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## Legal Landscape Overview

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Tue, May 9, 2017 at 3:41 PM

Laura and Jack –

The memo entitled “Behind the Courthouse Door: The Legal Landscape of Transparency and Privacy,” included in the materials you provided the Task Force at its first meeting, is excellent and very helpful.

In advance of next week’s meeting, and in connection with the agenda item “Legal Landscape Overview,” I thought I would share a few preliminary thoughts. If you think appropriate, please feel free to circulate this email to the members of the Task Force.

### **Natural Rights Clause of Maine Constitution**

Section II of the memo provides a good overview of Maine law governing access to court records and references a number of sections of the Maine Constitution. Noticeably absent, however, is any reference to or discussion about the Natural Rights Clause, Article I, section 1, of the Maine Constitution.

It provides as follows:

Natural Rights. All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

This broad language has no federal analogue, and it could support an argument that Maine’s Constitution provides broader privacy protections for individuals than does the U.S. Constitution. As you know, the Maine Constitution has an existence independent of the U.S. Constitution. While I haven’t researched the issue, I am not aware of any jurisprudence on the right to privacy under the Maine Constitution. In other states, some state courts have found that almost identically worded provisions form the basis of state privacy claims.

In other contexts, Maine’s courts have held that the Maine Constitution provides additional guarantees beyond those contained in the U.S. Constitution, as have many other states’ courts, such as New Hampshire, Vermont and Massachusetts. In Maine, *see e.g.*, *State v. Sklar*, 317 A.2d 160, 169 (Me. 1974) (noting that the state constitution, but not the Federal Constitution, guarantees trial by jury for all criminal offenses and similar language of federal and state provisions is not dispositive); *Danforth v. State Dep’t of Health and Welfare*, 303 A.2d 794, 800 (Me. 1973) (holding that the state constitution protects parent’s right to custody of child and that parent has due process right under the state constitution to court-appointed counsel although the Federal Constitution may not guarantee that right).

In New Hampshire, Vermont and Massachusetts, *see e.g.*, *State v. Ball*, 471 A.2d 347 (N.H. 1983) (analyzing state constitutional claim before turning to Federal Constitution, and concluding state constitution’s limitations on search and seizure were stricter than federal limitations); *State v. Kirchoff*, 587 A.2d 988 (Vt. 1991) (stating that the Vermont Constitution provides more protection against government searches and seizures than does the Federal Constitution); and *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (interpreting the Massachusetts Constitution’s free exercise of religion clause as broader than federal protections).

I think the Natural Rights Clause should be included in our review and consideration of Judicial Branch rules governing access to court records which may interfere with individuals' "inherent rights."

### **Maine Common Law Right of Privacy**

Also missing from the memo is any reference or discussion about Maine's recognition of a common law right of privacy, which I also think should be included in the Task Force's discussion. *See, e.g.,* Estate of Berthiaume v. Pratt, 365 A.2d 792, 794 (Me. 1976). Specifically, the Law Court recognized four different interests, when, taken as a whole, "represent an individual's right to be left alone." *Id.* at 795. The four types of privacy invasion are:

- (1) intrusion upon the plaintiff's physical and mental solitude or seclusion;
- (2) public disclosure of private facts;
- (3) publicity which places the plaintiff in a false light in the public eye;
- (4) appropriation for the defendant's benefit or advantage of the plaintiff's name or likeness.

*Id.* Restatement § 652D addresses the public disclosure of private matters:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.

Restatement (Second) of Torts § 652D. Maine courts "have required both widespread publicity about the matter and that the information about the plaintiff be truly private." Simmons, Zillman & Gregory, Maine Tort Law § 13.21 (2004 ed.).

I would be happy to expand on each of the above areas if you wish. Please let me know if you have any questions. Thank you.

Best,

Peter

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