APPENDIX

APPENDIX A

SUPREME COURT

STATE OF CONNECTICUT

PSC-190384

CHIEF DISCIPLINARY COUNSEL

v.

HAROLD H BURBANK II

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

The defendant's petition for certification to appeal from the Appellate Court, 195 Conn App 416 (AC 41805), is denied.

D'AURIA, J., did not participate in the consideration of or the decision on this petition.

Harold Burbank, self-represented, in support of the petition.

Decided March 11, 2020

By the Court,

/s/
Peter D. Keane
Assistant Clerk - Appellate

Notice Sent: March 11, 2020
Petition Filed: February 20, 2020
Clerk, Superior Court, HHDCV186088744S
Hon. David M. Sheridan
Clerk, Appellate Court
Reporter of Judicial Decisions
Staff Attorneys' Office
Counsel of Record

APPENDIX B

CHIEF DISCIPLINARY COUNSEL *v.* HAROLD H. BURBANK II
(AC 41805)

Prescott, Bright and Sheldon, Js.

Syllabus

The respondent attorney appealed to this court from the judgment of the trial court suspending him from the practice of law for one year. The respondent, who was admitted to practice law in both Maine and Connecticut, had been involved in civil litigation in Maine involving waterfront property that he owned in joint tenancy with several members of his family. After the trial court rendered judgment in that action, the respondent appealed as a self-represented party to the Maine Supreme Judicial Court, which affirmed the judgment of the Maine Superior Court and concluded that the respondent had engaged in misconduct while prosecuting the appeal. Accordingly, sanctions were imposed against the respondent in the form of an award of attorney's fees and costs. Subsequently, Maine's Board of Overseers of the Bar suspended the respondent from practicing law in Maine for one year on the ground that he had violated Maine's Rules of Professional Conduct. Thereafter, in the present case, the petitioner, the Chief Disciplinary Counsel, filed an application seeking commensurate disciplinary action against the respondent pursuant to the applicable rule of practice (§ 2-39). Subsequently, the trial court found that commensurate discipline was appropriate with respect to the respondent's Connecticut law license and ordered the respondent suspended from the practice of law in Connecticut for one year. On appeal, the respondent claimed, inter alia, that because he was a self-represented party at the time he engaged in the alleged misconduct that led to his suspension in Maine, the disciplinary action against his law license in Maine, and by extension, in Connecticut, violated his right as a citizen to petition the government for a redress of grievances as protected by the first amendment to the federal constitution and violated his rights to due process and equal protection under the fourteenth amendment to the federal constitution. *Held:*

1. The trial court did not err in determining that the respondent failed to demonstrate by clear and convincing evidence that the reciprocal suspension of his law license was a violation of his federal constitutional rights to petition the government without the fear of reprisal; the respondent failed to cite to any legal authority in which a court has ruled that the enforcement of attorney disciplinary rules on an attorney engaging in self-representation before a court implicates that attorney's right to petition as protected by the first amendment, nor did he cite to any authority for the proposition that an attorney acting as a self-represented litigant should be held to a different standard of professional conduct than that applied to an attorney acting on behalf of a client, and the respondent's attempt to differentiate for disciplinary and constitutional purposes between an attorney's actions taken on behalf of a client and actions taken in representing himself in his role as a citizen was unavailing, as this court has recognized that an attorney, as an officer of the court, must always conduct himself or herself in accordance with the Rules of Professional Conduct, the respondent had the same professional obligation to the court when representing himself as when representing a client, and the fact that he appeared in a self-represented capacity did not lesson his duty to comply with those rules.
2. The respondent could not prevail on his claim that the trial court's finding that he failed to demonstrate by clear and convincing evidence a cognizable defense to the Maine disciplinary proceedings was clearly erroneous; although the failure to receive due process in a disciplinary proceeding in another jurisdiction would be a proper defense to the imposition of reciprocal discipline in Connecticut, there was nothing in the record to demonstrate that the respondent raised a colorable claim that he was denied due process in the Maine disci[illegible]

his pleadings before the trial court and to this court on appeal, were circuitous, repetitious, and lacked a cogent discussion that was logically and legally tethered to the issue under consideration, which made it difficult to evaluate whether his claim was properly raised and preserved for appellate review, and even if the claim were deemed to be preserved, much of the veritable laundry list of constitutional arguments and alleged violations of rights, including fleeting references to the ninth amendment, the supremacy clause, the commerce clause, and the full faith and credit clause of the United States constitution, consisted of no more than generalized statements of legal propositions, devoid of any cogent analysis or application of the facts to any of the asserted constitutional doctrines relative to the subject matter at hand, namely, the reciprocal enforcement of rules governing attorney professional misconduct.

Argued October 17, 2019—officially released January 21, 2020

Procedural History

Presentment by the petitioner for alleged professional misconduct by the respondent, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Sheridan, J.*; judgment suspending the respondent from the practice of law for twelve months, from which the respondent appealed to this court. *Affirmed.*

Harold H. Burbank II, self-represented, the appellant (respondent).

Brian B. Staines, chief disciplinary counsel, for the appellee (petitioner).

from the trial court's decision. Although the appeal was filed initially by another attorney, she later withdrew her appearance, and the respondent continued prosecuting the appeal as a self-represented party. The Maine Supreme Judicial Court issued an opinion in which it affirmed the judgment of the Maine Superior Court and, more importantly for the issues now before this court, concluded that the respondent had engaged in misconduct while prosecuting the appeal. The court determined that this misconduct warranted the imposition of sanctions against the respondent in the form of an award of attorney's fees and costs.

The Maine Supreme Judicial Court summarized its decision as follows: "The trial court issued a thorough, carefully considered judgment, supported by extensive findings and conclusions and accurate legal analysis. Because the court did not err when it granted a prescriptive easement or ordered partition by sale of the property, and because the remainder of [the respondent's] arguments are either improperly raised, meritless, or both, we affirm the judgment and, on separate motions of the [n]eighbors and the [c]o-owners, we order sanctions against [the respondent] pursuant to [Me. R. App. P. 13 (f)]."[5] *Lincoln* v. *Burbank*, 147 A.3d 1165, 1169 (Me. 2016), cert. denied, U.S. , 137 S. Ct. 1338, 197 L. Ed. 2d 520 (2017).

In discussing its decision to sanction the respondent, an action that the court indicated it reserved for only "egregious cases"; (internal quotation marks omitted) id., 1176; the Maine Supreme Judicial Court made the following findings regarding what the court viewed as the respondent's "repeated misconduct in prosecuting [the] appeal." Id., 1179. "[The respondent] initiated the handling of this appeal with the same cavalier attitude that he demonstrated in his handling of the steps at issue in this case. He did not communicate with the appellees in order to reach some agreement on the contents of the [a]ppendix; he attempted to include in the [a]ppendix documents that were not part of the record below; he failed to respond to a direct order requiring him to explain how he, as the appellant, could purport to represent some of the appellees; he filed a brief 'bound' with twine; and as noted above, he failed to comply with [Maine's rules of appellate procedure by] filing a second reply brief without permission.

"[The respondent's] brief on appeal demonstrated this same contumacious attitude, a fact he apparently recognized, as, in his request for oral argument, Burbank asserted that some of his filings before us 'were not properly edited before being submitted to the court,' and argued for a chance to 'correct and clarify these errors, so the court may be certain that [the a]ppellant

included statements that further highlight the impropriety of his actions in this appeal. Beyond conceding the impropriety of some statements in his several appellate briefs . . . he proposed to represent the views of the other Burbank [d]efendants [who had] declined to have [the respondent] represent them on appeal and are not participating in this appeal. [The respondent], as a member of the Maine bar, must understand that he cannot represent on appeal persons who have declined to appeal and declined to have him represent them on appeal[6]. . . .

"In his request for oral argument, [the respondent] also proposed to testify or otherwise present facts to clarify [trial testimony that] the trial court found, in part, to be contradictory and not credible. There can be no question that presenting new facts or other evidence by brief or oral argument is not proper appellate advocacy. . . . [The respondent's] several briefs include a number of statements about facts that do not appear in the trial court record and thus are improperly offered for consideration on appeal. . . . [The respondent] also filed a "Supplement of Legal Authorities" that includes evidentiary materials and fact statements not in the trial court record, including an advocacy document that [the respondent] had filed with a private mediator that, as a document apparently used in settlement efforts, could not have been used at trial pursuant to [Maine's Rules of Evidence §] 408 (b), and, consequently, was improperly filed with the appeal documents.

"Beyond his purported representation of people who do not wish to be represented by him, his failure to comply with the logistical rules, his attempt to present new evidence at an appellate proceeding, and his contentious and unprofessional tone, [the respondent] makes several arguments in support of his appeal that are frivolous and devoid of legal authority to support them.

"Asserting propositions of law not supported by statute or precedent, absent a good faith effort to evolve the law, is an indication of frivolousness that can subject a party to sanctions. . . .

* * *

"Throughout the various stages of this appeal, in his briefs, his Supplement of Legal Authorities, his request for oral argument, and his responses to opposing parties' motions, [the respondent] has consistently disregarded standards of law and practice that govern appellate review. He has asserted legal arguments that are frivolous and baseless, and, contrary to governing precedent, he has sought to have us consider and decide

role of the trial court, unfair to and expensive for the other parties, and contrary to Maine appellate law. [The respondent]'s frivolous and baseless actions are egregious conduct that has confused the issues on appeal, delayed final resolution of this matter, and significantly driven up the costs to other parties. Although the actions taken by [the respondent] would be concerning if he were a litigant unschooled in law, we note that [the respondent] is not only an attorney, but an attorney who is licensed to practice in Maine. He is, therefore, presumed to be familiar with our case law, our statutes, and our [r]ules; his actions demonstrate either a complete lack of understanding or an intentional flouting of those guides.

* * *

"As with other rules, the rules regarding sanctions and determinations that an appeal is frivolous are applied equally to represented and unrepresented parties. . . . Although he purports to speak for or represent the interests of parties who are not participating in this appeal, and although he is an attorney, we consider [the respondent] to be unrepresented for purpose of our consideration of sanctions. However, attorneys who represent themselves on appeal are assumed to be aware of court rules and their ethical obligations in prosecuting their own appeals." (Citations omitted; footnote added.) *Lincoln* v. *Burbank*, supra, 147 A.3d 1176-79. The Maine Supreme Judicial Court concluded on the basis of what it described as "repeated misconduct in prosecuting this appeal" that the respondent should be sanctioned, and it ordered the respondent to pay each of the plaintiff neighbors and nonBurbank defendant co-owners of the property $5,000 toward their attorney fees incurred to defend the appeal as well as treble costs. Id.

On the basis of this conduct and following a review of those findings by a Maine grievance commission panel, Maine's Board of Overseers of the Bar (board) filed an information in accordance with Rule 13 of Maine's Disciplinary Rules of Procedure in which it alleged that the respondent had violated multiple provisions of Maine's Rules of Professional Conduct. In accordance with Maine procedural rules, on October 18, 2017, Justice Robert Clifford, an active retired justice of the Maine Supreme Judicial Court, conducted a de novo testimonial hearing. Justice Clifford, on January 25, 2018, filed a memorandum of decision suspending the respondent from practicing law in Maine for a period of twelve months. See *Board of Overseers of the Bar* v. *Burbank*, BAR-17-12 (January 29, 2018) (Clifford, J.). Justice Clifford found on the basis of the Maine Supreme Judicial Court's factual findings and conclu-

had violated Rules 1.1, 1.3, 3.1, 3.4 and 8.4 of Maine's Rules of Professional Conduct, which, like Connecticut's rules, adopt with modifications the American Bar Association's Model Rules of Professional Conduct.[7] See 1 & 2 G. Hazard, W. Hodes & P. Jarvis, The Law of Lawyering, (4th Ed., 2019), § 1.15 & Appendix B.

In his opinion, Justice Clifford also observed that the respondent's actions continued "to be problematic" during the disciplinary proceedings. *Board of Overseers of the Bar* v. *Burbank*, supra, BAR-17-12. Specifically, the court found the following: "In his answer to the within information in this case, [the respondent] has admitted to making errors in applying and interpreting the applicable rules of court, but has asserted that some rules were not published, and thus he could not interpret or apply them; some rules were ambiguous; and his failure to file timely responses was due to his suffering a stroke. [The respondent] has failed to pay the $10,000 in sanctions imposed on him by the [Maine Supreme Judicial Court], nor has he fully paid the $20,000 judgment against him imposed by the [Maine Superior Court] in the underlying litigation, and has since filed a Chapter 7 bankruptcy action in the Bankruptcy Court in Connecticut. [The respondent] also did not properly offer all the exhibits at this bar discipline hearing that he made reference to in his post hearing submission. In short, he does not appear to have a good grasp of the procedural rules of litigation."[8]

In determining the appropriate sanction to impose for the respondent's violations of the identified rules of professional conduct, Justice Clifford considered both aggravating and mitigating factors. Specifically, the court stated: "There are *many* aggravating factors in this case. The misconduct at issue is very serious. [The respondent's] conduct in the underlying litigation, and especially in the appeal in *Lincoln* [*v. Burbank*, supra, 147 A.3d 1165], has caused substantial injury to the parties involved in the litigation as well as a waste of judicial resources. Although this court does not find that all of [the respondent's] misconduct was deliberate, as a practicing attorney, he certainly should have known that his conduct was far afield from the standards expected of a reasonably competent attorney, and that his actions constituted misconduct.

"There are *some* mitigating factors that the court feels compelled to consider. [The respondent] has no prior disciplinary record in Maine, he was under great stress due to his father's poor health, and he himself has suffered from a stroke and is not in good health. There is also evidence that [the respondent] provided competent legal representation in Maine in the past, namely, in the effort by Ralph Nader to be placed on the Maine ballot

The sanction to be imposed must be significant because of the serious misconduct that is involved here, and must require that [the respondent] file a petition for reinstatement in order for him to be reinstated as an attorney in good standing." (Emphasis in original.) Id. Having considered both the aggravating and mitigating factors, Justice Clifford imposed a twelve month suspension from the practice of law in Maine, effective as of the date of the decision, with the attendant obligation that the respondent must petition for reinstatement in accordance with Maine's Disciplinary Rules of Procedure.

On February 6, 2018, having learned of the respondent's suspension in Maine, Connecticut's Chief Disciplinary Counsel filed an application in the Connecticut Superior Court pursuant to Practice Book § 2-39[9] seeking commensurate disciplinary action against the respondent's Connecticut law license. The application alleged that the respondent was admitted to the Connecticut bar on June 10, 1994, and that, on January 24, 2018, he had been suspended from the practice of law in Maine for a period of twelve months. A copy of the Maine order was attached to the application.

The respondent filed an answer in response to the application in accordance with Practice Book § 2-39, which he later amended. He also filed a number of exhibits with the court. In his amended answer, the respondent admitted to his twelve month suspension in Maine but argued that reciprocal action by Connecticut was unwarranted. The respondent principally argued that he should never have been subject to disciplinary proceedings in Maine because he had appeared before the Maine Supreme Judicial Court in *Lincoln* as a self-represented Connecticut citizen, not as a licensed attorney, and that any application of the rules of professional responsibility to his conduct while prosecuting the appeal as a self-represented party necessarily implicated and violated his rights under the first and fourteenth amendments to the United States constitution to petition the government without threat of punishment, reprisal or prior restraint. According to the respondent, any reciprocal disciplinary proceeding in Connecticut stemming from the allegedly unconstitutional Maine disciplinary action similarly would be unconstitutional.

The matter was assigned for a hearing before the court, *Sheridan, J.* At the hearing, the court afforded the respondent ample opportunity to present witnesses as well as additional evidence pertaining both to the underlying litigation in Maine and to the resulting disciplinary proceedings. On June 4, 2018, the court issued a decision concluding that the respondent's arguments

answer. The court found that commensurate discipline was appropriate under the circumstances and ordered the respondent suspended from the practice of law in Connecticut for a period of twelve months, retroactive to January 24, 2018. The court further ordered that, to be reinstated to the bar at the conclusion of his suspension, the respondent was required to apply for reinstatement in accordance with Practice Book § 2-53. This appeal followed.[10]

We begin with governing principles of law, including our standard of review. "Attorney disciplinary proceedings are for the purpose of preserving the courts of justice from the official ministration of persons unfit to [practice] in them. . . . An attorney as an officer of the court in the administration of justice, is *continually* accountable to it for the manner in which he exercises the privilege which has been accorded him. His admission is upon the implied condition that his continued enjoyment of the right conferred is dependent upon his remaining a fit and safe person to exercise it, so that when he, *by misconduct in any capacity*, discloses that he has become or is an unfit or unsafe person to be entrusted with the responsibilities and obligations of an attorney, his right to continue in the enjoyment of his professional privilege may and ought to be declared forfeited. . . . Therefore, [i]f a court disciplines an attorney, it does so not to mete out punishment to an offender, but [so] that the administration of justice may be safeguarded and the courts and the public protected from the misconduct or unfitness of those who are licensed to perform the important functions of the legal profession." (Citations omitted; emphasis added; internal quotation marks omitted.) *Statewide Grievance Committee* v. *Spirer*, 247 Conn. 762, 771–72, 725 A.2d 948 (1999).

Practice Book § 2-39 sets forth the procedures by which Connecticut courts may impose commensurate reciprocal discipline on an attorney admitted to the Connecticut bar who has been disciplined for professional misconduct in another jurisdiction. See footnote 9 of this opinion; *In re Weissman*, 203 Conn. 380, 383, 524 A.2d 1141 (1987). Section 2-39 compels disciplinary counsel, upon learning of an attorney's discipline occurring in another jurisdiction, to file a copy of the disciplinary order with the Superior Court, which then serves an order to show cause directing the attorney to file an answer "admitting or denying the action in the other jurisdiction and setting forth, if any, reasons why commensurate action in [Connecticut] would be unwarranted." Practice Book § 2-39 (b). The certified copy of the other jurisdiction's disciplinary order constitutes prima facie evidence that the order entered "and that the findings contained therein are true." Practice

by clear and convincing evidence." Practice Book § 2-39 (c).

"[C]lear and convincing proof denotes a degree of belief that lies between the belief that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution. . . . [The burden] is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist. . . . Our Supreme Court has stated that the clear and convincing standard is a demanding standard that should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory." (Citations omitted; internal quotation marks omitted.) *Shelton* v. *Statewide Grievance Committee*, 85 Conn. App. 440, 443–44, 857 A.2d 432 (2004), aff'd, 277 Conn. 99, 890 A.2d 104 (2006).

Because whether a respondent has established a defense to a disciplinary order by clear and convincing evidence presents a question of fact for the trier, it follows that our review of a court's finding that a respondent has failed to meet that high burden of persuasion is limited to whether that finding is clearly erroneous.[11] See, e.g., *Melillo* v. *New Haven*, 249 Conn. 138, 150, 732 A.2d 133 (1999) (reviewing under clearly erroneous standard court's finding that appellant failed to meet burden of proof); *Jazlowiecki* v. *Cyr*, 4 Conn. App. 76, 77, 492 A.2d 516 (1985) (same); *Ruggiero* v. *East Hartford*, 2 Conn. App. 89, 96, 477 A.2d 668 (1984) (same).[12] Under this highly deferential standard, "[w]e do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported. . . . A finding of fact is clearly erroneous when there is no evidence to support it . . . or when although there is evidence in the record to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Depart. of Transportation* v. *Cheriha, LLC*, 155 Conn. App. 181, 191–92, 112 A.3d 825 (2015).

Next, before turning to our discussion of the claims raised by the respondent on appeal, it is helpful to acknowledge what claims the respondent has chosen not to raise and, thus, what is not properly before us. The respondent has not claimed that the misconduct in which he was found to have engaged by the Maine

to have violated by Justice Clifford. He has not claimed that the same misconduct or actions, if taken in Connecticut, would not have constituted violations of Connecticut's corresponding rules of professional conduct and, thus, that reciprocal discipline would be inappropriate. Finally, the respondent does not claim that the trial court, having concluded that reciprocal discipline was warranted in this jurisdiction, abused its discretion by imposing a one year suspension rather than some lesser sanction.[13] The respondent argues only that the court should not have imposed *any* reciprocal discipline because, by doing so, it allegedly violated a myriad of constitutional rights.

Finally, to the extent that the respondent seeks to attack collaterally the underlying Maine disciplinary judgment, we, of course, have no appellate jurisdiction to alter the Maine judgment. See General Statutes § 51-197a (limiting appellate jurisdiction of this court to appeals from final judgments of our Superior Court unless otherwise provided by statute). Here, our review is limited as to whether the trial court properly rendered its judgment in accordance with the dictates of Practice Book § 2-39 (c). Although the respondent was free to seek appellate review of the Maine disciplinary judgment by filing an appeal with the Maine Supreme Judicial Court; see *Board of Overseers of the Bar* v. *Condon*, 940 A.2d 1065 (Me. February 5, 2008); it does not appear from the record presented to us that the respondent availed himself of such review, arguably waiving any appellate review he may have had with respect to the Maine disciplinary judgment. See *Sousa* v. *Sousa*, 322 Conn. 757, 771–72, 143 A.3d 578 (2016) ("collateral attack on a judgment is a procedurally impermissible substitute for an appeal").

I

The respondent first claims that the court improperly determined that he had failed to prove by clear and convincing evidence that the reciprocal suspension of his law license, which was based on his actions while prosecuting an appeal as a self-represented party, effectively violated his first and fourteenth amendment rights to petition the government without the fear of reprisal. As part of this claim, the respondent also suggests that his statements and arguments made while prosecuting the appeal before the Maine Supreme Judicial Court were protected political speech that could not have formed a proper basis for disciplinary proceedings. In other words, the respondent has raised arguments implicating both the petition and the free speech clause of the first amendment.[14] The petitioner responds that we should decline to review this claim entirely because the respondent has not adequately briefed it. The peti-

"frivolous," and "devoid of legal authority to support them," was protected speech exempt from the application of disciplinary rules, or that his status as a self-represented party should have precluded any finding that he violated the Rules of Professional Conduct. On the basis of the briefing and record provided, we conclude that the respondent's arguments are unpersuasive and, for the reasons that follow, the court's finding that the respondent failed to meet his burden of demonstrating a defense to the Maine disciplinary proceeding by clear and convincing proof was not clearly erroneous.

At their core, the respondent's constitutional arguments, to the extent that they are discernable, primarily focus on the fact that he was representing himself before the Maine Supreme Judicial Court in the *Lincoln* matter and that, because he allegedly was not acting in his capacity as an attorney but, rather, in his capacity as a private citizen, he simply was not accountable to the rules of professional conduct or related disciplinary procedures. According to the respondent, under these circumstances, holding him accountable to standards applicable to attorneys unfairly infringed on first amendment rights held by ordinary citizens.

There is no dispute that a person's ability to have access to courts to litigate civil disputes is among the rights protected under the first amendment's petition clause. See *Borough of Duryea* v. *Guarnieri*, 564 U.S. 379, 387, 131 S. Ct. 2488, 2494, 180 L. Ed. 2d 408 (2011) ("the [p]etition [c]lause [of the first amendment] protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes"]. In raising his first amendment arguments before the trial court, however, the respondent failed to cite to any case, from any jurisdiction, in which a court has ruled that the enforcement of attorney disciplinary rules on an attorney engaging in self-representation before the court implicates that attorney's right to petition as protected by the first amendment. The respondent has not remedied this deficiency in his appellate brief.[15] Additionally, the respondent cites no authority for the proposition that an attorney acting as a self-represented litigant should be held to a different standard of professional conduct than that applied to an attorney acting on behalf of a client.

Contrary to the assertions of the respondent, this court previously has stated that the "Rules of Professional Conduct bind attorneys to uphold the law and to act in accordance with high standards *in both their personal and professional lives.*" (Emphasis added.) *Statewide Grievance Committee* v. *Egbarin*, 61 Conn. App. 445, 450, 767 A.2d 732, cert. denied, 255 Conn. 949, 769 A.2d 64 (2001). In support of that statement, we relied on language found in the preamble to our Rules

sion, is a representative of clients, an officer of the legal system and *a public citizen having special responsibility for the quality of justice.*" (Emphasis added.)

In *In the Matter of Presnick*, 19 Conn. App. 340, 345–46, 563 A.2d 299, cert. denied, 213 Conn 801, 567 A.2d 833 (1989), an en banc panel of this court considered whether we had the authority to suspend an attorney from filing papers and appearing before this court for disobeying an order in a case in which the attorney was representing himself. We concluded that we had the authority to discipline an attorney despite the fact that the underlying behavior of the attorney resulting in the sanction occurred while the attorney was appearing as a self-represented party. Id., 341–42. In so holding, we indicated that "[a]lthough misconduct of an attorney may be unconnected with representation of another as a member of the bar, punishment may be imposed for that misconduct because it is an indication of a general unfitness to practice law. . . . Whether an attorney represents himself or not, his basic obligation to the court as an attorney remains the same. He is an officer of the court no matter who is the client. Disciplinary proceedings not only concern the rights of the lawyer and the client, but also the rights of the public and the rights of the judiciary to ensure that lawyers uphold their unique position as officers and commissioners of the court." Id., 344-45.

Our statements in *Egbarin* and *In the Matter of Presnick* recognize that an attorney always must conduct himself or herself in accordance with professional standards and belie the respondent's arguments that seek to differentiate for disciplinary and constitutional purposes between an attorney's actions taken on behalf of a client and actions taken in representing himself in his role as a citizen. Our Supreme Court similarly has stated that an attorney, as an officer of the court, "is *continually* accountable to [the court] for the manner in which he exercises the privilege which has been accorded him" and attorney disciplinary proceedings are appropriate with respect to "misconduct *in any capacity*," which necessarily encompasses actions taken by attorneys who are engaged in self-representation. (Emphasis added.) *Statewide Grievance Committee* v. *Spirer*, supra, 247 Conn. 771–72. Said another way, it is the unique position attorneys enjoy that makes it important that they, *at all times*, conduct themselves in accordance with the Rules of Professional Conduct; see *Statewide Grievance Committee* v. *Rozbicki*, 211 Conn. 232, 237–38, 558 A.2d 986 (1989); and the mere fact that an attorney may be appearing before a tribunal in a self-represented capacity does not lessen his duty to comply with such rules. If, through his actions, an attorney demonstrates that he cannot be "entrusted with

wide Grievance Committee v. *Spirer*, supra, 772.

Our conclusion that the respondent had the same professional obligation to the court when representing himself as when representing a client undermines the central construct in his first amendment challenge to the imposition of reciprocal discipline on him in this case. He advances no factual or legal basis for reaching any other conclusion. To avoid reciprocal discipline, it is the respondent who has the burden to demonstrate the validity of some defense; it is not the duty of the court or bar counsel to negate every posited defense. His arguments on appeal unquestionably fall short of convincing us that the trial court's finding that he failed to prove by clear and convincing evidence a defense premised on a violation of first amendment rights was clearly erroneous.

II

The respondent also claims that, under the circumstances of this case, the Maine court's disciplinary proceedings violated his rights to due process and equal protection as protected by the fourteenth amendment to the constitution of the United States, and that this violation should have barred the imposition of reciprocal discipline by the Connecticut trial court. The petitioner argues that the respondent failed to raise this claim in the trial court and, even if raised, that he failed to provide the trial court with a complete record adequate to review the claim. Similar to the respondent's prior claim, he has failed to demonstrate with respect to this claim that the trial court's finding that he failed to prove *any* defense raised in his answer by clear and convincing evidence was clearly erroneous.

"Because a license to practice law is a vested property interest, an attorney subject to discipline is entitled to due process of law. . . . In attorney grievance proceedings, due process mandates that [b]efore discipline may be imposed, an attorney is entitled to notice of the charges, a fair hearing and an appeal to court for a determination of whether he or she has been deprived of these rights in some substantial manner." (Citation omitted; internal quotation marks omitted.) *Statewide Grievance Committee* v. *Egbarin*, supra, 61 Conn. App. 456. Accordingly, if proven by clear and convincing evidence, the failure to receive due process in a disciplinary proceeding in another jurisdiction certainly would be a proper defense to the imposition of reciprocal discipline in Connecticut.

Here, however, nothing in the record before us suggests that the respondent raised even a colorable claim that he was denied due process in the Maine disciplinary proceedings. The respondent makes no credible claim that he lacked sufficient notice or an opportunity to be

on appeal, are circuitous, repetitious, and lack a cogent discussion that is logically and legally tethered to the issue under consideration. This makes it all the more difficult to evaluate whether his claim properly was raised and preserved for appellate review. For example, a significant portion of his answer to the application for reciprocal discipline focused on the Maine Supreme Judicial Court's resolution of the merits of the *Lincoln* matter rather than discussing the court's findings of misconduct by the respondent that formed the basis of the court's sanction orders and the subsequent disciplinary proceedings. Further, as the petitioner argues, the respondent failed to provide the trial court with a complete record of the appellate proceedings before the Maine Judicial Court.[16]

Even if we deem his claim preserved, however, much of the veritable laundry list of constitutional arguments and alleged violations of rights, including fleeting references to the ninth amendment, the supremacy clause, the commerce clause, and the full faith and credit clause of the United States constitution, consists of no more than generalized statements of legal propositions, devoid of any cogent analysis or application of the facts to any of the asserted constitutional doctrines relative to the subject matter at hand: the reciprocal enforcement of rules governing attorney professional conduct. Having thoroughly reviewed the record and the briefs, we are unpersuaded that the court's finding that the respondent failed to demonstrate by clear and convincing evidence a cognizable defense to the Maine disciplinary proceedings was clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] The United States Court of Appeals for the First Circuit and the United States District Court for the District of Connecticut each subsequently imposed a one year reciprocal suspension of the respondent's right to practice before them on the basis of the same Maine disciplinary action. See *In re Burbank*, United States Court of Appeals, Docket No. 19-8010 (1st Cir. Oct. 28, 2019); *In re Burbank*, United States District Court, Docket No. 3:18-GP-00006 (MPS) (D. Conn. Nov. 8, 2018).

[2] The respondent also claims that the disciplinary proceedings violated various rights afforded to him under the Connecticut constitution. The respondent, however, has failed to analyze adequately his state constitutional claims because, in his appellate brief, he has not "functionally address[ed] in detail the subject matter of most of the factors" set forth in *State* v. *Geisler*, 222 Conn. 672, 610 A.2d 1225 (1992), which our Supreme Court has made clear is necessary for any independent state constitutional analysis. See *State* v. *Santiago*, 305 Conn. 101, 250–51, 49 A.3d 566 (2012), superceded in part on other grounds by *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015). Because the respondent has not briefed adequately his state constitutional claims, we deem them abandoned. See *Wasko* v. *Farley*, 108 Conn. App. 156, 164, 947 A.2d 978, 985, cert. denied, 289 Conn. 922, 958 A.2d 155 (2008).

[3] The trial court effectively adopted the factual findings set forth in the opinions of the Maine Supreme Judicial Court and the retired justice who oversaw the Maine disciplinary proceeding, stating that it "[would] not revisit the factual findings made by the various courts in Maine that have fully reviewed, analyzed, and vetted the evidence." See *Lincoln* v. *Burbank*, 147

[4] The crux of the litigation was aptly described by the United States Court of Appeals for the First Circuit in its own reciprocal disciplinary action against the respondent. See *In re Burbank*, supra, United States Court of Appeals, Docket No. 19-8010. "The neighbors had been using for decades, without issue or objection, beach access stairs adjacent to [the Burbank property] to descend an embankment—they would then cross a small portion of [the Burbank property] in order to get to the beach. [The respondent] took it upon himself to report the stairs as a zoning violation and, ultimately, he removed the stairs (contrary to an advisement from the town and against the wishes of his fellow co-owners), giving rise to this lawsuit." Id.

[5] Subsection (f) of Rule 13 of the Maine Rules of Appellate Procedure provides: "If, after a separately filed motion or a notice from the court and a reasonable opportunity to respond, the Law Court determines that an appeal, motion for reconsideration, argument, or other proceeding before it is frivolous, contumacious, or instituted primarily for the purpose of delay, it may award to the opposing parties or their counsel treble costs and reasonable expenses, including attorney fees, caused by such action."

[6] The respondent did not withdraw as counsel for the remaining Burbank defendants until the Supreme Judicial Court had ordered the respondent to show cause as to why he should not be sanctioned for attempting to represent three appellees while simultaneously representing himself as the appellant.

[7] The text and numbering of the relevant Maine and Connecticut rules of professional conduct are virtually identical. The following are Connecticut's rules, which govern with respect to the reciprocal disciplinary ruling under review.

Rule 1.1, titled "Competence," provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Rule 1.3, titled "Diligence," provides: "A lawyer shall act with reasonable diligence and promptness in representing a client."

Rule 3.1, titled "Meritorious Claims & Contentions," provides in relevant part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . . ."

Rule 3.4, titled "Fairness to Opposing Party & Counsel," provides in relevant part: "A lawyer shall not . . . (3) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists . . . ."

Rule 8.4, titled "Misconduct," provides in relevant part: "It is professional misconduct for a lawyer to: (1) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another. . . ."

[8] It is unclear from Justice Clifford's decision what rule of professional conduct, if any, the court deemed implicated by an attorney's having filed for bankruptcy or his resulting inability to satisfy a civil judgment or monetary sanction. The respondent, however, has not raised any specific claim on appeal regarding these findings or suggested that they provide support for any of the constitutional claims that he raises. Furthermore, even if we were to conclude that these particular findings were irrelevant or improper factual predicates on which to base a finding of attorney misconduct, any such error likely was rendered harmless in light of the extensive other findings supporting the violations asserted. See *Henry* v. *Statewide Grievance Committee*, 111 Conn. App. 12, 27–28, 957 A.2d 547 (2008) (holding any impropriety in relying on allegedly irrelevant factual findings in finding violations of rules of professional conduct necessarily harmless if other evidence existed sufficient to support court's ultimate findings).

[9] Practice Book § 2-39 provides: "(a) Upon being informed that a lawyer admitted to the Connecticut bar has resigned, been disbarred, suspended or otherwise disciplined, or placed on inactive disability status in another jurisdiction, and that said discipline or inactive disability status has not been stayed, the disciplinary counsel shall obtain a certified copy of the order and file it with the Superior Court for the judicial district wherein the lawyer maintains an office for the practice of law in this state, except that, if the lawyer has no such office, the disciplinary counsel shall file the certified copy of the order from the other jurisdiction with the Superior

cause to be served upon the lawyer a copy of the order from the other jurisdiction and an order directing the lawyer to file within thirty days of service, with proof of service upon the disciplinary counsel, an answer admitting or denying the action in the other jurisdiction *and setting forth, if any, reasons why commensurate action in this state would be unwarranted.* Such certified copy will constitute prima facie evidence that the order of the other jurisdiction entered and that the findings contained therein are true.

"(c) Upon the expiration of the thirty day period the court shall assign the matter for a hearing. After hearing, *the court shall take commensurate action unless it is found that any defense set forth in the answer has been established by clear and convincing evidence.*

"(d) Notwithstanding the above, a reciprocal discipline action need not be filed if the conduct giving rise to discipline in another jurisdiction has already been the subject of a formal review by the court or Statewide Grievance Committee." (Emphasis added.)

[10] Although, as of the date of oral argument before this court, the respondent's suspension from the practice of law in Connecticut had expired by its terms on January 24, 2019, the respondent's license remains suspended according to the Judicial Branch's website. Even if the suspension order under consideration no longer were in effect, however, that fact alone would not render the present appeal moot because an expired suspension continues to have adverse collateral consequences on an attorney's reputation and professional standing. See *Statewide Grievance Committee* v. *Whitney*, 227 Conn. 829, 837–38 n.13, 633 A.2d 296 (1993) (holding that because prior misconduct of attorney may be considered in subsequent disciplinary proceeding, expiration of suspension during pendency of appeal from suspension order did not render appeal moot due to potentially prejudicial collateral consequences).

[11] "The concept of a burden of persuasion ordinarily applies to questions of fact, and ordinarily is expressed in one of three ways: (1) a preponderance of the evidence; (2) clear and convincing evidence; or (3) proof beyond a reasonable doubt." *Christian Activities Council, Congregational* v. *Town Council*, 249 Conn. 566, 580, 735 A.2d 231, 240 (1999).

[12] The respondent argues that he is entitled to de novo review because "whether the court held the parties to the proper standard of proof is a question of law." The respondent is not arguing on appeal, however, that the court made a legal error by choosing and applying an incorrect burden of persuasion in evaluating his defenses. Rather, acknowledging that he bears the burden of proving a defense by clear and convincing evidence, he challenges the court's factual finding that he failed to meet that standard.

[13] "[C]ommensurate action under [Practice Book § 2-39] (c) does not mean identical action. The trial court ha[s] inherent judicial power, derived from judicial responsibility for the administration of justice, to exercise sound discretion to determine what sanction to impose in light of the entire record before it." (Internal quotation marks omitted.) *In re Weissman*, supra, 203 Conn. 384. Accordingly, appellate review of the terms of any sanction imposed is limited to whether the court abused its discretion. In the present case, the respondent argues only that the court was precluded from imposing *any* discipline with respect to his Connecticut license. The respondent does not claim that the court abused its discretion by imposing a yearlong suspension rather than some lesser sanction.

[14] The first amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. "These two guarantees are known, respectively, as the Speech Clause and the Petition Clause." *Mirabella* v. *Villard*, 853 F.3d 641, 653 (3d Cir. 2017). "[T]he core value of the Free Speech Clause of the First Amendment" is "[t]he public interest in having free and unhindered debate on matters of public importance." *Pickering* v. *Board of Education*, 391 U.S. 563, 573, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). "The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives . . . ." *Borough of Duryea* v. *Guarnieri*, 564 U.S. 379, 388, 131 S. Ct. 2488, 180 L. Ed. 2d 408 (2011).

[15] Although the respondent quotes extensively from the dissenting opinion in *Cologne* v. *Westfarms Associates*, 192 Conn. 48, 469 A.2d 1201 (1984),

[16] For example, he did not provide the court with copies of any transcripts of the proceedings before the Maine Supreme Judicial Court or with copies of the relevant appellate pleadings and briefs that the Maine Supreme Court identified as having "consistently disregarded standards of law and practice that govern appellate review." *Lincoln* v. *Burbank*, supra, 147 A.3d 1179.

EXHIBIT C

20a

NO.: HHD-CV18-6088744-S		
CHIEF DISCIPLINARY COUNSEL	:	SUPERIOR COURT
V.	:	JUDICIAL DISTRICT OF HARTFORD AT HARTFORD
HAROLD H. BURBANK III	:	JUNE 4, 2018

MEMORANDUM OF DECISION RE
APPLICATION FOR RECIPROCAL DISCIPLINE

This is a reciprocal disciplinary proceeding brought pursuant to Practice Book § 2–39. It is undisputed that on January 24, 2018, the Respondent Harold H. Burbank III was suspended from the practice of law for a period of twelve months with reinstatement in accordance with M. Bar. R. 29 by the State of Maine, Supreme Judicial Court, Active Retired Justice Robert W. Clifford.

Pursuant to Practice Book § 2–39(c), presentment to the court of an order of disbarment or discipline from another jurisdiction requires commensurate reciprocal action in this state "unless it is found that any defense set forth in the answer has been established by clear and convincing evidence."

Practice Book § 2–39 is part of "a comprehensive disciplinary scheme ... established to safeguard the administration of justice, and designed to preserve public confidence in the system and to protect the public and the court from unfit practitioners ... the object of which is not the punishment of the offender but the protection of the court." *Burton v. Mottolese*, 267 Conn. 1, 25–26, 835 A.2d 898 (2003).

cc: Office of Chief Disciplinary Counsel (P)
Harold H. Burbank III (D)
Rptr. Judicial Decisions

"A court is free to determine in each case, as may seem best in light of the entire record before it, whether a sanction is appropriate and, if so, what that sanction should be ... Accordingly, a court may accomplish the goal of protecting the public and the courts by imposing a sanction that deters other attorneys from engaging in similar misconduct." (Citations omitted.) *Statewide Grievance Committee v. Fountain*, 56 Conn.App. 375, 378, 743 A.2d 647 (2000).

The court acknowledges that commensurate discipline does not necessarily require identical discipline. *In re Weissman*, 203 Conn. 380, 384, 524 A.2d 1141(1987). However, "[m]ost courts extend the reciprocity doctrine to include a practice of imposing a disciplinary sanction that normally will be the same in operative length and severity as that imposed in the first jurisdiction. An inappropriately lenient or severe sanction, however, will not be copied. Connecticut follows that majority view." *Statewide Grievance Comm. v. Tartaglia*, No. CV030828136S, 2003 WL 22904558, at *2 (Conn. Super. Ct. Nov. 24, 2003), quoting *Statewide Grievance Committee v. Dey*, Superior Court, judicial district of Ansonia/Milford at Milford, Docket No. CV98 0063144S, 22 Conn. L. Rptr. 612 (September 30, 1998, Flynn, J.).

In the present case, the Disciplinary Counsel requests commensurate discipline of twelve months suspension. The Respondent argues that the defenses set forth in his answer have been established by clear and convincing evidence and therefore, pursuant to Practice Book § 2–39(c), commensurate discipline is precluded.

The Respondent disputes the accuracy of the findings of fact made in the Maine disciplinary proceedings, claiming that they were "contrived and pretextual." He offers a substantial quantity of documentary evidence in support of those allegations. "[A] certified copy of the official disciplinary order of another jurisdiction establishes, prima facie, the validity of the order and the accuracy of its underlying findings. ... a lawyer who offers a defense to the disciplinary order of the other jurisdiction is obligated to prove such a defense 'by clear and convincing evidence.' In the absence of such a rebuttal of the disciplinary order of the other jurisdiction, the trial court in this state must, after a hearing, 'impose commensurate action.'" *In re Weissman*, 203 Conn. 380, 383–84, 524 A.2d 1141 (1987).

The court has closely scrutinized all of the information supplied by the Respondent and his arguments challenging the findings of the Maine courts and finds them to be largely without merit, or inconsequential. They fall well short of the "clear and convincing" evidence necessary to overcome the presumption that the findings of fact underlying the disciplinary action are accurate. This court will not revisit the factual findings made by the various courts in Maine that have fully reviewed, analyzed and vetted the evidence.

The Respondent also advances the novel argument that the Maine disciplinary process is unconstitutional, because when he appeared in the Maine courts, he did so "as a pro se Connecticut citizen and Maine land owner; not as a Maine or Connecticut attorney." As such, any attempt to discipline him, by this court or by the courts in Maine, infringes upon his

"fundamental First and Fourteenth Amendment rights to petition government without fear of punishment, reprisal or prior restraint." He argues, in effect, that when a lawyer appears in court on his own behalf as a plaintiff or defendant, he should not be held to the ethical standards of a practicing attorney. The Respondent offers no case law authority - from this state or any other state - that would support this bold proposition. The court has independently researched the question and finds the argument to be without merit.

To the contrary, the Preamble to the Rules of Professional Conduct make it clear that a lawyer has "responsibilities as a representative of clients, an officer of the legal system *and a public citizen*" (emphasis added). The American Bar Association has clearly expressed its strong position that a lawyer's conduct, even when in a non-professional capacity, is subject to sanction by the Bar. See Formal Opinion 336 (1974), ABA Comm. on Ethics and Prof'l Responsibility ("[a] lawyer, whether acting in his professional capacity or otherwise, is bound by applicable disciplinary rules of the Code of Professional Responsibility."). The Supreme Court of Kansas agreed, noting that "[i]t is recognized generally that lawyers are subject to discipline for improper conduct in connection with business activities, individual or personal activities, and activities as a judicial, governmental or public official." *State v. Russell*, 610 P.2d 1122, 1127 (Kan. 1980) (citing *In re Kirtz*, 494 S.W.2d 324 (Mo. 1973) (fact that attorney is not acting in his capacity as attorney in engaging in certain conduct while campaigning for

public office and that a person could hold such office without having license to practice law does not render Code of Professional Responsibility inapplicable to such conduct).

This court has considered the Respondent's circumstances as well as the goals inherent in the imposition of reciprocal attorney discipline. Commensurate discipline is appropriate here.

Accordingly, the Respondent Harold S. Burbank is ordered suspended from the practice of law for a period of 12 months, retroactive to January 24, 2018.

The Respondent shall comply with all the terms and conditions of Practice Book Section 2-53 in the event that she applies for reinstatement to the Connecticut Bar following his period of suspension.

BY THE COURT,

Sheridan, J.

EXHIBIT D

25a

STATE OF MAINE

SUPREME JUDICIAL COURT Docket No. BAR-17-12

BOARD OF OVERSEERS OF THE BAR
Plaintiff

v. **DECISION AND ORDER**

HAROLD H. BURBANK II
of Canton, CT
Me. Bar #006813
Defendant

Pursuant to M. Bar R. 13(g), the plaintiff Board of Overseers of the Bar has filed an Information alleging that defendant Harold H. Burbank II has violated multiple provisions of the Maine Rules of Professional Conduct. The Board seeks serious sanctions against Burbank, namely, his suspension from the practice of law in Maine.

This Information was filed in August of 2017, after a review of Burbank's conduct by the panel of the Grievance Commission. *See* M. Bar R. 13(e)(10)(E), (g).

The undersigned Active Retired Justice of the Supreme Judicial Court, sitting as a Single Justice, conducted a de novo testimonial hearing in this

matter on October 18, 2017. *See* M. Bar R. 13(g)(2), 14(b). The Board was represented by Bar Counsel J. Scott Davis. Harold Burbank represented himself.

This court finds that the Board has established the following facts by a preponderance of the evidence. *See* M. Bar R. 14(b)(4).

Burbank was admitted to the Maine Bar in 1989. He primarily resides in Connecticut and has practiced law very little in Maine. He is currently administratively suspended from practicing in Maine pursuant to M. Bar. R. 4(g).

The basis for the grievance complaint against Burbank, leading to the filing of the within Information, is the matter of *Lincoln v. Burbank*, 2016 ME 138, 147 A.3d 1165, decided by the Supreme Judicial Court, sitting as the Law Court, on August 30, 2016. This court takes judicial notice of and adopts the findings and conclusions set out in that decision.

The case of *Lincoln v. Burbank* involved an appeal of a Northport property dispute litigated in the Superior Court in Penobscot County, in which neighbors of property owned by the Burbank family filed claims against the Burbanks seeking a prescriptive easement over the Burbank property and a declaratory judgement, for conversion, and for punitive damages against Burbank himself. *Id.* ¶ 18. Burbank represented himself; his father, Harold Burbank I; his brother, David Burbank; and his sister, Lori Darnell. *Id.* ¶ 2. After a jury-waived

trial, the Superior Court found in favor of the neighbors and against Burbank's position. *Id.* ¶ 21. In addition, the Superior Court found in favor of other members of the Burbank family, who were co-owners of the Burbank property, on their cross-claim for partition by sale of the Burbank family property. *Id.* ¶¶ 19, 22. Only Harold Burbank II appealed the Superior Court's judgment. *Id.* ¶ 5 n.4.

The appeal was originally filed by Attorney Mariah A. Gleaton, who later withdrew as the attorney. Thereafter, Harold Burbank II represented himself.

By Order dated January 5, 2016, the Law Court rejected Burbank's brief, which was punched with three holes and bound with twine, *see* M.R. App. P. 7A(g)(3). The Law Court also ordered Burbank to show cause why he should not be sanctioned for failing to show why he should not be disqualified from representing three appellees—the family members he represented before the trial court—while representing himself as appellant. Burbank then moved to withdraw as counsel for the appellees.

The Law Court affirmed the Superior Court's decision, and also sanctioned Burbank for his serious misconduct in prosecuting the appeal.[1] *Id.* ¶¶ 61-64. In particular, the Law Court noted that Burbank stated facts not in

[1] The Law Court imposed sanctions of $5,000 toward the neighbors' attorney fees to defend the appeal, and $5,000 toward the co-owners' attorney fees to defend the appeal.

the trial record, *id.* ¶ 24; raised issues without any further argument, *id.* ¶ 39; listed "meritless" and "frivolous" issues, *id.* ¶¶ 40-41; and made arguments "devoid of legal authority to support them," *id.* ¶ 52. The Law Court ultimately determined that there was "no merit in any of Burbank's arguments on appeal, including those raised in his reply briefs." *Id.* ¶ 45. At the conclusion of its decision, the Law Court summarized,

> Throughout the various stages of this appeal, in his briefs, his Supplement of Legal Authorities, his request for oral argument, and his responses to opposing parties' motions, Burbank has consistently disregarded standards of law and practice that govern appellate review. He has asserted legal arguments that are frivolous and baseless, and, contrary to governing precedent, he has sought to have us consider and decide the appeal on new facts and new evidence that were not part of the trial record on appeal. Burbank's efforts have been disrespectful to the proper role of the trial court, unfair to and expensive for the other parties, and contrary to Maine appellate law. Burbank's frivolous and baseless actions are egregious conduct that has confused the issues on appeal, delayed final resolution of this matter, and significantly driven up the costs to other parties. Although the actions taken by Burbank would be concerning if he were a litigant unschooled in law, we note that Burbank is not only an attorney, but an attorney who is licensed to practice in Maine. He is therefore, presumed to be familiar with our case law, our statutes, and our Rules; his actions demonstrate either a complete lack of understanding or an intentional flouting of these guides.

Id. ¶ 61.

Burbank's actions continue to be problematic. In his Answer to the within Information in this case, Burbank has admitted to making errors in

applying and interpreting the applicable rules of court, but has asserted that some rules were not published, and thus he could not interpret or apply them; some rules were ambiguous; and his failure to file timely responses was due to his suffering a stroke. Burbank has failed to pay the $10,000 in sanctions imposed on him by the Law Court, nor has he fully paid the $20,000 judgment against him imposed by the Superior Court in the underlying litigation, and has since filed a Chapter 7 bankruptcy action in the Bankruptcy Court in Connecticut. Burbank also did not properly offer all the exhibits at this Bar Discipline Hearing that he made reference to in his post-hearing submission. In short, he does not appear to have a good grasp of the procedural rules of litigation.

Based on the findings and conclusions of the Law Court in *Lincoln*, in conjunction with the evidence presented at the hearing in this matter, this court finds and concludes that Burbank has violated the following Maine Rules of Professional Conduct.

- Rule 1.1 Competence

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

- Rule 3.1 Meritorious Claims and Contentions

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a non-frivolous basis in law and fact for doing so, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

- Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

....

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

....

- Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate any provision of either the Maine Rules of Professional Conduct or the Maine Bar Rules, or knowingly assist or induce another to do so, or do so through the acts of another; [or]

....

(d) engage in conduct that is prejudicial to the administration of justice.

SANCTION

Having found these violations of the Maine Rules of Professional Conduct, this court now addresses the appropriate sanction. Pursuant to M. Bar. R. 21(c), this court has considered the factors relevant to imposing sanctions.

There are *many* aggravating factors in this case. The misconduct at issue is very serious. Burbank's conduct in the underlying litigation, and especially in the appeal in *Lincoln*, has caused substantial injury to the parties involved in the litigation as well as a waste of judicial resources. Although this court does not find that all of Burbank's misconduct was deliberate, as a practicing attorney, he certainly should have known that his conduct was far afield from the standards expected of a reasonably competent attorney, and that his actions constituted misconduct.

There are *some* mitigating factors that the court feels compelled to consider. Burbank has no prior disciplinary record in Maine, he was under great stress due to his father's poor health, and he himself has suffered from a stroke and is not in good health. There is also evidence that Burbank provided competent legal representation in Maine in the past, namely, in the effort by

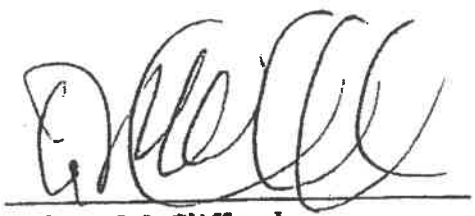
Ralph Nader to be placed on the Maine ballot as a presidential candidate in the early 2000s.

The main purpose of imposing a sanction in these disciplinary proceedings is the protection of the public. The sanction to be imposed must be significant because of the serious misconduct that is involved here, and must require that Burbank file a petition for reinstatement in order for him to be reinstated as an attorney in good standing.

Accordingly, pursuant to M. Bar R. 13(g)(4), and21(b)(6), Harold H. Burbank II is suspended from the practice of law in Maine for a period of twelve months. The suspension is effective immediately.

To be reinstated, Burbank must petition for reinstatement in accordance with M. Bar. R. 29.

Date: January 24, 2018



Robert W. Clifford
Active Retired Justice
Maine Supreme Judicial Court

APPENDIX E

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MAINE SUPREME JUDICIAL COURT
Decision: 2016 ME 138
Docket: Pen-15-440
Submitted
On Briefs: May 26, 2016
Decided: August 30, 2016

Reporter of Decisions

Panel: SAUFLEY, C.J., and ALEXANDER, GORMAN, JABAR, HJELM, and HUMPHREY, JJ.

FREDERICK B. LINCOLN et al.

v.

HAROLD BURBANK II et al.

ALEXANDER, J.

[¶1] Harold Burbank II appeals from a judgment of the Superior Court (Penobscot County, *A. Murray, J.*) (1) finding in favor of the owners of neighboring properties on their claims for a prescriptive easement, declaratory judgment, conversion, and punitive damages;[1] and (2) finding in favor of co-owners of property with Burbank on their cross-claim for partition by sale of that property.[2]

[¶2] Burbank is the owner of what the court found to be a 1/18 interest in a coastal property in Northport (the "Burbank property"). The Burbank

[1] The court denied the neighbors' claim for trespass against Burbank. The neighbors do not appeal that decision.

[2] The court found in favor of the co-owners on Burbank's cross-claim seeking an injunction precluding the co-owners from entering into agreements with the neighbors to convey an easement in the property at issue in this suit. Burbank does not appeal from that judgment.

property is owned in joint tenancy by fourteen owners, all of whom were defendants at trial. At the trial, Harold Burbank II acted as counsel[3] for four defendants: himself, his father Harold Burbank I, his sister Lori Darnell, and his brother David Burbank (collectively "the Burbank Defendants").

[¶3] The plaintiffs—Frederick B. Lincoln, Norman Moscow, Eleanor Moscow, Joan R. Kosel, Bruce C. Gerrity, John Fleming, and Suellyn Fleming (collectively "the Neighbors")—are the owners of a cluster of properties neighboring the Burbank property, who successfully asserted that they had acquired an easement over a portion of the Burbank property.

[¶4] The other ten owners of the Burbank property—Elizabeth Smith as Trustee of The Russell Smith Estate Reduction Trust, Sandra Tozier, Suzette Cyr, Christopher Smith, Nathanial Jennings, Susannah Corona, Luther Jennings, Rebeccah Jennings, Pamela Sullivan, and Sonia Burbank (collectively "the Co-owners"), were also named as defendants. The Co-owners attempted to settle with the Neighbors and later cross-claimed against the Burbank Defendants for partition by sale of the Burbank property.

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[3] Harold Burbank II is admitted to the practice of law in Maine and Connecticut. A separate Maine law firm appeared for the part of the trial that included Harold Burbank II's testimony, perhaps to limit concern about an attorney who was also a party testifying at a trial while also representing other parties.

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[¶5] Harold Burbank II is the only party appealing.[4] He argues that

- the evidence was insufficient to support the trial court's finding of a prescriptive easement;

- the trial court erred and abused its discretion by granting partition by sale of the Burbank property;

- the trial court erred as a matter of law by finding Burbank liable for conversion;

- the trial court should have bifurcated the trials on the Neighbors' and the Co-owners' claims;

- the Neighbors and the Co-owners lacked standing to bring their respective actions;

- the trial court's grant of a prescriptive easement constitutes a taking in violation of the Fifth Amendment to the United States Constitution;

- the trial court erred by declining to reopen the record and permit the testimony of an additional witness who, although present at trial, was not called to testify; and

- the trial court failed to address several affirmative defenses.

[¶6] The trial court issued a thorough, carefully considered judgment, supported by extensive findings and conclusions and accurate legal analysis. Because the court did not err when it granted a prescriptive easement or ordered partition by sale of the property, and because the remainder of Burbank's arguments are either improperly raised, meritless, or both, we

[4] All of the other Burbank Defendants indicated, after trial, that they did not wish to participate in the appeal.

affirm the judgment and, on separate motions of the Neighbors and the Co-owners, we order sanctions against Burbank pursuant to M.R. App. P. 13(f).

I. CASE HISTORY

[¶7] The court found the following facts by a preponderance of the evidence, and these facts are supported by the trial record. *See Androkites v. White*, 2010 ME 133, ¶¶ 12, 14, 10 A.3d 677.

[¶8] The Burbank property in Northport has been owned by various members of the Burbank family since 1940. In 1993, Phyllis Burbank gifted the Burbank property to her nineteen then-living children and grandchildren, including Harold Burbank II, as joint tenants.[5] The gift was made by warranty deed, and the property was transferred in fee simple with no reservation of any right or interest in the property. At the same time, Phyllis Burbank executed a will leaving certain stock to a trust to be used for maintenance of the property. Phyllis Burbank died in 1996.

[¶9] The Burbank property is on Penobscot Bay, and until 2012 there were two sets of stairs on the property leading down an embankment to a beach. One set of stairs was used by Phyllis Burbank and her family. The other set of stairs, which we will refer to as "the Neighbors' stairs," led to a

[5] The defendants in this case are the grantees and their successors in interest.

path running over a portion of the Burbank property and onto the abutting property. The Neighbors used the path and the Neighbors' stairs to access the beach from their cottages, which are located in a group abutting or near to the Burbank property. The two sets of stairs led to opposite sides of a largely impassable gully that separates the Burbank property from the Neighbors' properties.

[¶10] The path and the Neighbors' stairs had been in place since at least the early 1930s[6] and had been used continuously by the Neighbors and their predecessors to access the beach since that time. The Neighbors and their predecessors maintained the Neighbors' stairs. A person using the path is clearly visible to people at the cottage located on the Burbank property. No owner of the Burbank property ever gave permission for the Neighbors to use the path and stairs, nor did any owner prohibit use of the path and stairs until the 1990s. At least twenty years of continuous use by each Neighbor had occurred before any signs were posted indicating a lack of acquiescence to the Neighbors' use of the path and stairs.[7]

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[6] There was testimony that the Neighbors' stairs did not exist until the 1960s. The court specifically found that this testimony was not credible.

[7] There was testimony that a no trespassing sign was put across the path in the late 1960s. The court specifically found that this testimony was not credible.

[¶11] Beginning in the late 1990s, some of the owners of the Burbank property began posting no trespassing signs on the path; other owners of the Burbank property opposed posting the signs and removed them.

[¶12] In April 2012, Harold Burbank II discovered that vegetation had been removed from the Burbank property and contacted the Maine Department of Environmental Protection (DEP) and the Northport Code Enforcement Officer to ask whether the cutting constituted a violation of shoreland zoning regulations. Burbank also inquired whether it was a violation to have two sets of stairs leading to the beach on the property. Burbank persistently requested that the Town issue a notice of violation requiring that one of the sets of stairs be removed. The Town eventually issued a notice of violation in July 2012. The notice of violation required that one set of stairs be removed by August 31, 2012. The Code Enforcement Officer testified that this was the first time in his twelve years as a code enforcement officer that a landowner had self-reported a violation.

[¶13] Burbank did not communicate with the other owners of the Burbank property or the Neighbors prior to seeking and securing the issuance of the notice of violation. When they learned of the notice of violation, at least

one other owner of the Burbank property told Burbank not to remove the Neighbors' stairs.

[¶14] Burbank did not inform the DEP or the Town that the stairs had been in place prior to the enactment of the shoreland zoning regulations, or that the Neighbors had a potential claim to the stairs. When the DEP learned these facts, it informed Burbank that the stairs might constitute a legal nonconforming structure and requested that removal of the stairs be put on hold. The DEP sent a letter to the Town and a copy of the letter to Burbank suggesting that the stairs predated the 1992 enactment of Northport's shoreland zoning regulations and requesting that enforcement be put on hold. Burbank responded by suggesting that he would sue the Town if it did not continue enforcement efforts. The Town did not withdraw the notice of violation, but it did not take any enforcement action.

[¶15] In September 2012, Burbank, acting on his own, tore out and removed the stairs. Burbank did not notify the Neighbors or the other owners of the Burbank property prior to removing the stairs. The court specifically found that Burbank "used the Town to advance his own agenda to remove the [Neighbors'] stairs."

[¶16] The Burbank property is currently owned by fourteen people. The court found that many of the owners "can no longer tolerate owning the property with certain of the other co-owners." There had been ongoing conflicts among the owners since Phyllis Burbank's death, and family members had discussed partitioning the property since 2005 or 2006. The trial court found that there were a number of reasons the Co-owners were seeking partition, and that the reasons "centered on perceptions that Harold Burbank II wanted to control the property, his lack of meaningful communications with others, his lack of respect for the views of the other owners of the property, and his unilateral action" in obtaining the notice of violation and tearing out the Neighbors' stairs. The court found that there is a clear inability to communicate among the owners of the Burbank property and noted that "Harold Burbank I, while not wanting the property sold, testified that he would rather face the North Koreans at war again rather than coordinate with certain members of the family about the property."

[¶17] The procedural history of this case is extensive and reflects approximately 125 filings by the three sets of parties. The majority of this history is not addressed, as it is not relevant to this appeal.

[¶18] In February 2013, the Neighbors filed a complaint against all of the owners of the Burbank property. The complaint sought an easement across the Burbank property pursuant to several different theories and sought a declaratory judgment granting the Neighbors an easement over the existing path and the right to install and maintain stairs to the beach. The complaint also included claims for trespass, conversion, and punitive damages against Burbank individually.

[¶19] In April 2014, after the Co-owners entered into a settlement agreement with the Neighbors purporting to grant the Neighbors an easement over the Burbank property, the Burbank Defendants brought a cross-claim against the Co-owners, seeking an injunction to prevent the Co-owners from entering into any such agreements in the future. In May 2014, the Co-owners brought a cross-claim against the Burbank Defendants seeking partition by sale of the Burbank property.

[¶20] The Burbank Defendants moved to bifurcate the trial and hold separate trials on the Neighbors' claims for an easement and the Co-owners' cross-claim for partition. The court denied this motion on the first day of the three-day bench trial that it held in May 2015.

II. THE TRIAL COURT JUDGMENT AND APPEAL

[¶21] On August 12, 2015, the court entered a written judgment finding for the Neighbors on their claims for an easement by prescription, conversion, and punitive damages. The court issued a declaratory judgment granting the Neighbors an easement appurtenant across the Burbank property to access the beach by foot over the existing path and permitting them to install and maintain a set of stairs. On the conversion claim based on removal of the stairs, the court awarded the Neighbors damages of $5,000 to be recovered from Harold Burbank II. After finding by clear and convincing evidence that Burbank had acted with malice toward the Neighbors in removing the stairs and considering the reprehensibility of Burbank's conduct and the harm he had caused the Neighbors, the court awarded the Neighbors $15,000 in punitive damages to be recovered from Burbank. The court found for Burbank on the Neighbors' claim for trespass.

[¶22] On the cross-claims in the action between the Burbank Defendants and the Co-owners, the court found against the Burbank Defendants on their cross-claim for an injunction. The court found for the Co-owners on their cross-claim for a partition by sale of the Burbank property and ordered sale of the property and division of proceeds. Because of the

demonstrated difficulties of the property owners in cooperating with each other, the court's judgment appropriately specified a detailed process for coordinating the sale of the property.

[¶23] After trial but before the court issued its judgment or made any findings, the Burbank Defendants filed two motions to amend the court's findings, arguing, in part, that the court should reopen the record and allow Burbank's mother—who was included on the Burbank Defendants' original witness list and was present at the trial—to testify. The court denied these motions. After the court issued its judgment, Burbank, acting alone, filed a motion to alter or amend the court's judgment, reasserting his argument that his mother should be allowed to testify, which the court again denied. This appeal followed.

[¶24] Burbank filed his brief as appellant. Burbank's brief states facts not in the trial court record. His brief was supplemented by supporting documents adding facts not in the trial court record. The Neighbors and the Co-owners each filed a brief as appellees. Burbank then filed two reply briefs totaling thirty-three pages. The Neighbors and the Co-owners each moved to strike one or both of Burbank's reply briefs for failure to comply with M.R. App. P. 9(c), and each filed a motion, pursuant to M.R. App. P. 13(f), to

sanction Burbank for his conduct in the appeal. Burbank filed a response to the motions for sanctions, and we ordered that the motions for sanctions and to strike would be considered with the merits of the appeal.

III. LEGAL ANALYSIS

A. Prescriptive Easement

[¶25] Burbank argues that there was insufficient evidence to support the trial court's finding that the Neighbors proved the elements of a prescriptive easement across the Burbank property.

[¶26] We review questions of law related to easements de novo and review a trial court's factual findings as to the elements of a prescriptive easement for clear error. *Androkites*, 2010 ME 133, ¶ 12, 10 A.3d 677. We defer to a trial court's assessment of witness credibility and resolution of conflicting testimony. *Gordon v. Cheskin*, 2013 ME 113, ¶ 12, 82 A.3d 1221.

[¶27] A party claiming a prescriptive easement must prove three elements by a preponderance of the evidence: "(1) continuous use for at least twenty years; (2) under a claim of right adverse to the owner; (3) with the owner's knowledge and acquiescence, or with a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed." *Androkites*, 2010 ME 133, ¶ 14, 10 A.3d 677; 14 M.R.S. § 812

(2015). Adversity exists when the party "has received no permission from the owner of the soil, and uses the way as the owner would use it, disregarding [the owner's] claims entirely, using it as though [she] owned the property [her]self." *Androkites*, 2010 ME 133, ¶ 16, 10 A.3d 677 (alterations in original). "Acquiescence implies passive assent or submission to the use, as distinguished from the granting of a license or permission . . . . Acquiescence is consent by silence." *Stickney v. City of Saco*, 2001 ME 69, ¶ 23, 770 A.2d 592 (citation omitted). Either a grant of permission or an express protestation will defeat a claim for a prescriptive easement. *See Androkites*, 2010 ME 133, ¶ 16, 10 A.3d 677; *Taylor v. Nutter*, 687 A.2d 632, 634-35 (Me. 1996).

[¶28] Opposing the finding of a prescriptive easement, Burbank asserts four arguments on this appeal.

[¶29] First, Burbank argues that there was insufficient evidence of the specific "nature, duration and type of use" the Neighbors made of the property for the court to find each element of adverse possession by a preponderance of the evidence. Burbank points to several witnesses whose testimony, if found credible, might have undermined the Neighbors' claim for a prescriptive easement. In each case, the trial court specifically explained why it did not find the testimony credible and how the court was resolving

apparent conflicts in the testimony. We will not interfere with the trial court's thorough analysis of abundant and often conflicting testimony. *See Gordon*, 2013 ME 113, ¶ 12, 82 A.3d 1221.

[¶30] Second, Burbank argues that there was testimony that prior owners of the Burbank property discussed their concerns regarding the Neighbors and their predecessors using the path and stairs, thus undermining the court's finding of acquiescence. Specifically, Burbank points to testimony regarding two conversations: one between two prior owners, and another between a prior owner and a neighbor who is not a plaintiff or a plaintiff's predecessor in interest and did not use the stairs or path at issue here. Because a denial of the right to use property must be communicated to the potential adverse possessor to foreclose a finding that the owner acquiesced to the adverse possessor's use, the testimony Burbank cites does not undermine the trial court's findings. *See Dowley v. Morency*, 1999 ME 137, ¶¶ 23-24, 737 A.2d 1061; *Rollins v. Blackden*, 112 Me. 459, 466-67, 92 A. 521, 526 (1914).

[¶31] Third, Burbank argues that the close neighborly relationship between the Neighbors and the current and former owners of the Burbank property precludes a finding that the Neighbors' use of the path and stairs was

adverse. When the plaintiff has used the property continuously for twenty years and the property owner acquiesced to that use, a court ordinarily may presume that the use was adverse to the owner's rights. *Androkites*, 2010 ME 133, ¶¶ 14, 17, 10 A.3d 677. When the use at issue is by family members using one another's property, however, the familial relationship precludes application of this presumption. *Id.* ¶ 18. We have never applied this reasoning to unrelated neighbors. We do not reach the question of whether to extend the blood relative exception to unrelated neighbors because the trial court, noting the lack of case law on application of the presumption in cases involving neighborly relations, specifically found adversity both by presumption and without application of the presumption, and the record supports these findings.

[¶32] Finally, Burbank argues that the court erred by failing to apply a presumption of permission. This presumption arises only when the public uses private property for recreational uses, and is inapplicable to the Neighbors' claim for a private prescriptive easement. *See, e.g., Almeder v. Town of Kennebunkport*, 2014 ME 139, ¶ 29, 106 A.3d 1099; *Lyons v. Baptist Sch. of Christian Training*, 2002 ME 137, ¶ 19, 804 A.2d 364.

[¶33] The court properly applied prescriptive easement law, and the court's finding of each element of the prescriptive easement claim by a preponderance of the evidence is supported by competent record evidence. *See Androkites,* 2010 ME 133, ¶ 12, 10 A.3d 677. Accordingly, we affirm the court's judgment as to the Neighbors' prescriptive easement claim.

B. Partition by Sale

[¶34] Burbank argues that the Co-owners lacked the right to seek a partition because the deed gifting the Burbank property and Phyllis Burbank's will, when read together, demonstrate Phyllis Burbank's intent to deprive the grantees of this right. Burbank also argues that partition is inappropriate because the deed and will create interests in the property held by his children, Phyllis Burbank's great-grandchildren.

[¶35] Interpretation of unambiguous deeds and wills is a question of law that we review de novo. *Sleeper v. Loring*, 2013 ME 112, ¶ 10, 83 A.3d 769 (deeds); *Estate of Silsby*, 2006 ME 138, ¶ 15, 914 A.2d 703 (wills). In both instances, we look first to the plain language of the document to determine the intent of the parties. *Silsby*, ¶¶ 15, 18 (wills); *Matteson v. Batchelder*, 2011 ME 134, ¶ 16, 32 A.3d 1059 (deeds).

[¶36] Here, the documents demonstrate that Phyllis Burbank gifted the Burbank property in fee simple to her children and grandchildren as joint tenants with no reservation of rights or other restrictions on their ownership. This transaction was complete in 1993, three years before Phyllis Burbank's death. Phyllis Burbank's will devised certain stock to a trust to be used for maintenance of the property, but her will makes no attempt to convey, burden, or otherwise address the Burbank property or the rights of its owners.

[¶37] There is no reasonable interpretation of these documents that places any limitation on the rights of the owners of the Burbank property to partition the property or otherwise dispose of their interests in it. In fact, the will appears to contemplate the possibility of a sale of the property. In stating the conditions for termination of the trust, the will states, "Upon the death of my last surviving child and grandchild, *or upon the sale of the* [*Burbank property*] *to a person or persons not my lineal descendants*, the Trust shall terminate." (Emphasis added.) There is no basis for Burbank's interpretation of the deed and will as either restricting sale of the Burbank property or creating rights in the property held by Phyllis Burbank's great-grandchildren. We, therefore, affirm the trial court's grant of partition by sale.

C. Conversion

[¶38] Burbank argues that he cannot be held liable for conversion because he acted pursuant to the Town's notice of violation when he tore out and removed the Neighbors' stairs. We have not provided guidance on this particular point previously, and Burbank failed to produce a developed argument as to this issue. We deem the issue waived. *See Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290; *Casillas-Diaz v. Palau*, 463 F.3d 77, 84 (1st Cir. 2006). We note, however, that although the Town of Northport never formally withdrew the notice of violation requiring removal of a set of stairs on the Burbank property, Burbank was aware that, at the direction of the DEP, the enforcement action had been put on hold pending resolution of issues surrounding the age and potentially grandfathered status of the stairs and the Neighbors' claim to rights in the stairs. The evidence demonstrates that Burbank sought and obtained the notice of violation as a pretense for removal of the stairs. He may not, in these circumstances, claim to be innocently complying with local law. We affirm the trial court's finding that Burbank is liable for conversion.

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D. Bifurcation

[¶39] Burbank lists as an issue whether the court abused its discretion when it refused to bifurcate the proceedings and hold separate trials on the Neighbors' claims and the Co-owners' claim for partition. Burbank provides no further argument on this issue, and we deem this issue waived. *See Mehlhorn*, 2006 ME 110, ¶ 11, 905 A.2d 290.

[¶40] Even if this issue were properly presented on appeal, it is meritless. A court should consider the following factors as militating against bifurcating trials: "1) substantial identity of the parties, and the witnesses, 2) overlapping evidence, 3) relatively simple issues, 4) relative times required for litigating different issues, and 5) the absence of discernable prejudice to the parties." *Estate of McCormick*, 2001 ME 24, ¶ 40, 765 A.2d 552. Most, if not all, of these factors apply in this case. It was not an abuse of discretion for the court to refuse to bifurcate the proceedings. *See id.*; M.R. Civ. P. 42(b).

E. Remaining Issues

[¶41] Burbank's remaining issues are frivolous, and we do not address them. Additionally, with the exception of his argument that the grant of a prescriptive easement constitutes a judicial taking, none of his remaining issues were properly raised. Several of the issues were argued to the trial

court but not raised on appeal except in Burbank's reply briefs. An issue raised for the first time in a reply brief may be viewed as not preserved for appeal. *See State v. Blais*, 416 A.2d 1253, 1256 n.2 (Me. 1980); *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 239 (1st Cir. 2013) ("We have repeatedly held, 'with a regularity bordering on the monotonous,' that arguments not raised in an opening brief are waived." (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 299 (1st Cir. 2000))). One of the issues was raised for the first time in a response to a motion made before us during the appellate process.

[¶42] Accordingly, we affirm the trial court's judgment.

IV. MOTIONS ON APPEAL

A. Motion to Strike Reply Briefs

[¶43] The Neighbors and the Co-owners each moved to strike one or both of Burbank's two reply briefs. Burbank did not file any timely opposition to the motions to strike.

[¶44] Rule 9(c) of the Maine Rules of Appellate Procedure provides that a reply brief may not exceed twenty pages without prior approval. Taken together, Burbank's reply briefs constitute thirty-three pages of reply. Burbank did not receive leave to exceed the page limit. Rule 9(c) further provides that upon filing of the reply brief, "[n]o further briefs may be filed

437 F.3d 140, 142 (1st Cir. 2006) (quoting *Young v. City of Providence*, 404 F.3d 33, 39 (1st Cir. 2005)). We have stated that sanctions are reserved for "egregious cases." *Auburn Harpswell Ass'n v. Day*, 438 A.2d 234, 238-39 (Me. 1981).[8]

[¶47] Burbank has had both notice of the potential for sanctions on this appeal (and similar notice at the trial court level), and an opportunity to be heard on the motion for sanctions, which he treated with the same disregard for deadlines as he has treated other court rules. The Neighbors and the Co-owners each moved for sanctions against Burbank pursuant to M.R. App. P. 13(f). In his untimely[9] response to those motions, Burbank argues that sanctions are not appropriate because the moving parties lack standing and the trial court's judgment is not adequately supported by the evidence. Burbank's opposition to the motions for sanctions then raises new arguments not contained in his briefs and asserts several new allegations of fact not contained in the trial court record.

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[8] Opinions in which we have addressed the imposition of sanctions for misconduct on appeal include: *Key Equipment Finance, Inc. v. Hawkins*, 2009 ME 117, ¶¶ 21-24, 985 A.2d 1139, *reconsideration denied*, 2011 ME 102, ¶¶ 1, 7-9, 28 A.3d 1168; *Finch v. Higgins*, 2008 ME 13, ¶¶ 10-14, 953 A.2d 1142; *Hayden v. Orfe*, 2006 ME 56, ¶¶ 7-9, 896 A.2d 968; *Monty v. Monty*, 2004 ME 6, ¶ 1, 840 A.2d 106; *Rothstein v. Maloney*, 2002 ME 179, ¶¶ 11-12, 816 A.2d 812; and *Waxler v. Central Maine Power Company*, 2001 ME 135, ¶ 3, 780 A.2d 1134.

[9] M.R. App. P. 10(c) requires that all responses to motions be filed within seven days. Burbank filed his responses to the motions seventeen and twenty-one days after the motions were filed.

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[¶48] Burbank initiated the handling of this appeal with the same cavalier attitude that he demonstrated in his handling of the steps at issue in this case. He did not communicate with the appellees in order to reach some agreement on the contents of the Appendix; he attempted to include in the Appendix documents that were not part of the record below; he failed to respond to a direct order requiring him to explain how he, as the appellant, could purport to represent some of the appellees; he filed a brief "bound" with twine; and as noted above, he failed to comply with M.R. App. P. 9(c), filing a second reply brief without permission.

[¶49] Burbank's brief on appeal demonstrated this same contumacious attitude, a fact he apparently recognized, as, in his request for oral argument, Burbank asserted that some of his filings before us "were not properly edited before being submitted to the Court," and argued for a chance to "correct and clarify these errors, so the Court may be certain that Appellant certainly did not intend them or to offend the dignity and authority of the Court."

[¶50] Burbank's request for oral argument included statements that further highlight the impropriety of his actions in this appeal. Beyond conceding the impropriety of some statements in his several appellate briefs, in Burbank's request for oral argument he proposed to represent the views of

the other Burbank Defendants regarding "the facts and the law." The other Burbank Defendants have declined to have Burbank represent them on appeal and are not participating in this appeal. Burbank, as a member of the Maine bar, must understand that he cannot represent on appeal persons who have declined to appeal and declined to have him represent them on appeal. In fact, in the motion to withdraw that he filed on February 25, 2016, Burbank admitted that the other Burbank Defendants did *not* want him to file an appeal on their behalf.

[¶51] In his request for oral argument Burbank also proposed to testify or otherwise present facts to clarify what his father "meant in his testimony" which the trial court found, in part, to be contradictory and not credible. There can be no question that presenting new facts or other evidence by brief or oral argument is not proper appellate advocacy. *Beane v. Me. Ins. Guar. Ass'n*, 2005 ME 104, ¶¶ 9-11, 880 A.2d 284. Burbank's several briefs include a number of statements about facts that do not appear in the trial court record and thus are improperly offered for consideration on appeal. *Id.* Burbank also filed a "Supplement of Legal Authorities" that includes evidentiary materials and fact statements not in the trial court record, including an advocacy document that Burbank had filed with a private mediator that, as a document

apparently used in settlement efforts, could not have been used at trial pursuant to M.R. Evid. 408(b), and, consequently, was improperly filed with the appeal documents.

[¶52] Beyond his purported representation of people who do not wish to be represented by him, his failure to comply with the logistical rules, his attempt to present new evidence at an appellate proceeding, and his contentious and unprofessional tone, Burbank makes several arguments in support of his appeal that are frivolous and devoid of legal authority to support them.

[¶53] Asserting propositions of law not supported by statute or precedent, absent a good faith effort to evolve the law, is an indication of frivolousness that can subject a party to sanctions. *Finch v. Higgins,* 2008 ME 13, ¶¶ 10-14, 953 A.2d 1142; *see also* M.R. Prof. Conduct 3.3(a)(1), (2); *Hilmon Co. V.I. v. Hyatt Int'l,* 899 F.2d 250, 253 (3d Cir. 1990).

[¶54] Reviewing Burbank's arguments, first he argues that the court's award of a private prescriptive easement to private parties to cross private property on foot is somehow a government taking of land without just compensation. The only authorities Burbank offered to support this claim are a United States Supreme Court opinion and a law review article. The United

States Supreme Court opinion, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, affirmed the Florida Supreme Court's rejection of a regulatory takings claim and its holding that no takings had occurred when the state placed sand on public beaches in front of plaintiffs' properties to limit or reverse beach erosion. 560 U.S. 702 (2010). Private prescriptive easement actions were not addressed. Such actions between private individuals are constitutionally no different than actions for damages, debt collections, forcible entry and detainer, or replevin seeking transfers of money or property interests from one private entity to another. These court actions are not a government taking of property, and Burbank's argument otherwise is frivolous and baseless.

[¶55] Second, Burbank argues that neither the Neighbors nor the Co-owners had standing to bring their respective claims. In effect, he asserts that although the Neighbors demonstrated adverse use of a footpath across the Burbank property for three-quarters of a century, they somehow lacked standing to bring a prescriptive easement action. And he asserts that although the relationship among the many joint owners of the Burbank property had become dysfunctional, the Co-owners somehow lacked standing to bring the partition action.

[¶56] Burbank argues that the Neighbors lacked standing to claim a prescriptive easement because they could not demonstrate a particularized injury. Although somewhat unclear, he appears to argue that the Neighbors had no rights in the disputed property prior to the court's award of a prescriptive easement, and they could not, therefore, show they suffered any injury at the time they brought the action.

[¶57] Burbank argues that the Co-owners lacked standing because their counter-claim for partition was brought pursuant to 14 M.R.S. § 6501 (2015), which, he argues, does not authorize partition by sale. Contrary to Burbank's contention, partition by sale is available pursuant to the court's equity jurisdiction, as preserved by 14 M.R.S. § 6051(13) (2015). *See Libby v. Lorrain*, 430 A.2d 37, 39 (Me. 1981). Burbank's standing arguments are frivolous and baseless.

[¶58] Third, Burbank contends that the evidence in the record is insufficient to support the court's finding of a prescriptive easement. To support his argument, Burbank asks us to disregard the trial court's explicit determination that certain witnesses' testimony was not credible. Regarding each witness cited by Burbank, the trial court, although it was not required to

do so, specifically stated why it did not find the testimony credible and how the court resolved apparent conflicts in the testimony.

[¶59] On factual issues, we conduct a deferential review for clear error, meaning that we will defer to the fact-finder's decision as to (1) which witnesses to believe and not believe, (2) what significance to attach to particular evidence or exhibits, and (3) what inferences may or may not be drawn from evidence or exhibits. *See Stickney*, 2001 ME 69, ¶ 13, 770 A.2d 592; *Sturtevant v. Town of Winthrop*, 1999 ME 84, ¶ 9, 732 A.2d 264; *Lewisohn v. State*, 433 A.2d 351, 354 (Me. 1981). The existence of contrary evidence that would support a different result, without more, will not justify vacating the trial court's fact-findings. *Preston v. Tracy,* 2008 ME 34, ¶¶ 10-11, 942 A.2d 718. We "will not substitute our judgment as to the weight or credibility of the evidence for that of the fact-finder if there is evidence in the record to rationally support the trial court's result." *State v. Connor,* 2009 ME 91, ¶ 9, 977 A.2d 1003. Burbank's argument that we should disregard our established standards of appellate review and decide witness credibility issues based on his representations, ignoring the trial court's explicit findings on credibility issues, is frivolous and baseless.

[¶60] Fourth, Burbank argues that we are not bound to the confines of the trial court record, and may look outside that record when considering the facts on appeal. Contrary to Burbank's contention, our "review of the merits of an appeal is limited to the facts and evidence in the record before the trial court." *Beane*, 2005 ME 104, ¶ 9, 880 A.2d 284. Burbank's argument that we should disregard fundamental standards of appellate review to consider and decide the appeal on new facts he has presented on appeal is frivolous and baseless.

[¶61] Throughout the various stages of this appeal, in his briefs, his Supplement of Legal Authorities, his request for oral argument, and his responses to opposing parties' motions, Burbank has consistently disregarded standards of law and practice that govern appellate review. He has asserted legal arguments that are frivolous and baseless, and, contrary to governing precedent, he has sought to have us consider and decide the appeal on new facts and new evidence that were not part of the trial court record on appeal. Burbank's efforts have been disrespectful to the proper role of the trial court, unfair to and expensive for the other parties, and contrary to Maine appellate law. Burbank's frivolous and baseless actions are egregious conduct that has confused the issues on appeal, delayed final resolution of this matter, and

significantly driven up the costs to other parties. Although the actions taken by Burbank would be concerning if he were a litigant unschooled in law, we note that Burbank is not only an attorney, but an attorney who is licensed to practice in Maine. He is, therefore, presumed to be familiar with our case law, our statutes, and our Rules; his actions demonstrate either a complete lack of understanding or an intentional flouting of those guides.

[¶62] Rule 13(f) recognizes our inherent authority, upon a determination that an appeal, argument, or motion is frivolous, contumacious, or instituted primarily for the purpose of delay, to award an opposing party or their counsel a sanction that may include treble costs and reasonable expenses. Authority to award costs is also provided by 14 M.R.S. § 1802 (2015). In trial courts and on appeal, attorney fees may be awarded for egregious conduct in the course of litigation. *Soley v. Karll,* 2004 ME 89, ¶ 11, 853 A.2d 755. When we award attorney fees on appeal, we may set a fixed sum to be paid towards attorney fees. *See, e.g., Estate of Dineen,* 2006 ME 108, ¶ 8, 904 A.2d 417.

[¶63] As with other rules, the rules regarding sanctions and determinations that an appeal is frivolous are applied equally to represented and unrepresented parties. *Dep't of Health & Human Servs. v. Tardif,* 2009 ME

75, ¶ 7, 976 A.2d 963; *Edwards v. Campbell,* 2008 ME 173, ¶ 11, 960 A.2d 324. Although he purports to speak for or represent the interests of parties who are not participating in this appeal, and although he is an attorney, we consider Burbank to be unrepresented for purpose of our consideration of sanctions. However, attorneys who represent themselves on appeal are assumed to be aware of court rules and their ethical obligations in prosecuting their own appeals. *Marshall v. Webber*, 2008 ME 126, ¶ 4, 955 A.2d 751.

[¶64] Based on the above findings and discussion of sanctions, we conclude that Harold Burbank II should be sanctioned for his repeated misconduct in prosecuting this appeal. As a sanction, Harold Burbank II is required to pay the Neighbors $5,000 toward their attorney fees incurred to defend this appeal, and he is required to pay the Co-owners $5,000 toward their attorney fees incurred to defend this appeal. The Neighbors and the Co-owners are also awarded treble costs on appeal.

The entry is:

> Judgment affirmed. Attorney fees and costs on appeal awarded as indicated in this opinion.

APPENDIX F

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CONSTITUTION, STATUTES, OTHER AUTHORITIES

A. Constitutions and Statutes

1. US Constitution First Amendment

The free individual political speech and petition clauses of U.S. Const. amend. 1 provide:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. The Due Process and Equal Protection Clauses of U.S. Const. amend. 14, sec. 1 provide:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. US Constitution Art. VI Supremacy Clause:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

4. Connecticut Constitution Article First:

> SEC. 1. All men when they form a social compact, are equal in rights; no man or set of men are entitled to exclusive public emoluments or privilege from the community.
>
> SEC. 4. Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.
>
> SEC. 5. No law shall ever be passed to curtail or restrain the liberty of speech or of the press.
>
> SEC. 8. In all criminal prosecutions the accused shall have a right to be

heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by indictment or information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless on a presentment or an indictment of a grand jury, except in the armed forces, or in the militia when in actual service in time of war or public danger.

SEC. 9. No person shall be arrested, detained or punished, except in cases clearly warranted by law

SEC. 14.The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance.

6. Connecticut Constitution Amendment XXI

Article fifth of the amendments to the constitution is amended to read as follows: No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.

7. Americans With Disabilities Act, 42 USC Sec. 12101 et. seq.

8. Americans with Disabilities Act Title II Regulations

Part 35, Nondiscrimination on the Basis of Disability in State and Local Government Services

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7)(i) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

9. Maine Mandatory Shoreland Zoning Act, 38 MRSA Secs. 435-449.

B. Other Authorities

10. Maine Rules Civil Procedure [MRCP] 89:

(a) Withdrawal of Attorneys. An attorney may withdraw from a case in which the attorney appears as sole counsel for a client, by serving notice of withdrawal on the client and all other parties and filing the notice, provided that (1) such notice is accompanied by notice of the appearance of other counsel, (2) there are no motions pending before the court, and (3) no trial date has been set. Unless these conditions are met, the attorney may withdraw from the case only by leave of court. A motion for leave to withdraw shall state the last known address of the client and shall be served on the client in accordance with Rule 5. This subdivision shall not apply to a limited appearance filed under Rule 11(b) unless the attorney seeks to withdraw from the limited appearance itself...***Advisory Committee's Note September 1, 1973***: 'The new rule does not specify what notice is to be given the client or what considerations the court should take into account on a motion by an attorney for his withdrawal. Such detail is difficult, if not impossible, to spell out in the rule because of the variety of circumstances that may prevail. In general, the court should attempt to avoid prejudice to the client of the withdrawing attorney and at the same time avoid delay to the court and opposing counsel. Usually those objectives are best served by giving the client notice and opportunity to be heard, unless substitute counsel has appeared of record.

11. Bork, *Neutral Principles and Some First Amendment Problems*

12. Black, *Structure and Relationship in Constitutional Law*

13. Mieiklejohn,'The First Amendment Is A Absolute,'1961Sup.Ct.Rev. 245

14. Connecticut Practice Book Rule 3.1:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

15. Raymond, 'Professional Responsibility and the Pro Se Attorney', St. Mary's Law Journal of Legal Malpractice and Ethics, Vol1:2 (2011)

16. American Bar Association Model Rules of Professional Conduct

17. Maine Rules of Professional Conduct (MRPC) 1.0(e): Definitions and Terminology

"Informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. Whether a client has given informed consent to representation shall be determined in light of the mental capacity of the client to give consent, the explanation of the advantages and risks involved provided by the lawyer seeking consent, the circumstances under which the explanation was provided and the consent obtained, the experience of the client in legal matters generally, and any other circumstances bearing on whether the client has made a reasoned and deliberate choice.

18. MRPC 1.2:

Scope of Representation and Allocation of Authority Between Client and Lawyer:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. Subject to the Rules with respect to Declining or Terminating Representation (Rule 1.16), a lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

19. MRPC 1.4:

Communication:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and consult with the client about any relevant limitations set forth in the Maine Rules of Professional Conduct, or other law with respect to lawyers' conduct, when the lawyer knows that the client expects assistance not permitted by the Maine Rules of Professional Conduct or other law.

20. MRPC 1.6:

Confidentiality of Information: (a) A lawyer shall not reveal a confidence or secret of a client unless (i) the client gives informed consent; (ii) the lawyer reasonably believes that disclosure is authorized in order to carry out the representation; or (iii) the disclosure is permitted by paragraph (b). (b)A lawyer may reveal a confidence or secret of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain substantial bodily harm or death; (2)to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3)to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4)to secure legal advice about the lawyer's professional obligations...

21. MRPC 1.6, Comment #16:

A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. Consistent with Section 66 of the RESTATEMENT, a lawyer who takes action or decides not to take action allowed under this Rule is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third persons, or barred from recovery

against a client or third persons. The legal effect of the lawyer's choice, however, is beyond the scope of the Model Rules of Professional Conduct.

22. MRPC 1.7[b]:

Conflict-of-Interest: Current Clients:

b) Notwithstanding the existence of a concurrent conflict-of-interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer would be able to provide competent and diligent representation to each affected client.

23. Restatement Third, Sec. 66, *The Law Governing Lawyers*:

Sec. 66. (Substance not available due to COVID. Table of Contents follows).

24. MRPC 1.14:

Client with Diminished Capacity
(a) When a client's capacity to make adequately considered decisions i connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

testify falsely, or offer an inducement to a witness that is prohibited by law;(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

32. MRPC Preamble:

Preamble from the Maine Task Force on Ethics:
(15) The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are to alert lawyers to their responsibilities under such other law...

(16) Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

33. Gorod, 'The Adversarial Myth: Appellate Courts Extra Record Fact Finding', 61 Duke Law Journal 1 (2011).

34. Dobbins, 'New Evidence on Appeal',96 Minnesota Law Review 2016 (2012).

35. Schwartz, *A History of the Supreme Court*, p.215 (1993).

36. MRCP 1.16: Declining or Terminating Representation

Comment [6]: If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

37. MRCP 1.4, Comment 5:

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important

provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict-of-interest, the client must give informed consent, as defined in Rule 1.0(e).

APPENDIX G

79c

State of Maine

Supreme Judicial Court	*	Docket No. BAR-17-12
Board of Overseers of the Bar Plaintiff	* *	
v.	*	
Harold Burbank Defendant	*	

Defendant's Opposition to the Board's Proposed Factual Findings, Conclusions and Sanctions Order

Pursuant to Justice Robert Clifford's October 18, 2017 in-hearing instructions defendant Harold Burbank opposes the Board's proposed factual findings, conclusions of law, other conclusions, and sanctions, cover latter dated November 8, 2017, for the following reasons:

1. Introduction

In May, 2012 defendant asked Northport, Maine code enforcement officer Toopey Rooney and Maine Department of Environmental Protection Shoreland Zoning Programs Director Attorney Deidre Schneider to investigate zoning violations on defendant's Northport seaside lot by persons, not excluding neighbors, seeking to maintain ocean views (brush cutting) across defendant's lot, and/or structures (stairs and paths) on defendant's lot. Defendant Exhibit #38, p. 7. Violations of Maine's 1971 Mandatory Shore Land Zoning Act were found for which Northport had primary enforcement authority. In mid July, 2012, Northport issued a zoning notice of violation (NOV) against defendant and his (@ fourteen) co-tenants, including underlying case defendants father Harold Burbank, Sr., brother David

Burbank, and sister Lori Darnell, to remove one of two sets of stairs and make many remediations by mid August, 2012. Maine DEP and its Shoreland Zoning Director Attorney Deirdre Schneider supported the NOV due to Northport's lawful assessment and jurisdiction in the case. *Id*, and Defendant Exhibits #2, #3 (Law Court Errata Sheet) and #22, p. 10.

Defendant waited more than thirty days for Northport's Zoning Board NOV appeal period to pass, and having received no Northport notice of NOV rescission; having information that Northport rejected plaintiffs' and co-tenants' requests to rescind the NOV; and having Northport confirmation that Northport would not rescind the NOV; about July 27, 2012 defendant noticed neighbors by Waldo County Sheriff visit that defendant would comply with the NOV. Defendant Exhibit #35. Defendant complied on September 11, 2012. Defendant's Exhibits #31, #32, #33, #37, #38 pp. 6-15. On February 21, 2013 plaintiffs in the underlying case filed civil complaint. Defendant's and witness Marianne Burbank testimony, October 18, 2017 before Justice Clifford. See also Defendant Exhibit #22, p. 16.

In summer, 1993, defendant's paternal grandmother, Phyllis Burbank, a lifelong Maine resident, requested a meeting with defendant in his Maine attorney capacity at her Northport, Maine ocean cottage and lot underlying this case, to discuss her estate plans to leave the property and a substantial supporting trust fund to her children, grand children and great grandchildren so her property and trust would remain in Burbank descendancy in perpetuity. Defendant, wife Marianne and two natural children, Phyllis's great grandchildren, were in residence at the cottage at the time. The meeting occurred. Defendant Exhibit #34; photo depicting

defendant, legal pad in hand, sitting with Phyllis in her cottage driveway (taken by defendant's wife, Marianne Burbank, to memorialize this meeting for posterity). The meeting concluded that defendant advised due to Phyllis's multi-generational goals and very valuable property, she should seek counsel of a large Maine law firm's estate planning department with complex estate expertise. For reasons unknown, Phyllis Burbank chose instead to hire local Belfast, Maine Attorney Paul Hazard. Defendant Exhibit #22, pp. 36-38.

Marianne Burbank testified before Justice Clifford October 18, 2017, on facts above, including Phyllis Burbank's statements to Marianne that Phyllis's intention was to benefit Marianne's and defendants' two children – Phyllis's natural great grandchildren - in perpetuity as she intended to benefit her entire Burbank descendancy. *Id.*

About March 16, 2000 (not 2016 cited in defendant's Exhibit List) defendant and co-tenants received US Mail letter notice from Belfast, Maine Attorney Paul Hazard, attorney and trustee for Phyllis Burbank, who in Fall, 1993 gifted the underlying real estate to instant co-tenants, including defendant, in equal shares, and also gifted to co-tenants, including defendant, a substantial trust fund to support the real estate. Hazard's letter made Phyllis Burbank's gift intentions clear:

> On October 12, 1993, Phyllis took the unusual step of deeding the cottage to all of you...This was obviously done to *assure* (emphasis added) that the cottage remain in the Burbank family in perpetuity." Defendant Exhibit #1, p. 3.

Against this family legacy background, defendant, for not less than twenty-six years prior to the Board's instant Complaint, lived out of state holding a Maine (his home state) law license of sentiment only. He did not own a Maine law office,

solicit Maine clients, participate in Maine bar functions (save occasional continuing legal education (CLE) courses) or litigate cases in Maine courts. In 2004 he volunteered to represent presidential candidate Ralph Nader and running mate Peter Camejo in a 2004 Maine Secretary of State hearing about Maine petitions the campaign advanced to put the candidates on the 2004 Maine presidential ballot (defendant won the case; the only such win in similar cases brought against the campaign in @ 35 other states). Defendant Exhibit #19. Later defendant volunteered to sponsor the pro hac vice motion of Washington, DC Attorney Oliver Hall and supervise his work for the Nader-Camejo campaign, including before Maine's Law Court. *Id.*, and Attorney Halls' October 18, 2017 sworn hearing testimony before Justice Clifford.

Contrary to Law Court findings, and Board of Overseer contentions, defendant has never filed a Maine Law Court appeal. His attorney, Attorney Mariah Gleaton, Waterville, Maine, filed the instant Law Court appeal. Defendant Exhibits #6, #7, #8, #9, and #10. Attorney Gleaton's August 26, 2015 MRAP 5(b)(2)(A) Issues Statement made clear that issues she would present included trial court judgments for punitive damages, trial court judgments for conversion, trial court judgments for prescriptive easement, trial court judgments for partition by sale of underlying Northport real estate, trial court judgments unsupported or against trial evidence; trial court conclusions unsupported or against trial evidence; and trial court judgments unsupported by or contrary to law, including but not limited to Maine regulations and statutes, the Maine and US Constitutions, and all issues preserved on the record. Defendant Exhibit #8. These were the issues defendant briefed,

some of which the Law Court sanctioned. Defendant Exhibit #22. Board of Overseers Exhibit #1.

However, Maine court rules cited by Attorney Gleaton in her February 23, 2016 Motion to Withdraw (Defendant Exhibit #12, citing MRCP 89 and MRAP 10) specifically contemplate client due process rights to competent replacement counsel, filing of notice of appearance of that counsel with the Court, and/or a hearing on these matters so either the client has an opportunity to be heard, substitute counsel may be heard, or both may be heard to avoid client prejudice *before* Motions to Withdraw may be granted:

> MRCP 89. WITHDRAWAL OF ATTORNEYS; VISITING LAWYERS; TEMPORARY PRACTICE WITH LEGALSERVICES ORGANIZATIONS
> (a) Withdrawal of Attorneys. An attorney may withdraw from a case in which the attorney appears as sole counsel for a client, by serving notice of withdrawal on the client and all other parties and filing the notice, provided that *(1) such notice is accompanied by notice of the appearance of other counsel*...Unless these conditions are met, the attorney may withdraw from the case only by leave of court.
>
> Advisory Committee's Note, September 1, 1973: A new subdivision (a) is added to Rule 89 in order to deal with a lawyer's withdrawal from a case in which he appears as sole counsel for his client, a subject not now covered by the rules. The present Rule 89 relating to visiting lawyers is newly designated as subdivision (b). Rule 89(a) is taken substantially intact from Local Rule 7(d) of the United States District Court for the District of Massachusetts. It is to be contrasted with Local Rule 4(b) of the District of Maine reading: No attorney may withdraw his appearance in any action except by leave of Court. **The new rule does not specify what notice is to be given the client or what considerations the court should take into account on a motion by an attorney for his withdrawal. Such detail is difficult, if not impossible, to spell out in the rule because of the variety of circumstances that may prevail. In general, *the court should attempt to avoid prejudice to the client of the withdrawing attorney* and at the same time avoid delay to the court and opposing counsel. Usually *those objectives are best served by giving the client notice and opportunity to be heard, unless substitute counsel has appeared of record*** (emphases mine).

Though Attorney Gleaton's February 23, 2015 Motion to Withdraw stated that 'appellant (defendant) will proceed by representing himself in this matter as he is an attorney licensed in Maine', she cited no Maine authority permitting her to assert

this position without first complying with all client protection due process elements of MRCP 89, including its Advisory Committee Notes *infra*. Accordingly there is no record evidence that defendant filed an attorney appearance as MRCP 89 commands for a substitute attorney, nor that defendant was counseled by Attorney Gleaton or the Law Court on his due process rights or duties to file an appearance as a substitute attorney for himself or anyone else (ie Harold Sr., David Burbank, Lori Darnell); nor that defendant was counseled by anyone about Rule 89 due process rights for retaining or waiving rights to substitute counsel; nor that defendant was counseled on due process rights to hearing before the Court, or have substitute counsel appear for hearing; let alone whether the Law Court considered if defendant was prejudiced by denial of these rights; or if Rule 89 demanded a hearing; before Attorney Gleaton was permitted to withdraw. Defendant Exhibit #11.

Accordingly there is no record basis to conclude that defendant represented other trial parties on appeal as the Law Court's December 15, 2015 Order on Motion to Withdraw held:

> No other attorney has entered an appearance for Harold Burbank I (Sr.), David Burbank or Lori Darnell. As a result, Harold Burbank, II (defendant) is proceeding simultaneously as an appellant and as an attorney for three of the appellees...*Id.*

The Court cited no law for its position. It offered no hearing beforehand. It avoided defendant's Rule 89 due process rights, and those of trial co-defendants, to appear in Court themselves, or have an attorney of their choice file and appearance and appear for them to argue against the finding that defendant was proceeding as trial co-defendants' appeal attorney, which defendant and trial

co-defendants considered untrue, and to argue against prejudice to defendant and trial co-defendants resulting from the holding, exposing defendant to Law Court and Board of Overseers misconduct charges.

Other than for discipline purposes before Justice Clifford, defendant has never been allowed to appear before the Law Court, despite his April 5, 2016 MRAP 11(g)(1) 'Statement and Request for Oral Argument' (Defendant Exhibit #5) and September 10, 2016 MRAP 14(b) 'Motion for Reconsideration' (Defendant Exhibit #29), granted in part without hearing (Law Court 'Errata Sheet', Defendant Exhibit #3). MRAP 11(g)(1) allows that 'a party may file a *statement* (emphasis added) setting forth the reasons why oral argument should be entertained and requesting same.' At hearing October 18, 2017 Justice Clifford queried defendant whether he noticed the Law Court of background circumstances of the appeal prior to Law Court August 30, 2016 judgment. Defendant testified that he filed his April 5, 2016 'Statement and Request For Oral Argument' well before August 30, 2016 judgment, and that his 'Statement and Request' was denied.

The 'Statement and Request' plainly presented the Law Court with extraordinary pre-judgment trial party facts of due process concern; ie father Harold Burbank, Sr.'s stroke, cancer, kidney failure, and other facts unaccounted for by the Law Court's December 15, 2015 'Order on Motion to Withdraw' (Defendant Exhibit #11), compelling defendant, *as a consequence* of his appeal counsel's withdrawal, to assume attorney duties for defendant's trial clients, father Harold Sr., brother David Burbank, and sister Lori Darnell, without due process notice to or opportunity to be heard by any of these parties beforehand on issues raised or implied, including

show cause issues of why defendant should not be dismissed as trial clients' appeal counsel raised in the Court's Order on Motion to Withdraw. *Ibid.*

Only the defendant raised these due process concerns and in the interests of justice sought their redress. His 'Statement and Request' (Defendant Exhibit #5, *infra*) argued that the US Supreme Court would support him. Quoting Justice Scalia:

> It (oral argument) isn't just an exchange between counsel and each of the individual justices. What is also going on to some extent is an exchange of information among the Justices themselves. You hear the questions of the others and you hear how their minds are working, and that stimulates your own thinking...I use it to give counsel his or her best shot at meeting my major difficulty with that side of the case. 'Here's what's preventing me from going along with you. If you can explain why that's wrong, you have me.' *This Honorable Court* (WETA 1988; TV broadcast) and 'Statement and Request', *infra*, p.1.

The Law Court knew from the 'Statement and Request' that defendant sought to inform the Court of key background due process facts Justice Clifford adverted to by his October 18, 2017 query whether the Law Court knew of these facts pre-judgment. Defendant's "Statement" advocated that:

> Many scholars argue that oral argument is not perfunctory but can be critical to courts' rightful decision making for many reasons. Appellant adverts that the best reason was summed by the late US Supreme Court Justice Antonin Scalia when he described oral argument as a preliminary conference where judges more than parties share their views of the case, including their understanding of the facts and the law, in which case lawyers participate...'Statement and Request', Id., p. 1.

These facts included defendant's role as attorney to defendant's grandmother Phyllis Burbank, roles of durable power of attorney (Defendant's Exhibit #4) and trial counsel of defendant's father, Harold Burbank, Sr. (deceased January 20, 2017), Harold Sr.'s considerable medical disabilities complicating communications and representation of Harold Sr. for durable power of attorney.

Likewise, the Law Court did not schedule a hearing for defendant's February 23,

2016 Motion to Withdraw as Counsel, which argued defendant had no authority to represent anyone before the Law Court but himself, that trial clients Harold Burbank, Sr., David Burbank and Lori Darnell had not been heard on appeal issues raised by the Law Court alone; that Harold Sr. was severely disabled before and after defendant appealed; that Harold Sr. advised defendant that Harold Sr. wished to represent himself on appeal; that Harold Sr. could not represent himself due to severe disability; and that defendant consulted the trial clients before filing the Motion to Withdraw as appeal counsel. Defendant's Exhibit A, Motion to Withdraw as Counsel, attached to this Opposition.

Regardless, the Law Court unjustly ruled that defendant committed misconduct for making such lawful efforts to bring the full facts, full rights and lawful arguments of his trial clients, himself, and his appeal before the Court.

2. Defendant, whose attorney the Law Court dismissed without hearing, was a party to his appeal, not the attorney for appeal, as judged by the Law Court, precluding violations of MRPC 1.1, Competence, MRPC 1.3, Diligence, 3.1, Meritorious Claims, and/or MRPC 3.4, Fairness to Opposing Party-Counsel.

The purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. MRPC Preamble, para. 17. Scholars classify lawyer professional conduct rules as 'role rules' and 'identity rules'. Role rules have language about lawyers representing clients, not themselves (pro se). Identity rules use a law license as the basis to impose a rule. Raymond, 'Professional

Responsibility and the Pro Se Attorney', *St. Mary's Law Journal of Legal Malpractice and Ethics*, Vol. 1:2, (2011), p. 6.

By this definition, *MRPC* 1.1 and 1.3 from their language (*Proposed Factual Findings, Conclusions and Sanctions Order*, p. 7), are role rules. They do not apply to defendant because he entered the appeal as a represented party, and continued pro se. He never represented a client as these rules contemplate. He did not violate *MRPC* 3.1(a) since he did not 'bring' (file) the appeal. The record shows he had a good faith basis to appeal in law and fact, supported by the filing attorney, and argued by defendant on solid theories to extend, modify or reverse existing law. Even the Law Court acknowledged the appeal raised issues of fact, ignored by the Board, that could have changed the judgment. *Board Exhibit #1*, p. 13, para. 29. There is no record evidence that defendant 'knowingly' disobeyed a *MRCP* 3.4(c) obligation but rather as adverted in his 2016 answers to Board inquiries (Defendant Exhibit #20) no valid obligation existed where the Law Court and Board cited no specific facts supporting allegations of offending conduct; i.e. the Court and Board cited no specific facts pled not in the court record, nor justified judgment that unpublished pleadings rules such as coiled bindings for briefs (now published in 2017 *Rules*) could even possibly be 'knowingly' disregarded.

The Law Court's judgment that defendant was 'unrepresented' for sanctions purposes ((Board Exhibit #1, *Lincoln v. Burbank*, p. 31) but not 'unrepresented' for 'attorney role' misconduct brings the factual, due process and equal protection failures of the Board's complaint into compelling focus. Due process, equal protection and First Amendment rights to petition government without fear of

reprisal are not honored where a party-lawyer is judged unrepresented for the sanctions phase of an appeal judgment, and something 'more' during appeal phases leading to misconduct charges. Either defendant was without representation through the entire appeal, and thus had no 'role' under Maine Rules of Professional Conduct, or he was in all appeal phases an attorney subject to discipline for each phase. The Law Court and Board did not provide analysis for these distinctions.

Defendant contends therefore that competence, diligence, meritorious claims and contentions, and fairness to opposing party judgments (*MRPC* 1.1, 1.3, 3.1 and 3.4) cannot be made against him as a lawyer. There is no American Bar Association or Maine law ethics 'test' or precedent for these 'dual' party-lawyer circumstances. Defendant contends that assuming and applying a non-existent standard against him alone violates his due process, equal protection and First Amendment petition, without fear of reprisal, rights. Such judgment would be arbitrary, if not bias. Essentially the Court and Board argue that pro se defendant lawyers are exposed to all ethical risks of licensure and none of the protections, despite defendant's defenses on such 'role' bases dating to the Board's September 6, 2016 first investigation letter and defendant's answers to it (Defendant Exhibit #20).

Due process and equal protection demanded that MRPC regulations of 'Competence' for filing the appeal (Defendant Exhibit #7), filing the issues statement (Defendant's Exhibit #8), and filing appeal Notice of Appearance (Defendant Exhibit #10) ran to defendant's attorney, as did "Diligence' in pursing those issues, ' Meritorious Claims and Contentions', and attendant 'Fairness to

Opposing Party and Counsel'. There is no record basis or authority offered by the Law Court or Board to conclude how or why defendant transitioned to an attorney 'role' after his attorney was discharged, without hearing, or how or why exposure to attorney 'role' misconduct charges arose under Maine Rules of Professional Conduct in these circumstances. Due process demands such an analysis before either 'role' or 'identity' ethics rules apply. At a minimum many courts have found the term "attorney" implies an agency relationship and that such a relationship is missing where one person is both lawyer and client. Raymond, *infra*, p. 21. There is no record evidence, or Maine rule, demanding that defendant be found an 'agent' for himself subject to bar discipline due to pro se appeal.

3. Maine Common Law Fiduciary Duties of Client Loyalty and Fidelity, plus Law and Policy of Maine Rules of Professional Conduct, Do Not Support Sanctions

The Law Court adopted rules of professional responsibility to coordinate with the American Bar Association's review of the *Model Rules of Professional Conduct*. Maine's acceptance of these rules *maximizes conformity with those states embracing the ABA Model Rules* and also preserves the integrity of the manner in which Maine lawyers practice law. *Maine Rules of Professional Conduct*, Preamble Sections (1) to (14A).

Compliance with the *Rules*, as with all law in an open society, depends primarily upon understanding and voluntary compliance...and ***when necessary***, upon enforcement through disciplinary proceedings. *The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a*

framework for the ethical practice of law. Id., para 16.

Accordingly defendant contends that on October 18, 2017, the date of defendant's formal Law Court formal hearing in this matter, for reasons of due process, equal protection and First Amendment right to petition without fear of reprisal, the Law Court could not, as the Board's *Proposed Factual Findings* state (page 2, para 2) simply adopt ethics findings and conclusions of *Lincoln v. Burbank*, the appeal underlying the Board's complaint, without thorough de novo review of alleged facts and law, regardless of judgment textual holdings. In the instant forum defendant has rights to challenge whether he 'stated issues without further argument', 'listed meritless issues', 'filed many frivolous issues', or made arguments devoid of legal authority to support them', as the Board and Court alleged (*Proposed Factual Findings*, p. 3) especially where neither Board nor Court cited specific factual examples of their criticisms. Rather the Court and Board offered non-specific assertions that defendant disregarded standards of law and practice, made baseless and/or frivolous arguments, intended to have the appeal decided on facts and evidence not in the record, intended disrespect to the courts, intended to be unfair to parties, and acted contrary to Maine appellate law (*Proposed Factual Findings*, p. 4).

Close examination of defendant's *Lincoln v. Burbank* pleadings shows the allegations are false, particularly when viewed through the lens of competing *Maine Rules of Professional Conduct* the Board and Court avoided. For example, many Rules of Professional Conduct require lawyers to obtain informed consent of a client or another person (ie former or prospective client) before accepting or continuing

representation or pursuing a course of conduct. See, e.g., *Rules* 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives.

In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

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Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See *Rules* 1.7(b) and 1.9(a). Other *Rules* require that a client's consent be obtained in a writing signed by the client. See, e.g., *Rules* 1.8(a) and (g). For a definition of "signed," see paragraph (n). *Maine Rules of Professional Conduct* 1.0, Notes, Informed Consent, Comments (6) and (7).

A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by *Rule* 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. Subject to the *Rules* with respect to Declining or Terminating Representation (*Rule* 1.16), a lawyer shall abide by a client's decision whether to settle a matter. *MRPC* 1.2.

Defendant contends that his Motion for Oral Argument, Motion for Withdrawal As Counsel, and Motion for Reconsideration, infra, plainly intended to raise, discuss and settle *MRPC* representation issues above not only for himself, but for his trial clients, especially his severely disabled father, Harold Sr. The fact that the Court, by no fault of defendant, denied due process hearings on the Motions precluded fair ethical analysis of them, which should, in the interests justice, preclude sanction.

Regarding diligence, 29. Diligence. A lawyer shall act with reasonable diligence and promptness in representing a client. A lawyer should pursue a matter on behalf

of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client. *MRPC* 1.3. and Comment (1).

Defendant has exhaustively argued *infra* and to the Board that all of his acts comported with the diligence standard. In the interests of client Phyllis Burbank, trial clients and himself he conceived and advanced lawful theories of defense and property rights protections. He did so free of charge despite very high costs, time demands and stress levels resulting in either TIA stroke or a recurring migrainous condition (see October 18, 2017 testimony of Dr. Richard Abraham, MD) intending only to protect his grandmothers' legacy and family rights (including his two children's); truly selfless motives commanded by diligence rules.

A lawyer shall: a) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in *Rule* 1.0(e), is required by these *Rules*, b) reasonably consult with the client about the means by which the client's objectives are to be accomplished, c) keep the client reasonably informed about the status of the matter, d) promptly comply with reasonable requests for information and e) consult with the client about any relevant limitations set forth in the Maine Rules of Professional Conduct, or other law with respect to lawyers' conduct, when the lawyer knows that the client expects assistance not permitted by the *Maine Rules of Professional Conduct* or other law. Importantly, a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. The client should have sufficient

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information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. *MRPC* 1.4. and Comment 5.

Communication with disabled Harold Burbank, Sr. was particularly difficult for defendant, who delayed responding to Justice Gorman's Order to Show Cause re representing Harold Burbank, Sr. (and two others) on appeal precisely for reasons comporting with *MRPC* 1.4. Harold Sr. had not been diagnosed incompetent by his doctors during Show Cause pendency. Harold Sr. had keen interest in defendant's appeal and even told defendant he would represent himself if he decided to appeal. Before defendant communicated these facts to the Law Court he wanted to be sure Harold Sr. understood his rights. *MRPC 1.4* contemplates court delays in these circumstances precluding Board of Overseers' proposed sanctions.

A lawyer shall not reveal a confidence or secret of a client unless the client gives informed consent; the lawyer reasonably believes that disclosure is authorized in order to carry out the representation; or the disclosure is permitted by law. Before revealing information in most cases the lawyer must, if feasible, make a good-faith effort to counsel the client to prevent the harm and advise the client of the lawyer's

ability to reveal information and the consequences thereof. A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation which is protected by the attorney-client privilege or may be detrimental to the client's interests. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. **The confidentiality rule**, for example, **applies** not only to matters communicated in confidence by the client but also **to all information relating to the representation**, whatever its source, **which may be detrimental to the client's interests**. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. Other law may require that a lawyer disclose information about a client. **Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of *MRPC*.**

Consistent with Section 66 of the RESTATEMENT, ***a lawyer who takes action or decides not to take action allowed under the Maine confidentiality rules is not, solely by reason of such action or inaction, subject to professional discipline***, liable for damages to the lawyer's client or any third persons, or barred from recovery against a client or third persons. The legal effect of the lawyer's choice, however, is beyond the scope of the Model Rules of Professional Conduct.

Information relating to the representation of a client" is a very broad formulation. It protects not only information communicated by the client, but any information related to the representation received from other sources; and even information that is not in itself protected, if it leads to the discovery of protected information.

Positive, public information about the client learned in the course of the client representation would also be protected. The Model Rules Reporter acknowledged the potential breadth of this formulation of the scope of protected information, if read literally.

The Maine Ethics Task Force discussed the discretionary nature of the lawyer's choice to disclose. Consistent with Sections 66 and 67 of the RESTATEMENT, the Task Force thought it was important to note that the lawyer's choice to act or not act does not subject the attorney to liability. *The Task Force also thought it was also important to make clear that the legal effect of the lawyer's choice to act or not act is* ***beyond the scope*** *of the Maine Rules of Professional Conduct. MRPC 1.6, Comments and Notes.*

Given these Task force assessments, defendant contends his choices not to immediately respond to the Law Court's Show Cause order precludes such sanctions. Defendant did not know client views about appeal or even all of Harold Sr.'s medical conditions during the Order's pendency. Maine does not consider lawyer choices to act or not act to disclose client information in these circumstances within Maine ethics rules scope.

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the **lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.** When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot

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adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with ***individuals or entities that have the ability to take action to protect the client*** and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian. Information relating to the representation of a client with diminished capacity is protected by *Rule* 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under *Rule* 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal

representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

In some circumstances, a lawyer may be justified in delaying transmission of information when the client (ie Harold Sr.)**would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client.** See *MRPC* 1.14, especially Comment (7).

Defendant contends that he is thus protected from sanction for reasons of *MRPC* 1.14, concerning Harold Sr.'s and his own party-attorney diminished capacities well documented to the Law Court and/or Board of Overseers. No less than three times defendant moved to get Harold Sr.'s medical disability facts before the Court. All three times defendant was denied a hearing. He explained Harold Sr.'s and his own medical disability (ie stroke suffered while preparing briefs) facts to the Board of Overseers on numerous occasions, beginning in October 2016, yet finds himself in November, 2017 in final stages of attorney discipline. *MRPC*s plainly give rights and encourage attorneys to reach out - not excluding courts and the Board of Overseers - to 'entities that have the ability to take action to protect the client'. Government, not the defendant, refused to acknowledge attendant ethical responsibility. Defendant, as Professor Raymond noted *infra* re pro se attorney ethics cases, has instead been saddled with all of the ethics costs, and granted none of the disability ethics protections, of a Maine law license.

A lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client. If the

client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in *MRPC* 1.14. A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. *MRPC* 1.16 and Comments.

MRPC 1.14 and 1.16 applied to Harold Sr. David Burbank Lori Darnell, and defendant on record facts. Before defendant moved to withdraw or was dismissed by the Court from representing trial clients Harold Sr., David Burbank and Lori Darnell, defendant consulted exhaustively with them to preclude material adverse effects to their interests. He made not less than th1ree attempts to mitigate these harms by motioning the Law Court about harm prospects. He made several attempts to mitigate harms to himself by requesting Law Court hearings of review and oral argument where the matter of his stroke would have arisen. He was denied.

Conversely there is no record evidence defendant's appeal attorney moved the Law Court for hearing before she was dismissed from the appeal, nor evidence that defendant was counseled about withdrawal risks, including ethics sanctions risks, before defendant's appeal attorney moved to withdraw, or was permitted to withdraw, or at any time after withdrawal. There is no record evidence the Law

Court considered harms to defendant's interests, including risks of ethics sanctions, if the Court granted the attorney's withdrawal motion citing a *Maine R. Civ.P.* 89 basis (Defendant Exhibit #12) which before Rule 89 can be considered fully met, specifically contemplates a hearing to protect clients from withdrawal harms.

While before appeal judgment the Court was not directly noticed of defendant's January 12, 2016 stroke suffered attempting to comply with the Law Court's December 15, 2015 order to re-file briefs, stroke medical records evidence came to the Court's agent Board of Overseers about October 16, 2016. Yet there has been no Court or Board cognizance of the significance of that evidence, defendant's medical condition and ongoing stroke recurrence risks. (Defendant Exhibits #s 13, 14, and 15). Defendant contends that burdens of Maine ethics law have again been prioritized by the Law Court and Board over defendant ethics rules protections, including from his own disabilities as a party-lawyer.

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the **lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.** When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with ***individuals or entities that have the ability to take action to protect the client*** and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

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Information relating to the representation of a client with diminished capacity is protected by *Rule* 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under *Rule* 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an

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immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. See *MRPC* 1.14, especially Comment (7).

Defendant contends that he is protected from sanction for reasons of *MRPC* 1.14, concerning Harold Sr.'s and his own as a party-attorney diminished capacities well documented to the Law Court and/or Board of Overseers. No less than three times defendant moved to get Harold Sr.'s medical disability facts before the Court. All three times defendant was denied a hearing. He explained Harold Sr.'s and his own medical disability (ie stroke suffered while preparing briefs) facts to the Board of Overseers on numerous occasions, yet finds himself in the final stages of discipline before the Law Court. *MRPC*s plainly give rights and encourage attorneys to involve those - not excluding courts and the Board of Overseers - as 'entities that have the ability to take action to protect the client'. Here government, not the defendant, refused to acknowledge attendant ethical responsibility. As Professor Raymond observed *infra* re pro se attorney ethics cases, Maine attorneys like defendant are saddled with all of the ethics costs of Maine ethics rules, and granted none of the *Rules*' (disability) protections.

A lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client. If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided

in *MRPC* 1.14. A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. *MRPC* 1.16 and Comments.

MRPC 1.14 and 1.16 applied to defendant's trial Harold Sr. David Burbank Lori Darnell, and to defendant on record facts. Before defendant moved to withdraw or was dismissed by the Court from representing trial clients, defendant consulted exhaustively with them to preclude material adverse effects to their interests. He motioned the Law Court three times about them to mitigate trial client harms and harms to himself. He was denied.

Conversely there is no record evidence defendant's appeal attorney moved the Law Court for hearing before she was dismissed from the appeal, nor that she counseled defendant about withdrawal risks, including ethics sanctions risks, before she moved to withdraw, or was permitted to withdraw, or at any time after withdrawal. There is no record evidence the Law Court considered harms to defendant, including ethics sanctions, if the Court granted defendant's attorney's withdrawal motion, which cited *Maine R. Civ. P.* 89 as a basis, which before *Rule* 89 can be met contemplates a due process hearing to protect the to-be-unrepresented client. Notwithstanding the Board's contrary claim (*Proposed Factual Findings*, p. 10, para 2), the Law Court was in fact noticed of defendant's January 12, 2016 stroke (suffered attempting to comply with the Law Court's December 15, 2015 order to re-file briefs) in defendant's September 10, 2016 Motion for Reconsideration

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(Defendant Exhibit #29, p. 19) and medical records evidence came to the Court's agent Board of Overseers about October 16, 2016. There is no record evidence that Court or Board were concerned with defendant's stroke, legal prejudice to defendant due to stroke, related disability, or risks of stroke recurrence; a further example where burdens of Maine ethics law were prioritized by the Law Court and Board upon defendant over any ethics benefits and/or protections the *Rules* clearly contemplate for Maine attorneys.

Lawyers may not engage in conduct that is prejudicial to the administration of justice. Legitimate advocacy however does not violate the rule. A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The Maine Ethics Task Force observed that "conduct that is prejudicial to the administration of justice" is one upon which courts and ethics commissions are reluctant to expand. *MRPC 8.4(d), Comment (4) and Notes.*

Defendant at all times never knowingly or otherwise engaged in prejudicial conduct toward anyone, believing the facts and legal theories he advanced pro se on appeal were legitimate. There is no record evidence to the contrary. The law Court simply drew the inference without hearing, oral argument or other opportunity to be heard. Indeed there is no record evidence the Law Court knows the defendant at all. He has never appeared there but for Nader campaign attorney supervisions, *infra*. The Law Court cited no Maine or other precedent or analysis of *how* defendant's conduct offended existing Maine law, let alone ABA standards or the US Constitution, or *how or why* he, any attorney, or any US citizen should glean the Law Court's mind before appealing a case. Defendant contends that

those standards do not exist precisely because of the difficulty in establishing them in an adversarial system. The *MRPC* Task Force is on record asserting that American courts and ethics commissions disfavor expanding this subject area. There is no record evidence that Maine should be an exception, let alone in defendant's case. The truth of this argument is indicated by the Board of Overseers November 8, 2016 letter to defendant where Attorney Davis stated he would recommend sanction of 'warning' to the Board on facts and law defendant asserted responding to the Board's September 6, 2016 letter of inquiry which began the Board's investigation of this case. Defendant Exhibit #21.

Regarding *MRPC 3.1, Meritorious Claims and Contentions*, defendant contends the majority of issues raised on appeal concerned disputed facts and whether defendant (and co-defendants) got 'meticulous review' of facts at trial demanded by Maine prescriptive easement case law. Proof of lack of meticulous review concerned well documented facts and expert Northport and DEP trial testimony that the state did not order defendant not to comply with Northport's NOV to remove stairs on defendant's property. Only the plaintiffs made this claim, stating under oath that a document existed supporting them, which plaintiffs could not and did not produce. Indeed their own witness, Northport CEO Larson, under oath at trial, impeached plaintiffs' claim. In addition to Schneider's and Larson's trial testimony, defendant documented proof of that testimony with a DEP letter (Defendant Exhibit #2) specifically addressing these matters, written by Attorney Schneider, submitted many times to the trial, appeal and reconsideration records. Yet the trial court, and the Law Court unanimous decision, inexplicably failed to make the obviously correct

finding of no state or any other order relieving defendant (and all trial defendants) from complying with Northport's NOV; a finding not made until defendant's Motion for Reconsideration was judged.

There was no finding by the Law Court that defendant's *factual* concerns were baseless or frivolous. There was no specific Law Court finding as to which issues were raised 'without any further argument', which issues were 'meritless', which issues were 'frivolous', or which arguments were devoid of legal authority'. Board's *Information,* para. 23(b). The Law Court found that defendant's arguments of fact could be viewed in ways not found at trial (Board Exhibit #1, p. 13, para. 29), but did not disturb the trial judgment. Defendant therefore denies he appealed for the Law Court to *decide,* as the Board's *Information* asserted, the case on new facts and new evidence not in the record, or that his arguments were egregious.

Conversely, defendant contends he argued assiduously in his trial Answer to Complaint, in his other pleadings, and at trial that record facts underpinned his defenses to easement and partition claims. His appeal sought meticulous review of these facts and arguments denied to him to the Reconsideration stage. Defendant arguments included many citations to Maine shore land zoning policy, statutes, government documents, Northport records, case law precedent, *Restatement of the Law of Property* (Volume II, Future Interests, Partition & Judicial Sales, Chapt. 11, Sec. 173, Exclusion of Partition by Intent Manifested in the Instrument Creating Interests, pp. 669-70 Comment...(b)), law review articles appearing in *Yale Law Journal, Boston College Environmental Affairs Law Review,* the legislative history of Maine real estate partition statute, and other traditional legal research and

argument sources. None of these sources was cited as unlawful, or without merit by Maine courts. See *Defendant's Answer to Board Information*, dated August 22, 2017, pp. 19-21.

Regarding *MRPC 3.4, Fairness to Opposing Party and Counsel*, defendant did not *knowingly* or otherwise disobey an obligation under Maine *Rules*. There is no record evidence that facts, law and supporting materials submitted on appeal were not part of the record. The Court did not identify them in its opinion, nor has the Board of Overseers. Facts alleged were based on testimony, documents (including government publications), photographs and other materials in the trial court record. Theories and arguments advanced by appeal brief or motion were found in academic legal doctrines, treatises, restatements of law, cases, and law review articles (*Id*), the most important of which concerned the interests of justice.

Bearing in mind the *MRPC Preamble* caveat, '*The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law*,' *infra*, at times defendant asserted, at least in a reply brief to defendants-appellees (written March 1, 2016 when defendant was under duress from January, 2016 stroke diagnosis from comply with the law Court order to re-submit briefs with plastic bindings per rules not published in 2016 but published in 2017 *Maine R. App. P.* revisions) an open refusal to adhere *without question* to some *Rules* to keep to the trial record since defendant found scholars of the issue argued no valid *constitutional* obligation existed, and indeed the US Supreme Court had not bound itself unwaveringly to procedural rules. See

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Gorod, *The Adversarial Myth: Appellate Court Extra-Record Fact Finding*, 61 Duke Law Journal 1 (2011), cited in defendant's reply brief to defendants-appellees (Defendant Exhibit #24); and Dobbins, *New Evidence on Appeal*, 96 Minnesota Law Review 2016 (2012). This idea was advanced with the intent to evolve Maine law; evolution being 'legitimate' advocacy recognized by the underling Maine Law Court opinion. Board Exhibit #1, p. 25, citing *Finch v Higgins*, 2008 ME 13.

Defendant's defendant-appellees reply brief further argued that *Citizens United v. FEC*, 558 US 301 (2010), a significant corporate speech case, repeatedly relied on facts that were not part of the record created by parties below. That Court's analysis made factual assertions with citation only to an amicus brief or without citation at all. There was little evidence in the Supreme Court's opinion of any record developed by the adversaries who had litigated the case. *The Adversarial Myth*, *infra*, p. 28.

Similarly, defendant argued in his first responses to the Board of Overseers that Justice Louis Brandeis, when he practiced private law, was famed for the 'Brandeis Brief' of extensive new, non-record fact pleading on appeal causing Brandeis to win *Muller v Oregon*, 208 US 412 (1908). That appeal brief of over one hundred pages contained only two pages of legal argument, and the balance non-record legislative facts' underpinning legislation at issue. Justice Frankfurter remarked the Court relied on this 'epoch making' brief for its (unanimous) decision factual foundation, and credited Brandeis with a new briefing technique for counsel, still 'the model' for constitutional cases. Bernard Schwartz, *A History of the Supreme Court*, p. 215 (1993). *Defendant's Answer to Board Information*, dated August 22,

2017, pp. 16-17.

While some find this incongruous with other principles of law, there is no record evidence that parties must be prejudiced, that justice is not served, or more importantly that the US Supreme Court has ruled it unlawful in any way for courts to develop their own factual records by their own efforts or otherwise, including in the interests of justice reliance on documents, exhibits, testimony or other evidence not formally entered into a court record. Where attorney duties of zealous advocacy, client loyalty, protection of property and constitutional due process commanded, defendant made *all* arguments he believed in good faith lawfully advanced his case.

Poignantly, *Sargeant v Buckley*, 197 ME 159, 622 A.2d 721 (1993) the Law Court held Maine attorney common law duties of client fiduciary responsibility, especially loyalty, supersede professional codes:

> The fiduciary obligations of an attorney are derived from the common law and equity independent of rules of conduct...The basic fiduciary obligations are two-fold, **undivided** (emphasis added) loyalty and confidentiality. These common law duties pre-date and exist despite independent, codified ethical standards. *Id*, para 9...We have stated that :"The provisions of the code of professional responsibility and disciplinary rules are useful guidelines for the understanding of a lawyer's obligations.' *Id,* Note (3), citing *In Re Dineen* 380 A.2d 603, 604 (Me. 1977).

Defendant thus contends that his appeal was grounded in common law fiduciary duties of loyalty and fidelity, arising on undisputed law and facts of the underlying trial and appeal, to his pre-appeal client-grandmother Phyllis Burbank and her known intentions for her will and trust described in her attorney letter (Defendant Exhibit #1) to all grantees of her land and trust seeking to keep her land and trust fund in her decsedancy in perpetuity; to his severely disabled father

Harold Sr. for whom given the nature of these disabilities defendant had both ongoing trial attorney *MRPC* and common law loyalty and fidelity fiduciary duties on appeal; and to trial clients brother David Burbank and sister Lori Darnell so that rights conveyed to them by client Phyllis Burbank, and their own rights raised by the underlying trial judgment, and opinions and orders of the Law Court, were represented.

4. Defendant Has A Due Process Right To Know What Facts and Evidence Were Not In the Record Before Such MRPC Sanctions Attach

Because licenses are property rights, the US Supreme Court has thus recognized that due process protection applies to license revocation actions by the state. See J. Bruce Bennett, *The Rights of Licensed Professionals to Notice and Hearing in Agency Enforcement Actions*7 TEX TECH ADMIN L.J. 205, 208 (2006) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970)). Accordingly a state cannot deprive a person of an issued and outstanding license to practice a profession, or banish or exclude a person from the practice of a profession, in a manner that contravenes due process of law. Further:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that, at a minimum, they require that any deprivation of life, liberty or property by adjudication be preceded by notice and an opportunity for hearing *appropriate to the nature of the case* (emphasis added)'. *Mullane v Hanover Trust Co.*, 339 US 306(1950).

Due process procedures 'are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivations of life, liberty or property.' *Carey v. Piphus*, 435 US 247, 259 (1978). 'Procedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of

cases.' *Mathews v Eldridge*, 424 US 319, 344 (1976).

Defendant contends that any sanction of his Maine law license, without a hearing that appropriately addresses on the facts of this case, including litigation-based defendant TIA stroke and risk of a new stroke, defendant's lack of notice of specific facts, documents or other pleadings defendant allegedly mis-pled, offends his due process and equal protection of his property interests in that license. To date, no party has identified which if any part of the court record defendant pled that is in fact not in the record.

5. Debt is Not a Basis for Maine Attorney Sanction

There is no Maine precedent to sanction an attorney for debt, especially as in this case, debt for which there has been no hearing on the ability to pay, or evidence that defendant has avoided payment of what he can pay. The Board of Overseers acknowledge that defendant has paid some (about $21,000) of civil awards arising from trial and appeal. There has been no hearing specifically on what has been paid and what may be owed. Defendant does not know. The last accounting was in August, 2017 when his Northport real estate underlying this case was sold, and amounts paid from the sale paid out to parties involved. Defendant has filed for US bankruptcy due to this case, indicating that he cannot pay these substantial awards, and will not in the foreseeable future be able to do so. That case has gone to hearing and is continued to 2018 so the federal trustee may gather more information on defendant's assets to be liquidated in an attempt to pay and lawfully absolve himself of debt ostensibly impacting his Maine law license. Where $15,000 of the trial award was for malice, and federal bankruptcy law allows discharge of malice

awards, it possible that the current debt to Maine parties may be $15,000 less after federal review than current accounting may indicate.

Defendant contends law review of this subject does not support any debt-based sanction, even where debt is accrued by court judgment:

> "Because her failure to pay was based on an asserted inability to pay, the attorney received an admonition." Betty M. Shaw, *Professional Responsibility for Professionally Incurred Debts*, Minn. Law., Jan. 24, 2000, at 2, 15. However, in the author's colloquy with OLPR on October 2, 2013, the Director agreed that if there is a genuine inability to pay, and the lawyer does not incur new debt without a reasonable expectation of ability to pay, the lawyer should not receive even a private discipline for not paying. Even so, the Director also noted that total inability to pay something is likely rare. If the lawyer were to file bankruptcy, and have the debts discharged, the Supremacy Clause of the U.S. Constitution would preclude professional discipline, at least in the foregoing circumstances.

And:

> The EGC's recommendation that this Court indefinitely suspend Adams until and unless he pays the judgment in Super. Ct. Civ. No. 411/2005 (STT) is inconsistent with the purpose of the attorney discipline system. Whether Adams pays the judgment in one day or thirty years, the risk he poses to the public, the legal system, and the legal profession from his unethical conduct remains the same. Yet the EGC has not proffered, and we cannot independently discern, how tying the length of Adams's suspension to how quickly he pays the judgment serves to protect these institutions from Adams. Rather, the proposed sanction would either act as an impermissible punishment of Adams—in the event he does not have the means to immediately pay the judgment—or would use the attorney discipline system to further Allen's private interests by granting him a *de facto* lien on Adams's law license. And while this Court considers payment of restitution when reviewing a petition for reinstatement, *see* V.I.S.CT. R. 203(h)(6), the reinstatement process is holistic, and this Court considers numerous factors, including whether the suspended attorney possesses the ability to pay. Accordingly, we reject this portion of the EGC's recommended sanction. Supreme Court of the Virgin Islands. IN THE MATTER OF the SUSPENSION OF Elmo A. ADAMS, Jr., Esquire, as a Member of the Virgin Islands Bar. S. Ct. Civ. No. 2013-0013.

Further, as argued in Defendant's Opposition to the Board's Motion in Limine Dated October 8, 2017, defendant contends that adding debt related charges to the

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Board's case not contained in the Board's original complaint applicable to the Overseers' May, 2017 administrative hearing offended defendant's due process rights since it is impermissible to sanction (including disbarment) based on untimely state charges added to ethics violations alleged after testimony of a state witness in a state discipline proceeding. *In Re Ruffalo*, 390 US 544 (1968).

6. Substantial Mitigations Preclude Any Suspension in This Case

Most mitigations have been argued above. Defendant contends this Opposition proves that, contrary to the Board's *Proposed Facutal Findings,* defendant did not pursue any selfish motive, but rather acted to protect his grandmother, father, brother, sister, his two children (Phyllis Burbank's great grandchildren) and himself; did not commit misconduct since he was a party in most respects for litigation where he incidentally held a law license, and suffered stroke in the acts of submitting his briefs; has not failed to acknowledge wrongful behavior as he believed in good faith that he had rights and duties to appeal as he did; has not in fact practiced law in Maine for 28 years where has not lived there since 1990 and kept a license only of sentiment; and has made substantial restitution, while awaiting evaluation of his bankruptcy rights.

The Court received substantial testimony October 18, 2017 by two respected attorneys with significant appellate practice experience in Maine that defendant possesses competence, diligence, character and skills to practice law competently in Maine. The Court received substantial medical testimony October 18, 2017 that defendant was significantly disabled January 12, 2017 by TIA stroke, or possibly a (37) recurring migrainous condition brought on by stress. The record shows that

defendant remains in the care of neurologists at University of Connecticut Hospital, Farmington, Connecticut, and has a stroke prevention plan, including daily medication and exercise, in place. There is no record evidence that these regimens will ever change. Defendant has an outstanding record of public service which in and out of Maine, which continues to this day (currently a dam preservation project in hometown Kennebunk). He has served as Assistant Attorney General for Maine child protection, and Penobscot Indian Nation director of human services. As testified, he was recommend to law school by President GHW Bush, without solicitation by defendant, who worked for the Bush family for four high school summers (groundskeeper, Walker's Point, Kennebunkport). The list of free legal services he has performed for Maine and other citizen is too long to list (and cannot be fully recalled anyway). He has never before been cited for any sanction of any kind, anywhere since graduating from law school in 1987; over 30 years ago.

7. ABA Standards Do Not Support Sanctions And At Best Favor Admonitions

From "Theoretical Framework", p. 9, Standards for Imposing Lawyer Sanctions, Copyright 2005, by the America Bar Association:

> In determining the nature of the ethical duty violated, the standards assume that the most important ethical duties are those owed to clients. These include:
>
> a) the duty of loyalty which includes the duties to:
> (i) preserve the property of the client (Rule 1.15/DR9-102)

The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that

circumstances exist that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

Re competence, defendant contends there are no ABA sanctions in the range of disbarment to admonition, since defendant did not represent a client, was in fact a client before the Court dismissed his attorney without hearing, and was at all times afterward an unrepresented party appeal as the *Rules* contemplate. In the event Admonition is favored, it has basic elements that a lawyer engage in an isolated instance of negligence and causes little or no harm to a client, which harm defendant did not cause. "Theoretical Framework", *infra*, *Rule* 4.5, 4.54, p. 19.

Likewise Diligence, *Rule* 4.4, Id, p. 18, does not apply on the instant facts, as defendant did not represent a client.

Re *MRPC* 3.1, 3.4, and/or 8.4, sanctions can be appropriate for failure to bring meritorious claims, or failure to obey rules under a tribunal *except* for an open refusal based on an assertion that no valid obligation exists. Rule 6.2, *Id,* p. 22. Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding. *Rule* 6.24, *infra*. Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the lawyer's conduct violates a duty owed as a professional, and causes little or no actual or potential injury to a client, the public or the legal system.

Defendant contends that all ABA mitigations apply. He has no discipline record,

had no selfish motive, was deeply committed emotionally to the case for his grandmother's father's, brother's, sister's, his two children's and his own sakes; made substantial timely restitution on the damages awards with available resources; has cooperated with all Board activities; had never practiced in the Maine Law Court and did so free of charge to help family members who could not afford a lawyer; has an outstanding reputation for character wherever he has lived or worked; must treat for stroke prevention for the rest of his life as a consequence of duress of this case; has not delayed disciplinary proceeding or underlying litigation; other than civil money judgments, is not subject to other penalties or sanctions; is remorseful as indicated in this Opposition; and as stated, no prior offenses or even complaints exist. *Rule* 9.3, *Id.*

Factors that are neither aggravating nor mitigating include forced or compelled restitution, resignation from the bar prior to discipline completion; and complainant's sanction recommendation. *Rule* 9.6, *Id.*

8. Conclusion

In Maine:

> The fiduciary obligations of an attorney are derived from the common law and equity independent of rules of conduct...The basic fiduciary obligations are two-fold, **undivided** (emphasis added) loyalty and confidentiality. These common law duties pre-date and exist despite independent, codified ethical standards. *Id,* para 9...We have stated that :"The provisions of the code of professional responsibility and disciplinary rules are useful guidelines for the understanding of a lawyer's obligations.' *Id,* Note (3), citing *In Re Dineen* 380 A.2d 603, 604 (Me. 1977).

The Board's attorney, J. Scott Davis, correctly concluded after full review of the facts and law of the case in September, 2016, defendant merited only a warning (Defendant Exhibit #21) for defending his client-grandmother's legacy, and his

family's interests in it. Defendant's Maine property was violated by cutting protected vegetation and building and expanding structures and their footprints without permits by neighbors and others. Defendant called in local code enforcement and Maine DEP to investigate and defend his land against these violations of the public interest under Maine shore land zoning law. As defendant foresaw, violations of the 1971 Maine Shoreland Zoning Act were found and landowners, including defendant, properly cited by NOV.

The trial court held, without citing an underpinning legal theory or any Maine or other case precedent, that the NOV was some kind of 'cover' for more significant facts and law od the case. It made no finding that the NOV was withdrawn or that defendant and co-tenants were freed from its demands. Accordingly Defendant complied with the NOV which led to two underlying lawsuits for easement over defendant's (former) land and partition. Both suits won at trial, including costs and damages.

Defendant hired (at substantial cost) a Maine attorney to appeal. The attorney filed the appeal for defendant only, though he had durable power of attorney for his disabled father, and has advised his siblings about an appeal. Defendant's attorney withdrew without request of hearing by court order. Defendant was ordered by the court he then represented his trial clients on appeal, and to show cause why he should not be dismissed. Defendant complied, after the court deadline, due to his father's disability, and lack of knowledge as to how his representation was possible in the first place. He has not lived in Maine for over twenty-three years, nor practiced there since 1989, but for some volunteer roles.

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Defendant proceeded in good faith to prosecute the appeal. He complied with 2016 rules of procedure as written. If he did not – re timely filing for example - the violations occurred after defendant had a first ever TIA stroke and had been ordered by his doctor to avoid stress. In good faith he disagreed with the trial court's fact finding, on the legitimate facts opposed the trial court's theory of the case and its judgment. He cited considerable opposing Maine case law, legislative history – not the least of which was the landmark national model 1971 Maine Shoreland Zoning Act designed to protect the public *and private* interests against abuse of Maine's most valuable natural resources - established legal theories, and permitted legal practices supporting his appeal. The Law Court disagreed. However, while finding his work egregiously frivolous an/or baseless worthy of ethics sanction, that Court was forced to admit on Reconsideration that it had plainly misrepresented, for no apparent reason given the overwhelming record DEP documentation and DEP and Northport testimony to the contrary, that Maine (DEP) had not ordered defendant not to comply with an unquestionably lawful Northport NOV to bring his lot into Maine Shoreland Zoning Act compliance.

This was astounding result, considering the facts of the case and adversarial demands and rights of the profession toward the full truth and full justice of any legal problem. It set a precedent that the Law Court could simply disregard the investigative and administrative law rights, duties and judgment of Maine municipalities mandated by the legislature to enforce the Maine Shoreland Zoning and set its own standards, including disregard for what town and state officials actually say to the pubic and lot owners in Shoreland Zoning cases.

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Instead the Law Court and Board are focused on defendant's alleged ethics violations. There is no Maine common law precedent supporting this position. "The people" of Maine as well as the defendant lost in the underlying litigation. For example the Court offered no support for its judgment that the Shoreland Zoning Act arose in 1992, the year Northport completed it ordinance of local Enforcement. The Act was passed in 1971, with the mandate that towns pass local administration and enforcement procedure, while Maine DEP had authority to enforce the Act anywhere.

The common law of case facts arising, as defendant's did, from 1971 forward would presumably be that since 1971 defendant and public (Northport) had a right to rely on the Act from inception. The common law would be where any rightful authority cited violations, violators would be expected to comply with the law. The common law would be that lot owners whose lands were violated by others would be protected for lawful acts of zoning compliance, and against unlawful land abuses and abusers. Where a grandmother wills and gifts lands and funds 'in perpetuity' to her descendancy, the common law would be to support the grandmother's lawful intentions, and protect her great grandchildren according to them. Where court record facts are alleged not to exist, the due process common law would be to identify specifically what facts are being challenged so a defendant gets meaningful notice of allegations, and an opportunity to be heard on them, especially where property rights (ie law license) are concern. Where it is alleged that rules are not followed, the common law would be to account for what the published rule actually said (in 2015 when the appeal was filed; see attached Defendant Exhibit B,

showing changes for relevant Maine R. App.P., 2014 to 2017. As late as 2016 Maine R. Ap. P. 9(f) had no comb binding requirement for briefs. By 2017 Maine R. App. P. 7A(g)(3) demanded comb bindings. In 2014-15, Maine R. App. P 9(c) did not specify that reply briefs could not be filed against each plaintiff attorney of joined actions, where in fact two independent cases (ie easement and partition of real estate) were being tried at once by the same judge.

Defendant contends that MRPC violations asserted by the Board are not therefore supported by a preponderance of evidence under either existing Maine ethics law or common law and should be accordingly denied. Defendant requests that Court take judicial notice of the fact that he has been administratively suspended for more than a year and has told the Board that he does not seek reinstatement given the impact this case has had on his health and, regrettably, his current understanding of Maine courts. As a practical matter it will be difficult to impossible for defendant to use even his Connecticut or federal law licenses to make any kind of living, for health, daily or litigation restitution purposes, if he is suspended from Maine practice, as under Connecticut and federal *Rules* any court judgment of a discipline *Rule* mandates voluntary reporting and submission to attendant investigations and reciprocal discipline procedures.

WHEREFORE, for these reasons defendant requests that the Board's *Proposed Factual Findings, Conclusion and Sanctions Order* be denied.

Respectfully,

_____Date: November 28, 2017

Harold Burbank, II
84 N. Mountain Road

APPENDIX H

HHD-CV18-6088744	*	SUPERIOR COURT
Office of Chief Disciplinary Counsel	*	Judicial District of Hartford
v.	*	April 8, 2018
Harold Burbank II	*	

Answer to Complaint

Pursuant to Practice Book Rule 2-39 (b), but for complaint paragraphs 1 and 2 , respondent Harold Burbank II, a Connecticut citizen, and pro se Maine Law Court appellant, whose Maine and Connecticut law licenses were incidental to his Maine appeal of his private Maine real estate case underpinning Connecticut Disciplinary Counsel's complaint, denies Connecticut's discipline complaint in total, denies any and all Maine allegations and judgments underpinning Connecticut's complaint, and contends that all of his defenses herein meet Practice Book Rule 2-39(c) clear and convincing evidence standards precluding commensurate or any discipline.

Respondent is not an expert litigator nor can he afford an attorney and is accordingly proceeding pro se. He is not an expert in discipline law or practice. Though he has offered a Sec. 10-46 denial, he finds no rule precluding pleading a general denial and specific denials concurrently. The intention is to comply with Practice Book Secs. 10-46 et seq., particularly good faith controversion of any and all allegations of misconduct expressed or implied in Connecticut's complaint, and those of complaint Exhibit A, Maine Supreme Judicial Court *Decision and Order* dated January 24, 2018, Docket No. BAR-17-12. Commensurate action in Connecticut is unwarranted, and if taken would be without merit, standing and constitutional foundation for reasons following:

1. Respondent appeared in Maine's Law Court as a pro se Connecticut citizen and Maine land owner; not as a Maine or Connecticut attorney. The First and Fourteenth Amendments precluded Maine from annexing Maine ethics law to respondent's appeal on these facts. Where the Maine Law Court so annexed Maine ethics law to respondent's appeal, he was denied fundamental First and Fourteenth Amendment rights to petition government without fear of punishment, reprisal or prior restraint. Where respondent's Maine and Connecticut's law licenses were incidental to his Maine appearance, in which he argued Maine land owner and Connecticut citizen issues of public concern, and where the Maine Law Court unconstitutionally annexed Maine attorney ethics law to his fundamental First and Fourteenth Amendment Maine appeal rights; and where Connecticut Discipline Counsel's instant complaint is based on these unconstitutional Maine processes, allegations and judgments, Connecticut's complaint violates respondent's fundamental First and Fourteenth Amendment rights: to petition government free from punishment, reprisal and prior restraint; to due process and equal protection of law; and to Article IV, Section 1 US Constitution rights to liberty from 'full faith and credit' of unconstitutional foreign judgments. Connecticut Discipline Counsel's complaint thus lacks merit and standing in Connecticut courts. *Branti v Finkel,* 445 US 507 (1980), *Whitney v. California,* 274 US 357 (1927), *Abrams v US,* 250 US 616 (1919), *Schenck v. US,* 240 US 47 (1919), *New York Times v. US,* 403 US 713 (1971), *McCulloch v. Maryland,* 4 Wheaton 316 (1819).

2. Connecticut Discipline Counsel's complaint is based on contrived, pretextural Maine findings of fact, due to Maine Law Court malfeasance, since the letter and

substance of these facts fail to appear, despite respondent's pleadings demanding them, anywhere in Maine prosecution pleadings and court judgments against him, or in any Maine court records whatsoever, depriving the respondent of fundamental due process rights to know what the alleged facts are and answer them at law. The lack of legitimate Maine record facts alone underpinning Connecticut's complaint meets respondent's Practice Book 2-39(c) burden to show clear and convincing evidence that any and all of his defenses in his answer are established as a matter of law, precluding commensurate or any Connecticut discipline.

The illegitimacy of Connecticut's case, and Maine's underpinning it, stems from a simple case history and fact pattern which Maine conflated as pre-text for faux discipline is proved by another single fact, that upon review of respondent's written responses (**Exhibit A**) to Maine's initial investigation letter, Maine's bar counsel advised respondent that bar counsel would recommend a 'warning' to Maine discipline officials (**Exhibit B),** that did not require hearings, appearances, further evidence or private or public sanctions of any kind, let alone threats of disbarment and/or (year) suspension. These threats only came when Maine bar officials, apparently due to the Maine Law Court's August 30, 2016 *Lincoln v Burbank,* 147A.3d 1165, 2016 ME 138 (Me. 2016) faux ruling, rejected their attorney's 'warning' recommendation, demanding bar counsel to 'aim higher' (respondent was told by his Maine attorney). No reasons for 'aiming higher' were given to respondent or his Maine attorney.

Background facts of the underpinning Maine trial and appeal are that in 1993 respondent and fifteen relatives, including his severely disabled and dying father,

his brother who lived in New Hampshire, and his sister who lived in North Carolina, were gifted a Northport (Penobscot Bay), Maine shore land residential property by Phyllis Burbank, respondent's paternal grandmother. Phyllis sought respondent's legal advice about the gift before it was executed at her Maine law firm, so respondent considers her a client. She died in 1996.

For years respondent was told by his father that trial plaintiff neighbors trespassed on the property posted by his Phyllis and her husband against trespassing. Neighbors cut a boundary path on Phyllis's posted lot to access her shoreline banking above her beach, where over many years they built, replaced and and expanded a set of stairs down her bank to her beach, without establishing any rights in her land, applying for required zoning permits (which would have failed for lack of established land title) or asking Phyllis to acquire permits. For years Northport was aware of the problem, told Phyllis and her husband about it in the 1970s and that Northport could issue an NOV, but nothing was done.

Once neighbors built and rebuilt 'their' stairs there were two sets to the beach on the property – one legal set Phyllis inherited when her folks gifted her the property in the late 1940s, and a 'new', illegal set built, rebuilt and expanded by trespassing neighbors, including rebuilds after 1971 when the 1971 Maine Shoreland Zoning Act compelled Northport to police and enforce the Act.

In May, 2012 respondent observed fresh cutting of brush and trees by a neighbor on respondent's shoreline in violation of the Act . Having fruitlessly spoken with neighbors and family before May, 2012 about these kinds of historic violations and respondent and co-tenant liabilities to Northport and Maine for them,

knowing neighbor intent to break the zoning law, with support from some of respondent's co-owners to enhance neighborhood 'ocean views' and illegal neighbor and general pubic access to respondent's beach, respondent contacted Northport and Maine DEP shoreland zoning enforcement officers, who upon respondent's request inspected each violation, consulted each other on citation and enforcement, and in fact by summer, 2012 cited respondent and co-owners by Northport NOV for several Act violations of illegal cutting and having two sets rather than not one permissible set of stairs on a single lot to a shore. Northport at first demanded that certain vegetation be remediated from Northport's acceptable list of plants, and that a set of stairs be removed, but later decided plant remediation would cause more harm than good to the environmentally very sensitive shoreline banking, and modified the NOV to removal of a set of stairs only by mid August, 2012.

Neighbors and some co-owners of the Burbank lot informally asked Northport to reconsider its decision. It refused. They then asked Maine DEP Shoreland Zoning Coordinator Attorney Deidre Schneider to intervene. Her August 8, 2012 letter to Northport, exhaustively documented and argued to the Maine court and bar discipline files, including respondent's appeal to Maine's Law Court, clearly stated that as a matter of law under the Act, Northport was in the charge of the case, and DEP and any other officials in Maine were not:

> After the NOV was issued objections were raised by neighbors with support from other owners in interest on the Burbank property that the NOV was in error due to the fact that both sets of stairs predated shoreland zoning regulations. An additional claim is that there is a prescriptive easement for access to the water on this portion of the property. The second claim is a legal argument that would be need to be litigated and not something for either the Town or DEP to decide.

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These objections raise the issue of whether or not there are additional facts involved that should be included in the evaluation of the situation. The *DEP would recommend* (my emphasis) giving those with objections an additional few weeks to provide evidence to negate the NOV, and to extend the deadline for removal of these stairs until that time. However, even if the Town finds there is sufficient evidence to support that two sets of stairs are legally in existence, *it would appear that the rebuilt set would have required some form of permitting* (my emphasis).

While the DEP provides support to municipalities and ensures that shoreland zoning ordinances are properly enforced, the municipality is the primary enforcer of these ordinances. In this case, the DEP has provided advice to the municipality as to the particular shoreland zoning provisions that appear to apply to this situation. In the end however, the *final resolution of the matter will be left to the municipality to decide in their sound enforcement discretion* (my emphasis), based upon the knowledge of local conditions, the particular facts of the case, and any additional evidence provided by the NOV objectors. If however, the Town would like more guidance, especially if provided with additional information, DEP staff is available for assistance. **Exhibit C, Schneider Letter, attached.**

Regardless, on August 30, 2016 Maine's Law Court, by a 6-0 vote, issued the following clearly erroneous pretextural judgment in *Lincoln v Burbank*, infra:

...although the Town of Northport never formally withdrew the notice of violation requiring removal of a set of stairs on the Burbank property, Burbank was aware that, at the direction of the DEP, the enforcement action had been put on hold...The evidence demonstrates that Burbank sought and obtained the notice of violation as a pretense for removal of the stairs. He may not, in these circumstances, claim to be innocently complying with local law....Id, p.18.

The evidence demonstrated no such thing. On the plain record facts it is beyond comprehension that any competent or honorable court, by a 6-0 vote, could say Maine had issued a 'hold', when the state's top DEP shoreland zoning lawyer was on the entire court and discipline events record, in writing and by sworn testimony, that DEP had no authority, intention or record of a NOV 'hold', nor any authority, intention or record of due process notice to anyone of DEP authority, intention or record to even try to implement a 'hold'. The Law Court's fabrication of an executive branch (DEP) 'hold' is by itself clear and convincing and evidence of court constructive fraud and malfeasance meeting Practice Book Sec. 2-39(c) clear and convincing evidence of Maine's pretextural intent to deprive respondent of

of a fair hearing in violation of his First and Fourteenth Amendment attorney and/or citizen rights to petition government without threat of punishment, reprisal or prior restraint, and equal protection and due process of law. The ruling also violated Maine separation of powers law, which specifically precludes acts pursuant to state (NOV) law offensive to the US Constitution:

> The Legislature, with the exceptions hereinafter stated, shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States. *Maine Constitution Article IV, Part Third, Sec 1.*

Respondent in part successfully argued this theory in his Motion for Reconsideration, from which on October 13, 2016 Maine's Law court 'corrected' its August 30, 2016 decision with an Errata Sheet vis:

> The opinion of this Court certified on August 30, 2016, is amended as follows:
>
> The Fourth sentence of [para 38] is amended to read:
>
> We note, however, that although the Town of Northport never formally withdrew the notice of violation requiring removal of a set of stairs on the Burbank property, Burbank was aware that the DEP had recommended that the Town put the enforcement action on hold pending resolution of issues surrounding the age and potentially grandfathered status of the stairs and Neighbors' claim to rights in the stairs.
>
> The original opinion of the Judicial Branch website has been replaced with the opinion as corrected. **Exhibit D, Errata Sheet.**

However the correction still did not satisfy all of respondent's fundamental First and Fourteenth Amendment to rights to petition government without punishment, reprisal or prior restraint, or due process and equal protection of law rights, where the court clearly left the following language of the August 30, 2016 decision intact:

> The evidence demonstrates that Burbank sought and obtained the notice of violation as a pretense (my emphasis) for removal of the stairs. He may not, in these circumstances, claim to be innocently complying with local law *(my emphasis)*. *Lincoln,* infra, p. 18.

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Black's Law Dictionary defines 'pretext' (pretense) as:

> Ostensible reason or motive assigned or assumed as a color or cover for the real reasons or motive; false appearance, pretense. *Black's Law Dictionary*, 619, (5th ed. 1983).

Where there was no 'hold' on Northport's NOV, not only was respondent's compliance with the NOV clearly and convincingly not pretense as Maine judged, but a mandated, lawful, mandated and innocent act to comply with the 1971 Maine Shoreland Zoning Act, *38 MRSA Secs. 435-453*, ordered and not withdrawn by Northport, that Northport was mandated by the People of Maine to enforce with DEP guidance. The pretextual legal 'fiction' here was the Law Court's holding that respondent by law 'was aware' that he had any right, let alone a legal duty, not to comply with the NOV, which record facts, and Northport, DEP and Maine law plainly indicated that he did not have. The Law Court simply did not apply the law as the Maine legislature, DEP and Northport intended, depriving respondent of First and Fourteenth amendment rights to petition government for grievance without fear of punishment, reprisal or prior restraint, and due process and equal protection of law.

Respondent made this clear in his Motion for Reconsideration, where he agued if he had rights or duties not to comply with lawful Northport NOV, he surely would have had rights, from the day Northport issued the NOV, to direct Maine, DEP or Northport notice of rights and duties not to comply with the NOV, plus in fact direct notice of a fair hearing on Maine, DEP or Northport rights and duties not to comply, plus an in fact due process fair hearing on Maine, DEP or Northport rights and duties not comply with a lawful Northport NOV. From respondent's Motion for Reconsideration, **Exhibit E**, attached:

All lawful orders concerning property rights, such as a 'hold' from state and town zoning officers, are subject to constitutional procedural due process safeguards. The US Supreme Court has been particularly active in this area, and requires that procedural laws for property be applied evenhandedly, so individuals are not subjected to the arbitrary exercise of government power. *Marchant v. Pennsylvania R.R.*, 153 U.S. 380 (1894). The procedures "...are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). In the property context, due process requires the element of 'notice', which the US Supreme Court has defined as:

> (an) elementary and fundamental requirement...in any proceeding which is to be accorded finality...reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950).

The notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) Ordinarily, service of the notice must be reasonably structured to assure that the person to whom it is directed receives it. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

A 'hold' contemplated by the Law Court in this case affected 'resolution (my emphasis) of issues surrounding the age and potentially grandfathered status of the stairs and the neighbors' claim to rights in the stairs.' Law Court Decision, p. 18. 'Resolution' sounds in finality. A fair reading of the *Mullane v. Central Hanover Trust* notice standard, applied to the instant facts as the Law Court sees them, demands that all parties interested in the instant case – neighbors with claims, and certainly all sixteen Burbank joint tenants subject to Northport's NOV – be notified by either the town or the state of any hold, or any government administration of the NOV affecting property rights claimed in disputed Burbank land. *Mullane* held that these steps are required under the due process clause so claimants can know what government intends to do regarding claimant property, and what claimants can do to prevent deprivation of their interests. When a hold exists, service of notice of the hold must be structured to assure that claimants to whom the notice is directed receive it.

Mullane, a case of due process notice adequacy standards for a trust fund that petitioned under New York law for a judicial settlement of accounts, analyzed why due process adequate notice standards are very high in property cases, especially for out of state parties (which appellant and two co-defendants were at trial) even though in-state notice by publication was held adequate for in- state parties:

> Quite different from the question of a state's power to discharge trustees is that of the opportunity it must give beneficiaries to contest. Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that, at a minimum, they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case...
>
> In two ways, this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be

deprived of property rights and hence notice and hearing must measure up to the standards of due process. *Mullane*, p. 313.

Here the *Mullane* Court was not addressing parties analogous to Appellant, but parties like appellant's co-defendants, who were not notified in any way of a NOV hold, and whose property interests in any town or state sponsored NOV hold process might have been, without their knowledge, subject to diminution in a town or state proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. If such a proceeding had existed and gone forward, co-defendants may have lost property rights. Notice to them, and to appellant, of any NOV hold therefore must meet strict due process standards because:

"[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U. S. 385, 234 U. S. 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. *Mullane*, p. 314.

In appellant's case there was no NOV hold ordered, and no notice of a hold made to any property rights claimant – not to the appellant, not to his co-defendants, not to the other Burbank joint tenants, and not to the plaintiffs (neighbors). Had all Burbank defendants received such notice, at least one (ie appellant) or some of them would have sought proper local or state administrative process to be heard to prevent deprivation of their property interests. **Exhibit E,** Motion for Reconsideration, pp. 6-10.

Regardless, Maine's Law Court refused to acknowledge respondent's rights to constitutionally adequate Fourteenth Amendment due process notice of a hearing while the NOV was pending, and a constitutional fair hearing in fact, relying instead on a constitutionally illiterate 'awareness' standard for denying his claims of innocent compliance with the NOV. Had constitutionally adequate notice and hearing been offered or commanded by government before respondent complied with the NOV, his actions may not have been 'innocent'. As respondent unsuccessfully argued to the Law Court, he had no right or duty to act in government's or an opponent's interests on the facts. He had duties alone to comply with lawful orders, especially so as a member of Maine and Connecticut bars. He has no authority to send notices of hearings or rights to them. These are government rights and duties alone. Maine's Law Court avoided these issues altogether when it

laid the impacts for his compliance with a lawful Northport order on him alone, depriving him of First and Fourteenth Amendment rights to petition government without punishment, reprisal and prior restraint, and due process and equal protection of law.

By this example alone of Maine acts to deprive respondent of fundamental constitutional property and process rights, respondent has met his Practice Book Sec. 2-39(c) burden of providing Connecticut courts with clear and convincing evidence of unlawful Maine theories and facts of Maine judgments intending to deprive and in fact depriving him of fundamental Fourteenth Amendment due process and equal protection of law, as pretexts to cover Maine court errors of fact and judgment in the appeal underpinning Connecticut's complaint. Connecticut therefore cannot sustain its burden of a prima facie case for any ethical violations Maine found. It is regrettable that respondent's petition for certiorari to the US Supreme Court on these issues was denied. Burbank v. Lincoln, 137 S.Ct. 1338 (2017).

3. Respondent's fundamental First and Fourteenth Amendment rights are further protected and enhanced by the Ninth Amendment:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Respondent contends Maine's discipline process of him as a Maine attorney when he petitioned as a Connecticut citizen alone was unconstitutionally unconscionable , violating his Ninth Amendment rights to liberty, conscience, free speech; to petition government free from punishment, reprisal and prior restraint; to free thought; and

privacy; as well as to due process and equal protection of them. The Ninth Amendment was proposed by James Madison as a literal a 'right to conscience'. Respondent contends that Maine violated his Ninth Amendment free speech, thought, conscience and privacy rights by disciplining him as an attorney when he petitioned Maine as a Connecticut citizen alone. Such discipline is PB Sec. 2-39(c) clear and convincing evidence of the defense of unconscionability. The Ninth has been successfully litigated in Connecticut courts. *Griswold v Connecticut,* 381 US 479.

4. Other US constitutional founding liberty principles to petition government without fear of reprisal supporting respondent's First, Ninth and Fourteenth Amendment claims include the Declaration of Independence, US Constitution Preamble, US Constitution Privileges and Immunities Clause, US Constitution Supremacy Clause, and the Thirteenth Amendment.

5. Accordingly it is unconstitutional for any state to annex any disadvantage to the the practice of fundamental individual federal freedoms, including annexation of state bar ethics rules and judgments chilling, or as in this case disregarding completely, individual citizen First Amendment petition rights, solely for alleged violations of state (ethics) duties. Annexation is proscribed not only by First, Ninth and Fourteenth Amendment individual liberties, but as constitutional scholar Professor Charles L. Black argued in 1969 to his death (2001), the structure of the Constitution itself. From *McCullock v Maryland*, 4 Wheaton 316 (1819), which Black judged 'the greatest of our constitutional cases', he drew the following analysis:

(13)

> The...question in the case was whether a state might tax the functioning of the Bank of the United States, admitting the later to be a validly created national instrumentality. Here I find my students each year become rather puzzled. As laymen they have absorbed the layman's notions about constitutional law, and they think it consists, indeed that it must consist, in the interpretation of the commands embodied in particular texts. Yet (Justice) Marshall's reasoning on this branch of the case is, as I read it, essentially structural. It has to do in great part with what he conceives to be warranted relational properties between the national government and the government of the states, with the structural corollaries of national supremacy – and, at one point, the Mode of the formation of the Union. You can root the result, if you want to (and Marshall sometimes seems to be doing this) in the supremacy clause of Article VI, but that seems not to be a very satisfying rationale, for Article VI declares the supremacy of whatever the national law may turn out to be, and does not purport to give content to that law. In this, perhaps the greatest of our constitutional cases, judgment is reached not fundamentally on the basis of that kind of textual exegesis which we tend to regard as normal, but on the basis of reasoning from the total structure which the text has created. Charles, L Black, Jr., *Structure and Relationship in Constitutional Law*, pp. 14-15 (1969).

Respondent contends that Professor Black's reasoning correctly puts respondent's First, Ninth and Fourteenth Amendment rights in proper federal versus state power perspective. In Maine, no other group, indeed no other person, has had their federal liberty 'annexed' as respondent's liberty was, with a 'disability' of extraordinary state sanction (one year suspension) for exercising fundamental First Amendment and other federal rights of petition in state court. Maine cited no state or federal statute, nor any US or Maine constitution principle, nor any compelling set of facts proscribing those federal rights, or for historically doing so against respondent. Maine simply recited a summary of alleged state ethics violations – creatures of the court's own unchecked creation, violations of which respondent denied in detail **(EXHIBIT F)** - without weighing Maine's federal obligations under Maine's scheme.

Respondent contends, supported by Black, that such denial of Fourteenth Amendment due process of First Amendment and other government petition rights are unconstitutional under the Article VI supremacy clause. Respondent further

contends, as Black argued, that his federal constitutional and case law rights arise not just from textual exegesis, but a well reasoned federal superstructure paradigm of warranted relational properties between the national government and the government of the states, including but not limited to corollaries of national supremacy, underpinning the formation of the Union. Respondent contends the entire paradigm proscribes state interference with individual relationships (rights) with the federal government.

Accordingly in respondent's case there has yet to be any state or federal due process accounting of this 'interfering either with the operation of the federal government or with the direct relations of the individual with that government.' *Id,*

Maine therefore lacked standing and subject matter jurisdiction to regulate respondent's petition speech and opinions of his appeal.

6. Ethics law is designed not to punish the accused, but to protect the public. Where respondent did not appear in Maine as a Maine or Connecticut attorney, Maine's Law Court had no valid 'public interest' to protect. Respondent's fundamental rights to petition without fear of reprisal outweighed any public interest, which is not fundamental as a matter of law. Nor are court discipline powers and rules fundamental law. Respondent's fundamental rights outweighed alleged public and court discipline rights accordingly.

7. The complaint is brought pursuant to a reciprocity agreement. No states can agree to reciprocally violate fundamental First or Fourteenth Amendment rights, nor reciprocally deprive them of US citizens, without offending both Amendments. Respondent contends that imposing reciprocal discipline on the facts and law of

his case due to state 'reciprocity' contracts or agreements violates his First and Fourteenth Amendment rights to petition government free from punishment, reprisal and prior restraint

8. Maine thus lacked standing to prosecute respondent. Connecticut lacks standing to base its complaint on such a Maine judgment. **Exhibit A.**

9. Respondent denies he failed to follow Maine procedural rules. He contends several were not published at all or were constitutionally vague, depriving him of Fourteenth Amendment rights.

10. Respondent denies that he filed a Maine appeal. His Maine attorney, Mariah Gleaton, did. Respondent did not file a Maine attorney appearance. Pursuant to Maine Rule of Civil Procedure 89 and Maine Rule Appellate Procedure 10 Gleaton filed to withdraw as respondent's attorney December 4, 2015. Her motion paragraph 6 stated respondent as 'attorney or Appellees and as Appellant' was contacted and does not object to the motion. There is no record evidence respondent was contacted 'or Appellees', for appellees, or for any party but himself by Attorney Gleaton. Despite Maine procedure rules otherwise, respondent was denied a hearing on the nature and lawfulness of his attorney's withdrawal, and alleged duties he had unique to Maine law to trial clients in the circumstances, denying him Fourteenth Amendment due process and equal protection of law. **Exhibit F.** The Maine Law Court's annexation without hearing of respondent duties to represent trial clients on appeal who did not seek appeal to respondent's First Amendment Rights to petition government for personal grievance redress violated respondent's First Amendment rights to petition government free from threat of

punishment, reprisal and prior restraint, and Fourteenth Amendment due process and equal protection of law.

11. Respondent denies he attempted to represent anyone but himself on appeal once his attorney withdrew. He unsuccessfully moved Maine's Law Court for oral argument to be heard on his father's near-death health, inability to represent himself or hire an attorney, and prejudice to his father's property interests in Maine cases underlying respondent's Maine appeal and Connecticut's reliance on it for reciprocal discipline. Respondent did have Maine statutory power of attorney over his father's property affairs when respondent moved to be heard. Denying these facts for reciprocal discipline offends respondent's Fourteenth Amendment due process and equal protection rights.

12. Even where attorneys are rightly disciplined in other states, it is well established in Connecticut that "commensurate action does not mean identical action." *In re Weisman,* 203 Conn. 380, 384 (1987). "In order to establish a prima facie case the proponent must submit evidence which, if credited is sufficient to establish the fact or facts which it is adduced to prove." *Thomas v West Haven,* 249 Conn. 385, 392 (1999). The record shows that Connecticut cannot adduce evidence for a prima facie discipline case, since Maine lacked a factual foundation for a prima facie discipline case. The Maine discipline judgment was ordered by a Maine Law Court single justice (See January 24, 2018 *Decision and Order*, Complaint Exhibit A), who simply adopted sanctions findings of the full Maine Law Court's August 30, 2016.

13. Respondent contends that Connecticut Constitution Sections 1, 2, 4 and 5 offer

him greater liberty, speech, petition, and due process protections in this matter than his First and Fourteenth Amendment rights, and that the US Constitution is the baseline for such fundamental rights in his Connecticut case.

14. Respondent contends that after his January 12, 2016 stroke he was disabled from fully participating in his Maine case as an attorney or Connecticut citizen by doctor's order that he should avoid stress and follow regimens to reduce hypertension and future stroke risk flowing from that case, and that Maine courts, especially in disciplinary procedures, failed to lawfully and fully account for health performance impacts at that time, thereby unlawfully discriminating hm.

15 Respondent retains the right to add, supplement, modify, change, and amend any defenses due to health which has impacted his ability to prepare this Answer, and due to facts that become and circumstances that become known to him through Connecticut discipline process or other parties.

16. Respondent contends that *Disciplinary Counsel v Peters-Hamlin,* 2015 WL 3651918, decided May 20, 2015 is controlling law in this case.

17. Wherefore respondent prays that the complaint be dismissed with prejudice and that respondent be awarded costs of defense and further relief the court finds equitable and just.

Dated: April 13, 2018

Harold Burbank, II, Pro Se Respondent
84 N. Mountain Rd.
Canton, CT 06019
Ph. 860-693-2687

Certification

I hereby certify that a copy of this answer was US Mailed to Office of Chief Disciplinary Counsel, 100 Washington Street, Hartford, CT 06106 on 4-16-18.

APPENDIX I

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HHD-CV18-6088744	*	SUPERIOR COURT
Office of Chief Disciplinary Counsel	*	Judicial District of Hartford
v.	*	April 16, 2018
Harold Burbank II	*	

First Amended Answer to Complaint

Pursuant to Practice Book Rule 2-39 (b), but for complaint paragraphs 1 and 2 , respondent Harold Burbank II, a Connecticut citizen, and pro se Maine Law Court appellant, whose Maine and Connecticut law licenses were incidental to his Maine appeal of his private Maine real estate case underpinning Connecticut Disciplinary Counsel's complaint, denies Connecticut's discipline complaint in total, denies any and all Maine allegations and judgments underpinning Connecticut's complaint, and contends that all of his defenses herein meet Practice Book Rule 2-39(c) clear and convincing evidence standards precluding commensurate or any discipline.

Respondent is not an expert litigator nor can he afford an attorney and is accordingly proceeding pro se. He is not an expert in discipline law or practice. Though he has offered a Sec. 10-46 denial, he finds no rule precluding pleading a general denial and specific denials concurrently. The intention is to comply with Practice Book Secs. 10-46 et seq., particularly good faith controversion of any and all allegations of misconduct expressed or implied in Connecticut's complaint, and those of complaint Exhibit A, Maine Supreme Judicial Court *Decision and Order* dated January 24, 2018, Docket No. BAR-17-12. Commensurate action in Connecticut is unwarranted, and if taken would be without merit, standing and constitutional foundation for reasons following:

1. Respondent appeared in Maine's Law Court as a pro se Connecticut citizen and Maine land owner; not as a Maine or Connecticut attorney. The First and Fourteenth Amendments precluded Maine from annexing Maine ethics law to respondent's appeal on these facts. Where the Maine Law Court so annexed Maine ethics law to respondent's appeal, he was denied fundamental First and Fourteenth Amendment rights to petition government without fear of punishment, reprisal or prior restraint. Where respondent's Maine and Connecticut's law licenses were incidental to his Maine appearance, in which he argued Maine land owner and Connecticut citizen issues of public concern, and where the Maine Law Court unconstitutionally annexed Maine attorney ethics law to his fundamental First and Fourteenth Amendment Maine appeal rights; and where Connecticut Discipline Counsel's instant complaint is based on these unconstitutional Maine processes, allegations and judgments, Connecticut's complaint violates respondent's fundamental First and Fourteenth Amendment rights: to petition government free from punishment, reprisal and prior restraint; to due process and equal protection of law; and to Article IV, Section 1 US Constitution rights to liberty from 'full faith and credit' of unconstitutional foreign judgments. Connecticut Discipline Counsel's complaint thus lacks merit and standing in Connecticut courts. *Branti v Finkel,* 445 US 507 (1980), *Whitney v. California,* 274 US 357 (1927), *Abrams v US,* 250 US 616 (1919), *Schenck v. US,* 240 US 47 (1919), *New York Times v. US,* 403 US 713 (1971), *McCulloch v. Maryland,* 4 Wheaton 316 (1819).

2. Connecticut Discipline Counsel's complaint is based on contrived, pretextural Maine findings of fact, due to Maine Law Court malfeasance, since the letter and

substance of these facts fail to appear, despite respondent's pleadings demanding them, anywhere in Maine prosecution pleadings and court judgments against him, or in any Maine court records whatsoever, depriving the respondent of fundamental due process rights to know what the alleged facts are and answer them at law. The lack of legitimate Maine record facts alone underpinning Connecticut's complaint meets respondent's Practice Book 2-39(c) burden to show clear and convincing evidence that any and all of his defenses in his answer are established as a matter of law, precluding commensurate or any Connecticut discipline.

The illegitimacy of Connecticut's case, and Maine's underpinning it, stems from a simple case history and fact pattern which Maine conflated as pre-text for faux discipline is proved by another single fact, that upon review of respondent's written responses (**Exhibit A**) to Maine's initial investigation letter, Maine's bar counsel advised respondent that bar counsel would recommend a 'warning' to Maine discipline officials (**Exhibit B**), that did not require hearings, appearances, further evidence or private or public sanctions of any kind, let alone threats of disbarment and/or (year) suspension. These threats only came when Maine bar officials, apparently due to the Maine Law Court's August 30, 2016 *Lincoln v Burbank*, 147A.3d 1165, 2016 ME 138 (Me. 2016) faux ruling, rejected their attorney's 'warning' recommendation, demanding bar counsel to 'aim higher' (respondent was told by his Maine attorney). No reasons for 'aiming higher' were given to respondent or his Maine attorney.

Background facts of the underpinning Maine trial and appeal are that in 1993 respondent and fifteen relatives, including his severely disabled and dying father,

his brother who lived in New Hampshire, and his sister who lived in North Carolina, were gifted a Northport (Penobscot Bay), Maine shore land residential property by Phyllis Burbank, respondent's paternal grandmother. Phyllis sought respondent's legal advice about the gift before it was executed at her Maine law firm, so respondent considers her a client. She died in 1996.

For years respondent was told by his father that trial plaintiff neighbors trespassed on the property posted by his Phyllis and her husband against trespassing. Neighbors cut a boundary path on Phyllis's posted lot to access her shoreline banking above her beach, where over many years they built, replaced and and expanded a set of stairs down her bank to her beach, without establishing any rights in her land, applying for required zoning permits (which would have failed for lack of established land title) or asking Phyllis to acquire permits. For years Northport was aware of the problem, told Phyllis and her husband about it in the 1970s and that Northport could issue an NOV, but nothing was done.

Once neighbors built and rebuilt 'their' stairs there were two sets to the beach on the property – one legal set Phyllis inherited when her folks gifted her the property in the late 1940s, and a 'new', illegal set built, rebuilt and expanded by trespassing neighbors, including rebuilds after 1971 when the 1971 Maine Shoreland Zoning Act compelled Northport to police and enforce the Act.

In May, 2012 respondent observed fresh cutting of brush and trees by a neighbor on respondent's shoreline in violation of the Act. Having fruitlessly spoken with neighbors and family before May, 2012 about these kinds of historic violations and respondent and co-tenant liabilities to Northport and Maine for them,

knowing neighbor intent to break the zoning law, with support from some of respondent's co-owners to enhance neighborhood 'ocean views' and illegal neighbor and general pubic access to respondent's beach, respondent contacted Northport and Maine DEP shoreland zoning enforcement officers, who upon respondent's request inspected each violation, consulted each other on citation and enforcement, and in fact by summer, 2012 cited respondent and co-owners by Northport NOV for several Act violations of illegal cutting and having two sets rather than not one permissible set of stairs on a single lot to a shore. Northport at first demanded that certain vegetation be remediated from Northport's acceptable list of plants, and that a set of stairs be removed, but later decided plant remediation would cause more harm than good to the environmentally very sensitive shoreline banking, and modified the NOV to removal of a set of stairs only by mid August, 2012.

Neighbors and some co-owners of the Burbank lot informally asked Northport to reconsider its decision. It refused. They then asked Maine DEP Shoreland Zoning Coordinator Attorney Deidre Schneider to intervene. Her August 8, 2012 letter to Northport, exhaustively documented and argued to the Maine court and bar discipline files, including respondent's appeal to Maine's Law Court, clearly stated that as a matter of law under the Act, Northport was in the charge of the case, and DEP and any other officials in Maine were not:

> After the NOV was issued objections were raised by neighbors with support from other owners in interest on the Burbank property that the NOV was in error due to the fact that both sets of stairs predated shoreland zoning regulations. An additional claim is that there is a prescriptive easement for access to the water on this portion of the property. The second claim is a legal argument that would be need to be litigated and not something for either the Town or DEP to decide.

(6)

These objections raise the issue of whether or not there are additional facts involved that should be included in the evaluation of the situation. The *DEP would recommend* (my emphasis) giving those with objections an additional few weeks to provide evidence to negate the NOV, and to extend the deadline for removal of these stairs until that time. However, even if the Town finds there is sufficient evidence to support that two sets of stairs are legally in existence, *it would appear that the rebuilt set would have required some form of permitting* (my emphasis).

While the DEP provides support to municipalities and ensures that shoreland zoning ordinances are properly enforced, the municipality is the primary enforcer of these ordinances. In this case, the DEP has provided advice to the municipality as to the particular shoreland zoning provisions that appear to apply to this situation. In the end however, the *final resolution of the matter will be left to the municipality to decide in their sound enforcement discretion* (my emphasis), based upon the knowledge of local conditions, the particular facts of the case, and any additional evidence provided by the NOV objectors. If however, the Town would like more guidance, especially if provided with additional information, DEP staff is available for assistance. **Exhibit C, Schneider Letter, attached.**

Regardless, on August 30, 2016 Maine's Law Court, by a 6-0 vote, issued the following clearly erroneous pretextural judgment in *Lincoln v Burbank*, infra:

...although the Town of Northport never formally withdrew the notice of violation requiring removal of a set of stairs on the Burbank property, Burbank was aware that, at the direction of the DEP, the enforcement action had been put on hold...The evidence demonstrates that Burbank sought and obtained the notice of violation as a pretense for removal of the stairs. He may not, in these circumstances, claim to be innocently complying with local law....Id, p.18.

The evidence demonstrated no such thing. On the plain record facts it is beyond comprehension that any competent or honorable court, by a 6-0 vote, could say Maine had issued a 'hold', when the state's top DEP shoreland zoning lawyer was on the entire court and discipline events record, in writing and by sworn testimony, that DEP had no authority, intention or record of a NOV 'hold', nor any authority, intention or record of due process notice to anyone of DEP authority, intention or record to even try to implement a 'hold'. The Law Court's fabrication of an executive branch (DEP) 'hold' is by itself clear and convincing and evidence of court constructive fraud and malfeasance meeting Practice Book Sec. 2-39(c) clear and convincing evidence of Maine's pretextural intent to deprive respondent of

of a fair hearing in violation of his First and Fourteenth Amendment attorney and/or citizen rights to petition government without threat of punishment, reprisal or prior restraint, and equal protection and due process of law. The ruling also violated Maine separation of powers law, which specifically precludes acts pursuant to state (NOV) law offensive to the US Constitution:

> The Legislature, with the exceptions hereinafter stated, shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States. *Maine Constitution Article IV, Part Third, Sec 1.*

Respondent in part successfully argued this theory in his Motion for Reconsideration, from which on October 13, 2016 Maine's Law court 'corrected' its August 30, 2016 decision with an Errata Sheet vis:

> The opinion of this Court certified on August 30, 2016, is amended as follows:
>
> The Fourth sentence of [para 38] is amended to read:
>
> We note, however, that although the Town of Northport never formally withdrew the notice of violation requiring removal of a set of stairs on the Burbank property, Burbank was aware that the DEP had recommended that the Town put the enforcement action on hold pending resolution of issues surrounding the age and potentially grandfathered status of the stairs and Neighbors' claim to rights in the stairs.
>
> The original opinion of the Judicial Branch website has been replaced with the opinion as corrected. **Exhibit D, Errata Sheet.**

However the correction still did not satisfy all of respondent's fundamental First and Fourteenth Amendment to rights to petition government without punishment, reprisal or prior restraint, or due process and equal protection of law rights, where the court clearly left the following language of the August 30, 2016 decision intact:

> The evidence demonstrates that Burbank sought and obtained the notice of violation as a ***pretense*** (my emphasis) for removal of the stairs. He may not, in these circumstances, claim to be innocently complying with ***local law*** *(my emphasis)*. *Lincoln,* infra, p. 18.

(8)

Black's Law Dictionary defines 'pretext' (pretense) as:

> Ostensible reason or motive assigned or assumed as a color or cover for the real reasons or motive; false appearance, pretense. *Black's Law Dictionary*, 619, (5th ed. 1983).

Where there was no 'hold' on Northport's NOV, not only was respondent's compliance with the NOV clearly and convincingly not pretense as Maine judged, but a mandated lawful and innocent act to comply with the 1971 Maine Shoreland Zoning Act, *38 MRSA Secs. 435-453*, ordered and not withdrawn by Northport, that Northport was mandated by the People of Maine to enforce with DEP guidance. The pretextual legal 'fiction' here was the Law Court's holding that respondent by law 'was aware' that he had any right, let alone a legal duty, not to comply with the NOV, which record facts, and Northport, DEP and Maine law plainly indicated that he did not have. The Law Court simply did not apply the law as the Maine legislature, DEP and Northport intended, depriving respondent of First and Fourteenth amendment rights to petition government for grievance without fear of punishment, reprisal or prior restraint, and due process and equal protection of law.

Respondent made this clear in his Maine Law Court Motion for Reconsideration, where he agued if he had rights or duties not to comply with lawful Northport NOVs, he surely would have had rights, from the day Northport issued the NOV, to direct Maine, DEP or Northport notice of rights and duties not to comply with NOVs, plus in fact direct notice of a fair hearing on Maine, DEP or Northport rights and duties not to comply, plus an in fact due process fair hearing on Maine, DEP or Northport rights and duties not comply with a lawful Northport NOV. From respondent's Motion for Reconsideration, **Exhibit E**, attached:

(9)

All lawful orders concerning property rights, such as a 'hold' from state and town zoning officers, are subject to constitutional procedural due process safeguards. The US Supreme Court has been particularly active in this area, and requires that procedural laws for property be applied evenhandedly, so individuals are not subjected to the arbitrary exercise of government power. *Marchant v. Pennsylvania R.R.*, 153 U.S. 380 (1894). The procedures "...are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). In the property context, due process requires the element of 'notice', which the US Supreme Court has defined as:

> (an) elementary and fundamental requirement...in any proceeding which is to be accorded finality...reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950).

The notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) Ordinarily, service of the notice must be reasonably structured to assure that the person to whom it is directed receives it. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

A 'hold' contemplated by the Law Court in this case affected 'resolution (my emphasis) of issues surrounding the age and potentially grandfathered status of the stairs and the neighbors' claim to rights in the stairs.' Law Court Decision, p. 18. 'Resolution' sounds in finality. A fair reading of the *Mullane v. Central Hanover Trust* notice standard, applied to the instant facts as the Law Court sees them, demands that all parties interested in the instant case – neighbors with claims, and certainly all sixteen Burbank joint tenants subject to Northport's NOV – be notified by either the town or the state of any hold, or any government administration of the NOV affecting property rights claimed in disputed Burbank land. *Mullane* held that these steps are required under the due process clause so claimants can know what government intends to do regarding claimant property, and what claimants can do to prevent deprivation of their interests. When a hold exists, service of notice of the hold must be structured to assure that claimants to whom the notice is directed receive it.

Mullane, a case of due process notice adequacy standards for a trust fund that petitioned under New York law for a judicial settlement of accounts, analyzed why due process adequate notice standards are very high in property cases, especially for out of state parties (which appellant and two co-defendants were at trial) even though in-state notice by publication was held adequate for in- state parties:

> Quite different from the question of a state's power to discharge trustees is that of the opportunity it must give beneficiaries to contest. Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that, at a minimum, they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case...
>
> In two ways, this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be

deprived of property rights and hence notice and hearing must measure up to the standards of due process. *Mullane*, p. 313.

Here the *Mullane* Court was not addressing parties analogous to Appellant, but parties like appellant's co-defendants, who were not notified in any way of a NOV hold, and whose property interests in any town or state sponsored NOV hold process might have been, without their knowledge, subject to diminution in a town or state proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. If such a proceeding had existed and gone forward, co-defendants may have lost property rights. Notice to them, and to appellant, of any NOV hold therefore must meet strict due process standards because:

"[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U. S. 385, 234 U. S. 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. *Mullane*, p. 314.

In appellant's case there was no NOV hold ordered, and no notice of a hold made to any property rights claimant – not to the appellant, not to his co-defendants, not to the other Burbank joint tenants, and not to the plaintiffs (neighbors). Had all Burbank defendants received such notice, at least one (ie appellant) or some of them would have sought proper local or state administrative process to be heard to prevent deprivation of their property interests. **Exhibit E,** Motion for Reconsideration, pp. 6-10.

Regardless, Maine's Law Court refused to acknowledge respondent's, or any party's, fundamental, constitutionally minimal Fourteenth Amendment due process and equal protection adjudicative rights to notice appropriate to the nature of an NOV case directly from the proper NOV adjudicative authority – Northport, not DEP - of any adjudicative 'awareness' rights or duties respondent had at law to *not* comply with a lawful Northport NOV before he complied with it.

Mullane rightly contemplated parties like respondent whose due process rights at 'minimum...required that deprivation of life, liberty or property (including deprivations of protections of Maine's 1971 Shoreland Zoning Act against illegal environmental trespass and unpermitted environmentally non-conforming structures) be preceded by notice and opportunity for hearing appropriate to the nature of the case...'. Fourteenth Amendment due process and equal protection notice and opportunity to be heard appropriate to this case was for Northport

to decide by authority specifically delegated to Northport by the Shoreland Zoning Act, and not authority of Maine courts., since the Act *primarily* requires *local citizen input*, via town zoning boards and otherwise, for local shoreland zone management:

> The Mandatory Shoreland Zoning Act establishes a balance of State oversight and municipal control. The law requires the Department of Environmental Protection (DEP), its Commissioner and the Board of Environmental Protection to provide minimum guidelines and oversight to assure compliance with the legislative purposes and requirements of the law, whereas **primary authority for adoption, administration and enforcement of shoreland zoning ordinances** (my emphasis) rests with the municipalities. The respective roles and responsibilities, as stipulated by the Act are outlined below...
>
> In accordance with a comprehensive plan, municipalities shall prepare, adopt and submit for approval, a zoning and land use ordinance that is consistent with or no less stringent than the minimum guidelines (section 438-A(2)); Put administrative procedures in place to administer the ordinance through a permit application, review, permitting and inspection process; The municipal officials shall annually appoint/reappoint a code enforcement officer (can be the planning board) who will have the responsibility to (section 441(1)and (3)): Enforce the local shoreland zoning ordinance; Collect and remit any authorized shoreland zoning permit application fee; Keep a complete record of all essential transactions of the office (applications, permits, revocations, variances, appeals, court actions, violations); On a biennial basis, submit a summary of this record to the DEP; and Investigate alleged violations of the ordinance. *Background and Considerations of Shoreland Zoning Rules and Regulations As They Relate to the Study of Restoring Tidal Flow To the West Branch of the Pleasant River,* Prepared for The Town of Addison (ME) and the West Branch Study Committee, April 2007, p 3.

Maine court judgments underpinning Connecticut's discipline complaint presumed authority, with no basis in Maine law or record fact whatever, that Northport had no role in the administration of respondent's rights and duties re Northport's NOV, when the exact opposite was true. Northport had primary legislative authority to review and administer respondent's NOV conduct, and Maine courts unconstitutionally usurped that authority, and thereby respondent's Fourteenth Amendment due process and equal protection rights to that authority, by failing to account for lack of Northport notice and hearing of any NOV changes – of which there were none anyway.

As foreseen and precluded by *Mullane*, due process deprivations of Northport's

authority and its protections unlawfully deprived respondent of significant property rights, by total loss of his Maine real estate, his rights to the testamentary trust left by his grandmother Phyllis Burbank supporting that real estate, his rights to gift those rights to his children, Phyllis's lineal grandchildren, as her estate plan intended; and his children's loss in fact of their real property and trust fund property interests in their great grandmother's estate plan. Further property deprivations included fines and costs Maine courts levied on respondent of over $35,000 satisfied only by forced sale and proceeds lien of respondent's Northport real estate, plus respondent's bankruptcy discharge of Maine court fines and cost award balances. All of respondent's trial co-defendant's real property interests were similarly diminished back lack of protection by Northport's NOV administrative authority. The record facts that Northport did not issue a withdrawal or modification of its NOV after informal protests of interested neighbors and respondent's co-owners prior to respondent's compliance strongly supports the inference that Northport strongly disagreed with neighbor protests of the NOV and by Maine legislated local authority intended to protect respondent's and Northport's interests in seeing Maine's Shoreland Zoning Act enforced against any interested party.

Respondent's property deprivations resulting from Maine court denials of his Fourteenth Amendment due process and equal protection rights of 1971 Maine Shoreland Zoning Act Northport NOV administrative process would have been avoided if respondent had been afforded Northport process proximate to the time required for NOV compliance – mid August, 2012, though in deference to DEP

he did not comply until September 11, 2012. In August and September, 2012 neighbors had neither established any rights in respondent's land nor Northport permits for cutting a path proximate to neighbor lots across respondent's shoreland and erecting a forty foot set of stairs down respondent's highly protected shoreland embankment to respondent's highly protected beach. Neighbors did not sue for land rights until February, 2013. **Exhibit C,** DEP Attorney Schneider letter.

The clear record facts of Maine court denial of respondent's fundamental Fourteenth Amendment due process and equal protection property rights to local Northport NOV adjudicative administrative process to preclude devastating property rights devastations meets Practice Book Sec. 2-39 (c) clear and convincing record evidence standards of his Fourteenth Amendment defenses precluding Connecticut discipline in this case. The same records facts meet Practice Book Sec. 2-39(c) clear and convincing evidence standards of respondent's defense of compliance with Maine law, precluding reciprocal Connecticut discipline.

3. Where record facts showed that underpinning Maine lawsuit plaintiffs had questions about the NOV, yet only informally approached Northport and DEP about them, and did not file a Northport zoning board NOV appeal, nor a lawsuit prior to respondent's September 11, 2012 NOV compliance sixty days from NOV issue, including a month after DEP recommended (to Northport only) a short delay before compliance, during which no party produced adverted new evidence to void the NOV, Maine's Law Court deprived respondent of Fourteenth Amendment due process and equal protection rights demanded at trial and on appeal by failing to account for facts that NOV delay seeking parties failed to exhaust Northport NOV

administrative remedies, requiring that court to allow respondent the defense of laches, as pled in his answer to his trial complaint, but avoided in Maine courts.

The laches defense exists in the trial record on the issue of NOV validity. Where Maine courts denied respondent's Northport NOV adjudicative due process and equal protection rights to notice and hearing, respondent may plead laches as a defense to Connecticut's discipline complaint since foreign judgments denying fundamental Fourteenth Amendment Northport NOV adjudicative due process and equal protection rights to a laches defense cannot lawfully underpin a Connecticut discipline complaint, and do not establish evidence minimum required for a Connecticut attorney discipline complaint, since, due to respondent's lawful Maine Laches defense, Maine parties did not have Maine rights to avoid respondent's compliance with Northport's NOV, and Maine courts were without standing to vindicate Maine plaintiffs' alleged property rights subject to law Northport NOV where those plaintiffs' failed to act on their alleged property rights in a Northport zoning adjudication forum. Maine court record facts on respondent's laches defense are Practice Book Sec. 2-39(c) clear and convincing evidence of respondent's Connecticut defense of laches.

4. Respondent's fundamental First and Fourteenth Amendment rights to petition government for grievance redress without fear of punishment reprisal, or prior restraint; and to be considered a US and Connecticut citizen and not a Maine or Connecticut attorney when representing himself in Maine or any courts in Maine or any personal property matters; and to independent though and to dissent from

Maine or any government opinions; and to advance legal theories consistent with these independent thoughts, theories of law, relevant facts, and personal, conscientious, informed judgments of all of them consistent with First and Fourteenth Amendment fundamental rights as acts of conscience and human rights; are protected and enhanced by the US Constitution Ninth Amendment:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Respondent contends Maine's discipline process of him as a Maine attorney when he petitioned as a Connecticut citizen alone was unconstitutionally unconscionable , violating his Ninth Amendment rights to privacy, liberty, conscience, and free speech; to petition government free from punishment, reprisal and prior restraint; to free thought; and privacy; as well as to Fourteenth Amendment due process and equal protection of these rights. The Ninth Amendment was proposed by James Madison as a literal a 'right to conscience'. Respondent contends that Maine violated his Ninth Amendment conscience rights by disciplining him as an attorney when he petitioned Maine as a Connecticut citizen and a human being alone. Such discipline is PB Sec. 2-39(c) clear and convincing evidence of the defense of unconscionability. The Ninth has been successfully litigated in Connecticut courts. *Griswold v Connecticut,* 381 US 479. Rights protected by the Ninth Amendment, as they were in Maine, cannot be contested in Connecticut as a basis for attorney discipline.

5. Other US constitutional founding liberty principles to petition government without fear of reprisal supporting respondent's First, Ninth and Fourteenth

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Amendment claims are found in the Declaration of Independence, US Constitution Preamble, US Constitution Privileges and Immunities Clause, US Constitution Supremacy Clause, and the Thirteenth Amendment. Accordingly it is unconstitutional for any state to annex any disadvantage to the practice of fundamental individual federal freedoms, including annexation of state bar ethics rules and judgments chilling, or as in this case disregarding completely, individual citizen First Amendment petition rights, solely for alleged violations of state (ethics) duties. Annexation is proscribed not only by First, Ninth and Fourteenth Amendment individual liberties, but as constitutional scholar Professor Charles L. Black argued in 1969 to his death (2001), by the structure of the Constitution itself. From *McCullock v Maryland*, 4 Wheaton 316 (1819), which Black judged 'the greatest of our constitutional cases', he drew the following analysis:

> The...question in the case was whether a state might tax the functioning of the Bank of the United States, admitting the later to be a validly created national instrumentality. Here I find my students each year become rather puzzled. As laymen they have absorbed the layman's notions about constitutional law, and they think it consists, indeed that it must consist, in the interpretation of the commands embodied in particular texts. Yet (Justice) Marshall's reasoning on this branch of the case is, as I read it, essentially structural. It has to do in great part with what he conceives to be warranted relational properties between the national government and the government of the states, with the structural corollaries of national supremacy – and, at one point, the Mode of the formation of the Union. You can root the result, if you want to (and Marshall sometimes seems to be doing this) in the supremacy clause of Article VI, but that seems not to be a very satisfying rationale, for Article VI declares the supremacy of whatever the national law may turn out to be, and does not purport to give content to that law. In this, perhaps the greatest of our constitutional cases, judgment is reached not fundamentally on the basis of that kind of textual exegesis which we tend to regard as normal, but on the basis of reasoning from the total structure which the text has created. Charles, L Black, Jr., *Structure and Relationship in Constitutional Law*, pp. 14-15 (1969).

Respondent contends that Professor Black's reasoning correctly puts respondent's First, Ninth and Fourteenth Amendment rights in proper federal versus state power perspective. In Maine, no other group, indeed no other person,

has had their federal liberty 'annexed' as respondent's liberty was, with a 'disability' of extraordinary state sanction (one year suspension) for exercising fundamental First Amendment and other federal rights of petition in state court. Maine cited no state or federal statute, nor any US or Maine constitution principle, nor any compelling set of facts proscribing those federal rights, or for historically doing so against respondent. Maine simply recited a summary of alleged state ethics violations – creatures of the court's own unchecked creation, violations of which respondent denied in detail **(EXHIBIT F)** - without weighing Maine's federal obligations under Maine's scheme.

6. Respondent thus contends, supported by Black, that such denial of Fourteenth Amendment due process and equal protection of First Amendment and other government petition rights are unconstitutional under the Article VI supremacy clause. Respondent further contends, as Black argued, that his federal constitutional and case law rights arise not just from textual exegesis, but a well reasoned federal superstructure paradigm of warranted relational properties between the national government and the government of the states, including but not limited to corollaries of national supremacy, underpinning the formation of the Union. Respondent contends the entire paradigm proscribes state interference with individual relationships(rights) with the federal government.

Accordingly in respondent's case there has yet to be any state or federal due process accounting of this 'interfering either with the operation of the federal government or with the direct relations of the individual with that government.' *Id*, Accordingly, as argued i*nfra*, Maine lacked standing to regulate respondent's

petition speech and opinions of his appeal.

7. Ethics law is designed not to punish the accused, but to protect the public. Where respondent did not appear in Maine as a Maine or Connecticut attorney, Maine's Law Court had no valid 'public interest' to protect. Respondent's fundamental rights to petition without fear of reprisal outweighed any public interest, which is not fundamental as a matter of law. Nor are court discipline powers and rules fundamental law. Respondent's fundamental rights outweighed alleged public and court discipline rights accordingly. Accordingly Connecticut's complaint fails to state claims for which relief can be granted, as they cannot muster even a preponderance of evidence from Maine courts overcoming strict scrutiny of respondent's fundamental First Amendment and Fourteenth Amendment due process and equal protection rights to petition government free from punishment, reprisal and prior restraint; and efforts to so are clear and convincing Practice Book 2-39(c) evidence to unlawfully chill and deny respondent's fundamental First and Fourteenth Amendment rights.

8. The complaint is brought pursuant to a reciprocity agreement. No states can contract to reciprocally violate fundamental First or Fourteenth Amendment rights, nor reciprocally deprive them of US citizens, without offending both Amendments. Reciprocal contracts to violate fundamental First, Ninth and Fourteenth Amendment rights to petition government free from punishment, reprisal and prior restraint, and Fourteenth Amendment due process and equal protection of those rights are void for reasons of public policy and rightful subject of contract law.

Maine thus lacked standing to prosecute respondent. Connecticut lacks standing

to base its complaint on such a Maine judgment. **Exhibit A.**

9. Respondent denies he failed to follow Maine procedural rules. He contends several were not published at all or were constitutionally vague, depriving him of Fourteenth Amendment rights. **Exhibit F.**

10. Respondent denies that he filed a Maine appeal. His Maine attorney, Mariah Gleaton, did. Respondent did not file a Maine attorney appearance. Pursuant to Maine Rule of Civil Procedure 89 and Maine Rule Appellate Procedure 10 Gleaton filed to withdraw as respondent's attorney December 4, 2015. Her motion paragraph 6 stated respondent as 'attorney or Appellees and as Appellant' was contacted and does not object to the motion. There is no record evidence respondent was contacted as an attorney for anyone, including himself. The record shows he was contacted as Attorney Gleaton's Connecticut client. Despite MRCP 89 client rights to hearings when his attorney withdraws, respondent was denied a hearing on the nature and lawfulness of his attorney's withdrawal, and alleged duties he had unique to Maine law to trial clients in the circumstances, denying him Fourteenth Amendment due process and equal protection of law. This Maine denial of fundamental Fourteenth Amendment rights to due process and equal protection of MRCP 89 attorney withdrawal safeguards is clear and convincing Practice Book Sec. 2-39(c) evidence of violation of his Fourteenth Amendment rights precluding Connecticut discipline. **Exhibit F.**

Further, the Maine Law Court's annexation without hearing of respondent duties to represent trial clients on appeal who did not seek appeal to respondent's First

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Amendment Rights to petition government for personal grievance redress violated respondent's First Amendment rights to petition government free from threat of punishment, reprisal and prior restraint, and Fourteenth Amendment due process and equal protection of law; more clear and convincing evidence of Practice Book Sec 2-39(c) evidence of Maine's determination to deny his First and Fourteenth Amendment fundamental rights to petition government, without regard for his due process and equal protection rights to do so.

11. Respondent denies he attempted to represent anyone but himself on appeal once his attorney withdrew. He unsuccessfully moved Maine's Law Court for oral argument to be heard on his father's near-death health, inability to represent himself or hire an attorney, and prejudice to his father's property interests in Maine cases underlying respondent's Maine appeal and Connecticut's reliance on it for reciprocal discipline. Respondent did have Maine statutory power of attorney over his father's property affairs when respondent moved to be heard. Denying these facts for reciprocal discipline is clear and convincing Practice Book Sec. 2-39(c) evidence of Maine's intent to offend respondent's First and Fourteenth Amendment due process and equal protection rights to petition Maine courts to express lawful concerns of his severely disabled father's disability to protect himself and his property regarding any Maine appeal to which his disabled father was entitled.

12. Even where attorneys are rightly disciplined in other states, it is well established in Connecticut that "commensurate action does not mean identical action." *In re Weisman,* 203 Conn. 380, 384 (1987). "In order to establish a prima

facie case the proponent must submit evidence which, if credited is sufficient to establish the fact or facts which it is adduced to prove." *Thomas v West Haven,* 249 Conn. 385, 392 (1999). The record shows that Connecticut cannot adduce evidence for a prima facie discipline case, since Maine lacked a factual foundation for a prima facie discipline case. The Maine discipline judgment was ordered by a Maine Law Court single justice (See January 24, 2018 *Decision and Order*, Complaint Exhibit A), who simply adopted sanctions findings of the full Maine Law Court's August 30, 2016 decision. Reading *Weisman* and *Thomas* together, respondent contends that where he appeared in Maine as a Connecticut citizen only, and not an attorney, the *Weisman-Thomas* standard compels dismissal of Connecticut's complaint.

13. Respondent contends that Connecticut Constitution Sections 1, 2, 4 and 5 offer him greater liberty, conscience, speech, petition, and due process protections in this matter than his First and Fourteenth Amendment rights, and that the US Constitution is merely the baseline for such fundamental rights in his Connecticut case. Accordingly the Connecticut Constitution Sections 1,2 and 4 are clear and convincing Practice Book Sec. 2-39(c) evidence of respondent's defense of Connecticut Constitution protections to petition government free from punishment, reprisal and prior restraint, and protections of due process and equal protection of Connecticut law, superior to his fundamental First and Fourteenth Amendment rights precluding Connecticut's discipline petition.

14. Respondent contends that after his January 12, 2016 stroke he was disabled from fully participating in his Maine case as an attorney or Connecticut citizen by

doctor's order that he should avoid stress and follow regimens to reduce hypertension and future stroke risk flowing from that case, and that Maine courts, especially in disciplinary procedures, failed to lawfully and fully account for health impacts on his Maine appeal performances, especially on or after January 10, 2016, the day he filed final copies of his Maine appeal briefs, despite suffering a stroke that day, diagnosed about January 12, 2016, by UCONN hospital emergency and neurology staff. These facts were documented to the Maine's Law Court's files for discipline purposes, and testified to on the Maine Law Court discipline hearing record, by respondent's Connecticut general practitioner of over 30 years. Denial of these extreme health impacts in this case, which were and remain life threatening when symptoms arise and they did during the Maine appeal process, is clear and convincing Practice Book Sec. 2-39(c) evidence of denial of respondent's First, Ninth and Fourteenth Amendment rights to petition government without fear of punishment, reprisal and prior restraint, and due process and equal protection of of those rights; and to fundamental US and Connecticut human rights of life, liberty, and property, and rights to protect them without government annexation of duties and obligations that threaten those fundamental rights due to associated major health concerns, such as blindness, loss of speech, loss of consciousness and loss of life. Connecticut may not discriminate by attorney discipline by denying a law license to disabled citizens. See *Americans With Disabilities Act of 1990*, Pub. L. No. 101-336, 104 Stat. 328 (1990). Such discrimination is clear and convincing Practice Book Sec. 2-39(c) evidence of respondent's defense of disability discrimination during his Maine appeal and the pendency of Connecticut's

discipline complaint.

15. Respondent contends that Connecticut ethics rules offer the same of broader protections of his alleged misconduct than that he defended in his Maine discipline process, especially concerning his rights to his independent and lawful professional judgment.

16. Respondent contends that as his only client today is based in Canada, Maine's and Connecticut's discipline complaints against him are precluded by the US Constitution (Article I, Section 8, Clause 3 Commerce Clause as unlawful restraint of national and international trade.

17. Respondent retains the right to add, supplement, modify, change, and amend any defenses, due to health which have impacted his ability to prepare this Answer, and due to facts and circumstances that become known to him through Connecticut discipline process or other parties, or for any legal reason.

18. Defendant contends that any issues of indebtedness from Maine litigation impacting Connecticut discipline were resolved by Hartford District Court bankruptcy discharge in January, 2018, that the bankruptcy code specifically precludes denial of law licenses to attorneys whose litigation debts were discharged according to federal and state bankruptcy law and judgment, and that the US Constitution Supremacy Clause controls issues of conflicts of federal and state law that might arise in attorney discipline cases.

19. Respondent contends that any annexation of respondent duties to satisfy Maine standards of Maine bar membership by Connecticut Discipline Counsel during Connecticut discipline process before respondent may be licensed in Connecticut

violate his fundamental First, Ninth and Fourteenth Amendment rights to petition government without punishment, reprisal or prior restraint and due process and equal protection of those rights, and other constitutional rights to liberty, privacy and property described in the Answer.

20. Respondent contends that *Disciplinary Counsel v Peters-Hamlin,* 2015 WL 3651918, decided May 20, 2015 is controlling law in this case, insofar that it recognized Connecticut's right to apply no discipline in any case where the court concludes that an accused has 'suffered enough' from discipline process, or for any lawful reason.

21. Wherefore respondent prays that the complaint be dismissed with prejudice and that respondent be awarded costs of defense and further relief the court finds equitable and just.

Dated: April 16, 2018

Harold Burbank, II, Pro Se Respondent
84 N. Mountain Rd.
Canton, CT 06019
Ph. 860-693-2687

Certification

I hereby certify that a copy of this answer was US Mailed to Office of Chief Disciplinary Counsel, 100 Washington Street, Hartford, CT 06106 on 4-16-18.

Harold Burbank

APPENDIX J

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APPELLATE COURT

Of The

STATE OF CONNECTICUT

AC 41805

OFFICE OF CHIEF DISCIPLINARY COUNSEL

VS

HAROLD H. BURBANK, II

BRIEF OF DEFENDANT-APPELLANT
(With Separately Filed Appendix)

TO BE ARGUED BY:

Harold H. Burbank, II
Pro Se

FOR DEFENDANT-APPELLANT

Harold H. Burbank II
84 N. Mountain Rd.
Canton, CT 06019
Ph. 860-693-2687

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Statement of Issues

Where reciprocal Connecticut attorney discipline is applied by Practice Book (PB) Section 2-39, based on an unconstitutional Maine Law Court misconduct judgment, where defendant's Maine appeal was based on lawful compliance with a lawful zoning notice of violation (NOV) and other reasons of law, his attorney withdrew from the appeal without hearing; the Maine Law Court held defendant was not represented; the defendant appeared pro se in Maine; the defendant's Maine appeal rights arose under a Maine statute precluding punishments of procedure; the Maine Law Court refused merit hearings and oral arguments of fact prior to original misconduct judgment; the Maine Law Court on reconsideration admitted manufacturing facts applied to its misconduct judgment and issued an errata decision admitting court 'error'; the Law Court failed to cite record facts supporting misconduct judgment; the pro se defendant suffered blindness and stroke during Maine appeal; and the defendant's Maine father was dying during appeal; did Connecticut Superior Court:

1. Violate defendant's First Amendment right to petition government without fear of reprisal as PB Section 2-39 was applied? (pp. 4-14)

2. Violate defendant's Fourteenth Amendment rights to due process and equal protection of law as PB Section 2-39 was applied? (pp. 14-31)

3. Violate defendant's Connecticut Constitution Preamble, and Article First, Sections 1, 4, 5, 8, 10, 14 rights, and Amendment Section XXI rights, as PB Section 2-39 was applied? (pp. 31-40)

I. Statement of Proceedings and Facts

Since 1993 defendant Harold H. Burbank, II, a Connecticut citizen, with 14 co-tenant relatives, owned shoreland real estate in Northport, Maine gifted by defendant's client-grandmother Phyllis Burbank supported by her testamentary trust. In May, 2012 defendant found violations of the 1971 Maine Mandatory Shoreland Zoning Act on his lot, including cutting of trees and brush in a highly regulated zone, a pathway from an abutting lot over his wetlands, and a set of stairs leading to his beach. He suspected neighbors and other non-co-tenants of the cutting and construction.

Defendant intended to gift his lot and trust interests to his children free of violations. Some lot co-tenants approved of the violations and would not accept voluntary compliance. Thus Maine Department of Environmental Protection (DEP) Shoreland Zoning Program Coordinator Attorney Deidre Schneider and a Northport code officer physically inspected the lot for violations. They confirmed considerable violations existed requiring remedy under the 1971 Maine Mandatory Shoreland Zoning Act.

Maine DEP is not primary enforcer of the Act, which mandates municipalities shall have primary Act investigation and enforcement powers comporting with a locally drawn ordinance mandated by the Act. Northport issued a warming letter to all co-tenants, and a notice of violation (NOV) to all co-tenants. App. Part 2, A-114. Offended neighbors and co-tenants protested to Northport claiming stairs pre-dated the 1971 Maine Mandatory Shoreland Act. Northport refused to withdraw or 'hold' off the NOV. Parties had access to Northport's zoning board of

appeals but took no action. Northport had no permits or permit applications for either of 2 sets of stairs on the lot.

DEP corresponded with Northport that Northport had authority to issue a NOV 'hold', and DEP policy deferred to 'sound local enforcement discretion and judgment due to local knowledge and circumstances. App. Part 1, A99.

The NOV August, 2012 compliance date came with no compliance agreement or action by co-tenants. In mid September, 2012, more than 30 days after the NOV compliance deadline and rights of Northport zoning board appeal arose, defendant, with notice to all concerned, complied with the NOV, supported by defendant's co-tenant father and co-tenant brother and sister.

Neighbors filed suit against all co-tenants for prescriptive easement, and against defendant for trespass, conversion and malice. Defendant represented himself, father, brother and sister at trial pro bono. They could not afford counsel. Other co-tenants were represented by separate counsel. The trial court found for plaintiffs for prescriptive easement, conversion and malice, despite sworn testimony, eye witness accounts and physical evidence from defendant and his clients that removed stairs, and prior sets, were built after 1971 requiring permits, that Phyllis Burbank's husband posted the land; DEP Attorney Schneider and Northport code officer John Larson testified that Northport had no records permits, that Northport had lawful authority to administer the NOV as it did, and that Northport did not support an NOV 'hold', and did not order one.

Defendant appealed seeking review of trial defenses including compliance with a lawful Northport NOV, laches, neighbor illegality (lack of permits), and

presumption of permission. Defendant hired a lawyer who filed the appeal and withdrew without hearing. Defendant proceeded pro se as a Connecticut citizen. Defendant held power of attorney of his 85 year old dying father. The Law Court did not publish local rules requiring combed bindings in briefs. Defendant filed briefs without. He was ordered to re-file. The stress of extra work and new deadline caused defendant to suffer first ever stroke and blindness from stroke on the re-filing deadline. The Law Court was noticed of stroke during appeal.

The Law Court denied the appeal and alleged several counts of Maine misconduct without factual citation to the record of the allegations or merits hearing. The Maine Board of Overseers of the Bar (BBO) filed a sua sponte complaint based on Law Court allegations. BBO attorney, J. Scott Davis, recommended 'warning' after his investigation, but BBO filed formal charges heard by a single Law Court justice, who ruled for the BBO, despite Law Court errata admission it based its judgments on manufactured facts. App. Part 1, A 98.

Defendant noticed Office of Chief Disciplinary Counsel of Maine's judgment. The Office filed reciprocal complaint, applying a Maine judgment devoid of Maine record facts on which Maine or Connecticut judged the Maine case.

Maine punished defendant for exercising First and Fourteenth Amendment rights of pure political speech. As applied by PB Section 2-39, Connecticut did the same, and also violated defendants superior speech and other rights guaranteed by Connecticut's Constitution. This appeal followed.

III. **Standard of Review**

Connecticut brought its complaint pursuant to Practice Book Section 2-39, Reciprocal Discipline. Section 2-39(c) states: "After hearing, the court shall take commensurate action unless it is found that any defense set forth in the answer has been established by clear and convincing evidence." This appeal is brought because Maine and Connecticut failed to present *any* record evidence of defendant misconduct, because in Maine and Connecticut defendant established First and Fourteenth Amendment defenses, and in Connecticut defendant additionally established state constitution defenses and others by clear and convincing evidence.

"The issue of whether the court held the parties to the proper standard of proof is a question of law. When issues in [an] appeal concern a question of law, this court reviews such claims de novo." *Satti v. Kozek*, 58 Conn.App. 768, 771, 755 A.2d 333 (2000). "In the case of First Amendment contexts...appellate courts are bound to apply a de novo standard of review." *DiMartino v. Richens*, 263 Conn. 639, 822 A.2d 205, 263 (2003).

IV. Argument

A. Defendant's First Amendment rights to petition government without fear of reprisal were unconstitutionally denied by Maine and Connecticut ethics courts.

The Connecticut appellate standard of review for First Amendment issues is de novo.

The US Supreme court has established that attorneys, appearing pro se or not, have First Amendment rights superseding attorney ethics rules, even if attorneys agree to abide ethics rules:

At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law. See eg *In Re Primus*, 436 US412 (1978); *Bates v. State Bar of Arizona*, 433 US 350 (1977). We have not in recent years accepted our colleagues' apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions impinge upon First Amendment freedoms. *Gentile v State Bar of Nevada*, 501 US 1030 (1991).

Accordingly, former Connecticut Supreme Court Chief Justice and Yale Law Professor Ellen Peters' dissent in *Cologne v. Westfarms Assoc.*, 192 Conn. 48, 469 A.2d 1201 (1989) established the proper legal framework on which Connecticut attorney's First Amendment defenses to discipline must be analyzed and established:

...we must determine...the proper position of the right of political free speech under the Constitution of Connecticut...State courts today have the opportunity as well as the obligation by virtue of our federal system to begin to adapt state constitutional provisions to the issue presented to society dominated by large commercial groups...I believe that the *individual rights* (my emphasis) guaranteed by our state constitution's Declaration of Rights have a greater priority in our constitutional framework than the majority is prepared to recognize...For me it is of critical importance that the plaintiffs are seeking to exercise free speech which is political in its nature and therefore central to the very existence of a democratic society, and that the plaintiffs' claim finds strong textual support in the language of article first, section 4 of our constitution... Analysis of the rights of the parties in this case must begin with recognition of the central role assigned by constitutional theory to the rights of ***petitioning the government*** (my emphasis) and of free speech about political issues...'there is something special about speech' (quoting Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 23 (1971))...

An appropriate starting point for the relationship between free speech and constitutional government is Justice Brandeis concurrence in *Whitney v California*, 274 US 357 (1927)...'Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed the freedom to think as you will and to speak as you think are means

indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them discussion affords ordinarily adequate protection against noxious doctrine ...they knew...that it was hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones...'

...the amendment 'does not protect a 'freedom to speak'. It protects the freedom of those activities by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility.' Meiklejohn, *The First Amendment Is An Absolute,* 1961 Sup.Ct. Rev. 245, 255.

...'courts should be heavily involved in reviewing impediments to free speech because ***first amendment rights 'are critical to the functioning of an open and effective democratic process'*** (my emphasis)...

...the free speech provision of our own constitution has been held to embody the same understanding of the centrality of free speech to constitutional government...

Our early case law stems *from the time before the incorporation of the first amendment into the fourteenth amendment came to dominate the field of protection of individual liberties*...the right of every citizen to freely express his sentiments on all subjects stands on the broad principle which supports the equal rights of all to exercise gifts of property (ie law license) and faculty to any pursuit in life – in other words, upon the essential principles of civil liberty as recognized by our Constitution...(*State v McKee*, 73 Conn.18, 28-29 (1900))...Very recently in *Grievance Committee v Trantolo* 192 Conn. 27, 36 (1984), we noted the special protection afforded to an attorney's publication that was political rather than commercial when we said: 'If the statement is political or ideological, it naturally enjoys the fullest protection under the first amendment to the United States constitution and article first, section 4 of the Connecticut constitution...

The state constitutional framework for protection of the right of free speech rests principally upon the provisions of article first, sections 4 and 5 of the constitution of Connecticut. Section 4 states: '***Every*** (my emphasis) citizen may freely speak, write and publish his sentiments on all subjects. Section 5 states: 'No law shall ever be passed to curtail or restrain the liberty of speech...In addition, section 14 states: 'The citizens have a right...to apply to... government, for redress of grievances, or other proper purposes, ***by petition*** (my emphasis), address or remonstrance'...*Pruneyard Shopping Center v. Robins*, 447 US 74

(1980) expressly recognized the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution...

...state supreme courts have also recognized that state constitutional provisions like our own may afford protection not only against governmental or public bodies but, under appropriate circumstances, against private persons (or public interests, my note) as well...in the absence of an expressed state action requirement, there was 'no reason to imply such a requirement, and thereby to force a parallelism with the Federal Constitution.' *Batchelder v. Allied Stores*, 338 Mass. 83, 88-89 (1983). The court went on to broaden its holding to 'reject any suggestion that the Declaration of Rights should be read as directed exclusively toward restraining government action.'...

...on their face the relevant provisions of the Connecticut constitution afford protection of freedom of speech ***and for the right to petition*** without regard to the source of the interference with these constitutionally guaranteed rights (my emphasis) ...the conjunction of sections 4 and 5, both of which address freedom of speech, underscores that under our constitution as well as under the first amendment to the federal constitution, freedom of speech is 'special', and is entitled to a preferred position over other constitutional rights (my emphasis). See *US v. Carolene Products*, 304 US 144, 152-53 n.4 (1938)....

...***the most important datum bearing on what was intended is in the constitutional language itself***...(Emphasis in original.)...We have recognized the same rule of construction in *Borino v. Lounsbury*, 86 Conn. 622, 625 (1913)...Contemporary construction...can ***never*** (my emphasis) abrogate the text...it can never narrow down its true limitations, it can never enlarge its natural boundaries...

...the constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people...

...In my view, the Connecticut Constitution gives the plaintiffs the right to speak peacefully about their political concerns without regard to the presence of any special form of state action. Even if I am wrong about that proposition, however, these plaintiffs can still prevail because this record adequately demonstrates governmental involvement in the denial of their access to a political forum...

...the preferred position of freedom of speech entitles that claim to a special position in an assessment of state action. *Lockwood v. Killian*, 172 Conn.496, 502-03...I believe that the trial court's remedial approach excessively involved the court in the details of the plaintiffs' speech and in the manner of its exercise...*Cologne,* infra, pp. 67-84.

Defendant was unconstitutionally punished in Maine and Connecticut for pure speech in the political forum; speech which the US Supreme Court has specifically held lies 'at the core of the First Amendment. *Butterworth v. Smith*, 494 US 624, 632 (1990). *Gentile*, infra, is controlling US Supreme Court precedent in this area of attorney regulation. 'At issue is the constitutionality of a ban on political speech critical of the government.' *Id*, at 1031. Defendant appealed ('spoke') at a time and in a manner that neither at law nor in fact created any threat of real prejudice to anyone or to the state's interest in the enforcement of its laws. Further, Maine's and Connecticut's misconduct rules safe harbor provisions permit the speech in question. Maine's and Connecticut's decisions to discipline defendant in spite of those provisions are classic examples of unconstitutionally vague and selective law enforcement intended to punish the dissemination of information relating to alleged government misconduct. *Butterworth v. Smith*, 494 US 624, 632 (1990). In both Maine and Connecticut, 'The record does not support the conclusion that that (defendant) knew or reasonably should have known his remarks (appeal) created a substantial likelihood of material prejudice'. *Gentile*, at 1037-8. Discipline rules 'only prohibits the dissemination of information that one knows or reasonably should know has a 'substantial likelihood of materially prejudicing an adjudicative proceeding ." *Id*, at 1038. 'An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for (clients)...an attorney may take reasonable steps to defend a client's reputation and reduce adverse consequences...especially in the face of a prosecution

deemed unjust or commenced with improper motives...the record is devoid of facts one would expect to follow upon any statement that created a real likelihood of material prejudice...' *Id*, at 1043. 'There is no support for the conclusion that (defendant's) statements (appeal) created a likelihood of material prejudice or indeed any harm of sufficient magnitude or imminence to support a punishment for speech.' *Id at 1048.*

Maine discipline rules fail to provide 'fair notice to those to whom (they are) directed.' *Grayned v.City of Rockford*, 408 US 104, 112 (1972). A lawyer seeking to avail himself of (Maine and Connecticut rule) protections must guess at its contours...The lawyer has no principle for determining when his remarks (appeal) pass from the safe harbor of the general to the forbidden sea of the elaborated.' *Gentile*, at 1048-9. Maine Law Court allegations and judgments said only that defendant 'should have known...his actions constituted misconduct'. App. Part 1, A14. The fact defendant proved to Maine discipline prosecutor J. Scott Davis, Esq. a record of compliance in the Maine, leading to Davis's discipline 'warning' recommendation (App. Part 1, A 101) rejected by Davis's superiors, Maine Board of Overseers of the Bar (BBO) without explanation (Davis later offered to suspend defendant's Maine suspension) shows that Maine rules created 'a trap for the wary as well as the unwary'. *Gentile*, at 1051.

'Wide- open balancing of interests is not appropriate in this context'. *Id*, at 1052. 'At the very least (US Supreme Court) cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First

Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law...*In re Primus* , 436 US 412 (1978)... ,' *Id,* at 1054. None of the justifications put forward by Maine or Connecticut suffice to sanction abandonment of precedents '...in the case of speech (pleadings) by an attorney regarding pending cases...the Rule(s) as interpreted by (Maine and Connecticut) fails the ***searching*** (my emphasis) inquiry required by those precedents.' *Id.* Maine and Connecticut have 'not demonstrated any sufficient state interest in restricting the speech of attorneys to justify a lower standard of First Amendment scrutiny.' *Id.*

Neither Maine nor Connecticut provided a single record example of where an attorney on instant record facts prejudiced anyone. *Gentile at 1055.* 'If the dangers of such speech 'arise from its persuasiveness, from ability to explain judicial proceedings, or from likelihood that the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent... The instant case is a poor vehicle for defining with precision the outer limits under the Constitution of a court's ability to regulate an attorney's statements about ongoing adjudicative proceedings.' *Id*, at 1057. '...Rule(s) which punished (defendant's) statement represent(s) limitation of First Amendment freedoms greater than is necessary or essential for protection of the particular governmental interest...' *Id.* 'It cannot be said that (defendant's) conduct demonstrated any real or specific threat to the legal process, and his statements (appeal) have the full

protection of the First Amendment.' *Id*, at 1058.

Where defendant's Maine and Connecticut law licenses were incidental to his Maine appearance, in which he argued Maine land owner and Connecticut citizen issues of public concern, and where the Maine Law Court unconstitutionally annexed Maine attorney ethics law to his fundamental First Amendment and other Maine appeal rights; and where Connecticut's ethics complaint is based on these unconstitutional Maine processes, allegations and judgments, as applied Connecticut's PB Section 2-39 complaint and judgment violated defendant's fundamental First Amendment rights to petition government free from punishment, reprisal and prior restraint. Connecticut's complaint thus lacked merit and standing in Connecticut courts and must be dismissed:

> For at least a quarter-century, this Court has made clear that even though a person has no `right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government [445 U.S. 507, 515] may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to `produce a result which [it] could not command directly.' *Speiser v. Randall*, 357 U.S. 513, 526 . Such interference with constitutional rights is impermissible. *Branti v Finkel,* 445 US 507, Section I (1980).

See also *Whitney v. California,* 274 US 357 (1927), *Abrams v US*, 250 US 616 (1919), *Schenck v. US*, 240 US 47 (1919), *New York Times v. US*, 403 US 713 (1971), *McCulloch v. Maryland,* 4 Wheaton 316 (1819).

It is unconstitutional for any state to annex any disadvantage to the practice of fundamental individual federal freedoms, including annexation of state bar

ethics rules and judgments chilling, or as in this case disregarding completely, individual citizen First Amendment petition rights, solely for alleged state ethics rules. Annexation is proscribed not only by First, Amendment individual liberties, but as constitutional scholar Professor Charles L. Black argued in 1969 to his death (2001), by the structure of the Constitution itself. From *McCullock v Maryland*, 4 Wheaton 316 (1819), which Black judged 'the greatest of our constitutional cases', he drew the following analysis:

> The...question in the case was whether a state might tax the functioning of the Bank of the United States, admitting the later to be a validly created national instrumentality. Here I find my students each year become rather puzzled. As laymen they have absorbed the layman's notions about constitutional law, and they think it consists, indeed that it must consist, in the interpretation of the commands embodied in particular texts. Yet (Justice) Marshall's reasoning on this branch of the case is, as I read it, essentially structural. It has to do in great part with what he conceives to be warranted relational properties between the national government and the government of the states, with the structural corollaries of national supremacy – and, at one point, the Mode of the formation of the Union. You can root the result, if you want to (and Marshall sometimes seems to be doing this) in the supremacy clause of Article VI, but that seems not to be a very satisfying rationale, for Article VI declares the supremacy of whatever the national law may turn out to be, and does not purport to give content to that law. In this, perhaps the greatest of our constitutional cases, judgment is reached not fundamentally on the basis of that kind of textual exegesis which we tend to regard as normal, but on the basis of reasoning from the total structure which the text has created. Charles, L Black, Jr., *Structure and Relationship in Constitutional Law*, pp. 14-15 (1969).

In Maine, no other group, indeed no person, has had their federal liberty 'annexed' as defendant's liberty was, with a 'disability' of extraordinary state sanction (one year suspension) for exercising fundamental First Amendment and other rights of petition in state court. Maine cited no state or federal statute, nor any US or Maine constitution principle, nor any compelling set of facts proscribing those rights, or for historically doing so against defendant. Maine,

without weighing Maine's federal obligations to defendant, simply recited a list of alleged ethics violations, creatures of the court's own unchecked creation, which respondent denied in detail in Maine and Connecticut.

Clearly such denial of Fourteenth Amendment due process and equal protection of First Amendment and other government petition rights are unconstitutional under the Article VI supremacy clause. As Black argued, defendant's federal constitutional and case law rights arose not just from textual exegesis, but a well reasoned federal superstructure paradigm of warranted relational properties between the national government and the government of the states, including but not limited to corollaries of national supremacy underpinning formation of the Union. This entire paradigm proscribes state interference with individual relationships (rights) with the federal government. In defendant's case there has yet to be any state or federal due process accounting of this 'interfering either with the operation of the federal government or with the direct relations of the individual with that government.' Black, pp. 14-15, infra. Accordingly Maine, and therefore Connecticut, lacked standing and jurisdiction to regulate defendant's petition speech and opinions of his Maine appeal on which Connecticut's complaint was based.

Ethics law was designed not to punish the accused, but to protect the public. Where defendant did not appear in Maine as a Maine or Connecticut attorney, but rather pro se in a personal matter, Maine's Law Court had no valid attorney discipline 'public interest' to protect, precluding discipline complaints.

Connecticut's complaint was brought pursuant to a reciprocity agreement.

States cannot contract to reciprocally violate fundamental First Amendment rights, nor reciprocally deprive them of citizens, without violating those rights, Attempts at reciprocal enforcement on these facts are void for reasons of public policy and rightful subject of contract law.

For all of these reasons Connecticut Superior Court applied Maine and Connecticut attorney discipline rules, including PB 2-39 and a reciprocity agreement, in a manner violating defendant's First Amendment rights.

B. Defendant's Fourteenth Amendment rights to due process and equal protection of law to petition government without fear of reprisal were unconstitutionally denied by Maine and Connecticut ethics courts.

> It is the solemn duty of lawyers and especially those lawyers working as judges and law professors to perfect the law, to strive toward achieving such an idealistic ideal of justice and to define as precisely as possible (my emphasis) principles on which justice may be attained in decisional process. *Long. V. Citizens Bank & Trust*, 563 F.Supp.1203.

Defendant provided Connecticut Superior Court substantial PB Section 2-39 clear and convincing misconduct defense evidence, including that Maine found a prescriptive easement on his lot without applying Maine's 'presumption of permission' exception (due process), that Maine failed to apply the 1971 Maine Mandatory Shoreland Zoning Act by which Northport issued defendant and co-tenants a lawful NOV with which defendant complied (due process); failed to cite a single specific and articulable Maine ***record*** fact of misconduct in its case against defendant (due process); failed to account for his stroke and blindness caused by facts that Maine did not publish some rules for submitting briefs (due process, equal protection, duress, estoppel); manufactured facts on which to base misconduct and admitted it by issuing an errata sheet (fraud); and failed to

provide evidence defendant was not within his Maine appeal petition rights (First and Fourteenth Amendment). Defendant therefore met his PB Section 2-39 burden of proof to avoid commensurate Connecticut action.

In Connecticut the issue of whether a court held parties to the proper standard of proof is a question of law. When issues in an appeal concern a question of law, Connecticut appellate courts reviews such claims de novo.

Defendant re-states his argument infra made by retired Connecticut Chief Justice Ellen Peters in *Cologne v. Westfarms*, *infra*, that the Fourteenth Amendment commands that Connecticut protect defendant's First Amendment fundamental individual and attorney political rights to speech and to petition government without fear of reprisal or loss of property:

> Our early case law stems *from the time before the incorporation of the first amendment into the fourteenth amendment came to dominate the field of protection of individual liberties*...the right of every citizen to freely express his sentiments on all subjects stands on the broad principle which supports the equal rights of all to exercise gifts of property (ie law license) and faculty to any pursuit in life – in other words, upon the essential principles of civil liberty as recognized by our Constitution...(*State v McKee*, 73 Conn.18, 28-29 (1900))...Very recently in *Grievance Committee v Trantolo* 192 Conn. 27, 36 (1984), we noted the special protection afforded to an attorney's publication that was political rather than commercial when we said: 'If the statement is political or ideological, it naturally enjoys the fullest protection under the first amendment to the United States constitution and article first , section 4 of the Connecticut constitution...

Additionally, the Fourteenth Amendment commands our courts to protect defendant's individual and attorney due process and equal protection rights to real property, and law license property. 'A license to practice law is a property interest that cannot be suspended without due process.' *Grievance Committee v. Johnson*, 108 Conn.App. 74, 946 A.2d 256 (2008). To suspend a license, it is

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necessary for defendant to know exactly what record facts underpin ethics charges:

> Fundamental principle of due process which must be observed in Administrative proceedings is that each party has a right to receive notice of a hearing, and the opportunity to be heard at a meaningful time and in a meaningful manner; due process of the law requires not only that there be a proper notice of the hearing, but at the hearing the parties involved have a right to produce relevant evidence, and an opportunity to know the facts on which the agency is asked to act...and to offer rebuttal evidence. *Ryker v. Town of Bethany, 97* Conn.App. 304, 904 A.2d 1277 (2006)...At their core due process clauses of state and federal constitutions require that one subject to significant deprivations of liberty and property must be accorded adequate notice and meaningful opportunity to be heard. *Bhinder v. Sun Co*, 263 Conn. 358, 819 A.2d 822 (2003).Attorneys subject to disciplinary proceedings are entitled to due process of law, in part because such actions are adversary proceedings of a quasi-criminal nature (my emphasis). *Statewide v. Johnson*, 108 Conn.App. 74, 946 A.2d 1256 (2008)...Assessment of attorney conduct with respect to ethical standards is inherently an intensely fact based inquiry...*In Re Rite Aid Corp. Securities Litigation,* 139 F.Supp.2d 649.

The 'list' of Maine Law Court ethics violations alleged does not contain a single record fact of support. Connecticut did not assert any record supporting its complaint. Accordingly, there is not a single record fact for any court conclusion that defendant's Maine appeal was unethical, or created any harm of sufficient magnitude or imminence to support a punishment for protected speech in Maine or Connecticut.

Defendant corresponded with Maine Board of Bar Overseers Attorney J.Scott Davis during the Maine bar's investigation of the Maine Law Court Court's ethics allegations. Attorney Davis's investigation letter, while offering no record facts of misconduct, at least offered a summary of misconduct rules Attorney Davis believed, based on the Law Court's appeal decision alone, not any court argument, hearing or evidence judged on merits, applied to a discipline case, and

a chance for defendant to offer explanation and defenses. Defendant answered:

Response to Overseers 9-6-16 Investigation Letter Re Maine Rules of Professional Conduct and Rules of Appellate Procedure Referenced By Bar Counsel J. Scott Davis

ME Rule Professional Conduct 1.1, Competence: *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*
Answer: I was a non-resident sole pro se defendant-appellant who incidentally held a Maine law license. Constitution Article I, Section 19 guarantees parties the right to appear in Maine courts pro se. My pro se appeal was an exercise of my individual rights, not subject to Rule 1.1. Legal knowledge, skill, thoroughness and preparation I provided for myself are not subject to Rule 1.1, which applies to services for clients.

The Law Court's 12-15-15 Order on Motion to Withdraw, **Exhibit A**, granting Attorney Gleaton's (my appeal attorney) 12-4-15 Motion to Withdraw, **Exhibit B,** ordered that I was proceeding 'simultaneously as an appellant and as an attorney for three of the appellees (my three trial clients - father, brother and sister), although it is unclear what legal or personal interest those appellees have in this appeal (my emphasis)'. Order on Motion to Withdraw, back of page 1, *infra.*

Paragraph six of Attorney Gleaton' s 12-4-15 Motion to Withdraw stated, 'Harold Burbank, II, attorney *or* Appellees and as Appellant has been contacted and does not object to this motion'. Attorney Gleaton contacted me and I approved her motion as the appellant only, not as an attorney representing appellees. Attorney Gleaton did not advise me that her motion meant that I was proceeding as attorney for appellees. She did not request my consent to be their counsel, nor did she ask my father, brother or sister (appellees) to consent to my being their appeals counsel. Paragraph two of Attorney Gleaton's Motion to Withdraw said, ' Appellant will proceed by representing himself in this matter...'. I was only to represent myself if the motion was granted. Attorney Gleaton therefore did not mean that I was proceeding as attorney for appellees. A court inference or conclusion otherwise is misapprehended.

The 12-15-15 Order on Motion to Withdraw stated that I must "file, on or before December 29, 2015, a memorandum showing cause why (I) should not be disqualified from representing three appellees in this appeal given that (I am) an appellant'. The order did not cite Maine law compelling this result. After 12-15-15 I consulted two other Maine lawyers on this point, who could not explain why, by operation of law, I assumed appeals representation of trial clients (father,

brother and sister), who had not appealed, and did not want to appeal, only when my appeal attorney withdrew and not at any other time, or why a show cause order should lie on the facts.

The post withdrawal (of Attorney Gleaton) case status surprised my father, brother, sister and me. My trial clients did not want to be appellees or appellants. The court was aware of this, noting 12-15-15, '...it is unclear what legal or personal interest those three appellees have in the appeal'. *Order*, infra. My father, brother sister and I thought that there had been a mistake. In our minds, my father, brother and sister remained my clients only for purposes of questions they asked me about my appeal, and support they wanted to give, at Law Court discretion, for my appeal, without filing appeals themselves, for cost and other reasons. They did (do) not support the trial decision. They were (are) committed to justice in the case. My family and I remain confused about why I had no duty to represent them on appeal so long as I had appellate counsel, and why that status changed where my father, brother and sister had not appealed the trial decision.

Legal theories I applied to the case, including standing, which can be raised at any time, were brought in good faith consistent with theory and practice studied in law school and in Maine, Connecticut, federal and US Supreme Court practice. See **Exhibit C**, Brief of Appellant. See also **Exhibit D**, Motion for Reconsideration. Maine courts held the case concerned narrow issues of easement and partition. I disagreed, especially where Northport and Maine DEP found substantial zoning violations on my land and cited all Burbank property owners for them, implicating Maine and Northport environmental and zoning law, policy and enforcement authority.

ME Rule Professional Conduct 1.3, Diligence : *A lawyer shall act with reasonable diligence and promptness in representing a client.*
Answer: I was a non-resident sole pro se defendant-appellant who incidentally held a Maine law license. I did not represent a client. Lack of diligence, if any, was inadvertent, due to mistake of a procedural rule (ie opposition to trial motions may be filed within 21 days, where opposition to motions for appeal must be filed within 7 days), or due to health and distance of trial clients assigned to me by operation of Maine law when my appeal attorney withdrew, or due to my 1-12-16 stroke and recovery to at least 2-12-16. See **Exhibit E**, Medical Records, attached.

Re alleged untimely response to the Law Court's 12-15-15 show cause order (see Answer, Bar Rule 1.1), that order was captioned, 'Order on Motion to Withdraw'. **Exhibit A**. The motion was filed by my appeal attorney, not me. The back side of the Order on Motion to Withdraw, a single sheet document

with text on both sides, stated the order to show cause and its December 29,

2015 due date. The order caption made no reference to an order to show cause. Some response inadvertence was due to where the show cause order was printed on the Order on Motion to Withdraw (on the back), which did not state an order to show cause in the caption

My father, brother sister and I were surprised and confused by the order, since my father, brother and sister had not appealed, and expressed no desire to anyone in appeal at the time. We thought that there had been a mistake. I lived in Connecticut. Dad lived in Maine. My brother lived New Hampshire. My sister lived in North Carolina. Communications were accordingly tedious. Then trial court was aware that Dad, age 85, was extraordinarily fragile from cancer and age, so that information was in the record. On June 4, 2015, Dad suffered a significant stroke which hospitalized him for months. He suffered ongoing potentially fatal anxiety attacks and mini-strokes. I was not going to risk his life by pressuring him for show cause answers. Great time and effort were required to explain the order to him, and to understand his responses. Similar problems affected responses of my brother and sister. The order told Dad, my brother and my sister that they were appellees; a status they did not accept. They did not support the trial decision, but did not want to appeal for cost and other reasons. Their only interest in appeal was to support my appeal, which they were willing to communicate to the court through me, or by any means available at court discretion.

Legal authority compelling my 'proceeding simultaneously as an appellant and as attorney' for them was not cited in the 12-15-15 order. Attendant case law did not apply to my facts, where my appeal attorney withdrew, forcing me in December, 2015, and not in August, 2015 when my attorney filed appeal, to become appeals lawyer for trial clients who did not want to appeal and had not appealed.

On 12-30-15, a day after the 12-15-15 show cause order 12-29-15 answer date, I timely filed my appellate briefs, which clearly indicated that I was a non-resident, pro se, sole appellant. On 1-5-16 the court rejected the briefs for lack of combed bindings not specified in the appellate rules, and set a 1-15-16 resubmission date. See **Exhibit F**, Order Rejecting Briefs. The 1-5-16 order told me to show cause by 1-29-16 against sanctions for failure to answer the 12-15-15 order by 12-29-15 (explained *infra*). The 1-5-16 order said not to change anything in the briefs, so I filed a timely set with comb bindings and photocopied original signatures. Due to diligence and caution, I then timely filed a third set with comb bindings and an *original* signature required by MRAP 9. On 1-12-16, while diligently pushing myself to get the third set into overnight mail for timely filing, I temporarily lost my vision and had other acute symptoms of a first ever stroke. See **Exhibit E.**

I was hospitalized for brain scans @ 1-13-16. UCONN's chief of neurology

confirmed the stroke diagnosis 2-12-16 (**Exhibit E**), and ordered continued stress avoidance (ordered 1-13-16), lifelong medications, and therapy to avoid fatal stroke. On 1-25-16 I diligently filed timely opposition to the 1-5-16 show cause order, arguing for prior client consent and other law, because it is unethical to answer show cause orders concerning (court ordered) clients without consulting them. Scholars further hold attorney client privilege is violated by responding to show cause orders where clients do not want it known whether they considered appeal or consulted an appeal attorney. See **Exhibit G**, Opposition to Sanctions.

On 2-23-16, after consulting expert Maine counsel, I filed a Motion to Withdraw as Counsel (**Exhibit H**) for my father, brother and sister, which they pre-approved, stating that my father was not disinterested in my appeal, but due to life threatening health conditions did not himself wish to appeal at the time (offering however that if necessary he would represent himself on appeal), and that my brother and sister did not seek to be appellants or appellees "at this time". The motion again stated the odd posture of the appeal arising due to my appeal attorney's withdrawal. The motion was judged moot but was the first and only time that my severely disabled father, my brother and my sister had been represented by their own authority before the Law Court.

Re the court's order to resubmit appellate briefs that did not contain coil bindings, MRAP 9(f) does not stipulate coil bindings, but rather, "Briefs shall be bound on the left hand margin…", which my briefs were with twine, to save time to make the due date and save costs. I have submitted briefs to the US Supreme Court bound with brass fasteners covered with hockey tape, per that clerk's instructions, to save an indigent client binding costs. The method is acceptable there for prisoners and other indigent appellants. I lost vision and suffered a 1-12-16 mid day stroke precisely during efforts to comply with the Law Court's order to resubmit appellate briefs on time with comb bindings.

ME Rules Professional Conduct, 3.3(a)(1)(2), Candor Toward the Tribunal
(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer (2) misquote to a tribunal the language of a book, statute, ordinance, rule or decision or, with knowledge of its invalidity and without disclosing such knowledge, cite as authority, a decision that has been overruled or a statute, ordinance or rule that has been repealed or declared unconstitutional.
Answer: I did not knowingly make any false statement of fact or law to any tribunal in the case. Bar Rule 3.3(a)(1). I did not misquote a book, statute, ordinance, rule or decision, or otherwise violate Bar Rule 3.3(a)(2). The following is an attempt to answer to decision holdings that sound somewhat in violation Bar Rules 3.3(a)(1)(2). The court held that appeals reply briefs may

not exceed 20 pages. MRAP 9(c); Decision, p.20. The court held that I wrongly filed two reply briefs, totaling thirty-three pages. I was served two reply briefs; one from plaintiffs-appellees, and one from defendants-appellees. Their law firms represented separate issues of easement and real estate partition respectively. My trial motion to bifurcate these two distinct causes of action was denied, so the issues were tried together. MRAP 9(c) does not stipulate that appellants may not answer each of two reply briefs separately, or that each reply brief may not total 20 pages. Each reply brief was less than 20 pages. I therefore did not knowingly violate the rule, nor were my acts contumacious. Decision, p. 23.

The court held that my brief showed a contumacious attitude due to editing errors admitted in my request for oral argument. The errors were inadvertent due to lack of time for full editing and hand publishing before the filing deadline. Some were probably due to temporary blindness 1-12-16. The admission of error in the request for oral argument was to candidly bring the errors to the court's attention for correction, and not contumacy.

The court held that I failed to answer a direct order to explain how as appellant I could purport to represent appellees. I did not purport to represent appellees. The court did so, perhaps confused by my attorney's motion to withdraw, which I approved for myself, not regarding my father, brother and sister, explained *infra*.

The court held that I proposed to represent views of other Burbank defendants. It also held that my request for oral argument proposed to testify for my father. Decision pp. 23-4. See **Exhibit I**, Request for Oral Argument, attached. It stated oral argument is like a 'preliminary conference where judges more than parties share their views of the case, including their understanding of the facts and law, in which case lawyers participate...". My request was denied. If accepted, I would have explained, as I have *infra*, that while my father, brother and sister did not want to appeal, they did not support the trial decision, remained deeply interested in the case and my appeal, and would, at court direction, permit to me to speak to these matters for them in the interests of justice. This was especially appropriate where the trial court and Law Court were aware that my father is critically disabled, and did not renounce his appeal rights completely. **Exhibit I**.

ME Rules Professional Conduct, 3.4(c), Fairness to Opposing Party and Counsel. *A lawyer shall not:... (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.*
Answer: Fact, law and supporting materials submitted were not knowingly violative of a rule. Facts alleged were based on testimony, documents (including government publications), photographs and other materials in the

record. Theories alleged were found in well regarded legal doctrines, cases, and law review articles, the most important of which concerned the interests of justice, defined in US cases as permitting new facts and new arguments on appeal, regardless of the record. In this sense, I asserted, at least in my reply brief to defendants-appellees, an open refusal to adhere to rules to keep to the trial record since it was my legal conclusion, and that of scholars I read for the reply brief, that no valid constitutional obligation exists. See Gorod, *The Adversarial Myth: Appellate Court Extra-Record Fact Finding,* 61 Duke Law Journal 1 (2011), cited in my reply brief to defendants-appellees; and Dobbins, *New Evidence on Appeal*, 96 Minnesota Law Review 2016 (2012).

My reply brief argued that in *Citizens United v. FEC*, 558 US 301 (2010), a significant corporate speech case, the Supreme Court overruled long-standing precedent and held unconstitutional a federal law prohibiting "corporations and unions from using their general treasury funds" to engage in political speech. In reaching this result, the Court repeatedly relied on facts that were not part of the record created by the parties below. Throughout the Court's analysis, it made factual assertions with citation only to an amicus brief or without citation at all. Indeed, there was little evidence in the Court's opinion of any record developed by the adversaries who had litigated the case below. *The Adversarial Myth*, *infra*, p. 28. While some find this incongruous with other principles of law, there in no evidence whatever that parties must be prejudiced, that justice is not served, or more importantly that the US Supreme Court has ruled it unlawful in any way for the courts to develop their own factual records by their own efforts or otherwise, including relying on documents, exhibits, testimony or other evidence not formally entered into a court record.

ME Rules Professional Conduct 4.4(a), Respect for Rights of Third Persons. (*a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.*
Answer: I was a pro se sole appellant who incidentally held a Maine law license. I did not represent anyone on appeal but myself. Misapprehensions that I represented others (appellees) have been addressed previously. The case I made for myself did not use means to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person, as argued *infra.*

ME Rules Professional Conduct 8.4(a)(b)(c)(d): *It is professional misconduct for a lawyer to: (a) violate or attempt to violate any provision of either the Maine Rules of Professional Conduct or the Maine Bar Rules, or knowingly assist or induce another to do so, or do so through the acts of another (b) commit a criminal or unlawful act that reflects adversely on the lawyer's honesty,*

trustworthiness or fitness as a lawyer in other respect (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation (d) engage in conduct that is prejudicial to the administration of justice.
Answer: I did not violate or attempt to violate any provision of either the Maine Rules of Professional Conduct or the Maine Bar Rules, or knowingly assist or induce another to do so, or do so through the acts of another. Alleged failures have been addressed *infra*. I did not commit a criminal or unlawful act that reflects adversely on my honesty, trustworthiness or fitness as a lawyer in other respects. I do disagree strongly philosophically with Maine courts on matters of apparent judicial policy, discretion, right and the interests of justice, in the noblest, time honored intellectual traditions of American law. I did not engage in conduct involving dishonesty, fraud, deceit or misrepresentation with anyone at any time, as discussed *infra*. I did not engage in conduct that is prejudicial to the administration of justice, as explained *infra*.

Maine discipline counsel J. Scott Davis, Esq. responded to defendant's answers with a recommendation that a warning be issued, with no challenge whatever of facts alleged by defendant . App. Part 1, A101.Maine's Law Court denied every request for oral argument and motion hearing where facts could have been better understood by the Court if that were its interest. It was not, particularly evinced where the Court unanimously voted that defendant violated a state order to 'hold' off compliance with a Northport notice of violation (NOV) when defendant's appeal brief and the trial and appeal record were replete with document and testimonial evidence that Northport never withdrew its NOV, had no intention to withdraw, had been informally approached to do so and refused, and that it expected trial defendants to comply or face severe sanctions, which the Law Court ignored completely. App.Part 2, A114; App.Part 1, A99. Defendant forced the Law Court to confront its clear bias by Motion for Reconsideration, resulting in an Errata judgment by the Court. App. Part 1, A98.

Respondent's Maine appeal rights arose under *14 MRSA Sec. 1851* and *4*

MRSA Sec. 57. Maine's legislature did not except attorneys from pro se appeals. Maine's Law Court had a statutory duty to hear appeals regardless of attorney status or pleading quality:

> When the issues of law presented in any case before the Law Court can be clearly understood, they must be decided, and a case may not be dismissed by the Law Court for technical errors in pleading alone or for want of proper procedure if the record of the case presents the merits of the controversy between the parties. Whenever, in the opinion of the Law Court, the ends of justice require, it may remand any case to the court below or to any justice or judge thereof for the correction of any errors in pleading or procedure. In remanding said case, the Law Court may set the time within which said correction must be made and said case reentered in the Law Court. *4 MRSA Sec. 57, para 2.*

Maine's prosecution thus denied defendant's 14th Amendment rights to due process and equal protection of *14 MRSA Sec.1851* and *4 MRSA Sec. 57, as applied,* to be heard as a citizen and/or an attorney in Maine. There is no exception denying attorneys. Connecticut denied defendant's 14th Amendment due process and equal protection rights by applying PB Section 2-39 underpinned by Maine's judgment denying his 14 MRSA Sec. 1851 and 4 MRSA Sec. 57 rights.

Further underpinning Maine's judgment is a litigation fact pattern denying defendant's 14th Amendment rights to due process and equal protection of the 1971 Maine Mandatory Shoreland Zoning Act. The Maine trial court and Law Court brushed aside Act requirements compelling Maine courts to acknowledge Maine municipalities (Northport) as principal investigators, administrators and enforcers of the Act. From Maine DEP's website:

Background:

182a

The Mandatory Shoreland Zoning Act was enacted by the Legislature in 1971. The current law, as amended, requires municipalities to establish land use controls for all land areas within 250 feet of ponds and non-forested freshwater wetlands that are 10 acres or larger; rivers with watersheds of at least 25 square miles in drainage area; coastal wetlands and tidal waters; and all land areas within 75 feet of certain streams.

What is the intent of the law?

The law's intent is (1) to protect water quality, wildlife habitat, wetlands, archaeological sites and historic resources, and commercial fishing and maritime industries; and (2) to conserve shore cover, public access, natural beauty, and open space. It does this by controlling land uses, and placement of structures within the shoreland area.

How is the law implemented?

Your local shoreland zoning ordinance and map serve to implement the law. To assist towns in developing ordinances, the state has drafted a model *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances* containing the standards to be included.

Who adopts, administers and enforces shoreland zoning ordinances and maps?

Municipalities are empowered to by law adopt, administer, and enforce their own shoreland zoning ordinance and map.

The state's primary role, through the Department of Environmental Protection, is to provide technical assistance in the adoption, administration, and enforcement of these local ordinances. See *Issue Profile, Mandatory Shoreland Zoning Act Maine DEP Website*, https://www.maine.gov/dep/land/slz/ip-shore.html (2018).

There is no question the Act was not applied in Maine, resulting in extreme 14th Amendment violations of due process and equal protection precluding prejudicial taking of defendant's land where the Law Court relied on 'facts' it manufactured against the Town of Northport and defendant that Northport had ordered a hold on its NOV, of which there was no record since the hold did not occur, and the Court plainly knew from that record the hold did not occur.

Maine DEP Shoreland Zoning director Attorney Dierdre Schneider summed the facts of the issue in her August 8, 2012 letter to Northport:

> After the NOV was issued objections were raised by neighbors with support from other owners in interest on the Burbank property that the NOV was in error due to the fact that both sets of stairs predated shoreland zoning regulations. An additional claim is that there is a prescriptive easement for access to the water on this portion of the property. The second claim is a legal argument that would be need to be litigated and not something for either the Town or DEP to decide.
>
> These objections raise the issue of whether or not there are additional facts involved that should be included in the evaluation of the situation. The *DEP would recommend* (my emphasis) giving those with objections an additional few weeks to provide evidence to negate the NOV, and to extend the deadline for removal of these stairs until that time. However, even if the Town finds there is sufficient evidence to support that two sets of stairs are legally in existence, *it would appear that the rebuilt set would have required some form of permitting* (my emphasis).
>
> While the DEP provides support to municipalities and ensures that shoreland zoning ordinances are properly enforced, the municipality is the primary enforcer of these ordinances. In this case, the DEP has provided advice to the municipality as to the particular shoreland zoning provisions that appear to apply to this situation. In the end however, the *final resolution of the matter will be left to the municipality to decide in their sound enforcement discretion* (my emphasis), based upon the knowledge of local conditions, the particular facts of the case, and any additional evidence provided by the NOV objectors. If however, the Town would like more guidance, especially if provided with additional information, DEP staff is available for assistance. App. Part 1, A99.

On this record, the Maine Law Court clearly abused defendant's 14th Amendment rights with this plainly false holding underpinning its judgment:

> ...although the Town of Northport never formally withdrew the notice of violation requiring removal of a set of stairs on the Burbank property, Burbank was aware that, at the direction of the DEP, the enforcement action had been put on hold...The evidence demonstrates that Burbank sought and obtained the notice of violation as a pretense for removal of the stairs. He may not, in these circumstances, claim to be innocently complying with local law....

The evidence demonstrated no such thing. On the plain record facts it is beyond comprehension that any competent honorable court, by unanimous vote, could

say Maine issued a 'hold', when the state's top DEP shoreland zoning lawyer was on the entire trial, appeal and discipline court record, in writing and by sworn testimony, that DEP had no authority, intention or record of a NOV 'hold', nor any authority, intention or record of due process notice to anyone of DEP authority, intention or record to even try to implement a 'hold'. The Law Court's fabrication of an executive branch (DEP) 'hold' is by itself clear and convincing evidence of Law Court constructive or actual fraud., which the Court covered with the following post reconsideration motion Errata decision:

> The opinion of this Court certified on August 30, 2016, is amended as follows:
>
> The Fourth sentence of [para 38] is amended to read:
>
> We note, however, that although the Town of Northport never formally withdrew the notice of violation requiring removal of a set of stairs on the Burbank property, Burbank was aware that the DEP had recommended that the Town put the enforcement action on hold pending resolution of issues surrounding the age and potentially grandfathered status of the stairs and Neighbors' claim to rights in the stairs.
>
> The original opinion of the Judicial Branch website has been replaced with the opinion as corrected. App. Part 1, A98.. See also App.Part 1, A 61, Motion for Reconsideration.

The correction did not satisfy respondent's fundamental First and Fourteenth Amendment to rights to petition government without punishment, reprisal or prior restraint, or due process and equal protection of law, where the Law Court clearly left the following language of its August 30, 2016 judgment underpinning Connecticut discipline intact:

> The evidence demonstrates that Burbank sought and obtained the notice of violation as a ***pretense*** (my emphasis) for removal of the stairs. He may not, in these circumstances, claim to be innocently complying with ***local law*** *(my emphasis)*.

There is no record foundation for the Law Court's conclusion on this point. for the reason it is not true. Defendant testified at trial and appeal pleadings he sought Northport and DEP intervention because he suspected zoning violations by neighbors condoned by some co-tenants. Defendant testified he sought to have the violations cured so he could gift his interest in the property and his grandmother's testamentary trust supporting the property free of violations to his two children, as his client-grandmother wished. He had no control over what DEP and Northport found during their investigations or their conclusions leading to lawful NOV. This was not pretense but the result of lawful Maine zoning regulation due process. Indeed DEP Attorney Schneider's letter raised issues of fact that she believed the stairs were not grandfathered originals, but rebuilt, requiring permits, which did not exist. The Law Court avoided these facts with a pretense defendant did not follow a DEP mandated Northport 'hold' on NOV compliance.

If Northport had issued a hold, the record would contain notice of the hold to defendant and about fourteen co-tenants, plus notice of appeal rights. Any honorable court would cite this record in its findings of fact. But there was no such record supporting the trial judgment, or defendant discipline, so the Law Court invented one. DEP Attorney Schneider's letter *infra* said some neighbors and co-tenants asked Northport informally for relief. Northport refused. These objectors could have appealed to Northport formally, They did not. Defendant even waited for 30 days past the NOV compliance date so as to assure opponents due process of their rights to formally appeal Northport's NOV.

There was no appeal.

Maine courts unlawfully avoided applying Maine's 1971 Mandatory Shoreland Zoning Act to the facts of the trial and appeal, denying defendant's 14th Amendment due process and equal protection of these critical Maine environmental zoning laws.to his real property and his law license property. Connecticut PB Section 2-39 discipline underpinned by these deprivations violated defendant's 14thAmendment rights to due process and equal protection as well (Section 2-39 as applied).

Attorneys have rights and duties to vigorously defending clients, former clients and themselves within and bounds of published materials common to every law school library (bounds of the law); to independent thought and argument (ie Justice Peters First Amendment views, *infra*); to protect clients and former clients in the interests of justice and service to the public and profession by noticing courts and requesting their help when clients and former clients are disabled, or dying, or their interests are at risk because clients are severely disabled or cannot afford attorneys (ie respondent's 85 year old dying father, *infra*); to protect themselves when their own health and lives are at risk (ie stroke, blindness, *infra*) due to case work stress; to their good faith professional beliefs that they have First Amendment rights superseding ethics rules (Peters, J) and, to believe, as Maine instructs, that Maine ethics rules are primarily guidelines and not an exhaustive. The 14th Amendment commands that attorneys not be subjected to vagueness of rules regulating these matters, or to arbitrary enforcement. These principles are explicitly supported by the holding in *Gentile*

v. State Bar of Nevada, infra:

> The prohibition against the vague regulation of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement. *Kolender v. Lawson*, 461 US 352, 357-58 (1983); *Smith v. Goguen*, 415 US 566, 572-573 (1974), for ***history shows that speech is suppressed when the speaker or message is critical of those who enforce the law*** (my emphasis). The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility. *Gentile* at 1051.
>
> ...The vigorous advocacy we demand of the legal profession is accepted because it takes place under the neutral, dispassionate control of the judicial system. Though costs and delays undermine it in all too many circumstances, the American judicial trial remains of the purest, most rational forums for the lawful determination of disputes. A profession which takes just pride in these traditions may consider them disserved if lawyers use their skills and insight to make untested allegations in the press instead of the courtroom. But constraints of professional responsibility and societal disapproval will act as sufficient safeguards in most cases. And in some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts. It cannot be said that petitioner conduct demonstrated any real or specific threat to the legal process, and his statements have the full protection of the First Amendment. *Gentile* at 1058.

Accordingly defendant's 14th Amendment rights were violated by Maine's discriminatory enforcement of ethics rules on the facts of his appeal, where Maine ethics rules encouraged independent thought and judgment, permitted protection of defendant's father's severe disability (leading to death), permitted him to protect himself from own stroke and blindness, and ay recurrence, brought on by the stress of trying to comply with unpublished and/or vague Maine rules of procedure, and other reasons of case stress. Connecticut violated defendant's 14th Amendment rights by filing a discipline complaint against him underpinned by these Maine 14th Amendment violations.

Defendant suffered a first ever stroke and complete blindness the day his Maine appeal briefs were due. App. Part 2, A 112, A113.

One reason for stroke was Maine rules of appellate procedure were either unpublished (local rule requiring a combed binding) or so vague that defendant filed three sets of briefs to be certain of compliance. Maine contended that defendant was incompetent, but did not cite specific documents or facts from specific parts of the record supporting its conclusions. Defendant submitted reply briefs weeks after the stroke, when he was still recovering and under orders to avoid as much stress or work as possible, to avoid perhaps fatal recurrence. Accordingly Maine violated defendant's 14th Amendment rights to be free from prosecution due to medical duress and disability discrimination. Connecticut violated defendant's 14th Amendment rights where it disciplined defendant by complaint underpinned by Maine 14th Amendment violations.

In *Disciplinary Counsel v. Peters-Hamlin,* 2015 WL 3651918, decided May 20, 2015, an able bodied Connecticut attorney who directly disobeyed a court order was given no Connecticut discipline. Accordingly defendant's Connecticut discipline violated his 14th Amendment due process and equal protection rights to be free from discipline in circumstances of severe disability from stroke and risk of stroke recurrence; where he appeared in Maine pro se; where he was pursuing legitimate appeal; where he complied with a lawful NOV; where he won a Maine Law Court Errata decision based on a manufactured record; and where he complied to the best of his ability with all laws, procedures and orders of Maine and Maine cases applied to discipline by Connecticut.

C. Defendant's Connecticut Constitution Preamble rights, and Article First, Sections 1, 4, 5, 8, 10, 14 rights, and Amendment Section XXI rights, were violated by Connecticut Superior Court.

Connecticut's Constitution Preamble states:

> The People of Connecticut acknowledging with gratitude, the good providence of God, in having permitted them to enjoy a free government; do, in order more effectually to define, secure, and perpetuate the liberties, rights and privileges which they have derived from their ancestors; hereby, after a careful consideration and revision, ordain and establish the following constitution and form of civil government.

Defendant's liberties, rights and privileges derived from his ancestors include Connecticut rights superior to those acknowledged by Maine or protected by the First and Fourteenth Amendments, including but not limited to: rights to be recognized by Connecticut courts as an individual created by God; rights to speak freely and petition government without fear of reprisal; rights be informed of specific and articulable facts applied to allegations of quasi criminal acts; rights to defend himself, and by power of attorney to defend disabled and dying family in court free from threat of reprisal and law license property loss; rights to protect himself from risks of harm or death from stroke or disability; rights to protect himself from discrimination; and rights to freely avail himself and those he has represented of all human rights law of Maine, Connecticut and the United States without fear of reprisal or property loss. Where this view contemplates rights proposed by quasi-criminal defendants yet are absent from the Connecticut Constitution's plain text:

> ...the Supreme Court must employ the analytical framework by which it determines whether in any given instance, the State constitution affords broader protections to its citizens than the federal constitutional minimum. *State v. Lockhart,* 298 Conn. 537, 4 A.3d 1176 (2010).

Connecticut Constitution Article First, Declaration of Rights, states:

> That the great and essential principles of liberty and free government may be

recognized and established, WE DECLARE...

Connecticut Constitution Article First, Section 1 states:

> All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community.

> Provisions of the section that 'no man or set of men are entitled to exclusive public emoluments or privileges from the community' has like meaning to USCA Amendment 14, which prohibits states from denying to any person equal protection of the laws. *Barnes v. City of New Haven*, 140 Conn. 8, 98 A.2d 523 (1953); *Lyman v. Adorno*, 133 Conn. 511, 52 A.2d 702 (1947).

Argued *infra*, Maine and the Connecticut Superior Court did not acknowledge defendant's First and Fourteenth rights to appeal as an individual citizen and not as an attorney; that defendant's individual Maine appeal rights arose under *14 MRSA Sec. 1851* and *4 MRSA Sec. 57* specifically precluding prejudice to or punishment of appellants for alleged imperfect pleading or process; that Maine's Law Court and Connecticut Superior Court failed to cite a single record fact supporting conclusions of discipline; that the Maine Law Court by unanimous vote manufactured facts to the record profoundly prejudicial to Northport and defendant on which Maine and Connecticut discipline was based; and did not acknowledge professional rights and duties defendant has to his own judgment; rights to protect former clients and especially disabled clients from harm; rights to protect himself from illness and physical injury; and rights to protect his real property and be free from prosecution and loss of his law license property.

Maine violated defendant's First and Fourteenth Amendment rights to liberty and speech. Connecticut discipline was underpinned by Maine's unconstitutional judgment, and applied by Connecticut-Maine reciprocity Agreement and

Connecticut Practice Book Section 2-39. Accordingly as applied Connecticut Reciprocity agreement and Section 2-39 enforcement violated defendant's Connecticut Constitution Article First, Section 1 speech and liberty rights Connecticut Constitution Article First, Section Four states:

> Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

In Connecticut, the free speech provision of the Connecticut Constitution bestows greater expressive rights on the public than does the federal constitution. *Freedman v. America Online*, D. Conn. 2005, 412 F.Supp.2d 174 (2005). Where defendant's Maine appeal on which Connecticut discipline was based was pure political speech, former Connecticut Supreme Court Chief Justice Ellen Peters believed speech analysis required that:

> ...I believe that the ***individual rights*** (my emphasis) guaranteed by our state constitution's Declaration of Rights have a greater priority in our constitutional framework than the majority is prepared to recognize...For me it is of critical importance that the plaintiffs are seeking to exercise free speech which is political in its nature and therefore central to the very existence of a democratic society, and that the plaintiffs' claim finds strong textual support in the language of article first, section 4 of our constitution(my emphasis)...Analysis of the rights of the parties in this case must begin with recognition of the central role assigned by constitutional theory to the rights of **petitioning the government** (my emphasis) and of free speech about political issues...'there is something special about speech' (quoting Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 23 (1971))...
>
> An appropriate starting point for the relationship between free speech and constitutional government is Justice Brandeis concurrence in *Whitney v. California,* 274 US 357 (1927)...'Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that with free speech

and assembly discussion would be futile; that with them discussion affords ordinarily adequate protection against noxious doctrine ...they knew...that it was hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones...'

...the amendment 'does not protect a 'freedom to speak'. It protects the freedom of those activities by which we 'govern.'. It is concerned, not with a private right, but with a public power, a governmental responsibility.' Meiklejohn, *The First Amendment Is An Absolute,* 1961 Sup.Ct. Rev. 245, 255.

...'courts should be heavily involved in reviewing impediments to free speech' because ***first amendment rights 'are critical to the functioning of an open and effective democratic process'*** (my emphasis)...

...the free speech provision of our own constitution has been held to embody the same understanding of the centrality of free speech to constitutional government...Our early case law stems from the time before the incorporation of the first amendment into the fourteenth amendment came to dominate the field of protection of individual liberties...the right of every citizen to freely express his sentiments on all subjects stands on the broad principle which supports the equal rights of all to exercise gifts of property (ie law license) and faculty to any pursuit in life – in other words, upon the essential principles of civil liberty as recognized by our Constitution...(*State v McKee*, 73 Conn.18, 28-29 (1900))...Very recently in *Grievance Committee v Trantolo* 192 Conn. 27, 36 (1984), we noted the special protection afforded to an attorney's publication that was political rather than commercial when we said: 'If the statement is political or ideological, it naturally enjoys the fullest protection under the first amendment to the United States constitution and article first, section 4 of the Connecticut constitution...(my emphasis).

The state constitutional framework for protection of the right of free speech rests principally upon the provisions of article first, sections 4 and 5 of the constitution of Connecticut. Section 4 states: 'Every citizen may freely speak, write and publish his sentiments on all subjects. Section 5 states: 'No law shall ever be passed to curtail or restrain the liberty of speech...In addition, section 14 states: 'The citizens have a right...to apply to... government, for redress of grievances, or other proper purposes, *by petition* (my emphasis), address or remonstrance.'...*Pruneyard Shopping Center v.Robbins,* 447 US 74, 81... expressly recognized 'the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution...'

...state supreme courts have also recognized that state constitutional

provisions like our own may afford protection not only against governmental or public bodies but, under appropriate circumstances, against private persons (or public interests, my note) as well...in the absence of an expressed state action requirement, there was 'no reason to imply such a requirement, and thereby to force a parallelism with the Federal Constitution.' *Batchelder v. Allied Stores*, 338 Mass. 83, 88-89 (1983). The court went on to broaden its holding to 'reject any suggestion that the Declaration of Rights should be read as directed exclusively toward restraining government action.'...

...on their face the relevant provisions of the Connecticut constitution afford protection of freedom of speech ***and for the right to petition*** (my emphasis) without regard to the source of the interference with these constitutionally guaranteed rights...the conjunction of sections 4 and 5, both of which address freedom of speech, underscores that under our constitution as well as under the first amendment to the federal constitution, freedom of speech is 'special', and is entitled to a preferred position over other constitutional rights. See *US v. Carolene Products*, 304 US 144, 152-53 n.4 (1938)....

...*the most important datum bearing on what was intended is the constitutional language itself* (Emphasis in original)...

...the constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people...

...In my view, the Connecticut Constitution gives the plaintiffs the right to speak peacefully about their political concerns without regard to the presence of any special form of state action. Even if I am wrong about that proposition, however, these plaintiffs can still prevail because this record adequately demonstrates governmental involvement in the denial of their access to a political forum ...the preferred position of freedom of speech entitles that claim to a special position in an assessment of state action. *Lockwood v. Killian*, 172 Conn.496, 502-03...

...I believe that the trial court's remedial approach excessively involved the court in the details of the plaintiffs' speech and in the manner of its exercise...' *Cologne,* infra, pp. 67-84.

Accordingly Connecticut citizens have Article First, Section 4 individual rights to expression and petition of government free from threat of reprisal because speech is 'special' in constitutional law. Maine's objections to defendant's purely political speech were arbitrary, suppressive of defendant's own thoughts as a

citizen and/or an attorney; barriers to truth; void of discussion; disdainful of imagination; unconcerned with repressions breeding fear, hate, and unstable government; and opposed to reasons that safety lies in opportunities to freely discuss grievances. As applied Section 2-39 enforcement violated defendant's Connecticut Constitution Article First, Section 4 speech and liberty rights.

Connecticut Constitution Article First, Section 5 states:

> No law shall ever be passed to curtail or restrain the liberty of speech or of the press.

While Connecticut has held that Section Five applies only to passage of legislation and not protection of liberty, speech or press exercise rights, where defendant's Connecticut discipline was applied under Connecticut Practice Book Section 2-39, as applied Section 2-39 violated defendant's Article First, Section Five rights to be free of laws serving to restrain defendant's liberty of speech.

Connecticut Constitution Article First, Section 8 states in pertinent part:

> In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him...No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed...

Not a single record fact was asserted, let alone proven, in Maine judgments applied to Connecticut discipline informing defendant of the record factual nature of quasi-criminal discipline. Furthermore Article First, Section 8 compels Connecticut not to deprive defendant of speech and petition liberty, and law license property without due process of law. Practice Book Section 2-39 discipline as applied founded on Maine complaints and judgments failing to

inform defendant of specific record facts against him, violated defendant's Article First, Section 8 rights to be informed of the nature and cause of discipline accusations. Failure to apply this standard under Section 2-39 also violated defendant's Article First, Section 8 rights to due process.

Connecticut Constitution Article First, Section 10 states:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

Maine discipline refused to acknowledge defendant as an individual pro se citizen seeking to defend his individual Maine real property rights, but rather only as a Maine attorney. Inexplicably, the Maine Law Court expressly held defendant was not represented on appeal (App. Part 2, A115), but prosecuted him for attorney discipline. Despite repeated requests during Maine appeal to be heard orally on his motions and brief, defendant was always denied by the Maine Law Court.

These Maine practices denied defendant access to the Law Court as an individual, and due course of law. Connecticut reciprocal discipline as applied under Practice Book 2-39 was predicated on these Maine practices, denying defendant Article First, Section 10 protections to access courts as an individual to protect his real property by due course of law.

Connecticut Constitution Article First, Section 14 states:

> The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by ***petition*** (my emphasis), address or remonstrance.

Defendant was sued by Maine neighbors for prescriptive easement, conversion and malice concerning his compliance with a Northport, Maine NOV. The trial court judged for neighbors and defendant, when his appeal attorney quit, continued pro se. The Maine Law Court judged him both unrepresented and an attorney for the appeal, and punished him for alleged Maine attorney ethics violations. Defendant's Maine appeal rights arose by Maine statute expressly precluding punishment for procedural errors. His appeal petition was pure individual political speech protected by the First and Fourteenth Amendments. Regardless Maine punished defendant as an attorney for exercising his fundamental individual First Amendment rights to speech and petition of government without fear of reprisal for redress of grievances against his Maine property and rights during trial.

Connecticut applied the same punishment under Practice Book Section 2-39 reciprocal discipline, underpinned by the unconstitutional Maine Law Court judgment. As applied, Practice Book Section 2-39 violated defendant's Connecticut Constitution Article First, Section 14 rights to petition government without fear of reprisal for redress of trial rights and real property grievances.

Amendments to the Constitution of the State of Connecticut Article XXI states:

> Article fifth of the amendments to the constitution is amended to read as follows: No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.

Defendant suffered a first ever stroke and blindness event on January 12, 2016 while submitting his Maine Law Court briefs. App. Part 2, A11, A113.

The Law Court was aware of the stroke about September 10, 2016 when defendant described it in a Motion for Reconsideration (App. Part 1, A61) that led to an Errata judgment (App. Part 1, A98) where the Court admitted clear error on facts held for its appeal judgment and ethics allegations against defendant. Defendant was under doctor's orders to avoid work and other stress for the future else risk a possibly fatal recurrence. The Law Court proceeded with ethics charges and judgment against the defendant without due regard to defendant's brain injury suffered at the start of appeal litigation.

Connecticut applied the same punishment under Practice Book Section 2-39 reciprocal discipline in circumstances where Maine's Law Court knew defendant suffered brain injury and risked new brain injury during his appeal, and gave it no legal significance. As applied, Practice Book Section 2-39 discipline violated defendant's Amendments to the Constitution of the State of Connecticut Article XXI rights to due process and equal protection from discriminatory segregation for attorney discipline purposes, where defendant was suffering from and at high risk for physical and mental brain injury disability rendering him incapable of attorney performance.

V. Conclusion

For the foregoing reasons Connecticut Superior Court's judgment in this matter should be vacated, the complaint of the Office of Chief Discipline Counsel against defendant dismissed, defendant's Connecticut law license reinstated, and defendant's Connecticut law license record expunged of discipline.

Respectfully submitted,

/S/_____ Date: February 2, 2019
Harold H. Burbank, II, Pro Se Defendant
84 N. Mountain Road
Canton, CT 06019
Ph. 860-693-2687

Certification Re Practice Book Sections 67-2 and 62-7

This brief complies with the rules proscribed in Section 67-2, including Section 62-7. A copy of the brief and separately filed appendix were emailed to Brian Staines, Esq., Office of Chief Disciplinary Counsel, 100 Washington Street, Hartford, CT 06016, Ph. 860-706-5055, FAX 860-706-5063, email Brian.Staines@jud.ct.gov. All briefs and appendices filed with the court and Attorney Staines were true copies of the documents filed electronically at court. The documents did not contain any names or personal identifying information precluded by state rule, statute, court order or case law. The documents complied with all rules of state appellate procedure.

/S/_____
Harold H. Burbank, II

Certification of Service

Pursuant to Practice Book Section 67-2 I hereby certify that a paper copy of this brief with separately filed appendix was forwarded on or before 2-4-19 to Brian Staines, Esq., Office of Chief Disciplinary Counsel, 100 Washington Street, Hartford, CT 06016, Ph. 860-706-5055, FAX 860-706-5063, email Brian.Staines@jud.ct.gov. The documents were true copies of the documents filed electronically at court. The documents did not contain any names or personal identifying information precluded by state rule, statute, court order or case law. The documents complied with rules of state appellate procedure.

/S/_____
Harold H. Burbank, II

APPENDIX K

2059

! ! ! ! APPELLATE COURT

OF THE

STATE OF CONNECTICUT

!

DOCKET NO. A.C. 41805

OFFICE OF THE CHIEF DISCIPLINARY COUNSEL
PLAINTIFF-APPELLEE

VS.

HARLOLD H. BURBANK, II
DEFENDANT-APPELLANT

REPLY BRIEF OF DEFENDANT-APPELLANT
(With Appendix)

TO BE ARGUED BY:

HAROLD H. BURBANK, II PRO SE
84 N. MOUNTAIN ROAD
CANTON, CT 06019
PH. 860-693-2687

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I. Purpose Of Reply Brief

This reply brief is to contest sufficiency of factual notice of plaintiff's complaint, plaintiff's arguments on appeal, plaintiff's standing on the facts and law, and plaintiff's invidious discrimination based on disability.

II. Argument

A. Plaintiff's complaint and brief failed to provide defendant specific and articulable record facts supporting misconduct, depriving him of sufficient due process notice, equal protection of law and a legally effective review, as well as the court of a lawfully effective basis for judicial review.

Defendant's answers and supporting documents filed responding to plaintiff's complaint, and defendant's appeal brief and documents filed in support, provide the court a record of clear and convincing evidence that the Maine Board of Overseers of the Bar (BO) complaint, on which plaintiff's complaint relies, plaintiff's complaint, the decision below and plaintiff's Court of Appeals brief brief failed to source from court records sufficient foundational facts required by federal and state constitutions to support sufficient due process notice to defendant of alleged misconduct, failed to provide sufficient record facts to courts for lawfully effective complaints, judicial review and judgments, and failed to provide a legal basis for a court to conclude plaintiff was exempt from sufficient factual due process in license regulation cases. Maine and Connecticut complaints, the court below and plaintiff's appellate brief denied defendant's rights to sufficient notice of misconduct, and show clear and convincing evidence that defendant Answer(s) to instant complaint established his misconduct defenses as a matter of law.

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The record is clear Maine and Connecticut complaints relied on factually anemic misconduct allegations of Lincoln v. Burbank, 2016 ME 138, 147 A.3d 1165. Plaintiff's brief showed no record that Maine or Connecticut tried the sweeping Lincoln general factual allegations against defendant in or that defendant was given an opportunity to know the record facts alleged by appearing before the Maine Law Court that accused him, despite pre and post judgment requests to appear. Further no Maine or Connecticut judge conducted hearings or wrote opinions of the facts considering first amendment analyses of them. Plainly there is nothing in the Maine Law Court opinion discussing real estate or any facts defendant pled in opposition, none of which were judged false or misleading, or discussing precise record facts proving unlawfulness of plaintiff's appeal conduct, none of which was judged illegal or intentionally unethical. Nor were specific facts and reasons given justifying punishment of a year suspension which Connecticut demands reciprocally.

Indeed but for one very troubling disproved exception, the Lincoln decision did not specifically identity a single record fact supporting ethics allegations. Nor did Lincoln trouble itself with sufficiency of facts 'found', or facts it manufactured by unanimous vote, until confronted on Reconsideration (see Law Court's Errata decision, Connecticut Superior Court Case Detail, Entry 118, Exhibit E). The Maine Law Court's fact finding should be considered deeply suspect based on this poor record.

Unlike Maine, Connecticut law recognizes that facts cannot be assumed in licensing cases, with a legal culture acknowledging that:

2:11 9.

> Assessment of attorney conduct with respect to ethical standards is inherently an intensely fact based inquiry. In re Rite Aid Corp. Securities Litigation,139 F.Supp. 2d 649 (E.D. Pa. 2001)

and that:

> Courts are required to give state proceedings full faith and credit only if state proceedings satisfy due process. Cheng v. Wheaton, 745 F.Supp. 819.

Furthermore in Connecticut:

> A fundamental principle of due process which must be observed in administrative hearings is that each party has a right to... the opportunity to be heard at a meaningful time and in a meaningful manner... due process of law requires... that at the hearing the parties... have a right to... an opportunity to know the facts on which the agency is asked to act...and to offer rebuttal evidence. Ryker v.Town of Bethany, 97 Conn.App. 304, 904 A.2d 1277 (2006).

These cases underscore the Connecticut principle that insufficiency of factual pleading denies the accused of due process notice rights to have specific and articulable facts from the court record, not just general aversions of them on which Maine and Connecticut relied, presented in any complaint, or brief in defense thereof, so defendant may properly know what he is accused of, and meaningfully defend himself against deprivation risks. Lower fact pleading notice sufficiency standards risk arbitrary and abusive government power:

> The notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest. Goldberg v. Kelly, 397 U.S. 254, 267-68.

and is:

> ... meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Carey v. Piphus, 435 US, 247, 259 (1978).

Neither Maine nor Connecticut complaints, pleadings or judgments identified sufficient record facts, or where they existed in the record. The law clearly

mandates states, not defendants, to provide 'opportunities' sufficient for defendants to know the source and substance of alleged facts.

In Lincoln, facts the court 'found' either did not exist, or were manipulated to suit unjustified plaintiff purposes. Where Lincoln 'found' defendant did not follow appellate rules, such as use of combed bindings in briefs, defendant cited the applicable 2016 rule (App., p. A1, changed in 2017 precisely due to defendant criticism of insufficiency) in opposition arguing, as was plain from the text, that a combed binding was not described in the rule, let alone mandated.

Where the Law Court 'found' defendant exceeded maximum pages permitted in reply briefs, defendant cited the applicable 2016 rule (App.,p.A2) which did not address the fact that Lincoln involved trial court merger (over defendant's objection) of two separate cases brought by two distinct parties, on two distinct causes of action, for two unrelated goals (party 1: real estate partition; party 2: easement claims) by two separate law firms. Where the Law Court 'found' defendant cited facts not in the record, the court cited no record examples in support. Where the court said defendant made frivolous and contumacious arguments, it did not analyze why defendant's exhaustively researched and documented forty-eight page brief presented no reasonable chance of success, was not a serious attempt to advance or change Maine law, or evinced contempt. Where the entire court 'found' the defendant 'incompetent', it manufactured facts, based false ethics charges on them, and was forced to recant them (Errata, infra).

Conversely, the Lincoln court, the Maine Board of Overseers of the Bar, and

Maine discipline court (Justice Clifford) never acknowledged the factual and legal significance of the Law Court's plainly erroneous 6-0 vote that defendant, despite clear trial and appeal records otherwise, violated a DEP order to 'hold' off compliance with a lawful Maine zoning order (NOV), nor acknowledged the Law Court's Errata decision (infra) resulting from this extraordinary, unexplained, unanimous Law Court error; nor acknowledged defendant's January 12, 2016 stroke, noticed to Court September, 2016 on Reconsideration (Connecticut Superior Court Case Detail Entry No. 116, Exhibit E, Motion for Reconsideration, p. 20), suffered from stress of meeting the Court's order to resubmit defendant appeal briefs where the court failed to publish its procedural rules (combed bindings) – the stroke clearly exempting defendant from ethics duties due to diagnosed medical incapacity (letter of UCONN's Dr. Thomas Rockland, Defendant's brief Appendix Part 2, p. A112).

Plaintiff's brief contended defendant can be punished because he has not admitted misconduct. He has rights to contest. Plaintiff's brief argued defendant's bankruptcy flowed from Lincoln. The federal bankruptcy code specifically precludes attorney license suspension based on filing or protections of bankruptcy. Plaintiff's posture is irrelevant and severely prejudices defendant, depriving him of due process and equal protection of law:

... a governmental unit may not deny, revoke, suspend, or refuse to renew a license, condition such a grant to, discriminate with respect to such a grant against... a person that is or has been a debtor under this title... 11 U.S. Code § 525(a) - Protection against discriminatory treatment.

Plaintiff cited no Maine, Connecticut or federal law defining debt or bankruptcy

misconduct, preclusion from practicing law, or holding a law license. Plaintiff omitted defendant paid over $21,000 of alleged debt. The balance was discharged uncontested, of which Connecticut Superior Court was noticed in the record. Connecticut Superior Court Case Detail, Entry No. 122, US Bankruptcy Court discharge summary. Debt was not raised in Maine's or Connecticut's misconduct complaint, nor was it tried. Adding it now would further deprive defendant of sufficient due process notice and equal protection. In Re Ruffalo, 390 US 544 (1968). See also CT Disciplinary Counsel v. Peters-Hamlin, 2015 WL 3651918 (2015), no discipline despite directly violated court order. App.,p.A3.

Federal court debt discharge is protected by the federal constitution supremacy clause, even where debt is secured by court judgment, as defendant successfully argued to Maine's Justice Clifford:

> If the lawyer were to file bankruptcy, and have the debts discharged, the Supremacy Clause of the U.S. Constitution would preclude professional discipline... In the Matter of the Suspension of the Elmo A. Adams, Jr., Esquire, as a Member of the Virgin Islands Bar. S. Ct. Civ. No. 2013–0013. Connecticut Superior Court Case Detail Entry 117, Exhibit F,p.35. App.,p.A6.

Accordingly defendant contends plaintiff lacks standing to sue on the true facts of the case:

> In state court the state must demonstrate standing to sue in its own name, as may be conferred by a specific statutory interest of the state. A statute granting a department of the state the authority to being suit does not alone confer standing in a particular state court action as a state's capacity to sue and its standing to sue are distinct concepts. People ex rel Dept. of Conservation v.El Dorado County, 36 Cal. 4th 971, 116 P.3d 567 (2005). Standing is a concept utilized to determine whether a party is sufficiently (my emphasis) affected to insure that a justiciable controversy is presented to the court. General Development Corporation v. Kirk, 251 So.2d 284 (1971).

Defendant contends the facts do not support a Connecticut interest to

sue since facts alleged were not sufficiently 'found', and cannot therefore sufficiently affect a lawful Connecticut interest, precluding judicable controversy required for standing to sue.

Connecticut, attorneys subject to discipline are entitled to due process of law in part because such actions are adversary proceedings of a quasi-criminal nature. Statewide v. Johnson, 108 Conn.App. 74, 946 A.2d 1256 (2008). For reasons of fact infra Maine and plaintiff's complaints, plaintiff's brief, and the hearing below, failed to provide defendant an opportunity for sufficient due process notice of allegations against him for meaningful defense, a legally effective Connecticut Superior Court hearing, and all courts of a legally effective basis for judicial review.

Even in applying permissible standards, a state cannot exclude an attorney from licensure when there is no basis for their finding that he failed to meet permissible standards, or when the state is invidiously discriminatory. Yick Wo v. Hopkins, 118 U.S. 356 (1886). '... the accused shall have a right... to be informed of the nature and cause of the accusation... No person shall be deprived of... liberty or property without due process of law... nor excessive fines imposed.' Connecticut Constitution Article First, Sec. 8. 'Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.' In re Gault, 387 U.S. 1 (1967). 'Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must "set forth the alleged misconduct with particularity" '. Id, at

33. Accordingly Maine's and Connecticut's deficiencies argued infra, including defendant's standing challenge, meet defendant's Practice Book 2-39(c) burden of clear and convincing evidence that his defenses to Maine and Connecticut complaints are established as a matter of law, precluding Connecticut discipline.

B. The First Amendment and Connecticut Constitution Article First, Sections 4 and 14, demand de novo review of the case, and consequently are complete bars to defendant prosecution and discipline.

Plaintiff's brief contended defendant's First Amendment and by inference his superior, analogous Connecticut Constitution fundamental speech and petition rights are proscribed by his Lincoln appeal factual conduct. Connecticut has ruled even if that is true, defendant is still entitled to de novo review of his case implicating the First Amendment as a matter of law:

> Ordinarily a jury or trial court's findings of fact are not to be overturned on appeal unless clearly erroneous... In certain first amendment contexts however, appellate courts are bound to apply a de novo standard of review. For example, in the context of government employee speech... the inquiry into the protected status of... that speech is one of law, not fact. Connick v. Meyers, supra, 461 US 148, n. 7 (1983). As such an appellate court is required to examine for itself the... statements in issue and circumstances under which they (are) made to see whether or not they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment protect. Id, 150, n.10. In cases raising First Amendment issues, the (US Supreme Court) has repeatedly held that an appellate court has an obligation to make an independent examination of the whole record (my emphasis) in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. NY Times v. Sullivan, 376 US 254 (1964), NAACP v. Claiborne Hardware, 458 US 886... This rule of independent review was forged in recognition that a court's duty is not limited to the elaboration of constitutional principles... (it) must also in proper cases review the evidence to make certain that these principles have been constitutionally applied. Bose Corp. v. Consumers Union of the US, supra (466 US 485). Therefore (appellate courts) are obliged to make a fresh examination of crucial facts under the rule of independent review... This rule of independent review has been applied by the US Supreme Court in contexts aside from government employee speech. See e.g. Gentile v State Bar of Nevada, 501 US 1030 (1991) (attorney discipline for speech) (my emphasis)... Thus we

must engage in de novo review of the trial court's findings under (applicable statute)... that... speech was protected by the First Amendment. D. Martino v. Richens, 263 Conn. 639, 661-63; 822 A.2d 205 (2003).

Defendant's Lincoln appeal petition and alleged misconduct pursuing it fall precisely within First Amendment protections denials of which D. Martino foresaw and precluded as a matter of law:

... broad rules framed to protect the public and preserve respect for the administration of justice must not work a significant impairment of the 'value of associational freedoms'. Mine Workers v. Illinois Bar Assoc., 389 US 217, 222 (1967)...

The Disciplinary Rules in question, which sweep broadly, rather than regulating with the degree of precision required in the context of political expression and association, have a distinct potential for dampening the kind of cooperating activity that would make advocacy of litigation meaningful (my emphasis) as well as for permitting discretionary enforcement against unpopular causes...

The state's interest in preventing the 'stirring up' of frivolous and vexatious litigation (my emphasis) and minimizing commercialization of the legal profession offer no further justification for the discipline administered to appellant...

Free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts. Thomas v. Collins, 323 US 516, 537 (1945). The First and Fourteenth Amendments require a measure of protection for advocating lawful means of vindicating legal rights. NAACP v. Button, 371 US 415 (1963)...

Where political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs... At bottom the case against the appellant rests on the proposition that the state may regulate in a prophylactic fashion all solicitation activities of lawyers because there may be some potential for overreaching...

In the context of political expression and association however a state must regulate with significantly greater precision... An overbroad statute might serve to chill the protected speech. First amendment interests are fragile and a person who contemplates protected activity might be discouraged by the in terrorem effect of the statute. Id. 433. Indeed such a person might choose not

> to speak because of uncertainty whether his claim of privilege would prevail if challenged. The use of the overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted. In Re Primus, 436 US 412 (1978).

Maine's and Connecticut's complaints evince not mere possibility but a clear example of overbroad regulation not only muting protected speech, but denying speech demanded and protected by Maine ethics rules. Defendant's Connecticut Superior Court Case Detail Entry No. 117, Exhibit F, 'Defendant's Opposition to the Board's Proposed Factual Findings, Conclusions and Sanctions Order', Section 3, pages 12-33, Maine Common Law Fiduciary Duties of Client Loyalty and Fidelity, plus Law and Policy of Maine Rules of Professional Conduct, Do Not Support Sanctions, is hereby incorporated by reference as exhaustive analysis before Maine and Connecticut courts of the fact.

Unlike Primus, instant defendant's two law licenses were incidental to his Maine appeal and discipline and to Connecticut discipline. His Maine real estate appeal rights arose under Maine statute (4 M.R.S. Sec 57) precluding strict procedural rules. The record shows defendant's lawyer, who withdrew without hearing contemplated by Maine rules, filed appeal without defect. Pro se defendant only represented himself with no other political or associational activity. His appeal did not concern tensions between contending values of the legal profession and society.#Maine and Connecticut did not attempt to show discipline advanced a subordinating state interest in a manner avoiding unnecessary abridgment of First Amendment, and Connecticut Constitution Article First, Sections 4 and 14, values. Plaintiff's complaint and

brief presented no facts or law defendant actions fell outside Maine, Connecticut or federal protections. Rather, Maine and Connecticut discipline was pretext to impinge core First Amendment petition and expressive conduct which 'government may regulate... only with narrow specificity.' NAACP v. Button, 371 US 415, 433 (1963).

The record does not support Maine or Connecticut efforts to draw constitutionally meaningful distinctions between defendant and other Maine or Connecticut litigants. Maine's Justice Clifford's decision noted defendant's pro bono competency in his 2004 Nader-Camejo presidential campaign ballot access case win for Maine voters; the only such win of 35 such cases nationally. See Nader letter, App. p.16, submitted to Justice Clifford, Connecticut Superior Court Case Detail, Entry No. 117, Exhibit E, p. 4. In 27 years Maine licensure defendant never had a Maine office, phone number, advertising or paying clients.

Defendant would gain no unfair advantage from a constitutional strict scrutiny review standard. Discipline was premised solely on the basis of alleged Maine appeal conduct. Therefore Maine's and Connecticut's action must withstand the "exacting scrutiny applicable to limitations on core First Amendment rights . . . ." Buckley v. Valeo, 424 U.S. 1, 44 -45 (1976). The states must demonstrate 'a subordinating interest which is compelling," Bates v. Little Rock, 361 U.S. 516, 524 (1960), and that the means employed in furtherance of that interest are 'closely drawn to avoid unnecessary abridgment of (First Amendment) freedoms.' Buckley, supra, at 25. Plaintiff's brief did not.

Argued at Reply Brief Section A, infra, findings compatible with the First

Amendment could not have been made in this case. As in New York Times Co. v. Sullivan, 376 U.S. 254, 284 -285 (1964):

> ... considerations of effective judicial administration require (courts) to review the evidence in the present record to determine whether it could constitutionally support a judgment [against defendant]. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles [can be] constitutionally applied."

The record is they were not applied, and had they been, defendant's conduct implicated interests - rights to petition without reprisal - sufficient to justify the level of protection recognized in Button, infa, and subsequent cases:

> The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights.' Button, 371 U.S., at 437.
>
> Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts.' Thomas v. Collins, 323 U.S. 516, 537 (1945).

Defendant's Maine real estate trial resulted in court non-application of Maine's Mandatory Shoreland Zoning Act, in spite of a lawful Northport, Maine NOV pursuant to the Act, compliance with which resulted in severe defendant punishment. Defendant's appeal attorney filed on these facts. The Maine Law court accepted the appeal without challenge, but did not offer a hearing when the attorney withdrew. Defendant proceeded pro se on lawful, factually sufficient theories of trial due process denial, Maine plaintiff illegalities (no building permits) and lawful compliance with a lawful NOV, as well as real estate partition estoppel; supporting these appeals with 48 pages of rigorously researched written and documented legal argument.

Maine Justice Clifford's decision found defendant lacked intent to break

ethics law in Lincoln, infra, yet sanctioned defendant for what he 'should have known'. Maine, Connecticut and the US Supreme Court have not defined 'should have known' or how this standard falls outside First Amendment and higher Connecticut Constitution petition protections. Maine and plaintiff cited no 'should have known' precedent, how this standard proscribes lawful vindication of legal rights or free trade in legal ideas and opportunities to persuade, causing 'should have known' to completely fail the exacting scrutiny applicable to limitations on core First Amendment rights. Buckley, infra.

Maine's 'should have known' limitation is a draconian offense to Connecticut Constitution Article First Sections 4 and 14, and others. Plaintiff's brief did not demonstrate why defendant's Maine acts fell outside these protections, and why they support reciprocal discipline. Defendant did not derive the protections from courts or legislatures, but directly from the people:

> The People of Connecticut acknowledging with gratitude, the good providence of God... in order more effectually to define, secure, and perpetuate the liberties, rights and privileges which they have derived from their ancestors ... establish the following constitution. Connecticut Constitution Preamble.

which rights by Connecticut Constitution Article First the people have <u>not</u> proscribed against attorneys:

> Section 1: All men when they form a social compact, are equal in rights... Section 2: All political power is inherent in the people... Section 4: Every citizen may freely speak... Section 9: No person shall be ... punished, except in cases clearly warranted by law. Section 10: All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay... Section 14:The citizens have a right ... to apply to those invested with the powers of government... by petition

... the most important datum bearing on what was intended is in the

> constitutional language itself... (Emphasis in original.)... We have recognized the same rule of construction in Borino v. Lounsbury, 86 Conn. 622, 625 (1913)... Contemporary construction... can never (my emphasis) abrogate the text... it can never narrow down its true limitations. Cologne v. Westfarms Assoc., 192 Conn. 48, 67-84, 469 A.2d 1201 (1989).

Plaintiff did not offer a superseding theory. The federal and state constitutions completely bar plaintiff's complaint.

C. Defendant was disabled by stroke and threat of subsequent stroke due to his Maine appeal rendering misconduct punishment unconstitutionally discriminatory, cruel and unusual.

Defendant suffered disabling stroke January 12, 2016 preparing Maine appeal. UCONN's Dr. Thomas Rockland letter, Defendant's brief Appendix Part 2, p. A112. The stroke was noticed to Maine's Law Court in September, 2016. Connecticut Superior Court Case Detail Entry No. 116, Exhibit E, Motion for Reconsideration, p. 20. Complaints and plaintiff brief underpinned by Maine judgment failed to acknowledge defendant's disability and were thus invidious, discriminatory, cruel and unusual prosecution punishment offending the Eighth Amendment, and Connecticut Constitution Article First, Secs. 8 and 9; and Amendments to the Constitution of the State of Connecticut, Article XXI precluding discrimination against the mentally disabled.

A state cannot deny licensure when there is no basis for finding failure to meet permissible standards, or the state is invidiously discriminatory. Yick Wo v. Hopkins, 118 U.S. 356 (1886)). It is well established that the Connecticut Constitution prohibits cruel and unusual punishments under the dual due process provisions contained in Article First, §§ 8 and 9. State v. Rizzo, 266 Conn. 171, 206, 833 A.2d 363 (2003). The Eighth Amendment establishes impermissibly

excessive, disproportionate, arbitrary or discriminatory punishments as cruel and unusual. Rizzo, 206. 'Cruel and unusual' is to be judged according to "evolving standards of human decency". State v. Ross, 230 Conn.183, 251, 646 A.2d 1318 (1994). Reluctance of prosecutors to seek a punishment is objective evidence that punishment is excessive. Enmund v. Florida, 458 U.S. 78 2, 796. (1982). Plaintiff did not account for Maine prosecutor's court record letter of a 'warning' punishment. Connecticut Superior Court Case Detail Entry No.121, Davis Warning Letter, Exhibit B. Plaintiff did not apply 'standards of human decency' to defendants mental disability protected by Connecticut's Constitution, as cited above.

Accordingly Maine and Connecticut complaints and plaintiff's prosecution of defendant violate the Eighth Amendment, Connecticut Article First Secs. 8 and 9, and Amendments to the Constitution of the State of Connecticut, Article XXI.

III. Conclusion

For the foregoing reasons Connecticut Superior Court's judgment in this matter should be vacated, the complaint of the Office of Chief Discipline Counsel against defendant dismissed, defendant's Connecticut law license reinstated, and defendant's Connecticut law license record expunged of discipline.

Respectfully submitted,

/S/_____ Date: April 24, 2019

Harold H. Burbank, II, Pro Se Defendant
84 N. Mountain Road
Canton, CT 06019
Ph. 860-693-2687

APPENDIX L

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STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. PEN-15-440

FREDERICK B. LINCOLN, et al.,
Plaintiffs-Appellees

v.

HAROLD BURBANK, II, et al.,
Defendant -Appellant

On Appeal from Maine Superior Court
(Penobscot County)

BRIEF OF APPELLANT

Attorney Harold Burbank, II, Bar No. 6813
84 North Mountain Road
Canton, CT 06019
Ph. 860-693-2687
Pro Se

2259

Issue Profile
Mandatory Shoreland Zoning Act

What should I do if I suspect a shoreland zoning violation?
The provisions of a municipal shoreland zoning ordinance are enforced by the municipality. If you suspect a violation, contact the Code Enforcement Officer of the town where the alleged violation has occurred. http://www.state.me.us/dep/land/slz/ip-shore.html

- Maine DEP website, 2015

*As a result of the Mandatory Shoreland Zoning Act, all municipalities must adopt, administer, **and enforce** zoning ordinances that regulate land use activities within 250 feet of all tidal waters, great ponds, rivers, coastal wetlands, and non-forested freshwater wetlands of 10 acres or more, and within 75 feet of streams...Shoreland Districts ...This district includes shoreland areas which are undeveloped, and which meet any of the five characteristics listed below. At a minimum, the following areas must be in a **resource protection district*** (my emphasis)*,unless current development patterns dictate otherwise...Areas of two or more contiguous acres with sustained slopes of 20% or greater...Areas of severe bank erosion, bank undercutting, or river bed movement, along rivers or adjacent to tidal areas such as steep coastal bluffs...*

- Chapt. 2, 'The Elements of Shoreland Zoning', Municipal Code Enforcement Officer Training and Certification Manual, Maine Planning Office, 2008 (to date)

Introduction

The sole appellant, Harold Burbank, II, appeals from a Superior Court decision which failed, despite his motion, to bifurcate two sets of substantial issues raised by plaintiffs and some co-defendants at trial. The first set of issues concerned plaintiffs' claims of easement across appellant's (and all defendants') recreational shorelands at Northport, Maine, gifted to him (them) by 1993 warranty deed of Phyllis Burbank, appellant's paternal grandmother. The second set of issues concerned the title in these recreational lands Phyllis Burbank gifted to defendants by deed and Last Will and Testamentary Trust, which left the bulk of her financial estate in a trust for care of the property, naming her great

grandchildren specifically as a benefitted class, and intending to benefit all of her lineal descendants in perpetuity with title to the property. March 16, 2000 Attorney Robert Hazard letter to all defendants, Appendix 1- 3 (references to Appendix pages will be A. 2, A. 3, etc.).

The plaintiffs' case alleged contradictory theories of easement rights in Phyllis's recreational shorelands, ranging from rights by deed (withdrawn after a January 26, 2015 hearing where plaintiffs could not locate where on Northport's tax map the easement ran by deed) to implication and prescription. Overlaying these claims were facts that Northport, pursuant to Maine DEP instant physical shoreland inspection initiated by the appellant, cited (NOV) the defendants in summer 2012 for multiple Maine Shoreland Zoning Act violations, demanding compliance. The result was a case of at least four (4) distinct competing legal interests: 1) State of Maine rights and duties to administer Maine's public trust in all of Maine's recreational shorelands, 2) Northport's rights and duties to create, administer and enforce Maine law mandating all municipalities to create and enforce schemes implementing the 1971 Maine Shoreland Zoning Act, 3) rights and duties of Maine recreational shoreland owners (defendants) vis a vis the State of Maine public trust in Maine shorelands, and 4) plaintiffs'

allegations of adverse (acquiesced) mixed public and private uses of Burbank shorelands by deed, implication, prescription and other inapplicable theories on the facts.

Accordingly, if the trial court's decision is not vacated, Maine will have no longer have a legal basis to claim that:

> 'Today Maine's (Mandatory Shoreland Zoning) law is recognized as a national Model of responsible environmental regulation.' A Handbook for Shoreland Owners, Maine DEP, 2008, p.2. A. 4.

Rather, it is certain, as recreational shorland owners successfully argued in *Almeder v Kennebunkport*, 2014 ME 12, 106 A.3d 1115 (Me. 2014), that hardware stores across Maine will quickly sell out of chain-link fences, as panicked owners try to protect perhaps their most valuable asset from dubious predatory public and private prescriptive claims. This is exactly what happened in California following a court holding that the presumption of permission did not apply to beach property, and recreational use alone was evidence of "adverse" use that could give rise to a public recreational easement. *Gion- Dietz v. City of Santa Cruz*, 465 P.2d 50 (Cal. 1970). That case generated a spate of critical law review comments, prompting California to quickly abrogate the holding by legislative action. *County of Orange v. Chandler-Sherman Corp.*, 126 Cal. Rptr. 765, 767 (Cal. App. 1976).

In lieu of clear legal protections by lawful presumption, statute, or case law, otherwise public and neighborly-spirited recreational land owners - no matter how fraternal their history or intentions, no matter the economic and recreational interests of Maine, no matter the likely costs to Maine's unique aesthetic natural environment, and no matter the views and policies of local voters, planning boards and law enforcement officials - will be, from at least four sets of Maine recreational shorelands interests, compelled to protect themselves from interests granted unwarranted primacy by the Superior Court alone: the rights of private prescriptive claimants.

The instant result was possible only by meticulous, erroneous court avoidance of clear record facts; of Maine's mandatory public interests to investigate and enforce the 1971 Maine Shoreland Zoning Act; of all party, municipal and state duties to know and comply with lawful schemes and orders flowing from the Act; of facts that plaintiffs knew they (or 'someone') were violating and intended to violate the Act over many years against the people of Maine, especially their unsuspecting, elderly, generationally accommodating neighbor, Phyllis Burbank; of Phyllis Burbank's explicit and implied recreational shoreland permissions; of uncontested eye witness testimony of land posting and entry of the actual signs into evidence; of plaintiff sworn trial testimony that plaintiffs never did, and never would, contest Phyllis

Burbank's exclusive ownership and control of her recreational shoreland; and other facts precluding prescription and partition.

Significantly, in reaching its conclusions despite a lack of specific evidence of prescription and partition legal elements, the trial court conveniently ignored the presumption of permission that applies when any group, public or class, claims a prescriptive easement for recreational uses, erroneously assuming that Maine law supports a view that a group of individuals using recreational shorelands as a whole intermixed with the general public is distinguishable from the general public simply based on the fact that they own property in a defined geographic area, ie 'the neighborhood'; a neighborhood that in this case has a defined (Northport tax map) public way across plaintiff Gerrity's front lawn leading to the appellant's easterly boundary point precisely where plaintiffs claim private rights. Two plaintiffs, Lincoln and Gerrity, are historic neighbors of Phyllis Burbank for generations. Three plaintiffs are not. All clearly used Phyllis's lot as a group, as the general public did.

Finally, the plaintiffs' case raised Maine and US Constitution issues of due process and equal protection of Maine and municipal law, and the 5th Amendment 'takings clause' regarding judicial acts, argued at trial, erroneously avoided by the court. Read together, the court's errors deprived plaintiffs of standing, and the court of subject matter jurisdiction.

The co-defendants' partition case (cross claim alleged as a counter claim) also failed to state claims for which relief could be granted. Co-defendants sued under 14 MRSA Sec *6501* statutory partition, that 'can only be carried out by a physical division of the property.' *Liberty v Lorraine*, 430 A.2d 37, 39 (Me. 1981). Co-defendants requested a partition by sale. 'Section 6501 does not grant the Superior Court authority to grant such a sale.' *Boyer v Boyer*, 736 A.2d 273, 276, 1999 ME 128 (Me. 1999). The trial court erroneously cited Sec. *6051* as the basis of the partition suit.

Further, co-defendants took title to Phyllis Burbank's recreational shoreland property subject to her Last Will and Testament, which included a substantial trust fund with specific instructions to benefit only her lineal descendants, specifically including her lineal great grandchildren, and their lineal heirs and assigns, in perpetuity. March 16, 2000 Letter of Phyllis Burbank estate Attorney Paul Hazard, *infra.*

The trial court thus erred by conveniently avoiding documented record facts proving Phyllis Burbank's testamentary intent for her gifted real property and attendant estate plan, and avoiding application of appellant's legal arguments to those facts precluding partition as a matter of law.

Factual and Procedural Background

In October, 1993 Phyllis Burbank, the appellant's paternal

grandmother, at age 90, three years before her death in 1996, advised by her Belfast, Maine Attorney Paul Hazard, gifted her Northport, Maine Penobscot Bay property to her children and grandchildren – seventeen people - in equal shares as joint tenants with rights of survivorship by warranty deed. At the same time Phyllis executed her last will and testament, which established a trust fund of over $240,000, the bulk of her financial estate, to benefit this property 'in perpetuity' so long as at least one of her lineal descendants held a title interest in it. March 16, 2000 letter of Attorney Paul Hazard to all defendants, *infra*. Last Will and Testament of Phyllis Burbank, A. 5-10. Phyllis's great grandchildren were specifically named as a class benefitted by Phyllis's testamentary trust. *Id.*

Phyllis's property is located along Broadway Avenue, in Bayside, a summer enclave of Northport, Maine, where Northport exercises zoning jurisdiction. Bayside, and its historic 1849 Wesleyan Camp-meeting Grounds from which all lots in this case were 'carved', arose from:

> ....an impossibly huge tract of land granted by King James I to forty noblemen, knights and gentlemen in 1620. About three hundred years after, the result of (many) partitions was an inventory of leaseholds, each barely large enough to accommodate a platform tent. The history of these partitions contains the stories of many entrepreneurs, scoundrels, and ordinary hard-working people, the amassing and subsequent loss of huge family fortunes, and the consequences of conflicts between the settlers and Native Americans on the one hand, and

their British sponsors on the other. "From the King of England to the Northport Wesleyan Campmeeting Association", If These Cottage Could Talk: A History of Bayside in Northport, Maine, The Bayside Historical Preservation Society, 2008, p. 15. See court file for copy, submitted at trial.

Phyllis's lot consists of about two hill, coastal bluff and recreational beach acres, resting below a coastal mountain (Northport is about twenty miles north of the Camden Hills). There is no flat ground on the lot. A rainwater and natural surface spring water diversion culvert runs from a town ditch on the mountain side of Broadway Avenue, under that pavement in front of the Burbank lot, emptying onto the lot forming a long, steep brook and adjacent wetland draining the mountain and avenue watershed and the Burbank lot over their coastal bluff to easterly Burbank shorelands and their recreational beach.

Structures on the property include a two story, three bedroom unheated summer 'cottage' and an adjacent 1800s era horse barn proximate to Broadway, accessed by a wide, mostly steep, well maintained, tar and gravel, shared (with Parsons, west) driveway, abutted by a large, open, sloped lawn above the cottage and barn. Below the cottage the land sweeps steeply downhill at a 20% or more grade to a clay and sand coastal bluff dropping forty-five vertical feet to a stone, gravel and sand recreational beach with one hundred

foot or more tides that rise and fall over the bluff lowlands. There is a large, open lawn from the cottage to bluff edge on the westerly half of land below the cottage. The easterly half consists of a wide, 20% or more grade, forested, heavily overgrown (with brush and plants) slope and watercourse gully (fed by the town drainage culvert sweeping downhill from Broadway, behind the horse barn, to the easterly bluff.

The coastal bluff runs along the Burbank lot's entire northerly aspect for a length of over one hundred ten feet. The entire bluff is heavily overgrown with wild blackberries, sea roses, some trees, and other thick vegetation to heights of four or more feet. The top of the easterly bluff proximate to plaintiffs' lots features a stand of enormous birch trees and some smaller trees. The gully feature cascades fresh water over and down the bluff to the recreational beach. The bluff falls not less than forty vertical feet for its entire length of the Burbank lot to the shore and for many contiguous acres up and down the Bay shore, often protected by private seawalls to stem obvious tidal and other bluff erosion. There are no breaks in the thick vegetation on the Burbank bluff face except for a set of permitted stairs. The bluff face depends on its thick vegetation to avoid erosion of clay and sand soils under the vegetation comprising the bluff from top to bottom.

Until September, 2012, there were two sets of large wooden recreational beach stairs on the property. One set, the 'primary stairs', has existed for decades at the base of the lot lawn, one hundred fifty feet downhill from the cottage. The stairs consist of a small landing platform on the top of the coastal bluff, and at least 40 large, wide, wooden steps and rugged oak plank sub-frame dating to the 1940's, falling at more than a thirty degree pitch over the bluff more than forty vertical feet to the recreational beach below.

A second, easterly set of recreational beach stairs is subject of this action. Until September, 2012, those stairs existed on the Burbank lot seventy feet east of the primary stairs, in heavy undergrowth, among trees and thick bushes, proximate to easterly neighbors, including plaintiffs, and the Burbank lot watercourse gully. The stairs were removed by the appellant pursuant to a July, 2012 Northport notice of violation (NOV) issued by Northport Code Enforcement Officer (CEO) John Larson. Larson NOV, A. 11.

No full easterly staircase existed until the 1970's. No 'versions' were visible from the Burbank cottage due to vegetation, the two hundred foot distance to them, and because they spilled over a steep bluff. The stairs removed in 2012 were built by a professional

carpenter. They consisted of at least thirty wooden steps, a wooden railing, and a post and beam sub-frame lodged into clay and sand coastal bluff soils beneath the stairs without concrete or other footings. All of the natural vegetation under the stairs was killed by them, leaving a bare clay and sand bluff face exposed to wind, rain, snow, tidal and human erosion, and garbage and other debris unlike any other area of the Burbank lot. No one replanted vegetation securing the bluff. No one built sea walls. The stairs ended about four feet above the beach in a platform supported by thick posts extending to the recreational beach. Attached to the platform was a five foot long set of removable steps, completing the forty foot stairway over the bluff to the Burbank recreational beach. The ability to remove the lowest steps protected them from being damaged by daily winds and high tides pounding the beach and bluff, and storms and ice that would otherwise destroy the low steps. Photo, A. 12.

Before 2012, at least two earlier easterly stairs existed on the same easterly bluff footprint. A full length staircase of pressure treated lumber, built by a professional after 1971 without removable steps, pre-dated the 2012 stairs (pressure treated lumber did not exist prior to 1971). Photo, A. 13. Defendants testified at trial that this set was built

without a permit when the 1971 Maine Shoreland Zoning Act was in force. Pre-dating that pressure treated staircase was another full staircase of natural, painted wood built after 1971 without a permit. Testimony of Harold Burbank, Sr., David Burbank, Harold II, A. 14-16.

The first stairs on this footprint did not exist in the 1940's as witness Adelaide Lincoln testified, but not until the 1960's, consisting of a few crude planks buried into the coastal bluff soils, and a small frame of several crude, unprofessionally built wooden steps and railing located at the very base of the Burbank lot easterly coastal bluff over shoreland rocks to the Burbank's recreational beach. A. 17.

From the 1960's, beginning at the top of bluff, a narrow fifty foot long path ran to the easterly Burbank lot boundary, intersecting a *Northport public way* running across plaintiff Gerrity's front lawn, to a public road serving as easterly Burbank neighbors' access to Broadway Avenue, Bayside's primary public road. See Northport Tax Map, A. 18. The path traversed Burbank's coastal bluff, between it and Burbanks' sloping, heavily overgrown wetland gully region below their barn far above. Due to surface waters found on the path, after 1971 the path was heavily landscaped with crushed stone, especially at the top of the stairs and bluff where gully runoff, rain and melting snow saturated that

ground. Pictures of path and top of bluff and stairs, A. 19-21.

In May, 2012 the appellant reported what Burbank lot vegetation cutting violations of the 1971 Maine Shore Land Zoning Act to Northport, Maine CEO John Larson, Maine Department of Environmental Protection (DEP) shoreland zoning program director Attorney Deirdre Schneider and the Office of Maine Attorney General. A. 22-23.

Appellant's concerns stemmed not just from what he observed on his lot in May, 2012, but also unpermitted shoreland vegetation cutting on the lot that he discovered in spring, 2011, and a massive clear cut of all shoreland vegetation on the lot that he found in spring, 2009: a swath running from the cottage and barn over almost all of the coastal bluff to the shore. Appellant stated on the trial record that the cut area 'looked like a war zone' and that he found survey stakes in the cut. A. 24..

Northport co-CEO Toopey Rooney and DEP director Schneider together inspected the Burbank lot with appellant and told him that actionable Maine Shoreland Zoning Act violations demanding remediation of lost vegetation and removal of a set of stairs had occurred. In a June, 2012 letter to the Burbank joint tenants, Northport CEO Larson advised the lot owners of Maine Shoreland Zoning Act violations,

including illegal vegetation clear cutting and selective cutting along and over the thickly overgrown Burbank lot westerly coastal bluff proximate to 'primary stairs' to the recreational beach, along the easterly coastal bluff pathway from the easterly bluff recreational stairs proximate to the Burbank's easterly boundary, unpermitted use of crushed landscaping stone on this wetlands path, and unpermitted existence of two sets of recreational stairs on one residential lot to a recreational beach. A. 25. The CEO also advised Burbanks verbally that in addition to violating a Maine DEP shoreland zoning regulation prohibiting two sets of stairs, Northport had no record of anyone at any time applying for or receiving mandatory building permits for construction or modification of recreational stairs to the beach, or for mandatory permits for land-scaping a lot shoreland path with unnatural (crushed, off site) stone or otherwise.

After long discussions with Maine DEP shoreland zoning program director Attorney Deirdre Schneider, Northport advised Burbanks that in addition to removing a set of stairs, remedial purchase and hand planting of hundreds of dollars worth of native bushes and trees that had been illegally cut would be required to bring the lot into Maine and Northport shoreland zoning compliance.

Some public protest ensued against Northport by plaintiffs, Burbank family members sympathetic to neighbors, and others in Bayside. Nevertheless, in July, 2012 Northport CEO Larson issued a formal NOV to Burbanks stating the same issues and demands appearing in his June, 2012 letter, this time demanding 1971 Maine Shoreland Zoning Act standards compliance by mid August, 2012. A. 11.

Appellant was verbally advised by CEO Larson that despite contrary rumors Northport had no intentions to withdraw the NOV (and never did). CEO Larson also advised that non-compliance could lead to Northport enforcement action and $2500/day fines.

Northport's zoning board of appeals observes a thirty day NOV appeal period. No appeal was ever filed by any plaintiff, Burbank lot owner, or anyone else.

Appellant lives in Connecticut, over three hundred twenty miles and six hours drive from the lot. Since being gifted the lot the owners have agreed to a one or two week time share type schedule for its use which the trial court agreed has worked well. Judgment and Order, p. 20, para k. Accordingly appellant is rarely on the property and in some years not at all. By August, 2012 appellant had not heard from co-tenants on a plan of NOV compliance. He had contacted them earlier

offering a plan to remove the non-permitted easterly stairs at his expense, gifting the stairs to any neighbor wanting them. When no reply was received, he removed the stairs in mid September, 2012, stacked them behind the Burbank lot barn in usable condition in plain view of his co-tenants and neighbors, and so noticed Northport CEO Larson in writing. A. 27.

Plaintiffs sued in 2013. The first hearing was held at Waldo County Superior Court that spring, where the court stated, apparently based on appellant's answer to complaint, that the case was "not about environmental law". The court ordered mandatory MRCP 16B mediation of the case for April 11, 2104.

Defendants Harold Burbank, Sr., David Burbank and appellant Harold Burbank, II attended the mediation before agreed mediator Attorney Robert Crowley, Portland, Maine, where plaintiffs asserted that they had a 'map' showing the location and recording of a pathway-easement supporting their written complaint that an easement to the shore benefitting plaintiffs existed on the Burbank lot. Mediator Crowley called for a recess specifically so plaintiffs could produce this map at the mediation session. Mediation resumed, but plaintiffs had no map, and made no further comment about such a map. Defendants however

produced a large 1800's era Waldo County registry map of the Burbank lot neighborhood which showed no path-easement on or near the Burbank lot.

On April 9, 2014 per Mediator Crowley's written request the defendants submitted a written case position memorandum of law to Mr. Crowley before the April, 11, 2014 mediation session stating that no recorded or any other easement existed on the Burbank lot, arguing that co-defendants had no authority to grant easement rights to plaintiffs since the facts and law of Phyllis Burbank's gift of the lot and facts and intentions expressed in her Last Will and Trust precluded any title in the Burbank lot subject to co-defendant easement transfers to plaintiffs. Supplement of Legal Authorities, pp. 1-9 (hereinafter SLA).

A hearing was held in January, 2015 at Penobscot Superior Court, in which plaintiffs again asserted that they could show documented proof that an easement existed across the Burbank lot benefitting plaintiffs. They produced a slide of the Northport tax map. The court asked plaintiffs to draw a line on that map depicting the meets and bounds of the easement. Plaintiffs marked a line down the Burbank lot center to the *westerly* coastal bluff. The stairs appellant removed were on the *easterly* bluff, proximate to plaintiff lots. A correct line depicting

plaintiffs' claims was drawn by co-defendants' attorney, not plaintiffs. The court then stated that plaintiffs had withdrawn the 'documented' easement claim. The plaintiffs did not file or state such a motion for the record. See Penobscot Superior Court file notes for January 26, 2015 Penobscot Superior Court hearing.

The trial was held in May, 2015. Defendants Harold Burbank, Sr., David Burbank, and Harold Burbank, II attended all days of the trial. All testified under oath. Defendant Lori Darnell attended the trial by computer means (SKYPE) and gave sworn, observed court testimony.

Statement of Issues on Appeal

I. Did the Superior Court find sufficient facts of private prescription, where Phyllis Burbank had accommodated 'the world' on her recreational shoreland for decades? Does Northport's NOV regulating a mandatory shoreland resource protection district affect prescription?

II. Did the Superior Court violate the US Constitution Fifth and Fourteenth Amendments by finding private prescriptive easements on the Burbank lot? Did it unconstitutionally 'take' the property for a public purpose without just (any) compensation?

III. Was the appellant unlawfully prejudiced in a trial concerning overlapping prescriptive and partition claims to inherited real estate subject to Phyllis Burbank's last will and testamentary trust? Should the two petitions have been heard in a bifurcated manner?

IV. Does Phyllis Burbank's last will and testamentary trust preclude partition of her gifted real estate subject to her testamentary intent? Does her will and trust preclude heirs from granting Burbank lot recreational easements?

V. Do easement and partition parties have standing to sue on the facts?

Standards of Review

The viability of a type of easement and the evidence required to establish that easement are matters of law the Law Court reviews de novo. *See Androkites v. White*, 2010 ME 133, ¶ 12, 10 A.3d 677. The Court will:

> review the facts supporting the court's conclusions for clear error, and will uphold the court's findings unless " there is no credible evidence on the record to support them or the court bases its findings of fact upon a clear misapprehension of the meaning of the evidence." *Baptist Youth Camp v. Robinson*, 1998 ME 175, ¶ 7, 714 A.2d 809 (alterations omitted) (quotation marks omitted). *Almeder v Kennebunkport*, 2014 ME 139, 106 A.3d 1099, 1108 (Me. 2014).

The Law Court shall "vacate a trial court's conclusion that a prescriptive easement was formed only if [the Court] determine[s] that the evidence below compelled a contrary holding." *Id.* ¶ 14 (citing *Glidden v. Belden*, 684 A.2d 1306, 1316 (Me. 1996).

As to issues of Phyllis Burbank's last will and testamentary trust,

> In accordance with well established principles we seek the intention of the testator at the time of his execution of the will. We look *first* (emphasis added) to the whole instrument. 'In case of doubt *the intention is to be ascertained in the light of the existing conditions, which may be supposed to have been in testator's mind.*' (emphasis mine). *New England Trust Co. v. Sanger* (1955) 151 Me. 295, 302, 118 A.2d 760, 764.

As to plaintiff standing in Maine private prescriptive cases, plaintiffs must sufficiently plead or prove the elements necessary to obtain an easement as to any specific parcel of recreational beach

property. *Almeder*, infra, p. 1108. As to co-defendant's partition petition standing, whether a petition is properly brought under a statute is a matter of law and as such is reviewed de novo by this Court.

Summary of the Arguments

> Maine's Mandatory Shoreland Zoning Law was first enacted in 1971 in response to *increasing development pressure* (my emphasis). The legislature concluded that strict regulation of land-use activities was necessary in the shoreland zone. Through the years, the law has been strengthened and amended in response to environmental and citizen concerns. ***Citizen planning boards, other local officials, and legislators have all shaped and honed the state's shoreland zoning law*** (my emphasis). Maine Shorelnd Zoning: A Handbook for Shoreland Owners, Maine DEP, Publication Number: DEPLW0674-D08, 2008, p. 2.

The instant case shows that Maine's private landowners cannot rely on trial courts to acknowledge let alone apply the Act to protect and preserve all public and private interests in shorelands - lawfully determined by citizen planning boards, local officials and legislators rather than courts - from unlawful development, including prescriptive easements undercutting Maine DEP regulations enforced by towns precluding more than one set of recreational stairs per residential lot to a recreational beach. If this case stands, it serves as precedent to ignore the Act, gut principles of constitutional separation of powers, and eliminate legislatively mandated public inputs and defenses of shoreland development, pollution and erosion control, animal

habitat loss, wetlands destruction, and shoreland aesthetics that the Act was designed to protect and serve in the public interest.

Furthermore, no Maine property owner expects to lose her property rights by allowing mixed public and private access over her property for reasonable recreational activities that do not interfere with the owner's enjoyment of her property. Maine is unique in that open public and private recreational access to private property is "tradition" rather than an exception. Just as Maine's tourism economy relies heavily on this tradition, exceedingly generous property owners like Phyllis Burbank rely on protections embedded in Maine law to ensure that both public and private recreational uses of private property do not result in any losses to landowners, especially where owners become publicly and privately known for welcoming anyone for recreation.

Phyllis was renowned for her entire life for being such an owner, in the small, historic, generationally tight knit, former summer Methodist campground enclave of Bayside, at Northport, Maine. Plaintiffs, defendants and witnesses admitted this at trial and elsewhere. They would not sue her during her lifetime for that reason. A. 28-29. They also would not apply for building permits for at least three coastal bluff staircase versions 'someone' built on Phyllis's recreational land since

they knew they did not build any stairs, did not 'possess' the land there, could not claim easements to it, that Phyllis would reject those claims and knew Northport would reject permit applications regardless of who owned the land since coastal bluffs are mandated by Maine for resource protection districts. Chapt. 2, 'The Elements of Shoreland Zoning', Municipal Code Enforcement Officer Training and Certification Manual, Maine Planning Office, 2008 (to date), *infra*.

Accordingly under Maine common law Phyllis had a right to rely on presumptions of permission – the public recreational use presumption, 'implied permission', 'neighborly accommodation'- and other uses explained by a rationale contradicting Maine's private claims prescriptive presumption, to avoid private and public prescriptive claims. The trial court, by failing to meticulously examine all of the salient facts, but rather meticulously avoiding almost all of them, did not under Maine law find legally sufficient findings to justify prescriptive claims in the case, requiring that the judgment be vacated.

Alternatively, since 1971, Maine and Northport had a duty to protect Maine coastal bluff shorelands, recreational or not, in public trust against unlawful development, by placing them in legislatively mandated 'resource protection districts', in compliance with the 1971

Maine Shoreland Zoning Act, the enforcement of which lies with municipal code enforcement officers. 'The Elements of Shoreland Zoning', *infra*. Assuming arguendo that Phyllis Burbank had any right to permit or deny recreational staircase construction on her coastal bluff, or that she or plaintiffs could in any way support or preclude prescriptive claims, the claims are lawfully estopped by Northport's jurisdiction of the Act, where CEO Larson, after full factual investigation of the Burbank lot, and expert consultation with Maine Department of Environmental Protection mandates under the Act, issued a Northport unrevoked NOV to remove Burbank lot stairs.

The trial court however, without cause, ignored the controlling environmental statute, and the public policy it supports, which as a matter of law, by decisions of citizen planning boards, local officials and the legislature, not the courts, controls access to the coastal bluff on Phyllis Burbank's lot, which, as a matter of law, was accessed for decades without required Northport permits by unidentified parties building or renovating four recreational beach staircases from 1971 to 2012 on the Burbank lot coastal bluff.

Partition Claims

In October, 1993 Phyllis Burbank gifted her Northport, Maine Penobscot Bay summer cottage property to all of the defendants in this case in equal shares as joint tenants with rights of survivorship. At the same time Phyllis executed her last will and testamentary trust, subjecting the real estate to that trust, intending for it to enable her heirs and her lineal descendants to continue to own and enjoy the property 'in perpetuity'. A. 1-3. Accordingly the 'total' posture of real estate gifts demands the legal conclusion at that Phyllis did not grant fee simple title to grantees. Maine partition thus cannot lie for lack of subject matter jurisdiction. The judgment must be vacated for this reason alone.

On May 29, 2014 some co-defendants filed for 14 MRSA Sec. 6501 statutory partition requesting forced sale of Phyllis's real estate (gifts). A. 30-36. But claimants lacked standing for partition under Sec. 6501. It only permits partition by physical property division and not sale as requested. *Libby v Lorraine*, 430 A.2d 37, 39 (Me. 1981). Hearings convened and orders granted pursuant to Sec. 6501 thus were void also for lack of subject matter jurisdiction and must be vacated accordingly.

As *Libby* held, partition sale can lie pursuant to 33 MRSA Sec. 153. if future interests in the real estate are named and considered. Phyllis Burbank's specifically included her lineal great grandchildren as a benefited testamentary class, as well as her lineal descendants, 'in perpetuity'. Claimants avoided Sec. 153 since it opens the door to future

interests defeating fee simple title claims, since Maine has held these claims support conclusions at law that grantors did not intend and did not grant fee simple title to their lands; fee simple being prerequisite at law to Maine partition.

Appellant has two natural children; lineal descendants of Phyllis, who from lawful inferences of her land grant and last will and testament, intended to deny fee simple title in her grantee-heirs. Accordingly the trial court committed clear error. The judgment must be vacated.

Argument

1. The Superior Court's decision must be vacated for meticulous *avoidance* of clear record facts explaining plaintiffs' 'particular' familial and public uses of Phyllis Burbank's lot, and linking these explained 'particular' uses alleged to the Burbank lot, standing the Law Court's specific prescriptive rights fact finding standard on its head.

The Law Court has set a 'meticulous' fact finding standard for prescription. From *Androkides* to *Almeder* the Court has been clear that presumptions of prescriptive adversity are not only overcome by facts contradicting a presumption's rationale, but Maine courts are compelled to meticulously seek and find those facts, specifically of the 'nature, duration and type of use proved':

> A finding that a public prescriptive easement exists is no small matter. Such an easement necessarily deprives a private landowner of some property rights, most notably by limiting the owner's ability to exclude the public from his or her property. In determining that such a reduction in the landowner's property rights should be recognized and enforceable, *a trial court must be* ***meticulous*** *in assuring that sufficient facts have been demonstrated linking the particular use alleged to the particular property at issue* (emphasis added). This determination is

> completely dependent on the facts in a given matter--*including the nature, duration, and type of use proved (*emphasis added*).* It is not possible to establish the existence of a public prescriptive easement on a parcel of property without reference to the individual lot or lots on which the use is alleged to have occurred. *See D'Angelo v. McNutt* 2005 ME 31, ¶ 9, 868 A.2d 239 (stating that it is in the very nature of a claim to adverse possession of property interests that persons may " typically only acquire that property which they actually possessed")... *Almeder v Kennebunkport*, 106 A.3d 1115, 1120-1122 (Me. 2014).

Further, as a preliminary matter the trial court had a duty to meticulously hold all plaintiffs to proof of whether their easements were pled as 'appurtenant' or 'in gross' because:

> An easement is a right of use over the property of another. See RESTATEMENT OF PROPERTY § 450 (1944); BLACK'S LAW DICTIONARY 509 (6th ed.1990). The law recognizes two different types of easements: an easement in gross and an easement appurtenant. An easement appurtenant is created to benefit the dominant tenement and runs with the land. See *O'Neill v. Williams,* 527 A.2d 322, 323 (Me.1987). To be appurtenant, however, the easement must also be attached to or related to a dominant estate of the grantor. See *Anchors v. Manter,* 1998 ME 152, p 12, 714 A.2d 134, 139; O'Neill, 527 A.2d at 323. Here, because McIntosh owned no dominant estate to which the easement could be appurtenant, the easement is in gross. See Anchors, 1998 ME 152, p 12, 714 A.2d 134, 139; O'Neill, 527 A.2d at 323. *O'Donovan v. McIntosh*, 728 A.2d 681, 1999 ME 71 (Me. 1999).

Yet the trial court made no findings of plaintiff appurtenance, or by what facts or theory appurtenance is attached or related to the dominant Burbank estate, but instead simply ordered easements of the Burbank lot recorded on plaintiff deeds. That is not Maine law.

The judgment also must be vacated because it does not find sufficient specific facts of the 'nature, duration and type of use' each plaintiff made of the Burbank lot, or whether these facts, without contradicting or explaining presumed prescriptive adversity (*Androkites v. White,* 2010 ME 133, 10 A.3d 677, 682-83 (Me. 2010)), by a preponderance of

evidence show:

> (1)continuous use for at least twenty years; (2) under a claim of right adverse to the owner; (3) with the owner's knowledge and acquiescence, or with a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed. *Sandmaier,* 2005 ME 126, ¶ 5, 887 A.2d at 518; *accord Jordan,* 2002 ME 36, ¶ 22, 791 A.2d at 122; *Town of Kittery v. MacKenzie,* 2001 ME 170, ¶ 15, 785 A.2d 1251, 1255-56; *Dartnell v. Bidwell,* 115 Me. 227, 230, 98 A. 743, 744 (1916). *Androkites v. White,* 2010 ME 133, 10 A.3d 677, 681 (Me. 2010).

All of the plaintiffs failed the *Androkites* tests, compelling vacation of the judgment.

For example, the trial court conveniently ignored the sworn trial testimony of defendant Lori (Burbank) Darnell, Phyllis and Fred Burbank's granddaughter, who waited by her North Carolina computer for two days to give this testimony to the trial court by SKYPE. Lori testified that in summer 1969, she went with Fred Burbank to post the Burbank-Gerrity boundary, where the shoreland path at issue meets a Northport right of way across the Gerrity front lawn. Northport tax map. A 18. There she watched Fred hammer three steel pipes into the ground, across the path, and affix a heavy steel chain to each pipe, blocking the path completely. She also said she watched Fred post a 'no trespassing' sign proximate to the pipes and chain. This testimony was not rebutted by any witness or trial evidence.

Glaringly, the trial court held, without any foundation, that Lori was simply too young to know what she saw, or where she saw it. Lori was born in 1959. She had been on this property every summer all of her

despite severe health problems of which the trial court was aware (he had a significant stroke soon after trial), attended Penobscot Superior Court for two days from Kennebunk to testify to Burbank lot history and his mother Phyllis Burbank's intentions. Harold Sr. is trustee of Phyllis Burbank's testamentary trust. Due to mortally failing health, Harold Sr. gave an April, 2014 deposition for the court record. In it and at trial Harold, Sr. testified that his grandfather Merton Haley may have posted the path area at issue 'no trespassing', and that Harold Sr. surely overheard Merton protest use of this path and bluff to friends. A. 41. In Maine, a single verbal protest, whether on or off the premises, defeats the element of prescriptive acquiescence:

> The doctrine that denials and remonstrances, on or off the land are sufficient to rebut acquiescence, and work an interruption is supported by Workman v. Curran, supra; *Nichols v. Aylor, 7 Leigh (Va.)* 546; *Field v. Brown,* 24 Grat. (Va.) 74; *Reid v. Garnett,* 101 Va. 47, 43 S.E. 182; *Stillman v. White Rock Mfg. Co.,* 23 Fed. Cas. 549; *Wooldridge v. Coughlin,* 46 W.Va. 345, 33 S.E. 233; *Crosier v. Brown,* 66 W.Va. 273, 66 S.E. 326, 25 L.R.A. (N. S.) 174; *Andries v. Detroit, G. H. & M. R. Co.,* 105 Mich. 557, 63 N.W. 526; *Bealey v. Shaw, 6 East,* 216; *Livett v. Wilson, 3 Bing.* 115; Washburn on Easements, p. 162. *Dartnell v. Bidwell,* 98 A. 743, 745, 115 Me. 227 (Me. 1916).

Harold Sr. also testified that his father, Fred Burbank, posted the path to the stairs 'Private Grounds, Trespass Forbidden, ' supporting Lori (Burbank) Darnell's testimony, that his mother Phyllis Burbank knew Fred was posting the land and did not protest, due to safety concerns on the path and bluff. A. 42-44. At trial Harold Sr. was presented with an original large wooden sign. He identified the sign as one he retrieved

from the Burbank lot barn. He read the sign for the record: 'Private Grounds, Trespass Forbidden'. He testified that this was the sign Merton Haley and Fred Burbank used to post the path and bluff at issue. A. 46.

Harold Sr. testified that several versions of disputed stairs existed on the bluff over the years (as did defendants David Burbank and Harold Burbank, II). Harold Sr. testified that his sister Jean Jennings and her five children (four are defendants) lived summers in the Burbank cottage for years as intimate friends of Lincolns and Gerritys (plaintiffs). None of the testimony was controverted. A. 46-47. The trial court conveniently ignored about all of Harold Sr.'s testimony, including the large wooden 'no trespassing' sign, which the defense entered into the court record as an exhibit. Material dispositive fact avoidance is not 'meticulous' Maine due process and equal protection of prescription law.

Meticulous review of plaintiffs' testimony supports findings of significant facts precluding prescription. Fred Lincoln and Bruce Gerrity testified to decades of intergenerational neighborly accommodation by Phyllis Burbank and her family on the Burbank lot, revealingly stating under oath, "We would never sue Mrs. Burbank," negating prescriptive adversity/acquiescence. A. 28-9. Fred Lincoln testified that he purchased liability insurance for the path and stairs, for public and

other claims against him, but did not consider discussing insurance with Phyllis Burbank, and never did. A. 53.

Longtime Burbank neighborhood resident Ms. Huntoon testified that Burbanks were renowned for harmonious, family-like accommodating relations on their lot all of her and her father's lives. A. 54. No Fleming, Kosel or Moscow (plaintiffs) party or witness testified or proved that they had ever had any contact with Phyllis Burbank. They offered no evidence differentiating themselves from the public. Plaintiffs and their witnesses avoided or did not know facts that Phyllis, born in 1903, was in her 70's, 80's and 90's when Kosels, Moscows and Flemings bought their lots. At that time Phyllis was rarely if ever on her beach, being too frail to use stairs forty vertical feet up and down the coastal bluff. Kosels, Flemings and Moscows offered no proof of Phyllis knowing them or their use of her lot, making them no different than the public.

Adelaide Lincoln, predecessor in title to plaintiff Fred Lincoln, testified at her deposition that she could not locate on photos she was shown by her attorney where on the Burbank lot the path she used as a child ran on the Haley-Burbank lot. She could not differentiate herself from the public since, 'it (the path) was the way everyone got to the beach...'. Yet the trial court used Adelaide's childhood to calculate Fred Lincoln's twenty consecutive prescriptive years, though Maine has ruled that prescriptive claimants cannot tack childhood years. *Blackmer*

v. Williams, 437 A.2d 858, 861 & note 2 (Me. 1981). A. 56.

Plaintiff Eleanor Moscow testified she used the lot under the mistaken impression that it was public - possible where the Burbank path intersects a Northport public way crossing plaintiff Gerrity's front lawn directly to the Burbank path. See Northport tax map, A. 18. But mistake cannot give rise to prescription:

> ...a mistaken belief that it is a town way or a public way precludes the user from asserting sufficient adversity of use to claim a right of way by prescription. *Glidden v. Belden,* 684 A.2d at 1318.

None of the plaintiffs established when they knew or did not know the Haleys and Phyllis Burbank and began, with any certainty, to establish 'the nature, duration and type of use' they made of her lot. None established who ordered any of the stairs, built, their purposes, who paid for them, who was hired to build them, in what years and times of year they were built, who regulated their use, Northport building permits, or other indicia of ownership and control, which at law could put Phyllis Burbank on notice of risk to her lot.

Viewed through the *Androkites* lens, plaintiffs did not plead, nor did the trial court find for any plaintiff, sufficient facts of continuous use for at least twenty years under a claim of right adverse to Phyllis Burbank or her family, with Phyllis's knowledge and acquiescence, or with a use so open, notorious, visible, and uninterrupted that Phyllis's knowledge and acquiescence will be presumed at law. No one proved

and the court did not find that plaintiffs used or intended to claim Phyllis's land as their own before the instant lawsuit ('Relevant to these determinations is the prescriptive user's state of mind.' *Glidden v.Belden,* 684 A.2d at 1317). No one proved that they possessed Phyllis's land as their own (re prescription, "[t]he law generally disfavors findings of adverse possession...[t]here is every presumption that the occupancy is in subordination to the true title,". *Hamlin v Niedner*, 2008 ME 130, 955 A.2d at 254). No one claimed that they did not recognize Phyllis's rights and duties (ie building permits) in this land for any period of time, disregarding Phyllis entirely (...(claimant) uses the way as the owner would use it, disregarding [the owner's] claims entirely, using it as though [she] owned the property [her]self." *Stickney v. City of Saco,* 2001 ME 69, ¶ 21, 770 A.2d 592). No one claimed that they did not have a relationship with Phyllis Burbank where use of her lot was explained by a rationale contradicting a prescriptive presumption:

> the presumption of adversity is inapplicable when the landowner and user have a relationship, such as a close blood relationship, such " that the landowner is reasonably entitled to regard the use as permissive unless specifically informed of the contrary fact"...(claimant) instead bears the burden of proving, by a preponderance of the evidence, that she used the land under a claim of right in a manner adverse to the owner, which requires proof of adversity and actual notice to the true owner. *Androkites,* infra, para 18 and 22.

Further, *Lyons v. Baptist School of Christian Training,* 2002 ME 137, ¶ 15, 804 A.2d 364, 369, recognized that recreational use "is consistent with, and in no way diminishes, the rights of the owner of the land" and

leaves the claimant with the burden to show that the recreational use was without the implied permission of the owner, demonstrates the claimant intended to take the land for herself, and sufficiently put the owner on notice that their property rights were in jeopardy. *Id.* ¶ 19.

Conveniently, the Superior Court completely avoided analysis of the presumption of permission in public use cases and mixed public-private use cases. Appellant argued below that where private use is combined with public use and there is no private act indicating the assertion of an exclusive individual right private prescription does not lie. Burbank Defendants' Second MRCP 50(d) Motion for Judgment as a Matter of Law, May 18, 2014, p. 7, para 2. Citing *Simmons v Perkins,* 118 P.2d 740, 744 (Idaho, 1941). Also, "When 'Comprehensive' Prescriptive Easements Overlap Adverse Possession: Shifting Theories of 'Use' and 'Possession', Boston College Env. Affairs Law Rev., Vol. 33, Issue 1, Art. 5, p 191 (2006), attached to the Motion in full. A. 56.

If the court's judgment is applied in other cases, Maine's presumption of permission and the statutory liability protections in 14 M.R.S. § 159-A for example would encourage property owners to permit recreational uses on their properties, at which point, *absent application of the presumption,* mixed public-private parties and private parties

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alone could simply point to that recreational use to prevail in a claim for a prescriptive easement.

Accordingly, malice and conversion claims cannot lie, being estopped for reasons of factual insufficiency and public policy (Maine Shoreland Zoning Act). Conversion against whom? The public? One plaintiff? All? In the face of willful unpermitted use? A right in land does not arise until it is proved. Plaintiffs have yet to make that case. Conversely, plaintiff acts of unpermitted use, including unpermitted construction, sound in trespass, for which plaintiff removal of structures is required:

> A trespass maybe committed by the continued presence on land of a structure... which the actor has tortiously placed there, whether or not the actor has the ability to remove it. A trespass may be committed by the continued presence on the land of a structure...which the actor's predecessor in legal interest therein has tortuously placed there, if the actor, having acquired his legal interest in the thing with knowledge of such tortious conduct or having thereafter learned of it, fails to remove the thing. *Restatement, Second, Torts, Sec 161.*

By this definition, considering the commands of Northport and Maine under the 1971 Shoreland Zoning Act, Phyllis Burbank, plaintiffs and current Burbank lot joint tenants had clear duties to remove illegal stairs else be accountable to harms against Northport and Maine. Conversion and trespass judgments here are without legal foundation. The attempt by plaintiff Gerrity to 'cover' these claims by false sworn testimony of NOV withdrawal was soundly impeached and defeated his own witness, Northport CEO John Larson, who testified unequivocally that Northport did not withdraw the NOV, and never suggested that it

would to anyone. A. 57.

2. The partition judgment must be vacated for failure of court subject matter jurisdiction, and failure to acknowledge Phyllis Burbank's testamentary intentions precluding partition.

Appellant is the natural grandson of Phyllis Burbank. His rights in the Burbank lot are no more or less than co-joint tenants. Appellant has two natural children who are lineal descendants of Phyllis Burbank, the children's great grandmother, who knew the children well and spent considerable time in happy weeks with them at her Northport summer property, and at her nearby home in Belfast, Maine to their ages of seven (7) and four (4), respectively, when Phyllis died. Given Phyllis's undisputed love for all of her natural family, and the nature of her gift of her Northport property combined with her lineal descendants' interests in that property "in perpetuity" created by Phyllis, with the assistance of her Belfast, Maine attorney, Paul Hazard, when Phyllis executed her testamentary estate, naming her great grandchildren specifically therein beneficiaries (class gift, Last Will and Testamentary Trust of Phyllis Burbank, *infra*; Hazard letter, *infra*), on the same day, at the same time as her real estate gift by warranty deed to her family, in Maine it must be concluded as a matter of law that Phyllis intended to create great grandchild and continued multi-generational future interests in her gifted real estate:

> Future interests: Interests in land or other things in which the privilege of possession or of enjoyment is future and not present. An interest that will come

into being at some future point in time. Black's Law Dictionary, Abridged 5th Ed., West Publishing, 1983, p. 345.

The Maine standard for judging what a testatrix intends in the instant case was settled in *New England Trust v. Sanger*:

> In accordance with well established principles we seek the intention of the testator at the time of his execution of the will. We look *first* to the whole instrument.' In case of doubt *the intention is to be ascertained in the light of the existing conditions, which may be supposed to have been in testator's mind.*' (my emphases). *New England Trust Co. v. Sanger (*1955) 151 Me. 295, 302, 118 A.2d 760, 764.

It is undisputed from the record that the existing testamentary conditions which may be supposed to have been in Phyllis Burbank's mind, and were in her mind in fact, included transfers of her Northport real estate to her great grandchildren, including appellants' children:

> Upon the death of my last surviving child and grandchild, or upon the sale of the Northport cottage to a person or persons *not my lineal descendants*, the Trust shall terminate, and my trustee shall pay over any of my enumerated children or grandchildren then surviving, or if none of them are surviving, *to my great grandchildren* then living in equal shares. Phyllis Burbank's Last Will and Testament, Blake and Hazard, Attorneys, 81 High Street, Belfast, Maine, executed October 12, 1993, p. 2, para 1, A. 5-10.

and any future generations arising from them, 'in perpetuity':

> On October 12, 1993 Phyllis took the unusual step of deeding the cottage to all of you as tenants in common (actually joint tenants) her interest in the cottage. This was obviously done to assure that the cottage remain in the Burbank family in perpetuity. Attorney Paul Hazard March 16, 2000 letter to trust beneficiaries, *infra*. A. 1-3.

As appellant has exhaustively argued below, the *only* legal inference that may be reasonably taken from the record facts is that Phyllis as a matter of law intended to benefit the great grand children in the same

scheme that she benefitted her children and grand children, but was advised not to do so for fear of offending the rule against perpetuities. From the Hazard letter:

> She (Phyllis) specifically allocated her telephone stock to fund the trust because that stock for many years had served her well and been very stable and consistently produced good dividends. She believed that these consistent dividends would maintain the cottage *indefinitely (my emphasis)*...the trust corpus has grown from approximately $130,000 at the time of Phyllis's death to approximately $240,000 as of December, 1999. Hazard letter, p. 3, A. 1-3.

For this and other equitable reasons appellant moved below for partition dismissal, denied May 11, 2015, and then for bifurcated hearing of partition issues. *Burbank Defendants' MRCP 50(d) Second Motion for Judgment As a Matter of Law*, May 18, 2015, pp 9-10, A. 58-68. The motion was denied.

Well argued below, claimants lack standing to bring their case because they filed under the wrong statute. Had they filed under the statute required, 33 MRSA Secs. 153-155, they would have been compelled to notice the trial court of Phyllis Burbank's entire testamentary intentions to benefit appellant's two children in Phyllis's deeded real estate, as well as the supporting trust fund. Claimants cannot avoid Secs. 153-155 reporting requirements with a pretext that Sec. 6501's equity powers vested the trial court with jurisdiction on the facts of this case. Neither can the trial court avoid Secs. 153-155 by erroneously holding that claimants brought their claims under Sec. 6051 when they clearly filed their May 29, 2014 cross-claim (wrongly

captioned counterclaim) citing jurisdiction under 14 MRSA Sec. 6501:

> 4. Title 14 MRSA Sec 6501 provides that persons seized of real estate in fee simple as tenants in common or joint tenants may be compelled to divide same. Counterclaim for Partition, May 29, 2014, Jenny Burch, Bar No. 4495, PO Box, 662, Bath, Maine 04530-0662, 207.442.0000. A. 30-36.

Appellant cited *Libby v Lorraine*, 430 A.2d 37, 39 (Me. 1981) as dispositive on the jurisdiction issue, since *Libby* clearly held courts lack jurisdiction on claims for sales where the statute only permits physical real estate partition. Appellant argued exhaustively that Phyllis Burbank's estate plan also evinced her intent that no right of partition in her real estate should flow from her explicit and implied estate intentions, which the property, wills and trusts and future interests Restatements support. These were documented in total to the trial court thus:

> When the creator of undivided interests including a future interest, by the terms of the creating instrument, has manifested an intent that the owner of such future interest, for a reasonable period of time and with regard to the other persons having interests limited by the creating instrument, *shall not have the power to compel partition, or shall not have a liability to be subjected to partition, then no power of liability inconsistent with such manifested intent exists. Restatement of the Law of Property, Volume II, Future Interests, Partition & Judicial Sales, Chapt. 11, Sec. 173, Exclusion of Partition by Intent Manifested in the Instrument Creating Interests, pp. 669-70... Comment*...(b) What constitutes sufficient manifestation of intent? The manifestation of intent, requisite for the operation of the rule stated in this Section can consist in a direction for the division of the subject matter of the disposition *at the end of prior interests and not before* (emphasis added); *or in the creation of a prior trust with the normal execution of which a partition would interfere*...This enumeration is not all inclusive, but consists of commonly occurring modes of manifesting the intent to include partition. **Any language** (emphasis added) which, construed **in the light of the circumstances of the formulation of the disposition, indicates an intent to exclude partition, is sufficient under the rule stated here** (my emphases) Id.

Appellant argued that Phyllis Burbank's creation of her prior trust, with the normal execution of which a partition would interfere, plainly manifested her intention to exclude partition rights in her real estate. *Burbank Defendants' MRCP 50(d) Second Motion for Judgment, infra*, p. 9, A. 58-68.

Accordingly appellant performed a diligent legislative history of 33 MRSA Sec. 153, as the only partition statute that may apply to the case. The law dates to 1821, from Massachusetts probate statutes, from which Maine took its probate statutes after 1820 statehood. *Chapter 51, 'An Act to Regulate the Jurisdiction and Proceedings of the Courts of Probate'*. For it, the Maine legislature expressed:

> when any minor...or any person who shall be out of the state, are interested either in the estate of such deceased person, or in the estate with which it so lies in common, some suitable person shall be appointed for such absent persons by the Judge before such division...had such due notice of such partition. *Public Laws of Maine, Vol.1, 1821, Part 1, Chapt. LI(5), p 191, Sec. 33, pp.208-09...*

> Be it further enacted, that all such partitions of real estate made, accepted and recorded as aforesaid, shall be valid in law...**unless** upon appeal of any party aggrieved thereby, the same should be reversed or altered by the Supreme Court of Probate; but **no partition** shall be ordered by <u>any</u> judge of Probate under this act when the proportions of the heirs or devisees, or any of them, shall be disputable **by the tenor of the will** in the case, **or any other matter in writing from which it may appear that the propositions are uncertain and ought in the opinion of the judge first to be legally ascertained.** Sec. 35, p. 209, Id.

Regarding the original 1821 Maine statute creating titles to property, conveyances of them by deed, enacted as Title 7, Chapter 75, Trusts, Section 3, the legislature said:

> When a contingent remainder, executory devisee, or estate in expectancy is so

limited to a person that it will in case of his death before the happening of such a contingency, descend in fee simple to his heirs, he may before it happens, convey or devise it subject to the contingency. *Sec. 3, Id...*

There can be no trust concerning lands, except trusts arising or resulting by implication, of law, unless created or declared by some writing signed by a party *or his attorney* (my emphasis). *Sec. 14, Id*

By 1841, the legislature intended the following partition scheme for distributing real and personal estates, and land, held on mortgage or taken on execution:

Every partition...on application of an heir, shall be made amongst all the owners of the estate, that descended from the ancestor, and which any party interested, whether the applicant or others, shall require to have included in the partition, and when on application of a devisee, it shall be made of all the estate held by any applicant, joint or in common with others holding under the testator which he or any other devisee shall require to have included, and the same rule shall apply, when the application is made by any person holding under an heir or devisee. *Revised Statutes of Maine, 1841, Chapt. 108 of The Modes of Distributing Real Estate, Sec 11...*

If it shall appear to the court that any minor or insane person is interested in the premises, having no guardian within the state, the court shall assign him a guardian for the suit, to appear for him and to defend his interests therein, as guardians are assigned in actions of common law; and if **any one resides without the state,** having no agent therein, the judge shall appoint an agent for such owner for the same purpose (my emphasis). *Sec. 13, id.*

From the earliest legislative foundations of Sec. 33 it is clear Maine intends an inclusive and protective approach toward minors, the disabled and out of state parties subjected to Maine real estate partition claims. There are no exemptions excluding parties holding future interests. Where great grandchildren, and even later generations are contemplated by Phyllis Burbank's last will and testament, it would be unlawful for any Maine court to allow partition without those

interests being considered and represented during any process ordered. Attorney Hazard's March 16, 2000 letter to Phyllis Burbank's heirs describing her real estate gift and attendant trust intentions and other evidence of Phyllis's intentions must be considered through the historical lens of Sec. 33 to be lawfully valid and enforceable in Maine against appellant, any other heir or any future interest (appellant's two out of state children) of which Phyllis took account in her estate Northport property estate plan. The trial court must be vacated accordingly.

Examination of 18-A MRSA Sec. 2-603 will and trust interpretation standards support appellant's views. Sec. 2-603 rules of construction and intention require that testatrix intentions expressed her will controls the legal effect of her dispositions. The rules of construction expressed sections of Sec. 2-603 apply unless a will indicates contrary intent. Intent of the testatrix from her will as a whole guides interpretation. *Estate of Champlin*, 684 A.2d 798 (1996). In the final analysis, it is the intention of the of testatrix which when clearly manifest must prevail over technical construction rules. *In Re Thompson's Estate*, 414 A.2d 881 (1980). In the case of doubt or ambiguity of testatrix intent, evidence outside the will may be used to assist in finding the probable intention. *Bar Harbor Banking & Trust Co. v. Preachers' Aid Society of Methodist Church, Me.*, 244 A.2d 558, 562 (1968).

However conclusive legal bases for claimants to lack partition standing and consequently loss of court subject matter jurisdiction moots all of these arguments. Record facts of Phyllis's last will and testament executed on the same day at the same time of her real estate grant(s) evince an unequivocal intent that she did not grant fee simple title in the real estate, precluding Maine partition under any theory, as fee simple title is prerequisite., and lack commands findings of no claimant standing, and attendant lack of court subject matter jurisdiction.

State v. Rand, 366 A.2d 183 (Me. 1976), is dispositive. A key issue was whether testatrix granted fee simple title in her land gifted to Portland for a park. The court held it must answer whether testatrix conveyance created a charitable trust or was a conditional gift establishing in the City a fee simple determinable. It further held the review standard was, 'as we have many times observed', to seek out the intention of the particular donor as objectively manifested in all the circumstances legally admissible for consideration and uniquely relevant to the transaction under scrutiny. It concluded that the objective import of testatrix conveyance was the creation of a charitable trust.

The holding adverted to countless decisions finding trusts in the absence of express language of trust. See: e.g., Neely v. Hoskins, 24 A. 882, 84 Me. 386 (Me. 1892), *Inhabitants of York v. Stewart*, 110 Me. 523,

87 A. 372 (1913). It found the face of testatrix deed had two purposes in mind when she gave property to the City. In light of her dual purpose, and her express wish that her objects continue 'forever', the court held it more consonant with testatrix true intent that her conveyance be held to create a charitable trust rather than to be a gift to the City of Portland of a fee simple determinable:

> By a determinable fee Miriam Winslow's goals would be achieved only so long as the City would choose to comply with the terms of the deed. Upon breach of condition, there would be no mechanism whereby the benefit to the neighborhood, and the memorial to James and Ella Winslow, could be ordered continued; instead, the property would pass to Miss Winslow's heirs, however remote and unknown to her they might be. Through the establishment of a charitable trust, however, the City would be placed under affirmative fiduciary obligation to carry out Miriam Winslow's purposes in perpetuity. Upon breach, the City could be ordered to comply; if for some reason it could not continue as trustee the appropriate Court could replace it with another. Finally, were some supervening event to frustrate the original scheme, as here, the doctrine of 'cy pres' might be available to save Miss Winslow's plan. *Rand*, at 196.

The Law Court has an analogous duty to determine Phyllis Burbank's true dispositional and testamentary intentions of her grant. She plainly had goals of gifting and financing her real estate as a place of family respite and legacy 'in perpetuity'. These goals are destroyed by partition. Property and Future Interest Restatements do not support partition on instant facts of creation of a prior trust with the normal execution of which a partition would interfere. *Rand* compels a judgment that Phyllis's express goals and resources to meet them did not create fee title in her real estate, making it capable of partition. Rather Phyllis's acts evinced intent to gift her land in trust, and not in fee. The

same logic holds that grantees have no title basis to grant easement in Phyllis's land since this too would frustrate purposes evident from her intentions, acts and resources committed to benefit her lineal descendants alone.

Last, there is no just reason on record that Phyllis's heirs cannot continue to enjoy the property as she intended. Even the trial court noted in its judgment that the 'time share' type arrangement that the families have worked out for property use over eighteen years since Phyllis's death have worked well.

3. Maine constitution due process and equal protection standards and the 5th and 14th Amendments preclude taking appellant's land by easement without just compensation.

When a court rules to take property, the 5th Amendment applies, making the judicial act unconstitutional unless the owner is properly compensated:

> The Takings Clause – 'nor shall private property be taken for public use, without just compensation'... applies to other state actions...
>
> The Takings Clause...is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the government actor...There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government...**Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary**...the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch of government is the instrument of the taking...**If a legislature or a court declares that what was once an established right of property no longer exists, it has taken that property...** *Stop the Beach*

Renourishment Inc. v. Florida Department of Environmental Protection, 560 US 702, 709-12 (2010).

As Supreme Court has begun to create constitutional tests for determining when owner's lands are unconstitutionally taken without just compensation for public purposes, scholars have concluded that the high court's standards do not exempt judicial takings for private purposes as well:

> The *Stop the Beach* plurality suggests that the judiciary should be treated no differently than from the other branches of government. Legislative actions that result in the reassignment of property from one private party to another are subject to the Takings Clause commands. Thus to the extent that the plurality's broad vision of judicial takings doctrine is based on treatment of the branches as equivalent, the plurality standard may well be applicable to new rules announced in adjudications and disputes between private parties. "The New Judicial Takings Construct," 120 Yale Law Journal 1210-11, 18 FEB 2011, Sec.III(A), para. 4.

Though no court has articulated private takings tests, the case at the bar contains considerable facts, legal principles and legal precedent arguing against judicial takings held lawful by the trial court. Appellant contends that his case is exactly the kind contemplated for review and reversal by the Supreme Court, and accordingly by Maine's Law court as well. The trial judgment does not account for the most basic standards of due process and equal protection found and routinely upheld by both high courts. Facts were meticulously avoided, major principles of separation of powers ignored, major environmental public policy and trust interests ranked below predatory private seaside property

developer and 'entitled' home owner interests, and misrepresentations of fact tolerated at many phases of the court process. These are not constitutional priorities underpinning lawful taking of private property for either public or private purposes, let alone purposes for which no compensation was received. The Law Court would be wise to prevent Maine from being the state where the Supreme Court found sufficient cause to expand its anti-judicial takings doctrines for national application. Surely the people of Maine demand and deserve better. Appellant knows that all of his family and others with whom he was raised, educated and employed there do.

Conclusion

When it comes to recreational public or private use of private property, fences do not make good neighbors, especially when Maine traditions and the presumptions of permission encourage landowners to open their lands to public and private recreational use. The court below simply ignored the presumptions of public use, mixed public and private use, implied permission, neighborly accommodation, facts that contradict the rationale prescriptive adversity, environmental mandates of the 1971 Maine Shoreland Zoning Act; municipal rights and duties under the Act; plaintiff misrepresentations and inadequacies of fact; party duties to know and obey these all lawful public and private

property laws. The court 'covered' this approach with unsupportable holdings of malice, trespass and punitive damages, where plaintiff innocently reported otherwise unaddressed shoreland zoning violations on his land, as Maine DEP policy encourages.

It is the duty of this Court to seek unbiased justice, to uphold legislative priorities of public trust and environmental security, to avoid unconstitutional uncompensated takings of private property, and to implement the wills, trusts and property grants of Maine's beloved grandparents in manners accounting for all of their intentions, resources and rights in their actions of estate planning to fulfill their goals of creating legacy property rights in their families 'in perpetuity'. For these reasons appellant respectfully requests this Court to side with Maine tradition and values and vacate the trial court's decision.

Date: December 29, 2015

Harold Burbank, Bar # 6813
84 North Mountain Road
Canton, CT 06019
Ph. 860-693-2687
Pro Se Defendant Appellant

Certificate of Service

I hereby certify that I hand delivered two copies of the foregoing brief to the offices of Adam Shub, One City Center, Portland, Maine and Jenny Burch, 872 Washington Street, Bath, Maine on December 30, 2015.

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Date: January 10, 2016 _____

Harold Burbank, Bar # 6813
84 North Mountain Road
Canton, CT 06019
Ph. 860-693-2687
Pro Se Defendant-Appellant

Certificate of Service

I hereby certify that on January 10, 2016 I US Mailed two copies of the foregoing brief to Adam Shub, Esq., PO Box 9546, Portland, ME 04112-9546, and Jenny Burch, Esq., PO Box 662, Bath, ME 04530.

_____

APPENDIX M

2749

State of Maine
Cumberland SS

Supreme Judicial Court
Sitting as the Law Court
Docket Number PEN-15-440

Frederick B. Lincoln, et al
Plaintiffs-Appellees

v.

Harold Burbank, II et al
Defendant-Appellant

Defendant-Appellant's
Motion for Reconsideration

Pursuant to MRAP 14(b), Defendant-Appellant Harold Burbank, II moves for Reconsideration of the judgment of the Law Court entered August 30, 2016 for the following reasons:

Standard of Review

A Motion for Reconsideration 'shall state with particularity the points of law or fact that the moving party asserts the Court has overlooked or misapprehended and shall contain such argument in support of the motion...' MRAP 14(b)(1).

Argument

I. The Stairs Were Lawfully Removed Pursuant to Northport's NOV Because Northport Did Not Issue a NOV Hold

The Law Court's August 30, 2016 decision states at page 18,

'...although the Town of Northport never formally withdrew the notice of violation requiring removal of a set of stairs on the

Burbank property, Burbank was aware that, at the direction of the DEP, the enforcement action had been put on hold pending resolution of issues surrounding the age and potentially grandfathered status of the stairs...'. This view is not supported by record facts or the law.

On August 8, 2012, DEP Attorney Deirdre Schneider issued a letter from her office to Northport Code Enforcement Officers John Larson and Toupie Rooney. **Exhibit A**, attached. The letter was admitted into the trial court record on May 13, 2015 as 'Defendant's 27, Letter'. May 13, 2015 Trial Transcript, Volume III of III, p. 18, line 17.

The letter pertinently states:

> After the NOV was issued, objections were raised by neighbors with support from other owners in interest on the 'Burbank' property that the NOV was in error due to the fact that both sets of stairs predated shoreland zoning...The DEP would recommend giving those with objections an additional few weeks to provide evidence to negate the NOV...However, even if the Town finds there is sufficient evidence to support that two sets of stairs are legally in existence, it would appear that the rebuilt (newer in time) set would have required some form of permitting...While DEP provides support...the municipality is the primary enforcer of these ordinances...the final resolution of this matter will be left to the municipality to decide in their sound enforcement discretion...(my emphasis).

The letter does not state that DEP put anyone on notice of a hold, or had the intention or authority to put anyone on notice of a hold, or that DEP 'directed' the Burbank NOV to be 'on hold'. The letter specifically

says that Northport, not DEP, is the primary investigator and enforcer of the NOV matters, which authority shall be exercised in Northport's sound discretion. Discretion includes a right to order a NOV 'hold' if in the town's judgment a hold is justified, and a right not to order a 'hold' if the hold is not justified.

There is no evidence in the record that Northport ordered a hold, because Northport clearly did not order one. Thus the Law Court misapprehended that 'Burbank was aware that, at the direction of DEP, the enforcement action had been put on hold pending resolution of issues surrounding the age and potentially grandfathered status of the stairs.'

Unwavering support for appellant's 'no hold' contention exists in the May, 2015 trial transcripts, especially Attorney Schneider's testimony about her August 8, 2012 letter to Northport zoning officers Larson and Rooney *infra*:

> Burbank: Do you recall any conversations that you had with the Northport Zoning Enforcement staff about that particular letter...
>
> Schneider: I do believe that I spoke with Mr. Larson about it...I'm a little fuzzy, but I know there was some subsequent communication. And at one point – I never knew if what they had - how much evidence they had (of NOV rebuttal from neighbors and others) – but I

think that at one point I was told that they were going forth with the – violation as – as they had planned, and they were not revoking anything (my emphasis)...So my assumption was that they were either not satisfied by the evidence or there wasn't evidence enough, but we never got into detail or anything at that point. **Exhibit B**, Trial Transcript Vol. III of III, May 13, 2015, p. 17, lines 11–24, attached.

Burbank: Had the Town of Northport contacted you any time after August 8 or in the month of August 2012 to state...their final position on the NOV...

Schneider: ...I don't think they contacted me after the letter. **Exhibit C,** Trial Transcript, Vol. III of III, p. 19, lines 8-13, attached.

Other May 13, 2015 trial testimony DEP Attorney Schneider gave concerning August, 2012 communications between Northport, Burbank and Schneider supporting a 'no hold' status of the NOV:

Schneider: ....we're talking about the non-conformance piece?

Burbank: Yes

Schneider: Ok yes. That was August 10.

Burbank: Do you recall having any conversations with code enforcement staff at Northport about the subject matter of this email?

Schneider: Honestly, I don't. I didn't have a lot of contact with them...We had the site visit...I think I had one call with Mr. Larson. Some maybe potential emails and then the letter, so I don't recall if I talked to them specifically about this...I'm sure it would come up in conversation if we're talking about how to view the situation. But I don't remember specifically.

Burbank: Right. Did he ever contact you about his authority to either withdraw or suspend the NOV?

Schneider: No. He didn't...

Burbank: Is there any State of Maine regulation that would require a town to contact DEP if they should choose to withdraw or suspend an NOV for Shoreland Zoning violation?

Schneider: ...the DEP has enforcement discretion over a town if they're not doing their job right...but they are still not required to contact us.

Burbank: In your judgment, had there been any improper activity by the town of Northport up to this point in time?

Schneider: No. **Exhibit D**, Transcript, Vol. III of III, May 13, 2015, p. 27, attached.

Nor does the sworn trial testimony of Northport Code Enforcement Officer (CEO) John Larson support the Law Court's conclusion that 'at the direction of the DEP, the enforcement action had been put on hold...' :

Shub: So, this is Mr. Burbank has expressed to you (an) understanding that things would be put on hold?

CEO Larson: It appears that way, **but I was not aware that things were put on hold** (my emphasis(. **Exhibit E**, Trial Transcript, May 11, 2015, Vol. I of III, p. 184, attached.

Larson was consistently clear in the case that he and Northport have the authority to put an NOV on hold, and explicitly acknowledged at trial that he and Northport had not done so. Plainly Larson's testimony shows that he did not accept that there was a 'hold' lawfully in place

from the town or DEP, when appellant made multiple contacts with Larson before appellant complied with the NOV, nor after compliance.

Larson's testimony is supported by appellant's testimony:

> Rogers (appellant's attorney): Did you take any further steps to prior to the removal of the stairs to find out if the NOV was still in effect?
>
> Burbank: I contacted the (CEO) office and asked them if they were going to make any change in the notice I had received (NOV).
>
> Rogers: And as a result of that contact did you learn anything that would have stopped you from taking action to remove the stairs?
>
> Burbank: No, the opposite actually. Trial Transcript, Vol. III of III, May 13, 2015, pp. 58-9.

Appellant contends therefore that legal conclusions based on misapprehensions of a clear, lawful NOV 'hold' are without any factual foundation in the record, since the foundation cannot be shown in the minds of Northport and DEP agents tasked by Maine law with issuing holds, or in their records.

All lawful orders concerning property rights, such as a 'hold' from state and town zoning officers, are subject to constitutional procedural due process safeguards. The US Supreme Court has been particularly active in this area, and requires that procedural laws for property be applied evenhandedly, so individuals are not subjected to the arbitrary

exercise of government power. *Marchant v. Pennsylvania R.R.*, 153 U.S. 380 (1894). The procedures "...are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976).

In the property context, due process requires the element of 'notice', which the US Supreme Court has defined as:

> (an) elementary and fundamental requirement...in any proceeding which is to be accorded finality...reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950).

The notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) Ordinarily, service of the notice must be reasonably structured to assure that the person to whom it is directed receives it. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

A 'hold' contemplated by the Law Court in this case affected 'resolution (my emphasis) of issues surrounding the age and

potentially grandfathered status of the stairs and the neighbors' claim to rights in the stairs.' Law Court Decision, p. 18. 'Resolution' sounds in finality. A fair reading of the *Mullane v. Central Hanover Trust* notice standard, applied to the instant facts as the Law Court sees them, demands that all parties interested in the instant case – neighbors with claims, and certainly all sixteen Burbank joint tenants subject to Northport's NOV – be notified by either the town or the state of any hold, or any government administration of the NOV affecting property rights claimed in disputed Burbank land. *Mullane* held that these steps are required under the due process clause so claimants can know what government intends to do regarding claimant property, and what claimants can do to prevent deprivation of their interests. When a hold exists, service of notice of the hold must be structured to assure that claimants to whom the notice is directed receive it.

Mullane, a case of due process notice adequacy standards for a trust fund that petitioned under New York law for a judicial settlement of accounts, analyzed why due process adequate notice standards are very high in property cases, especially for out of state parties (which appellant and two co-defendants were at trial) even

though in-state notice by publication was held adequate for in- state parties:

> Quite different from the question of a state's power to discharge trustees is that of the opportunity it must give beneficiaries to contest. Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that, at a minimum, they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case...
>
> In two ways, this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process. *Mullane*, p. 313.

Here the *Mullane* Court was not addressing parties analogous to Appellant, but parties like appellant's co-defendants, who were not notified in any way of a NOV hold, and whose property interests in any town or state sponsored NOV hold process might have been, without their knowledge, subject to diminution in a town or state proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. If such a proceeding had existed and gone forward, co-defendants may have lost property rights. Notice to them, and to appellant, of any NOV hold therefore must meet strict due process standards because:

"[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean,* 234 U. S. 385, 234 U. S. 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. *Mullane,* p. 314.

In appellant's case there was no NOV hold ordered, and no notice of a hold made to any property rights claimant – not to the appellant, not to his co-defendants, not to the other Burbank joint tenants, and not to the plaintiffs (neighbors). Had all Burbank defendants received such notice, at least one (ie appellant) or some of them would have sought proper local or state administrative process to be heard to prevent deprivation of their property interests.

Cementing appellant's assertion that Northport did not consider or issue notice of a hold, CEO Larson said at trial:

Shub: Were you aware this (August 8) letter was coming (from DEP to Northport, but not Burbank)?

Larson: No

Shub:...based on this letter, what was your understanding of the situation with the stairs as of August 8th?

Larson: I think it was Deirdre's position that probably we (Northport) could hold off on this.

Shub: After you received this letter on August 8th, did you have any communication with Mr. Burbank?

Larson: ***I don't believe so*** (my emphasis). **Exhibit D**, Trial

Transcript, May 11, 2012, Vol. I of III, p. 184, lines 15-24, attached.

The trial record is plain that any communications from DEP to Northport, or between Northport and appellant, did not 'direct a hold', as the Law Court misapprehends. Appellant is not an addressee of the August 8 letter to Northport, nor any DEP document of a hold. Nor are any Burbank joint tenants or plaintiffs addressees of such documents. CEO Larson issued neither a written nor verbal notice of hold. From the trial transcript:

> Shub: It says, 'So I (Burbank) think I still must comply by 8-12-12. Please advise how and why this is not true if the town now thinks I need not comply'. **Exhibit E**, re Burbank 8-1-12 email to Larson, Transcript, Vol. I of III, p. 182, line 8, attached.

The only fair conclusion to draw from this early August 2001 email from appellant to Northport is that contrary to misapprehensions that appellant 'used' the government for his 'agenda' (Law Court Decision, pp. 7, 18) he consistently without legal duty tried to understand and comply with Maine's property NOV administration due process and equal protection prosecution standards by remaining in contact with Northport for new NOV developments. Accordingly there is no statement in the trial transcript, and no document in the record, showing that appellant received any answer to his August 1,

2012 email to Northport for its view of a 'hold' for the reason stated in this argument. None was issued.

The US Supreme Court has never held that due process requires property owners to ask the state for notice of any changes the state makes in its (NOV) orders before the owner is burdened at law. He is presumptively burdened when the lawful order is made, as well as when any lawful change is made, barring a contrary order. There is no US Supreme Court case holding that due process requires owners to contact the state when it seeks to delay NOV enforcement or to further investigate the NOV. No decision holds that the burden of being notified of a NOV delay or investigation rests with the property owner, or that owners have a due process duty to ask the state for a 'hold' order, else be held liable for harms flowing from a duty to seek NOV notices. The duties of NOV notification rest with the state alone. The substance, intent, and receipt of that notice must be clear and unmistakable:

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness, and hence the constitutional validity of, any chosen method may be defended on the ground that it is, in itself, reasonably certain to inform those affected...*Mullane*, p. 315.

Contrary to misapprehensions that appellant avoided necessary

communications with parties or pre-texturally 'used' government for his agenda (Law Court decision, p.7), appellant engaged the town and state to do what they are mandated by the legislature to do – protect his property in one the Maine's most regulated zones - from unlawful environmental encroachments. Appellant's case evinced a very long, even catastrophic, encroachment history of illegal vegetation cutting (Law Court decision, p. 6, and appellant trial testimony, Appendix to Briefs, p. 119) by neighbors and others. It also evinced a decades long year history of encroaching 'neighbor stairs' without building permits. Trial testimony of David Burbank, Appendix to Briefs, p. 149. The trial record, especially DEP Attorney Schneider's sworn testimony, is clear that DEP and Northport were called when appellant discovered new and continuing illegal vegetation removal along both stairways on his land to the shore. Law Court decision, p. 6. It is equally clear from the trial record that some encroachments were supported by some Burbank joint tenants (Law Court decision, p. 6, para 11), exposing all owners to risks of state imposed fines, up to $2500/day. CEO Larson, Trial Transcript, Vol. I of III, p. 195.

Confusion and consequences in the case might have been avoided if

the town or state had offered recourse to a procedural hearing on NOV matters raised after the NOV issued, or after the town and state discussed a NOV hold; or if appellant had been adequately noticed by the town or state of his rights and duties regarding a hold. The US Supreme Court has consistently held in the property context that due process requires some form of hearing before an individual is finally deprived of a property [or liberty] interest. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). This right is a "...basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment (my emphasis) ..."*Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972). Thus, the notice of hearing and the opportunity to be heard "...must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Appellant and others testified at trial to many examples and in one instance a devastating event of arbitrary environmental encroachment on appellant's property, compromising its use and possession. Transcript,

Vol. III of III, May 13, 2015, p. 37. The US Supreme Court has also found that due process includes the right to an impartial tribunal. Just as in criminal and quasi-criminal cases, an impartial decision maker is an essential right in civil proceedings as well. Goldberg v. Kelly, 397 U.S. 254, 271 (1970). "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law... At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980). In appellant's case, no tribunal, impartial or otherwise, was offered to appellant by DEP or Northport to consider the issue of a 'hold'.

In appellant's case, the due process notice sufficiency analysis above would apply only where a NOV hold was in fact issued by Northport or DEP. The analysis is provided only to show due process steps the town and state would be required to follow if they had ordered a hold, and support appellant's view that since these steps are not in the case

record, Northport and DEP did not intend and did not in fact issue a hold. The Law Court's conclusion that the NOV was 'put on hold pending resolution of issues surrounding the age and potentially grandfathered status of the stairs and the neighbors' claim to rights in the stairs' (Law Court decision, p. 18), is not supported by the record, thus leaving the NOV in full force, demanding Burbank owners to comply by August 13, 2012, or face sanctions. The record shows that appellant contacted Northport by email on August 1, 2012 to check on the NOV status. There is no record of response. He therefore had no reason to think that the NOV was a 'pretense' not in effect when he complied on September 11, 2012 by removing stairs.

II. Appellant Is Not Liable for Conversion, Damages, and Punitive Damages Awarded At Trial

The Law Court has held that necessary elements for a conversion claim are:

> (1) a showing that the person claiming that his property was converted has a property interest in the property; (2) that he had the right to possession at the time of the alleged conversion; and (3) that the party with the right to possession made a demand for its return that was denied by the holder. *Leighton v. Fleet Bank of Me.*, 634 A.2d 453, 457 (Me.1993).

The trial court concluded that when the appellant acted to remove stairs on his property he was not trespassing (Law Court decision, p

10). The Law Court concluded that 'at the direction of DEP, the (NOV) enforcement action had been put on hold pending resolution of issues surrounding the age and potentially grandfathered status of the stairs and the Neighbors' claims to rights in the stairs'. Law Court decision, p. 18.

Appellant removed the stairs on September 11, 2012, pursuant to Northport's NOV. Larson Testimony, Transcript, Vol. I of III, May 11, 2015, p. 185. There are no facts in the record supporting a finding of conversion of stairs on or before September, 11, 2012, but only allegations of the elements of conversion against appellant by plaintiffs. Neither the trial court nor the Law Court concluded that any neighbors' property interest in Burbank stairs was determined by September 11, 2012, that appellant had no right of possession in the stairs that date, or that any neighbor made a demand to appellant not to remove the stairs on or before that date. The record shows that plaintiff Gerrity met with DEP Attorney Schneider (Transcript, Vol. III of III, May 13, 2015, p. 18) to question whether the stairs were exempt from DEP and Northport regulations due to issues of age, potentially grandfathered status and neighbors' claims to rights in the stairs, but there is no evidence in the

record showing that neighbors expressed these concerns directly to appellant.

Appellant therefore contends that a conversion judgment is misapprehended in the case because on the day the stairs were removed neighbors lacked adequate proof of the required tortious conversion elements: 1) proof of property interest in the stairs 2) right to stairs possession at the time of the alleged conversion and 3) a demand of a return of property converted, denied by the appellant. In Maine a demand of return is required only if the holder took the property rightfully at the time of conversion. If circumstances show that a demand would be useless, it is not required. *General Motors Acceptance Corp. v. Anacone,* 160 Me. at 83, 197 A.2d at 524.

Appellant contends *infra* that he took the property by rightful demand of lawful Northport NOV authority, which at the least undermines the conversion element of neighbors' rightful stairs possession at the time of the alleged conversion. The record does not support that neighbors had proved any rights in the stairs by September 11, 2012, the day they were removed. At common law, authority of law, such as a NOV to remove stairs, is a complete defense

to conversion. Restatement (Second) of Torts Sec. 265.

The Law Court judged the NOV defense waived because appellant did not produce a developed argument on conversion and NOV law. The Law Court also held that it had not been provided guidance on this point before. Decision, p. 19. Appellant has been accused in this case by the Law Court of making frivolous and baseless claims. Appellant did not find any precedent on the issue to argue before the Court, other than the common law defense of lawful government order, and the facts of the Northport order. Appellant contends that in the circumstances due process, equal protection and the interests of justice support the basic common law defense of legal authority (NOV) as sufficiently pled in appellant's brief and at trial to overcome the waiver bar. Accordingly, conversion, and damages awarded to plaintiffs therefrom, should not lie.

III. The Court Has Misapprehended Bases for Sanctions

When the Law Court wrote its decision, it was not aware that on January 12, 2016 appellant had his first ever stroke while preparing his brief for resubmission, ordered by the Court on January 5, 2016 for January 15, 2016, because appellant allegedly had not followed MRAP 9(f), and had submitted timely, unaccepted twine bound briefs.

Appellant used twine to bind the originals because the amount of time required to write and self-publish the brief pressed him against the original filing deadline, which he complied with only by driving the briefs from Connecticut to the Law Court on the December, 2015 due date. In Maine, failure to file on time risks dismissal for non-prosecution.

Appellant contends that describing appellant as 'cavalier' in this appeal, preparations for which caused his first ever stroke, which his neurologist advised was not insignificant and a clear signal for a potentially fatal stroke (per doctor orders, appellant is now on a strict avoidance regimen), misapprehends appellant's attitude and medical condition for every phase of the appeal, and is a significant basis for the Law Court to reconsider its comments and holdings for sanctions. See **Exhibit F**, UCONN medical reports, attached.

MRAP 9(f) does not stipulate that briefs must be spiral bound, or bound by any one method. Having hand published (to save an indigent client money) a US Supreme Court brief in his career, hand cutting the paper to size, and under those rules, permissibly using brass fasteners and hockey tape on the binding to seal it (as many prisoners do since

they have no access to publishing machines or funds to publish otherwise) appellant did not think that the Law Court would, under Maine rules, reject his brief for lack of a spiral binding not clearly mandated by Maine rules.

Appellant's notice of rejection stipulated ten days to re-publish and re-send briefs to the Law Court. The notice was received on a weekend. Appellant could not call the clerk's office to determine whether he could simply re-publish with his signature copied into all of the replacements, or he had to re-publish with one original signature in at least one copy. In the interest of time he chose the former method first, since the order was to re-publish with 'no changes.' Appellant then decided an abundance of caution required publishing and sending a third set, with one copy showing an original signature, and remaining copies showing copies of that original signature. This again pushed appellant against a Court filing deadline, causing extreme anxiety, to where appellant went temporarily blind and had his first ever stroke during the completion of this work. The fact that appellant pushed through his emergency medical symptoms on January 12, 2016 to comply with the Court's January 15, 2016 filing deadline, before seeking

medical help on January 13, 2016, attests to appellant's respect for his case, his opponents and the Law Court. The rest of appellant's work in this physically and emotionally draining appeal was accordingly treated with some trepidation of new, severe health problems.

Other facts the Law Court misapprehend include that in summer, 1993, Phyllis Burbank, at age 93, called him to meet with her on her Northport property to describe her wishes for it. Trial Transcript, Vol. III of III, May 13, 2015, p. 60. Appellant is the only lawyer among her relatives and beneficiaries and she called him for that reason, not for his expertise in estates, trusts, wills, or trial practice. It was plainly, from an ethical view, a meeting of lawyer and client to whom appellant thereafter owed duties of trust, and vigorous representation at the bar as required. Being appellant's beloved grand-mother he made these duties a priority in his life, including in this case.

At trial appellant testified that the 'first moments of my life occurred on this property.' Transcript, Vol. III of III, May 15, 2015, p. 34. The property was a place of annual total family gathering hosted by appellant's grandparents. Ibid, p. 35. From infancy his children grew up summering on the property at his grandmother's annual

invitation. Ibid, p. 36. Appellant testified that he opposed partition since he thought the law of the case supported his opposition. Id, p. 60. He also testified that his grandmother did not want the property to go out of the family. Id.

From the case history and trial testimony the Law Court can infer that appellant is profoundly committed intellectually and emotionally to defend his grandmother's, his own, his co-defendants' (father Harold, Sr., brother David, sister Lori) and his children's family legacy interests in the case. The property is unique to all for its familial and environmental heritage. It will never be replaced for those appellant represented. Accordingly appellant's conduct in this case was an attempt to defend a family legacy from physical encroachment and partition; a duty of loyalty and love. He took no pay.

Appellant is over 59 years old and long retired from any regular work in the law (2003). He maintains a Maine law license out of sentiment, as Maine is his home state, and that license was his first. He is not formally educated in trial law or trial advocacy, as these courses were not required in law school or to take the Maine (or any) bar exam. He has never opened or worked for a Maine law practice, or appeared in

any Maine court to argue for private clients. He did work as a Maine assistant attorney general for child protection very briefly from 1989-90, appearing in about seven bench trials. He worked on the staff of the Connecticut attorney general for over twelve years, and was in court about every day assisting with an overwhelming child support magistrate docket, but worked in an administrative and not a trial attorney capacity. Magistrate hearings are extremely informal to get to the facts as quickly as possible. Appellant has appeared once before the Connecticut Court of Appeals. He has rarely appeared before the Connecticut Superior Court. He has never appeared before the Maine Supreme Judicial Court. He appeared in Maine Superior Court for the first time in the instant case, after holding a Maine law license for 26 years without incident or complaint.

Appellant conducted the instant case alone, with no attorney or staff support of any kind. His two opponents had at least some office staff support, and substantial staff in plaintiffs' case. His motion for trial bifurcation designed to lift some of this burden was denied. The Law Court decision notes the case history is extensive and reflects 125 filings by three sets of parties. Decision, p. 8.

Appellant discussed appeal with co-defendants before and after trial. While they were clear that they would not join an appeal as parties, mostly for financial reasons, they were keenly interested in and supported appellant's appeal, and committed to justice in the case, which they agreed had not been served at trial. Harold Sr. advised appellant that if Harold Sr. changed his mind he would represent himself on appeal. At no time did co-defendants indicate that they did not want appellant to represent their views in the appeal should a proper 'agency', as opposed to attorney, opportunity for such communication at the Court's discretion arise.

The Law Court sanctioned appellant against this backdrop. The following is an attempt to address the Court's specific concerns.

The Court cited MRAP 13(f) as its basis for sanctions. Decision, p. 21. The rule requires evidence that an appeal is 'frivolous, contumacious, or instituted for the purpose of delay.' It held that 'some degree of fault is required...(offender) must at the very least be culpably careless to commit a violation', and reserved for 'egregious cases'. Decision, p. 22.

In support, the Court cited *Auburn Harpswell Ass'n v. Day*, 438A.2d 234 (Me. 1981), which held that sanctions shall not lie unless the Law

Court determines:

> ...that an appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing, and results in delayed implementation of the judgment of the lower court; increased costs of litigation; and dissipation of the time and resources of the Law Court. *Auburn*, p. 239.

Auburn also stated that sanctions should not be levied in a manner to improperly chill rights of appeal. The term 'improperly' is not defined in *Auburn* or in appellant's case. Decision, p. 22. However the Law Court offered some guidance at Decision p. 25, stating that absent a good faith effort to evolve the law a party may be subject sanctions.

The Law Court's legal analysis of appellant's arguments comprised about one third of its opinion. Appellant contends that this work reflects the fact that his brief had considerable substance, and was not frivolous, contumacious or for delay. It was not improper. It was not obviously without any merit and taken with *no* reasonable likelihood of prevailing. Prescriptive easement law in Maine, especially for recreational lands is evolving. It is prone to many points of view often due to difficulties in assessing facts over twenty year periods from 'best evidence' sources, including witnesses who have died, moved, or otherwise are unavailable to assist parties, trial courts and interests of justice. As a policy matter prescriptive easement is disfavored in

Maine.

In *Lyons v. Baptist School of Christian Training*, 2002 ME 137, 804 A.2d 364, a public prescriptive easement case, the Law Court overruled trial facts of required party adversity and thereby reversed the trial court which had found a public prescriptive easement. In *Almeder v. Kennebunkport*, 2014 ME 12, 106 A.3d 1115 (Me.2014), another public prescriptive easement case, the town's reconsideration petition, even where the town had argued against its reconsideration position throughout the entire trial, was granted by the Law Court due to important matters of public policy, when such requests usually are denied for reasons of judicial estoppel. *Almeder* at 106 A.3rd 1120. Based on these prescriptive easement cases, and others where the Law Court did look to the facts, the public policy at issue or both, before overruling a prescriptive easement case, appellant contends he had an equal right of due process to access the Law Court to make his arguments, for which he should not be sanctioned.

Regarding timeliness of response to Appellees' motions, appellant contends this was inadvertent due to confusion with MRCP 7(c)(2) twenty-one day opposition deadline. As to new facts and arguments

raised in opposition motions, appellant contends inadvertence, due to unfamiliarity with Maine opposition process, and unwillingness to request a hearing due to costs to all, travel, stress and health concerns. He denies that he failed to communicate with parties on the Appendix. He did send them notice of the contents he intended to include. Attorney Burch objected to some. One objection concerned parts of the trial transcript, testimony of which is in the trial record for appeal. Another objection concerned government publications appellant contends were submitted for admission to the trial court and the court admitted them pending further review. Appellant contends that the amount of time and work required of one person to coordinate and perfect all of this information in the midst of writing and publishing an appellate brief and appendix is overwhelming, and in appellant's case, dangerously stressful. Appellees were notified of appellants appendix contents. **Exhibit H**, attached. They did not offer submissions, and only expressed objections. Appellant is not aware of any prejudice to appellees these circumstances caused.

The Law Court contends that appellant purported that he could represent some appellees. Appellant denies this confusing

allegation. This appeal introduced appellant to Maine's case law rule that attorneys are presumed to represent all defendant clients on appeal when only one defendant appeals, even when that defendant-appellant is an attorney representing only himself. This issue caught appellant by surprise and confused him. It confused his co-defendants who got a notice from the Court advising them that they were now defendant-appellees, and asked appellant what it meant, which, having never been a Maine trial lawyer, he did not know. Appellant tied to correct misunderstandings and confusions he had, and still has, about Maine's rule for these circumstances.

The issue arose on facts where appellant was represented on the Law Court record by Attorney Mariah Gleaton, Weeks & Hutchins, Waterville, Maine. Attorney Gleaton withdrew from the case, and only then did the Law Court advise appellant and appellees rule that appellant had duties to represent appellees on appeal. The date on appellant's Opposition to Sanctions on this matter is dated January 25, 2016; thirteen days after his stroke resulting from his diligent prosecution of this case. Appellant contends that the record, and the interests of justice support his view of this issue, and that he did not, as alleged, 'purport' to represent

some of the appellees, where in his mind the Court had notified him and his co-defendants that by operation of law he was considered to be representing them. It is also clear from the record that appellant thereafter consulted co-defendants on this issue, and only after getting their explicit permission to withdraw from the case as their attorney for any apparent status co-defendants had on appeal, he filed a Motion to Withdraw as their counsel, which the Law Court judged moot. The Appellant therefore contends that the circumstances and record do not support sanctions.

The Law Court contends that appellant violated MRAP 9(c) by filing two reply briefs. Appellant was opposed by two record counsel, each of whom filed reply briefs for their distinct clients. MRAP (9)(c) states that any reply brief filed by the appellant shall not exceed 20 pages. Appellant read the rule as applying to each of the reply briefs he received from two distinct opponents on two distinct sets of issues. Appellant contends that the error was inadvertent due to ambiguity in the rule.

The Law Court contends appellant's contumacious attitude is reflected by his admission that he filed unedited documents. Appellant

was referring to his brief. Explained *infra*, appellant researched, wrote and edited a long, mixed policy and law brief, which he lacked time to fully edit in its final version due to the filing deadline. Appellant apologizes for this imperfection, but given that he writes alone, edits alone, and self-publishes all of his documents, he contends that the errors do not rise to the level of contumaciousness, but rather reflect stress, exhaustion and lack of sufficient time.

The Law Court contends that appellant's briefs contain statements and facts not in the record. Appellant hereby requests leave of the Court for more time to verify whether or not this is true. Assuming that he can find these errors in the record, where they exist, appellant contends they were inadvertent, and not intended for prejudice or delay.

Where the Court contended that appellant sought to testify or clarify what his father meant in his trial testimony, appellant contends that he intended to convey once more, in any way the Court deemed appropriate, the nature of his father's age (85), illnesses (cancer, stroke, others), and inability to understand some of the issues and facts of the case, where if he did fully understand them better, he might, as he told appellant after trial, decide to represent himself on appeal, since he

could not afford an attorney, and the Court disqualified appellant from appearing for him. Appellant, who has power of attorney over his father's affairs today (**Exhibit I**, attached) asserts that appellant is in a lawful position to advocate for his father's best interests now. Due to the pending nature of this appointment at the time the Court cited for sanction appellant's motion for oral argument, for appellants advocacy for his father's interests in that motion, appellant further contends that the facts and interests of justice do not support sanctions where in the motion appellant sought his father's best interests only upon the advice and consent of the Court.

The Law Court contends appellant's arguments opposing partition are frivolous and baseless since *Libby v. Lorraine*, 430 A.2d 37 (Me. 1981) shows that 14 MRSA Sec. 6051 preserves the equity jurisdiction of the Superior Court, permitting that Court to order partition by sale, though claimants brought their partition petition under 14 MRSA Sec. 6501, which only permits partition by physical division. But in *Libby*, plaintiff filed his Sec. 6501 partition complaint asking *alternatively* for partition by division or sale, not sale alone as was done in appellant's case:

> By his complaint in the case at bar plaintiff Warren Libby, by asking alternatively for partition by physical division or by sale, clearly invoked the Superior Court's equity jurisdiction. *Libby*, para. 6.

The Law Court did not rule on the issue of whether Maine law supports Superior Court equity jurisdiction for sale where a Sec. 6501 complaint only requests sale, Sec. 6501 only allows property division, and the complaint does not contemplate both division and sale on its face, as occurred at appellant's trial. Appellant contends therefore that his appeal argument opposing partition was not frivolous and baseless, and sanctions cannot lie for it.

The Law Court contends that appellant threatened to sue Northport. The record does not support this conclusion. From the trial:

> Northport CEO John Larson: Where it says I wonder what liability?
>
> Shub: Yes
>
> Larson: The town has to landowner where the town avoids or evades shore land law. I am sure it risks very high sanctions from the state...
>
> Shub: Were you aware at the time that Mr. Burbank's an attorney?
>
> Larson: Yes.
>
> Shub: Did you feel this was a shot across the bow...?
>
> Larson: I think he was just notifying me that he was an attorney.
> Trial Transcript, Vol. I of III, May 11, 2015, pp. 182-83.

Appellant contends Larson's testimony is clear that he and Northport were not threatened with suit by appellant, and that appellant was discussing appellant's view that Maine holds towns to high enforcement standards of shore land zoning law. First Amendment speech with state officials is not sanctionable.

The Law Court alleges that appellant frivolously argued that the Law Court is not bound by the court record. Appellant contends that his argument, that the interests of justice do not compel any courts to be totally bound by the court record, and it is within any court's discretion to consider cases accordingly, is not baseless and frivolous according to many authorities, some of which appellant cited. Further, appellant did not argue that the Law Court *should*, as the Court contended he did, 'disregard fundamental standards of review to consider and decide the appeal on new facts' (Decision, p. 29), but rather that it *could* do so if the interests of justice require it. *National Association of Social Workers v. Harwood*, 874 F.Supp. 530 (1995). See also *United States v. La Guardia*, 902 F.2d 1010, 1013 (1st Cir.1990) (holding that "an appellate court has discretion, in an exceptional case, to reach virgin issues"); accord *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826

(1976); *United States v. Mercedes-Amparo*, 980 F.2d 17, 18-19 (1st Cir.1992); *United States v. Krynicki*, 689 F.2d 289, 291-92 (1st Cir.1982). Therefore appellant contends that his argument was misapprehended and the record does not support sanctions for it.

Finally, the Law Court alleges appellant's arguments are sanctionable because they do not reflect a good faith effort to advance the law. This misapprehension is not supported by a record brief where appellant's submissions contained considerable applicable facts, arguments and public policy of prescription law; considerable facts, statutory legislative history and analysis, property treatise citations, and arguments concerning Maine partition law and policy; and considerable law and policy of due process and equal protection standards in takings cases. The brief alone was forty-eight pages long. It was well written, and but for some mistakes due to fatigue and lack of time, well edited. The Law Court did not find that any of this material was presented in bad faith, because it was not. The Court was not clear about what 'good faith' it lacked. The Court did not state what *Auburn*, infra, standard it failed:

> that an appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing. *Auburn*, p. 239.

Appellant contends therefore that a judgment that this work is frivolous

309a

meriting sanction is misapprehended.

Appellant is not a wealthy person. Indeed he lives a very humble life materially and cannot afford trial damages of $20,000, and appeal sanctions of $10,000+. He has been a publicly spirited attorney in Maine and Connecticut, having done human services and pro bono ballot access law work Maine, and human services work in Connecticut, which has advanced some of the noblest ideals of the profession and law in both states.

Wherefore, appellant respectfully requests reconsideration of the Law Court's opinion in this matter.

Date: September 10, 2016

Harold Burbank, II, ME bar # 6813
84 N. Mountain Road
Canton, CT 06019
Ph. 860-693-2687
Pro Se Defendant-Appellant

Certificate of Service

I hereby certify that I US Mailed a copy of this Motion for Reconsideration to Adam Shub, Esq., 1 City Center, Portland, ME 04101, and Jenny Burch, 872 Washington Street, Bath, ME 04530 on September 12, 2016.

APPENDIX N

310a

STATE OF MAINE

BOARD OF OVERSEERS OF THE BAR GCF No. 16-315

Board of Overseers of the Bar Petitioner v. Harold H. Burbank II, Esq. of Canton, CT Me. Bar No. 006813 Respondent	)	**Order of Grievance Panel B on the Respondent's Request for Extension of Time to File a Written Answer to Disciplinary Petition**

By letter dated March 28, 2017, Respondent Harold Burbank requested an extension of time to file a written response to the Board's Formal Disciplinary Charge Petition. The Board filed its Petition on January 5, 2017, and mailed it that same day to Attorney Burbank at his home address in Connecticut. [1] While Attorney Burbank was in Maine attending to his parents who were in very poor health, he acknowledges that his wife delivered the Board's Petition to him on or about January 12, 2017, when she joined him in Maine.

Attorney Burbank offers two reasons for his request for an extension. The first is his focus on his parents' needs during the period from late December 2016 to late January 2017. Attorney Burbank's father died on January 20, 2017, after a long illness, and his mother had suffered a stroke in December 2016 and needed family support. During this period Attorney Burbank was staying in Maine with his mother and notes that he did not have access to the records he needed to respond to the Board's Petition, because those records were in Connecticut.

[1] Attorney Burbank's home is in Canton, Connecticut, not Canton, Maine, as suggested in the heading of the Board's opposition to his request for an extension of time.

The second reason offered by Attorney Burbank is that he had consulted Attorney Craig Gardner in the fall of 2016 regarding the Board's investigation, and in January 2017 he had mailed a packet to Attorney Gardner, presumably including the Board's Petition. Attorney Burbank was apparently hoping to obtain the services of Attorney Gardner in representing him in this matter, but he received no response to his mailing. Attorney Burbank later learned that he had mailed the packet to a Biddeford, Maine, address and that at some point Attorney Gardner had moved his office to North Waterboro, Maine.[2] Apparently Attorney Gardner did not receive the mailing, nor was it returned to Attorney Burbank. Attorney Burbank made no effort to follow up with Attorney Gardner by telephone or otherwise until on or about March 22, 2017, after he had received the notice of hearing in this matter. Attorney Gardner subsequently entered his appearance in this proceeding by e-mail to the Board of Overseers on March 30, 2017.

As Bar Counsel points out in opposing the request for an extension, Rule 20(a) of the Maine Bar Rules states that a failure to answer a Disciplinary Petition constitutes an admission of the factual allegations and misconduct alleged, and the rules do not have any good cause provision for an extension of time submitted long after the answer period has expired. While one can imagine circumstances where due process of law would require permission to file a late answer after the deadline to answer had passed, notwithstanding the failure of the rule to provide for that, this is not such a case.

While the circumstances Attorney Burbank was coping with in January 2017 were certainly distressing, he could have sent a short letter to the Board at that time requesting an extension of the answer period. It is likely that Bar Counsel and the panel chair would have been sympathetic to a request made

---

[2] The Maine Bar Directory for 2016 lists Attorney Gardner's address as North Waterboro. An Internet search indicated that Attorney Gardner has been located in Saco, Biddeford, and North Waterboro at various times in the last several years.

at the time. Alternatively, Attorney Burbank could have called Attorney Gardner at that time and arranged for him to intervene. As a practicing lawyer, Attorney Burbank should have been aware that he could not count on Attorney Gardner's appearance on his behalf without having direct contact with Attorney Gardner and confirming Attorney Gardner's willingness to assist. Waiting until two months after the answer deadline had expired to request an extension was not appropriate under the circumstances.

The panel chair hereby denies Attorney Burbank's request for an extension of time to file a written answer to the Board's Formal Disciplinary Charge. The panel chair notes, however, that at the hearing on April 21, 2017, the panel will take any testimony and any other evidence that may be offered by Attorney Burbank that the panel determines to be relevant to the determination of an appropriate sanction.

Dated: April 3, 2017

Thomas H. Kelley, Esq., Chair

APPENDIX O

3139

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Pen-15-440

Frederick B. Lincoln et al.

v.

Harold Burbank II et al.

ORDER ON MOTION TO WITHDRAW

Mariah A. Gleaton, Esq., has moved to withdraw from her representation of Harold A. Burbank II on appeal. The motion states that no other party objects to the motion.

According to the Superior Court docket in this matter, Harold Burbank II represented himself, Harold Burbank I, David Burbank, and Lori Darnell at trial. After the judgment was entered, Attorney Gleaton filed an entry of appearance and notice of appeal on behalf of only Harold Burbank II. No other attorney has entered an appearance for Harold Burbank I, David Burbank, or Lori Darnell. As a result, Harold Burbank II is proceeding simultaneously as an appellant and as attorney for three of the appellees, although it is unclear what legal or personal interest those three appellees have in this appeal.

The motion is GRANTED. Attorney Gleaton is permitted to withdraw. Service upon Harold Burbank II may be to him at his office address as listed with the Maine Board of Overseers of the Bar.

It is further ORDERED that Harold Burbank II must file, on or before **December 29, 2015**, a memorandum showing cause why he should not be disqualified from representing three appellees in this appeal given that he is an appellant.

Dated: December 15, 2015 For the Court,

Associate Justice

APPENDIX P

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

PAUL R. LEPAGE
GOVERNOR

PATRICIA W. AH
COMMISSIONER

August 8, 2012

Mr. John Larson and Ms. Toupie Rooney
Code Enforcement Office
Town of Northport
16 Beech Hill Road
Northport, Maine 04849

Exhibit
Burbank Defendants
27

Dear Mr. Larson and Ms. Rooney:

As you are both aware, back in May, I visited a property on Broadway with Ms. Rooney and Harold Burbank to discuss shoreland zoning regulations. Mr. Burbank shares an interest in this parcel with many individuals. He had concerns with some of the activities conducted on this parcel by others.

While on-site Mr. Burbank pointed out that there were two sets of access stairs on the property he has a shared interest in, and that one set, which looked newer, was recently constructed without any permits. Based on the facts we were given and a review of the Town of Northport's (Town) records, the Town issued a Notice of Violation (NOV), and required that this second set of stairs be removed. This issuance of an NOV was also based on guidance given by Maine Department of Environmental Protection (DEP) staff interpreting Section 15(B)(6) of both the Town's Shoreland Zoning Ordinance and the Chapter 1000: Guidelines for Municipal Shoreland Zoning Ordinances.

After the NOV was issued, objections were raised by neighbors with support from other owners in interest on the "Burbank" property that the NOV was in error due to the fact that both sets of stairs predated shoreland zoning regulations. An additional claim is that there is a prescriptive easement for access to the water on this portion of the property. This second claim is a legal argument that would need to be litigated and not something for either the Town or DEP to decide.

These objections raise the issue of whether or not there are additional facts involved that should be included in the evaluation of this situation. The DEP would recommend giving those with objections an additional few weeks to provide evidence to negate the NOV, and to extend the deadline for removal of these stairs until that time. However, even if the Town finds there is sufficient evidence to support that two sets of stairs are legally in existence, it would appear that the rebuilt set would have required some form of permitting.

While the DEP provides support to municipalities and ensures that shoreland zoning ordinances are properly enforced, the municipality is the primary enforcers of these ordinances. In this case, the DEP has provided advice to the municipality as to the particular shoreland zoning provisions that appear to apply to this situation. In the end, however, the final resolution of this matter will be left to the municipality to decide in their sound enforcement discretion, based upon their knowledge of local conditions, the particular facts of the case, and any additional evidence provided by the NOV objectors. If however, the Town would like more guidance, especially if provided with additional information, DEP staff is available for assistance.

If you have additional questions or concerns feel free to contact me at (207) 557-0353 or via email at deirdre.schneider@maine.gov.

Sincerely,

Deirdre Schneider

Deirdre Schneider
Shoreland Zoning Coordinator

APPENDIX Q

317 a

BOARD OF OVERSEERS OF THE BAR

Established by the Maine Supreme Judicial Court

97 Winthrop Street
P O Box 527
Augusta, ME 04332-0527

Phone 207-623-1121 • Fax 207-623-4175
Email: Board@mebaroverseers.org • Web: www.mebaroverseers.org

November 8, 2016

Harold H. Burbank II
84 N. Mountain Road
Canton, CT 06019

RE: GCF #16-315 - Harold H. Burbank II

Dear Mr. Burbank:

Thank you for your two follow-up letters of October 25, 2016 concerning the above-captioned matter. In that regard, please be aware that my investigation of this complaint is now complete. Therefore, please be notified as follows:

My recommendation for a dismissal with a warning of this complaint has now been forwarded to the Board Clerk who will schedule a confidential review in the near future by a Panel of the Grievance Commission. Please further understand that under the Maine Bar Rules it will be that Panel, not me, that will determine the appropriate disposition of this complaint. That is, from its review of this matter, the Panel may choose to accept, reject or modify my recommendation. After that review has occurred and upon issuance of its determination, you will receive written notice of the Panel's decision.

Thank you.

Sincerely,

J. Scott Davis
Bar Counsel

JSD/kme

APPENDIX R

3180

MAINE SUPREME JUDICIAL COURT Reporter of Decisions
Decision: 2016 ME 138
Docket: Pen-15-440
Submitted
On Briefs: May 26, 2016
Decided: August 30, 2016
Corrected: October 13, 2016

Panel: SAUFLEY, C.J., and ALEXANDER, GORMAN, JABAR, HJELM, and HUMPHREY, JJ.

FREDERICK B. LINCOLN et al.

v.

HAROLD BURBANK II et al.

ERRATA SHEET

The opinion of this Court certified on August 30, 2016, is amended as follows:

The fourth sentence of [¶38] is amended to read:

We note, however, that although the Town of Northport never formally withdrew the notice of violation requiring removal of a set of stairs on the Burbank property, Burbank was aware that~~, at the direction of~~ the DEP~~,~~ had recommended that the Town put the enforcement action ~~had been put~~ on hold pending resolution of issues surrounding the age and potentially grandfathered status of the stairs and the Neighbors' claim to rights in the stairs.

The original opinion on the Judicial Branch website has been replaced with the opinion as corrected.

APPENDIX S

3199

Town of Northport

16 Beech Hill Road Northport, ME 04849
(207) 338-3819 email: northportceo@gmail.com

July 13, 2012

SEP 11 2012

Harold Burbank
Sandra Tozier
Nathaniel Jennings ET AL
13 Intervale Road
Kennebunk, ME 04043

Dear Harold Burbank,

This letter serves as Notice of Violation and Order to Correct Violations of the Town of Northport's Shoreland Zoning Ordinance. After conversations with Deirdre Schneider, shoreland zoning coordinator with the Department of Environmental Protection, one of the two sets of stairs to the shore needs to be removed by August 13, 2012.

The cutting of vegetation in the seventy-five foot setback is also a violation of Northport Shoreland Zoning Ordinance Section P.2. However, it appears a grey area as to whether the cutting was to maintain a previously cleared area prior to the enactment of shoreland zoning or a new cutting. If the area is allowed to re-vegetate as opposed to the requirement to replant is an alternative solution. The disturbance of soil in the process may have a greater impact than allowing the natural re-vegetation.

If you have any questions, please contact us at 207-338-3819 or e-mail northportceo@gmail.com.

Sincerely,

John Larson
Code Enforcement Officer
Town of Northport

Cc; Selectboard
file

9-11-12

Dear Mr. Larson:
Above order complied with 9-10-12, Please advise immediately of future violations to assure continued compliance.
Thank you for your attention
Sincerely,
Harold Burbank 84 N. ...

(175)

APPENDIX T

3209

UCONN HEALTH
263 Farmington Avenue
Farmington, CT 06030
Phone: 860-679-2000

04/16/2017

Re: HAROLD BURBANK
84 NORTH MOUNTAIN ROAD
CANTON, CT 06019-

Maine Board of Overseers of the Bar
97 Winthrop Street
Augusta, ME 04330

To Whom it May Concern:

Mr. Burbank has been a patient of this primary care medical practice for many years, and I know him well.

He has asked me to write to you regarding his health issues and a discipline hearing that is scheduled for April 21, 2017.

On or around January 12, 2016 Mr. Burbank suffered symptoms that were consistent with a stroke.The symptoms included visual loss, facial pain and dizziness. Because they eventually resolved and the related imaging didn't show permanent physical damage, his final diagnosis was a Transient Ischemic Attack (TIA.)

Mr. Burbank has a history of hypertension and stress, and it is medically reasonable to assume that both played a part in the TIA.

It is my understanding that Mr. Burbank was working on a Maine Supreme Court brief around the time of the TIA. Clearly, his stress level was elevated due to the nature of the work and the deadlines involved.

It would be consistent with his medical diagnoses to state that Mr. Burbank's physical and intellectual abilities were to some degree compromised at that time, including the ability to see a computer and keyboard and the ability to maintain sustained focus on technical legal matters, legal analysis and writing.

I believe that Mr. Burbank's statements regarding the effects of his medical condition on his interactions with the Medical Board are truthful and accurate.

Mr. Burbank is very involved with his health and closely monitors his blood pressure and stress level. It is my hope that his future stress can be kept to a minimum.

Sincerely,

THOMAS E. ROCKLAND MD

Document generated by: Thomas E. Rockland MD 04/16/2017

APPENDIX U

3219

BLAKE & HAZARD
ATTORNEYS AT LAW

ROGER F. BLAKE
PAUL L. HAZARD

139 HIGH STREET
BELFAST, MAINE 04915

TELEPHONE 207-338-2630
FAX 207-338-5220
E-Mail: blakehaz@mint.net

March 16, 2000

Ms Elizabeth Smith
264 Spurwink Ave.
Cape Elizabeth, ME 04107

Mr. Christopher Smith
382 Royal Road
North Yarmouth, ME 04097

Ms. Suzette Cyr
526 East Ave.
Mountain View #108
Lewiston, ME 04240

Mr. Robert J. Burbank
1537 Covington Circle E
Fort Myers, FL 33919

Ms. Pamela Sullivan
7 Forbes Road
Lisbon Falls, ME 04252

Ms. Sonia Nichols
21 Berwick Road
Sanford, ME 04073

Mr. Harold Burbank
13 Intervale Road
Kennebunk, ME 04043

Mr. Harold Burbank, Jr.
84 North Mountain Road
Canton, CT 06019

3229

Mr. David Burbank
88 Buffin Road
North Berwick, ME 03906

Ms. Lori Darnell
208 Valley Ridge Court
Raleigh, NC 27603

Mr. Russell Ortman
10335 Lime Tree Lane
Spring Valley, CA 91977

Ms. Cheri Welch
32 Maine Street Box 504
UnaDilla, NY 13849

Ms. Sandy Toizer
RR 1 Box 271T
Silver Street
Farmington, NH 03835

Ms. Becky Jennings
15 Mistic Lake Drive
Arlington, MA 02474

Ms. Susannah Corona
256 School Street
Wataertown, MA 02172

Mr. Nathaniel Jennings
204 Imperial Court
Vestal, NY 13850

Mr. Luther Jennings
992 Green Giant Road
Townsend, DE 19734

Re: Phyllis Burbank Trust

Dear Ladies and Gentlemen:

As you are all aware, Phyllis Burbank appointed me as trustee of her testamentary trust, set up for the purpose of managing the Bayside cottage which you all jointly own. It is now my intention to resign as trustee of that trust.

As you can see by the attached excerpt from the will, Michael Nickerson, a local C.P.A., was named as alternate trustee. I have discussed this matter with Mr. Nickerson, and he has declined the assumption of duties as the trustee. Therefore, the procedure is to petition the Probate Court for the appointment of an alternate trustee.

At this point, I wish to explain to you as owners of the Burbank cottage, and ultimately the recipients of the income from the testamentary trust, what Phyllis' intent was in creating the trust fund, and the current status of that trust. On October 12, 1993, Phyllis took the unusual step of deeding the cottage to all of you as tenants in common her interest in the cottage. This was obviously done to assure that the cottage remain in the Burbank family into perpetuity.

She then established the testamentary trust in her will in the hopes that its income would defray the maintenance and upkeep of the cottage in the future. She appointed non-family members as trustee and alternate, I believe, in an effort to eliminate the possibility of jealousies or hard feelings arising due to possible actions of a family member as trustee.

She specifically allocated her telephone stock to fund the trust, because that stock for many years had served her well and been very stable and consistently produced good dividends. She believed that these consistent dividends would maintain the cottage indefinitely. In addition to the receipt of consistent dividends, the trust corpus has grown from approximately $130,000.00 at the time of Phyllis' death to approximately $240,000.00 as of December 1999.

Please furnish me with any proposals that you might have for successor trustee, either individual or corporate, and I will investigate those prior to submitting my resignation and proposal for new trustee to the Probate Court. Please communicate any thoughts to me no later than April 3, 2000.

Thank you for your assistance.

Sincerely yours,

Paul L. Hazard

Paul L. Hazard, Esquire
PLH/dhp
enc

APPENDIX V

3249

WEEKS & HUTCHINS, LLC
ATTORNEYS AT LAW
TWO PARK PLACE
P.O. BOX 417
WATERVILLE, MAINE 04903-0417

PHONE: 207-872-2783 FAX: 207-872-5749

e-mail: mag@lawweeks.com

WALDEMAR G. BUSCHMANN
JONATHAN G. ROGERS
MARIAH A. GLEATON
DANIEL J. ECCHER

THOMAS N. WEEKS
1895-1985
BRADFORD H. HUTCHINS
1907-1992

August 26, 2015

Penobscot County Superior Court
Penny H. Reckards, Clerk
78 Exchange Street
Bangor, ME 04401

RE: Lincoln et al v Burbank et al
Docket No. RE-14-49

Dear Ms. Reckards:

Enclosed please find:

1. Notice of Appeal;
2. Issue Statement;
3. Transcript and Audio Order Form;
4. Notice of Appearance; and
5. Check of $150.00 for the filing fee.

Please do not hesitate to call if you have any questions or concerns.

Regards,

Mariah A. Gleaton, Esq.

Cc: Attorney Adam Shub
Attorney Jenny Burch

3.25.9

STATE OF MAINE

☐ UNIFIED CRIMINAL DOCKET
■ SUPERIOR COURT
☐ DISTRICT COURT

County: Penobscot
Location: Bangor
Docket No: RE-14-49

Lincoln et al
v.
Burbank et al

NOTICE OF APPEAL
☒ **Civil**
☐ **Criminal**

I, Harold Burbank II (name of party appealing), appeal from the judgment, order or ruling entered in this proceeding on August 12th, 2015 (date of order appealed from).

☒ If this is a civil appeal, the Statement of the Issues (reasons for appeal) are ~~as follows~~ (attached) pursuant to M.R. App. P. 5 (b)(2)(A).

☐ This case arises from the Maine Tort Claims Act requiring the clerk to send a copy of this Notice of Appeal to the Office of the Attorney General.

☐ If this is a criminal appeal, check one of the following:
☐ The defendant is presently confined at
☐ The defendant is not in custody. The defendant's address is

CHECK APPLICABLE BOX:
■ The Transcript Order form is attached.
☐ No transcript will be ordered.
☐ No electronic or other recording of the proceedings can be prepared for this civil case. Therefore, a statement in lieu of transcript will be prepared pursuant to M.R.App.P. 5 (d).

Date: 8/25/2015

Signature of Appellant or Appellant's Attorney

Address of Appellant or Attorney:
Weeks & Hutchins, LLC
2 Park Place; P.O. Box 417
Waterville, ME 04901

Mariah A. Gleaton
Printed name of Appellant or Appellant's Attorney
If attorney, bar number: 5416

THIS NOTICE OF APPEAL MUST BE FILED IN THE COURT THAT ISSUED THE ORDER APPEALED FROM. IT WILL NOT BE ACCEPTED OR DOCKETED UNLESS (1) IN A CIVIL CASE, IT IS ACCOMPANIED BY THE REQUIRED FILING FEE OR A MOTION TO WAIVE THE FILING FEE, AND (2) IF THE APPELLANT IS REPRESENTED, IT CONTAINS THE BAR NUMBER OF APPELLANT'S ATTORNEY.

NOTICE: If this is an appeal from a civil case or a criminal case involving an adult defendant, this notice must be filed within 21 days of the entry of the judgment in the docket. If this is an appeal from a case involving the extradition of a fugitive to another state, this notice must be filed within 7 days of the entry of the judgment in the docket.
Warning: Small Claims, Forcible Entry & Detainer and Juvenile matters have differing time limits for filing a Notice of Appeal. If this is an appeal from a Small Claims, Forcible Entry and Detainer or Juvenile matter, another form must be used which is available from the clerk.

326a

STATE OF MAINE
PENOBSCOT, ss.

BANGOR SUPERIOR COURT
DOCKET NO.: RE-14-49

LINCOLN ET AL

Plaintiff

vs.

BURBANK ET AL

Defendant

ISSUE STATEMENT
M.R. App. P. 5 (b)(2)(A)

NOW COMES Harold Burbank II, by and through undersigned counsel, Mariah A. Gleaton, an represents that the following issues will be presented on appeal.

1. The Trial Courts judgment against Harold Burbank II for punitive damages.
2. The Trial Courts judgment against Harold Burbank for conversion.
3. The Trial Courts judgment for Plaintiffs on Counts II and IV granting prescriptive easement.
4. The Trial Courts judgment and order of partition by sale.
5. The Trial Courts finding of facts were unsupported by the evidence and/or contrary to the evidence.
6. The Trial Courts conclusions in support of its judgment were unsupported by the evidence and/or contrary to the evidence.
7. The Trial Courts conclusions in support of its judgment were unsupported by law and/or contrary to regulations, statutes, the Constitution of Maine and the Constitution of the United States.
8. Any and all other properly preserved issues on the record.

August 26, 2015

Mariah A. Gleaton, Esq., Bar No. 5416
Counsel for Defendant/Appellant
Weeks & Hutchins, LLC
Two Park Place
P.O. Box 417
Waterville, Maine 04903-0417
207-872-2783

327Q

STATE OF MAINE
PENOBSCOT, ss.

BANGOR SUPERIOR COURT
DOCKET NO.: RE-14-49

LINCOLN ET AL

Plaintiff

vs.

BURBANK ET AL

Defendant

NOTICE OF APPEARANCE

NOW COMES Mariah A. Gleaton and enters her appearance for Defendant Harold Burbank II in the above captioned case.

August 26, 2015

Mariah A. Gleaton, Esq., Bar No. 5416
Counsel for Defendant/Appellant
Weeks & Hutchins, LLC
Two Park Place
P.O. Box 417
Waterville, Maine 04903-0417
207-872-2783

328a

STATE OF MAINE

☐ UNIFIED CRIMINAL DOCKET
■ SUPERIOR COURT
☐ DISTRICT COURT

County: Penobscot
Location: Bangor
Docket No: RE-14-49

Lincoln et al
Plaintiff

v.

Burbank et al
Defendant

TRANSCRIPT AND AUDIO ORDER FORM

Plaintiff/State Attorney Adam Shub

Defendant Attorney Jenny Burch; Harold Burbank II
Mariah A. GLeaton for Harold Burba on appeal

Purpose of Transcript or Audio Request: (Please check one)

1. ■ **Appeal** - Appeals require paper transcripts unless otherwise ordered by the court. M.R. App. P. 5
   ■ Law Court ☐ Superior Court ☐ UCD ☐ Sentence Review Panel ☐ Post-Conviction Review

2. ☐ **Reference** ☐ Use in another pending case ☐ Personal Reference
   If for use in another pending case, is there a court imposed due date? ☐ Yes ☐ No
   If yes, date due: _____

Type of Request: (Please check one)

■ Paper Transcript (Appeals require paper transcripts unless otherwise ordered by the court. M.R. App. P 5
☐ Audio Recording (MP3 Recording on CD)

Payment: (Please check one)

1. ■ Private Pay
2. ☐ State Agency (Office of the Attorney General, District Attorney, etc.)
3. ☐ MCILS (Motion for Transcript at State Expense (CV/CR-166) required)
4. ☐ Judicial Branch (Motion for Transcript at State Expense (CV/CR-166) required)

A clerk must verify that all of the necessary information is listed below. Under hearing type, please be specific if you want the entire hearing or just a specific portion of it

Hearing Date(s)	Hearing Type	Courtroom	CD Start/End Times, Tape & Index Number or OCR Name
1. May 11th, 2015	ALL		
2. May 12th, 2015	ALL		
3. May 13th, 2015	ALL		
4.			
5.			

Court Clerk Signature _____ Date _____

INCOMPLETE FORMS MAY BE RETURNED

Please write your contact information clearly in the section below. This information is used only to ensure delivery of transcript/audio recordings. 3299

Name of person ordering transcript/recording: Mariah A. Gleaton
Firm or Agency: (if applicable) Weeks & Hutchins, LLC
Mailing Address: PO Box 417, Waterville, ME 04901
Phone Number: 207-872-2783
Signature of person ordering transcript/recording: Mariah A. Gleaton

Email Address: mag@lawweeks.com
Transcripts are generally sent via email. Audio recordings are generally sent via US Mail. Email delivery of audio can be arranged in some circumstances. If you do not have an email address, the Office of Transcript Operations will need your phone number and mailing address to assist you with receiving your materials.

Office of Transcript Operations
Penobscot Judicial Center
78 Exchange Street, Suite 200, Bangor, ME 04401
207-991-6322 OTO@courts.maine.gov

INSTRUCTIONS FOR ORDERING TRANSCRIPTS

A. You must include all of the information requested on the **transcript order form** or the form may be returned and your request will not be acted upon.
B. The party who will be responsible for the bill must **sign** the order.
C. If you are requesting that the transcript be provided at no cost or paid for by MCILS, you must complete and attach to this form a **Motion for Transcript at State Expense (CV/CR-166)**.
D. **File** the complete transcript and audio request form with the clerk of court.
E. The **costs** for transcripts of any court proceedings are specified in Administrative Order JB-05-26.
F. All transcripts for the Maine Judicial Branch are produced by AVTranz or by Official Court Reporters.
G. If AVTranz is preparing your transcript, AVTranz will automatically send you an email that includes a cost estimate (based on the 14-day turnaround rate), deposit information, and payment options after they receive your request from the Office of Transcript Operations. If your transcript is being paid for **privately**, you can also opt for 1, 3, 7, 21 and 30-day turnaround. If your transcript is provided at **no cost** to you or is paid for by **MCILS**, the standard turnaround is 30 days.
H. Turnaround times begin once AVTranz receives a digital copy of the audio. When the transcript has been completed, you will receive it by email from AVTranz and, depending on your circumstances, you will either be charged the balance due or issued a refund.
I. If an Official Court Reporter is preparing your transcript, s/he will contact you by phone directly to discuss arrangements of payment and a timeframe for completion.
J. Neither an Official Court Reporter nor the Office of Transcript Operations is responsible for delay in transcript production or for requesting additional time to obtain a transcript if you fail to comply with these procedures.

APPEAL ORDERS: If you are ordering a transcript as part of an appeal, you must file the order with the clerk of the trial court when you file the Notice of Appeal. Once it is completed, the transcript will be filed with the appropriate court and a copy of the transcript will be delivered to you.
REFERENCE ORDERS: If you are ordering a transcript for reference purposes, you must file the order with the clerk of the trial court. The clerk will then forward it to the Official Court Reporter and/or the Office of Transcript Operations.

INCOMPLETE FORMS MAY BE RETURNED

APPENDIX W

3309

April 19, 2017

Angela Morse, Clerk
Board of Overseers of the Bar
97 Winthrop Street
P.O. Box 527
Augusta, ME 04332-0527

Re: GCF# 16-315 – Board of Overseers of the Bar v. Harold H. Burbank II

To the Board of Overseers of the Bar:

I write in support of Respondent Harold H. Burbank II in the above-referenced matter, to offer the Board of Overseers of the Bar ("the Board") my perspective as a character witness on his behalf. I have known Mr. Burbank personally since 2004, when he undertook what would be the first of several matters in which he worked *pro bono publico* on behalf of my presidential campaign and its supporters, motivated by what I have come to recognize as his profound and abiding concern for the pursuit of justice. In my experience, throughout the countless hours that Mr. Burbank worked on these matters over nearly a decade, he displayed the highest degree of competence, diligence and respect for opposing parties and counsel and the administration of justice. In short, the picture of Mr. Burbank that emerges from the Formal Disciplinary Charges Petition that Bar Counsel filed on January 5, 2017 does not comport in the least with my long experience with him, and I do not believe it is an accurate representation of his personal character or professional ability.

I met Mr. Burbank during the course of the 2004 presidential election, when he volunteered to defend my independent presidential campaign against a challenge to the validity of the nomination petitions we had submitted in Maine. Although we did not know each other, Mr. Burbank explained that, as a lifelong Mainer, he believed Maine voters should have the right to vote for any qualified candidate of their choosing, and that the dictates of the First and Fourteenth Amendments required nothing less. We could not have chosen a more competent, diligent or dedicated advocate if we had hired the most expensive lawyer in the state. Guided by Mr. Burbank's able representation, we prevailed before the Secretary of State's hearing officer, before the Superior Court, and before the Law Court. *See Melanson v. Gwadosky*, Civ. No. AP-04-68 (Sup. Ct. Kennebec County Sept. 27, 2004) (unpublished), *aff'd*, 2004 Me. 127, 861 A.2d 641 (2004).

Even more impressive than the complete victory that Mr. Burbank won for us at each stage of the 2004 proceedings, he subsequently represented my campaign and the Maine voters affiliated with it in an action filed in Maine state court, during the course of which he won a precedent-setting decision on our behalf from the Law Court. *See Nader v. Maine Democratic Party*, 41 A.3d 551, 2012 ME 57 (2012). In that case, the Law Court established a new standard that now applies in actions filed pursuant to 14 M.R.S. § 556 ("the Anti-SLAPP law"). Based on that decision, dismissal was reversed and our case was remanded to the trial court for further proceedings.

As I got to know Mr. Burbank better over time, I learned that his *pro bono* work on behalf of our campaigns reflected a deep commitment to the professional obligations of an attorney, which dates back to his days as a law student volunteer for Amnesty International from 1984 to 1987. When the nation was at war during the 2004 presidential election, for example, Mr. Burbank began working as a *pro bono* attorney for Veterans for Peace. Following the injury of a friend with whom he used to ski, Mr. Burbank also founded the Bill Johnson Special Needs Trust Project, which raised more than $100,000 for the United States' first male gold medalist in alpine ski racing, who had sustained a traumatic brain injury. I have discussed Mr. Burbank's *pro bono* work with him on several occasions throughout the years, and it is clear to me that he does it for no reason other than his recognition that a lawyer has a professional obligation to serve those in need.

My experience of Mr. Burbank is that of a conscientious attorney who has been tireless in his efforts to represent parties who might otherwise be unable to find counsel. As I wrote to him long ago, in thanks for his extraordinary service on our behalf before the Maine state courts, he consistently upholds the highest ideals of the legal profession. *See* Maine Rules of Professional Conduct 6.1(3), (4) (recognizing a lawyer's professional obligation to provide *pro bono* services to individuals and groups seeking to protect civil rights, and to improve the law, legal system and legal profession). Mr. Burbank is that increasingly rare attorney who not only recognizes his obligation to provide *pro bono* services, but has demonstrated his commitment to fulfilling it over the entire course of his career. As such, Mr. Burbank is a credit to the legal profession.

In view of my long and uniformly positive experience with Mr. Burbank, I am perplexed by the circumstances giving rise to the charges now pending against him in the instant matter, as well as the entry of a default judgment. By contrast with the well-documented wars of attrition by large corporate law firms, for whom abuse of process is a normal tactic, I cannot understand how an attorney who has unfailingly performed at the exemplary level that Mr. Burbank has over the course of a decade should now be facing the charges asserted in this matter. I can only surmise that perhaps the extenuating circumstances of which Mr. Burbank notified the Board in his letter dated March 28, 2017 ought to be given greater weight. Surely the loss of a parent, as well as the other personal hardships Mr. Burbank describes, are relevant to this matter, and should inform the Board's review of bar counsel's charges. If the Board will not reconsider its decision to enter a default judgment against Mr. Burbank, then it should exercise its broad discretion now and decline to sanction him.

Thank you for your consideration and attention to this matter.

Sincerely,

Ralph Nader

PO Box 500
Winsted, CT 06098

APPENDIX X

3329

Response to Overseers 9-6-16 Investigation Letter Re Maine Rules of Professional Conduct and Rules of Appellate Procedure Referenced By Bar Counsel J. Scott Davis

ME Rule Professional Conduct 1.1, Competence: *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*

Answer: I was a non-resident sole pro se defendant-appellant who incidentally held a Maine law license. Constitution Article I, Section 19 guarantees parties the right to appear in Maine courts pro se. My pro se appeal was an exercise of my individual rights, not subject to Rule 1.1. Legal knowledge, skill, thoroughness and preparation I provided for myself are not subject to Rule 1.1, which applies to services for clients.

The Law Court's 12-15-15 Order on Motion to Withdraw, **Exhibit A**, granting Attorney Gleaton's (my appeal attorney) 12-4-15 Motion to Withdraw, **Exhibit B,** ordered that I was proceeding 'simultaneously as an appellant and as an attorney for three of the appellees (my three trial clients - father, brother and sister), although it is unclear what legal or personal interest those appellees have in this appeal (my emphasis)'. Order on Motion to Withdraw, back of page 1, *infra.*

Paragraph six of Attorney Gleaton' s 12-4-15 Motion to Withdraw stated, 'Harold Burbank, II, attorney *or* Appellees and as Appellant has been contacted and does not object to this motion'. Attorney Gleaton contacted me and I approved her motion as the appellant only, not as an attorney representing appellees. Attorney Gleaton did not advise me that her motion meant that I was proceeding as attorney for appellees. She did not request my consent to be their counsel, nor did she ask my father, brother or sister (appellees) to consent to my being their appeals counsel. Paragraph two of Attorney Gleaton's Motion to Withdraw said, ' Appellant will proceed by representing himself in this matter...'. I was only to represent myself if the motion was granted. Attorney Gleaton therefore did not mean that I was proceeding as attorney for appellees. A court inference or conclusion otherwise in misapprehended.

The 12-15-15 Order on Motion to Withdraw stated that I must "file, on or before December 29, 2015, a memorandum showing cause why (I) should not be disqualified from representing three appellees in this appeal given that (I am) an appellant'. The order did not cite Maine law compelling this result. After 12-15-15 I consulted two other Maine lawyers on this point, who could not explain why, by operation of law, I assumed appeals representation of trial clients (father, brother and sister), who had not appealed, and did not want to appeal, only when my appeal attorney withdrew and not at any other time, or why a show cause order should lie on the facts.

The post withdrawal (of Attorney Gleaton) case status surprised my father, brother, sister and me. My trial clients did not want to be appellees or appellants. The court was aware of this, noting 12-15-15, '...it is unclear what legal or personal interest those three appellees have in the appeal'. *Order*, infra. My father, brother sister and I thought that there had been a mistake. In our minds, my father, brother and sister remained my clients only for purposes of questions they asked me about my appeal, and support they wanted to give, at Law Court discretion, for my appeal, without filing appeals themselves, for cost and other reasons. They did (do) not support the trial decision. They were (are) committed to justice in the case. My family and I remain confused about why I had no duty to represent them on appeal so long as I had appellate counsel, and why that status changed where my father, brother and sister had not appealed the trial decision.

Legal theories I applied to the case, including standing, which can be raised at any time, were brought in good faith consistent with theory and practice studied in law school and in Maine, Connecticut, federal and US Supreme Court practice. See **Exhibit C**, Brief of Appellant. See also **Exhibit D**, Motion for Reconsideration. Maine courts held the case concerned narrow issues of easement and partition. I disagreed, especially where Northport and Maine DEP found substantial zoning violations on my land and cited all Burbank property owners for them, implicating Maine and Northport environmental and zoning law, policy and enforcement authority.

ME Rule Professional Conduct 1.3, Diligence : *A lawyer shall act with reasonable diligence and promptness in representing a client.*

Answer: I was a non-resident sole pro se defendant-appellant who incidentally held a Maine law license. I did not represent a client. Lack of diligence, if any, was inadvertent, due to mistake of a procedural rule (ie opposition to trial motions may be filed within 21 days, where opposition to motions for appeal must be filed within 7 days), or due to health and distance of trial clients assigned to me by operation of Maine law when my appeal attorney withdrew, or due to my 1-12-16 stroke and recovery to at least 2-12-16. See **Exhibit E**, Medical Records, attached.

Re alleged untimely response to the Law Court's 12-15-15 show cause order (see Answer, Bar Rule 1.1), that order was captioned, 'Order on Motion to Withdraw'. **Exhibit A**. The motion was filed by my appeal attorney, not me. The back side of the Order on Motion to Withdraw, a single sheet document with text on both sides, stated the order to show cause and its December 29, 2015 due date. The order caption made no reference to an order to show cause. Some response inadvertence was due to where the show cause order was printed on the Order on Motion to Withdraw (on the back), which did not state an order to show cause in the caption.

My father, brother sister and I were surprised and confused by the order, since my father, brother and sister had not appealed, and expressed no desire to anyone

in appeal at the time. We thought that there had been a mistake. I lived in Connecticut. Dad lived in Maine. My brother lived New Hampshire. My sister lived in North Carolina. Communications were accordingly tedious. Then trial court was aware that Dad, age 85, was extraordinarily fragile from cancer and age, so that information was in the record. On June 4, 2015, Dad suffered a significant stroke which hospitalized him for months. He suffered ongoing potentially fatal anxiety attacks and mini-strokes. I was not going to risk his life by pressuring him for show cause answers. Great time and effort were required to explain the order to him, and to understand his responses. Similar problems affected responses of my brother and sister. The order told Dad, my brother and my sister that they were appellees; a status they did not accept. They did not support the trial decision, but did not want to appeal for cost and other reasons. Their only interest in appeal was to support my appeal, which they were willing to communicate to the court through me, or by any means available at court discretion.

Legal authority compelling my 'proceeding simultaneously as an appellant and as attorney' for them was not cited in the 12-15-15 order. Attendant case law did not apply to my facts, where my appeal attorney withdrew, forcing me in December, 2015, and not in August, 2015 when my attorney filed appeal, to become appeals lawyer for trial clients who did not want to appeal and had not appealed.

On 12-30-15, a day after the 12-15-15 show cause order 12-29-15 answer date, I timely filed my appellate briefs, which clearly indicated that I was a non-resident, pro se, sole appellant. On 1-5-16 the court rejected the briefs for lack of combed bindings not specified in the appellate rules, and set a 1-15-16 resubmission date. See **Exhibit F**, Order Rejecting Briefs. The 1-5-16 order told me to show cause by 1-29-16 against sanctions for failure to answer the 12-15-15 order by 12-29-15 (explained *infra*). The 1-5-16 order said not to change anything in the briefs, so I filed a timely set with comb bindings and photocopied original signatures. Due to diligence and caution, I then timely filed a third set with comb bindings and an *original* signature required by MRAP 9. On 1-12-16, while diligently pushing myself to get the third set into overnight mail for timely filing, I temporarily lost my vision and had other acute symptoms of a first ever stroke. See **Exhibit E.**

I was hospitalized for brain scans @ 1-13-16. UCONN's chief of neurology confirmed the stroke diagnosis 2-12-16 (**Exhibit E**), and ordered continued stress avoidance (ordered 1-13-16), lifelong medications, and therapy to avoid fatal stroke. On 1-25-16 I diligently filed timely opposition to the 1-5-16 show cause order, arguing for prior client consent and other law, because it is unethical to answer show cause orders concerning (court ordered) clients without consulting them. Scholars further hold attorney client privilege is violated by responding to show cause orders where clients do not want it known whether they considered appeal or consulted an appeal attorney. See **Exhibit G**, Opposition to Sanctions.

On 2-23-16, after consulting expert Maine counsel, I filed a Motion to Withdraw

as Counsel (**Exhibit H**) for my father, brother and sister, which they pre-approved, stating that my father was not disinterested in my appeal, but due to life threatening health conditions did not himself wish to appeal at the time (offering however that if necessary he would represent himself on appeal), and that my brother and sister did not seek to be appellants or appellees "at this time". The motion again stated the odd posture of the appeal arising due to my appeal attorney's withdrawal. The motion was judged moot but was the first and only time that my severely disabled father, my brother and my sister had been represented by their own authority before the Law Court.

Re the court's order to resubmit appellate briefs that did not contain coil bindings, MRAP 9(f) does not stipulate coil bindings, but rather, "Briefs shall be bound on the left hand margin...", which my briefs were with twine, to save time to make the due date and save costs. I have submitted briefs to the US Supreme Court bound with brass fasteners covered with hockey tape, per that clerk's instructions, to save an indigent client binding costs. The method is acceptable there for prisoners and other indigent appellants. I lost vision and suffered a 1-12-16 mid day stroke precisely during efforts to comply with the Law Court's order to resubmit appellate briefs on time with comb bindings.

ME Rules Professional Conduct, 3.3(a)(1)(2), Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) misquote to a tribunal the language of a book, statute, ordinance, rule or decision or, with knowledge of its invalidity and without disclosing such knowledge, cite as authority, a decision that has been overruled or a statute, ordinance or rule that has been repealed or declared unconstitutional;

Answer: I did not knowingly make any false statement of fact or law to any tribunal in the case. Bar Rule 3.3(a)(1). I did not misquote a book, statute, ordinance, rule or decision, or otherwise violate Bar Rule 3.3(a)(2). The following is an attempt to answer to decision holdings that sound somewhat in violation Bar Rules 3.3(a)(1)(2).

The court held that appeals reply briefs may not exceed 20 pages. MRAP 9(c); Decision, p. 20. The court held that I wrongly filed two reply briefs, totaling thirty-three pages. I was served two reply briefs; one from plaintiffs-appellees, and one from defendants-appellees. Their law firms represented separate issues of easement and real estate partition respectively. My trial motion to bifurcate these

two distinct causes of action was denied, so the issues were tried together. MRAP 9(c) does not stipulate that appellants may not answer each of two reply briefs separately, or that each reply brief may not total 20 pages. Each reply brief was less than 20 pages. I therefore did not knowingly violate the rule, nor were my acts contumacious. Decision, p. 23.

The court held that my brief showed a contumacious attitude due to editing errors admitted in my request for oral argument. The errors were inadvertent due to lack of time for full editing and hand publishing before the filing deadline. Some were probably due to temporary blindness 1-12-16. The admission of error in the request for oral argument was to candidly bring the errors to the court's attention for correction, and not contumacy.

The court held that I failed to answer a direct order to explain how as appellant I could purport to represent appellees. I did not purport to represent appellees. The court did so, perhaps confused by my attorney's motion to withdraw, which I approved for myself, not regarding my father, brother and sister, explained *infra.*

The court held that I proposed to represent views of other Burbank defendants. It also held that my request for oral argument proposed to testify for my father. Decision pp. 23-4. See **Exhibit I**, Request for Oral Argument, attached. It stated oral argument is like a 'preliminary conference where judges more than parties share their views of the case, including their understanding of the facts and law, in which case lawyers participate...". My request was denied. If accepted, I would have explained, as I have *infra*, that while my father, brother and sister did not want to appeal, they did not support the trial decision, remained deeply interested in the case and my appeal, and would, at court direction, permit to me to speak to these matters for them in the interests of justice. This was especially appropriate where the trial court and Law Court were aware that my father is critically disabled, and did not renounced his appeal rights completely. **Exhibit I**.

ME Rules Professional Conduct, 3.4(c), Fairness to Opposing Party and Counsel

A lawyer shall not:... (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

Answer: Fact, law and supporting materials submitted were not knowingly violative of a rule. Facts alleged were based on testimony, documents (including government publications), photographs and other materials in the record. Theories alleged were found in well regarded legal doctrines, cases, and law review articles, the most important of which concerned the interests of justice, defined in US cases as permitting new facts and new arguments on appeal, regardless of the record. In this sense, I asserted, at least in my reply brief to defendants-appellees, an open

refusal to adhere to rules to keep to the trial record since it was my legal conclusion, and that of scholars I read for the reply brief, that no valid constitutional obligation exists. See Gorod, *The Adversarial Myth: Appellate Court Extra-Record Fact Finding,* 61 Duke Law Journal 1 (2011), cited in my reply brief to defendants-appellees; and Dobbins, *New Evidence on Appeal,* 96 Minnesota Law Review 2016 (2012).

My reply brief argued that *Citizens United v. FEC,* 558 US 301 (2010), a significant corporate speech case, the Supreme Court overruled long-standing precedent and held unconstitutional a federal law prohibiting "corporations and unions from using their general treasury funds" to engage in political speech. In reaching this result, the Court repeatedly relied on facts that were not part of the record created by the parties below. Throughout the Court's analysis, it made factual assertions with citation only to an amicus brief or without citation at all. Indeed, there was little evidence in the Court's opinion of any record developed by the adversaries who had litigated the case below. *The Adversarial Myth, infra,* p. 28. While some find this incongruous with other principles of law, there in no evidence whatever that parties must be prejudiced, that justice is not served, or more importantly that the US Supreme Court has ruled it unlawful in any way for the courts to develop their own factual records by their own efforts or otherwise, including relying on documents, exhibits, testimony or other evidence not formally entered into a court record.

ME Rules Professional Conduct 4.4(a), Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Answer: I was a pro se sole appellant who incidentally held a Maine law license. I did not represent anyone on appeal but myself. Misapprehensions that I represented others (appellees) have been addressed previously. The case I made for myself did not use means to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person, as argued *infra.*

ME Rules Professional Conduct 8.4(a)(b)(c)(d)

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate any provision of either the Maine Rules of Professional Conduct or the Maine Bar Rules, or knowingly assist or induce another to do so, or do so through the acts of another
(b) commit a criminal or unlawful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respect

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(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation
(d) engage in conduct that is prejudicial to the administration of justice

Answer: I did not violate or attempt to violate any provision of either the Maine Rules of Professional Conduct or the Maine Bar Rules, or knowingly assist or induce another to do so, or do so through the acts of another. Alleged failures have been addressed *infra*. I did not commit a criminal or unlawful act that reflects adversely on my honesty, trustworthiness or fitness as a lawyer in other respects. I do disagree strongly philosophically with Maine courts on matters of apparent judicial policy, discretion, right and the interests of justice, in the noblest, time honored intellectual traditions of American law. I did not engage in conduct involving dishonesty, fraud, deceit or misrepresentation with anyone at any time, as discussed *infra*. I did not engage in conduct that is prejudicial to the administration of justice, as explained *infra*.

APPENDIX Y

3299

State of Maine

SUPREME JUDICIAL COURT

Docket No. BAR-17-12

BOARD OF OVERSEERS OF THE BAR
Plaintiff

v.

HAROLD H. BURBANK II
of Canton, CT
Me. Bar #006813
Defendant

BOARD OF OVERSEERS OF THE BAR'S PROPOSED FACTUAL FINDINGS, CONCLUSIONS & SANCTION ORDER

FACTUAL FINDINGS

Based upon the testimony presented at the disciplinary hearing of October 18, 2017 and its consideration of the Board of Overseers of the Bar's admitted Exhibits (#1 - #14) and Defendant Harold H. Burbank II's admitted Exhibits (#1, #14, #15 and #19), the Court makes the following factual findings:

Defendant Harold H. Burbank II of Canton, Connecticut was at all times relevant hereto either an attorney duly admitted to and authorized to engage in the practice of law in Maine or, more recently, an administratively suspended attorney in Maine. In any event, in all cases, he was always subject to the Maine Bar Rules and the Maine Rules of Professional Conduct.

Burbank was admitted to the Maine Bar in 1989, but his primary law office, when he had one, was located at his residence in Canton, Connecticut. In that regard, although he maintains a law license in Connecticut, he does not practice every day, i.e. he rarely practices.

3409

In accordance with M. Bar R. 4(g), on October 18, 2016 Burbank was administratively suspended from practicing law in Maine, and he remains so suspended at this time.

Pursuant to the Maine Bar Rules, on August 31, 2016, Bar Counsel docketed a *sua sponte* grievance complaint against Burbank. The basis for initiating that grievance complaint was the Maine Law Court's decision in the matter of *Frederick B. Lincoln et al. v. Harold Burbank II et al.* 2016 ME 138, 147 A.3d 1165, issued on August 30, 2016. Board Exhibit #1. The Law Court therein found that Burbank had engaged in extensive frivolous litigation on appeal for which he was sanctioned by the Court. At that October 18, 2017 disciplinary hearing, the Court took judicial notice of and adopted the findings and conclusions of Burbank's frivolous appeal as found and issued in *Burbank*. See M. R. Evid. 201 and *In Re Caleb M. et al.*, 2017 ME 66, ¶ 23, 159 A.3d 345, 353.

In that regard, the Law Court therein stated and found that "...Burbank has consistently disregarded standards of law and practice that govern appellate review. He has asserted legal arguments that are frivolous and baseless, and, contrary to governing precedent, he has sought to have (the Law Court) consider and decide the appeal on new facts and new evidence that were not part of the trial court record on appeal." *Burbank*, 2016 ME 138, ¶ 61, 147 A.3d 1165, 1178-1179.

Burbank's improper conduct resulted in the Law Court's imposition of significant sanctions upon him totaling $10,000.00. Specifically, Burbank was sanctioned by the Law Court to make the following payments:

1. $5,000 toward "the Neighbors" (seven of the plaintiffs in the Law Court decision) attorney fees incurred to defend that appeal; and
2. Another $5,000 toward the Co-owners' (also named as defendants) attorney fees to defend this appeal. *Id.* ¶ 64.

The underlying *Lincoln v. Burbank* litigation had resulted in the lower court's very thorough and detailed written judgment finding in favor of the owners of neighboring properties claims for a prescriptive easement, declaratory judgment, conversion and punitive damages against Burbank. That judgment further found in favor of co-owners of property with Burbank on their cross-claim for partition by sale of the coastal property located in Northport, Maine.

Burbank's serious misconduct as specifically referenced by the Law Court in *Lincoln v. Burbank* is summarized as follows:

a. In his appellant's brief, Burbank had stated facts not in the trial record. *Id.* ¶ 24.

b. In addition, the Law Court also ruled that Burbank had:

- Stated issues without any further argument – *Id.* ¶ 39;
- Listed "meritless" issues – *Id.* ¶ 40;
- Filed many "frivolous" issues – *Id.* ¶ 41; and
- Made arguments "devoid of legal authority to support them" – *Id.* ¶ 52.

c. The Law Court further found "no merit in any of Burbanks' arguments on appeal, including those raised in his (many) reply briefs." *Id.* ¶ 45.

d. Although the Law Court ultimately decided this matter as "submitted on briefs" without any oral argument, Burbank had nevertheless "proposed to testify" at oral argument before the Law Court. *Id.* ¶ 51; and

e. At the conclusion of its decision, the Law Court found as follows concerning Burbank's misconduct: "Throughout the various stages of this appeal, in his briefs, his Supplement of Legal Authorities, his request for oral argument, and his responses to opposing parties' motions, Burbank has consistently disregarded standards of law and practice that govern appellate review. He has asserted legal arguments that are frivolous and baseless, and, contrary to governing precedent, he has sought to have (the Law Court) consider and decide the appeal on new facts and new evidence that were not part of the trial record on appeal. Burbank's efforts have been disrespectful to the proper role of the trial court, unfair to and expensive for the other parties, and contrary to Maine appellate law. Burbank's frivolous and baseless actions are egregious conduct that has confused the issues on appeal, delayed final resolution of this matter, and significantly driven up the costs to other parties. Although the actions taken by Burbank would be concerning if he were a litigant unschooled in law, we note that Burbank is not only an attorney, but an attorney who is licensed to practice in Maine. He is therefore, presumed to be familiar with our case law, our statutes, and our Rules; his actions demonstrate either a

complete lack of understanding or an intentional flouting of these guides." *Id.* ¶ 61.

Burbank's misconduct had earlier been mentioned in the Law Court's preliminary Order Rejecting Brief and Disqualifying Attorney dated January 5, 2016. In that Order, the Court rejected Burbank's brief, finding that he had "filed his appellant's brief with the pages punched with three holes and bound with red twine." As a result, that Order required Burbank to correctly refile his brief on or before January 15, 2016 – but without making "any changes to the content of the brief." Board Exhibit #3.

In addition, that Order further required Burbank to file a memorandum on or before January 29, 2016 showing cause why he should not be sanctioned for failing to comply with the Court's December 15, 2015 Order requiring that he file a show-cause memorandum regarding his representation of appellees in the same matter in which he was also an appellant. On or about February 23, 2016 Burbank then filed a "Motion to Withdraw as Counsel" in that appeal.

In his Answer to the Board's disciplinary Information, Burbank stated and admitted "that he either made errors in applying or interpreting some rules, or that some rules were not published thus denying him an opportunity to interpret or apply them; or that some rules were ambiguous preventing application by someone making a Law Court appeal for the first time; or that he failed to answer on time in some cases for legitimate reasons, including stroke. He provided the Board with legal and medical documents supporting his claims, *infra*." See Paragraph #33 of Burbank's Answer of August 22, 2017.

At this Court's disciplinary hearing, Burbank also confirmed and agreed he has still failed to pay the amounts of the two monetary sanctions – totaling $10,000.00 – so imposed upon him in the Law Court's decision. The evidence further confirmed that Burbank has not completely paid the judgment amount totaling $20,000 issued against him in the underlying litigation of this matter. In that regard, perhaps to possibly further delay or even discharge those currently unpaid sanction and judgment amounts, on October 16, 2017 – just two days before this Court's disciplinary hearing – Burbank filed a Chapter 7 bankruptcy action in the U. S. Bankruptcy Court, District of Connecticut, Board Exhibit #13.

CONCLUSIONS

Based on the facts as found above, the Court hereby affirms the misconduct findings and conclusions reached and described in *Lincoln v. Burbank*, 2016 ME 138, 147 A.3d 1165. As a result of that decision of the Law Court as well as the testimony presented and various Exhibits admitted at this disciplinary hearing, the Court now further finds that Burbank engaged in multiple serious violations of the applicable M. R. Prof. Conduct as set forth in detail below. Specifically, Burbank's misconduct violated M. R. Prof. Conduct 1.1 (Competence); 1.3 (Diligence); 3.1(a) (Meritorious Claims and Contentions); 3.4(c) (Fairness to Opposing Party and Counsel); and 8.4(a)(d) (General Misconduct and Conduct Prejudicial to the Administration of Justice).

Maine Rules of Professional Conduct

1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

3.1 Meritorious Claims and Contentions

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a non-frivolous basis in law and fact for doing so, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate any provision of either the Maine Rules of Professional Conduct or the Maine Bar Rules, or knowingly assist or induce another to do so, or do so through the acts of another; or

(d) engage in conduct that is prejudicial to the administration of justice.

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SANCTION

M. Bar R. 21(c) "Factors to be Considered in Imposing Sanctions," governs the analysis in the determination of the proper sanction to be imposed by the Court as a result of Burbank's professional misconduct in his frivolous appeal of the *Lincoln V. Burbank* litigation matter. See *In Re Paulson*, 136 P.3d 1087, 1096-1098 (Or. 2006). The Court finds the following factors, as listed in M. Bar R. 21(c) and enumerated within the ABA Standards for Imposing Lawyer Sanctions, to be present in this misconduct matter:

(1) Duty Violated: Burbank violated important and significant duties owed to the public, the legal system and to the legal profession. The countless improper appellate tactics and wastefulness found by the Law Court – and by this Court as well – to have been engaged in by Burbank has been discussed above at pages 2-4. Such a needless waste of time and judicial resources in Maine caused by Burbank's misconduct warrants the imposition of a significant sanction, namely a disciplinary suspension from practice;

(2) Mental State: Burbank's misconduct was not any mistake, but instead intentional. He knew – or certainly should have known – that his frivolous appellate behavior constituted misconduct. He chose to deny his wrongful conduct and disregard the consequences resulting therefrom. The "Appellant's Opposition to Sanctions" dated March 18, 2016, confirms Burbank's unwillingness to appreciate, accept or understand his consistently harmful appellate inadequacies and serious breaches of the Maine Rules of Appellate

Procedure, in addition to his violations of the MRPC, as discussed above. See Board Exhibit #11.

(3) Injury Caused: The actual injury caused by Burbank's behavior is significant. The two sets of plaintiffs that Burbank was sanctioned to pay the amount of $5,000.00, respectively, each still await payment of any of those ordered amounts. Likewise, only a minimal partial amount of the underlying court judgment totaling $20,000.00 has been partially indirectly lessened by the sale of real estate, namely 62 Broadway in Northport, Maine. See Board Exhibit #8.

(4) Existence of Aggravating/Mitigating Factors; The aggravating factors outweigh the mitigating factors as set forth within ABA Sanction Standards 9.22 and 9.32. See attached Board Exhibits #15 & #16 incorporated herein, respectively. As a result of the evidence presented and admitted in this disciplinary action, the Court now finds that the following aggravating factors are present in Burbank's self-centered appellate violations:

- selfish motive (Factor 9.22(b))
- a pattern of appellate misconduct in his handling of that appeal (Factor 9.22(c))
- multiple offenses in that appellate matter (Factor 9.22(d))
- refusal to totally acknowledge or accept the wrongful nature of his serious misconduct (Factor 9.22(g))
-substantial experience (28 years in Maine) in the practice of law (Factor 9.22(i))

- indifference to making restitution (Factor 9.22(j))

By contrast, although the majority of Burbank's presentation at the October 18th hearing, by either the testimony of his witnesses or his own verbal argument, attempted to focus primarily on points of possible mitigation for his misconduct, the Court now finds the actual presence of only a few (three) such mitigating factors:

- absence of a prior disciplinary record in Maine (Factor 9.32(a))
- limited character or reputation evidence (Factor 9.32(g))
- minor physical disability (that was, however, never timely disclosed by Burbank to the Law Court or opposing counsel at any point during this appellate matter) (Factor 9.32(h))

Pursuant to M. Bar R. 21(c), the Court has also reviewed and considered ABA's Sanction Standards 4.5 "Lack of Competence" and 6.0 "Violation of Duties Owed to the Legal System." In each instance, such frivolous appellate conduct, or similar significant incompetence, has warranted a court's issuance of a significant suspension from practice. *See In re Selmer*, 866 N.W.2d 893, 896-897 (Minn. 2015) (twelve-month suspension); *In re Bradley*, 875 So. 2d 67 (La 2004) (eighteen-month suspension, with five months deferred); and *In re Eadie*, 333 Or. 42, 36 P.3d 468, 480 (2001) (suspension for three years).

In that regard, from its analysis of those aggravating and mitigating factors, the Court concludes that it must impose a significant disciplinary sanction for Burbank's serious appellate misconduct in this matter. *See In the Matter of a Member of the State Bar of Arizona, Jack Levine, Respondent*, 174 Ariz.

146, 847 P. 2d. 1093 (Az 1993) (Upon its detailed analysis of the ABA Sanction Standards, the court imposed a six-month suspension with 2 years' probation. Levine's primary misconduct involved his filing of frivolous lawsuits). In this current matter, however, the Court finds that the "automatic" reinstatement to practice allowed by Maine Bar Rule 28 for suspensions of six months or less, is inappropriate for the proper protection of the Maine public from Burbank's serious misconduct.

Accordingly, to ensure the protection of the public and Maine's legal profession from Burbank's significant and serious misconduct, the Court HEREBY orders that a disciplinary suspension of twelve months now be imposed upon Harold H. Burbank II, effective immediately. As a result, because this period of suspension is in excess of six months, Burbank may not be relieved of that disciplinary suspension without first filing a petition for reinstatement in accordance with the requirements of M. Bar R. 29. Finally, to the extent applicable, Burbank must also comply with the requirements of M. Bar R. 31 within 30 days of the date of this Order.

Date: _____, 2017

_____
Robert W. Clifford
Active Retired Justice
Maine Supreme Judicial Court

APPENDIX Z

350a

State of Maine	*	Supreme Judicial Court Sitting as the Law Court
Frederick Lincoln et al	*	Docket No. PEN-15-440
v.	*	
Harold Burbank et al	*	

Appellant's Statement and Request For Oral Argument

Pursuant to MRAP 11(g)(1), appellant Harold Burbank, II hereby files his statement and request for oral argument as follows:

1. MRAP 11(g)(1) states that: "Within 7 days after the Clerk has sent this notice of decision to consider the case on the briefs, a party may file a statement setting forth the reasons why oral argument should be entertained and requesting same."

2. The Clerk sent notice of decision to consider the case on the briefs on April 1, 2016. Exhibit A, copy of April 1, 2016 postmark of notice received, attached.

3. Many scholars argue that oral argument is not perfunctory but can be critical to courts' rightful decision making for many reasons. Appellant adverts that the best reason was summed by the late US Supreme Court Justice Antonin Scalia when he said described oral argument as a preliminary conference where judges more than parties share their views of the case, including their understanding of the facts and law, in which case lawyers participate:

> It isn't just an interchange between counsel and each of the individual Justices. What is going on is also to some extent an exchange of information among the Justices themselves. You hear the questions of the others and see how their minds are working, and that stimulates your own thinking. I use it... to give counsel his or her best shot at meeting my major difficulty with that side of the case. "Here's what's preventing me from going along with you. If you can explain why that's wrong, you have me." *This Honorable Court* (WETA 1988; TV broadcast)...

> Following the "oral argument as a preliminary conference model," an advocate at oral argument should attempt to engage in a conversation with the judges and be prepared to answer questions that the judge may have. When oral argument is viewed this way, its whole existence becomes an exercise in answering the judges' questions, and clarifying their understanding of the law. *THE IMPORTANCE OF APPELLATE ORAL ARGUMENT,* Hon. Joseph W. Hatchett, Robert J. Telfer, III, 33 *Stetson L. Rev.* 139, 142-3 (2003).

4. Appellant directly counseled Phyllis Burbank, Harold Burbank Sr., David Burbank and Lori Darnell on many facts and circumstances of the case. He knows them intimately and can answer any questions the Court has on their views, understandings, and expectations of the facts and the law. Where appellant has said in pleadings that Harold Sr., David Burbank and Lori Darnell have expressed 'no interest' in the appeal, that was not to say that they are not very engaged to this day in the facts and outcomes of the case, and the Court's views of them. All Burbank trial defendants care very much that the Court gets the facts right, that Phyllis Burbank's estate plan is fully implemented, and that her dignity and legacy are honored. Harold Sr., David Burbank and Lori Darnell simply did not wish to be *parties* to the appeal for many reasons, not the least of which was cost. Since considerable issues of equity will be decided by the Court affecting all defendants, oral argument would permit appellant to answer questions of fact, and clarification of fact, that affect the case for all Burbank defendants, and for testatrix-grantor Phyllis Burbank.

5. Defendant Harold Burbank Sr. is 85 years old. He has suffered cancer for many years, which causes considerable physical and emotional distress, yet he willed himself to attend over two days of Bangor trial to testify on the record. Some of that

testimony was somewhat contradictory or unclear. It became clearer and less contradictory over time. Appellant seeks an opportunity at oral argument to make perfectly clear what Harold Sr. meant in his testimony, if the Court has such questions. Harold Sr. is the oldest defendant, and the most knowledgeable of the property history, and all facts and circumstances of the Haley ownership (his grandparents) and Phyllis Burbank ownership (his mother). He has known Mrs. Lincoln (key witness whose deposition testimony the trial court accepted entirely though she did not appear for trial) from childhood.

Further, Harold Sr. suffered a significant stroke post trial in June, 2015. He has made considerable progress toward recovery since that time. His mind is reasonable and clear. He suffers no diagnosed mental health disorders other than 'normal' symptoms of a recovering stroke victim. He answers questions perceptively and intelligently. Appellant has spent considerable time with him during recovery and to date, keeping current on his health with all of his treating physicians, including his private GP, VA GP, oncologist, nephrologist (Harold Sr. was diagnosed with kidney disease after his stroke), cardiologist, and vascular surgeon, as well as physical therapists, nurses, social workers, health insurance staff, other support staff, his daily caregivers, a home aide and his wife. Appellant can therefore answer detailed questions on Harold Sr.'s ability to participate further in the case (ie remand) or any other questions concerning Harold Sr. and his court testimony.

6. The case concerns significant facts and issue of the interplay of the law and policy of shore land zoning, prescriptive easement; wills, estates and trusts; joint tenancy;

municipal law; environmental law, administrative law; due process, equal protection; the takings clause, and more. Appellant avers that oral argument is precisely the forum where he should be permitted to describe his theory of the interplay, since his arguments could persuade the Court of his just contemplations of facts, and applications of them to the law(s). True, the briefs do some of this work, but they cannot answer new and perhaps unique questions of the individual justices, nor provoke live discussions between the justices as oral argument is designed to do.

The case has the prospect of helping the Court craft precedential shore land zoning law principles and policies applicable to Maine's over 3000 mile coastline (where all islands, inlets and bays are measured lineally) as well as Maine's considerable fresh water shore lands and wetlands. Accordingly the Hon. Joseph W. Hatchett, former Chief Judge, United States Court of Appeals for the Eleventh Circuit, has written that appellate oral argument should be vigorously invoked to allow advocates to help courts decide:

> What is the case about? (What holding do you want? What rule do you want the court to adopt to justify that holding? Is there any other rule that would satisfy you?).
>
> How would your rule work? (What are the practical consequences of the rule? How would it change current practices? Can it be administered?)
>
> What will the rule mean in future cases? (How far does your rule go? Where does it meet a limiting principle? Will lower courts have trouble applying it?)
>
> Can the court do that? (Is there a legally respectable ar-

> gument for the rule based on traditional principles of interpretation? Is it consistent with what the court has said before? Does it conform to governing statutory or constitutional language and history?)
>
> Why should we do that? (What values and interests would be advanced by adoption of the proposed rule? Would opposing values and interests be fairly accommodated?)
> *THE IMPORTANCE OF APPELLATE ORAL ARGUMENT,* infra, p. 148-9.

Appellant requests the opportunity to answer these kinds of questions for the Court.

7. It was not brought out much in the pleadings or at trial that neighbors have physically threatened appellant and Harold Sr. for simply asserting their rights in their land. Oral argument would permit appellant to describe these threats and defend his rights of peaceable ownership and privacy.

8. Some of Appellant's pleadings were not properly edited before being submitted to the Court, due to pressures of filing deadlines and shipping distances to the Court from out of state, and in one case, he allegedly missed a filing deadline to show cause. Oral argument would permit Appellant to correct and clarify these errors, so the Court may be certain that Appellant certainly did not intend them or to offend the dignity and authority of the Court.

9. Last, judges who argue for the importance of oral argument have stressed that argument is the only time that litigants come before the Court in person. Many judges find the meeting useful to assess a litigant's truthfulness, veracity, competence, passion for the case, and respect for the issues and the Court. Appellant would welcome to the opportunity to address these matters at oral

argument.

Wherefore, Appellant requests that this Statement be accepted for purposes of scheduling the case for oral argument.

Respectfully,

_____ Date: 4-5-16

Harold Burbank, II, Bar No. 6813
84 N. Mountain Rd.
Canton, CT 06019
Ph. 860-693-2687
Sole Appellant

Certification of Service

I hereby certify that on 4-5-16 I US mailed 2 copies of the foregoing Statement to:

Adam Shub, Esq,
PO Box 9546
Portland, ME 04112-9546

Lori Darnell
1313 Rocky Gap Circle
Raleigh, NC 27603

Jenny Burch, Esq,
PO Box 662
Bath, ME 04530-0662

Harold Burbank, Sr.
13 Intervale Rd.
Kennebunk, ME 04043

David Burbank
21 Elm Street
Wakefield, NH 03872

APPENDIX AA

RULE 9. BRIEFS IN THE LAW COURT

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases, statutes and other authorities cited.

(2) A statement of the facts of the case, including its procedural history.

(3) A statement of the issues presented for review.

(4) A summary of argument. The argument shall be preceded by a summary of the argument that includes the standard(s) of appellate review applicable to each issue presented for review.

(5) An argument. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons supporting each contention, with citations to the authorities and the particular documents or exhibits in the record relied on, with citation to page numbers when they exist. The brief of the appellant shall not exceed 50 pages without prior approval of the Law Court, which shall be granted only upon a showing of good cause.

(b) Brief of the Appellee. The brief of the appellee shall conform to the requirements of subdivision (a) of this rule, except that a statement of the issues and standards of appellate review or of the facts of the case need not be included unless the appellee is dissatisfied with the statements of the appellant. The brief of the appellee shall not exceed 50 pages without prior approval of the Law Court, which shall be granted only upon a showing of good cause.

(c) Reply Brief. Any reply brief filed by the appellant must be strictly confined to replying to new matter raised in the brief of the appellee. A reply brief shall not exceed 20 pages without prior approval of the Law Court, which shall be granted only upon a showing of good cause. No further briefs may be filed except with leave of the Law Court.

(d) Briefs on Cross-Appeals. If a cross-appeal is filed, the brief of the second party to appeal shall contain the issues and argument involved in the cross-appeal as well as the answer to the brief of the appellant. The brief of the second

party shall not exceed 50 pages without prior approval of the Law Court, which shall be granted only upon a showing of good cause.

(e) Brief of an Amicus Curiae.

(1) General. Except as provided in paragraph (2) of this subdivision, a brief of an amicus curiae may be filed only if accompanied by written consent of all parties or by leave of the Law Court. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. An amicus curiae brief. shall be filed on the date on which the appellee's brief is filed, unless the Law Court for cause shown shall grant leave for later filing. Any party may file a reply brief replying to new matter raised by the amicus curiae within 14 days after service of the brief of an amicus curiae, or within such other time as the Law Court may specify in granting leave for later filing to the amicus curiae. The brief of an amicus curiae shall not exceed 50 pages, and any reply brief thereto may not exceed 20 pages, without prior approval of the Law Court, which shall be granted only upon a showing of good cause. The motion of an amicus curiae for leave to participate in the oral argument will be granted only for extraordinary reasons.

(2) Maine Tort Claims Act. In any action under the Maine Tort Claims Act, 14 M.R.S.A. §§ 8101 et seq., the Attorney General shall have the right to appear before the Law Court by brief and oral argument as an amicus curiae where the Attorney General is not appearing representing a party to the action. Unless all parties otherwise consent, in any such action where the Attorney General has received notice of appeal as provided in Rule 2(a)(5), the Attorney General shall file an amicus brief within the time allowed the party whose position as to affirmance or reversal the brief will support, unless the Law Court for cause shown shall grant leave for later filing. In that event, the Law Court shall specify within what period an opposing party may reply to the Attorney General's brief.

(f) Form of Briefs. Briefs shall be signed. Briefs may be reproduced by standard printing or by any duplicating or copying process capable of producing a clear black image on white paper, with printing on only one side of each page. All printed matter must appear in at least 14-point font on opaque, unglazed paper except that footnotes and quotations may appear in 11-point type. Briefs shall be bound on the left hand margin in volumes having pages 8-1/2 x 11 inches and typed matter not exceeding 6 1/2 x 9 1/2 inches, with double spacing between each line of text except for quotations. The front cover of the brief shall contain: (1) the name of the Supreme Judicial Court sitting as the Law Court and the Law Court docket number of the case; (2) the title of the case; (3) the nature of the proceeding

before the Law Court (e.g., Appeal; Report; Certification) and the name of the court, agency, or commission below; (4) the title of the document (e.g., Brief for Appellant); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed. The covers of the brief of the appellant shall be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; and that of any reply brief, gray.

(g) Page Limit Calculations. The table of contents and the table of authorities are not counted in calculating the page limits set in this rule.

(h) Briefs in an Appeal Involving Multiple Appellants or Appellees. In an appeal involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference another's brief or any part thereof. Parties may also join in reply briefs. Adoption of a brief or portion thereof may be by letter to the Clerk of the Law Court, with a copy to all other parties, if the adopting party does not otherwise file a brief. A party adopting another's brief or part thereof shall do so on or before the due date for that party's own brief.

RULE 9

Advisory Notes - January 1, 2001

Rule 9 tracks very closely the generally comparable provisions of M.R. Civ. P. 75A and M.R. Crim. P. 39B. The key changes from those comparable rules relating to the nature and content of briefs on oral arguments are as follows:

— The reference to an appendix in M.R. Crim. P. 39P(a)(6) is eliminated as the appendix is now governed by M.R. App. P. 8.

— Subdivision (d) of both M.R. Civ. P. 75A and M.R. Crim. P. 39B which relates to reproductions of statutes, rules, regulations, etc. is eliminated. Any supplemental authorities which parties desire to file should be included in a separate supplement, filed with the appendix as specified in M.R. App. P. 8(l).

— A cap of 50 pages is placed on the length of briefs on cross-appeals. M.R. Civ. P. 75A(e) included a 75-page limit. M.R. Crim. P. 39B(e) had no page limit.

— Subdivision (e) relating to briefs of an amicus curiae generally follows the language of M.R. Civ. P. 75A(f). The more expansive language is necessary

particularly to accommodate the special provision that needs to be made regarding filing of a brief relating to the Maine Tort Claims Act, which is, of course, unique to civil cases. The more formal approval provisions for filing a civil amicus brief are also included in this rule now applicable to both criminal and civil cases.

— The type or font size requirements addressed in subdivision (f) are designed to achieve clear, easy to read text. Plain roman type or font styles should be used, although italics or boldface may be used for emphasis. Appropriate type styles to use include Bookman, Courier, Geneva, Georgia, or other similar type styles. Type styles such as Arrus, Script, or Times should be avoided.

— Subdivision (g) is added to note, as under present practice, that the pages for the table of contents and table of authorities are not counted in calculating the page limits for the briefs.

Advisory Notes - September 10, 2001

The amendments to subdivision (f) add more specification to the printing and type or font size requirements and make clerical corrections to the original Rule. The signing requirement reflects current practice carried over from previously applicable rule requirements. See M.R. Civ. P. 11.

Advisory Notes- August 1, 2009

Rules 9(a) and 9(b) are amended to require that for each issue presented for appeal, the brief also state the standard of appellate review that will be applicable to resolution of each issue. This is to help assure consideration of the proper standard of review for each issue presented on appeal, an area that has been ignored in some brief writing practice. The appellate standard of review for most issues will fall into one of three broad categories: (i) "de novo" review, (ii) "clear error" or "sufficiency of evidence" review, and (iii) "abuse of discretion" or "unreasonable exercise of discretion" review. The law regarding standards of review is addressed in Chapter 4 of Maine Appellate Practice (2008).

Advisory Note - November 2011

The reference [in Rule 9(a)] to "pages" of the record was an outdated reference from the time when the trial court clerks individually numbered each page of the record before forwarding the record to the Law Court pursuant to M.R. App. P. 6. To ease review of briefs, citations to the record should continue to be as precise as possible. Pursuant to the amendment, citations to the record must

indicate the particular document or exhibit referenced, including page numbers when page numbers exist.

Advisory Note – November 2011

Rule 9(h) is adopted to establish the proper procedure when one or more parties to an appeal elect to adopt another party's argument or brief. The first two sentences of Rule 9(h) are identical to Fed. R. App. P. 28(i). The last two sentences are added to provide a mechanism for adopting another party's brief when the adopting party is not otherwise filing a brief and to provide the due date for any adoption.

Advisory Note – October 2014

Rule 9(f) is amended to omit the requirement that briefs be printed in Bookman font, to change the minimum size of the font from 12-point font to 14-point font, and to standardize formatting.

RULE 10. MOTIONS AND OTHER PAPERS IN THE LAW COURT

(a) Motions. Unless another form is prescribed by these rules, an application to the Law Court for an order or other relief shall be by motion, shall be typewritten, shall state with particularity the grounds therefor and shall set forth the order or relief sought. Supporting papers shall be served and filed with the motion. Motions and supporting papers shall be typewritten and shall conform to subdivision (d) of this rule. All motions will be acted on without oral argument unless otherwise ordered. Motions will not necessarily be granted even though assented to by other parties. Motions may be acted upon at any time, without waiting for a response thereto. The Chief Justice, or another justice designated by the Chief Justice, may act on motions on behalf of the Court, or may refer motions to the entire Court.

(b) Certificate of Service Required. Every motion shall be served on the other parties and shall be accompanied by a certificate of service upon the other parties. If the certificate is not included with the motion, the Clerk of the Law Court shall return the motion as incomplete. The Clerk will not docket the attempted filing but will retain a copy and the notice of return. If the moving party refiles the motion with the proper certificate of service, the complete motion will then be accepted and docketed.

APPENDIX BB

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

August 18, 2020

Harold H. Burbank, II
84 N. Mountain Rd.
Canton, CT 06019

RE: Burbank v. CT Office of Chief Disciplinary Counsel
CTSC No. PSC-190384

Dear Mr. Burbank, II:

Returned are copies of the petition and the appendix in the above-entitled case sent by commercial carrier on August 10, 2020 and received on August 14, 2020, which fails to comply with the Rules of this Court.

You must submit a certificate stating that the petition complies with the word limitation. The certificate must state the number of words in the document and must be separate from the petition. Rule 33.1(h). If the certificate is signed by a person other than a member of the Bar of this Court, the counsel of record, or the unrepresented party, it must contain a notarized affidavit or declaration in compliance with 28 USC 1746.

Your petitions and check in the amount of $300.00 are herewith returned.

Kindly correct the petition and appendix so that it complies in all respects with the Rules of this Court and return it to this Office promptly so that it may be docketed. Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

Three copies of the corrected petition must be served on opposing counsel. Rule 29.3.

The e-filing submission is herewith rejected.

Sincerely,
Scott S. Harris, Clerk
By:

Susan Frimpong
(202) 479-3039

Enclosures