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As another year—and my tenure as your president—came to a close, I enjoyed taking the opportunity to reflect on good times with family and friends and the camaraderie of many who work and toil in this great profession of ours.

I had earlier promised a former member of your Board of Governors that I would write an article about how the practice of law wasn’t fun anymore. I was referring to frivolous claims and defenses, the perception that insurance defense counsel were just running up billable hours, the failure to even try to settle disputes, the “gotcha” mentality, the failure to answer phone calls, the lack of respect, etc. In short, I was questioning the culture of our profession.

When I mentioned this to one of our prominent jurists, who is about my age, he quickly and decisively talked me out writing this article. Perhaps, more important, he put me back on track with my primary belief that we are actually very lucky to be part of this profession, and if there are perceived shortcomings we must work to make things better. He is right. Maybe “fun” wasn’t the right word. Maybe I was just recognizing some of our shortcomings, and that was clouding my core belief in this great profession.

We truly are fortunate to be part of this profession. Think about it: There is an element of intellectual satisfaction in what we do, and whether we admit it or not there is a certain amount of personal satisfaction in actually helping someone. Win, lose or draw, at the end of the day that inner voice says, “you know what, I made a difference in someone’s life today.” That’s what it’s all about.

Of course this profession has its flaws; they all do. But we can—and should—strive to overcome our professional and personal shortcomings, and we can do so while continuing to recognize how privileged we are to practice law. (Yes, I truly do love this profession.)
With that privilege comes some responsibility. Take a moment to think back to the time when some older, experienced lawyer (you probably thought anyone over 40 was “old”), took a chance and hired you—fresh out of law school, full of wonder and excitement, but unsure as to what a “real lawyer” actually did. Today’s “youngsters” are no different. Only today it is harder than ever to land that first job. Remember how you began your career, and keep these youngsters in mind when you need more help. Give them a chance. I don’t want to hear that it’s too expensive to train young inexperienced lawyers. Indeed, it is too expensive to our profession and to the future of our legal system not to train them. You actually have a lot to offer in terms of real-life lawyering; although I hasten to add, however, many of these youngsters already know more about portions of the law than you do!

As Susan Driscoll takes over the reins as president this month, I want to express my gratitude to each and every MSBA member, your Board of Governors, and the entire MSBA staff for allowing me to serve you during 2017. The MSBA remains strong and vibrant, and your Board and staff continue to work every day with renewed dedication to serve you.

Thank you—and now let’s all get back to work.

Think about it: There is an element of intellectual satisfaction in what we do, and whether we admit it or not there is a certain amount of personal satisfaction in actually helping someone. Win, lose or draw, at the end of the day that inner voice says, “you know what, I made a difference in someone’s life today.” That’s what it’s all about.
I’ve been hearing a lot lately in the news and from my colleagues at other bar associations about wellness, work-life balance, mindfulness, and fitness. For those of you who know me, you know that I am physically active and work out about 4-5 times per week. Exercising is my means for achieving wellness. I run, bike, swim, and participate in CrossFit. Working out makes me feel healthy and strong—not just my body, but also my mind. It allows me to get out my frustrations and stress and spend time with like-minded individuals. I also get time to myself…to clear my head or to work through a problem.

Most people say they don't have time to exercise. My response to that is we make time for what is important to us. Are there days when I run out of time for my workout? Absolutely! Life is busy, especially if you work full time and have a family. For lawyers, cases can become overwhelming and deadlines have to be met. But, that is precisely when it is important to take time for you. Studies have shown that most people are more productive and focused when they take breaks from their work. Get up from your desk every hour and stretch, or do a set of push-ups or sit-ups or toe touches. Go outside and walk while you check your voicemails. Always take the stairs when you have the opportunity, and schedule walking meetings instead of doing lunch. Physical activity is cumulative, so even if you only squeeze in 5 minutes at a time several times a day, you are still achieving your goals.

Maybe working out isn’t your cup of tea. That’s OK. There are many ways to achieve mental and physical well-being. You might want to consider relaxation techniques, meditation, yoga, stretches in your office, a stand-up desk…the possibilities are endless. Check out Mindful Lawyer Magazine (visit www.jeenacho.com) or consider meditation as a way to reduce stress, anxiety and negative emotions (visit www.mindful.org). Living well isn’t just about exercising. It’s about knowing your body, proactively dealing with stress and anxiety, and developing a healthy work-life balance.

Is it easy for me to get to the gym or go out for a run every day? No. There are days that I don’t feel like it at all. Sometimes, I have to make myself work out and, by the time I’m done, I am usually glad that I did. And some days, I can’t wait for my workout. The key is consistency, to keep your body and mind in tune. Find that “thing” that makes you feel good…whether it is a run, walking with a friend, meditating or attending a yoga class. By making the time for yourself, you will find that you are more centered, less stressed and better prepared to tackle everything else that is going on in your life and at work.

Find that “thing” that makes you feel good...whether it is a run, walking with a friend, meditating or attending a yoga class. By making the time for yourself, you will find that you are more centered, less stressed and better prepared to tackle everything else that is going on in your life and at work.
When Your Work-Life Balance Isn’t

In 2016, the ABA Commission on Lawyer Assistance Programs and the Hazeldon Betty Ford Foundation released the results of a major study on substance abuse and mental health issues among lawyers. The study, which was built on responses from nearly 13,000 lawyers and judges throughout the United States, found that:

- 20.6 percent reported problematic alcohol use
- 34.6 percent qualified as problem drinkers
- 28 percent experience depression
- 19 percent experience anxiety
- 23 percent experience stress.1

These numbers are significant and demand our attention. Take time now to assess your own wellness. Do you have a balance between your work life and your personal life? Do you exercise? Do you have a means for managing stress or anxiety? Your well-being isn’t necessarily defined by the absence of a problem or the presence of happiness. There’s more to it than that. It can include being engaged with peers, belonging to a community, feeling a sense of purpose in life, learning new activities, and more. With 2018 upon us, now is a good time to assess your overall wellness. Maybe you want to add in a regular workout to your daily routine, or you want to consider meditation, or yoga, or even explore a new hobby. Don’t wait—take charge of your wellness now!

Now, in looking at the statistics above, it’s likely that you or someone you know might be struggling with something more than implementing an exercise program or taking up a hobby. What if you are struggling to manage substance use or mental health issues? Confidential help is available through the Maine Assistance Program for Lawyers and Judges (MAP). MAP was created in 2002 by rule of the Supreme Judicial Court of Maine for the purpose of providing confidential assistance to Maine lawyers and judges to help them identify and address problems with alcoholism, other drug addictions or mental health disorders, including those caused by aging, that impair the ability of a lawyer or judge to practice or serve. All communications and actions taken by MAP with its clients are held in the strictest confidence and will not be reported to anyone outside of MAP, including any professional disciplinary agency, without the client’s permission. The identity of any individual who contacts MAP about a fellow professional will likewise remain confidential, and will not be disclosed to the person referred. To learn more about MAP, visit www.me-lap.org, call (800) 530-4627, or email maineasstprog1@myfairpoint.net.

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Maine children can have more than two legal parents. That was the outcome of *Pitts v. Moore*, a 2014 case in which the Maine Supreme Judicial Court recognized that a nonbiological parent could, in limited circumstances, become a parent in the full legal sense of the word. Although the debate over same-sex marriage overshadowed that important decision, Maine family law practitioners took note. Some surely praised the Law Court for accommodating the evolving Maine family. Others, without being insensitive, were nonplussed as they imagined the headache that calculating child support for three-parent families would cause. As if to console those less enthusiastic readers, the Court apologetically noted that “many aspects of the parental rights order may be cumbersome” when three parents are involved.

“Cumbersome” is not quite the right word. It implies that calculating child support will only require more time and effort but does not capture the uncertainty that practitioners will feel in the face of unanswered questions. “Confusing” would be a better word. Does the traditional child support formula apply to three-parent families? If so, how? Three years after *Pitts*, opinions vary and precedent is scarce. Yet such questions will need answers if Maine hopes to offer three-parent families the consistency and predictability that two-parent families enjoy, thanks to clear statutory guidelines. This article will explore the application Maine’s child support law to three-parent families. It will defend the application of the existing child support guidelines to three-parent families and suggest methods for doing so.

**Why the Child Support Guidelines Should Apply to Three-Parent Families**

Ordinarily, child support calculations are highly formulaic thanks to the statutory child support guidelines. These guidelines provide a method for determining a presumptive child support obligation using a limited set of easily-ascertainable facts—most importantly, the parents’ gross incomes. Maine has adopted an “Income Shares Model” of child support that, put most simply, approximates how much it costs parents to support a child, then apportions that cost between the parties based on their relative incomes, the end result being that the noncustodial parent pays the custodial parent a weekly or biweekly amount to cover his or her share. Courts may deviate from the presumptive child support obligation in a limited set of situations—the broadest exception being when the guidelines would be “unjust, inappropriate or

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Modern Families, Outdated Child Support Guidelines

By Daniel R. Lawson
not in the child’s best interest”—but the guidelines make child support orders fairly predictable and consistent.8 Unfortunately, the child support guidelines are a vehicle with only two seats: one for a custodial parent and one for a noncustodial parent. They anticipate that two, not three, parents will shoulder the cost of raising a child. For that reason, it may be tempting to bypass the guidelines entirely. Courts could, after all, cite the rarity of three-parent families as grounds for a deviation, thereby leaving the matter to the broad discretion of a judge, magistrate, or hearing officer.

That approach is problematic. For one, the child support guidelines arguably require courts to derive a presumptive child support obligation before entertaining a deviation in the first place (after all, how can a court find that a presumptive obligation is “unjust” if it does not even know what that presumptive obligation is).9

Secondly, bypassing the guidelines would not bypass the dilemmas presented by three-parent families; it would merely put those dilemmas into the laps of judges who would have to exercise their discretion without any guidance and little precedent. That is not particularly fair to judges, but even less fair to litigants. Parents in three-parent families, like any other, would benefit from the consistency and predictability that the child support guidelines offer. In fact, prospective third parents may be more interested in knowing the financial responsibility that they will shoulder as a legal parent: if the obligation looks too onerous, they may be less inclined to advance a legal claim of parenthood in the first place.

Finally, despite their awkward fit, Maine’s child support guidelines will, at the very least, provide a suitable point of departure for child support in three-parent families. At the core of Maine’s “Income Shares Model” is a Child Support Schedule that approximates what parents of various income levels typically spend on their children.10 Using that table, the child support guidelines give a rough estimate of what a child costs and then divvies up that cost between the parents. Although the formula anticipates only two parents, the same basic principle can apply to three.

Thus, to bring consistency and predictability to child support in three-parent families, courts should use, not circumvent, the child support guidelines. They should derive a presumptive child support obligation by applying the guidelines with as little adaptation as necessary, deviating from that presumptive obligation only when—and to the limited extent—that justice requires. As will be illustrated below, the child support guidelines can provide a consistent method for deriving a presumptive obligation both when the child lives primarily with a single parent and when a parent lives in a two-parent household.

**The Guidelines Applied to Two Custodial Parents**

Before proposing a method for applying the child support guidelines to situations in which a child lives with two legal parents and apart from another, a special justification for ordering child support in such cases is warranted. After all, if a child shares a household with two legal parents, what need does the child have of additional financial support? Ordering the third parent to pay child support, one could argue, would be filling a financial void that does not exist.

Professor Melanie B. Jacobs of Michigan State University College of Law, for example, argued that the law should disaggregate parental rights and responsibilities in a way that might excuse biological fathers from child support if a “social father” was fulfilling a role as provider.11 She wrote:

> A biological father with no parental intent might have his paternity recognized for genetic history purposes, but would have no further legal obligations nor legal rights to maintain a relationship with the child. . . . A man engaging in significant social parenting without a biological connection to the child would support the child and would reap the benefits of custody and/or visitation. . . . If the biological father wants to preserve some visitation rights, even for the future, then he will likely need to agree to contribute some child support. The support obligation, however, should not be consistent with current child support guidelines if the father has no parental intent or interest.12

Thus, Professor Jacobs would not subject third parents to the child support guidelines, but would leave it to judges to establish a modest child support order that is loosely proportional to the parent’s involvement in the child’s life.13

Jacob’s approach to child support would undermine Maine’s approach toward parenthood by effectively creating a legal quasi-parent, that is, a parent who accepts only some of the legal rights and obligations normally afforded them. The Law Court unequivocally rejected such an approach in *Pitts v. Moore*.14 “A *de facto parent* is a parent for all purposes,” the Court wrote, “and [after it recognizes a third parent,] the court must then go on to consider the appropriate award of parental rights and responsibilities—including child support—pursuant to title 19-A. . . . We cannot emphasize enough that parenthood is forever, whether the relationship is biological, adoptive, or *de facto*.”15
Thus, courts must premise their child support orders on the presupposition that parents are full and co-equal stakeholders in the financial support of their children. Accordingly, the fact that a third parent has a distant relationship with a child should neither obviate nor diminish his or her duty of support. Fortunately, one can apply the child support guidelines to such scenarios with relative ease. A sound approach would be to apply the guidelines with the following adaptations: (1) when calculating the parents’ combined gross incomes, use the income of all three parents; (2) after applying the parents’ combined gross income to the child support table and determining a total basic support obligation, assign a parental support obligation to the noncustodial parent in proportion to his or her respective gross income.

In form, this approach would treat the custodial parents’ incomes as one. The parties could enter their incomes (aggregating the custodial parents’ incomes) into a child support worksheet and calculate the support obligation accordingly. The end result may be a higher-than-normal total basic support obligation, but the noncustodial parent will benefit from paying a smaller percentage of the whole. As always, if the resulting obligation was unreasonable under the circumstances, the court could grant a deviation.

**The Guidelines Applied with Two Noncustodial Parents**

When a child lives with a single parent and apart from two noncustodial parents, there will, in fact, be an obvious void to fill, so expecting both noncustodial parents to pay child support should be less controversial. Indeed, having two parents rather than one from whom to draw support will give the child added financial security. Unfortunately, the calculations in such cases are more complex. There are at least two ways to adapt the child support guidelines to such three-parent arrangements: (1) the parties could calculate child support for each non-custodial parent separately and individually, ignoring the contribution of the other; or (2) like the approach in two-parent households, all three parents’ incomes could be added together and each noncustodial parent would take a pro rata share of the resulting total basic support obligation.

Each approach has its advantages. The first has the advantage of simplicity. Worksheets could be filled out and the guidelines applied just as they would in an ordinary two-parent case. But allowing a custodial parent to “double dip” from two different parents as if the other does not exist would likely yield inflated child support entitlements. If courts adopted this method, justice would require a deviation in virtually every case. Indeed, the Supreme Court of Louisiana held that a trial court must at least consider deviating from the child support guidelines to include a second noncustodial parent’s income. 16

The second approach would generally result in fairer obligations that more accurately reflect the three parents’ equal standing and mutual responsibility to support the child by incorporating all three incomes. The approach can be implemented by drafting a separate worksheet for each noncustodial parent, combining the other two parents’ incomes as if they were one “custodial parent.”17 The result will be two worksheets (one for each noncustodial parent) with identical combined incomes and total support obligations. Each worksheet would assign its respective noncustodial parent a pro rata share of the total support obligation. Doing separate worksheets in this way, rather than combining all incomes into one worksheet, would have the added benefit of ensuring that neither non-custodial parent loses the special consideration that they deserve if they fall into the child support table’s self-support reserve or below the federal poverty line.18

Whether and how the child support guidelines apply to three-parent families warrants careful consideration. Courts should maintain a keen awareness that child support can have a potent influence on family structures. That is especially true in three-parent families when one parent’s inclusion is, as a legal matter, voluntary. Leaving child support in such cases to the unguided discretion of a judge is to give that judge the power to encourage or discourage caretaker relatives from becoming de facto parents, and to encourage or discourage estranged parents from asserting their parental rights. It is an arena fraught with moral subjectivity where judges, who have their own conception of how a family should be structured, may be prone to bias.

Although there is limited precedent for child support calculations in three-parent families, courts and practitioners can adapt the existing child support guidelines with relative ease. Until the legislature says otherwise, courts should bring predictability to three-parent families and adapt the guidelines in a consistent, methodical manner. Once courts adopt a consistent approach, calculations will be cumbersome but not confounding.

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The legislature has since enacted the Maine Parentage Act, which recognizes three-parent families. See 2015 Me. Laws 710. In fact, Maine law does not limit the number of legal parents that a child can have. However, this article will confine its discussion to three-parent families and leave other scenarios for another day.

The child support guidelines clearly anticipate only two parents. See 19-A M.R.S. § 2006 (requiring the addition of “2 incomes” and making “both parents” responsible for child support to a caretaker relative).

Section 2007 allows a deviation “[i]f the court or hearing officer finds that a child support order based on the support guidelines would be inequitable or unjust.”

When a noncustodial parent’s income is factored into the custodial parent’s column of the worksheet, the parties will need to ensure that the noncustodial parent’s income is adjusted for other children in his or her home in accordance with section 2006(5). That adjustment is not available for custodial parents.


See Pitts, 2014 ME at ¶ 30, 90 A.3d at 1181 (“A determination that a person is a de facto parent means that he or she is a parent on equal footing with a biological or adoptive parent, that is to say, with the same opportunity for parental rights and responsibilities.”).

Id. at ¶¶ 32, 34.

State, Dept. of Children and Family Servs. ex rel. A.L. v. Lowrie, 167 So.3d 573, 584–5. The Court held that:

[T]he court may deviate from a ‘mechanical application’ of the child support guidelines “if their application would not be in the best interest of the child or would be inequitable to the parties.” . . . [W]e conclude that Mr. Lowrie’s asserted defense, that he be accorded a deviation in the mechanical application of the child support guidelines to take into account Mr. Wetzel’s income . . . should not have been summarily dismissed.

Id.

When a noncustodial parent’s income is factored into the custodial parent’s column of the worksheet, the parties will need to ensure that the noncustodial parent’s income is adjusted for other children in his or her home in accordance with section 2006(5). That adjustment is not available for custodial parents.
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Solving A Mystery: Justice Brandeis’ Approach to Judicial Decision-Making

This article was originally presented at The Brandeis Symposium at Touro Law Center March 31, 2016,¹ and appeared in the Touro Law Review, at 33 Touro L. Rev. 91 (2017). The article is being reprinted with the permission of Touro Law Review.

I. INTRODUCTION

I decided to write about Justice Brandeis’ approach to judicial decision-making to solve a small mystery. About a year ago, I read in Andrew Kaufman’s biography of Justice Cardozo that Justice Brandeis stated to one of Cardozo’s law clerks: “The trouble with your Judge is that he thinks he has to be one hundred percent right. He doesn’t realize that it is enough to be fifty-one percent right.”² That comment startled me. I thought Brandeis’ observation was odd.

For judges and juries who must decide the facts in ordinary civil cases, we accept a preponderance of the evidence standard as a pragmatic necessity for the resolution of disputes. But for appellate judges deciding issues of law, there is no such necessity. We can and should impose on ourselves a much higher degree of certainty in our decision-making. Imagine the public outcry if a Supreme Court justice who cast the deciding vote in a controversial case said she was 51% confident that she was right. It would be difficult to justify using the power of the state to enforce such a tentative decision. Therefore, I would never quantify the appellate decision-making process as a 51% proposition. With so much time to study and reflect, with the benefit of collegial decision-making, and with the input of able law clerks, I would place my certainty closer to 90%. Sure, the decision-making process itself often involves fits and starts, changes of direction, blind alleys, and discarded drafts. At the moment of decision there might still be some doubt. But 49%? No way. I could not issue a decision with such doubt.

So how could Brandeis make an observation that seems so antithetical to the appellate decision-making process that I have experienced? To answer that question, I decided to explore some of Justice Brandeis’ letters, speeches, essays and opinions, and the views of those who worked with and studied him. I was limited to such sources because, so far as I can tell, Justice Brandeis did not keep a journal of reflections during his years on the Court, and he did not write a memoir.³ Nevertheless, on the basis of the available sources, I came to a new understanding of Justice Brandeis’ 51% observation. Let me explain the travel that got me there.

II. THE CONFIDENCE OF LOUIS BRANDEIS

Self doubt was not an issue for Louis Brandeis; he had the confidence of a man who understood his superior gifts early in life. At Harvard Law School he set academic records that were unsurpassed for years.⁴ As a law student, in a letter to his brother-in-law, he criticized harshly a U.S. Supreme Court opinion that he thought was wrong on a point of evidence: “I am afraid those Supreme Court Judges [sic] will be refused admittance into paradise for the bad law they have been promulgating in this life. Many of them, surely, deserve the most dreadful punishment.”⁵ In 1879, while working in Cambridge in a new law partnership with his Harvard Law School classmate Samuel Warren, Brandeis wrote to his brother Alfred that he had just returned from a Saturday afternoon tea with friends, “where we criticized the people and agreed on the stupidity of the world.”⁶ Brandeis believed that the projection of confidence was an important attribute for a lawyer.⁷ In 1893, in a long letter to William Harrison Dunbar, a young associate in the Warren and Brandeis law firm, he wrote that Dunbar should strive to impress clients “with the confidence which you yourself feel in your powers. That confidence can never come from books; it is gained by human intercourse.”⁸

As a corollary to his confidence, Brandeis was not a worrier.
In a 1939 conversation with his niece, Fanny, Brandeis observed that “for all his philosophy, Justice Holmes worried.”⁹ Fanny asked him if he ever worried.¹⁰ Brandeis responded emphatically: “No, never—not even when I had trouble with my eyes. That was when I was about nineteen. The doctor told me I had better give up all idea of the law . . . . [B]ut with my
temperament I could go on . . . . [T]here was never anything organically wrong with my eyes.”11 Fanny pressed her inquiry: “If you didn’t worry about yourself, didn’t you worry about the world or about people you cared about?”12 Brandeis demurred: “I always went on the principle of ‘Do what you can and hope for the best’—I worked on the problem at hand. All those years before I went on the Court, that was my philosophy.”13

III. BRANDEIS AS A LAWYER

Before Brandeis joined the Court, he spent approximately forty years in law practice.14 Brandeis had been torn between a career as a law professor and a practicing lawyer.15 He acknowledged in an 1879 letter that “law as a logical science has very great attractions for me.”16 But so did “the wrangling of the Bar . . . . It is merely a question of selecting between two good things . . . . I question only which I am good for.”17

In choosing the “wrangling of the Bar” over an academic career, Brandeis made a choice of enormous import for his future work on the Supreme Court. In law practice, the logical science of the law was of secondary importance. A lawyer, he explained, must “reason from the facts within his grasp.”18 The “accuracy of his facts could be a more powerful argument than the logic of his law.”19 He understood “that a case may be won or lost before a legal question is ever raised.”20 He considered it “axiomatic that since facts determined law, the law had to reflect the realities of contemporary life.”21

Brandeis was immersed in those realities throughout his career as the “people’s lawyer,” a phrase that he used in his famous 1905 address to the Harvard Ethical Society on “The Opportunity in the Law.”22 He believed that “[t]he controlling force is the deep knowledge of human necessities,” and that “[n]o hermit can be a great lawyer.”23 A lawyer should “[l]ose no opportunity of becoming acquainted with men, of learning to feel instinctively their inclinations, of familiarizing . . . [himself] with their personal and business habits.”24 He warned that “[a] lawyer who does not know men is handicapped. It is like practicing in a strange city.”25

By the time Brandeis arrived at the Supreme Court in 1916, he had already used his “deep knowledge of human necessities”26 and his fondness for facts “stripped for action”27 to win many great legal victories. These victories included his successful challenge to the plans of a railway company to run a rail line across the Boston Common,28 his fights for cheaper consumer rates from gas companies,29 his peacemaker role in the Garment Workers Union Strike,30 and his storied advocacy in Muller v. Oregon,31 a women’s labor law case in which Brandeis intro-duced social science to the American legal system in the “Brandeis Brief.”32

However, there was some cost for Brandeis in those legal victories. During the bitter fight over his nomination by President Wilson in 1916 to the Supreme Court, one of the petitions against him claimed “that he does not possess the ‘judicial temperament’ that would fit him for the duties of . . . [a] Supreme Court judge.”33 That charge prompted a strong defense of Brandeis by his close friend, Felix Frankfurter, in the pages of the New Republic.34 Acknowledging that Brandeis was “not amiable in a fight,” Frankfurter justified this quality by the high stakes of Brandeis’ battles.35 Frankfurter stated that “[t]he law has not been a game to him, the issues he has dealt with have been great moral questions. He has often fought with great severity. He has rarely lost. His great fights have been undertaken in the public interest.”36

These great fights would now take place in a different forum. Given his confidence and his history of success, Brandeis had little reason to question the fallibility of his own judgment when he became a member of the Supreme Court.

IV. THE NATURE OF SUPREME COURT DECISION-MAKING

The Supreme Court was a good fit for Brandeis. The Court did not enjoy the enhanced power to control its own docket that it has today, as a primarily certiorari court, until 1925.37 Therefore, Brandeis had ample opportunities to apply the traditional skills of a legal craftsman to correct legal errors by the lower courts.38

Although consequential, decisions correcting legal errors from the lower court did not always engage the creative energies that Brandeis applied to the constitutional law cases and their difficult generalities—unreasonable searches and seizures, freedom of speech, the commerce clause powers, and equal protection of the law. These constitutional law cases posed special challenges for the justices, described by Professor Walton Hamilton of Yale Law School in a 1931 essay on Brandeis’ Supreme Court work:

[W]here a changing social necessity impinges upon the established law, the jurist must possess a double competence; he must employ alike legal rule and social fact, and where they clash, as inevitably they will in a developing culture, he must effect the best
reconciliation that may lie between them. The judge must become the statesman without ceasing to be the jurist; the quality of his art lies in the skill, the intelligence, and the sincerity with which he manages to serve two masters.39

Justice Brandeis was blessed with the double competence described by Hamilton because he had a vast knowledge of social fact from his years of law practice, and was always a brilliant student of the legal rules. Moreover, the constitutional cases played to some of his deepest impulses—a distrust of large institutions, governmental or private, and a strong belief in the worth of the individual.40 At times, as Justice Holmes observed about his colleague, he “was an advocate rather than a judge. He is affected by his interest in a cause.”41

There seems to be a mix of admiration and unease in Holmes’ observation, along with some exaggeration. Brandeis knew how to hold his fire. In non-constitutional cases, which Brandeis described as “ordinary cases,” he usually joined his colleagues, even if he disagreed with them. As Brandeis explained: “[T]here is a good deal to be said for not having dissents. You want certainty & definiteness & it doesn’t matter terribly how you decide, so long as it is settled.”42

For constitutional cases, moreover, he believed deeply in principles of judicial restraint—refraining from constitutional dicta, adhering to the doctrine of constitutional avoidance, and refusing to hold an act of Congress void unless it clearly exceeded congressional powers.43 However, if he felt his colleagues had reached an errant constitutional decision, he no longer cared about settled law:

[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.44

Committed to this process of trial and error, Brandeis wrote the great dissents that justified Holmes’ observation about him; he was a judge deeply “affected by his interest in a cause.”45

V. BRANDEIS ON THE COURT: HIS DECISION-MAKING PROCESS

There was a curious duality in the perceptions of Brandeis during his years on the Court. Judge Henry Friendly, a former Brandeis law clerk, described Brandeis’ “Olympian calm,” and Professor Hamilton wrote that Brandeis’ “opinions seem to reveal a mind rather quickly made up . . . .”46 Yet Brandeis’ outward calm and ease of decision-making could not mask his intensity. As Judge Friendly observed: “Everyone who knew Brandeis was struck by his intensity. President Roosevelt recognized this when he took to addressing Brandeis as ‘Isaiah.’ This quality was manifest in Brandeis’ appearance, in his acts and in his writings.”47

Perhaps as a way of controlling the intensity, Brandeis followed strict routines in his daily life. He took brisk, lengthy walks for exercise.48 He pursued an early to bed, early to rise regimen, often being in bed by 10 P.M., and working at his desk by 5 A.M.49 He believed that “[t]he bow must be strung and unstrung; work must be measured not merely by time but also by its intensity; there must be time also for the unconscious thinking which comes to the busy man in his play.”50 True to this philosophy, Brandeis always ceased work for the month of August, explaining: “I soon learned that I could do twelve months’ work in eleven months, but not in twelve.”51

He also followed strict routines in his decision-making, including his use of law clerks. Brandeis had been a law clerk himself for Chief Justice Gray of the Massachusetts Supreme Judicial Court.52 Brandeis described Chief Justice Gray’s “mode of working:”

He takes out the record & briefs in any case, we read them over, talk about the points raised, examine the authorities’ arguments—then he makes up his mind if he can, marks out the line of argument for his opinion, writes it, & then dictates it to me.

But I am treated in every respect as a person of co-ordinate position. He asks me what I think of his line of argument and I answer candidly. If I think other reasons better, I give them; if I think his language is obscure, I tell him so; if I have any doubts I express them and he is very fair in acknowledging a correct suggestion or disabusing one of an erroneous idea.53
Brandeis applied this model to his own work with the gifted law clerks who worked for him, “albeit with the law clerk in a more junior role.” As one law clerk put it: “He expected me to pull no punches and read everything with a critical eye. He didn’t want any petitions for rehearing because of any error on his part. I was not to stand in awe of him but was to tell him frankly what I thought.”

There was, however, one critical difference between the way in which Chief Justice Gray worked with Brandeis and the way in which Brandeis worked with his law clerks: Brandeis discussed the cases with Chief Justice Gray as part of the Justice’s decision-making process. By contrast, Dean Acheson, another Brandeis clerk, recalls that, 

The Justice wanted no help or suggestions in making up his mind . . . . [T]he Justice was inflexible in holding that the duty of decision must be performed by him unaided. He was equally emphatic in refusing to permit what many of the Justices today require, a bench memorandum or précis of the case from their law clerks . . . . He owed it to counsel . . . . to present them with a judicial mind unscathed by the scribblings of clerks.

There was also a more practical reason for Brandeis’ refusal to discuss the cases with law clerks before making a decision. According to Paul Freund, yet another famous Brandeis law clerk, “he would consider it an unnecessary drain on resources.” Indeed, Brandeis had little patience with endless debating about the merits of a case even with colleagues. He disapproved of the approach of Harlan Fiske Stone, the future Chief Justice, when Stone first joined the Supreme Court because he thought Stone was too indecisive and too inclined to discuss endlessly the pros and cons of each case. He even mocked Stone privately: “I think it’s wrong, but. [sic] I think it’s right, but. [sic] He doesn’t know and doesn’t take trouble to find out.”

Once Brandeis made his decision—and Judge Friendly observes that “on many of the great issues it had been made long before the case was argued”—there remained “the engrossing task of endeavoring to persuade his colleagues, or at least four of them.” Brandeis lavished far more time on the drafting of opinions than on the decision-making process itself. To be sure, there is an indication in Brandeis’ Supreme Court files that he occasionally changed his mind while writing a decision that he had been assigned to write. But these instances are the exception.

Brandeis’ drafting process followed an almost unvarying routine. He “wrote out in longhand on a yellow legal-size pad the nub of the case, the question posed, the Court’s decision, and the rationale.” Brandeis would then send the resulting document, which was rarely longer “than a page and a half,” to the court printer. When he got it back the next day he would begin to revise and expand the opinion, starting with the statement of facts, which he always wrote himself. While Brandeis wrote this skeletal draft, he was waiting for his law clerk to bring him the results of research that Brandeis assigned to him. When he got that research, he would insert it into the text of the opinion by cutting up the memo and pasting it in the appropriate place. For Brandeis, the drafting process appeared to be less a test of the correctness of his decision than the painstaking effort to explain to his colleagues and the world why he was right.

Brandeis’ research for his opinions involved one revolutionary step—he was the first Supreme Court Justice to cite a law review article in an opinion. Brandeis believed strongly in the importance of law journals. As he explained: “I incline to think that the law schools and their journals will ultimately furnish the most effective means for recall of erroneous judicial decisions.” Brandeis understood that, as a judge, he held the “duty of decision” in each case before him; thus, he left it to law students and professors, with the benefit of hindsight, to expose the mistakes of the judges. To that end, in a 1922 letter to then-Professor Felix Frankfurter, Brandeis urged Frankfurter to cultivate in law students the virtues of accuracy and thoroughness, although he acknowledged that some would have the advantage of natural talent. As Brandeis put it: “High ability, resourcefulness, imagination, the essentially legal mind, come, like kissing, by favor of the gods . . . .” The essentially legal mind and kissing—only a man of Brandeis’ genius could make that connection.

VI. Conclusion

So, in conclusion, what do I now make of Justice Brandeis’ observation that “the trouble with [Cardozo] is that he thinks he has to be one hundred percent right. He doesn’t realize that it is enough to be fifty-one percent right?” I think appellate judges, if asked to consider the issue, would calibrate their decision-making certainty at different levels. I placed mine at 90% because, like most judges, I experience the journey to certainty as an incremental process beyond the halfway point. When I have only an inclination about an
outcome—my 51% point—I must do more thinking about the case, more research, more discussion with law clerks, and more drafting, before I have enough confidence in my inclination to treat it as a decision. My 90% figure is, in part, a description of that arduous journey.

My late colleague Frank Coffin, a gifted jurist by any measure, described in his book, The Ways of a Judge, the appellate judge’s “state of prolonged indecisiveness” in hard cases.79 Judge Coffin added this metaphor: “I see the process rather, as a series of shifting biases. It is much like tracing the source of a river, following various minor tributaries, which are found to rise in swamps, returning to the channel, which narrows as one goes upstream.”80

I do not think Justice Brandeis would describe his decision-making process as “a state of prolonged indecisiveness” or “a series of shifting biases” as he fought his way upstream through swamps and tributaries. Favored with a rare genius, Brandeis made his decisions quickly, largely through his own counsel, without much fuss. For him, that 51% figure did not reflect uncertainty. Rather, it reflected his speedy arrival at a confident judgment. I am not suggesting, of course, that Brandeis did not work hard. Nothing could be further from the truth. But he saved his hardest work for explaining decisions, not making them.

That was not true of Justice Cardozo. Their approach to decision-making could not have been more different. Henry Friendly, observing both of them, said that Brandeis “knew nothing of what Judge Hand, in his moving tribute to Justice Cardozo, has called ‘the anguish which had preceded decision.’”81 Cardozo arrived at the Supreme Court in March 1932.82 Brandeis made his 51% comment to the Cardozo law clerk during the 1933-34 term of the Court.83 It was offered, according to the law clerk, in “reaction to Cardozo’s conscience.”84 By then, Brandeis had observed the anguish which preceded Cardozo’s decisions, and the physical toll it may have had on Cardozo, who had his first heart attack in 1930, around the age of 60, and who was in declining health during his six years on the Supreme Court.85 Yet, according to one account, Cardozo “was a tireless worker exhausting himself by the close of each term. He used work as a way to escape, if not beat, illness.”86

Observing Cardozo and his declining health, Brandeis may have been worried about Cardozo and, with the law clerk as an intermediary, delivered a message to Cardozo that he should not drive himself so hard.87 Cardozo, hearing the message, responded skeptically: “The trouble with that is when you think you are fifty-one percent right it may really only be forty-nine percent.”88 Hence, for Cardozo, the journey from inclination to certainty would remain much longer than Brandeis’. The men were simply different kinds of geniuses. Brandeis’ gifts were not easily transferable. With his confidence, his refusal to worry, his grounding in the world of affairs, his understanding of the “human necessities” of life,89 his insistence on time for play, and his adherence to the routines of his decision-making, he had a remarkable judicial career without the anguish of decision-making. There is no probability in that judgment. I am 100% confident that I am right.

JUDGE KERMIT V. LIPEZ graduated from Haverford College in 1963 and Yale Law School in 1967. He earned his LL.M. from the University of Virginia School of Law in 1980. Judge Lipez participated in the U.S. Department of Justice Honors Program as a Staff Attorney in the Civil Rights Division from 1967 to 1968. He then served as Special Assistant and Legal Counsel to Maine Governor Kenneth M. Curtis from 1968 to 1971 and as a Legislative Aide for United States Senator Edmund S. Muskie from 1971 to 1972. Judge Lipez worked in private practice in Portland, Maine from 1973 to 1985, before he was appointed Justice of the Maine Superior Court, where he served from 1985 to 1994. In 1994, he was elevated to the Maine Supreme Judicial Court, where he served until he was appointed to the First Circuit Court of Appeals in 1998.
16 Letter from Louis D. Brandeis to Charles Nagel (July 12, 1879), in 1 LETTERS, supra note 5, at 39.
17 Letter from Louis D. Brandeis to Charles Nagel (July 12, 1879), in 1 LETTERS, supra note 5, at 39.
21 Urofsky, supra note 19, at 477.
22 Brandeis, Opportunity in the Law, supra note 18, at 555, 559.
23 Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), in 1 LETTERS, supra note 5, at 107.
24 Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), in 1 LETTERS, supra note 5, at 106.
25 Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), in 1 LETTERS, supra note 5, at 108.
26 Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), in 1 LETTERS, supra note 5, at 107.
28 Urofsky, supra note 19, at 131-32.
29 Urofsky, supra note 19, at 140-49.
30 See Urofsky, supra note 19, at 244–53.
32 Id. at 419.
35 Id.
36 Id.
37 See Urofsky, supra note 19, at 584.
38 See Dean v. Davis, 242 U.S. 438 (1917).
39 Hamilton, supra note 20, at 1077.
40 Hamilton, supra note 20, at 1084.
41 Urofsky, supra note 19, at 578.
42 Urofsky, supra note 19, at 579.
43 Urofsky, supra note 19, at 579.
46 Urofsky, supra note 19, at 578.
48 Hamilton, supra note 20, at 1089.
49 Friendly, supra note 47, at 985.
50 See Letter from Louis D. Brandeis to Alice Goldmark Brandeis (Dec. 1, 1918), in 4 LETTERS, supra note 27, at 367.
52 Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), in 1 LETTERS, supra note 5, at 109.
53 Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), in 1 LETTERS, supra note 5, at 110.
54 Letter from Louis D. Brandeis to Charles Nagel (July 12, 1879), in 1 LETTERS, supra note 5, at 38.
55 Letter from Louis D. Brandeis to Charles Nagel (July 12, 1879), in 1 LETTERS, supra note 5, at 38.
56 Peppers, supra note 51, at 72.
57 Peppers, supra note 51, at 72.
58 Letter from Louis D. Brandeis to Charles Nagel (July 12,1879), in 1 LETTERS, supra note 5, at 38.
59 Peppers, supra note 51, at 72-73.
60 Peppers, supra note 51, at 73.
61 Urofsky, supra note 19, at 577.
62 Urofsky, supra note 19, at 577.
63 Friendly, supra note 47, at 986.
64 Friendly, supra note 47, at 986.
65 See Bickel, supra note 3, at 22.
66 See Bickel, supra note 3, at 22.
67 Urofsky, supra note 19, at 473.
68 Urofsky, supra note 19, at 473.
69 Urofsky, supra note 19, at 473.
70 Urofsky, supra note 19, at 473.
71 Urofsky, supra note 19, at 474.
72 Urofsky, supra note 19, at 474.
73 Urofsky, supra note 19, at 473.
74 Letter from Louis D. Brandeis to Thomas Reed Powell (June 8, 1923), in 5 LETTERS, supra note 44, at 97.
75 Peppers, supra note 51, at 72.
76 Letter from Louis D. Brandeis to Felix Frankfurter (Feb. 3, 1922), in 5 LETTERS, supra note 44, at 44.
77 Letter from Louis D. Brandeis to Felix Frankfurter (Feb. 3, 1922), in 5 LETTERS, supra note 44, at 44.
78 Kaufman, supra note 2, at 212.
80 Coffin, supra note 79, at 63.
81 Friendly, supra note 47, at 986.
84 Id. at 18.
86 Id.
87 Kaufman, supra note 2, at 212.
88 Kaufman, supra note 2, at 212.
89 Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), in 1 LETTERS, supra note 5, at 107.
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A lawyer, a veteran and a cup of coffee at a Starbucks. This is the idea behind Military Mondays, a pro bono initiative designed to address the justice gap for low-income and middle-income Maine veterans and servicemembers.

In October 2016, the Veterans’ Law Section of the Maine State Bar Association, Pine Tree Legal Assistance, and the Starbucks Armed Forces Network partnered to bring Military Mondays to Maine. The Military Mondays concept – a free legal clinic for the veteran community in a comfortable and accessible setting – originated in 2015 with Patricia Roberts, a clinical professor of law at William & Mary, who directs the Lewis B. Puller, Jr. Veterans Benefits Clinic. Roberts began Military Mondays in June 2015, with students and professors from the Puller Clinic meeting with veterans once a month at the McLaws Circle Starbucks in Williamsburg, Virginia, after her pitch to Starbucks CEO, Howard Schultz, resulted in an email response the next day indicating the project was a go. Every month, Roberts and her students set up shop at McLaws Circle Starbucks to help veterans with their benefits claims and lend support and guidance to a complex and overwhelming process.

Maine Military Mondays: An Innovative Partnership

Military Mondays have since caught on fast, with several states now hosting their own Military Mondays, from Maine to California. Each state’s model differs slightly from the next with law school clinics or legal aid organizations working closely with their local Starbucks to develop a model and best practices that works well for their state. Maine’s model – the first state in the country to include its state bar association as a Military Mondays partner – has resulted in an innovative partnership with proven results.

Staff from Pine Tree Legal Assistance heard Roberts speak about Military Mondays at a veterans’ law conference in Washington, D.C. in November 2015 and immediately were impressed with the model as a novel way to address the justice gap facing low-income and middle-income Maine veterans and servicemembers. Each year, more than 12 percent of Pine Tree Legal Assistance’s clients are veterans or service members; however, that number only captures the veterans and servicemembers that Pine Tree can help. As an LSC-funded
legal aid organization, Pine Tree provides free civil legal aid to low-income Mainers. Typically, to qualify as low-income for legal aid, a client must fall below 125 percent of the federal poverty level. That’s less than $25,000 a year for a family of four. Clients must also need legal help in one of the areas that legal aid can assist with: housing, consumer, domestic violence, benefits and education – to name a few. But veterans who are 100 percent service-connected disabled sometimes do not qualify for legal aid because their monthly VA disability benefits position them over 125 percent of the federal poverty level, despite facing real barriers due to disability or trauma. Additionally, they may need legal help in an area that is simply beyond the scope and expertise of legal aid.

Pine Tree staff were seeking a way to close the justice gap described above when they heard Roberts speak. Partnering with the Veterans’ Law Section and the Maine State Bar Association, an innovative Military Monday pro bono model utilizing the existing expertise of private attorneys in areas outside the scope and expertise of legal aid offered a solution. Access to justice for the low-income and middle-income veteran and servicemember community would increase and private attorneys could simply step into a pro bono role without the need to commit to a timely training process. The model would apply unbundling rules, allowing for effective brief assistance and advice.

Pine Tree staff and the Veterans’ Law Section developed a proposal for their local Starbucks. Roberts connected Pine Tree with Starbucks leadership in Maine and after a successful pitch, Cooks Corner Starbucks in Brunswick agreed to be the first store to pilot Military Mondays in Maine.

The model is a natural fit for Starbucks. In 2013, Starbucks committed to hiring at least 10,000 veterans and military spouses by 2018. However, their commitment extends beyond hiring and includes connecting the veteran and military family community, creating volunteer opportunities in their communities, and partnering with like-minded companies and military and veteran service organizations to serve the veteran and military family community. Maine Starbucks leadership has already indicated interest in expanding Military Mondays to a second location in southern Maine.

Pro Bono and Beyond

Maine’s Military Monday model – to utilize the existing expertise of private attorneys – allows attorneys a discrete and time-limited option for giving back to the Maine veteran and servicemember community without the need for any prerequisite training. Pine Tree staff coordinate one or two calls with the pro bono attorney to answer questions and walk them through the limited assistance agreement, developed in accordance with Maine Rules of Professional Conduct Rule 1.2(c), that limits the scope and duration of the advice provided to Military Mondays. Pine Tree screens veteran callers seeking legal help and schedules appointments. Starbucks advertises the project in their stores with flyers and postcards developed by Starbucks and the Maine State Bar Association. Starbucks also provides their baristas with talking points on each month’s legal topic – developed by Pine Tree staff – designed to engage customers in conversation about Military Mondays. And Starbucks generously donates reserved space, pastries and coffee each month. The reserved space itself includes a small table with a red-white-and-blue tablecloth and a chalkboard welcoming veterans to Military Mondays.

Military Mondays launched on Halloween, October 31, 2016, with Francis Jackson of Jackson & MacNichol volunteering to provide free advice and counsel on veterans benefits. Military Mondays have since been held the last Monday of every month from 1:00-4:00 p.m. at the Cooks Corner Starbucks in Brunswick. Topics change monthly and are dependent on the legal expertise of pro bono attorneys. So far, Military Mondays have covered consumer and debt resolution, bankruptcy, veterans benefits, powers of attorney and automobile drivers license fines and fees. While each topic is widely different, they all have the same effect – reducing barriers to income, employment, housing and health while increasing a veteran’s or service member’s ability to access justice.

One retired Army veteran diagnosed with service-connected PTSD faced an automobile drivers license issue and was unable to access reliable transportation to Togus VA for PTSD-related services. Fortunately, this veteran connected with a pro bono attorney at Military Monday and his drivers license issue was resolved. He can now access the healthcare he needs, when he needs it.

Getting Involved

If you are interested in Military Mondays, please contact Krista at kselnau@ptla.org or 207-400-3251. Any attorney, regardless of experience or practice area, so long as they are interested in serving the veteran and servicemember community, can field general questions in their practice area. Pine Tree staff is always on-site at Military Mondays to lend support to pro bono volunteers and field general questions.

KRISTA M. SELNAU is a staff attorney with Pine Tree Legal Assistance and co-chair of the Veterans’ Law Section of the Maine State Bar Association. She is licensed in Arkansas.
Field Notes from Pro Bono Attorney Francis M. Jackson: The Mystery of the Missing Nurse

As a member of the private bar who represents veterans primarily in cases seeking compensation for service connected disabilities, I have had the honor to participate in the Military Mondays program in two different months. While Pine Tree picks a topic each month, servicemembers or veterans often ask a wide range to of legal questions.

My most interesting issue so far was being consulted by an older lady whose veteran sister, a nurse, had died in Boston and whose body had not been claimed by the family because none of her brothers or sisters in Maine had been notified of the death. She was particularly concerned that her sister had not been buried with military honors. She wanted to find out how to arrange for military honors and an appropriate headstone.

Fortunately, she had brought sufficient information to allow me to guide her to the attorney appointed by the Boston probate court to handle the estate so that the family could take steps to be named as the heirs and make arrangements for a suitable memorial. I also suggested that she contact a local probate expert to assist her.

Francis M. Jackson is a founding partner at Jackson & MacNichol and is co-chair of the Veterans’ Law Section of the Maine State Bar Association. He is licensed in Maine.
Historic Settlement
On August 21, 2014, the U.S. Department of Justice announced a nearly $17 billion settlement with Bank of America Corporation. Officials described this as “the largest civil settlement with a single entity in American history.” The settlement resolved federal and state claims against Bank of America and its former and current subsidiaries.

Of that settlement amount, $7 billion was allocated for consumer relief to struggling homeowners, borrowers and communities affected by the bank’s conduct. Interest on Lawyers Trust Accounts (IOLTA) programs in the 50 states, District of Columbia, and U.S. Territories have received millions of settlement dollars for the provision of foreclosure prevention legal services and community redevelopment legal services.

In March 2017, Eric D. Green, Esq., the Monitor of the 2014 Mortgage Settlement, issued his eighth and final report. He confirmed that Bank of America had completed its obligations under the settlement agreement to provide $7 billion of credited consumer relief. Across our Nation legal aid organizations are using these funds to help people of limited means.

Maine’s Share and Focus
As manager of Maine’s IOLTA program, the Maine Justice Foundation has received $1,769,655 under the settlement—$267,784 in 2015 plus $1,501,871 in 2016. The Foundation has held these funds in an investment account as it plans for their use and makes quarterly distributions to the legal aid organizations. To date, these invested funds have generated more than $100,000 in income. The Foundation has disbursed and committed almost $540,000 in settlement funds through December 2017 and has committed more than $400,000 to be used during 2018. This leaves approximately $900,000 in funds not yet committed.

As a condition of receiving settlement funds, the Foundation agreed to use the Bank of America donation for the sole purpose of funding Maine’s legal aid organizations to provide foreclosure prevention legal assistance and community redevelopment legal assistance. These are the same organizations that also receive IOLTA funds: Immigrant Legal Advocacy Project, Legal Services for the Elderly, Maine Equal Justice Partners, Pine Tree Legal Assistance, University of Maine School of Law/Cumberland Legal Aid Clinic, and Volunteer Lawyers Project.

Four organizations are providing foreclosure prevention legal assistance: Cumberland Legal Aid Clinic, Legal Services for the Elderly, Pine Tree Legal Assistance, and Volunteer Lawyers Project, Inc. Three are providing community redevelopment legal assistance: Immigrant Legal Advocacy Project, Maine Equal Justice Partners, and University of Maine School of Law.

A Closer Look at Work Supported by Bank of America Funds
Immigrant Legal Advocacy Project (ILAP). With skills and talents that are needed in Maine’s work force, asylum seekers are critical to community redevelopment in Portland and Lewiston. But without work authorization, asylum seekers cannot be employed. ILAP uses Bank of America funds to help asylum seekers win their asylum cases and to get work authorization. ILAP has a pro bono panel of more than 140
With skills and talents that are needed in Maine’s work force, asylum seekers are critical to community redevelopment in Portland and Lewiston. But without work authorization, asylum seekers cannot be employed.

attorneys, works closely with the immigrant community, and has collaborated with organizations involved in the Portland Workforce Initiative and with Lewiston’s business community, Adult Learning Center, and Bates College.

Legal Services for the Elderly (LSE). Bank of America funds support LSE’s goal to keep Maine seniors in their homes. LSE has a long-standing commitment to doing foreclosure prevention litigation on a statewide basis, and LSE staff attorneys have developed considerable expertise in this area. The typical foreclosure defense client is over seventy years old, has been in her home for at least two decades. These are very vulnerable Maine seniors who could not possibly navigate the foreclosure process without legal representation. LSE uses a small portion of their Bank of America funds to leverage federal dollars to represent seniors who face the loss of their homes as a direct result of financial exploitation. Each $1.00 in Bank of America funds generates $4.00 in federal funds.

Maine Equal Justice Partners (MEJP). Community redevelopment has been the focus of MEJP’s work supported by Bank of America funds. Affordable and safe housing is fundamental for a family’s economic stability. MEJP has been building awareness of the need for more affordable housing in Maine and working with allies to move toward a systemic solution that will address this issue on a broad scale. MEJP is building leadership and advocacy skills in low-income communities and plays an active role at the Maine Legislature on affordable housing issues.

Pine Tree Legal Assistance (PTLA). PTLA uses Bank of America funds to support four key areas of foreclosure prevention: provision of direct legal assistance in foreclosure cases, creation of client educational materials on the foreclosure process available via www.ptla.org; strengthening the community-coordinated response to homeowners at risk of foreclosure by working with the Maine Housing Counselor Network and Maine Attorneys Saving Homes; and policy work aimed at improving systems and maintaining statutory protections for homeowners. PTLA has used Bank of America funds to help leverage support by other funders for this important work.

University of Maine School of Law. The University of Maine School of Law has launched both a foreclosure prevention initiative and a community redevelopment initiative with the support of Bank of America funds:

- Since January 2016, the Cumberland Legal Aid Clinic’s Homeowners Assistance Project has recruited and trained law students to serve as student attorneys. The project’s goals are to assist clients in foreclosure avoidance matters and to provide student attorneys with knowledge and experience they can use with their current clients and also after graduation. The Clinic works in partnership with Avesta Housing in Portland, among others.

- The Law School’s Rural Practice Fellowship accepted the first two students to work in Aroostook County law firms for the summer of 2017. This three-year pilot program is designed to place law students in rural communities that may otherwise have limited access to legal services. The Fellowship gives students invaluable experience and exposure to both legal work and the local community and also provides their mentors with assistance with legal research, document preparation, and related activities.

Volunteer Lawyers Project, Inc. (VLP). At VLP, Bank of America funds are used to support the intake and referral of cases to pro bono attorneys where clients need help resolving foreclosure issues and stabilizing family homeownership situations. Included are cases with foreclosure as the presenting issue and cases where risk of foreclosure is one of the issues.

A Nice Bonus! The income generated by the invested Bank of America settlement funds may be used for any purpose. In September 2017, the Foundation’s Board voted to commit up to $78,000 of this income to help cover the cost of LegalServer, the new electronic case management system that will be shared by Maine’s legal aid organizations.

Mainers Helped by Bank of America Settlement Funds

2016 reports submitted to the Foundation by the legal aid organizations for their first year of Bank of America funding show us that these dollars are helping thousands of Mainers:
387 people received foreclosure prevention legal services. 94 foreclosures were prevented and 179 people benefited in other ways.

815 asylum seekers benefited from local community redevelopment efforts. 170 cases received full representation and 418 individuals were helped in applying for work authorization.

22,000 households on Section 8 housing wait lists benefited from state-level community redevelopment work when a new law was passed requiring the first ever statewide universal Section 8 housing voucher application and wait list. Also, 20 individuals living in poverty participated in leadership and advocacy training to become partners in advocacy.

Next Steps
To gather information and develop recommendations for the use and distribution the remaining $900,000 in Bank of America funds, an ad hoc work group comprised of five members of the Foundation’s Board of Directors has been working over the past several months. Chaired by Mike Levey, the work group also includes Aaron Kouhoupt, Ron Phillips, David Pierson, and Kate Tierney. In June 2017, the work group met with fifteen stakeholders in ten different sessions to brainstorm ideas. The work group has been working on priorities and specifications for the distribution of the remaining $900,000. By around mid-2018, the Foundation expects to issue a request for proposals for one more round of Bank of America grants. Stay tuned!

DIANA SCULLY is executive director of the Maine Justice Foundation. She may be reached at dscully@justicemaine.org or (207) 622-3477.
In 2004, leaders of Maine’s legal community and core legal aid organizations decided to join together in a collaborative annual fundraising campaign. In 2016, the Campaign for Justice raised over $600,000 for Cumberland Legal Aid Clinic, Immigrant Legal Advocacy Project, Legal Services for the Elderly, Maine Equal Justice Partners, Pine Tree Legal Assistance, and Volunteer Lawyers Project. The 2017 Campaign is on track to break all previous records.

The Campaign’s success is attributable to close collaboration among the legal aid organizations, the legal community, and the Maine Justice Foundation. The six legal aid organizations agree to engage in joint fundraising within the legal community. Volunteer Campaign Chairs from the legal community lead each year’s Campaign, supported by dozens of other volunteers from the bar. The Foundation employs the Campaign Director and provides administrative support for the Campaign.

There is one more reason for the Campaign’s success: Excellent staff leadership. Recently, the Campaign Steering Committee said good-bye and offered profound thanks to Cathy Coffman, who decided to step down after capably leading the Campaign since 2011. After an extensive search, the Steering Committee found Trish O’Donnell, who became the new Campaign Director on Labor Day 2017.

Hiring Trish was the unanimous recommendation of a screening/interview team, which included representatives of the private bar, legal aid organizations, and Foundation. Her selection had the full support of the Campaign’s Executive Committee and the Executive Directors of the six legal aid organizations.

Trish brings to the Campaign for Justice a strong understanding of fundraising strategies and deep experience in data mining for assets, as well as building and training teams. She gravitates toward roles that require a leader who can train, motivate, and appropriately hold accountable volunteer teams.

A graduate of Rutgers University, Trish began her professional career as Membership Coordinator for the New Jersey State Bar Association, developing programs and materials to attract and retain members and serving as the liaison to the Young Lawyers Committee. Her legal marketing career was further developed as a legal recruiter in Washington, D.C. Through her firm O’Donnell Marketing & Communications, Trish served as a marketing consultant for several law firms and as the Marketing and Advertising Manager for the Maine Lawyers Review. She also has held high-level positions in Maine at WEX, Disability RMS, Taction, Inc., and Acadia Trust/Gouws Capital Management, Inc. Trish has been an active volunteer in a range of professional and community organizations.

If you have any questions or suggestions about the Campaign for Justice, please contact Trish at todonnell@campaignforjustice.org or (207) 620-1358.
After the administration included in its federal budget proposal a provision to completely defund the Legal Services Corporation, legal service providers and interested organizations and individuals launched a concerted effort to encourage Congress to defeat the defunding proposal. It appears the efforts have been successful to date.

The House of Representatives completed its consideration of LSC funding in mid-September and effectively ignored the administration's defunding proposal. As the House-Senate budget negotiations take place in the near future, the discussions will focus on resolving the difference between the House funding level ($300 million) and the Senate's preliminary funding level ($385 million).

Although the battle is far from over, it appears the efforts of legal services providers and the organizations and individuals who support their mission have scored an important victory on behalf of the millions of disadvantaged people who rely upon legal services.
Over the years, I have witnessed a few vigorous debates where the point of contention was whether the practice of law is a business or a profession and, let me tell you, this can be an emotionally charged topic. Things get really exciting if, in one of these debates, you have those who equate the notion of the practice of law with the running of a business as an extremely offensive position up against those who are in it solely for the money. I remember one particularly heated debate where one of the “money” folks actually stated that he viewed the very existence of our rules of professional conduct as a personal affront. Wow. That got everyone’s attention. As for me, I tend to take the middle ground. After all, if a lawyer fails to find financial success in his or her practice, the privilege of being able to practice in this honored profession will not be long-lived.

In the past, I would often walk away from these debates simply shaking my head because I failed to see their true value. Today however, and to my great surprise, I’m starting to believe lawyers should not only have this debate but we should elevate it and take it to center stage. Why? Because tremendous change is afoot. Non-lawyers are moving into various service sectors that have traditionally been the exclusive purview of lawyers, legal services are being commoditized at an ever-increasing rate, and artificial intelligence has arrived on scene. This is not meant to be a siren call. It is what it is. Change is neither good nor bad; but here’s my concern. Those who embrace the business side of the debate are running rickshaw over those who view law as an honored profession simply due to their success in driving such change. In light of the pace of this change, I feel a need to ask this question. Is there a cost to all this, and if so, is the cost worth it?

As you reflect upon the costs involved, allow me to share a few thoughts. Nonlawyers who deliver services in the legal services sector are not subject to the regulations licensed attorneys are. From a societal perspective, is this a positive or negative? Of course, how can the rapid commoditization of legal services not have an impact on how the general public views lawyers and their role in society today? And finally, as I think about the long-term ramifications of computers replacing the human element in the practice of law, my head starts to hurt. Can computers even be programmed to interact as a professional? Heck if I know, and I suspect few will care.

Look, I get it. Change is a constant and there really are some incredibly successful legal service business models that are meeting very real and legitimate legal needs. Honestly, I applaud many of the entrepreneurs who have proved to be so adept in doing so. In my humble opinion, however, I fear our profession may be losing its identity in the process and I’m not convinced we shouldn’t be worried about that particular cost.

I suspect there will never be a great debate within our profession about the value of professionalism in the practice of law, but there sure should be. A comment I have heard in every corner of the U.S. during all my years traveling for ALPS, and from more longtime lawyers than I can remember, is some variation of “I’m so thankful to be at this point in my career. If I was just starting out, I don’t think I could do it because the practice just isn’t fulfilling anymore.” Every one of these individuals was expressing regret. Regret that something has been lost. I am positing that what has been lost might be our sense of professionalism.
As I see it, society no longer seems to view lawyers as practitioners of an honored profession. Why? Is it because the debate has been lost before it even got started? Is it because so few seem willing to take up the cause? It’s not for me to say. What I can say, however, is this. Whether we like it or not, each of us has a role to play in how the changes to our profession will continue to evolve because even a passive, do-nothing response has a consequence. So, while a great debate may never occur, there is no reason why each of us can’t have our own personal debate. I have come to believe in its value. Perhaps if enough of us do, we will find a way to preserve the integrity and reputation of the legal profession together. Is it worth it? You tell me.

ALPS Risk Manager MARK BASSINGTHWAIGTE, ESQ., has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Check out Mark’s recent seminars to assist you with your solo practice by visiting our on-demand CLE library at alps.inreachce.com. Mark can be contacted at mbass@alpsnet.com.
Writing in the Winter 2013 edition of the Maine Bar Journal, Peter Culley noted in his review of the 11-volume Third Edition of Business and Commercial Litigation in Federal Courts that it “has been justifiably recognized as the definitive treatise for the commercial litigator.” The recently issued Fourth Edition is just that, and more. This 14-volume treatise includes updates and revisions to the 128 chapters found in the Third Edition, and adds 25 new chapters on subjects that have come into greater focus and importance in commercial litigation in recent years. Among the new additions are chapters entitled Marketing to Potential Business Clients, Effective Trial Performance, Teaching Litigation Skills, Mass Torts and Civil Rights. The authors of the 153 chapters include 27 judges from the federal circuit courts of appeals, federal district courts and state trial courts. The breadth of subjects covered in the treatise is extensive, but its greatest strength is that each chapter is a self-contained, soup-to-nuts guide to the subject matter.

The volumes contain chapters every practitioner would expect to see in a treatise on commercial litigation. Those chapters combine discussions of the Federal Rules of Civil Procedure, interpretive case law, and the substantive law. They are particularly useful to practitioners in Maine, because the Maine Rules of Civil Procedure are similar in so many respects to the Federal Rules. Thus, Chapter 7, “The Complaint,” covers the basics: technical pleading requirements, heightened pleading standards under Rule 9, and the reasonable inquiry requirement of Rule 11. But what is most compelling about the treatise for the more experienced litigator is the content in each chapter that goes well beyond the basics. In Chapter 7, the author discusses strategic concerns that should be considered in the drafting of the complaint. These include the relatively obvious, as in how to avoid a motion to dismiss, but also more subtle strategy considerations, including the importance of evaluating the impact of the complaint on non-traditional potential audiences, such as shareholders, competitors and the public.

Likewise, the chapter on “Motions in Limine” includes an extensive discussion of the principles governing pretrial exclusion of expert testimony on Daubert grounds. As with all other chapters, it goes beyond the norm. For example, it illustrates how victory on a motion in limine can be undone at trial, by reference to an Eleventh Circuit decision involving a products liability case against the manufacturer of a wood chipper that was allegedly defective and unreasonable dangerous. The district court granted a motion in limine under Rule 407 of the Federal Rules of Evidence to exclude plaintiff’s evidence of post-accident changes to the chipper. At trial on defendant’s case in chief, defense counsel introduced evidence that the chipper was as safe as possible, thus opening the door for plaintiff’s rebuttal evidence as to the post-accident design change. A single careless question undid the win on the motion in limine. These chapters, like every chapter in the treatise, include a section entitled “Practice Aids,” which provides practice pointers and checklists to assist commercial litigators in completing all the details of the litigation task at hand.

What I found most compelling about the volumes were the chapters on subjects that I did not anticipate seeing in a treatise on commercial litigation. Chapter 71, “Teaching Litigation Skills,” discusses the difficulties law firms face in training new lawyers how to become litigators in a world where so few civil cases are tried, and provides suggestions for in-house training opportunities. Chapter 74, “Civility,” provides advice on formal – through court intervention – and informal techniques to respond to incivility by opposing counsel. The chapter underscores the fact that those “who are perceived as the best litigators in commercial litigation are usually – by reputation and in fact – the most courteous and professional in their dealings with other attorneys.” Chapters on “Mediation,” “Negotiations,” and “Arbitration,” all new to the Fourth Edition, do an exceptional job explaining how the skills that make an attorney an excellent trial lawyer may not serve to best represent the client’s interests in these different settings.
“This is not only a law book that is valuable as a research tool and a source of legal knowledge and citations, it is an idea book filled with nuggets of wisdom and perspective that could only have been gained by years of experience in handling cases from the most simple to the most complex.”

Since mediation is mandatory in most civil cases in the Maine Superior Court, the mediation chapter is especially valuable to Maine practitioners, including in particular the importance of bringing creativity and a willingness to think outside the box to the mediation session.

The treatise defines commercial litigation broadly. There are substantive law chapters that may not be commonly viewed as involving commercial litigation, or which are so new that they are just now developing as specialty litigation areas. Although too numerous to list in full in this book review, they include “E-Commerce,” “Aviation,” “Health Care Institutions,” “Employment Discrimination,” “Sports,” “Entertainment” and “Fashion and Retail.”

I have given a good deal of thought to how best to summarize the value to Maine practitioners of the Fourth Edition of Business And Commercial Litigation In Federal Courts. I can do no better than the description of its editor-in-chief, Robert L. Haig, who writes: “This is not only a law book that is valuable as a research tool and a source of legal knowledge and citations, it is an idea book filled with nuggets of wisdom and perspective that could only have been gained by years of experience in handling cases from the most simple to the most complex.” The Fourth Edition, which includes a CD-ROM containing jury instructions, forms and practice checklists, is a must-have for every commercial litigator in Maine.

JERRY CROUTER is a member of Drummond Woodsum’s Trial Services Group. He has 30 years’ experience as a civil trial attorney in both federal and state courts, including employment, commercial and construction litigation. Jerry may be reached at jcrouter@dwmlaw.com.
The MSBA’s Silent Partners program offers low-key assistance to lawyers in dealing with problems in substantive and administrative areas of the law where there may be a lack of familiarity or comfort, where some help and guidance would benefit both the practitioner and the client.

The coordinator has a list of attorneys associated with organizations, sections, and committees who are willing to provide help. The program provides confidentiality recognized by the Supreme Judicial Court in Maine bar Rule 7.3(o). We can provide guidance and assistance in most areas of law.

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“My teenage son is in big trouble now that I’ve seen the photos on his cell phone . . . because in my house there is no privilege against selfie-incrimination.”
Punctuation, like politics and religion, can elicit strong emotions. Some people passionately defend the rules they learned from their favorite eighth grade English teacher. Others never learned punctuation rules and feel totally at sea when it comes to commas. Some people punctuate by the seat of their pants, throwing in commas and semicolons, hoping for the best. Usually, legal writers manage to use correct punctuation, especially those who love to read. Knowing the rules, however, removes uncertainty and potential ambiguity.

Most of the time, failing to use a comma correctly does little harm. For lawyers, however, omitting a comma can result in serious consequences. Recently, those consequences included a judgment that could cost Oakhurst Dairy $10 million.¹

Although the Oakhurst Dairy case involved the highly controversial Oxford comma rule, comma rules are generally based on common sense and are not that difficult to master. The following 10 rules are all anyone needs to master proper comma usage.

THE TEN COMMANDMENTS OF COMMA USAGE²

**Commandment 1:** Use a comma before a coordinating conjunction joining two independent clauses. An independent clause is a group of words with a subject and a verb that can stand alone as a sentence.

*Example:* The jurors entered the courtroom, and the defendant stood to face them.

**Commandment 2:** Use a comma to set off introductory words, phrases, and clauses.

*Example:* Following their closing arguments, the lawyers went to lunch.

**Commandment 3:** Use a comma to set off nonrestrictive phrases and clauses. A non-restrictive phrase or clause is a group of words that is not essential to the main idea in the sentence. If it were removed, the essence of the sentence would remain intact.

*Example:* The law clerk, acting as bailiff, announced the judge’s arrival in the courtroom.

“Acting as bailiff” is a non-restrictive phrase because it could be removed without altering the main idea in the sentence: that the law clerk announced the judge’s arrival in the courtroom.

**Commandment 4:** Use a comma to avoid ambiguity and confusion.

*Example:* Let’s eat, Grandma.

With the comma, the sentence makes clear that the speaker is addressing his or her grandmother, suggesting that it is time to eat. Omitting the comma results in a much more alarming message: *Let’s eat Grandma.*

**Commandment 5:** Use commas to set off transitional words and phrases.

*Example:* The victim’s testimony, however, contradicted the police report. After three hours, the jury found her to be a credible witness.

“However” is a transitional word; “After three hours” is a transitional phrase.

**Commandment 6:** Always place a comma within quotation marks, unless the quotation marks come after words introducing a quote.

*Example:* Three words came to mind: “yes,” “no,” and “maybe.” Jan smiled and said, “I am so glad to be here.”

**Commandment 7:** Use a comma to set off words of contrast.

*Example:* Torts, not Contracts, was my favorite class in law school.

**Commandment 8:** Use a comma between two adjectives coming before a noun.

*Example:* The judge drives a big, black Cadillac.
Commandment 9: Place commas between and after cities and states and between and after dates and years.
Example: On June 31, 1941, Marge and Ed moved to New Kensington, Pennsylvania, where they lived for more than 50 years together.

Commandment 10 (the Oxford comma rule): Use a comma between items in a series.
Example: She learned how to use periods, commas, semicolons, and apostrophes.

The Oxford comma rule requires a comma before the conjunction (“and” or “or”) coming before the last item in the series. This is the rule that came into play in the *Oakhurst Dairy* case.

Not using a comma before the conjunction in a series can lead to unintended meanings.
Example: She admired her parents, the Pope and Mother Teresa. With no comma before the conjunction in the series, this sentence seems to communicate that her parents are the Pope and Mother Teresa. To avoid this unintended meaning, the sentence should include an Oxford comma, as follows: She admired her parents, the Pope, and Mother Teresa.

 WHEN NOT TO USE A COMMA

It is just as important to know when *not* to use a comma as it is to know when to use one. Here are four rules and explanations about when a comma is unnecessary.

Rule 1: Do not use a comma to set off a restrictive clause that follows an independent clause. A restrictive clause is a group of words containing a subject and a verb that is essential to the main idea in the sentence.
Example: Lawyers are reprimanded when they commit ethical violations.

“When they commit ethical violations” is a restrictive clause. It completes the main idea in the sentence and follows the independent clause, “Lawyers are reprimanded.” When a restrictive clause comes first in a sentence, it is followed by a comma.
(See Commandment 2, above.)
Example: When they commit ethical violations, lawyers are reprimanded.

Rule 2: Do not use a comma to separate a subject and its verb or a verb and its object.
Example: Attorneys who are writing motions and briefs on behalf of their clients may encounter various kinds of resistance from opposing attorneys.

No commas are needed in this sentence because “who are writing motions and briefs on behalf of their clients” is a restrictive clause, and no commas should be placed between the subject of the sentence, “Attorneys,” and its verb, “may encounter,” or between the verb, “may encounter,” and its object, “kinds.”

Rule 3: Do not use a comma before the word “because.”
Example: The trial lasted 93 days because so many experts testified.

Putting a comma before “because” would cause an unwelcome break between the cause (“so many experts testified”) and effect (“the trial lasted 93 days”). Commas create pauses in the sentence, and there should never be a pause before the word “because,” regardless of how long a sentence is.

Rule 4: Do not use a comma with the word “that.”
Example: The fire that was discovered in the woodshed was much more destructive than the blaze that had begun in the kitchen.

You should use commas when you use the word “which” when dealing with non-restrictive phrases and clauses.
Example: The fire, which was discovered in the woodshed, caused the entire house to burn down.

Knowing whether to use commas or not helps to determine when to use “which” or “that” in a sentence. It might help to remember this little jingle, called “Comma Sense”:

> Commas, which take out the fat,  
> go with which, never with that.³

Non-restrictive clauses are the “fat.” They should have commas around them because they may be omitted without affecting the main idea of the sentence. The word “that” introduces only restrictive clauses, which contain the essence of the sentence, not the “fat.” Thus, they should never be enclosed within commas.
**O’Connor v. Oakhurst Dairy** and the Ten-Million-Dollar Serial Comma

“For want of a comma, we have this case.”

So began the First Circuit’s opinion in a case that hinged on the court’s adoption of the Oxford comma rule. The case involved the following question of statutory interpretation: Maine statute requires overtime pay, except for some activities that involve the “canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution” of certain food products. The court was asked to decide whether the statute protects truck drivers who are involved in “distributing” products, but not “packing [products] for shipment.” To reach its decision, the court had to determine whether “packing for shipment or distribution” referred to one activity involving two parts, “packing” and “distribution,” or two totally separate activities. If “distribution” was separate from “packing,” the truck drivers would not be able to collect overtime.

The truck drivers argued that “distribution” was not a separate activity because there was no comma after “packing for shipment.” They made an additional grammatical argument involving parallel structure that will not be discussed here. I will save it for a future column.

Making the decision even more difficult, the Maine Legislative Drafting Manual explicitly prohibits the use of a comma “between the penultimate and the last item of a series.” The Manual provides the following example:

“Do not write: Trailers, semitrailers, and pole trailers
Write: Trailers, semitrailers and pole trailers”

The First Circuit, however, was not impressed with that position. It chastised the authors of the Manual, extolling “the clarifying virtues of serial commas that other jurisdictions recognize.” The court went further, asserting that “guidance on legislative drafting in most other states and in the Congress appears to differ from Maine’s when it comes to serial commas.” Accordingly, the court concluded that the drafting manual failed to clarify the statute’s meaning, stating, “The text has, to be candid, not gotten us very far.” Ultimately, the First Circuit decided that the lack of a comma produced enough uncertainty to rule in favor of the truck drivers, taking into consideration the remedial nature of the statute. Described by one commentator as “an exercise in high-stakes pedantry,” this ruling will probably cost Oakhurst Dairy an estimated $10 million.

According to David G. Webbert, the lawyer representing the truck drivers, “That comma would have sunk our ship.” Although Webbert said that “working on the case recalled his boyhood grammar and Latin lessons,” he declined to take a position on the broader debate surrounding the use of the Oxford comma. Nevertheless, he recognized that the sentence in the overtime statute did create an ambiguity, suggesting that either a comma should have been added or the sentence should have been completely rewritten. Sounding like an English teacher (or legal writing professor), Webbert gave the following sage advice, with which I will end this column: “If there’s any doubt, tear up what you wrote and start over.” Amen.

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3 Id. at 242 (quoting Patricia T. O’Connor, Woe is I: The Grammaphobe’s Guide to Better English in Plain English 3-4 (1996)).
5 Id. at *1.
6 Id.
7 Maine Legislative Drafting Manual, sec. 2(A) (revised through Aug. 2009).
8 Id.
9 O’Connor, 2017 WL 957195, at *6 n. 5.
10 Id.
11 Id. at *7.
12 Id. at *10.
14 Id.
15 Id.
16 Id.
17 Id.
In 1985, a private creditor recorded a $400,000 judgment lien against Francis Romani’s Pennsylvania real estate. Not long afterwards, the federal government recorded $490,000 in tax liens against the same property. The debts remained uncollected until 1992, when Romani died, and his real estate was valued at only $53,000.

The shortfall triggered a $53,000 collection dispute between the private creditor and the federal government. The central issue involved an inconsistency between two federal statutes. One was the federal priority statute, 31 U.S.C. § 3713, which provided the federal government “shall be paid first” when a decedent’s estate cannot pay all of its debts. The other was the Federal Tax Lien Act, 26 U.S.C. § 6321, which declared that a federal tax lien “shall not be valid” against a previously-recorded judgment lien.

The federal government’s attempt to rely on the first statute, while ignoring the second, raised the ire of Justice Stevens, who opined that the government’s aggressive collection tactics “gave new meaning to Franklin’s aphorism,” quoted above. Writing for the unanimous Court, Justice Stevens concluded the Federal Tax Lien Act blocked the government’s collection efforts, thus proving that while death is inevitable, taxes are not.
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Beyond the Law

Brenda Buchanan

Interview and photos by Daniel J. Murphy

It has been said that the art of writing a great thriller is knowing when to let the spinning plate fall to ground. Although suspense is the lifeblood of all crime fiction, the most satisfying novels are carefully woven out of compelling characters, engrossing story line, and riveting conflict. For Brenda Buchanan, author of the Joe Gale mystery series and other crime novels, this creative process for writing crime fiction has become a source of great fulfillment and an important part of her daily routine. Buchanan, a transactional attorney at Warren, Currier & Buchanan, P.A, in Portland, recently sat down with the Maine Bar Journal to discuss her interests.

How did you become a crime fiction novelist?
I was a journalist before I became a lawyer. I began writing at a very young age—fiction, poetry, and journalism—trying it all on. I was editor of my high school newspaper and studied journalism at Northeastern University in Boston, where through the co-op program, I worked as a reporter trainee at the Boston Globe. I grew up reading the Globe, so it was really thrilling for me at age 20 to work in that newsroom. When I was at Northeastern, I also studied creative writing with Robert B. Parker, who wrote, famously, The Spencer Series. At the time, he had published a few books, and was at the point where he was about to let go of teaching and write full time. I took two courses with him and believe the second was one of the last courses he taught, either my junior or senior year. It was one of those cool things that happen in your life that you tuck away for later. After graduation from Northeastern I became a journalist and moved to Maine, where I worked at the York County Coast Star down in Kennebunk.
How many years were you at the York County Coast Star? From 1980 to 1986. It was a great experience, but eventually, I wanted to move on and do something different. I was interested in the Maine Times and the Press Herald, but they didn’t have any openings. I covered the courts for the Star, which allowed me to meet an awful lot of lawyers, several of whom asked if I was considering law school. I hadn’t, but with their encouragement, I did. So, journalism led me directly to law school. I went to Maine Law and then set about building a legal career. But all that time, the writing thing stayed in my mind because first and foremost, before I was anything else, I was a writer. When I was doing litigation and appellate work I poured a lot of energy into writing briefs. Now I confine my practice to transactional work and I’m really precise with words when drafting contracts. The writing part of lawyering matters a lot to me.

About 10 years ago, I’d been living on Peaks Island for a dozen years and was getting ready to move to the mainland. I loved living on the island and knew I would miss it. I also realized I would have the chance to substitute something else for the time that it took to commute back and forth. At that point, I realized that it was high time to start writing fiction. I started noodling around before we moved, and once we settled in our new home I made sure to create a physical space for my writing. I took a couple of classes and eventually developed the most critical thing—a daily writing habit. I made the commitment to myself to write every day. The book that had been rattling around in my brain with a newspaper reporter protagonist began to emerge. I originally thought that if I could write two pages a night, I’d have a book in six or eight months. And, of course, that is funny, because I soon learned it takes years to hone a book to where you are happy with it, and able to send it out, find an agent, and sell it to a publisher.

Could you describe your writing routine for our readers? I usually get to work early in the morning and if I’m having an efficient day, I can leave around 5:00. Those are the really good days. I don’t ever write fiction when I’m at my office unless I come in on a weekend specifically for that purpose. On workdays, when I’m in the office, I’m lawyering. I owe that to my clients. I owe that to my partners. But whatever time I manage to leave on a workday, after I step out the back door of 57 Exchange Street, I begin to think about writing, and where I am going with the book. I have a quick supper and write a couple of hours in the evening. There are days when my writing time gets shortened up a bit, but every day I make sure to set aside time for writing. Right now, I’m in the final revisions of a manuscript, so “writing” means taking apart every paragraph and looking at every word to make sure it does what I want it to do. When I’m actively writing, I usually try to get about 1,000 words down each night. Sometimes the words come very, very quickly, and other times it’s like pulling teeth.

What was your first crime novel? My first book is called Quick Pivot, and has as its protagonist a contemporary newspaper reporter named Joe Gale. Joe has deep respect for journalism and for the role of journalism in a democratic society. Primarily he covers crime and the courts, but like most local newspaper reporters, he’s a generalist. As the book opens, Joe is touring a defunct textile mill being redeveloped into condominiums. He and the developer are walking through the basement where a construction crew is knocking down a wall, and a skull comes flying out of the rubble. It turns out the skull is that of a man who once worked in the mill’s finance department, who disappeared in 1968. He vanished around the same time as half a million dollars went missing, which was a lot of money in 1968. It’s long been assumed he embezzled the money and left town. So when his body is found in the mill 44 years later, it’s obvious that not only did he not steal the money, but also that somebody murdered him and made him the fall guy. Joe Gale uses the old notes of his late mentor to help reconstruct what happened in 1968 and uncover the facts that weren’t discovered at the time. The story moves back and forth in time, with every third chapter occurring in 1968. It was a lot of fun to write, and to pull out historical photos and other data to figure out where things were in Portland at that time.

Did you receive some nice feedback for your first work? Yes. It was great to hear from people, both from the area and from away. Really gratifying.

My second book in the Joe Gale series, Cover Story, is set in Machias and involves a murder trial. The best reaction to that book came from a friend who said he was reading it on his deck on a hot summer day with a glass of iced tea sweating on the table beside him. When he was reading a scene that occurs during a blizzard, he had the urge to get up and put on a sweater, because the book transported him into the dead of winter. What a compliment!

The third book in the series, called Truth Beat, takes place back in the Portland area. It involves the murder of a Catholic priest who stood with the victims when the priest abuse scandal broke. He stood up to the bishop, who was inclined to sweep things under the rug. He advocated for the victims very strongly and ran support groups for Catholics who were devastated by the scandal. This made him some enemies, and that, it was assumed, led to his murder. But as is always the case with mysteries, there were other factors at work, things no one knew. Joe Gale was acquainted with the priest personally, and his coverage of the case is key to figuring out who killed Father Patrick, and why.

Where are these books available? This series is only available in digital format. All three books
are easily available anywhere you would buy an e-book. My publisher is Carina Press, and my books are available through its website. They also can be purchased through Amazon, Barnes & Noble, and Apple, depending on whether you have a Kindle, a Nook, or an iPad.

Are you currently working on another book?
I’m just finishing up the manuscript for a book that I’m calling Big Fish. If it’s published, it may be under another title, but that’s my working title right now. I’m about send it to my agent in the next week or two. Hopefully, we will be able to sell it and have it published in both paper and digital versions.

Is the new book a crime novel?
Oh, yes. It has as its protagonist a Portland criminal defense lawyer named Neva Pierce. She’s the daughter of a criminal defense lawyer here in Portland, who was a flamboyant, high profile kind of guy. She had no interest in following his footsteps. Fresh out of law school she landed a job in Boston at a high-powered, white-collar defense firm. Through a series of circumstances, she lost her job at the Boston firm the same week her father dropped dead of a heart attack. So she moved back to Portland to wind up her father’s law practice. One of the conflicts she faces is whether to stay in Portland, or move to a bigger city, for another shot of what she thinks of as “the big time.” In Big Fish there is, of course, a murder to sort out, as well as a large burglary case in which she represents a key figure. Neva—which is short for Geneva—is an interesting character in that she wrestles with both personal and professional conflicts. I’m very excited about this book and I have a plot sketched out for two more books in the series.

What is it about writing that gives you pleasure?
I love storytelling. I come from an Irish family where storytelling was central. My mother and her side of the family were big storytellers. I remember as a kid sitting around and listening to people tell a well-crafted story, and being amazed by their skill. I also was a big mystery reader growing up. As a kid, I thought a lot about actually writing a book myself, and spent a lot of time dreaming up plots and characters. It began to come to life when I was in college and had that opportunity to study creative writing, but then I put it on hold for a while. It gives me pleasure to imagine people into existence, and create complex stories that say something about the human condition through characters who are multi-faceted people. It’s a challenge, and it’s a lot of fun.

Do you have any influences as writers or folks who inspire you to write?
One big role model was in my law school class—Julia
Spencer-Fleming. She practiced here in Portland briefly, started a family, and then started writing. She’s a wonderful writer—a *New York Times* bestseller—who is just so skilled at what she does. Anyone who hasn’t read her books really ought to get out there and find them.

**What’s the best advice you have ever received?**

You shouldn’t proofread your own work. That advice really has two levels of meaning. Literally, of course, if you insist on proofing your own work, chances are you’re going to miss errors. But it’s also good counsel in a larger sense, because in law and in writing, the help of other people is vital. If you invite others to help you and you embrace what they have to offer, your work will shine.

There are a lot of crime writers in Maine. We are very supportive of each other and work hard to become more skilled at what we do. We hang out at various conferences where we participate on panel discussions and workshops. And sometimes we just get together to have fun. For example, there is an event called Noir @ The Bar that happens a couple of times a year over at Bull Feeney’s. It’s a Sunday afternoon gathering where a dozen or so local crime writers get up on stage and do three-minute readings from their work. It’s always a great time.

I’ve also been involved with the Maine Writers and Publishers Alliance (MWPA), a statewide organization for writers, which has been a wonderful thing for me. MWPA helps people interested in writing plug into the community and find support. This goes back to my best advice, which is to ask others for help. Support from colleagues is essential, both in law and writing. Nobody can do this alone.

**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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