MAINE OFFICE OF THE ATTORNEY GENERAL
CONTINUING LEGAL EDUCATION
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# Notable Decisions of the Law Court

## Principles of Statutory Interpretation

*State of Maine v. Dubois Livestock, Inc., et al.,* 2017 ME 223: See Discussion in Statute-Specific Applications section below. The case involves a brief discussion of certain principles of statutory interpretation, including “plain language,” and the use of the word “and.”

*Euphrem Manirakiza et al. v. Department of Health & Human Services,* 2018 ME 10: The Law Court held that the Department of Health and Human Services could not deny eligible asylum seekers’ applications for food supplement benefits based on a temporary limitation contained only in the language of a public law. The vacated superior court ruling had upheld a final agency denial of benefits based on public law language that was not present within, or allocated to, the statutory text. That unallocated language contained a fiscal limitation of $261,384 and a temporal limitation - June 30, 2015 - on the availability of funding for benefits for persons otherwise eligible under 22 MRS § 3104-A(1)(D). The limitations in the unallocated language conflicted with the plain language of a specific provision of the statute, thus creating a statutory ambiguity that the Law Court resolved by looking to legislative intent. Relying in large part on the Office of the Revisor of Statutes’ Maine Legislative Drafting Manual, the Court focused on the significance of allocated versus unallocated legislative language. In doing so, the Law Court concluded that the unallocated language of limitation in the public law was of a “temporary” or “housekeeping” nature, and that the legislative intent was for Paragraph D to be a permanent exception to the general ineligibility of noncitizens for food assistance.

### Implied Repeal/Election Law

*Maine State Senate v. Secretary of State,* 2018 ME 52: The Law Court applied the doctrine of “implied repeal” or “repeal by implication” to conclude that the provisions of Maine’s election statutes stating that the outcome of a primary election is determined by plurality were implicitly repealed by the more recent enactment of the ranked-choice voting law by citizen initiative. The Superior Court (Murphy, J.) had come to the same conclusion in denying a motion for TRO a few weeks earlier, in *Committee for Ranked-choice Voting v. Sec’y of State*, Docket No. AUGSC-CV-18-24 (Me. Super. Ct., Ken. Cnty., Apr. 3, 2018).

### Legislative History/Interpreting Citizen Initiatives

*Wawenock, LLC v. Department of Transportation*, 2018 ME 83: Four business that own property along Route 1/Maine St. in Wiscasset filed a complaint for declaratory judgment and injunctive relief claiming DOT violated the Sensible Transportation Policy Act (STPA), 23 M.R.S.A. § 73, by failing to allow public participation in the planning and design of the project to widen and alter Route 1/Maine St. The trial court concluded, based on the legislative history of the STPA, that the Act afforded the plaintiffs no private right of action. On appeal, the Law Court found that the plain language of the STPA afforded no express or implied private right of action and affirmed the judgment in favor of DOT. Because the trial court and the parties focused on the legislative history, the Law Court used the case as an opportunity to clarify the means of determining the legislative intent of citizen-enacted legislation from the legislative history. First, the legislative intent of any statutory enactment is determined wholly as a matter of law, not fact. Thus, no burden or standard of proof applies, and judicial notice is not implicated. Second, “evidence” of legislative history is not offered or admitted, and neither the trial court nor the Law Court is limited to reviewing those portions of the legislative history provided by the parties. No matter what materials are directed to the court’s attention, the court may review any and all legislative history information in the course of its own evaluation of the law. Third, although Rule 12(c) required the court to make all factual inferences in favor of the plaintiffs, they are entitled to no favorable inferences as to the legal interpretation of the statute. The Law Court provided examples of the types of legislative history materials courts may rely on in evaluating the legislative intent. Because the STPA was a citizen-initiative, the Court also discussed the types of legislative history materials courts may rely on in interpreting citizen-initiative statutes. The Law Court then discussed the rules of statutory interpretation for citizen-initiatives and examined the sources of legislative history for the STPA and determined that nothing in the legislative history suggests that the intent of the Act was to create a private right of action.

## Statute-Specific Applications of Statutory Interpretation Principles

### Workers’ Compensation Act

*Urrutia v. Interstate Brands International*, 2018 ME 24: The claimant was receiving total incapacity workers’ compensation benefits when he also began receiving Social Security retirement benefits. His employer, Interstate, later sought a credit for the benefits it had overpaid while the claimant was also receiving retirement benefits. The hearing officer granted Interstate the credit for past payments. The Appellate Division reversed the decision, holding that the Workers’ Compensation statute did not permit a credit for benefits already paid, a credit may only be applied against ongoing WC benefits paid for the “same time period” as the retirement benefits. Interstate appealed. The Law Court vacated Appellate Divisions decision and held that the plain language of the “coordination of benefits” statute in the Workers’ Compensation Act, 39-A M.R.S. § 221(1), entitles an employer to a credit against ongoing incapacity benefit payments for overpayments made in the past while the employee was also receiving “old-age” Social Security benefit payments. The Law Court reached this interpretation of the statute based on several aspects of the statute, including: the grammatical structure of the pertinent language (the lack of a comma to separate phrases); the reference to past receipt of retirement benefits in § 221(1)(A); the specific reference in § 221 to a “credit or reduction” of incapacity benefits (signifies two distinct recovery mechanisms for overpayment); the overall purpose of the “coordination of benefits” statute, which is to prevent a double recovery of benefits; and the mandatory language in the “coordination of benefits” statute. The Court distinguished past cases where it held that the Workers’ Compensation Act did not create a remedy for employers to recover overpayments they voluntarily made to claimants. The Court also remanded for ALJ to conduct a statutory hardship analysis regarding how the credit for overpayment should be structured.

 Justice Jabar, joined by Justice Alexander, issued a dissenting opinion. The dissenting Justices would have deferred to and upheld the decision of the Appellate Division that the “coordination of benefits” statute applies only to ongoing weekly benefits the claimant is receiving at the same time as retirement benefits or, if the claimant is receiving a lump sum payment retroactive to their period of incapacity, to the past retirement benefits already received for that same time period. The dissenting Justices argue that the Court’s analysis ignores the lump sum payment provisions. The dissenting Justices also assert that the Court’s interpretation prioritizes the statutes purpose of preventing double recovery over its dual purpose of ensuring a minimum income during a period of incapacity and is contrary to the Court’s numerous prior opinions holding that Workers’ Compensation Act does not create a remedy for employers to recover overpayments. The dissenting justices also stated that statutory hardship analysis ordered by the Court does not apply in such circumstances.

*Larry Huff v. Regional Transportation Program et al.,* 2017 ME 229: In case of first impression, Court asks whether a mileage reimbursement to a “volunteer” driver of a transportation company can constitute remuneration when it is significant enough to exceed the volunteer’s immediate expenditures. Court evaluates Workers’ Compensation Act and the two elements that are needed for an employer-employee relationship. Although the volunteer driver had submitted himself to the control of another, the mileage reimbursement he received did not constitute payment – in this case – for purposes of the Act.

### Environmental Law/ Right to Access

*State of Maine v. Dubois Livestock, Inc., et al.,* 2017 ME 223: In a case of first impression involving the Department of Environmental Protection’s attempts to inspect a solid waste facility, the Court questions the parameters of the Department’s right to enter and inspect property pursuant to 38 M.R.S. §§ 347-C and 1304(4-A).

### Licensing

*Doane v. Department of Health and Human Services*, 2017 ME 193: The Board of Licensure in Medicine (“BLM”) censured Doane, a licensed physician, for unethical practices. The BLM renewed Doane’s license, but imposed terms of probation. Shortly thereafter, the Department of Health and Human Services (“DHHS”) terminated Doane’s participation in and reimbursement from the MaineCare program. Pursuant to the MaineCare Benefits Manual, Doane requested informal review by the Department, which affirmed the termination. Thereafter, Doane filed an action in Superior Court for declaratory judgment that the DHHS’s decision to terminate his participation in MaineCare constituted a license revocation within the exclusive jurisdiction of the Maine District Court. The Superior Court granted summary judgment for Doane, concluding that the ability to provide and be reimbursed for MaineCare patients constituted a form of permission that fell within the statutory definition of “license,” and therefore, the District Court has exclusive jurisdiction to adjudicate termination of Doane’s participation in MaineCare. The Law Court reversed the decision of the Superior Court. The Administrative Procedure Act defines a “license” as “the whole or part of any agency permit, certificate, approval registration, charter or similar form of permission required by law which represents an exercise of the state’s regulatory or police powers.” 5 M.R.S.A. § 8002(5). The Law Court concluded that, in light of entire schemes, the agency that provides physicians with “approval … required by law [that] represents an exercise of the state’s regulatory or police powers” is the BLM. It is through the licensing of physicians, not the Sate’s implementation of MaineCare, that the State exercises its police power on behalf of all Maine citizens to regulate physicians. DHHS’s decision regarding participation in MaineCare only affects the health or safety of Maine citizens who receive services through MaineCare, and DHHS’s other purpose for regulating participation in Maine – to make the best use of State funds – is not an exercise of the State’s police power. Therefore, DHHS’s decision to terminate Doane’s participation in MaineCare was not a licensing decision and not within the District Court’s exclusive jurisdiction. (Jabar, J. wrote a dissenting opinion).

### Agency Deference/Utilities

*Enhanced Communications of Northern New England v. Public Utilities Commission* 2017 ME 178: Enhanced Communications appealed an order from the PUC granting in part and denying in part a petition for a certificate of public convenience and necessity to operate a competitive local exchange carrier. (35-A M.R.S. §§ 2012, 2015. Enhanced contended the denial was unlawful and supported by substantial evidence. The order was affirmed. Enhanced meet the technical capacity requirements, but the statute requires the PUC to make a finding that an additional public utility is needed “after public hearing of all parents interested, the public convenience and necessity require a 2nd public utility.” 35-A M.R.S. §2105(1). Enhanced argued that “a public interest criterion is a ‘rudderless’ standard that is unreasonably difficult to understand.” The Court disagreed finding that a public finding of convenience and necessity is distinguished from finding for an individual that such a standard is a lawful requirement that comports with statute, regulation and federal law.

### Local Ordinance

*Estate of Pirozzolo v. Department of Marine Resources*, 2017 ME 147: Law Court dismissed 80C appeal, concluding that the Superior Court decision that vacated in part a decision of the Department of Marine Resources granting Joseph Porada a three-year limited-purpose aquaculture lease to farm oysters and quahogs in Morgan Bay in Surry, and remanded the matter to the Department to decrease the area of the lease site from four to two acres, was not final.

*Arthur J. Greif v. Town of Bar Harbor*, 2017 ME 163: Law Court affirmed decision of Superior Court on 80B appeal, affirming the decision of the Bar Harbor Town Council declining to conduct an investigatory hearing after receiving a letter from Greif in which he detailed allegations of misconduct by two of the Town’s councilors. The Court found that the Council acted properly pursuant to the Bar Harbor Town Charter and Maine’s Freedom of Access Act.

*Olson v. Town of Yarmouth*, 2018 ME 27: 80B appeal. Law Court affirmed Planning Board interpretation of local ordinance that only new cell towers, and not co-locations (on existing water tower), had a presumption of unsuitability. Law Court affirmed that Planning Board approval based on substantial evidence in the record.

## Rules of Evidence

*Deutsche Bank National Trust Company v. Eddins*, 2018 ME 47: Law Court held that the trial court had abused its discretion in admitting evidence that did not qualify under the business records exception to the hearsay rule. The custodial witness did not have sufficient knowledge of business practices of the law firm that had sent the notice of default to establish foundation for its admission into evidence.

*State v. Olah*, 2018 ME 56: Defendant in gross sexual assault case challenged Superior Court’s decision to quash his subpoenas for the mental health records of the minor victim. Law Court held that the Superior Court erred in granting the motion to quash the subpoena without first reviewing the documents in camera. The mandated report to law enforcement by victim’s counselor, and the victim’s disclosures to police, did not waive statutory confidentiality of victim’s counseling records, but the Superior Court should have reviewed the records to determine whether they contained exculpatory evidence, including evidence undermining a witness’s credibility, that must be provided to the defendant to comply with his fundamental right to due process. Decision includes a very full discussion of the standards for determining what should be released.

*Avis Rent a Car v. Burrill,* 2018 ME 81: Law Court vacated award of damages on partial summary judgment ruling, finding that the trial court erred in allowing a document attached to an affidavit under the business records exception. The Law Court found that the affidavit failed to provide the foundational predicate necessary for admission in evidence of the attached vehicle valuation report prepared by a third party.

## Procedural and Appellate Issues and Pitfalls

### Professionalism/Appellate Advocacy

*Laura A. Millay v. John E. McKay, Jr.,* 2017 ME 39: In a Per Curiam opinion, the Court affirmed the District Court’s divorce order. Notably, the Court advised counsel that the “buckshot and substantially unsupported strategy for advancing issues on appeal is not an effective approach to appellate advocacy.” The Court further stated that, “potentially meritorious points on appeal, if any exist, have been lost in the fog of insubstantial and unsupportable objections to the trial process and the trial court’s decision.”

### Sanctions

*Rowland S. Whittet v. Daniel C. Whittet*, 2017 ME 156: Court affirmed Superior Court award of sanctions because appellant (1) has failed to provide transcripts of the relevant proceedings or a substitute to allow for adequate appellate review, (2) mounts untimely challenges to earlier decisions of the trial court; and (3) has made no argument as to why the court erred in issuing the orders for sanctions.

### Appendix

*Hall v. Camden Hills Farm by the Sea*, 2017 ME 150: Law Court dismissed appeal of foreclosure action because appellant’s second appendix (after the first appendix was rejected by the Court with instructions to provide a corrected appendix in compliance with the rule) disregarded the explicit requirements of M.R. App. P. 8, addressing organization and the order in which documents are to appear in the appendix to the briefs.

### Justiciability

*Maine State Senate v. Secretary of State,* 2018 ME 52: The Law Court declined to address several questions of law that had been reported by the Superior Court, based on the “universal rule” of justiciability, which demands that the court “exercise judicial restraint by refusing to adjudicate matters” where doing so would encroach upon the powers of the executive or legislative branches of government. In particular, the Court declined to address the Senate’s claims regarding the Secretary of State’s expenditure of appropriated funds or the manner in which the Secretary was handling the logistics of implementing ranked-choice voting. (For those who are interested, this opinion lays out a good description of the tangled web of legislation and litigation over ranked-choice voting in Maine.)

*Heidi M. Pushard et al. v. Bank of America, N.A****.***, 2017 ME 230: Foreclosure action involving multiple claims in which the Law Court vacated summary judgment against Pushards and remanded for entry of summary judgment declaring the note and mortgage unenforceable and that the Pushards hold title to property free and clear of Bank’s mortgage encumbrance. Good discussion on principle of *res judicata* and claim preclusion. The Court held the Bank was precluded from seeking to recover on the note or enforce the mortgage because it had indeed triggered the acceleration clause when it filed the foreclosure action demanding immediate payment of the debt.

### Necessary Party

*MTGLQ Investors, L.P. v. Shelley Alley,* 2017 ME 145: Law Court sua sponte raised issue of lack of necessary party (the estate of the deceased debtor) in foreclosure action. Court vacated and remanded with instructions to dismiss without prejudice. Discussion of mandatory joinder requirements under M.R.Civ.P. 19(a).

### Interlocutory Appeal

*Kittery Point Partners, LLC v. Bayview Loan Servicing, LLC*, 2018 ME 35: The Court dismissed the appeal from a partial summary judgment as interlocutory, holding that the trial court (York County, Douglas, J.) did not properly certify the partial final judgment pursuant to M.R. Civ. P. 54(b)(1). The Court held that the trial court’s order did not contain specific findings about and did not adequately explain the basis for its certification, and its “statement amount to a summary recitation of the provisions of Rule 54(b)(1)” in direct contradiction of the rule’s requirements. As neither party requested that the trial court provide a more detailed explanation of its order, the Court was unable to determine if the facts of the case merited an interlocutory appeal before all pending claims were resolved.

### Contempt of Court

*State of Maine v. Carol Ann Murphy*, 2017 ME 165: Law Court affirmed finding of contempt after defendant who had been twice convicted of animal cruelty, and ordered never to possess animals again, acquired a variety of animals, including dogs, cats, chinchillas, rabbits, and a potbellied pig.

### Default

*Dawn H. Haskell et al. v. Grover B. Bragg Jr.,* 2017 ME 154: Defendant defaulted in claim for claims for negligence, assault and battery, intentional trespass, intentional infliction of emotional distress, negligent infliction of emotional distress, and punitive damages. Defendant, while on drugs, damaged property in the plaintiffs’ home and caused them to fear for their life. During hearing on damages, the trial court precluded the defendant from requiring that the plaintiffs were required to prove causation, but allowed a claim of comparative negligence, but found that there was no evidence of comparative negligence. On cross-appeal, the Law Court reiterated that default establishes liability, and that factual findings are required only as to damages. The Law Court further clarified that affirmative defenses are also waived by a default, and thus trial court erred by allowing assertion of comparative negligence at damages stage, although such error was harmless, as the trial court found no comparative negligence.

## Due Process

### Failure to Appear

*In re Kaylianna C*., 2017 ME 135: In a termination of parental rights matter, the District Court terminated father’s parental rights without him being present. His attorney was present and went forward with the hearing without requesting a continuance. The Law Court held that the father failed to show “… how his participation in the trial would have affected the court’s determinations that he was parentally unfit and that termination was in the child's best interest.” The father’s due process rights were not violated.

### Setting Aside Default for Failure to Appear

*Taylor v. Walker*, 2017 ME 218. The Taylors hired Walker to install foam insulation in their home. In a subsequent small claims case, the Taylors alleged that Walker’s application was inadequate and caused damage to their home in the amount of $4625. On the day of the hearing, Walker failed to appear, and the District Court entered a default judgment. Later that same day, Walker submitted a letter to the court claiming he had gone to the wrong courthouse and tried to get to the hearing on time when he realized the error. The District Court treated the letter a motion to set aside default, which it denied without a hearing. Walker appealed to Superior Court, which has limited statutory authority in such cases to address only 1) questions of law and 2) challenges to the exercise of discretion not related to factual determinations. The Superior Court, without hearing from either party, made various factual findings and credibility determinations, set aside the default upon excusable neglect, and remanded the matter back to District Court for a hearing on the merits. The Law Court accepted the Taylors interlocutory appeal based on the judicial economy exception to the final judgment rule. The Law Court vacated the Superior Court’s order because the court did not have the authority to make factual findings. The Law Court remanded to the Superior Court for a determination on whether to remand the case to District Court for an evidentiary hearing on the motion to set aside default.

### Service

*Schultz v. Doeppe*, 2018 ME 49: Law Court held that service by publication, without more, was sufficient to satisfy requirements of due process.

### Probate Court/Access to Courts

*Renee Legrand et al. v. York County Judge of Probate*, 2017 ME 167: This is a class action lawsuit against York County Probate Judge for violation of due process, alleging that delays in proceedings caused by Judge’s reduction of court hours in retaliation for budget decisions by County Commissioners. The Law Court declined to dismiss the appeal as moot on two grounds. First, even though the Judge was not re-elected as Probate Judge, the Court held that the substitution of a successor government official is automatic and changed case caption from Judge Nadeau as a party-defendant to “York County Judge of Probate.” Second, although defendant had alleged that all the class members had already had their cases adjudicated in Probate Court, the Law Court did not dismiss the appeal as moot because the class included litigants who may in the future be harmed by the alleged delays. The Law Court affirmed the findings of the Superior Court that the delays were not of a magnitude to raise constitutional concerns of lack of access to the courts. The Law Court affirmed the finding of no substantive due process violation, quoting language of the Superior Court as to the practical difficulties of one court micromanaging the schedule of another court.

### Impartiality

*State of Maine v. Eric Bard,* 2018 ME 38: The court vacated all adjudicatory action undertaken by the trial court (Kennebec County, Marden, J.) after the trial court held an ex parte conference with the prosecutor to address alleged prosecutorial misconduct. The Court further dismissed the appeal from the dismissal of the motion to vacate as moot and remanded for further proceedings. The Court held that, to ensure due process, the decisions reached by the judge after he held the ex parte conference must be vacated. The due process infirmity arose when the court held the ex parte conference, without the defendant’s knowledge or consent, on a subject directly related to the viability of the charges against the defendant and the process for adjudication of those charges. The court was obligated to address those matters in a proceeding in which both parties had the opportunity to be heard.

### Adoption of the prison mailbox rule.

*Charles M. Martin v. Department of Corrections*, 2018 ME 103: The plaintiff is a prisoner at the Maine State Prison. The plaintiff sought to file a petition pursuant to the M.R. Civ. P. 80C and the Maine Administrative Procedure Act (APA) seeking judicial review of a final agency action by the Department of Corrections (DOC). The plaintiff placed his petition in the prison mail system for forwarding to the court. The plaintiff’s petition was received by the clerk of the court eight days later, one day after the expiration of the APA’s thirty-day time limit for appeal. The DOC moved to dismiss the petition for lack of jurisdiction, which the trial court granted. On appeal, the plaintiff asked the Law Court to adopt the “prison mailbox rule”, which the United States Supreme Court had adopted in *Houston v. Lack*, 487 U.S. 266 (1988). Interpreting the Fed. R. App. P. 4, the Supreme Court held that a pro se prisoner’s appeal is deemed “filed” on the date it is delivered to prison authorities for forwarding to the clerk of the court. The Law Court held because the Supreme Court adopted the prison mailbox rule as interpretation of the Fed. R. App. P., its holding was non-binding on the states. The Court held that it could not adopt the prison mailbox rule an interpretation of its rules in this case because the plain language of the APA specifies that a petition must be filed “in the Superior Court.” The court also held that it could not adopt the prison mailbox rule as an equitable tolling provision, as other states have done, because the APA’s time limits are jurisdictional and not subject to court-ordered enlargement. Instead, the Law Court adopted the prison mailbox rule on state constitutional grounds. The Court held that failure to adopt the rule would violate the Maine Constitution’s Open Court Provision and Due Process Clause. The court held that in this case, because the plaintiff lost control of his petition when he delivered it to the prison authorities for mailing, he was unjustly denied access to the courts when it was ultimately received by the clerk of the court one-day late. However, the Law Court also stated that, because pro se prisoners must recognize that they have no choice by to mail their petition, it is not unconstitutional to require them to deliver their petitions to prison authorities at least three days prior to the thirty-day deadline. Accordingly, the Law Court concluded, “we adopt the prisoner mailbox rule for any unrepresented prisoner whose 80C petition, having been delivered to the Department of Corrections at least three days before the last day on which the petition may be timely filed, arrives at the clerk of court after the deadline has expired.”

## Freedom of Access Act

*Steve Anctil v. Department of Corrections,* 2017 ME 233: The plaintiff sent a FOAA request to the Department of Corrections (DOC) seeking personnel records “not classified as confidential and resulted in disciplinary action” for thirty employees at the Maine State Prison. DOC produced sixteen documents, but redacted portions of the documents pursuant to 34-A M.R.S.A. § 1216 and 5 M.R.S.A. § 7070(2)(E). The plaintiff filed an appeal challenging five of the redactions. The trial court affirmed the redactions. On appeal, the Law Court address four of the redactions in four documents. First, the Law Court upheld the redaction of a final written decision that did not impose or uphold discipline on an employee. Under § 7070(2)(E), a final written decision is not confidential only if it imposes or upholds discipline. Regarding the second document, DOC redacted a portion describing a past incident of misconduct by another employee not the subject of the final report imposing discipline. The Court affirmed that § 7070(2)(E) permitted DOC to redact the narrow portion that contains the names of employees not subject to discipline in the final decision. But, the document contained an additional redaction that detailed the actions that led to the imposition of discipline. This portion was not confidential and the Court order it to be disclosed. Regarding the third document, DOC redacted the name of an officer that was the victim/person making the accusation of misconduct. The Court held that the plain language of § 7070(2)(E) does not permit an agency to redact name of a victim/accuser of misconduct from final decision imposing discipline. Therefore, the redaction was improper. Lastly, DOC redaction the “name of a person receiving services from the Department” involved in an incident that resulted in the employee discipline. The Court held that DOC properly redacted the person’s name pursuant to 34-A M.R.S.A. § 1216.

*Marcel Dubois et al. v. Department of Environmental Protection et al.,* 2017 ME 224: Plaintiffs submitted a broad FOAA request for documents related to a composting facility. DEP produced certain documents but withheld other documents on the basis of both the work product and informant identity privileges. The trial court order DEP to produce the withheld documents for *in camera* review and submit an affidavit supporting its position. The trial court affirmed DEP’s withholding of documents pursuant to both the work product and informant identity privilege. Plaintiffs appealed, claiming that the court’s *in camera* review denied them due process and challenging the court’s determination. Regarding due process, the Law Court reiterated that *in camera* review is an appropriate means for determining whether records were properly withheld. However, at the time Plaintiffs filed their FOAA appeal, the FOAA anticipated a “trial de novo” of any contested facts. Accordingly, Plaintiffs were entitled to present evidence regarding any relevant factual dispute. In this case, however, Plaintiffs were not permitted to present any responsive evidence. Thus, the dispositive issue regarding due process was whether Plaintiffs had identified any dispute of fact necessitating a trial de novo. The Law Court also noted that, pursuant a recent amendment to the FOAA, a trial de novo was no longer required in FOAA appeals. Thus, for FOAA cases filed after October 15, 2015, the reviewing court has the discretion to determine the process necessary to resolve FOAA appeals. Regarding the withheld documents, the Law Court affirmed that DEP had properly withheld drafts of administrative search warrants, drafts of warrant applications, and emails concerning the drafting process and strategy for executing the warrant, if granted, under the work product privilege. The Court stated that such documents were plainly prepared in anticipation of litigation. However, the Court vacated the trial court’s determination regarding records withheld under the informant identity privilege. The Court stated that, based on the record before it, it could not determine whether the informant identify privilege applied to odor complaints against the composting facility. The Court also raised *sua sponte* the Maine Intelligence and Investigative Records Act (MIIRIA), which states that investigative records are confidential if disclosure would reveal the identity of a confidential source. The Court similarly held that, based on the record before it, the Court could not determine whether the MIIRIA applied to the complaints against the composting facility. Thus, the Law Court remanded the case to the trial court to take evidence and make findings of fact regarding the confidentiality of complainant identities.

*Marcel Dubois et al. v. Department of Agriculture, Conservation and Forestry et al.,* 2018 ME 68: Plaintiffs submitted a broad FOAA request for drafts of letters and emails related to a composting facility. DACF initially produced some emails, and later produced additional emails with redactions. DACF denied the FOAA request with regard to certain emails and drafts of a letter on the basis of the informant identity and work product privileges. DACF submitted the withheld documents for *in camera* review and filed an exceptions log, affidavits supporting its withholding of the documents, and written argument with the court. Plaintiffs submitted an objection to an affidavit, a motion to depose a DACF compliance supervisor, and a principal and a reply brief. After oral argument, the trial court affirmed most of the DACF’s withholdings and redactions. The court denied Plaintiffs’ motion to depose the compliance supervisor. On appeal, the Law Court reiterated that, following the amendment to FOAA, a trial de novo is no longer required, and the reviewing court has the discretion to determine the process necessary to resolve the appeal. The Law Court held that the process chosen by the trial court in this case provided Plaintiffs with a fair process that resulted a meaningful record to decide the case. Moreover, Plaintiff did not demonstrate there was sufficient cause for them to depose the compliance supervisor. Regarding the withheld documents, the Law Court first held that the express terms of informant identify privilege, M. R. Evid. 509, apply to state investigations and action relating to civil violations of law as much as criminal cases, and that DACF officials involved in the investigation were “law enforcement officers” enforcing agency regulations within the meaning of the relevant statute and the privilege. Thus, the complainants to DACF were informants whose identities were confidential pursuant to the informant identify privilege. Plaintiff also argued that DACF regulations required the agency to notify them of the odor complaints, including the names of the complainant, thus the identities of the complainants were not confidential for FOAA purposes. The Law Court disagreed and distinguished these regulations, stating that whatever rights Plaintiffs had under a different regulation, Plaintiffs brought this suit pursuant to the FOAA and did not raise any independent grounds for disclosure. The regulations cited by Plaintiffs were not a part of the FOAA analysis.

*Marcel Dubois et al. v. Office of the Attorney General et al.*, 2018 ME 67: During their investigation of odor complaints related to a composting facility, DEP and DACF were represented by assistant attorneys general from the OAG. Plaintiffs sent a FOAA request to the OAG seeking copies of drafts of a letter by a DACF official and documents pertaining to a meeting of employees of DACF, DEP, and OAG. The OAG denied the request, asserting that the records were prepared in anticipation of litigation and therefore protected work product not subject to FOAA. OAG submitted the withheld documents for *in camera* review and filed an exceptions log, a brief, and supporting affidavits. Plaintiff filed their own brief, but no support affidavits or evidence. After oral argument, the trial court affirmed OAG’s withholding of the drafts by a DACF official under the work product privilege. However, the court determined that emails concerning the meeting of the agencies were not privileged and ordered them to be disclosed. Plaintiffs appealed and the OAG cross-appealed. On appeal, Plaintiff argued that the trial court violated their right to due process by not requiring the OAG to produce a more detailed exceptions log as required by M.R. Civ. P. 26(b)(5)(A) and relying on affidavits. The Law Court rejected these arguments. The Court held that the exceptions log produced by the OAG sufficiently complied with FOAA and the court’s order. The Court held that Plaintiff reliance on the discovery rules requiring a more detailed exceptions logs was misplaced because neither the FOAA nor the court’s order incorporated the rules for pretrial discovery. The Law Court further held that the process chosen by the trial court in this case provided Plaintiffs with a fair process. Regarding the requested documents, the Court affirmed the OAG’s withholding of the drafts of a letter by a DACF official. The Court stated that the drafts submitted for *in camera* review and the final letter plainly demonstrate that they were created in anticipating of litigation and contain attorneys’ mental impressions, conclusions, opinions, and legal theories. The Court also found that the privilege was not waived by the collaboration disclosure of information between DACF and DEP. The Law Court reversed the trial court’s order the disclosure of the emails concerning the meeting of the agencies. The trial court found that the emails were not protected work product because they contained merely correspondence about scheduling. The Law Court disagreed, stating that the emails submitted for *in camera* review reveled the purpose of meeting, the nature of the issues and strategies that would be considered, and explicitly discussed investigative and legal options. Thus, the emails were privileged work product not subject to disclosure under the FOAA.

## Judicial Ethics

*Matter of Nadeau*, 2017 ME 121, reconsideration denied, 2017 ME 191: In a disciplinary proceeding against a probate judge, multiple ethics violations were found which supported a two-year suspension and forfeiture of $5,000. The court found that the judge directed that certain attorneys be removed from court appointment lists; ordered an attorney to destroy a lawfully obtained public record; urged litigants to lobby for increased funding for probate court; made campaign funding solicitations on law firm website. In ordering the suspension and forfeiture, the court noted that “prior corrective efforts have not been effective in dissuading [the judge] from engaging in intemperate conduct prohibited by the Canons.”

*Matter of Nadeau*, 2018 ME 18: Former York County Probate Judge Robert M.A. Nadeau participated in mediating a child support case after acknowledging that he would have been required to recuse himself for bias if an evidentiary hearing had been necessary to resolve the dispute. The source of the bias was a social media exchange between Judge Nadeau’s wife and a party to the underlying matter, which Judge Nadeau knew about and stated had had a negative effect on his credibility determinations as to the party involved in the social media postings. The Law Court concluded that Judge Nadeau’s participation in the case under those circumstances violated Rule 2.11(A) of the Maine Code of Judicial Conduct. The Court accepted the Committee on Judicial Responsibility and Disability’s recommendation and ordered that Judge Nadeau be publicly reprimanded for violating Rule 2.11(A). The Court did note that a sanction was warranted for his actions, but since Judge Nadeau was longer a judicial officer and already was serving a suspension from the practice of law, those circumstances tempered the need to deter others from similar misconduct.

## Res Judicata

*Estate of Paul F. Treworgy et al v. Commissioner, Department of Health and Human Services et al,* 2017 ME 179: Plaintiffs appealed from the Superior Court’s dismissal of their constitutional and statutory claims against DHHS and two DHHS employees, Ingraham and Perskins. Plaintiffs had previously filed suit in federal court in June 2014 alleging that DHHS, Ingraham and other defendants violated various federal and state constitutional rights and Maine’s Uniform Health-Care Directives Act. The Plaintiffs alleged that DHHS unlawfully instituted temporary guardianship proceedings and took control of his health care decisions contrary to an advance health care directive. The federal court dismissed the claims against Ingraham without prejudice, concluding that plaintiffs did not demonstrate good cause for failing to timely serve her. The federal court dismissed all claims against the other defendants with prejudice for failure to state a claim. Plaintiffs did not appeal to the First Circuit. Plaintiffs filed another suit in Superior Court a year later, naming the DHHS Commissioner again, Ingraham again and adding Perkins as a defendant. Plaintiffs alleged the same facts, and asserted claims for breach of fiduciary duty, breach of a duty to properly supervise employees, violation of due process and privacy rights violations pursuant to the Maine Civil Rights Act and violations of the Uniform Health-Care Directives Act. The Superior Court concluded the claims were barred by the claim preclusion component of the doctrine of *res judicata*, because the Superior Court action arose from the same set of facts as the prior federal lawsuit that had been dismissed and all parties to the present action are the same as the named parties in the federal case or are in privity with them. The Law Court affirmed the judgment, looking beyond the nominal parties of record to the real party in interest. The Court reasoned that the plaintiff could not “be permitted to circumvent the sound principles of *res judicata* merely by inserting the word ‘individually’ in his complaint.”

## Probate Law

*Estate of Stephen Libby*, 2018 ME 1: At issue was a dispute between siblings over certain real property in their deceased father’s estate. The litigant brother maintained that the siblings’ father had conditioned his pre-death transfer of real property to the litigant sister on the condition that she would hold all of the father’s property for the benefit of all his children and would convey her interests back to the estate or a trust after the father’s death. When the sister refused to make such a conveyance when their father died, the brother sued on grounds of constructive fraud and requested the imposition of a constructive trust on the property in dispute. A referee concluded that the sister committed constructive fraud and recommended the imposition of a constructive trust, and the probate court adopted the referee’s report. The Law Court reviewed the record and found evidence to support the referee’s findings that a relationship of trust existed between the litigant sister and the father, and that she had agreed to hold the father’s property for the benefit of all his children. Based on clear and convincing evidence of constructive fraud, the probate court’s adoption of the referee’s report and imposition of a constructive trust on the property were not error. The Court did find, however, that remand was necessary for the probate court to enter an appropriate judgment in compliance with Rules 58 and 79 of the Maine Rules of Probate Procedure, specifically one that “described with particularity” the property, interests and obligations pursuant to the judgment outlined in the referee’s report.

## Election Law

*In Re Ballot Dispute in Election of Town of Winslow District 3 Town Councilor*, 2018 ME 2: A close town election went to a recount and hinged on one vote. The single ballot at issue had multiple misplaced markings on it such that it failed to indicate the voter’s intent and therefore could not be counted to result in different outcome. 21-A MRS Sec. 696 (2)(A) and (B). The Law Court had original jurisdiction to determine the outcome of the election given that the disputed ballot would “affect the result of the election.” 21-A MRS Sec. 737-A(10). The Court examined the ballot and upheld the recount, declaring the victor to be the winner by the one vote since the Court could not discern from the ballot the voter’s choice for one candidate or the other.

## Statute of Limitations

*Alan Miller v. Steve N. Miller*, 2017 ME 155: Law Court affirmed summary judgment on grounds of statute of limitations. Court rejected argument that statute of limitations was tolled by equitable doctrine of adverse domination (a corporation’s cause of action against controlling directors who are culpable of wrongdoing may be tolled in some circumstances where the culpable officers would have a duty to institute the action on behalf of the corporation against themselves). The Court affirmed the trial court’s ruling (consistent with Massachusetts and Second Circuit cases) that tolling does not apply when a non-controlling shareholder has the requisite information and ability to assert derivative claims.

## Name Change

*In re Boardman*, 2017 ME 131: Petitioner sought to legally change her surname. The Probate Court denied petition based on a finding that the new name demonstrated a purpose “of defrauding another person or entity.” The court felt that because the new name was the same as her male friend’s that it could create the false appearance that she was married to him. The court held that name changes are to be liberally granted and the Probate Code “… shall be liberally construed and applied to promote its underlying purposes and policies.” The court further held that the name change statute provides only two bases for denying a requested name change: when it is sought “for purposes of defrauding another person or entity” or when it is sought “for purposes otherwise contrary to the public interest.” The court concluded that “… a person's potential misunderstanding of another person's marital status, without more, does not qualify as a fraud that precludes the otherwise liberal grant of name change petitions in the Probate Court.”

## Insurance Coverage

*Richardie Kelley v. North East Insurance Company*, 2017 ME 166: Law Court affirmed grant of summary judgment to insurance company on reach and apply action. The named insured was a co-owner of a dog. The unmarried co-owner drove an employer’s vehicle (not the insured vehicle) to meet the plaintiff, and the dog, while still in the vehicle, bit the plaintiff. The insured was not the driver, passenger, or owner of the car that the dog was in when it bit the plaintiff. The Superior Court granted summary judgment to the insurance company, finding that the unmarried co-owner of the dog was not an “insured” and the dog bite incident was not an “auto accident” covered by the policy. The Law Court affirmed, using the plain language meaning of “auto accident.”

*Theresa L. Allocca et al v. York Insurance Company of Maine et al,* 2017 ME 186: Plaintiff’s son was fatally shot while driving his father’s car in Pennsylvania. An assailant had pursed the son through Maryland into Pennsylvania and fired at the vehicle. The assailant rammed his truck into the son’s vehicle, pushing it off the road and into the median. The assailant then reversed direction and approached the son’s vehicle from the southbound side of the highway, fired multiple shots, and drove away. The son died from the gunshot wounds. Plaintiff’s filed suit against their insurers seeking to recovery uninsured motorist (UM) benefits. The Superior Court granted summary judgment in favor of the insurers, concluding that neither any of the policies nor Maine’s UM statute 24-A M.R.S.§2902 provides UM coverage for the loss associated with their son’s death. On Appeal, the Law Court considering each of the four insurance policies at issue and found that each of the UM policies required that, to be covered, the loss must be by accident. Interpreting the plain meaning of the policy language, the Law Court concluded the son’s murder was not an accident, and therefore the loss was not covered.

*Estate of Carrol G. Frye et al. v. MMG Insurance Company*, 2018 ME 44: The Law Court vacated the judgment of the Superior Court that granted summary judgment to the insured’s heirs and his estate on their action seeking enforcement of a property insurance contract for the loss of a dwelling by fire. The Court, under 24-A M.R.S. § 2406, evaluated whether the estate or heirs had an insurable interest in the property. The insured had reserved a life estate in the insured property and deeded a remainder interest to his heirs almost 20 years prior to his death. The Court held that because the remainder vested in the heirs at the insureds death, the estate lacked any insurable interest in the property the moment the insured died. The Court also held that the heirs had an insurable interest as soon as the remainder was deeded to them, but, at no point in time was that interest covered by the policy at issue in this case.

## Property Law

### Eminent Domain – Public Roads

*Bayberry Cove Children’s Land Trust v. Town of Steuben*, 2018 ME 28: Law Court affirmed Superior Court that taking of an interest in a road by eminent domain taking is constitutional because it arose from a public exigency and is for public use. The Town initiated the eminent domain process in response to legal challenges commenced by the Trust concerning the use and ownership of the road. Additionally, the road’s physical location had changed from the boundaries as laid out in 1825 because of the 1887 extension and the 1944 wash-out. The resulting deviation between the record boundaries and a small portion of the physical location of the traveled area of the road was revealed by the 2013 survey. These circumstances reasonably prompted the Town to lay out new boundaries for a relatively small portion of the road. As a result of the historical changes affecting the road, and consistent with a municipality’s authorization to take property for “highway purposes,” which includes the “alignment” of town ways, see 23 M.R.S. § 3021(1), the Town decided to align the road’s record boundaries with its actual location on the face of the earth. Residents at town meeting authorized the taking of the interest in the road. Case involves discussion of the elements of public exigency and definition of public use.

### Construction of Deeded Right of Way

*Beckerman v. Conant,* 2017 ME 142: Law Court affirmed lower court decision that deeded right-of-way was ambiguous, that ambiguities in a deed are to be resolved against the grantor and in favor of the grantee, and that the deeded right-of-way to the grantee exists over the grantor’s paved driveway.

## Tax Law

### Municipal Tax Abatement

*Roque Island Gardner Homestead Corporation v. Town of Jonesport*, 2017 ME 152: Rate differential between structures on the mainland and structures on the island are not unjustly discriminatory.

### Fee vs. Tax

*State of Maine v. Biddeford Internet Corp.*, 2017 ME 204: The State filed a lawsuit against an internet server provider to collect unpaid fees pursuant to a statute requiring users of a federally-supported high speed network to contribute to a broadband sustainability fund. The defendant argued that the assessment was not a fee, but either an invalid business tax or an unconstitutional property tax. The Court set forth the factors to be considered when determining whether an assessment is a fee or a tax: (1) whether the primary purpose is to raise revenue or to further regulatory goals, (2) whether the assessment is paid in exchange for benefits not received by the general public, (3) whether the assessment is voluntary, and (4) whether the assessment is a fair approximation of the cost to the government and of the benefit to the party. The Court held that all four factors favored treating the assessment as a fee and affirmed the judgment of the Superior Court awarding the State the unpaid fees.

## Guardianship

*Guardianship of Alisha K. Golodner*, 2017 ME 54, replaces 2017 ME 31 pursuant to Order Granting Motion for Reconsideration: The Law Court affirmed in part the judgment of the York County Probate Court that denied a parent’s petition to terminate guardianship, and remanded case for reconsideration of the portion of its order requiring payment of guardian ad litem fees as a sanction. The trial court found that the guardian proved, by clear and convincing evidence, that the petitioning parent was unfit to parent. The Court indicated that, at the time of its decision, the Legislature had not made clear what specific standard of proof the existing guardian must meet in proving the petitioning parent’s unfitness in order for the guardianship to continue. The Court, while pointing to cases applying a clear and convincing standard, did not decide the applicable burden, because the court applied a clear and convincing evidence standard. The Legislature has subsequently addressed the applicable standard, requiring clear and convincing evidence (effective January 1, 2019).

## Child Protective Law

*In re Evelyn A.,* 2017 ME 182: The District Court terminated the parental rights of a mother and father to twins born in 2013.  The parents had been convicted in 2005 of manslaughter and assault, respectively, in connection with the death of their first child, who died at age twenty-one months.  The order terminating parental rights was based upon a statutory “rebuttable presumption” that the parents were unfit because they had subjected their first child to treatment that was “heinous or abhorrent to society.”  Subsequently, on the parents’ motion, the District Court vacated the termination because it was persuaded that the parents had been accorded ineffective assistance of counsel years earlier at the five-day-long jeopardy hearing in 2014.  The Department appealed. The Law Court held that the parents had not timely raised the issue of ineffectiveness at the 2014 hearings and that the District Court had abused its discretion by reaching the same.  The Law Court held that, in terminating their parental rights, the trial court had improperly utilized the statutory “presumption” in a manner that shifted the burden of proof from the Department to the parents.  The Law Court instructed lower courts, in future, to treat the statutory rebuttable presumption as a mere “inference,” as in M.R. Evid. 303(b). On remand, the District Court was to determine (1) whether to terminate the parents’ rights without shifting the burden of proof and (2) whether parents’ counsel had represented them effectively at the termination hearing. The order issued after remand was appealed by the parents and argued in May 2018.

*In re Emma B,* 2017 ME 187: A Massachusetts man, the father of a child in foster care in Maine, appealed the District Court’s jeopardy determination.  He argued the court lacked in personam jurisdiction because he “has had no contact with Maine.”  Without reaching the Department’s argument that “a status theory of jurisdiction” applies in child protection proceedings, the Law Court affirmed, holding that personal jurisdiction is not a necessary predicate to the entry of a jeopardy order, which is by its nature “a nonpermanent interim order.”  The Law Court did so after balancing the interests asserted by the out-of-State parent against the State’s parens patriae interest in protecting Maine children from abuse and neglect.

## Preemption

*Puritan Medical Products Co., LLC v. Copan Italia S.P.A.*, 2018 ME 90: The plaintiff is a Maine-based company that produces flocked swabs for collection biological specimens. The defendant is an Italian company that also produces flocked swabs. The defendant sent letters to plaintiff’s distributor and filed a suit in Germany claiming that plaintiff’s swabs violated its U.S. and European patents. Plaintiff filed a complaint in the Maine Superior Court under the Maine’s Action for Bad Faith Assertion of Patent Infringement statute, 14 M.R.S.A. §§ 8701-8702, which seeks to protect companies from “patent trolls” by prohibiting persons from making bad faith assertions of patent infringement. The defendant moved for summary judgment arguing that federal patent law preempted the plaintiff’s claim or, in the alternative, it was entitled to judgment on the merits. The trial court concluded that it had “jurisdiction” to consider plaintiff’s claim and found there was no genuine issue of fact that defendant was entitled to judgment in its favor. Plaintiff appealed the judgment, defendant cross-appealed, challenging the court’s conclusion that the claim was not preempted by federal law. The Law Court first addressed the issue of federal preemption. The Court explained that federal preemption of state law takes three forms: (1) express preemption, when Congress explicitly defines the extent to which its enactments preempt state law; (2) field preemption, when state law attempts to regulate conduct in a field that Congress intended the Federal Government to occupy exclusively; and (3) conflict preemption, where state law stands as an obstacle to the accomplishment of Congress’s objectives. Federal patent law neither fully occupies the field nor expressly preempts state patent laws. Therefore, the Law Court engaged in a conflict preemption analysis, which requires an “as-applied” approach. The Court stated that federal patent law protects a patent holder’s good-faith assertion of patent infringement and its rights, even if the patent holder misconceives those rights. Thus, any state-law claim that conflicts with the federal law’s protection of good faith assertions of patent infringement would be preempted. In other words, any state-law claims against a patent holder for asserting their rights is preempted by federal patent law, unless the state-law complainant can show the patent holder’s assertion of their patent rights was both objectively baseless and made in subjective bad faith. The Maine patent troll statute prohibits a person from making a “bad faith assertion of patent infringement.” The statute does not define the phrase “bad faith assertion”, but does list factors a court may consider in determining whether a defendant did or did not make a “bad faith assertion”. The Court held that, although one of the factors is similar to the federal standard, the Maine patent troll statute does not require that a plaintiff prove that the defendant’s allegations of infringement were objectively baseless or made in subjective bad faith. The Court emphasized that the Maine patent troll statute was not per se preempted as a whole. According to the Court, there may be cases were a plaintiff under the Maine statute will satisfy the two-part test and avoid preemption, but there will also be cases where a plaintiff under the Maine statute will not meet that burden and their claim is therefore preempted. In this case, the Court determined that the defendant’s assertions of its patent rights were not objectively baseless, and therefore, could not be subjectively in bad faith. Thus, the plaintiff’s claim under the Maine patent troll statute was preempted by Federal patent law. Because the Law Court concluded that the plaintiff’s claims were preempted, the Court affirmed that judgment of the trial court on other grounds. The Court noted that the trial court had incorrectly conflated the test for federal preemption with the test for federal jurisdiction.

 Justice Alexander wrote a concurring opinion arguing that the trial court correctly reached the merits of the plaintiff’s claims and correctly granted summary judgment for the defendant. Alexander argues that the majority incorrectly addressed the Federal preemption issue before reaching the merits. Justice Alexander argues that Federal precedent establishes that Federal preemption should only be reached when there is no alternative, independent basis for disposing of a case and that courts should avoid unnecessary constitutional adjudication. According to Justice Alexander, because the trial court correctly disposed of the plaintiff’s claim on the merits, the Court should have affirmed the judgment on those grounds and should not have reached the constitutional question of Federal preemption.

*Bourgoin v. Twin Rivers Paper Co.*, 2018 ME 77: The Workers Compensation Board’s Appellate Division affirmed a hearing officer’s order requiring the appellant employer to compensate the appellee worker for his medical marijuana. The employer raised various objections to the ruling, including, most significantly, that the order was preempted by the federal Controlled Substances Act, which criminalizes possess or distribution of marijuana for any purpose. The Court split. Justice Hjelm, writing for the majority, concluded that the employer would be guilty of criminal aiding and abetting if it complied with the order. It therefore concluded that the order was preempted under a conflict-preemption theory. Justice Jabar’s dissent argues at length that the employer’s compliance with the order would not meet the elements of aiding and abetting and, in any event, federal law-enforcement policies would preclude such a prosecution as a practical matter. Justice Alexander also wrote separately in dissent to emphasize the potential harm to the injured worker as a result of the majority’s ruling.

# notable decisions of the first circuit

*March v. Mills*, 867 F.3d 46 (1st Cir. 2017): Protester, who opposed abortion, brought § 1983 action against state and city officials, asserting facial free speech challenge to provision of Maine Civil Rights Act (MCRA), which barred a person from making noise that can be heard within a building when such noise was made intentionally, following order from law enforcement to cease making it, and with additional intent either to jeopardize the health of persons receiving health services within the building, or to interfere with safe and effective delivery of those services within the building. The United States District Court for the District of Maine, Nancy Torresen, Chief Judge, 2016 WL 2993168, granted protester's motion for preliminary injunction. Officials appealed.

Holding: Reversed**.** The First Circuit held that the MCRA provision was not a content-based restriction on speech, and was thus subject to only intermediate scrutiny. The Court then concluded that the provision survived intermediate scrutiny: that it (1) served a significant governmental interest in protecting patients from disruption, (2) that it was narrowly tailored to serve that interest, and (3) that the provision left only alternative channels for communication.

*McKee v. Cosby*, 874 F.3d 54 (1st Cir. 2017): Alleged sexual assault victim brought defamation action against alleged assailant, a well-known celebrity and entertainer, based on various statements contained in letter written to a newspaper by alleged assailant's attorney, in response to newspaper's publication of alleged victim's accusation. The United States District Court for the District of Massachusetts, No. 3:15-CV-30221, Mark G. Mastroianni, J., 236 F.Supp.3d 427, granted alleged assailant's motion to dismiss. Alleged victim appealed.

Holding: Affirmed. Applying Michigan law, the First Circuit concluded that the alleged victim was a limited-purpose public figure. She was thus required by the First Amendment to show that the defendant acted with actual malice. In this case, the letter made statements that the victim was untruthful, but adequately disclosed the non-defamatory facts upon which the statements were based. Other statements by the defendant were also not defamatory under the First Amendment standard.

*Cullinane v. Uber*, 893 F.3d 54 (1st Cir. 2018): Users of ride-sharing service brought putative class action in state court against service provider, alleging that it violated Massachusetts' consumer protection law by knowingly imposing certain fictitious or inflated fees. Following removal, the United States District Court for the District of Massachusetts, Douglas P. Woodlock, J., 2016 WL 3751652, granted provider's motion to compel arbitration. Users appealed.

Holding: Reversed and remanded**.** The court applied state contract law to determine whether the plaintiff Uber users were reasonably notified of the terms of Uber’s end-user agreement. The court discussed the specific steps a user must follow in order to unearth the end-user agreement and the arbitration provision. It included screenshots of the app in the decision. The court concluded that the design of the app, including the lack of an obvious hyperlink to the user agreement, made the arbitration provision too inconspicuous to constitute reasonable notice to the end user of the arbitration provision. Among other things, the notice was “displayed in a dark gray small-sized non-bolded font against a black background.”

*Doherty v. Merck & Co.*, 892 F.3d 493 (1st Cir. 2018): Patient brought action against device manufacturer alleging that its contraceptive implant and/or its applicator were defective, and against United States under Federal Tort Claims Act (FTCA) alleging that her doctor at federally-funded community health center committed malpractice in unsuccessfully implanting manufacturer's product. The Maine Attorney General intervened in defense of the statute. After the Supreme Judicial Court of Maine, 154 A.3d 1202, answered certified questions, the United States District Court for the District of Maine, D. Brock Hornby, J., 2017 WL 3668415, dismissed complaint, and patient appealed.

Holding: Affirmed.The court concluded that none of plaintiff’s various theories of unconstitutionality were viable. It held that the statute did not violate the Maine Constitution’s open courts provision because that provision does not limit the Legislature’s power to alter or eliminate substantive causes of action. It rejected plaintiff’s First Amendment and right-to-jury-trial claims for the same reason. It rejected plaintiff’s equal protection argument as inadequately briefed. And it found that the law was subject to rational-basis review for plaintiff’s substantive due process claim, under which it was justified as a means of reducing malpractice and other insurance premiums.

*Skrabec v. Town of North Attleboro*, 878 F.3d 5 (1st Cir. 2017): Parents brought § 1983 action against town, alleging that son's constitutional rights were violated when he was arrested and prosecuted for threatening to shoot up his high school based on statements he had made to classmates. After allowing town's unopposed motion for summary judgment, the United States District Court for the District of Massachusetts, Nathaniel M. Gorton, J., 321 F.R.D. 46, denied parents' motion to alter judgment. Parents appealed.

Holding: Affirmed.Parents' belief that settlement was forthcoming, as reason for not responding for town's summary judgment motion, was not excusable neglect, as would warrant relief from judgment. Plaintiff should have obtained opposing counsel’s express consent and filed a motion with the Court.

*Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018): Former city firefighter filed Title VII action against city, its fire department, and union asserting claims for gender-based hostile work environment discrimination and retaliation. The United States District Court for the District of Rhode Island entered judgment on jury verdict in firefighter's favor, awarded emotional and front pay damages, and denied city's motion for judgment as matter of law. City appealed. Scathing opinion.

Holding: Affirmed. (1) district court did not abuse its discretion in admitting evidence of incident of sexual harassment at an out of workplace event where all colleagues and supervisors were present as non-workplace incidences are admissible if they cast light on the motivations, pervasiveness, and/or severity of the harassment; (2) transcript of state court proceeding was admissible as non-hearsay, as out-of-court statements are considered “nonhearsay” when they are offered not for the truth of the matter but for some other purpose; (3) there was sufficient evidence to support jury's finding that firefighter was subjected to hostile work environment under her sex-plus claim; (4) district court was not required to instruct jury that firefighter could not recover if she was harassed solely because of her sexual orientation; (5) district court did not commit reversible error as result of its failure to instruct jury that any front pay award needed to be reduced to present day value; and (6) there was sufficient evidence to support front pay award of $545,000.

*Morales-Melecio v. United States (Dep't of Health & Human Servs.)*, 890 F.3d 361 (1st Cir. 2018): Survivors of patient who died while under care at federally-funded hospital brought wrongful death action against the United States under the Federal Tort Claims Act (FTCA). The United States District Court for the District of Puerto Rico entered summary judgment for the government on ground that action was time-barred. Survivors appealed, arguing that their FTCA claims did not begin to accrue until they received the autopsy report.

Holding: Affirmed**.** Cause of action accrued, and statute of limitations began to run, when survivors received the death certificate, rather than when they received the autopsy report because that is when they would be aware of the probable cause and existence of the injury and receive notice to seek further advice from the medical and legal communities to decide whether they have a viable cause of action.

*Transupport, Inc. v. Comm'r of Internal Revenue*, 882 F.3d 274 (1st Cir. 2018): Taxpayer corporation petitioned for review of Commissioner of Internal Revenue's notice of deficiency that reduced corporation's cost of goods sold, reduced deductions it took for compensation paid to employee-shareholders, and assessed a 20% accuracy-related penalty. The United States Tax Court, 2016 WL 6900913, upheld Commissioner's decision. Corporation appealed.

Holding: Affirmed. (1) Tax Court properly omitted consideration of the return on equity enjoyed by corporation's shareholders when determining whether the compensation deducted by corporation from its income was reasonable; (2) burden remained on corporation to prove by a preponderance of the evidence that the Commissioner's tax assessment was erroneous; (3) Tax Court's finding that corporation failed to meet its burden of proof regarding the reasonableness of its deductions for officers' compensation was supported by the record; (4) Tax Court's adoption of Commissioner's 75% gross profit percentage to calculate corporation's profit had sufficient support in the record; and (5) Tax Court did not clearly err in assessing 20% accuracy-related penalty against corporation.

*Benenson v. Comm'r of Internal Revenue*, 887 F.3d 511 (1st Cir. 2018): Corporate and individual taxpayers petitioned for review of IRS determination that payments made by corporate taxpayer were not domestic international sales corporation (DISC) commission payments, but dividends to shareholders followed by contributions to Roth individual retirement accounts (Roth IRAs), which resulted in tax deficiencies and penalties. The Tax Court, 2015 WL 3943219, issued partial summary judgment for IRS. Individual taxpayers appealed, contending (1) that the Sixth Circuit's ruling in *Summa Holdings, Inc. v. Comm'r*, 109 T.C.M. (CCH) 1612 (2015) (where the Tax Court found it was appropriate for the Commissioner to recharacterize the transaction under the substance over form doctrine because the transaction's sole purpose was to “shift[ ] millions of dollars into Roth IRAs in violation of the statutory contribution limits”) prevents the court from making an independent determination of the issues in this case, invoking the principles of claim preclusion, issue preclusion, and comity.

Holding: Reversed**,** the transaction violates neither the letter nor purpose of the relevant statutory provisions. (1) claim and issue preclusion did not bar it from determining whether taxpayers owed excise tax liabilities because each tax year is a different cause of action even when the transaction being disputed and taxpayer is the same and here, claim preclusion does not apply. Since determining whether plaintiffs owe excise tax liabilities for the year 2008, not whether Summa Holdings owes a corporate tax liability for that year, James III and Clement cannot show that they are in privity with Summa Holdings. Comity is not a rule of law, but one of practice, convenience, and expediency and a circuit need not follow other circuits' decisions where “there appear cogent reasons for rejecting them”; (2) substance over form doctrine did not apply to dividends paid to taxpayers' Roth IRA accounts and, thus, taxpayers were not liable for excise tax for contributions in excess of Roth IRA contribution limits.

*Audette v. Town of Plymouth, MA*, 858 F.3d 13 (1st Cir. 2017): Police officer brought action in state court against town, police department, and various employees, alleging violations of the Americans with Disabilities Act (ADA) and Massachusetts law for failure to accommodate her request for transfer to another position in the Department after she sustained an on-the-job injury. Following removal, the United States District Court for the District of Massachusetts granted summary judgment to defendants. Officer appealed.

Holding: Affirmed. (1) officer's request for transfer after suffering on-the-job injury was not a reasonable accommodation as she offered no evidence that there were any clerical vacancies when she asked for an accommodation and it was her burden to show as much; (2) officer waived any ADA retaliation claim because she did not address any ADA retaliation claims in her memoranda filed in opposition to summary judgment; and (3) officer's receipt of a reprimand letter was not an adverse employment action.

*Dixon v. United States*, No. 17-1069, 2018 WL 1747728 (1st Cir. Apr. 11, 2018): Following affirmance on direct appeal of defendant's conviction of being a felon in possession of a firearm and ammunition, 787 F.3d 55, defendant filed a motion to vacate or correct his sentence. The United States District Court for the District of Massachusetts entered order of dismissal. Defendant appealed.

Holding: Affirmed, equitable tolling of limitations period was not applicable to render timely defendant's motion, filed one day late. “Petitioner has not proffered any facts sufficient to justify his tardiness. He has not in any way attempted to justify his late filing. Nor does he give any reasons, compelling or otherwise, that would support a decision to excuse his tardiness. To cinch matters, we note that the issue of timeliness was clearly raised by the government both in the district court and in this court, yet the petitioner's briefing is wholly silent on the subject. This ‘paucity of information’ itself erects an insurmountable barrier for the petitioner. He has had ample opportunity to attempt to justify his tardiness, and his silence speaks volumes. Consequently, the one-year limitations period controls.” (citation omitted).

*Town of Westport v. Monsanto Co.*, 877 F.3d 58 (1st Cir. 2017): Town brought products liability action against supplier of polychlorinated biphenyls (PCBs) component of caulk used in construction of town middle school alleging property damage caused by PCBs contamination, and asserting claims for breach of implied warranty of merchantability for failure to warn and negligent marketing. The United States District Court for the District of Massachusetts, 2017 WL 1347671, granted summary judgment in favor of supplier. Town appealed

Holding: Affirmed, standard of foreseeability, as element of failure to warn claim, was whether supplier should have reasonably known at time of construction that there was risk PCBs would volatilize out of caulk at levels harmful to human health, presence of imperceptible chemical is insufficient to prove property damage.