capital Markets Law, Securities Reg.)
Martha C. Gaythwaite (Commercial Litig., Litig. – Health Care, Litig. – Insurance, Mass Tort Litig./ Class Actions – Defendants, Personal Injury Litig. – Defendants, Product Liability Litig. – Defendants, Prof. Malpractice Law – Defendants) *Lawyer of the Year: Litig. - Insurance
John P. Giffune (Construction Law, Litig. – Construction)
Mark K. Googins (Banking and Finance Law, Corp. Law, Mergers / Acquisitions Law) *Lawyer of the Year: Banking and Finance Law *and* Corp. Law
Nathaniel R. Hull (Bkcy and Creditor Debtor Rights / Insolvency and Reorg. Law)
Elizabeth T. Johnston (Labor and Employ. Law – Mgmt) *One to Watch
Keith C. Jones (Corp. Law, Mergers / Acquisitions Law, Securities / Capital Markets Law, Sec.Reg.)
Kurt E. Klebe (Litig. – Trusts and Estates, Non-Profit / Charities Law, T&E)
William C. Knowles (Commercial Litig., Litig. – Land Use and Zoning, Litig. – T&E, Personal Injury Litig. – Defendants)
Mary McQuillen (Trusts and Estates)
Marie J. Mueller (Commercial Litig., Litig. – Construction, Prof. Malpractice Law) *One to Watch
Jacqueline W. Rider (Litig. – Trusts and Estates, T&E)
A. Robert Ruesch (Commercial Litig., Construction Law, Litigation – Construction) *Lawyer of the Year: Construction Law
Jeffrey D. Russell (Commercial Litig.)
Stephen B. Segal (Bankruptcy and Creditor Debtor Rights / Insolvency and Reorg. Law) *One to Watch
Christopher R. Smith (Business Orgs, Corporate Law, Mergers and Acquisitions Law)
Gordon R. Smith (Environmental Law, Land Use and Zoning Law, Litig. - Environmental)
Danielle R. Starr (Family Law, Real Estate) *One to Watch
William H. Stiles (Health Care Law, Litig. – Health Care)
David E. Warren (Business Orgs (including LLCs and Partnerships), Closely Held Companies and Family Bus. Law, Corp. Governance Law, Corp. Law, Education Law) *Lawyer of the Year: Business Orgs
Rachel Wertheimer (Litig. – Regulatory Enforcement (SEC, Telecom, Energy)
Boston Office
Thomas O. Bean (Commercial Litig., Litig. – Bankruptcy)
Katharine B. M. Brite, Dena W. Hirsch (Trusts and Estates) *One to Watch
Margaret Capp Fitzgerald (Insurance Law) *One to Watch
Gene D. Dahmen, Kristin S. Doeberl, Regina M. Hurley, Kyle T. MacDonald, Nancy O'Donnell, Robin D. Murphy (Family Law)
Francesco A. De Vito, Megan E. Delehanty, Louis C. Miller (Real Estate Law)
Michael L. Fay, Ellen M. Harrington, Matthew J. Leonard, Ruth A. Mattson (Trusts and Estates)
Michael K. Fee (Commercial Litig., Criminal Defense: White-Collar)
William F. Friedler (Elder Law)
Brian M. Hurley (Litig. – Real Estate, Real Estate Law)
William D. Jewett (ERISA)
Michael P. Last (Env. Law, Real Estate)
J. David Leslie, Eric Smith (Insurance Law)
Elizabeth Murdock Myers (Corporate Law)
Michael F. O'Connell (Tax Law)
Brian O'Rourke (Litig. – Construction)
Daniel J. Ossoff (Land Use and Zoning Law, Real Estate Law)
Derek T. Rocha (Commercial Litig.) *One to Watch
James Roosevelt Jr., Gary A. Rosenberg, Paul W. Shaw (Health Care Law)
Mary H. Schmidt (Elder Law, Family Law, Litig. – Trusts and Estates, T&E)
Westport, Conn. Office
Andrew B. Nevas (Commercial Litig., Litig. – T&E)
Kristen G. Rossetti (Commercial Litig.) *One to Watch
Frank J. Silvestri, Jr. (Arbitration, Commercial Litig., Litig. – Health Care, Litig. – Securities)
Barbara A. Young (Business Orgs (including LLCs and Partnerships))

Justice Murphy Rejects Settlement to Overhaul Indigent Defense in Maine

By Samantha Hogan

Maine Superior Court Justice Michaela Murphy recently rejected a proposed settlement in a lawsuit over indigent legal services, saying the agreement could "close the courthouse doors" for poor defendants and leave them little recourse if the state failed to provide lawyers.

Criminal defendants who are not able to afford to hire their own lawyer would be without a path to sue the state for a systemic failure to meet their Sixth Amendment right to an attorney, if she approved the settlement and paused the lawsuit for four years while the state worked on reforms, Justice Murphy wrote in a decision released on September 13 (see summary of decision in *Robbins, et al. v. Maine Commission on Indigent Legal Services, et al*, MLR/SC#267-23, at p. 9).

It was unknowable how many defendants could go without an attorney over the next four years, but the risks are too high, she wrote. "What is at stake, depending on the evidence presented, could be the deprivation of the fundamental rights to due process and to liberty, and the failure on the part of the state of Maine to fulfill a core function of government."

The ACLU and the state's indigent defense commission are now being sent back to the drawing board to renegotiate a settlement as the lawsuit heads toward trial over how to overhaul Maine's system of providing legal services to poor criminal defendants. Future proceedings were expected to be scheduled during a court hearing on September 15.

The Maine Commission on Indigent Legal Services, or MCILS, is responsible for providing a lawyer to every criminal defendant who cannot afford to hire their own. The agency does this by contracting with private defense attorneys and employing a few public defenders.

Lawyers for the ACLU and MCILS jointly filed the proposed settlement with the court on Aug. 21. The agreement would have set new standards for lawyers, ordered a top to bottom review of how attorneys handle cases, and called for future advocacy to add an unspecified number of public defenders to handle appellate and post-conviction cases.

Justice Murphy expressed skepticism about the proposed settlement a week after receiving it, Maine Public reported on August 30. https://www.mainepublic.org/courts-and-crime/2023-08-30/judge-skeptical-of-agreement-to-drop-maine-aclu-lawsuit-over-low-income-representation. The agreement didn't address existing issues, including the shrinking availability of defense lawyers to represent poor criminal defendants or their workloads.

"The court finds that the settlement agreement proposed here is highly unusual for class action litigation. … It is not a judgment that can be entered on the docket or appealed. It is not a judicially enforceable consent decree. It is a four-year stay -- or continuance -- of the litigation which was intended to decide if the state of Maine has systematically violated class members' Sixth Amendment right and their rights under the Maine constitution."

The ACLU of Maine sued state officials 18 months ago for their alleged failure to create an effective system to defend adults who had been charged with crimes and could not afford to hire their own lawyers. It could not comment about the court's decision but repeated a statement it has previously released to the media. "The right to an attorney is not a luxury for the rich. It is a constitutional guarantee to us all. We are proud to continue this fight so all people in Maine may one day be treated equally under the law, no matter their wealth," wrote spokesman Samuel Crankshaw.

MCILS Executive Director Jim Billings did not immediately respond to a voicemail seeking comment.

Justice Murphy took specific aim at the state's "Lawyer of the Day' program. One or two lawyers are present to provide assistance during defendants' initial appearance in front of a judge. The lawyer of the day's representation of defendant is "short-term" and does not usually extend beyond that first appearance, after which "Maine jurists can only hope that there will be a MCILS-qualified and rostered attorney to accept appointment," she wrote.

There is no legal standard in Maine for how long a defendant can go without counsel after the lawyer of the day has represented them. News outlets have reported that the amount of time that defendants are waiting to be assigned a lawyer by the court is getting longer. *The Maine Monitor* reported in mid-July that on at least one day more than 100 criminal and child protection cases did not have a lawyer appointed to represent defendant.

In late August, MCILS stopped assisting the courts with finding available defense attorneys. Court clerks and judges are now solely responsible. "Judges and clerks continue to make calls pleading with lawyers to take cases," Justice Murphy wrote. "This arrangement may work for the attorneys and for the courts, at least temporarily, but no one is monitoring how this improvising by jurists and the ongoing instability affects class members in terms of delay or adequacy of representation."

Until late last year, Maine was the only state in the nation that did not employ any public defenders. Five public defenders now work as a roaming "rural defender unit" in areas of the state where there are not enough local lawyers to handle all of the criminal cases. State lawmakers approved funding for MCILS to hire additional public defenders this year and open the state's first public defender office.

More money -- to hire public defenders and open offices across the state -- is ultimately the decision of state lawmakers. The rejected settlement had acknowledged this fact and promises for the ACLU and MCILS to work together to advocate for additional funding.

"It is MCILS's obligation to maintain sufficient numbers of attorneys on their rosters, by case type, and the Judicial Branch is charged with appointing attorneys from these rosters," Justice Murphy wrote. "This means that the system is entirely dependent on the willingness of the MCILS-qualified, independent contractor attorneys to accept or not accept certain kinds of cases."

Samantha Hogan reports on the criminal justice system and government accountability for The Maine Monitor, samantha@themainemonitor.org. This story was originally published by The Maine Monitor, a local journalism product published by The Maine Center for Public Interest Reporting, a nonpartisan and nonprofit civic news organization.

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MAINE ASSISTANCE PROGRAM
FOR LAWYERS & JUDGES

Maine Assistance Program for Lawyers & Judges Executive Director Search

The Maine Assistance Program for Lawyers & Judges (MAP) is seeking a new Executive Director to assume responsibility for operation of the program. Applicants must be self-motivated, independent, empathetic, and passionate about working with individuals with mental health or substance use issues.

Background: The Maine Assistance Program for Lawyers & Judges, commonly referred to as MAP, was created in 2002 by the Maine Supreme Judicial Court for the purpose of protecting the public from harm caused by impaired members of the legal profession. To meet this goal, MAP provides free and confidential assistance to Maine attorneys, judges, University of Maine School of Law students, and applicants to the Maine Bar for issues that might adversely affect their work performance or personal life, including but not limited to depression, substance use disorders, anxiety, burnout, addictive behaviors, and aging.

Responsibilities: The Director oversees a program providing on-call 24/7 assistance to clients needing advice, arrangements for treatment, hospitalization, or other matters. MAP responsibilities include developing and guiding MAP-sponsored support and 12 Step groups. The Director implements and oversees monitoring programs required by courts, Bar Counsel, the Board of Bar Examiners, and law firms and must maintain and expand the existing peer support network of volunteer lawyers, law students, and judges. Educating the bench, bar, and public about issues relating to the impairment of legal professionals and the importance of maintaining their well-being is a core responsibility of MAP. Accordingly, the Director must develop relevant presentations and CLE programs and disseminate that information in print and online. The position also requires out-of-state travel and participation in various seminars and conferences associated with lawyer assistance programs. Due to the importance of continuity of relationships and services, a five-year commitment is expected.

Education: A Juris Doctorate is preferred, but a qualified candidate with a master's or doctoral degree in a human services field may also be considered.

Knowledge, Skills, and Abilities:

- Familiarity with stresses and pressures associated with the practice of law.
- Education or experience with mental health or substance use disorders in professionals. (Understanding of 12 Step programs a plus).
- Strong interpersonal and organizational skills.
- Empathetic, non-judgmental demeanor, and outstanding listening skills.
- Excellent writing and oral presentation skills.
- Trustworthiness concerning confidential information.
- Willingness to attend bench and bar functions.
- Valid driver's license and ability to drive anywhere in Maine on short notice.
- Willingness and ability to travel to conferences held throughout the U.S.
- Ability to work alone from home without clerical support.
- Familiarity with use of ZOOM or other remote work platforms.
- High degree of moral character, integrity, and professionalism.

Compensation:
Salary and benefits commensurate with experience and education.

Application:
To apply, please send letter of interest and resume to nugentwc@outlook.com. Inquiries seeking further information are also welcome.

MAP is an equal opportunity employer

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is seeking an experienced Trial Attorney to join our Personal Injury practice. This attorney must have a minimum of five years of experience working with clients in this area of practice and proven success at trial. Our busy personal injury practice group needs to add an attorney capable of handling a volume of quality cases. This is a shareholder track position that will be well supported by a legal assistant and paralegal. Our marketing generates numerous potential cases, and we have a broad network of referring attorneys. The ideal candidate will be prepared to take advantage of our in-house marketing and business development resources to generate business. They must be capable of working collaboratively with other experienced trial attorneys and excellent research and writing attorneys to achieve the best possible results for our clients.

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INDIVIDUAL SUBSCRIBERS AND SUBSCRIBING LAW FIRMS ARE INVITED TO SUBMIT NEWS OF PERSONNEL APPOINTMENTS, ADVANCEMENTS, SPEAKING ENGAGEMENTS, AUTHORSHIP, RECOGNITION, AND SIMILAR NOTEWORTHY NEWS OF A NON-COMMERCIAL NATURE ABOUT MAINE ATTORNEYS TO MLR:NEWS@MAINELAWYERSREVIEW.COM. ITEMS SHOULD BE OF 150 WORDS OR FEWER, ACCOMPANIED BY A PHOTO (PREFERABLY .JPG OF 300 DPI) IF AVAILABLE.

Assistant Attorney General

Child Protection Division – Central Maine

Opening Date: July 31, 2023

Closing Date: October 20, 2023

Job Class Code: 0186

Grade: 1 Position # 006000481

Salary: Salary competitive and based upon qualifications*

*Pursuant to 5 MRS § 196 the salary for this position has been set by the Office of the Attorney General

Job Description The Office of the Attorney General is seeking one highly motivated and experienced lawyer to fill a full-time vacancy for an Assistant Attorney General. The primary responsibility of the AAG will be litigating DHHS child protection cases in the District Courts in Central Maine. Candidates must have well-developed skills in skills in trial practice, motion practice, negotiation, professional communication, time optimization, case management, calendar management, and the ability to engage effectively with an array of stationary and mobile law office technology for research, communication, documentation, and time management. **The position will require a high-volume caseload of expedited and intensive litigation, requiring multiple court appearances each week – both in person and remote court proceedings. Multi-day trials are common. The cases often develop from urgent circumstances, requiring the attorney to effectively communicate with the client and develop a litigation strategy within days of the filing of pleadings. This position also performs regular trainings for DHHS child welfare staff, and other legal work in the child welfare field, as assigned by the Division Chief.** Applicants who enjoy litigation and have superb legal writing skills are encouraged to apply, as this position may provide opportunities for sophisticated brief writing to those who are qualified and interested in developing as appellate writers. **Office of the Attorney General, https://www.maine.gov/ag/**

Minimum Qualifications Applicants must be members of the Maine Bar in good standing, who are experienced litigators, excellent writers, willing to travel regularly, able to develop proficiency with remote court proceedings, and have demonstrated that they conduct their professional work in a manner that is thorough, accurate, resourceful, collegial and effective. Skills must be highly developed in all aspects of litigation, client communication, negotiation, time optimization, file management, schedule organization, and use of law office technology. Applicants must adhere the highest standards of legal ethics and civility.

Application Instructions Prepare a cover letter highlighting your experience and qualifications that make you a strong candidate for the position and the knowledge, skills, and abilities required. Include resume, writing sample, three references (to include one work-related reference), a copy of your Maine Board of Overseers of the Bar certification, and complete the online direct hire application, https://mainebhr.hire.trakstar.com/jobs/fk0xa5v/. The Department is not responsible for late receipt of applications due to electronic transmission malfunctions. Job offer to new hire is conditional upon verification of credentials, criminal records, driver's license check, and professional license requirements if applicable. Please direct all questions to Assistant Attorney General, Division Chief Ariel Piers-Gamble at Ariel.Gannon@maine.gov, or call 207-626-8800.

Benefits We believe in supporting our workforce's health and wellbeing with a valuable total compensation package, including: **Work-Life Balance** – The State offers **13 paid holidays, 12 days of sick leave, and 3+ weeks of vacation leave** annually. Vacation leave accrual increases with years of service, and overtime-exempt employees receive personal leave. **Health Insurance Coverage** – The State pays **85%-100%** of employee-only premiums ($9,893.52-$11,057.52 annual value), depending on salary. Use this chart to find the premium costs (https://www.maine.gov/bhr/oeh/benefits/som-health-plan/premium-rates), including percentage of dependent coverage paid by the State. **Health Insurance Premium Credit** – Participation decreases employee-only premiums by 5%. Visit the Office of Employee Health and Wellness for more information about program requirements. https://www.maine.gov/bhr/oeh/benefits/health-premium-credit **Dental Insurance** – The State pays 100% of employee-only dental premiums ($350.40 annual value). **Retirement Plan** – The State contributes **13.16% of pay** to the Maine Public Employees Retirement System (MainePERS), on behalf of employee. **Gym Membership Reimbursement** – Receive up to $40 per month to offset this expense. **Health and Dependent Care Flexible Spending Accounts** – Set aside money pre-tax to help pay for out-of-pocket health care expenses and/or daycare expenses. **Public Service Student Loan Forgiveness** – The State is a qualified employer for this federal program. For more information, visit the Federal Student Aid office: https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service **Living Resources Program** – Navigate challenging work and life situations with our employee assistance program. **Parental leave:** All employees who are welcoming a child—including fathers and adoptive parents—receive **four weeks of fully paid parental leave**. Additional, unpaid leave may also be available, under the Family and Medical Leave Act. **Voluntary Deferred Compensation** – Save additional pre-tax funds for retirement in a MaineSaves 457(b) account through payroll deductions. Learn about additional wellness benefits at the Office of Employee Health and Wellness: https://www.maine.gov/bhr/oeh/

Maine State Government and the Office of the Attorney General are Equal Opportunity employers. We celebrate diversity and are committed to creating an inclusive environment for all employees. We provide reasonable accommodations to qualified individuals with disabilities upon request.

Assistant Attorney General

Child Protection Division

Opening Date: July 31, 2023

Closing Date: October 20, 2023

Job Class Code: 0186

Grade: 1

Salary: Salary competitive and based upon qualifications*

*Pursuant to 5 MRS § 196 the salary for this position has been set by the Office of the Attorney General

Position # 006006021

JOB DESCRIPTION The Office of the Attorney General is seeking one highly motivated lawyer to fill a full-time vacancy for an Assistant Attorney General. This position will be located in the Portland Office. The primary assignment for the Assistant Attorney General will be litigating DHHS child protection cases in the District Courts located in the western area of the state, as well as all other locations as needed. This position will perform other legal work in the child welfare field, present regular trainings for DHHS child welfare staff, and a variety of other duties as assigned by the Division Chief. Candidates must have well-developed skills in litigation, motion practice, negotiation, professional communication, time optimization, case management, calendar management, and the ability to engage effectively with an array of stationary and mobile law office technology for research, communication, documentation, and task management. The position will require a lawyer to handle a high-volume caseload of expedited and intensive litigation, requiring multiple court appearances each week. Multi-day trials are common. The cases often develop from urgent circumstances, are presented to a judge within hours, and hearings are held within days. Applicants who enjoy litigation and have superb legal writing skills are encouraged to apply, as this position may provide opportunities for sophisticated brief writing to those who are qualified and interested in developing as appellate writers.

MINIMUM QUALIFICATIONS Applicants must be members of the Maine Bar in good standing, who are well-developed litigators, willing to travel regularly, and conduct their work in a manner that is thorough, resourceful and effective as a team member. Skills must be highly developed in litigation, client communication, negotiation, time optimization, file management, schedule organization, and use of law office technology. Applicants must adhere the highest standards of legal ethics and civility.

Office of the Attorney General APPLICATION INSTRUCTIONS If you are interested in applying for this position, prepare a cover letter highlighting your experience and qualifications that make you a strong candidate for the position and the knowledge, skills and abilities required. Include resume, writing sample, three references (to include one work-related reference), a copy of your Maine Board of Overseers of the Bar certification and complete the online direct hire application. The Department is not responsible for late receipt of applications due to electronic transmission malfunctions. Job offer to new hire is conditional upon verification of credentials, criminal records, and driver's license check, and professional license requirements if applicable. Please direct all questions to Assistant Attorney General, Division Chief Ariel Gannon via email or you may call 207-626-8800.

BENEFITS No matter where you work across Maine state government, you find employees who embody our state motto—"Dirigo" or "I lead"—as they provide essential services to Mainers every day. We believe in supporting our workforce's health and wellbeing with a valuable total compensation package, including: **Work-Life Balance** – Rest is essential. Take time for yourself using 13 paid holidays, 12 days of sick leave, and 3+ weeks of vacation leave annually. Vacation leave accrual increases with years of service, and overtime-exempt employees receive personal leave. **Health Insurance Coverage** – The State of Maine pays 85%-100% of employee-only premiums ($9,893.52-$11,057.52 annual value), depending on salary. Use this chart to find the premium costs for you and your family, including the percentage of dependent coverage paid by the State. **Health Insurance Premium Credit** – Participation decreases employee-only premiums by 5%. Visit the Office of Employee Health and Wellness for more information about program requirements. **Dental Insurance –** The State of Maine pays 100% of employee-only dental premiums ($350.40 annual value). **Retirement Plan –** The State of Maine contributes 13.16% of pay to the Maine Public Employees Retirement System (MainePERS), on behalf of the employee. **Gym Membership Reimbursement** – Improve overall health with regular exercise and receive up to $40 per month to offset this expense. **Health and Dependent Care Flexible Spending Accounts** – Set aside money pre-tax to help pay for out-of-pocket health care expenses and/or daycare expenses. **Public Service Student Loan Forgiveness** – The State of Maine is a qualified employer for this federal program. For more information, visit the Federal Student Aid office. **Living Resources Program –** Navigate challenging work and life situations with our employee assistance program. **Parental leave** is one of the most important benefits for any working parent. All employees who are welcoming a child—including fathers and adoptive parents—receive four weeks of fully paid parental leave. Additional, unpaid leave may also be available, under the Family and Medical Leave Act. **Voluntary Deferred Compensation** – Save additional pre-tax funds for retirement in a MaineSaves 457(b) account through payroll deductions. Learn about additional wellness benefits for State employees from the Office of Employee Health and Wellness.

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