MAINE BAR JOURNAL

THE QUARTERLY PUBLICATION OF THE MAINE STATE BAR ASSOCIATION MAINEBAR.ORG

VOLUME 29 • NUMBER 4 • FALL 2014

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President's Page

MSBA Kicks Off Inaugural Leadership Academy

by Diane Dusini

I am thrilled to introduce 12 attorneys from throughout the state who have been selected for the Leadership Academy Class of 2015. These lawyers are accomplished legal practitioners who have been admitted to the practice of law for at least two years and no more than 10 years.

The MSBA Leadership Academy is an 8-month, statewide leadership-training program to foster the professional growth and enhance the leadership skills of a diverse group of member attorneys.

As I worked with other Governors on the Leadership Academy Selection Committee, I felt confident in our program but truly had no idea what to expect. To my great pleasure, we received an overwhelming number of applications from highly qualified attorneys across the state, and it was tough to say "no" to any of them. I'm also proud to report that the class reflects geographic and gender diversity.

We held a kick-off event on Nov. 7, at Bar Headquarters, where I had the pleasure of meeting each member of the Leadership Academy Class of 2015. Please join me in welcoming them:

Nathaniel Bessy
Brann & Isaacson LLP, Lewiston

Devin W. Deane
Norman Hanson & DeTroy LLC, Portland

Lindsay R.B. Dickerson
U.S. District Court, District of Maine, Portland

Amy Dieterich
Skelton Taintor & Abbott, Auburn

Meredith C. Eilers
Bernstein Shur, Portland

Ben Fowler
Fowler Law Office, Bangor

Sarah Irving Gilbert
Elliott & MacLean LLP, Camden

Allison Gardiner Gray
Johnson Webbert & Young LLP, Augusta

Erica M. Johanson
Eaton Peabody, Portland

Sean S. O'Mara
Sean S. O'Mara, Attorney-at-Law, Orono

Robert Van Horn
Law Office of Robert Van Horn, Ellsworth

Ezra A.R. Willey
Willey Law Offices, Bangor

The 12 Leadership Academy members will participate in eight sessions over the next 8 months, and graduate at the 2015 MSBA Summer Meeting in Bar Harbor. The sessions will feature professional facilitators and prominent speakers from various disciplines to inform participants about leadership principles and techniques, the importance of effective leaders in organizations to maximize efficiency and effectiveness, and the practice of ethical and professional law in Maine.

I encourage each of you to learn more about the MSBA Leadership Academy. If you are a newer attorney who meets the admission critiera, I encourage you to apply. If you are a seasoned attorney who knows of a promising candidate, please encourage that colleague to apply. Information is available on the MSBA's website at mainebar.org or by contacting Executive Director Angela Weston.

As I conclude my year as president, I look back proudly on a year of positive growth for the MSBA. We have increased membership, introduced new member benefits, and identified new ways to collaborate with the New Lawyers Section and law students. We held successful Annual and Summer Meetings, and we hosted the 44th Annual Meeting of the New England Bar Association at the Cliff House in Ogunquit. The MSBA is a strong and vibrant organization, and we will continue to grow and serve the Maine Bar and the public in positive and valuable ways. Thank you for the opportunity and honor to serve as your president.

Left to right—standing: Robert VanHorn, Lindsay Dickerson, Devin Deane, Ben Fowler, Sean O'Mara, Meredith Eilers, Allison Gray, Kathy Hunt—facilitator, Erica Johanson.

Front row—sitting: Nathaniel Bessey, Sarah Gilbert, Ezra Willey, Amy Dieterich.

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Finding The Right Home For Orphan Funds

by Diana Scully

An Unresolved Question

In the spring 2014 edition of the *Maine Bar Journal*, I explained how—through Maine's Interest on Lawyers Trust Accounts (IOLTA) program—both financial institutions and law firms make a difference in the amount of funding available to help poor and vulnerable Mainers who face complex civil legal problems navigate the justice system. Financial institutions can help increase funding by paying favorable interest rates on IOLTA funds. Law firms can help by their decisions about where to bank.

In this fall edition, I will provide an update on a long-simmering question related to the IOLTA program: ***What should happen with abandoned and unaccounted-for IOLTA funds?*** Our IOLTA program colleagues from Massachusetts refer to these as orphan funds.[1] A clear answer has remained elusive for a long time not only in Maine, but also throughout much of the county. Building on groundwork done previously in Maine and on approaches taken by other states, we can and must answer this question—preferably in a way that allows orphan funds to be used to support access to civil legal aid and *pro bono* legal services for low income Mainers who cannot afford to pay for a lawyer.

Why Is This Important?

There are at least three reasons why it is important to answer this question.

First, a clear answer could result in a small amount of additional funding for civil legal aid. Since a gaping chasm has persisted between need and resources for the past quarter of a century—at least since the 1990 Muskie Commission on Legal Needs—every little bit helps. Amending Maine laws and rules to clarify that under certain circumstances orphaned IOLTA funds should go to the Maine Bar Foundation for distribution to civil legal aid providers would provide a small, but ongoing funding stream for this charitable purpose.

Second, a clear answer about what to do with orphaned IOLTA funds would be helpful to many in Maine's legal community. At present, we know that some law firms send orphan funds in IOLTA accounts to the Maine Bar Foundation, some send these funds to the state treasurer as abandoned property, and some hold on to these funds because they do not know what to do with them.

Third, since Maine is the oldest state in the nation (based on median age), the problem of what to do with orphan funds will become even more acute as more attorneys retire from the practice of law. In the words of our IOLTA program colleague from Hawaii, unclaimed property issues often become apparent when an attorney dies or retires from practice.[2]

No Blame

There is no place for blame in this conversation. Law firms do not intentionally have accounts with client funds that cannot be traced to particular clients or funds being held for clients whose names are known but cannot be tracked down. What is important is to provide clear pathways for law firms to follow when they find themselves with orphan funds.

Two Basic Types of Orphan Funds

Sometimes a client is known, but cannot be located. It is not unusual for a lawyer to hold IOLTA funds that he or she has tried to return to the client. For example, the lawyer receives a settlement check and sends it to the client; the check remains uncashed; and the lawyer makes repeated attempts over time to find that client without success.

Sometimes client funds cannot be traced back to a particular client. Examples of how this happens include:[3]

- When lawyers try to reconcile their accounts after a number of years, unidentifiable balances might appear.
- When a lawyer who has died kept no or inadequate records, there might be no way to tie clients to the remaining funds.
- When there are mergers of law firms and as the records are combined, sometimes IOLTA balances appear that have no client identifier in the surviving records.

Maine's Attempts to Clarify the Proper Disposition of Orphan Funds

In 2008, a Maine law firm tried to resolve how to dispose of orphan funds. They wanted these funds, minus any future legitimate client claims, to be used for civil legal aid programs. Spurred on by this firm's quest for clarity and desire to use orphan funds for charitable purposes, the Maine Bar Foundation jumped in to help.

In 2009, the Foundation sent a memorandum to the Board of Overseers of the Bar and the Office of Attorney General, sharing information about what was happening in other states with regard to the disposition of unidentified IOLTA funds and suggesting possible solutions for resolving this issue in Maine.[4]

The Foundation shared its findings that many states treated unclaimed IOLTA funds, after due diligence to identify and locate clients, as abandoned property; some states allowed funds not attributable to any client to be used for various law-related purposes; and a number of states found it appropriate to transfer unaccounted for balances to the IOLTA program because it can retain the funds as a disinterested third party and refund them if they are later clearly attributable to a client or other owner. The Foundation also suggested possible ways to resolve the handling of unclaimed IOLTA funds, including a new court rule; determination by the Board of Overseers of the Bar; and/or attorney petitions to the Supreme Judicial Court or Probate Court (on the theory of failed trust) asking for instructions based on the circumstances.

The Board of Overseers responded that the Professional Ethics Commission "unanimously concluded that…it does not have any jurisdiction or authority to render an advisory opinion" and believes that "the issues involved with this question require either a court rule or legislative action." An assistant attorney general (AAG) responded to the Foundation, commenting, "it is my belief that where an owner of funds in the account is lost or unknown, that money is unclaimed property within the meaning of Maine's Unclaimed Property law." The AAG also recognized that "interest on the account is the property of the Maine Bar Foundation" and "jurisdictions are not uniform in the way such accounts are treated."[6]

During 2010, the Foundation worked on a draft new court rule, providing that:

- When the lawyer or law firm cannot, after reasonable efforts, identify or locate the owner of funds in its IOLTA account, it must pay the funds to the Maine Bar Foundation for distribution to civil legal aid organizations;
- If the lawyer or law firm later identifies and locates the owner of funds paid to the Bar Foundation, the Bar Foundation must refund the sum to the owner; and
- The Maine Bar Foundation must maintain sufficient reserves to pay all claims for such funds.

However, the draft new rule did not move forward. At that time, the Foundation was focused on finding the answer to another important question—What should happen with residual funds in class actions when some payments for class members are not claimed? This was answered in 2013 when the Maine Supreme Judicial Court adopted a new *cy pres* rule confirming the appropriateness of . . . distributions of residual funds to third parties and specifying that when it is not clear that there is a third party whose interests reasonably approximate those being pursued by the class, the Maine Bar Foundation… should be the recipient.[7, 8]

It is now time to return our attention to finding the right home for orphan funds. The Foundation discussed its interest in jump-starting efforts to resolve this with the leaders of the Justice Action Group early this year. To figure out what to do, we not only need to build on the past efforts here in Maine, described above, but also on progress (or lack thereof) made by other states over the past few years, described below.

Use Orphan Funds for Civil Legal Aid—Laws and Rules in Nine States

As was the case five years ago, orphan funds are considered to be abandoned property in many states. However, as the chart that accompanies this column shows, a lot has been happening in at least nine states (in addition to Maine) to allow the use orphan funds for civil legal aid—Arkansas, Colorado, Hawaii, Illinois, Maryland, Massachusetts, Oregon, Pennsylvania, and Utah.[9]

In two states—Maryland and Oregon—there are state laws linking abandoned/unclaimed funds to civil legal aid:

- Since 1984, the Maryland Legal Services Corporation has received an annual statutory distribution of from Maryland's abandoned property fund. The amount was $500,000 for a number of years, but recently increased to $1.5 million.
- Since 2010, lawyers and law firms in Oregon have been required to remit unclaimed client funds to the Oregon State Bar's Legal Services Program. The law also applies to financial institutions with dormant IOLTA bank accounts. During the first four years, the Oregon State Bar received close to $500,000 and distributed $262,000 for legal aid. Key statutory provisions include:
  - There is an exception for funds in lawyer trust accounts under the abandoned property law, which is managed by the Department of Lands.
  - Amounts identified as lawyer trust account funds must be paid to the Oregon State Bar for distribution to civil legal aid organizations.
  - If a claim is filed for any of these funds, the Department of Lands must forward this to the Oregon State Bar for review and payment if the claim is allowed.

The other seven states shown in the chart are at various stages of developing rules:

- IOLTA programs in three states—Colorado, Illinois, and Pennsylvania—are exploring rules.
- IOLTA programs in three states have developed a draft rule—Arkansas, Hawaii, and Utah.
  - The draft rule in Arkansas was put on the back burner for a while, pending the merger of the Arkansas IOLTA Foundation and Access to Justice Foundation. They plan to regroup soon to resume work on their rule.
  - After many months of hard work, the Hawaii Justice Foundation decided not to submit their proposal to their Supreme Court, because the Hawaii Department of Budget and Finance was not inclined to lend its support.
  - The Utah Bar Foundation is moving forward with a rule relating to unidentified client funds and ex-

pects their Court to review this before the end of the year. They have put dealing with unclaimed funds on hold while they work out some details with Utah's Unclaimed Property Department.

- In Massachusetts, the IOLTA Committee and Board of Bar Overseers jointly submitted a proposed rule to their Supreme Judicial Court in January 2013. The Court has not yet acted on the rule.

What's Next in Maine?

Based on this analysis, the Maine Bar Foundation will continue reaching out to key organizations and individuals—Maine Supreme Judicial Court, Justice Action Group, key legislators, attorney general, Board of Overseers of the Bar, Maine State Bar Association, state treasurer, and civil legal aid providers—to determine the extent to which there might be support for state legislation regarding orphan funds. The purpose of this legislation, along with implementing rules, would be to:

- Provide greater clarity about what lawyers, law firms, and financial institutions in Maine must do with orphan funds; and
- Require that orphan funds be paid to the Maine Bar Foundation for distribution to civil legal aid organizations, after setting aside sufficient reserves to cover possible future claims.
- The Foundation welcomes any and all questions and comments.

Diana Scully has been executive director of the Maine Bar Foundation since June 2013. She holds a B.A. from Wellesley College and M.S.W. from the University of Michigan. Previously, Diana worked in Washington, D.C. as director of state services, National Association of States United for Aging and Disabilities; operated her firm Vantage Point, consulting with more than 60 Maine clients; served as executive director of the Maine Indian Tribal-State Commission; was appointed to various positions in Maine state government; and was a Peace Corps community organizer in the Philippines. Diana may be reached at dscully@mbf.org or 207.622.3477. For more information about the Maine Bar Foundation, visit mbf.org.

1. Jayne Tyrell, Executive Director, MA IOLTA Committee, attributes the term orphan funds to her colleague Erik Lund, Chair, MA Board of Bar Overseers Rules Committee.

2. Memorandum by Bob LeClair, Hawaii Justice Foundation, March 10, 2013.

3. Memoranda from Jayne Tyrell to Massachusetts IOLTA Committee, September 14, 2007 and May 18, 2012.

4. Memorandum from Calien Lewis, Executive Director, Maine Bar Foundation, to Board of Overseers of the Bar, June 23, 2009.

5. Letter from J. Scott Davis, Bar Counsel, Board of Overseers of the Bar, to Calien Lewis, July 28, 2009.

6. Letter from Lucinda White, Assistant Attorney General, to Calien Lewis, August 31, 2009.

7. MRCivP 23(f), effective March 1, 2013.

8. Access to Justice Update, Justice Action Group, April 2013.

9. Information in this section and in the accompanying chart was provided by the IOLTA programs from these states and the National Association of IOLTA Programs

Use Orphan Funds for Civil Legal Aid—Laws and Rules in Nine States

State	Law or Rule?	Key Provisions
Arkansas	draft rule	Key provisions in the draft rule developed by the AR IOLTA Foundation include: When a lawyer or law firm cannot identify or locate the owner of funds in its IOLTA or non-OLTA trust account for 5 years, the lawyer or firm must pay the funds to the Arkansas IOLTA Foundation. At the time such funds are remitted, the lawyer or law firm must submit the name and last known address of each person appearing to be entitled to the funds, if known, along with the amount of any unclaimed or unidentified funds. If, within 2 years of making a payment of unclaimed or unidentified funds to the Foundation, the lawyer or law firm identifies and locates the owner, the Foundation must refund the sum to the lawyer or law firm. The Foundation must maintain sufficient reserves to pay all claims for such funds.

State	Law or Rule?	Key Provisions
Colorado	exploring rule	The Colorado Lawyer Trust Account Foundation is considering proposing amendments to their Unclaimed Property Act to allow unclaimed IOLTA funds to go the Foundation.
Hawaii	draft rule on hold after many months of work	Key provisions in the draft rule developed by the HI Justice Foundation include: ***Unclaimed and Unidentified Funds.*** When for 2 years a ***lawyer or law firm*** cannot identify or locate the owner of funds in its IOLTA or non-IOLTA client trust account(s), it must promptly pay the funds to the Hawaii Justice Foundation. During the 2 years, where ***ownership of the funds*** is not in question, the lawyer or law firm must make reasonable efforts to locate the owner and return the funds to the owner; and where ***ownership of the funds is unclear***, the lawyer or firm must make reasonable efforts to resolve the issue of ownership and make reasonable efforts to locate and return the funds to the owner. When such funds are remitted to the Foundation, the lawyer or law firm must submit a letter with the name and last known address of each person appearing to be entitled to the funds, if known, and the amount of any unclaimed or unidentified funds. The letter must briefly describe the lawyer's or firm's efforts to locate or identify the owner of the funds. If within 2 years, the lawyer or law firm identifies and locates the owner, the Foundation must refund the sum to the lawyer or firm, and the lawyer or firm must promptly pay the funds to the owner. ***Abandoned Trust Accounts.*** When for a period of 2 years, a ***bank*** participating in IOLTA cannot locate the lawyer or law firm that is the last-known account holder, the bank must promptly remit the funds to the Foundation. When such funds are remitted, the bank must submit a letter with the name and last known address of the lawyer or law firm and the amount being paid by the bank to the Foundation. The letter must briefly describe the bank's efforts to locate the lawyer or firm that is the last-known account holder. If within 2 years the bank locates the lawyer or law firm, the Foundation must refund the sum to the bank. Upon receiving any funds from a bank, the Foundation must make reasonable efforts to locate the lawyer or law firm that was the last-known account holder and must promptly return the funds. ***Additional Provisions.*** The Foundation must adopt rules; maintain sufficient reserves; and report annually to the Supreme Court. There also are provisions governing the disposition of physical property and involving the Office of Disciplinary Counsel.
Illinois	exploring rule	The Lawyers' Trust Fund of IL has researched a few different approaches to unclaimed and unidentified funds in IOLTA accounts, all of which would seek to address this by court rule. At this point, IL is close to moving forward on unidentified funds only.
Maryland	law since 1984	Since 1984, the MD Legal Services Corporation has received an annual statutory distribution from Maryland's abandoned property fund (which has approximately $70 million). For many years the amount received was $500,000. This recently was increased to $1.5 million.

State	Law or Rule?	Key Provisions
Massachusetts	proposed rule submitted 1.10.2013 to MA Supreme Judicial Court; awaiting response	Here is a summary of the proposed rule developed by the MA IOLTA Committee and the MA Board of Bar Overseers: When a lawyer or law firm holds funds in its IOLTA account for a client or third party, and cannot locate that client or third party after 4 or more months of reasonable efforts to do so, it must pay the funds to the IOLTA Committee and notify Bar Counsel of the efforts made to locate the owner, whether client or third party. When a lawyer or law firm cannot identify the owner(s) of funds in an IOLTA account after 4 or more months of reasonable efforts to do so, the lawyer or firm must petition the Supreme Judicial Court for leave to pay the funds to the IOLTA Committee, together with a statement of the efforts made to identify and locate the owner or owners. The lawyer or law firm has a continuing responsibility for returning the funds to the owner or owners, and, if an owner of funds remitted to the IOLTA Committee is identified and located after the funds have been remitted to the Committee, then the lawyer or law firm must notify the Committee; and request, pursuant to procedures adopted by the Committee, a refund of amounts paid to the lawyer or firm. The lawyer or firm shall be responsible for their proper distribution. The procedures set forth in this subsection shall apply in cases where the amount of the funds is $500 or more…In cases where the amount of the funds is $500 or less, the lawyer or law firm must remit the funds directly to the Committee.
Oregon	law since 2010	Every person holding funds or other property presumed abandoned must report and pay or deliver to the Department of Lands all property presumed abandoned, with certain exceptions. One of the exceptions is that funds in lawyer trust accounts shall only be reported to the Department. [ORS 98.352] Any amounts identified as lawyer trust account funds in the report required by ORS 98.352 must be paid or delivered by the person holding the amounts to the Oregon State Bar along with a copy of the report. All amounts paid or delivered to the Oregon State Bar are continuously appropriated to the Oregon State Bar, and may be used only for the funding of legal services provided through the Legal Services Program established under ORS 9.572, the payment of claims allowed under ORS 98.392 (2), and the payment of expenses incurred by the Oregon State Bar in the administration of the Legal Services Program. [ORS 98.386(2)] If a claim is filed under this section for amounts identified as lawyer trust account funds in the report required by ORS 98.352, the department shall forward the claim to the Oregon State Bar for review and for payment by the Oregon State Bar if the claim is allowed. The department and the Oregon State Bar shall adopt rules for the administration of claims subject to this section. [ORS 98.392(2)] Oregon's law applies to financial institutions with dormant bank accounts that are designated IOLTA and these are reported to the Oregon State Bar, just as lawyers and law firms are required to report these.
Pennsylvania	exploring rule	The PA IOLTA Board is exploring the feasibility of a court rule which requires an attorney to remit unclaimed funds in an IOLTA account to the IOLTA Board, rather than escheating those funds to the State Bureau of Unclaimed Property.
Utah	draft rule	The Utah Bar Foundation met with the Utah Supreme Court. They are optimistic about submitting a rule allowing unidentifiable client funds to be donated to the Foundation, and drafting that rule for submission to and review by the Court. The Foundation also discussed the possibilities of working with unclaimed client funds. The Supreme Court thought it was best for the Foundation to meet with Utah's Unclaimed Property Division to see what they could work out with them.

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2014 Katahdin Recognition Programs Of The Maine Supreme Judicial Court

This year, the Maine Supreme Judicial Court honored 135 attorneys participating in the Katahdin Counsel Recognition Program, and seven law students participating in the second year of the Katahdin Law Student Recognition Program. Collectively, these volunteers have provide more than 15,847 hours of *pro bono* legal service to their communities. At a conservative estimate of $150 per hour, this represents more than $2 million in free legal assistance.

The purpose of the Katahdin Counsel program, the Katahdin Law Student program, and the corresponding recognition events, is to bring public attention to the important role of *pro bono* legal service in maintaining the civil justice system, and to honor attorneys and law students who have provided 50 or more hours of service during the past year. Seven Katahdin recognition events were held in Alfred, Auburn, Augusta, Bangor, Portland, Presque Isle, and Rockland in the last month to recognize participating attorneys and law students for this outstanding achievement.

Attorneys and law students are invited to participate in this program each year. Participation is voluntary, and based on the self-reporting of 50 or more hour hours of *pro bono* service during the time period July 1 through June 30 of the corresponding year. For more information, please visit the Judicial Branch's website, email katahdin@courts.maine.gov or call (207) 561-2310.

Pro bono opportunities can be found by contacting any of Maine's legal aid providers, including the Maine Volunteer Lawyers Project, The Immigrant Legal Advocacy Project, Legal Services for the Elderly, Pine Tree Legal, and Maine Equal Justice Partners.

Katahdin Counsel Recognition Ceremony
Cumberland County

A photo caption was not available at the time of publication.

Katahdin Counsel Recognition Ceremony
Androscoggin & Oxford Counties

Left to right: Heather S. Walker, Taylor S. Kilgore, Molly Watson Shukie, Hon. Robert W. Clifford, Sheldon J. Tepler, and Michael S. Malloy.

Katahdin Counsel Recognition Ceremony
Knox, Waldo, Sagadahoc & Lincoln Counties

From left: Hon. Jeffrey Hjelm, MSBA Governor Marcia DeGeer, Hon. Carol Emery, Kelley E. Mellenthin, Kimberly J. Ervin Tucker, Bruce M. Harris, Hon. Susan Sparaco, and Hon. Patricia Worth.

Katahdin Counsel Recognition Ceremony
Penobscot, Hancock & Washington Counties

Front row, from left: Cynthia Mehnert, Angela Farrell, Sandra Rothera, Roberta Winchell, Hon. Warren M. Silver, Scott Helmke, Margaret Shalhoob, and Joseph Baldacci. Back row, from left: Javaneh Pourkarim, Matthew Foster, Carrie Jordan, and Aaron Fethke.

Katahdin Counsel Recognition Ceremony
York County

From left: Christopher Guillory, John F.P. Murphy, Scott Houde, Robert Powers, Hon. Donald G. Alexander, Hon. John O'Neil, Andrea Stark, Pamela Holmes, Craig Rancourt, and James Mundy.

2014 Katahdin Law Student Honorees

Scott Helmke, University of Maine School of Law, Class of 2015; **Ashely Janotta**, University of Maine School of Law, Class of 2014; **Saad Khan**, University of Maine School of Law, Class of 2014; **Nora Lawrence**, Boston College Law School, Class of 2014; **Taylor Sampson**, University of Maine School of Law, Class of 2015; **Kimberly Watson**, University of Maine School of Law, Class of 2014; **Sarah Ann Wilson-Lemay**, University of Maine School of Law, Class of 2016

2014 Katahdin Counsel Honorees

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Kenneth Altshuler, Childs, Rundlett, Fifield & Altshuler
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Jennifer A. Archer, Kelly, Remmel & Zimmerman
John J. Aromando, Pierce Atwood LLP
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Andrea Bopp Stark, Molleur Law Office
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Diane W. Cipollone, Pine Tree Legal Services (volunteer)
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Dina Jellison
Benjamin W. Jenkins, Pierce Atwood LLP
Benjamin Y. Jones, Disability Rights Center
Maria Viola Jones, Maine Employers' Mutual Insurance Co.
David M. Kallin, Drummond Woodsum & MacMahon
Ryan F. Kelley, Pierce Atwood LLP
Taylor S. Kilgore, Boothby Perry, LLC
Pamela Knowles Lawrason, Family Law Resolutions
Elizabeth Lancaster Peoples, Peoples Law
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N L S MSBA New Lawyers Section

As I wind up my term as chair of the New Lawyers Section (NLS), I want to extend my thanks to the leadership and members who made this past year another exciting and active one for our Section. Next year, under the leadership of Emily Green, the NLS will continue to provide numerous and creative opportunities for professional development, networking, and community service. Many of the NLS's favorite activities will return, but you should also expect to see some exciting new additions.

This year, the Professional Development Committee kicked off its brown bag lunch series featuring experienced attorneys and judges on a variety of topics of particular relevance to the new lawyer. The NLS hosted seven round table discussions on topics including, among others, the duty of candor to the court, the use of technology in a trial, and maternity and paternity rights. Next year, the Professional Development Committee will again offer these events at little or no cost to NLS members. The NLS welcomes opportunities to collaborate with other sections on this useful and well-received initiative.

The Professional Development Committee also introduced its "Conversations Over Coffee" program this year, which matches new lawyers with experienced attorneys in a practice area and location of their choice. Whether you are looking for a single coffee meet-up to ask a couple of questions, or aiming for a longer-term relationship, the NLS will match you with an interested attorney who will work with you. To bolster this versatile mentoring program, in the upcoming months, the NLS will begin to develop an attorney resource directory offering assistance with career opportunities throughout the state.

Next year, the Networking Committee will also see the return of its popular cocktail hour networking events hosted by law offices. This past year, the Committee revamped the NLS's happy hours to create these professional networking mixers. Our generous hosts this year included Preti Flaherty and Bernstein Shur. If your office wants to join the effort, we are looking forward to expanding these cocktail hour networking mixers beyond Portland and would like to feature a greater variety of practice settings.

This summer, the NLS's Community Service Committee delivered two carloads of donated professional clothing to the Penobscot Job Corps. and The Opportunity Alliance as a result of its "Suited for Success" clothing drive. Next year, the NLS will conduct its first computer fundraiser, accepting gently used computers or cash donations to provide parents at risk for homelessness access to a computer in today's competitive digital world. The NLS will also organize its second annual Habitat for Humanity Volunteer Build Day.

We hope you will join us for the upcoming year. It's a great way for new lawyers to get into an enriching current of networking and information. For more about the NLS and our upcoming events, please visit the NLS page on the MSBA website or find us on LinkedIn. We look forward to hearing from you!

Caroline Y. Jova is an associate at Murray, Plumb & Murray where she is a member of the litigation practice group. Prior to entering private practice, she was the Frank M. Coffin Family Law Fellow at Pine Tree Legal Assistance where she represented low-income parties in family law matters. She is a graduate of The George Washington University Law School and magna cum laude graduate of New York University where she earned her B.A. in history and romance languages as a Martin Luther King, Jr. Scholar. Ms. Jova is a native Spanish speaker.

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Observations On Maine's Mechanic's Lien

by Jason R. Heath

Maine's Mechanic's Lien Statute,[1] among other statutes that pertain to construction work, can be a valuable tool when an individual or corporation has completed work on a building but the owner has not paid. For example, provided that a lienor[2] complies with all the statute's technical requirements,[3] the lienor can obtain a mechanic's lien even though the lienor has a contract with the owner, which requires arbitration.[4] Moreover, the lienor can request a sale order to pay the amount owed. This article draws attention to some important features of the Mechanic's Lien Statute that may help both novice and experienced practitioners.

Broad Scope

The lienor need not be a prototypical contractor to pursue a mechanic's lien. For example, the right to a mechanic's lien does not depend on the existence of a contract. The lienor need only provide labor and materials to be incorporated into buildings, wharves, and piers pursuant to a contract with the owner or with the owner's consent.[5] To show consent, the lienor must prove that the owner knew about the work and that the lienor believed the owner consented based on the owner's conduct.[6] The statute also covers surveyors, architects, and engineers.[7] It also includes those involved in moving a building.[8] For example, a transport company that moves a modular home could pursue a mechanic's lien on the home. The statute expressly covers anyone who surveys, clears, grades, drains, excavates, or landscapes the property next to and beneath where a building is constructed.[9] For example, a landscape company that plants trees and is not paid could pursue a mechanic's lien on the property.[10] Practitioners who represent clients whose work involves real estate should read the statute closely.

Deadlines

The Mechanic's Lien Statute has several important deadlines. When the lienor does not have a contract with the owner, the lienor has 90 days to record a mechanic's lien in the county registry and to provide a copy to the owner.[11] The mechanic's lien must state how much money is due with any proper credit given,[12] describe the property,[13] provide the owner's name when known, and include the lienor's sworn signature.[14] An acknowledged signature is not enough; the signature must be sworn and subscribed to by the lienor.[15] As a practical recommendation, the mechanic's lien could (1) recite that the labor and materials were incorporated into the property under a contract with the owner or with the owner's consent and (2) state the date when the lienor ceased to provide labor and materials. The lienor must send a copy to the owner and may do so by ordinary mail.[16]

While the 90-day deadline to record and send notice is inapplicable to a lienor who has a contract with the owner,[17] compliance is nevertheless prudent. For example, the owner might contend that the labor and materials in controversy were outside the contract's scope, such as when change orders have not been documented. When the lienor has no contract and does not record and send the mechanic's lien within 90 days as required, the mechanic's lien is dissolved.[18] Moreover, recording the mechanic's lien may give the lienor important rights against a *bona fide* purchaser of the property.[19] Given such serious consequences, even when the lienor has a contract with the owner, the best practice is to record and send notice within the deadline.

Except in very limited circumstances,[20] once the lienor ceases to provide labor and materials, the lienor must file a complaint in court within 120 days.[21] Once the lienor files the complaint, the lienor has 60 days to cause to be recorded in the county registry a notice about the complaint.[22] The notice must be a clerk's certificate,[23] an affidavit[24] or an attested copy of the complaint.[25] The clerk's certificate is recommended because it is concise and clear. However, the complaint could be used when the 60-day deadline is close. The lienor must submit a written request that the clerk complete and file a clerk's certificate in the county registry.[26] The lienor should prepare the clerk's certificate. As a convenience, the lienor can submit the written request and clerk's certificate when the lienor files the complaint. Where the lienor does not record a notice concerning the complaint within 60 days as required, a purchaser can buy the property without the mechanic's lien.[27]

The Complaint

The complaint to enforce a mechanic's lien must include a count to foreclose on the lien. This count must recite that the lienor claims a mechanic's lien on the building and property based on labor and services provided to build or repair the building, recite whether the lienor had a contract with the owner or the owner's consent, and (when required) recite whether the lienor recorded the mechanic's lien in the county registry and sent a copy to the owner within 90 days once the lienor ceased to provide labor and materials.[28] The count must request that the property be sold and the proceeds applied to the lien's discharge.[29] The count to

foreclose on the lien should also recite that the labor and materials were incorporated into the building with the intent to be so incorporated,[30] the complaint was filed within 120 days once the lienor ceased to provide labor and materials, and the lienor has timely met all conditions precedent to his right to a mechanic's lien and to foreclose his mechanic's lien.[31] The lienor or the owner may request that a jury determine the amount due.[32]

Besides a count requesting foreclosure, the complaint should include additional theories of recovery as may be applicable. Such counts could include breach of contract, promissory estoppel, *quantum meruit*, and unjust enrichment. Promissory estoppel requires a promise the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person.[33] *Quantum meruit* requires that the lienor rendered services to the owner with the owner's knowledge and consent and under circumstances that make it reasonable for the lienor to expect payment.[34] Unjust enrichment requires that the lienor conferred a benefit on the owner, the owner had appreciation or knowledge of the benefit, and the acceptance or retention of the benefit was under such circumstances as to make it inequitable for the owner to retain the benefit without payment of its value.[35] The lienor should also consider a count pursuant to the Prompt Payment Act.[36] The owner must pay the lienor in accordance with the contract terms.[37] Except as agreed otherwise, the owner must pay within 20 days once the billing period ends or the invoice is delivered, whichever occurs last.[38] When the owner does not pay on time and does not withhold payment based on an honest dispute,[39] the lienor who prevails in court recovers attorney fees and costs.[40]

Remedies

Once the lienor has prevailed in court, the lienor can request a sale order as a remedy. The Mechanic's Lien Statute has two sections concerning a sale.[41]

Section 3259 provides that the court may order that the property be sold and prescribe the sale's time, terms, manner, and conditions.[42] The court may order that the owner can redeem the property within a time stated in the order.[43] Section 3259, however, does not require any particular redemption period or indeed any redemption period whatsoever. As a practical matter, expect the court to include some redemption period in the sale order. For instance, the court might order a 90-day redemption period as is required with mortgage liens.[44] The court could also order that only a portion of the property must be sold.[45] Section 3259 provides that several lienors share in the proceeds *pro rata*.[46]

Section 3265 provides that when judgment is rendered the property shall be sold on execution in the same manner as rights to redeem mortgaged property.[47] The redemption period on rights to redeem mortgaged property is one year.[48] Section 3265 provides instead that the court may set the redemption period.[49] Section 3265 provides that several lienors share in the proceeds *pro rata*.[50] Section 3265 is broader than Section 3259 in that Section 3265 covers any liens in 14 M.R.S. §§ 3201-4012 (2013) which includes the Mechanic's Lien Statute in 14 M.R.S. §§ 3251-3269 (2013).[51]

Conclusion

Maine's Mechanic's Lien Statute should not be overlooked when an owner owes money to an individual or corporation for work related to improvements to real property. The statute is quite broad and covers not only a contractor who builds or repairs a building, but others such as surveyors, architects, engineers, building movers, and landscapers. However, the lienor must comply scrupulously with various technical requirements, such as deadlines and recording requirements.

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1. 10 M.R.S. §§ 3251-3269 (2013). The statute uses the term "lien" rather than "mechanic's lien". This article uses the term "mechanic's lien" to distinguish this lien from other liens, such as mortgage liens and tax liens.

2. The statute uses the terms "claimant" and "lienor" to mean the individual or corporation that claims to have a lien on the owner's property. This article uses the term "lienor".

3. Because a mechanic's lien "is statutory and was unknown at common law, every jurisdictional requirement must be met and all conditions precedent as prescribed by statute must be complied with, before the lienor can prevail." *Pineland Lumber Co. v. Robinson*, 382 A.2d 33, 36 (Me. 1978).

4. *Buckminster v. Acadia Village Resort, Inc.*, 565 A.2d 313, 316 (Me. 1989).

5. 10 M.R.S. § 3251 (2013).

6. *F.R. Carroll, Inc. v. TD Bank, N.A.*, 2010 ME 115, ¶ 10, 8 A.3d 646.

7. 10 M.R.S. § 3251 (2013).

8. *Id.*

9. *Id.*

10. *Id.* See also 10 M.R.S. § 3501 (2013).

11. 10 M.R.S. § 3253 (2013).

12. For instance, any money paid by the owner as a deposit. Note that an inaccuracy in the amount due will not void the lien unless the lienor has intentionally claimed more than his due. 10 M.R.S. § 3254 (2013).

13. The description must be accurate enough so the property can be identified. The description should include the street address, the deed's date, and the county registry book and page number. Note that an inaccuracy in the description will not void the lien provided the property in question can be reasonably recognized. 10 M.R.S. § 3254 (2013).

14. 10 M.R.S. § 3253(1)(A) (2013). The lienor's agent can also provide the sworn signature.

15. *Pineland Lumber Co. v. Robinson,* 382 A.2d 33, 37 (Me. 1978).

16. 10 M.R.S. § 3253(1)(B) (2013).

17. 10 M.R.S. § 3253(2) (2013).

18. 10 M.R.S. § 3253(1) (2013).

19. 10 M.R.S. § 3255(2) (2013).

20. 10 M.R.S. §3256 (2013)

21. 10 M.R.S. § 3255(1) (2013). The lienor should note that the deadline

is to file, not to serve. Section 3255 has several complex notice requirements that are beyond the scope of this article.

22. 10 M.R.S. § 3261(2) (2013).

23. 10 M.R.S. § 3261(2)(A) (2013). The clerk's certificate must recite the parties' names, the date of the complaint and the date the complaint was filed, and a description of the real estate as described in the complaint.

24. 10 M.R.S. § 3261(2)(B) (2013). The affidavit must recite the court where the complaint was filed, the parties' names, the date of the complaint and the date the complaint was filed, a description of the real estate as described in the complaint, and the contact information of the lienor or the lienor's attorney.

25. 10 M.R.S. § 3261(2)(C) (2013).

26. 10 M.R.S. § 3261(1) (2013). The written request does not have to be a motion and can be a short letter.

27. 10 M.R.S. § 3255(2) (2013); 10 M.R.S. § 3261(3) (2013). The lienor could proceed with suit against the owner but the lienor's claims would no longer be completely secured.

28. 10 M.R.S. § 3257 (2013).

29. *Id.*

30. *Thayer Corporation v. Maine School Administrative District 61*, 2012 ME 37, ¶ 5, 38 A.3d 1263.

31. *Pineland Lumber Co. v. Robinson*, 382 A.2d 33, 36 (Me. 1978).

32. 10 M.R.S. §3258 (2013).

33. *Cottle Enterprises, Inc. v. Town of Farmington*, 1997 ME 78, ¶ 17 n.6, 693 A.2d 330 (comparing promissory estoppel to equitable estoppel).

34. *Forrest Associates v. Passamaquoddy Tribe*, 2000 ME 195, ¶ 11, 760 A.2d 1041.

35. *Id.* ¶ 14.

36. 10 M.R.S. §§ 1111-1120 (2013). The statute covers a "construction contract" with a "contractor" but those terms are quite broad.

37. 10 M.R.S. § 1113(1) (2013).

38. 10 M.R.S. § 1113(3) (2013).

39. 10 M.R.S. § 1118(1), (3) (2013).

40. 10 M.R.S. § 1118(4) (2013). The lienor "must be awarded" attorney fees and costs.

41. 10 M.R.S. § 3259 (2013); 10 M.R.S. § 3265 (2013).

42. 10 M.R.S. § 3259 (2013).

43. *Id.*

44. 14 M.R.S. § 6322 (2013).

45. 10 M.R.S. § 3259 (2013).

46. *Id.*

47. 14 M.R.S. §§ 2151-2152 (2013).

48. 14 M.R.S. § 2152 (2013).

49. 10 M.R.S. § 3265 (2013). The Law Court implicitly endorsed the concept that the Court can set the redemption period in *The Cote Corporation v. Kelley Earthworks, Inc.*, 2014 ME 93, ¶ 20, __ A.3d __. The Law Court discussed both Section 3259 and 3265 and noted that the Superior Court was "authorized to include in its judgment a right of redemption". The Superior Court had set the redemption period at 90 days.

50. 10 M.R.S. § 3265 (2013).

51. *Id.* Besides the remedy provided in the Mechanic's Lien Statute, the lienor can enforce a mechanic's lien by attachment as described in 10 M.R.S. § 3262 (2013).

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Standing To Foreclose In Maine: *Bank of America, N.A. v. Greenleaf* [1]

by John J. Aromando

"There are few titles in the law of higher importance in the United States, than that of *Mortgage*." [2]

During the last several years, the Law Court has issued a string of decisions adverse to financial institutions in the area of residential mortgage foreclosure litigation. Some of these decisions have dealt with errors or even alleged fraud in documentation supporting foreclosure actions.[3] Others have taken lenders and servicers to task concerning the admissibility of evidence offered to prove foreclosure cases, in particular efforts to admit business records under Rule 803(6) of the Maine Rules of Evidence.[4] These decisions have made it more difficult for lenders and servicers to obtain judgments of foreclosure in the Superior and District Courts, even though the borrower has admittedly defaulted on the loan. Summary judgments are now hard to come by. And trials have become exercises in gamesmanship over whether the plaintiff can produce the right custodial witness to vouch for the reliability of records reflecting the current status of the loan, the substance of which often nobody seriously contests. All of this has created significant, but hopefully not insurmountable, obstacles for lenders and servicers seeking to collect on non-performing home loans.

Recently, however, the Law Court issued a decision on an issue of fundamental importance to the residential lending community that took many in that community by surprise. In *Bank of America, N.A. v. Greenleaf*,[5] the Law Court ruled that a bank which held the original promissory note, and therefore the legal authority to collect the amount due under that note, could not foreclose on the mortgage that accompanied the note, even though the mortgage existed for the sole purpose of securing the note. The Law Court held that, because

the foreclosing bank was not the original mortgagee (another lender made the original loan and then sold it, a common practice within the industry), and did not, in the Court's view, hold a sufficient assignment of the mortgage, it did not "own" the mortgage, and therefore did not have standing to foreclose.[6] In so ruling, the Court departed from established Maine law confirming that the beneficial interest in a mortgage follows, and is not separated from, the note it secures when the note is transferred. The Court imposed upon foreclosing lenders a standing requirement—"ownership" of the mortgage separate and distinct from the note it secures—that appears nowhere in the Maine statute governing residential foreclosure actions or the Court's prior precedent.

As discussed further at the conclusion of this article, the adverse consequences of this decision to separate the mortgage from the note for the purpose of analyzing standing to foreclose are far-reaching and serious, and at this point probably require a legislative solution.

Maine Law on Mortgages

As described by a leading commentator on Maine real estate law:

> The typical mortgage transaction involves the execution of two documents: (1) a *promissory note* and (2) a *mortgage deed*. The promissory note is the primary instrument; it creates the legal obligation and makes the mortgagor personally liable for payment of the debt. The mortgage deed serves as collateral security for the loan; it is the secondary instrument and creates a *security* interest in the land.[7]

Maine follows the title theory of mortgages, under which title to the mortgaged property passes from the mortgagor (borrower) to the mortgagee (lender), subject to defeasance upon satisfaction of the underlying debt, also known as the equity of redemption.[8] Other states have adopted a lien theory of mortgages.[9] "However, as a practical matter the distinction between lien-theory states and title-theory states is largely academic; the mortgagee's interest has always been considered as a security interest only."[10]

When the lender transfers the promissory note, the mortgage securing the debt follows the note. The Law Court has described this as "the principle that determines the very essence of a mortgage, namely, that the security follows the debt."[11] The Law Court has also held that a separate assignment of the mortgage is not necessary to accomplish that result.[12] Although a bare legal interest in the mortgaged premises may be held by another party, "he must hold the estate in trust for the holder of the notes to secure which the mortgage was given, whoever that holder may be," [13] and may be compelled to convey that legal interest to the legal holder of the promissory note.[14] As another leading commentator on Maine real estate law has summarized the rule: "If the note was assigned and the mortgage was not, the assignee has an interest in the mortgage which will be protected by equity."[15]

The *Saunders* Court commented in a footnote that it was not addressing the situation where "the mortgage and the note are truly held by different parties," but in that same footnote the Court cited its own authority, going back over 100 years, confirming that the beneficial interest in a mortgage follows possession of the note it secures, even without a separate assignment of the mortgage.

The sole purpose of the mortgage–the "secondary instrument"–is to secure the "primary instrument," the promissory note. It is therefore illogical to require "ownership" of the mortgage, separate and distinct from the note, as a condition of standing to foreclose. Maine law has been clear on this for many years: the mortgage follows the note.

The Uniform Commercial Code (UCC) as adopted in Maine "codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien."[16] In other words, the UCC "adopts the traditional view that the mortgage follows the note; i.e., the transferee of the note acquires the mortgage, as well."[17]

The Maine Foreclosure Statute

"In Maine, foreclosure is a creature of statute, see 14 M.R.S. §§ 6101-6325 (2013), and thus, standing to foreclose is informed by various statutory provisions."[18] Maine is a judicial foreclosure state, meaning that foreclosure must proceed by civil action.[19] Section 6321 defines who may bring a foreclosure action: "the mortgagee or any person claiming under the mortgagee may proceed for the purpose of foreclosure by a civil action."[20] The foreclosure statute itself does not define "mortgagee" but the common law definition established by the Law Court is straightforward: "[A] mortgagee is a party that is entitled to enforce the debt obligation that is secured by a mortgage."[21]

Law Court Precedent on Standing to Foreclose before *Greenleaf*

As the Law Court itself observed in *Greenleaf*, "we have not always clearly distinguished between issues of standing and issues of proof."[22] Nevertheless, between 2010 and 2013, the Court issued several decisions explicitly addressing the plaintiff's standing to bring a civil action for foreclosure.[23]

In those decisions, the Law Court articulated the general principles behind the standing requirement. "Because standing to sue in Maine is prudential, rather than of constitutional dimension, we may 'limit access to the courts to those best suited to assert a particular claim.'"[24] "Verifying that a party has standing ensures that there is 'concrete adverseness that facilitates diligent development of the legal issues presented.'"[25] "At a minimum, '[s]tanding to sue means that the party, at the commencement of the litigation, has sufficient personal stake in the controversy

to obtain judicial resolution of that controversy.'"[26]

In *Mortgage Electronic Registration Systems, Inc. v. Saunders*, the Law Court confirmed that the only party with standing to foreclose is the party with the right to enforce the note.[27] Because a promissory note is a negotiable instrument, the Court specifically tied that right to the person holding or possessing the original note under Section 3-1301 of the UCC.[28] The Court in *Saunders* expressly stated that the party entitled to foreclose—the "mortgagee" or a person claiming under it pursuant to Section 6321 of the Maine foreclosure statute—"is a party that is entitled to enforce the debt obligation that is secured by a mortgage."[29] The *Saunders* Court commented in a footnote that it was not addressing the situation where "the mortgage and the note are truly held by different parties," but in that same footnote the Court cited its own authority, going back over 100 years, confirming that the beneficial interest in a mortgage follows possession of the note it secures, even without a separate assignment of the mortgage.[30]

The Law Court reaffirmed this link between the holder of a promissory note under UCC Section 3-1301 and standing to foreclose in *JP Morgan Chase v. Harp*.[31] Referring to the definition of who can bring an action under Section 6321 of the Maine foreclosure statute—"the mortgagee or any person claiming under the mortgagee"—the Court noted that "Maine has adopted the Uniform Commercial Code's definition of 'person entitled to enforce' an instrument," quoting the language of UCC Section 3-1301.[32]

The *Harp* Court also noted that "[a]t the commencement of the litigation, JP Morgan owned the note, but not the mortgage," because a written assignment of the mortgage to JP Morgan from the original holder of the note was not executed until several weeks after JP Morgan, as the new holder of the note, had filed the foreclosure action.[33] Without further discussion of the issue of who "owns" a mortgage, including the longstanding Maine authority cited in *Saunders* establishing that the beneficial interest in the mortgage follows possession of the note it secures, the Law Court commented that "JP Morgan would have been vulnerable to a motion by Harp challenging JP Morgan's ability to foreclose at that time."[34] This comment was superfluous to the holding in the case, because the Court concluded that the assignment of the mortgage to JP Morgan before the borrower raised his objection to JP Morgan's standing to foreclose rendered the issue moot in any event.[35]

Then, in *Bank of America, N.A. v. Cloutier*,[36] the Law Court seemed to nail down once and for all the link between status as a holder of a promissory note under UCC Section 3-1301 and standing to foreclose a mortgage securing that note. In language plain and simple, citing both *Saunders* and *Harp*, the Court stated: "We have previously connected a party's right to bring an action for foreclosure to its right to enforce pursuant to 11 M.R.S. § 3-1301."[37] The *Cloutier* Court expressly held that the third paragraph of Section 6321 of the Maine foreclosure statute, requiring the mortgagee to "certify proof of ownership of the mortgage note and produce evidence of the mortgage note, mortgage and all assignments and endorsements of the mortgage note and mortgage," governed issues of proof only, and imposed no additional requirement for standing, which was governed exclusively by the first paragraph of the statute.[38] Regarding the relevant language of the first paragraph of Section 6321, stating that "the mortgagee or any person claiming under the mortgagee may proceed for the purpose of foreclosure by a civil action," the Law Court had been equally clear: "In other words, a mortgagee is a party that is entitled to enforce the debt obligation that is secured by a mortgage."[39]

Rather than relying on over a century of Maine law confirming that the beneficial interest in a mortgage follows the ownership of the promissory note it secures, the Court read into the Maine mortgage foreclosure law on standing a separation between ownership of the mortgage and the legal right to enforce the note it secures, a distinction not supported by the plain language of the statute.

All of which makes perfect sense. Going back to the general principles governing standing, the current holder of a promissory note secured by a mortgage "has sufficient personal stake in the controversy to obtain judicial resolution of that controversy"[40] in the event of a default under the note. Even without a separate assignment of the mortgage, the current holder of the note also owns the beneficial interest in that mortgage, protected by equity, which follows the note under Maine law.[41] That is the real party in interest under both the mortgage and the note,[42] and the party "best suited to assert"[43] the foreclosure claim. Indeed, the Law Court has held that only the party with the right to enforce the note may foreclose on the mortgage securing that note.[44]

A contrary view makes no sense. The sole purpose of the mortgage—the "secondary instrument"—is to secure the "primary instrument," the promissory note.[45] It is therefore illogical to require "ownership" of the mortgage, separate and distinct from the note, as a condition of standing to foreclose. Maine law has been clear on this for many years: the mortgage follows the note.[46] Evidence of conflicting claims to the mort-

gage, when and if they actually arise, can be dealt with as a matter of proof.[47] As already noted, the Maine mortgage foreclosure statute requires the plaintiff, separate from the issue of standing, to "certify proof of ownership of the mortgage note and produce evidence of the mortgage note, mortgage and all assignments and endorsements of the mortgage note and mortgage."[48] If that proof leaves sufficient doubt concerning that plaintiff's legal right to enforce the mortgage, the court can deny the claim.[49] That does not mean, however, that the plaintiff lacked standing to sue in the first instance.

That is where the law in Maine appeared to rest until the *Greenleaf* decision.

The *Greenleaf* Decision

Discussion about *Bank of America, N.A. v. Greenleaf*[50] has focused on Mortgage Electronic Registration Systems, Inc. or MERS, and the continuing viability of MERS's method of recording transfers (and also terminations) of mortgage interests in Maine. An even larger issue, foundational to Maine law on mortgages and foreclosures, is also in play, however.

The Law Court encountered MERS previously in *Saunders*, where it described the role of MERS in mortgage transactions as follows:

> MERS's purpose is to streamline the mortgage process by eliminating the need to prepare and record paper assignments of mortgage, as had been done for hundreds of years. To accomplish this goal, MERS acts as nominee and as mortgagee of record for its members nationwide and appoints itself nominee, as mortgagee, for its members' successors and assigns, thereby remaining nominal mortgagee of record no matter how many times loan servicing, or the debt itself, may be transferred.[51]

MERS itself does not hold or otherwise own the promissory note or the beneficial interest in the mortgage. As described by the *Saunders* Court, "the only rights conveyed to MERS in either the . . . mortgage or the corresponding promissory note are bare legal title to the property for the sole purpose of recording the mortgage and the corresponding right to record the mortgage with the Registry of Deeds," for the benefit of the current owner of the promissory note.[52]

The *Saunders* Court held that MERS itself does not have standing to foreclose, because it does not have "possession of or any interest in the note" secured by the mortgage.[53] The Court gave no indication, however, that it saw any problem with MERS's performance of its essential functions as the Court itself described them: "to streamline the mortgage process" by holding the nominal interest in the mortgage through multiple transfers of the note ("no matter how many times loan servicing, or the debt itself, may be transferred"), and executing and recording at the registry of deeds assignments or releases of the mortgage when required on behalf of the beneficial owner.[54] Indeed, the *Saunders* decision, which allowed substitution of the lender currently holding the promissory note for MERS as the real party in interest and proper foreclosure plaintiff in that case,[55] can be read as endorsing the MERS system for assigning and releasing mortgages.[56]

From there, the Court proceeded to analyze ownership of the note and mortgage separately, contrary to over 100 years of common law and current UCC provisions emphasizing the exact opposite.

Parties can no longer rely on the MERS system for assigning and releasing mortgage interests in Maine. Even more significantly, the right "to enforce a debt obligation that is secured by a mortgage" no longer assures standing to foreclose in Maine, even when the borrower admits the note is in default, and the lender's beneficial interest in the mortgaged property is uncontested.

That perspective, however, was placed in doubt by the Law Court's decision in *Greenleaf*. The Court adopted a narrow view of MERS's legal authority to assign the mortgage in which it held nominal title on behalf of the lender and its assigns.[57] The Court held that such assignments are legally insufficient to confer standing to sue for foreclosure on the current holder of the note.[58] Given the prevalence of mortgage assignments and discharges executed by MERS under this system, this ruling has thrown the mortgage and title industries in Maine into potential chaos.

The Law Court overlooked or ignored prior precedent that could have avoided this result. Rather than relying on over a century of Maine law confirming that the beneficial interest in a mortgage follows the ownership of the promissory note it secures,[59] the Court read into the Maine mortgage foreclosure law on standing a separation between ownership of the mortgage and the legal right to enforce the note it secures, a distinction not supported by the plain language of the statute.

The *Greenleaf* Court began its analysis of the standing issue with the premise that, because foreclosure in Maine "is a creature of statute," standing to foreclose is governed by the Maine foreclosure statute.[60] The Court then acknowledged that the relevant statutory language, the first paragraph of 14 M.R.S. § 6321, permits "the mortgagee or any person claiming under the mortgagee" to "seek foreclosure of the mortgaged property."[61] Quoting its decision in *Saunders*, the Court confirmed that "mortgagee" means "a party that is entitled to enforce the debt obligation that is secured by a mortgage."[62] Indisputably in the *Greenleaf* case, that was the plaintiff, Bank of America, N.A.,[63] which should have ended the standing inquiry in the plaintiff's favor.

It was here that the *Greenleaf* Court departed from existing Maine law in a way that unexpectedly changed the foreclosure landscape. The Court began with the following comment: "Because foreclosure regards two documents—a promissory note and a mortgage secur-

ing the note—standing to foreclose involves the plaintiff's interest in both the note and the mortgage."[64] From there, the Court proceeded to analyze ownership of the note and mortgage separately,[65] contrary to over 100 years of common law and current UCC provisions emphasizing the exact opposite.[66] The Court cited no language from the Maine foreclosure statute supporting this novel standing requirement of "ownership" of the mortgage separate and distinct from the note—because none exists. The Court followed this new path based on the assertion that, "[u]nlike a note, a mortgage is not a negotiable instrument,"[67] and therefore, "whereas a plaintiff who merely holds or possesses — but does not necessarily own — the note satisfies the note portion of the standing analysis, the mortgage portion of the standing analysis requires the plaintiff to establish ownership of the mortgage."[68]

Such concerns were merely hypothetical in *Greenleaf*, where the record confirmed that Federal National Mortgage Association (FNMA or Fannie Mae), for whom the plaintiff Bank of America serviced the loan, "is in fact the owner of the note,"[69] and "that the Bank has the priority interest in the property," and "there are no other parties that claim an interest in the property."[70] There was no actual contest over "ownership" of the mortgage in *Greenleaf*, and even if there was it should have been resolved as a matter of proof, not standing.

To have standing to foreclose, it had appeared to be enough before *Greenleaf* that the plaintiff had the legal right to enforce the note secured by the mortgage. The viability of the MERS recording system did not appear to be an obstacle to establishing standing to foreclose in Maine. After the *Greenleaf* decision, that is no longer true. Parties cannot necessarily rely on the MERS system for assigning and releasing mortgage interests in Maine. More significantly, the right "to enforce a debt obligation that is secured by a mortgage" no longer assures standing to foreclose in Maine, even when the borrower admits the note is in default, and the lender's beneficial interest in the mortgaged property is uncontested.

The Aftermath and Potential Solutions

From a policy perspective, the separation of the mortgage from the note it secures announced in *Greenleaf* creates obvious problems for lenders and a windfall for borrowers. It deprives lenders of bargained-for security that induced them to make the loan in the first place, and allows borrowers to default on their obligations without facing consequences they agreed to accept. Debating the adequacy of the MERS paperwork assigning the mortgage in this context is an academic exercise. In *Greenleaf*, nobody contended that the lender had misrepresented material facts or that the borrower had been misled.

The resulting cost and chaos will be significant. In addition to the financial losses faced by lenders holding notes secured by mortgages on which they no longer have standing to foreclose, there is also now significant turmoil in the title industry as insurers struggle with how to address the title issues created by this decision.

The intent of all parties involved could not have been clearer, yet the result—the borrower defaults, but does not forfeit the security pledged for the defaulted obligation to the current holder of the note—is the exact opposite. This exalts form over substance.

Policy arguments in favor of such an approach are difficult to divine. Certainly, big banks are not very popular these days, and the hue and cry to further punish Wall Street can be difficult to resist. Given the prevalence of the MERS system, however, smaller community banks are potentially caught in this trap as well. A string of recent lawsuits illustrates one motivation for disrupting the MERS recording system—claims by county registries of deeds that they are being deprived of fees because a new assignment of the mortgage is not recorded every time the loan is transferred.[71] Filling county coffers, however, hardly seems like a good reason to override established law governing beneficial ownership of security interests granted by mortgages. And of course, this decision is one more arrow in the quiver of borrowers' counsel as they look for ways to prevent foreclosures when there is no defense on the merits to the defaulted debt alleged.

The resulting cost and chaos will be significant. In addition to the financial losses faced by lenders holding notes secured by mortgages on which they no longer have standing to foreclose, there is also now significant turmoil in the title industry as insurers struggle with how to address the title issues created by this decision. MERS also executes and records mortgage discharges, so the potential title crisis is not limited to foreclosures.[72]

Greenleaf creates a serious problem that needs to be fixed. It appears, however, that any solution will need to come from the Legislature. The Law Court's decision leaves little if any room for judicial correction and the dominoes are already falling in foreclosure cases pending in the Superior and District Courts. Even final judgments in foreclosure actions concluded before *Greenleaf* could be subject to challenge.[73] Title insurers are scrambling to adjust, and litigation in that area may be around the corner. Opportunities for self-help are limited. One option is to return to the original lender to obtain a substitute assignment of the mortgage, but if that original lender is no longer in business—an all-too-common occurrence since the real estate bubble burst in 2008—the current holder of the note may be out of luck. The Law Court did leave open the possibility of proving "that MERS acquired [the requisite] authority [to assign] the mortgage by . . . means other than that defined in the mortgage itself,"[74] for example under the MERS membership agreement and rules, documents that were not part of the record in *Greenleaf*.

It will be interesting to see in the coming months how the lending and title communities respond to these challenges created by the Law Court's decision in *Greenleaf*, and whether the Legislature is willing to step in to help solve these problems.

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1. 2014 ME 89, 96 A.3d 700.

2. F. Hilliard, *The Law of Mortgages, of Real and Personal Property*, Preface to First Edition (1852) (emphasis in original).

3. *See, e.g., Federal Nat'l Mortgage Assoc. v. Bradbury*, 2011 ME 120, 32 A.3d 1014; HSBC Mortgage Services, Inc. v. Murphy, 2011 ME 59, 19 A.3d 815.

4. *See, e.g., Beneficial Maine Inc. v. Carter,* 2011 ME 77, 25 A.3d 96; *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶¶ 25-27, 96 A.3d 700; *but see The Bank of Maine v. Hatch*, 2012 ME 35, 38 A.3d 1260; *Bank of America, N.A. v. Barr*, 2010 ME 124, 9 A.3d 816.

5. 2014 ME 89, 96 A.3d 700.

6. *Id.* at ¶¶ 6-17.

7. P. Creteau, *Maine Real Estate Law*, Ch. 10, at 232 (1969) (emphasis in original).

8. *Johnson v. McNeil*, 2002 ME 99, ¶ 10, 800 A.2d 702.

9. P. Creteau, *Maine Real Estate Law*, Ch. 10, at 234 n. 11 (1969).

10. *Id*. (citing *Pettengill v. Turo*, 159 Me. 350, 13 A.2d 367 (1963)).

11. *Wyman v. Porter*, 108 Me. 110, 120, 79 A. 371 (1911); *see also Jordan v. Cheney*, 74 Me. 359, 361-63 (1883). Older decisions using contrary language, see, e.g., *Stanley v. Kempton*, 59 Me. 472 (1871); *Dwinel v. Perley,* 32 Me. 197 (1850); *Smith v. Kelley*, 27 Me. 472 (1847), to the extent still viable, refer only to the bare legal interest in the mortgaged property, which in and of itself is not a sufficient interest on which to foreclose under current law, *see Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶ 15, 2 A.3d 289.

12. *Jordan v. Cheney*, 74 Me. 359, 361 (1883) ("Nor is an assignment of the mortgage necessary.")

13. *Id.* at 361-62.

14. See *Averill v. Cone*, 128 Me. 546, 149 A. 297 (1930).

15. C. Cowan, *Maine Real Estate Law and Practice, Section* 13.2, at 519 (2d ed. 2007) (citing *Stone v. Locke*, 46 Me. 445 (1859)).

16. 11 M.R.S. § 9-1203(7) cmt. 9.

17. 11 M.R.S. § 9-1308 cmt. 6.; *see also* Report of the Permanent Editorial Board for the Uniform Commercial Code 12 (Nov. 2011), *available at* http://www.uniformlaws.org/Shared/Committees_Materials/PEBUCC/PEB_Report_111411.pdf.

18. *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶8, 96 A.3d 700.

19. *See id.* at ¶ 17, n. 11; 14 M.R.S. § 6321.

20. 14 M.R.S. § 6321.

21. *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶ 9, 96 A.3d 700 (quoting *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶ 11, 2 A.3d 289 (emphasis omitted)).

22. *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶8, 96 A.3d 700.

23. *See, e.g., Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, 2 A.3d 289; *JP Morgan Chase Bank v. Harp*, 2011 ME 5, 10 A.3d 718; *Bank of America, N.A. v. Cloutier*, 2013 ME 17, 61 A.3d 1242.

24. *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶ 14, 2 A.3d 289 (quoting *Lindemann v. Comm'n on Govtl. Ethics & Election Practices*, 2008 ME 187, ¶ 8, 961 A.2d 538, 541-42).

25. *JP Morgan Chase Bank v. Harp*, 2011 ME 5, ¶ 8, 10 A.3d 718 (quoting *Halfway House, Inc. v. City of Portland*, 670 A.2d 1377, 1380 (Me. 1996) (quotation marks omitted)).

26. *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶ 7, 2 A.3d 289 (quoting *Halfway House, Inc. v. City of Portland*, 670 A.2d 1377, 1379 (Me. 1996) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972))).

27. 2010 ME 79, ¶¶ 7-15, 2 A.3d 289.

28. *See id.* at ¶ 12 (citing 11 M.R.S. § 3-1301 (2009)). The Court also noted that, under Section 3-1301, a note may be enforced by a party "purporting to enforce a lost, destroyed, or stolen instrument pursuant to 11 M.R.S. § 3-1309 (2009), or . . . purporting to enforce a dishonored instrument pursuant to 11 M.R.S. § 3-1428(4) (2009)." Id.

29. *Id.* at ¶ 11 (emphasis in original).

30. *Id.* at ¶ 11 n. 3 (citing Averill v. Cone, 129 Me. 9, 11-12, 149 A. 297 (1930); *Wyman v. Porter,* 108 Me. 110, 120, 79 A. 371 (1911); *Jordan v. Cheney*, 74 Me. 359, 361-62 (1883)).

31. 2011 ME 5, 10 A.3d 718.

32. *Id.* at ¶ 9 n. 3.

33. *Id.* at ¶ 9.

34. *Id*.

35. *Id*. at ¶ 14.

36. 2013 ME 17, 61 A.3d 1242.

37. *Id*. at ¶ 16.

38. *Id*. at ¶¶ 14-17.

39. *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶ 11, 2 A.3d 289; *see also Bank of America, N.A. v. Cloutier,* 2013 ME 17, ¶ 17, 61 A.3d 1242 ("In contrast, paragraph one of section 6321 can be read consistently with [UCC] Article 3-A to specifically define who may enforce a promissory note.").

40. *See supra* at note 26.

41. *See supra* at notes 7-17.

42. *See* Me. R. Civ. P. 17(a) ("Every action shall be prosecuted in the name of the real party in interest.").

43. *See supra* at note 24.

44. *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶¶ 12-15, 2 A.3d 289.

45. *See supra* at note 7.

46. *See supra* at notes 7-17.

47. *See, e.g., Deutsche Bank National Trust Company v. Wilk*, 2013 ME 79, ¶¶ 11-22, 76 A.3d 363; *Wells Fargo Bank, N.A. v. Burek*, 2013 ME 87, ¶¶ 12-16, 81 A.3d 330.

48. 14 M.R.S. § 6321; *see Bank of America, N.A. v. Cloutier*, 2013 ME 17, ¶¶ 15-17, 61 A.3d 1242.

49. *See, e.g., Deutsche Bank National Trust Company v. Wilk*, 2013 ME 79, ¶¶ 11-22, 76 A.3d 363.

50. 2014 ME 89, 96 A.3d 700.

51. *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶ 8, 2 A.3d 289 (quoting *MERSCORP, Inc. v. Ro*I,

861 N.E.2d 81, 86 (N.Y. 2006) (Kaye, C.J., dissenting)).

52. *Id.* at ¶ 10.

53. *Id.* at ¶ 15.

54. *Id.* at ¶ 8.

55. *Id.* at ¶ 19.

56. I, 2013 ME 17, ¶¶ 1, 4-5, 16-18, 61 A.3d 1242 (indicating, in response to a reported question, that the current holder of the promissory note, with an assignment of the mortgage by MERS, had standing to foreclose).

57. *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶¶ 13-16, 96 A.3d 700.

58. *Id.*

59. *See supra* at notes 7-17.

60. *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶ 8, 96 A.3d 700.

61. *Id.* at ¶ 9.

62. *Id.*

63. *Id.* at ¶ 11("This is precisely what the Bank established and the court found in this matter; as the possessor of a note indorsed in blank, the Bank proved its status as the holder of the note and therefore enjoys the right to enforce the debt." (Emphasis added.))

64. *Id.* at ¶ 9.

65. *Id.* at ¶ 12 ("The interest in the note is only part of the standing analysis, however; to be able to foreclose, a plaintiff must also show the requisite interest in the mortgage.")

66. *See supra* at notes 7-17.

67. *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶ 12, 96 A.3d 700 (citing 5 Emily S. Bernheim, *Tiffany Real Property*, § 1455 n. 14 (3d ed. Supp. 2000)).

68. *Id.* (emphasis in original).

69. *Id.* at ¶ 21.

70. *Id.* at ¶ 28.

71. *See, e.g., Union County, Ill. v. MERSCORP, Inc.*, 920 F.Supp.2d 923 (S.D. Ill. 2013); *Montgomery County, Pa. v. MERSCORP, Inc.*, 904 F.Supp.2d 436 (E.D. Pa. 2012). More recently, one county has asserted a similar claim against banks participating in the MERS recording system. *Montgomery County, Pa. v. The Bank of New York Mellon et al.*, Case No. 2:2014cv05500 (E.D. Pa., filed Sept. 24, 2014).

72. *See* 33 M.R.S. § 551 (requiring "a written instrument . . . signed and acknowledged by the mortgagee or by the mortgagee's duly authorized officer or agent, personal representative or assignee" to discharge a mortgage, and imposing liability for the failure of the mortgagee within 60 days after full performance of the conditions of the mortgage to "record a valid and complete release of the mortgage together with any instrument of assignment necessary to establish the mortgagee's record ownership of the mortgage.")

73. *But see Bank of Am., N.A. v. Kuchta*, Slip Opinion No. 2014-Ohio-4275 (Oct. 8, 2014) (holding that a final judgment of foreclosure is not subject to collateral attack under Rule 60(b) or for lack of subject matter jurisdiction based on the plaintiff's alleged lack of standing to commence the foreclosure action).

74. *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶ 15, 96 A.3d 700.

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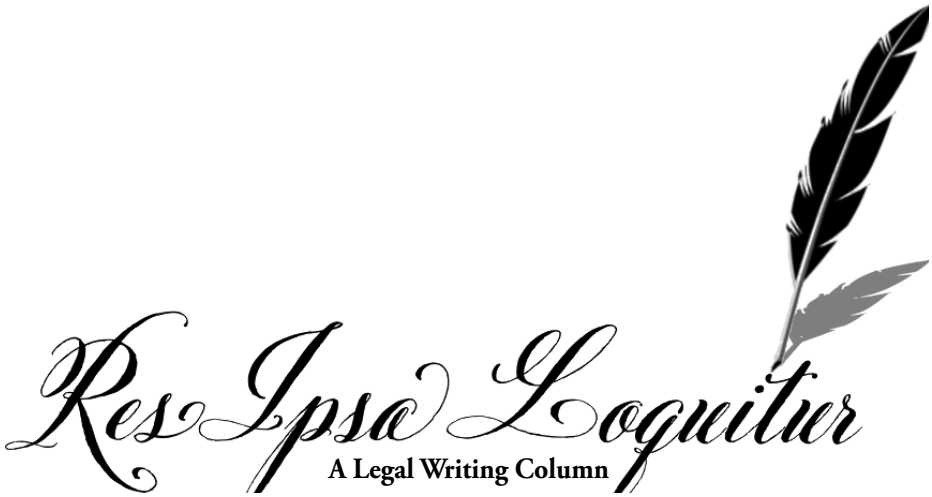

by Nancy A. Wanderer

Punctuation Pitfalls: The Perils Of Showing Possession

Families generally have a common interest or identity that reflects their core values. Often that identity relates to sports, politics, or the arts. Tennis great Billie Jean King, for example, was not the only athlete in her family. Her brother, Randy Moffitt, was a major league baseball player, and her father, Bill Moffitt, was a college basketball star.

Similarly, several families have dominated the American political scene. So far, six United States presidents have come from three prominent political families: John Adams and his son John Quincy Adams; Theodore Roosevelt and his cousin Franklin Delano Roosevelt; and George H. W. Bush and his son George W. Bush. If Hillary Rodham Clinton becomes president, that would make seven families. Although John F. Kennedy was the only member of his family to be elected president, his two brothers were strong contenders, and many other members of the Kennedy family have devoted their lives to public service.

Families also populate the arts. For 200 years, over 50 musicians and composers from the family of Johann Sebastian Bach dominated the music world. Three generations of the Wyeth family have significantly impacted the visual arts: illustrator N.C. Wyeth; his famous son, Andrew; and grandson, Jamie; and also his lesser known, but equally talented daughters, Henriette and Carolyn, both of whom have been heralded among the greatest painters of the Twentieth Century.

The core value that formed my own family's identity was a deep interest in punctuation and grammar. So far, that interest has not led to international or even national fame, but it was central to our identity as a family. While other families were discussing current events at the dinner table, the Wanderers were debating points of grammar and reporting punctuation errors they had spotted on advertising signs. My father even corrected errors in the church bulletin every Sunday while sitting in the choir loft. The topic that triggered the most heated family debates usually involved the proper use of the apostrophe.

The apostrophe, one of the most controversial punctuation marks, is not as confusing as it may seem. Yet, people often have difficulty remembering how to show possession when nouns end in the letter *s* or need to be made plural before adding *'s* or simply an apostrophe. This column, the first in a series on "Punctuation Pitfalls," is intended to demystify the apostrophe and provide a roadmap for its use.[1]

Apostrophes show possession—who belongs to what and what belongs to whom. Basically, two rules apply, with one refinement: Rule 1: To make a singular noun possessive, add *s*. Rule 2: To make a plural noun ending in *s* possessive, simply add an apostrophe. If a plural noun does not end in *s*, add *'s*.

Examples of singular nouns: *defendant's testimony, everyone's concern, master's degree, James's brother*. Notice that you need to add *'s* even when the singular noun ends in *s*. It is not correct to write "James' brother," even though people and newspaper editors commonly make this mistake. The *Chicago Manual of Style*, which is generally regarded as the ultimate authority in matters of punctuation, used to allow "James' brother," but recently changed its position, rejecting that style as incorrect.[2]

Examples of plural nouns ending in *s*: *the Framers' intent, 60 days' notice, the Joneses' house*. Notice that you have to make the name "Jones" plural before adding the apostrophe to show possession. Examples of plural nouns not ending in *s*: *the children's school*, *the women's department, the people's choice*.

Exceptions are sometimes made for certain expressions that include the word "sake" and end in *s*, when the *s* sound is not pronounced: *for goodness' sake, for righteousness' sake*. Exceptions have also been made for some other nouns that end in *s*: *United States' promise*, *General Motors' employees*. It is usually better to revise your sentence to avoid these awkward constructions, however: *the promise of the United States, the employees of General Motors*.

To show joint possession, use *s* only after the last noun in the group: *James and Jonah's living room*, *the Congress and the president's dispute*. To show individual possession of more than one member of a group, use *'s* after each of the nouns: *Mom's and Dad's home towns*, *the dog's and cat's water dishes*. The same rules do not apply when a pronoun is involved. You must make both possessive. *Susan's and my cars* (individual possession); *Susan's and my trip to Colorado* (joint possession).

The possessive form of pronouns like *his, hers, theirs*, and *its* does not use an apostrophe. Be careful not to confuse the possessive forms *its*, *their, theirs*, and *whose* with the contractions *it's* (it is), *they're* (they are), *there's* (there is), and *who's* (who is). Apostrophes are used to show that letters or numbers have been omitted, as in the above contractions and other situations: *Class of '69* (Class of 1969).

Whether it is fair or not, writers are often judged on their ability to use apostrophes correctly. Thus, it is important to master these relatively simple rules and apply them, especially when writing persuasive memos and briefs for courts and when communicating with clients. Your credibility may hinge on your mastery of this tiny punctuation mark. Who knows? The judge considering the arguments in your brief or the client perusing a letter you have written might have come from a family like mine. If so, believe me, you do not want your apostrophe error to be the subject of the judge's or client's dinner table conversation that night.

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1. The rules included in this article appear in *Off and Running: A Practical Guide to Legal Research, Analysis, and Writing* (Wolters Kluwer Law & Business 2014) by Angela C. Arey and Nancy A. Wanderer.

2. The *Chicago Manual of Style Online*, explaining the rules regarding possessives and attributives in the new 16th edition (accessed Oct. 14, 2014).

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

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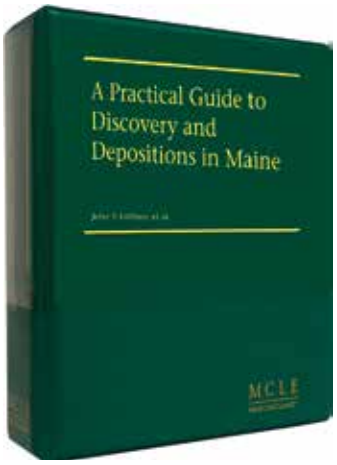

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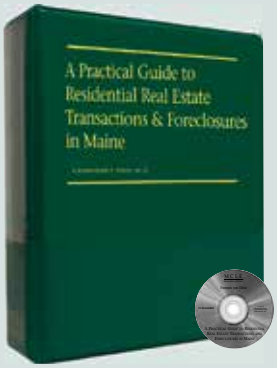

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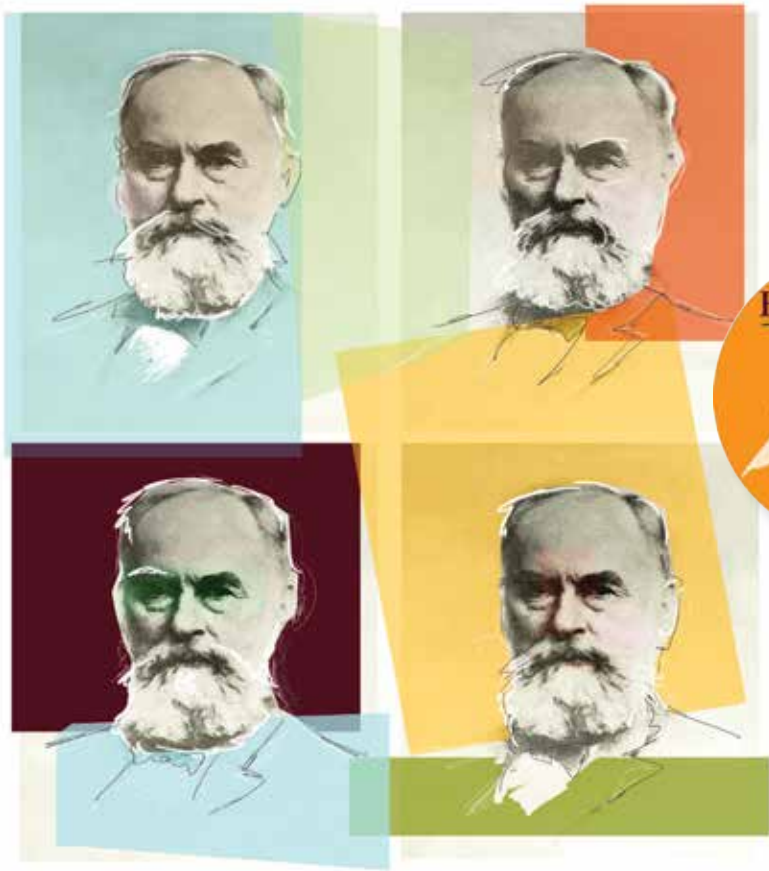

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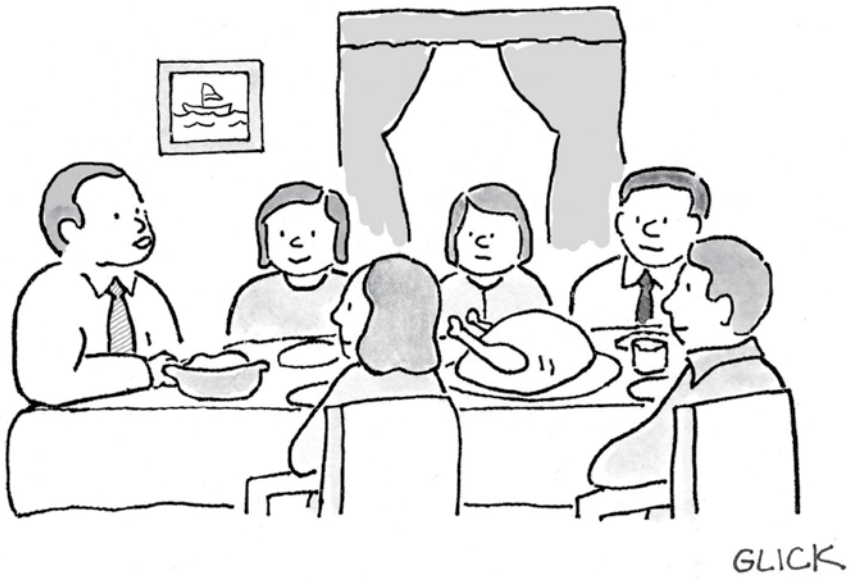

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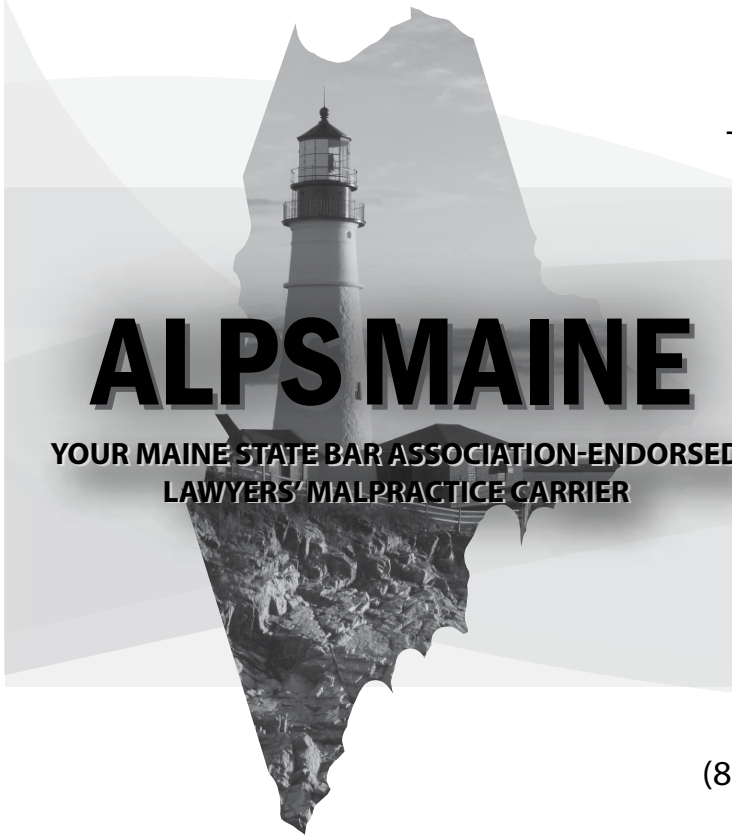

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by Jonathan Mermin

Litigation Glossary

And/or: strange conjunction used by lawyers who expect their adversaries not to understand the meaning of "or"—as if "documents that refer to the fire department or the police department" could be read not to include documents that refer to both departments. *See In re Fresh & Process Potatoes Antitrust Litigation*, 2014 U.S. Dist. LEXIS 50828, *24 & n. 6 (D. Idaho Apr. 11, 2014) (criticizing "and/or" as "sloppy and careless," and noting that "at least one court has construed the phrase against the drafter.").

Bluebook: peculiar publication that takes a simple problem—how to cite sources—that could be solved with a few general principles and a measure of common sense, and instead announces hundreds of pages of arbitrary, rigid, and pointless rules; described by Judge Richard A. Posner as "a monstrous growth, remote from the functional need for legal citation forms, that serves obscure needs of the legal culture and its student subculture." *The Bluebook Blues*, 120 Yale L.J. 850 (2011).

Certificate of service: document federal courts require parties to file certifying that a pleading has been served on opposing counsel, despite the fact that service is accomplished, not by the party certifying to it, but by the court's own computer system.

Definitions: prefatory section of written discovery requests where lawyers explain the meaning of common words in apparent anticipation of their adversaries being idiots.

Discovery: the process of delaying the disclosure of information the rules require to be disclosed, or of demanding irrelevant information for no discernable purpose, or of registering indignant objection to such delaying or demanding, or of being outraged by such objection.

Disingenuous: word used to describe the motives of our adversaries when they do the same things we would do if we were in their position; s*ee also* "self-serving."

Documents: a term deemed so obscure by drafters of requests for production as to require a sprawling definition that assumes the reader is incapable of processing abstract concepts, but instead requires a listing of every conceivable thing that might constitute a "document," often including items (teletypes, telexes, microfiche, phonograph records) few 21st-century litigants possess; for a better definition *see* Fed. R. Civ. P. 34(a)(1)(A) (authorizing requests for "documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.").

E-discovery: the process of exchanging far more information about what people were thinking and saying than existed in documentary form when the basic framework of civil discovery was established—before computers and smartphones (which remember everything) replaced typewriters and telephones (which don't)—at a cost often disproportionate to the stakes in the litigation.

Footnote: the place to say something you want the court to know it doesn't need to know.

Intent, of contracting party: what a person is deemed to have intended by signing a document they never read; to be ascertained by painstaking parsing of the unread document.

Jury: mythical panel of citizens convened to resolve civil disputes; fanciful alternative to the actual mechanisms of dispute resolution (summary judgment, arbitration, settlement, just giving up because it would cost too much to litigate).

Litigator: "a combination of the Latin *litigare*, 'to dispute,' and the American 'gator,' to chomp down hard with sharp teeth. Litigators are lawyers who engage ferociously in all aspects of the pretrial process, and then settle." Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 Colum. L. Rev. 1618, 1620 n. 7 (1996).

Multipronged test: objective-sounding standard courts recite before making decisions based on what seems fair under the circumstances.

Notice pleading: principle that says you can impose the costs and burdens of litigation on a defendant without having to tell them what exactly you think they did wrong.

Pronoun: word used in ordinary human communication to avoid the clunky repetition of proper nouns; avoided by lawyers in favor of the clunky repetition of proper nouns ("Mr. Block sued alleging that Mr. Block had been injured when the defendant's vehicle collided with Mr. Block").

Stated: how lawyers say "said" (which is how normal people say "stated").

The State of Maine: four words lawyers use where one ("Maine"—it has no other meaning) would suffice; *see also* "filed a motion" (three-word way to say "moved").

War story: tale told by an attorney of an epic adventure, usually involving information exchange or the obstruction thereof.

Jonathan Mermin is Of Counsel at Preti Flaherty. He can be reached at jmermin@preti.com.

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Joseph D. Thornton was born in Portland, Maine. He is Jesuit educated, graduating from Cheverus Classical Preparatory School in 1967 and then from Boston College with a B.A. in English and Philosophy in1971. He attended the University of Maine School of Law, has been a licensed private investigator in Maine since 1975 and in Massachusetts since 2005. He owned and operated Lawyers Investigating Service in Maine performing civil and criminal investigations for trial lawyers throughout New England until 1995. He also has been licensed and worked extensively in New Hampshire, North Carolina and Florida. Between 1999 and 2005 he was a staff investigator for the Federal Defender Office in their Capital Habeas Unit in Philadelphia assigned to Pennsylvania capital cases. Thornton has returned to the private sector and currently operates an agency in Boston. He is a former director of the National Association of Legal Investigators, Certified Legal Investigator, Board Certified Criminal Defense Investigator and has active cases pending in several jurisdictions at both the trial and appellate level.

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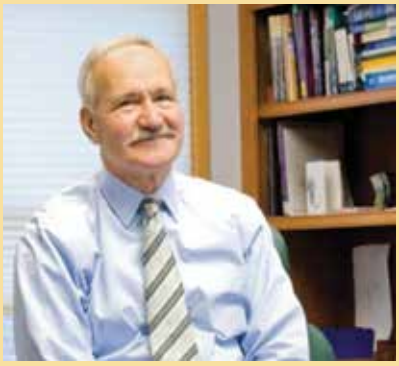

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Central Maine Derby
Est. 2013

Beyond The Law: Jennifer Eastman

Interview by Daniel J. Murphy
Photos by Emma Sato Murphy and Daniel J. Murphy

Circling the flat track just prior to the starting whistle, the women of the Central Maine Derby revel in the enthusiastic cheers of their hometown fans at the Cross Insurance Center in Bangor. Introducing the skaters by their derby names, the announcer explains that today's derby is a distant relative of the more theatrical version of the sport that peaked in popularity in the 1940's. Modern roller derby is a strategic game where offense and defense are continually in flux, as each team's jammer tries to score points by breaking through the opposing team's blockers. Although elbowing, tripping, and other illegal maneuvers are forbidden, hip checks, hip whips, and targeted blocks are conspicuously permitted in this fast-paced contact sport. For Jennifer Eastman, who goes by the moniker Miss Anthrope when she is on the track, roller derby has become an unexpected source of physical challenge, mental stimulation, and sustaining camaraderie. Eastman, who otherwise practices estate and elder law at Rudman Winchell in Bangor, sat down with the *Maine Bar Journal* to discuss her interest.

MBJ: Could you please tell our readers about your interest?

JE: I am the president and one of the founders of Central Maine Roller Derby, a women's flat track roller derby league based in Bangor. We started in the spring of 2012 with about 10 women who were interested in playing roller derby. Since that time, we have grown to a league of about 50 members. We have female skaters and male referees and volunteers. It is a wonderful group of people.

MBJ: What is it about roller derby that appeals to you?

JE: It's the only sport I know where you play offense and defense at the same time. It is like chess on wheels. It is entirely strategic. That's one of the things that I really love about it. It is not just a physically demanding sport; it's really much more of a mental game. It is a full contact sport, but much like hockey, there are legal and illegal hitting zones and actions, and a penalty will send a skater to the penalty box for 30 seconds. The hits are hard and real, but there's no hair pulling, punching, or tripping.

MBJ: How did you become interested in roller derby?

JE: When I was pregnant with my third child, I saw a documentary about the roller derby team in Austin, Texas, which is where flat track derby started. I watched that and just knew that I had missed my calling. It was just the coolest thing that I had ever seen. I grew up playing sports and have always enjoyed team sports, but as an adult woman, there are really few opportunities to take part in a team event that's really competitive. So I promised myself that after I had that baby I would make roller derby happen in Bangor. I knew there was a league in Portland and got a lot of advice from them before we started.

MBJ: For the uninitiated, could you describe roller derby for our readers?

JE: Yes, and that's a question that I get asked often. People will say, Roller derby? Like I used to watch on TV on Saturday mornings? Modern-day roller derby is a bit different. It developed in

the early 2000s. Primarily, we play flat track roller derby, not banked track like the old days. We tape a rope to the floor and that's our track. A game is made up of two 30-minute halves, which are made up of jams that last up to two minutes each. The teams play five on five for each jam. There's one skater on each team that wears a star on her helmet; she's the jammer. The rest of the skaters are blockers, and the blockers stay together in a pack. The job of the jammer is to get through the pack and lap the pack. Then, every time the jammer passes a member of the opposing team, she scores a point. The first jammer through the pack is designated as the lead jammer, and she can call the jam off any time before the two minutes runs. The blocker's job is to help her jammer get through the pack and score points, while at the same time stopping the opposing jammer from getting through the pack.

MBJ: How has the reception been for the league?

JE: It has been fabulous. We have the best fans, and we have major support from the Greater Bangor community. We play our games—we call them bouts—at the Cross Insurance Center here in Bangor. It is an absolutely phenomenal facility. We had the mayor of Bangor blow the first whistle at our first game here, which was fun. Modern roller derby is a very grass roots movement. A big part of that involves giving back to the community that supports us. We have had great success with that. We developed our signature program that we call Skate Don't Hate. We go out to schools all over Central Maine and talk to kids about bullying, how to deal with it, and how to not be a part of it. Our league is this very diverse group of women who have come together to be a team. We don't always get along, but we need to respect each other, and work together, to be successful. We find that's very analogous to kids' experiences in school these days. The kids are very excited and motivated by it. That has helped us gain a lot of fans and grow a great reputation in the community.

MBJ: Does your league compete against other leagues?

JE: Yes. We complete against other leagues all over New England and Atlantic Canada. I think Hartford is the furthest we've gone. We've been to Massachusetts, New Hampshire, and Rhode Island several times. We've been to St. John and Fredericton, New Brunswick.

MBJ: How has your league done on the road?

JE: We do pretty well for a new team. We've only been doing this for a couple of years, and we have taken on some teams that have considerably more experience than we have. This summer we played one of the home teams from the Boston Derby Dames, which included skaters who play on Boston's nationally ranked All Star team. We win some games and we lose some games. It really just depends on the level of team that we are playing. For me personally, I never really care what the score is. It is so much fun to do this, and it is so much about community and women having this fantastic time playing a contact sport on roller skates. It doesn't really matter who wins or who loses. You get to play, that's a win.

MBJ: What are some of the big challenges of the sport?

JE: We have had our share of broken ankles on our league. We've had a couple of concussions, too. That can be very scary. We do wear full gear. We wear helmets, mouth guards, elbow pads, wrist guards, and knee pads.

But injuries do happen like they do in any sport. It's a big time commitment. You could skate and practice six days a week if you wanted to. Running the league takes a huge amount of time, setting up events, games and fundraising. It's a common joke that roller derby can consume your life, but it's true. I'm so very fortunate and grateful that my husband and children support me in this. I could never play roller derby and have a law career and be a mom without the massive support that I get from my family. I'm not sure I could do any two of those without the great support that I receive.

MBJ: How many days a week do you skate and practice?

JE: I shoot for two nights a week and three or four hours on Sundays.

MBJ: What are some of the rewarding aspects of roller derby for you?

JE: I think a lot of people think of roller derby as punk rock girls with tattoos beating each other up entertainment, but it's really a very athletic endeavor. Today's roller derby is a very competitive sport. The women in our league include a couple of doctors, professors at the University of Maine, a bank manager, and a nuclear engineer. So one of the things that I really love about my league is that these are fascinating, smart women from really different backgrounds that I would never get to know or become friends with just because of the differences in our lives. But they've become some of the closest friends I've ever had. I am passionate about this sport for so many reasons. The opportunity to follow your passion with your whole heart, and watch it come to fruition because of your blood, sweat and hard work is a pretty rewarding experience in itself.

MBJ: Any intersection between your legal world and this particular world?

JE: It's funny because the more my derby life goes on, the more analogies I see between roller derby and everything else. It always seems to come back to roller derby. Managing a league of 50 women ranging in ages from 19 to 50-something with different backgrounds and careers and lots of opinions is a constant exercise in communication. That crosses over to anything that you do. I'm an estate planning attorney, so I like to think that I come across as a nice girl. When I have probate litigation cases, I like to think that my clients feel encouraged knowing that I can be this very aggressive person on the track and that can carry over to the courtroom. And I do think to some extent, knowing that I am this aggressive athlete on the track gives me some extra confidence to be in other adversarial situations. You have to keep your cool and focus on the goal.

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

JE: A very wise woman once told me, you can wear the same pair of black pants every day and no one will ever notice. She was right.

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

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

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Supreme Quotes

by Evan J. Roth

Yes, truly, for look you, the sins of the father are to be laid upon the children.

Tison v. Arizona, 481 U.S. 137, 184 n.20 (1987) (Brennan, J., dissenting) (quoting W. Shakespeare, The Merchant of Venice, Act III, scene 5, line 1).

In 1978, Gary Tison escaped from an Arizona State Prison with the help of his three sons, Donald, Ricky, and Raymond. As the sons drove their fugitive father through the desert toward Flagstaff, a tire blew out, so they decided to flag down a passing motorist and steal a car. Raymond stood in front of the Tisons' car while the others hid. Eventually, a Mazda pulled over, which was occupied by John and Donnelda Lyons, their 2-year-old son, and their 15-year-old niece. The Lyons family was forced into the backseat of the Tisons' car and taken to a more remote location, away from the highway. When John Lyons began to beg for his life, Gary Tison told his three sons to walk back to the Mazda to get some water. As they did, they heard their father shoot and kill the Lyons family. Eventually the police caught Rickey and Raymond Tison, who were tried and convicted and sentenced to death. Donald Tison and his father Gary were never prosecuted because they died trying to escape from the police manhunt.

The issue for the Supreme Court was whether the death penalty was constitutionally permissible even though Rickey and Raymond did not specifically intend to kill the Lyons family, and they did not inflict the fatal gunshot wounds. A majority of the Court concluded that the death penalty was constitutional if the defendants were recklessly indifferent to human life and were major participants in the crime, which was supported by the record.

Justice Brennan dissented. He emphasized that the murders were committed, not by the sons, but by the father, who was now dead. Brennan's dissent criticized the urge to employ the death penalty against accomplices when the killings stir public passion and the actual murderer is beyond human grasp. Quoting Shakespeare's *Merchant of Venice*, Justice Brennan wondered whether the urge was also deeply rooted in our consciousness that sons must sometimes be punished for the sins of the father.

Evan J. Roth After nearly 20 years in Portland, Maine as an Assistant U.S. Attorney, Evan is now an Administrative Judge for the Merit System Protection Board in Denver, Colorado. He can be reached at Evan.J.Roth@icloud.com.

MSBA CLE Calendar

Dec. 16 **"Earnouts" in Business Transactions** • Telephone Seminar. CLE Credits: 1.0.

Dec. 17 **Estate and Succession Planning with Family Business: Part I** • Telephone Seminar. CLE Credits: 1.0.

Dec. 18 **Estate and Succession Planning with Family Business: Part II** • Telephone Seminar. CLE Credits: 1.0.

Dec. 19 **Ethics and Confidentiality: What Is, What Isn't, and What Can Be Shared?** • Telephone Seminar. CLE Credits: 1.0 ethics.

Dec. 29 **Advanced Issues in MaineCare Planning** • Webcast Video Replay. CLE Credits: 1.0.

Dec. 30 **Life Insurance for Lawyers: What You Need to Know to Help Your Client…and Avoid Malpractice** • Webcast Video Replay. CLE Credits: 1.0 (ethics).

Jan. 6 **Estate Planning in 2015: A Look Forward** • Telephone Seminar. CLE Credits: 1.0.

Jan. 7 **Real Estate Institute 2013** • Video Replay: Ramada, Saco. CLE Credits: 6.0, including 1.0 ethics.

Jan. 7 **Understanding and Modifying Fiduciary Duties in LLCs** • Telephone Seminar. CLE Credits: 1.0.

Jan. 8 **Opening and Closing Statements in Civil and Criminal Law** • Webcast Video Replay. CLE Credits: 3.0.

Jan. 8 **Direct Examination of Witnesses** • Webcast Video Replay. CLE Credits: 1.0.

Jan. 8 **Taking Better Depositions** • Webcast Video Replay. CLE Credits: 1.0.

Jan. 12 **LLCs Taxed as Partnerships: Drafting and Planning Considerations** • Webcast Video Replay. CLE Credits: 2.75.

Jan. 12 **Attorney Ethics When Starting a New Law Firm** • Telephone Seminar. CLE Credits: 1.0.

Jan. 14 **Will Contests: Common Grounds for Challenges & How to Defeat or Avoid Them** • Telephone Seminar. CLE Credits: 1.0.

Jan. 15 **Veterans' Law: For Those Who Protect and Defend Us** • Video Replay: Embassy Suites, Portland. CLE Credits: 6.0, including 1.25 ethics.

Jan. 15 **Drafting Powers of Attorney** • Video Replay: Embassy Suites, Portland. CLE Credits: 1.25 ethics.

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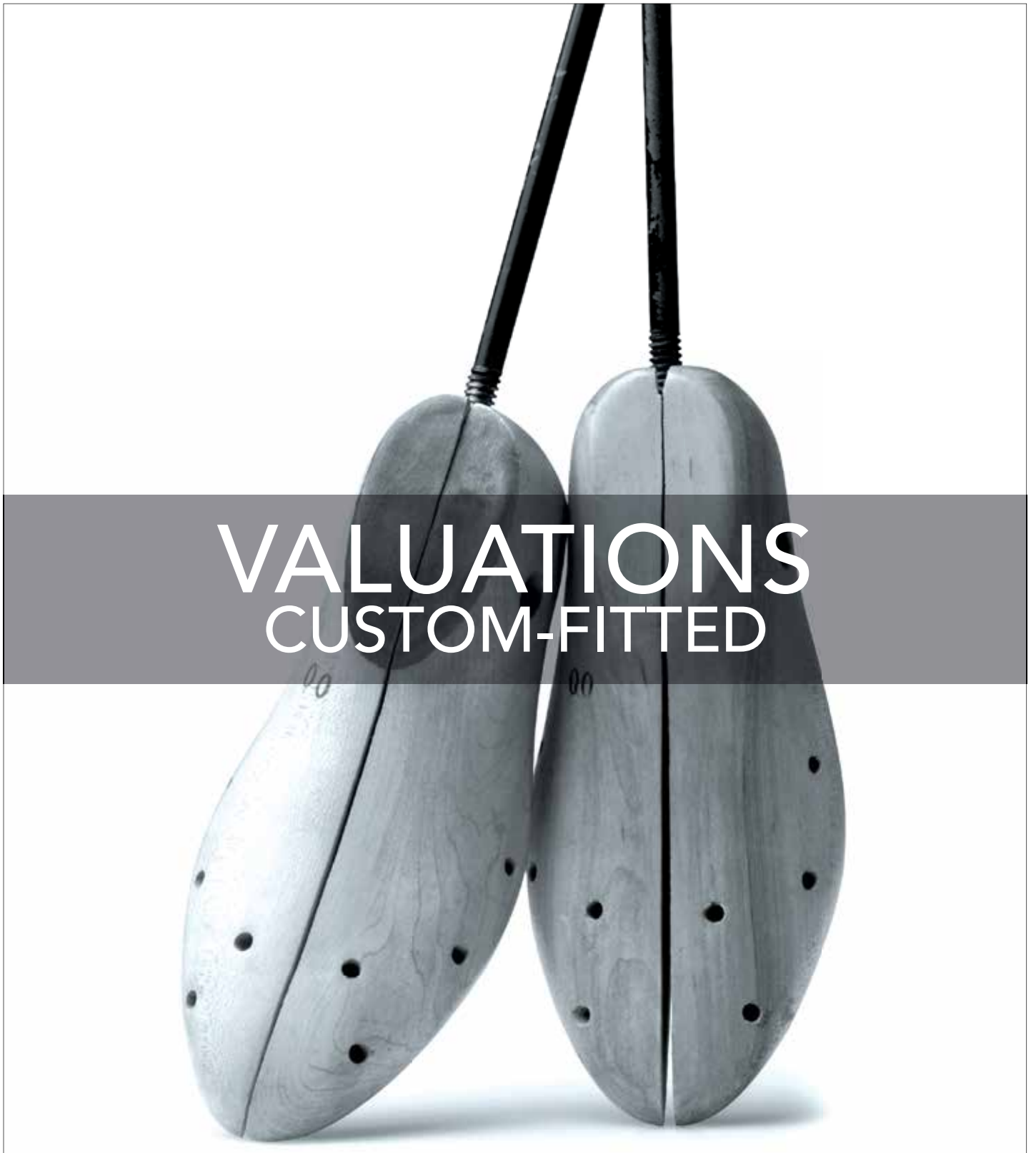

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