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VERMONT BAR JOURNAL

Vol. 45, No. 2 Summer 2019

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Published four times a year by the
Vermont Bar Association
Subscription rates: 1 year $35. 2 years $65.
Printed by L Brown & Sons Printing, Inc.
VBA assumes no responsibility for claims
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by Therese M. Corsones, Esq.

FROM OUR EXECUTIVE DIRECTOR

VBA Advocacy at the Statehouse

The Summer Edition of the VBA Journal typically includes a legislative overview of the bills that became law during the last legislative session that affect the courts and the bar. You can find this year's legislative overview in the *What's New* department of this issue. Early returns from our VBA Membership Survey (there's still time to take it if you haven't already!) show VBA advocacy as one of the highest valued benefits that the VBA offers its members. I thought it might be helpful to explain what VBA advocacy involves. Given that the 2019 session was Bob Paolini's last as the VBA Government Relations Coordinator, I wanted to take this opportunity to thank Bob for all that he's done to make VBA advocacy in the legislature the strong force that it is today.

The work starts in the fall, when section chairs are asked to identify any legislation that they would like to see brought before the Legislature. Examples include anything from minor revisions to statutes that are ambiguous or inconsistent with other statutes, to full scale overhauls of areas of the law that might need modernizing. The most recent example was the probate bill intending to update and modernize Vermont's decades-old laws on trusts and estates. Sponsors are identified, depending on what committee would likely be assigned the bill given its subject matter and Legislative Counsel is contacted to assist with the drafting. Section members willing to testify about the bill are enlisted so they are "on call" when the committee schedules time for the bill to be taken up. We also reach out to the committee chair to gauge when testimony would best be scheduled. Since the Legislature can change every two years (sometimes significantly – there were 40 new members in 2019) identifying sponsors and key committee chairs is an ever-changing challenge.

For the past three years the VBA has jointly organized with the judiciary a "Legislators Day" in each of the 14 counties in the fall. During the Legislators Days, all of the county legislators are invited to sit in on court hearings for whichever docket most interests them. They're also invited to a luncheon, attended by the judicial officers in the county, and "bar ambassadors" representing each of the dockets, to give legislators a chance to ask questions about what they observed in the hearings. It's an excellent opportunity to discuss challenges in the courts and legal system, and the resources available locally to meet those challenges. The Legislators Days are a great way for legislators to see first-hand how the courts and the legal system are impacting their constituents, and for the VBA to forge connections with legislators.

Once the legislative session starts, we check the new bills introduced daily, and alert affected sections about any bills that might impact a specific legal field. Thanks to the relationships that have been cultivated with many committee chairs, the chairs may also alert the VBA of bills that are being introduced in their committees and may seek testimony about ramifications of the bills. In those instances, we notify the sections and typically the section chair or others in the section are very generous in their willingness to testify when asked.

During the session, we continue our outreach efforts to all legislators through a legislators' reception in mid-January, when all legislators, section chairs, bar ambassadors and VBA Board members are invited to a late afternoon social hour in the Cedar Creek Room, and a legislators' breakfast in mid-March, when the same groups are invited to coffee, donuts and apple bread pudding (nine trays' worth last March) in the statehouse cafeteria.

Except for Town Meeting Day week in March, when legislators take the week off to attend Town Meeting Day events in their home districts, we check the weekly House and Senate calendars for progress on bills that we've introduced, or bills that we're following. If one of those bills is scheduled for testimony, we check with the committee chairs to see if additional testimony is needed and check with affected section chairs to see if testimony is requested. The goal is to make sure that committee members have as much information as possible about the proposed legislation before they cast their votes.

Other work involves seeking out and meeting with legislators outside of the committee rooms, to answer questions and to get information about specific bills, especially ones that we've proposed, to best facilitate their passage. Some bills are easier than others to see through the process. And oftentimes the legislative work continues through the summer months. Such work includes either summer study groups or task forces that include a VBA appointee; this summer VBA appointee Jeffrey Nolan will work on a "Task Force on Campus Sexual Harm" that was created during the last

session. Informal working groups also collaborate on particular issues during the summer months. For example, this summer a working group including members of the bar, bankers, realtors, and municipal clerks and treasurers are meeting to identify best practices in town clerk recording practices. The same group of stakeholders worked together to bring about the "best practices" recently codified in Act 38.

With respect to the VBA taking a position on a bill, there's a "Legislative Advocacy Policy" that Bob Paolini recommended to section chairs in 2002 still followed today. It provides that the VBA Board will take one of four positions regarding Board support of specific legislation: support, oppose, information only, or no position. Before taking a position, the Board is asked to answer three questions about the proposed bill: Does the bill affect the courts, the practice of law or the administration of justice? Is the subject matter of general interest to the members of the Bar? Would there be a general consensus among the Board supporting the position of the Association? If the answer to each question is yes, the Board can take a position on a bill - to support, oppose, offer information only on the bill, or take no official position.

When Bob Paolini became Executive Director of the Vermont Bar Association in 1996, he was a natural fit for legislative ad-

vocacy, having served two terms as a state representative from 1986 – 1990. Asked what his favorite part about the legislative advocacy work he's done has been, Bob replied:

> I'd say my favorite part of the work has been positioning the VBA in a place where legislators rely on the association as they work on bills. Since 1996 we've become the "go to" resource for many issues, many of which didn't even appear on our radar screen. But legislators have come to respect us and seek us out for advice and suggestions for how best to proceed even if the topic at hand wasn't necessarily one that we'd identified. Earning that position of respect is one of my proudest accomplishments.

And his least favorite part?

> I'd say it's the unpredictability of scheduling and the amount of down time involved. There's certainly a lot of "hurry up and wait" as those of you who have traveled to Montpelier to testify certainly know. I can't count how many times I or one of you was stymied by ongoing floor debate that kept committees from meeting as scheduled. My thanks go to all of the members of the VBA who made many sacrifices to improve and modernize our laws. Legislative advocacy on behalf of our association only works because of members' involvement.

The VBA is happy to help our members make a very positive difference at the statehouse. Without members' willingness to share their expertise, and their generosity of time and effort in preparing and delivering testimony, legislators would be at a distinct disadvantage when voting on bills that impact members and their clients. We are very grateful to all the lawyers who have answered the call to testify when asked, to propose legislation, and to otherwise inform legislators about a wide variety of topics. And Bob, we are very grateful to you for the standard of excellence that you've brought to VBA legislative advocacy. We will do our best to maintain and build upon that standard!

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PURSUITS OF HAPPINESS

Improv-able Duo

Jennifer Emens-Butler: I am here in Burlington, and I have the pleasure of interviewing two people at the same time about a certain passion that both Rick Hecht and Neil Groberg have. As our readers know Pursuits of Happiness is our column where I interview lawyers who have interests and talents outside the law, which are sometimes tangential to their practices and sometimes are just something entirely different altogether. How long have you two known each other?

Rick Hecht: So, I think we first met at a Chittenden County mediation group, that Neil and some other folks were trying to start up as a mediator support group. I then found myself going to a meeting that Emily Gould had called for the DR Section and somehow as a result of that meeting I became assistant chair of that Section.

JEB: Ah, so this is all Emily Gould's fault! She set up her co-chair before she left. Well done Emily!

Neil Groberg: I remember us meeting before that.

RH: Before my "power?" [laughs]

NG: I remember the mediation folks trying to help plan mediation week at Citizen's Cider and I think that was the first time I met Rick, and we were brainstorming at the time.

JEB: Wait, you were planning the mediation week at Citizen's Cider, or the mediation week was going to be at Citizen's Cider?!

NG: Ha, well it should have been! But no, we were brainstorming what to do for mediation week over cider, and I think Rick came up with the suggestion of doing something with what was then under construction, the Vermont Comedy Club.

RH: Yes, the Comedy Club at that time was just starting up with Nathan Harwick and Natalie Miller. It was in infancy, but I had taken a standup class from Nathan and I knew that they also did improv.

JEB: You were already interested in improv?

RH: Right. I came to improv when I was a first-year law student. When I was In Boston they had this sort of continuing education thing that had all sorts of classes -- anything from knitting to astrology -- and one of the classes was improv comedy and I thought, that's what I need!

JEB: Needed?

RH: Yeah. It really was, like this is the opposite of drilling stuff into my head at law school and being more free flowing.

JEB: Ok.

RH: And so it sort of happened, and then fast forward however many years, I found that improv is good, I've seen it help me with the law, and I think there is even more tie-in with mediation (where things come at you from out of left field) so Neil and I and a couple of other folks, put together a workshop that was co-sponsored by the VBA and Champlain College's mediation program. The workshop had a bunch of the trainers from what was to be the Comedy Club and it was a really good time.

JEB: So the mediation section went to this workshop?

RH: Yes, it was probably 25-30 people who all participated.

NG: It was a lot of fun and it was educational, and it was where I learned the underlying theory of improv, which is actually incredibly helpful in mediation: *instead of saying 'yes BUT,' when someone says something, you say 'yes AND,'* where you expand the thought as opposed to contract the thought.

RH: So the way it plays out in improv is, let's say someone will walk into the scene and come up with an idea that you think is completely stupid, and flat, but you are morally obliged not to say "no, we are not doing that" but you have to say "Okay" and make it work.

JEB: Oh, so now I am an alien, or whatever.

RH: Exactly. It is one of the crucial things in negotiation and mediation, where you expand the threshold of what you are talking about so hopefully, not just saying, "oh I want that" and the other person says "I want this," but where you bring in other ideas like maybe you want "X" in addition to that. So you expand the field of possibilities and increase the circle within which you can come together.

JEB: Right, creative solutions! Is there always somebody at improv like Michael Scott in *The Office*, where in his improv class he always ends up saying he is a a secret agent with a gun and no matter what they are talking about, be it labor and delivery, aliens, toddlers or what have you, somehow, he always seems to pull out the gun and says "Michael Scarn, FBI" or something. Do you have some people who are just one-track mind people?

RH: Yes, I think there is sort of a self-weeding process, because in level 1, you have people who are all over the map. I think one of the most important lessons I learned in the early classes is to stop trying to be funny, that you really sort of shoot yourself in the foot when you come up with a plan for how the skit is going to go and how you are going to be more clever than everyone else.

JEB: Right you must be open to alternatives…

RH: Right you have to be open, you have to be mindful, and there is a lot of people who try it out that cannot do that and then you know, you don't see them at level 3 or higher. Or they do a one off and say this was fun, but I am not interested in doing it anymore.

NG: Some people are better naturally and some people are more persistent with training, kind of like me. I didn't have any prior experience or inspiration other than having

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what my family thinks is a terrible sense of humor over the years, loving comedy and loving watching improv so I just thought, hey, this would be kind of fun. I was thinking my kids are out of the house and in my practice is now just mediation, so I had time at night to do it. I thought it was going to be a one-off, just to try it, but I loved it!

JEB: And do you find you grew as you were able to be more creative as you took the course?

NG: Yes, I improved as I moved on to each level where in level three you can expand the story more.

RH: The courses at the Comedy Club are really special. They have built up this real community of improv learners, fans and instructors, and so even though sometimes I feel pretty out of my league, they are all so friendly and fun that it doesn't matter.

JEB: You said that the downfall of a lot of people is trying to be so funny and creative in their own world that they cannot see what is going on, but it does end up being funny, right?

NG: Yes, it is absolutely funny. Once you just let yourself be part of the flow of the bigger process, you kind of lose any pressure to be funny, you just add to the scene which inevitably ends up being funny. I mean it is hard not to think of funny things but still you shouldn't try to be funny, you just go with it. It never ceases to amaze me, the things that come to you. The value of it is that it ends up being incredibly funny and you just get a rush with it.

JEB: Saying things that you thought of you never would have….

NG: Right, it was pretty shocking to my family because it is a safe space, where you can go off and say things without violating social constraints, although, we do make a big effort to make sure that the performances do not have discriminatory or sexist intent.

JEB: Because off-color tends to be funny, but you have to be pretty careful, since you never know what people are going to say, right?

RH: It's definitely hard to string five words together on stage at a comedy club without saying the f-word, for example.

JEB: But that is allowed.

NG: Correct, there is no censorship.

JEB: So speaking of the f-word, I understand you took the standup class too, Rick, so that's more pressure in trying to be as funny as possible and trying to think of creative things to say.

RH: Yes, so this may be a stupid analogy, but it just popped into my head and I am going to use it.

JEB: You are going to improv right here.

RH: Yes! So standup is more like trial work, you know, prepare, prepare, prepare. I started out with maybe 10 minutes of pretty lousy material, and over the course of 5 weeks of classes, honed it down to maybe 4 minutes of pretty good stuff. So, like trial work, it's the constant sitting with the material and honing it down…

JEB: And hoping you have a receptive ear.

RH: Yes, hoping you have a receptive ear, and running it past as many people as possible to see who thinks it is funny.

JEB: Are you going to give us one of those 4 minutes?

RH: Not on the record.

JEB: Oh, bummer! Contains some f-bombs?

RH: I suspect so, yeah. But improv, it's more like mediation, even just when you are meeting with your client or meeting with opposing counsel for the story. And at the sessions, you have to be ready for anything and you have to be creative and open. The trainings definitely help.

NG: I continue to do trainings and performances because I love it so much. Rick is a little more occupied than me, because he has 3 children at home. A lot of independent improv groups have sprung up out of the club. I joined one of them, the "old" people group, and it…

RH: Over 40.

JEB: Oh, wow yikes.

NG: That's to show you how young the usual demographic of the comic club is. And almost every Wednesday night they have what's called the "Smack Down" which is where 3 independent improv groups compete against each other, the audience votes, and the winner gets to go the next week.

JEB: Ok.

NG: So, the old age group has performed 4 or 5 times in the Smack Down. We won once and we won the trophy and then we lost the following week.

JEB: Ok, sounds fun! Are these performances at a bar?

NG: No, it's at the Comedy Club. But it's a full liquor licensed bar, with an inside section with tables and chairs and the stage.

JEB: Ok, nice.

NG: Yes, they do have table servers, and actually pretty good snack foods and things, my favorite is they warm up cookies … I should say we are not getting kickbacks.

JEB: I know, first you were saying how awesome the Comedy Club is and now you are saying something about the cookies, yeah sure.

NG: There are 5 people in our "senior" group called Celine Dior (long story) and we have been a great team. The coach has been terrific with us. I love it so much that these performances have been my continuity with the club. I am not sure what my next things is, because there was also a sketch comedy class, which I took, and Rick took that too, and the only class I haven't taken is standup.

JEB: You don't do trial work, so you don't need it?

NG: I don't do trial work, and I never liked trial work. They did do something this winter where they had improvers who had never done standup, do standup, and standup people who had never done improv do improv.

JEB: And?

NG: I thought, and modestly, that it was funny even though I was nervous all week and didn't want my family to come. I didn't want to tell them I was doing it.

RH: So you told her you were having an affair?

JEB: [Laughs] Yeah, anything but standup!

NG: My wife came and said it was pretty good and was startled by how poised I was. , generally, I don't think I could do the standup class because it is too structured for me.

JEB: Too prepared and designed?

RH: Yes, there is a rhythm to typical standup, there is the setup, there's the joke and then you move on, but, like Neil, I am more of a story teller and so I found that structure kind of hindered me.

JEB: Question for both of you because the thought of doing either improv or standup scares the daylights out of me. Class clowns, yes or no?

RH: No.

NG: No.

JEB: Shy?

RH: Yes.

NG: Yes.

RH: Well, I think, I was a class clown to a certain group of like 2 or 3 people.

JEB: Ah, so they knew you were funny but no one else knew you were funny!

NG: My 25-year-old self-looking at myself now, would be shocked.

JEB: Neither of you would imagine that you would have done this?

RH: I don't know, because even though I was shy about it, I have always liked humor and I have always liked doing funky things with words, so maybe I don't think my teenage self would be surprised that I did it more than once. But I wouldn't have done it then.

There was an improv group at college where my hidden dream was to I join it, but I never felt like I would be good enough, so I never did.

JEB: I know our former VBA President, Dan Richardson has done improv and stand-up but maybe just in Boston. Have you seen him or other lawyers there?

NG: No, but there are lawyers doing it. I can't recall any names.

JEB: Well I like the idea that improv is really good for mediation, and thinking on your feet as lawyers, so at your suggestion for the bar, we are doing an improv CLE the Thursday night of our Annual Meeting on September 26th. Maybe it will be more lawyers that are interested in doing improv after this.

RH: Oh, no. I don't want the competition!

JEB: But then you could put together a group of 5 to compete, to be the lawyer team, but what would the name be?

NG: Of the lawyer team?

JEB: Yeah.

RH: We could think of a whole lot of off-color suggestions I'm sure.

JEB: No improv?

NG: I was thinking of the joke, what's one good lawyer on the bottom of the Hudson.

JEB: Right, you could just call the team "A Good Start" but of course I'm always in favor of something more positive to help with the public perception of lawyers. Maybe "Justice Crusaders" or something.

You both firmly believe that it has helped your mediation practices, right?

NG: Oh, yes absolutely! It's akin to mediation training, a renewal of sorts, it is refreshing and it keeps your brain active. Here I am, this old guy, working with very young people who are really vibrant, and who are coming up with these incredible things and you have got to keep up with them. It keeps you fresh.

JEB: Isn't that funny, my interviewees seem to find polar opposite things to be refreshing. For example, I interviewed Mark Oettinger who plays high level duplicate bridge and I said to him that most of the people I interview want to do something physical, they want to do a sport or something with their hands, where they can shut their brain down entirely to relax. So I asked him "is this relaxing for you to have to use your brain so strenuously?" He noted that using your brain in a very different way, where it can be taxing but also creative and fun, is extremely relaxing.

NG: Yes, it's very energizing and relaxing in the same breath.

RH: I think that is a really good point. I see legal work as something that you go in tighter and tighter, and it's like you focus on what you are focusing on and then you are focusing some more, but improv goes exactly the other way. It's like all of those circuits that were so tightly honed on, for example, whether this piece of evidence can get in or not, in improv you are suddenly free to go anywhere and set your mind free in a creative space.

NG: And I wanted to add in terms of the value of improv and comedy for people, not just lawyers. When we moved to Burlington, I became involved with a neighborhood planning assembly and I was on the steering committee for 5 years which was quite active. And I became filled with angst about pressing issues and I got burned out. But then I focused a lot of my energy on improv, and I think that in this very messed up world, being able to have that escape of comedy and have people laugh and enjoy things, is really valuable, and not just to me, but I really do feel it helps everyone to come and escape and see humor.

JEB: Laughter is one of the most important things that keeps us all sane.

NG: Yes I even try in the right circumstances in the mediation to bring some humor into the room. And I think it cuts the tension.

RH: But the one thing that I wanted to add in keeping with your column goals, is that there is an aspect to improv, that almost feels like a meditative practice, kind of like yoga, for me. It's the freeing of the mind, to get absorbed in the moment.

JEB: Right, you have to be super mindful to get into the scene. If you let your mind wander then you are not part of the team and you are not expanding on what they are doing, but rather you are trying to be too clever. But you have to be paying attention the whole time and be present to what is going on, right?

RH: Yes, and I think that is the closest thing to meditation or yoga, but a really good gig just feels so much better even.

JEB: Ah! Like yoga and meditation, humor and fun all wrapped into one, with the added benefit that it is helpful to your law practices too. Everybody should be doing this!

RH: Yes.

NG: Oh yes.

JEB: I am sold! See everyone on September 26th for an evening at the improv in Burlington.

Do you want to nominate yourself or a fellow VBA member to be interviewed for Pursuits of Happiness? Email me at jeb@vtbar.org.

by Paul S. Gillies, Esq.

RUMINATIONS

Politics and the Court

On November 18, 1944, President Franklin D. Roosevelt attended a cocktail party in Burlington. William Hassett, who traveled with FDR for several years, reported that Stella Pratt Moulton, the wife of Vermont's Chief Justice, told the president, "although her husband was a 'morbid' (new descriptive adjective) Republican, she had voted for the President; also to tell him that the wives of the old-line Republican members of the faculty of the University of Vermont all had voted for him."[1] Hassett's memoirs were published in 1960. Chief Justice Moulton died in 1949, and may never have known what his wife told the President.

The private lives of justices are none of our business, but all the same it is hard not to focus on the idea of a "morbid Republican." Did Mrs. Moulton reveal something about the Chief? Would his political philosophy show in his decisions on the court? There are plenty of decisions to choose from. Moulton served 30 years as a judge, seven as a Superior Court Judge, 23 on the Supreme Court, and nearly eleven of those years as Chief Justice. He authored more than 100 decisions as Chief, more than 160 as an Associate Justice.[2] Are his political opinions reflected in this body of work?

Chief Justice John G. Roberts, Jr. said recently, "There are no Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their best to do equal right to those appearing before them."[3] But some judges are conservative and some are liberal and some are progressive. These biases are political, even if they are detached from any political party platform. Let's investigate.[4]

Standard of Review

We begin by defining terms. As a Republican, Sherman Moulton was not alone. Every Governor from 1854 to 1962, when Phil Hoff became the first Democrat to be elected to the high office, was a Republican. Vermont was Republican. There were factions within the Republican Party, a conservative wing and a progressive wing, but Vermont progressivism was very unlike the progressivism of 2019. And the Republican Party of the thirties and forties was not like the party or its positions today. The natural fiscal conservatism of state leaders was hardened by the two world wars and the depression. FDR won every state in the nation in the election of 1936 except Maine and Vermont.[5] He never won Vermont in four presidential elections.[6]

The Republican Party of the 1940s was not purely conservative. It was the first major party to endorse an equal rights amendment for women in its platform, in 1940. But it was opposed to the Democrats' attempts to concentrate power in the federal government, consequently limiting the powers of states and interfering in private commerce, setting minimum wages and hours, fixing prices, and regulating the workplace.

"Morbid" in this context is more challenging. An online dictionary defines it as "characterized by or appealing to an abnormal and unhealthy interest in disturbing and unpleasant subjects, especially death and disease." Synonyms include "ghoulish, macabre, gruesome, grotesque, ghastly," and "unwholesome."[7] As applied to politics, the term has an obvious pejorative meaning. Arthur Schlesinger, Jr. labeled Richard Nixon a morbid Republican, in *Kennedy or Nixon: Does It Make a Difference?* (1960).[8] The first use in a Vermont paper came in 1886, when the editor of the Argus and Patriot, a Democratic newspaper published in Montpelier, commented, "This record of the administration for paying the debts of the government is a most satisfactory and enviable one, and abundantly demonstrates the economic ability and tendency of a thoroughly Democratic government. Those morbid Republicans, ranters who have prophesized financial ruin to the government by a Democratic administration, are invited to consider those facts and figures."[9]

Perhaps Mrs. Moulton intended it to mean "dedicated" or "determined" (but not "rabid"), connoting a political philosophy that was unsusceptible to change. We can only imagine the discussions that must have occurred at the Moulton home during the era of the New Deal, the U.S. Supreme Court's repudiation of its programs, and the threat of enlarging the highest court in the land to overcome that conservative opposition to FDR's efforts to introduce "socialist" programs and expand the reach of the federal government.[10]

"Morbid" wasn't easy, but how about "conservative"? The political dividing line between conservative and liberal or progressive judges is reflected in several ways, including the relative deference to the legislature in reviewing acts for their constitutionality, and a consequent reluctance to exercise judicial review to undo what the legislature has enacted. "Activist" judges are more likely to invalidate legislation on such grounds.[11] In criminal law, a conservative judge may be less likely to recognize the privacy rights of landowners in the investigation of crime, less likely to extend constitutional protections against unlawful search and seizure, less willing to dismiss prosecutions on the dividing line between words taken down after Miranda warnings than before. To a conservative, "judicial legislation" is anathema.

Another issue is delegation. The laws must have standards to be enforceable; without them, whatever action is taken is arbitrary and indefensible. This idea has defeated many laws at the federal and state levels, on separation of powers grounds, where the legislature has improperly ceded to the executive the power to make quasi-judicial decisions or quasi-legislative rules or ordinances, with undefined discretion.

Conservative judges share a strong belief in precedents. What has been decided should not be easily overturned. They favor property rights, are likely to find un-

constitutional takings, and prize Article 2 (compensation for taking private property for public purposes) over Article 5 (police power).

Categorizing judges and justices by these criteria is risky. Louis Peck was a conservative, as shown by his dissents. But trying to classify other judges and justices often defies us. Decisions are based on precedent, statute, the constitution, and legal ideas, under specific facts, and there is usually little room for discretion.[12]

How can we really know Sherman Roberts Moulton? We have his decisions, and we have a few other facts. We know he was born in Burlington in the house that John Dewey lived in before him. His father was a banker who owned a stock farm in Randolph that made "butter of great perfection," that won a gold medal at the Paris Exposition of 1889 and another at the 1893 Chicago World's Fair.[13] We know Sherman Moulton promised 30 Revolutionary War era drums to the Vermont Historical Society in 1915.[14] We have his book, *The Boorn Mystery* (1937), a defense of the Vermont Supreme Court's actions in the murder convictions of two brothers accused of killing another, notorious in Vermont judicial history for the arrival of the victim shortly before one of the brothers was to be hanged.[15] Moulton was a graduate of Harvard Law School. In a book published to honor the graduates of the school, he included his score on the bar exam (95.28, to be precise) in his biography.[16] As Reporter of Decisions, he was the one to remove the synopsis of attorneys' arguments from *Vermont Reports*, a long-standing practice of the court. These details tell us nothing about his politics or his judicial views. If there are revelations of a conservative temperament, they would appear in the opinions of the court that he authored, and those he joined.

Sherman Moulton's years on the court saw many changes and challenges for Vermonters and the world, including the 1927 flood, the 1929 Wall Street Crash and the depression that followed, prohibition, and World War II. In his years as a judge or justice, women were given the right to vote and serve on juries, motor vehicles replaced horses, radio became omnipresent, and FDR brought on the New Deal. The first federal laws that Roosevelt sponsored to respond to the depression were struck down by the Supreme Court. These decisions defined conservative judicial thinking.

Judicial Review

FDR was frustrated by the rulings of the Supreme Court that threatened to undo the work his administration had done to respond to the depression. The New Deal and the recovery were threatened. His answer was to expand the court, which nearly came to pass, had Justice Owen Roberts not changed his position and begun voting with the court's more liberal members (the "switch in time saved nine").[17]

During the mid to late 1930s, this judicial crisis would have been a subject no justice or judge could ignore. It would have been talked about over a justice's dinner table and in the chambers of the court in every state, including Vermont. Everyone watched as the Supreme Court of the United States struck down elements of the New Deal, including acts for debtor relief, a poultry code, a price fixing law for agricultural products, a tax on coal, and a law regulating the hours women and children could work.[18]

During Sherman Moulton's years on the Vermont Supreme Court (1926-1949), his court exercised judicial review seven times to void acts or statutes, four of them based on Section 5 of the constitution, the separation of powers clause. Struck were a local ordinance requiring high fees for a junk dealer license that raised revenue and allowed trustees to grant licenses on their sole discretion; a junk dealer's ordinance that gave total discretion to the village trustees where a junk yard may be located;[20] a statute requiring the Supreme Court to give advisory opinions to the legislature;[21] and a law allowing the allocation of flood control project funds. That was *Village of Waterbury v. Melendy* (1941), which left the apportionment decision to the Board of Public Works and the Public Service Commission. Justice John S. Buttles wrote the decision for the court, and faulted the law for failing to include standards for the apportionment of expenses.

> How are the benefits to the municipalities to be determined? Shall it be only on the basis of probable flood protection to riparian property owners, thus requiring assessment of the whole town for the direct benefit of riparian owners only? Is riparian land alone to be considered, or land liable to flowage on a basis of frontage, area, or value, or shall consideration also be given to the personal property of great value which is subject to flood risk in some of the towns and cities? Or is the term "benefits" to be restricted to benefits which the municipality itself, apart from its citizens, may receive, such as protection to its highways and parks and public buildings and any lands to which it may have title? Or is the term to be given a wider application and held to include not only protection to property, but also to life of the inhabitants and intangible benefits like a greater sense of security on the part of inhabitants and sojourners, possibly tending to attract more business to the town?[22]

The court struck down provisions of the Gross Retail Sales Act in 1935, null and void for violating Articles 1, 7, and 9 of the Vermont Constitution and the Fourteenth Amendment to the U.S. Constitution, finding the law arbitrary, unequal, and unreasonable. Retail merchants were taxed on a graduated scale, increasing in proportion to the amount of sale, varying from one-eighth of one percent to four percent.[23] The court also found a statute requiring those convicted of intoxication to disclose the names of the sellers of the drinks violated Article 10 (self-incrimination).[24]

In eight cases during Moulton's tenure, the Vermont Supreme Court found laws or acts *not* unconstitutional, including a statute that imposed penalties on a decedent's estate for failure to list intangibles for taxation (proportional contribution and equal protection not offended);[25] a change in the law on gaming machines that revoked all existing licenses (authorized by the police power);[26] a law that prohibited billboards on highways (a proper and constitutional exercise of the government's right to regulate the use of highways; police power);[27] the non-exemption of municipal electric plants located outside of the town (no offense to the constitutional guarantee of Article 9);[28] an act that appropriates money not in the state treasury at the time the appropriation is made (again, Article 9 not triggered);[29] the acts of a town grand juror who also served as a referee in bankruptcy (although the constitution was violated by dual office holding, his acts are valid under the de facto officer rule);[30] the price-fixing provisions of milk regulation;[31] and the statute appraising corporate stock for taxation (no usurpation of judicial power, no offense to due process, nor a palpably arbitrary or unreasonable classification of taxpayers).[32]

In constitutional cases, the court sets a high bar. Every presumption is to be made in favor of the constitutionality of an act of the Legislature and it will not be declared unconstitutional without clear and irrefragable proof that it infringes the paramount law.[33] An act is never to be construed as unconstitutional if a reasonable construction can be placed upon it which will render it valid.[34]

Another fertile area for discerning a justice's views are dissenting opinions. Only there will the individual justice's voice be heard.

Dissents

Sherman Moulton dissented only four

times in his nearly 23 years as a justice. Although he did not live to appreciate it, three of the four cases were eventually reversed on the grounds common to the ideas raised in his dissents.

Sherman Moulton's first dissent began with a confession of humility, in *University of Vermont and State Agricultural College v. Ward* (1932).[35] "I regret that I cannot agree with the majority in the disposition of this case. It is with all diffidence that I find myself unable to reconcile my views with those of my brethren, whose mature opinion cannot fail to impress upon me the high respect which it deserves and the temerity of a dissent from it. Yet my belief in the unsoundness of their conclusion prompts me to state the reasons for my objection."

The justice could not agree with the majority's understanding of lease lands. "We have here a conveyance which is valid under the common law as regards private lands and valid under the statute as regards public lands. If, in one case, the instrument conveys a conditional fee, it is difficult for me to understand why it does not do so in the other; and why exactly the same language should be construed to mean one thing in one instance, and the opposite in the other."

In 1946, the Supreme Court criticized the *Ward* decision in *Colette v. Town of Charlotte*.[36] The court in *Ward* had ruled "that a possibility of reverter is incapable of alienation or devise. The question at issue in that case was whether the instrument through which the defendant claimed title was a lease or a conveyance of a base or determinable fee. The alienability of a possibility of reverter was not in issue or relevant to the issue presented, and the statement above referred to is not to be considered authoritative as to a possibility of reverter resulting from the creation of a qualified or determinable fee."[37] The line was dictum, and of no binding value, but paralleled Moulton's criticism of Ward.

Partition was the subject of *Billings v. Billings* (1946). The majority concluded that when two parties own equal shares in a piece of property and both wish to take assignment of the other's share, the statutory scheme requires public sale of the property.[38] Chief Justice Moulton dissented, saying the majority's decision "savors altogether too strongly of judicial legislation."[39]

In 2002, the Supreme Court overruled *Billings* and the Chief's dissent finally found a majority. In *Wilk v. Wilk*, the court held "that, under the statutory scheme, a trial court may consider the relative equities of multiple parties wishing to take assignment of an outstanding interest in a parcel and assign that interest to one of the parties, instead of ordering a public sale."[40]

The majority in *State v. Baker* (1947) held that "only physical means for compelling a person to give evidence against himself in a criminal prosecution are forbidden by Chapter I, Article 10 of the Vermont Constitution." Chief Justice Moulton dissented, arguing that a moral compulsion is equally prohibited. "I construe this provision of our Constitution to forbid compulsion of any kind, moral as well as physical, which may cause a respondent against his will to give evidence as a witness in a prosecution against him for a criminal offense. Moral compulsion can be just as strong and just as hard to resist as physical compulsion."[41] In 1957, *Baker* was overruled. Recognizing that the statute on which the holding was based had been amended in 1955, the high court in *State v. Goyet* (1955) explained, "It seems plain from the history of the legislation and our decisions in connection therewith, that it was the intention of the Legislature, by this amendment to remove the dilemma to which we have referred in which the respondent was placed by the 1935 amendment. Referring to that amendment, Chief Justice Moulton in his dissenting opinion in *State v. Baker*, supra, 115 Vt. at pages 113–114, 53 A.2d at page 64 said, 'Before its amendment P.L. § 2383 required that juries be instructed that the refusal of a respondent to testify must not be considered by them as evidence against him. It cannot be assumed that this admonition was not given due weight and attention by those to whom it was addressed.'"[42]

Chief Justice Moulton also dissented in *Kinsley v. Herald & Globe Ass'n* (1943), a libel case where the jury had awarded damages for statements made in a newspaper article, a judgment affirmed by the Court. The Chief explained, "I would hold that the article may be reasonably understood as an expression of the opinion of the writer concerning tort actions, arising from automobile accidents, between near relatives, where the damages recovered must be paid by liability insurance companies, and, without the imputation of anything wrong or illegal in the conduct of the plaintiff in the particular instance, calling attention to the danger of collusion and fraud in proceedings of this nature." "So long as a newspaper writer states his actual opinion, on a matter of public concern, based upon a true statement of facts, and without the sole purpose of causing harm to another, he cannot be held liable for what he writes and causes to be published, although it may be defamatory."[43]

Moulton's greatest decisions

If there was a contest to name the greatest decisions of a justice, it's only fair we should insist on criteria. This shouldn't be

discretionary. The choices would be necessarily idiosyncratic even with some criteria by which to judge greatness. There are seven of Moulton's majority opinions that stand out, because they state the leading principles for certain species of cases, because they are often cited as authorities by successor courts, and because they have attained a certain cachet in the history of the development of Vermont law.

Of course a written decision by a justice is not necessarily a reflection of the judge's own personal opinion, but an opinion of the majority, and the resultant decisions are not made on the basis of political philosophy, but on the law, precedent, and rule. But the justice is the author of the decision, and it must be fair to conclude the choices of words and principles are owned by the writer. At some point in many cases, the law is piled up on one side of the road and the facts are piled up on the other, and the court walks down the middle, usually allowing the facts to stand and, at least in Moulton's time on the court, allowing the trial court's decision on the law to remain unchanged as well. Affirmances were more common than reversals in the years Moulton served (1926-1949).

Moulton's decision in *Village of St. Johnsbury v. Aron* (1930) declared a village ordinance repugnant to Articles 1, 4, and 7 and the Fourteenth Amendment, as it gave total discretion to the trustees on where junk yards could be sited.

> No rules are laid down for the guidance of the trustees; they are not required to consider the personal fitness of the applicant, the propriety and convenience of his location or premises, or any other thing in granting or withholding permission to carry on the business. No regulations are prescribed, the compliance with which will entitle the applicant to receive a license. The requirement of a fence does not so entitle him. Whether or not the license is to be granted lies wholly in the discretion of the trustees and the discretion they may exercise arbitrarily and for personal and private reasons.

This reasoning would come back again as a powerful weapon against arbitrary decision-making in several dozen cases.[44]

In *State v. Auclair* (1939), the Supreme Court affirmed the lower court's decision finding a man named Auclair guilty of selling milk without a license. Auclair's defense cited Articles 2, 5, 6, 7, and 9 of the Vermont Constitution claiming the act on which the prosecution was based was discriminatory and a denial of due process, in particular because it authorized a milk control board to fix minimum and maximum retail prices. When Chief Justice Sherman Moulton reached the Articles 7 and 9 claims, he dismissed them quickly with the comment that he saw no arbitrary or irrational legislative classification in the facts of the case, although the legislation treated producers' cooperatives and charitable organizations differently from other milk producers.[45]

"The statute itself negatives any idea of arbitrary action by the board in this regard, for in sec. 5 the elements of costs of production, transportation, processing, distribution and other services, the balance between production and consumption and the purchasing power of the public, which the board is required to take into consideration in fixing just and reasonable prices, are carefully enumerated." The act had standards.

The 1941 decision in *Schirmer v. Myrick* is remembered for forcing the Communist Party candidate for U.S. Representative off the 1940 General Election ballot. The candidate had served as a notary in administering oaths to those who signed his petitions, and the Secretary of State had refused to accept them for that reason. Chief Justice Moulton agreed with the Secretary. "[P]ublic policy forbids . . . one with a financial or beneficial interest in the proceeding" to perform even a ministerial function."[46] *Schirmer* may be evidence of a political bias against a renegade party; however tempting that thought is, there is no direct evidence of a discriminatory impulse, and the need for clarity on whether there is a conflict of interest even with ministerial duties is welcome.

That year Chief Justice Moulton wrote the majority decision in *Trybulski v. Bellows Falls Hydro-Electric Corporation.* Plaintiff had been damaged by the operation of the dam. The law governing the Public Utilities Commission granted that body the authority to assess damages. The Commission dismissed the petition, for lack of jurisdiction. Moulton agreed, concluding that power was purely judicial, and not "incidental to the general supervisory power of the Commission." It violated Section 5 of the constitution.[47]

At the business block on Merchants Row in Rutland, a passageway on the second floor linked two buildings, after the walls were removed. One tenant of one of the buildings blocked the door. The owner of the other building sued to have it reopened, claiming a right-of-way. The tenant argued the easement had been abandoned. On appeal, the Supreme Court, in the voice of the Chief Justice, upheld the easement in Nelson v. Bacon (1943). He explained, "The existence of a thing, permanent in its character, once established is presumed to continue thereafter until the contrary is shown."[48]

The court in *Nelson v. Bacon* dismissed the abandonment claim by ruling that "In order to establish an abandonment there must be in addition to nonuser, acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence." In 1989, the Supreme Court reversed this position, finally establishing that "reliance by the owner of the servient estate is not required to establish an abandonment of an easement," overruling *Nelson.*[49]

Three other of Moulton's decisions were overruled by subsequent courts. In 1941 his decision in *Gero v. John Hancock Mut. Life Ins. Co.* held that the "only inferences of fact which the law recognizes are immediate inferences from the facts proved," and not inferences drawn from other inferences. But he also concluded that parallel inferences—several inferences built on the same facts—were proper. In 2010, the high court abrogated *Gero* in *State v. Godfrey*, abandoning what it called an unworkable distinction, a distraction from the basic question whether the evidence sufficiently and fairly supports a finding of guilt beyond a reasonable doubt.[50]

Charging "gross" error in judgment as a condition for recovery in a medical malpractice case was held to be essential in *Domina v. Pratt* (1940), a case expressly overruled by *Deyo v. Kinley* (1989), after calling the charge "at best misleading and confusing," suggesting a "standard of care higher than ordinary care."[51] In 2014, in *Demag v. Better Power Equipment, Inc.*, the Supreme Court reversed the holding in *Watterlund v. Billings* (1942). A business owes a driver a duly of reasonable care regardless of the driver's status as an invitee or licensee.[52]

A major public trust decision was issued by Chief Justice Moulton in 1944. In *State v. Malquist*, his opinion denied a landowner's claim to the right to lower the water of Lake Fairlee, finding it a public nuisance. The lake was boatable. "The artificial lake has become the natural lake, the artificial level has become the natural level, and the entire body of water has become subject to the common rights of fishing and navigation and to all other incidents of public water."[53]

Finally, the Moulton decision in Town of Springfield v. Newton (1947) is memorable for its ruling on the principle of dedication and acceptance in highway law. The acceptance was lacking, even though the road commissioner maintained the road, when the selectboard had never explicitly authorized it.[54]

What have we learned?

Was Sherman Moulton a morbid, Republican justice? The cases do not show it. He may well have been a partisan in politics at home, across the dinner table, but his decisions show no infection of politics into his work on the court. He was certainly a conservative. This is seen in his constitutional decisions, which focused largely on separation of powers issues. He punished acts of discretion without standards. Where government action was challenged, he was more likely than not to affirm what officials have done than second-guess them in their duties.

Lucky for us we do not insist on our judges leaving their moral compasses at the door of the courthouse. We do not want men and women on the bench with no interest in politics. We don't want politics to affect their reasoning, but far worse than a judge with a conservative or liberal philosophy is a judge with a blank mind, with no interest in how the world works.

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[1] William Hassett, *Off the Record with FDR: 1942-1945* (Rutgers, NJ: Rutgers University Press, 2016), 236.

[2] Sherman R. Moulton was born in New York City on June 10, 1876, and moved to Randolph in 1890. He was educated at Randolph High School, Dartmouth College (A.B., 1898), and Harvard Law School (LL.B., 1901). He was admitted to the Vermont bar in October 1901, and located in Burlington in 1903. He served as City Grand Juror, executive clerk to Governor Charles W. Gates, reporter of decisions (1916-1919), and was elected Chittenden County Senator. Shortly after taking office, he was elected Superior Judge on February 1, 1919. He held that office until appointment as Chief Superior Judge on April 2, 1926. Governor Franklin Billings appointed him Associate Justice of the Supreme Court on November 1, 1926 upon the resignation of Fred Butler. On September 23, 1938, following the death of George M. Powers, Moulton was appointed Chief Justice by Governor George D. Aiken. He retired April 1, 1949. He died on June 16, 1949.

[3] "Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge,'" *New York Times*, November 21, 2018.

[4] This essay is not interested in politics in the selection of judges, which is a subject for another day. Politics were involved in the elections of judges in 1798 (called the Vergennes Slaughterhouse), 1801, 1813, and 1815. Later, the politics of a judge mattered less. "In 1870, a vacancy occurred on the supreme court bench. Mr. [Timothy Parker] Redfield had always been a democrat in politics, but his fitness for the position was so generally acknowledged that he was elected to the place by a legislature overwhelmingly republican, and against numerous competitors." B.F. Fifield, "Timothy Parker Redfield," Abby Maria Hemenway, *The History of Washington County* (Montpelier, Vt.: Vermont Watchman and State Journal Press, 1882), 540.

Politics comes into courtrooms through challenges to nominating processes and election challenges. See *Judd v. State*, unreported (2012). Defamation is another entry point. In 1901, E.M. Sutton was indicted for defaming the Supreme Court. The report of the decision included the offensive language: "There is no use for a Democrat to bring anything to the supreme court of Vermont where politics is involved, and there is an unbroken line of just such procedure for the last forty years." *State v. Sutton*, 74 Vt. 12 (1901). The indictment was upheld on appeal.

[5] "As goes Maine, so goes Vermont," quipped FDR's campaign manager James Farley, mocking the axiom that "As goes Maine, so goes the nation," popular in earlier elections. *Columbia Daily Spectator, 5 November 1936.*

[6] See Samuel B. Hand, *The Star That Set: The Vermont Republican Party, 1854-1974* (Lanham, Ma.: Lexington Books, 2002).

[7] www.dictionary.com/browse/morbid.

[8] Andrew Burstein, *Democracy's Muse: How Thomas Jefferson Became an FDR Liberal* (Charlottesville, Va.: University of Virginia Press, 2015).

[9] "Various Editorial Notes," *Argus and Patriot*, 6 October 1886, 6.

[10] The term "morbid" when associated with "Republican" is an epithet that appeared in newspapers as early as 1868, although the phrase rarely appears in print in other sources. "We merely commented upon a statement in the *World* that a large amount of money was about to be subscribed to compel the President's acquittal, and upon the current rumors that there were men clamoring to be Republicans who were morbid and sick with dissatisfied ambition." "The Statesmanship of Impeachment," *Daily Ohio statesman*, 13 May 1868, 2.

"The Albany *Argus* (dem.), reciting 'the issues before the county,' asserts that the 'whole republican policy is merely a morbid method of governmental action. The natural action is to be attained by a return to healthy democratic principles. The real issue before the county is, whether these morbid and unhealthy republican processes shall continue, to the exhaustion and destruction of the vital forces, or whether the government shall discharge its functions as it founders designed." "Personal Intelligence," *The New York Herald*, 15 February 1876, 4.

"And Thomas Sullivan, too, if it had been left to the Sixth District it would never have been patent to the citizens of New York that there was such a thing as the morbid Republicans, the canting fusion abomination and the so-called reformer." Howard Craig, "Manhattan and Bronx News," *The Tammany Times, v. 18-19 1901-1902*, 9.

Political membership was not a permanent characteristic of judges. Asahel Peck was originally a Democrat but changed his mind after becoming "strongly aroused by the aggressions of the slave power, and after the formation of the Free Democracy or Liberty party, he identified himself with that, and was its candidate for Congress in this district." Later, he became a Republican. *Burlington Free Press*, 23 May 1879, 3.

[11] Justice Louis Peck is the only member of the Supreme Court to call its decisions "activist." He condemned the "runaway liberalism" of the court. *State v. Oakes*, 157 Vt. 171, 184 (1991) ("The majority opinion is additional evidence, if any is needed at this point in time, that within

the boundaries of the law of search and seizure, the *only* individuals enjoying any constitutional rights recognized by this Court are the criminals"); *State v. Kirchoff*, 156 Vt. 1, 22 (1991).

[12] Perhaps the best definition of a conservative is found in how an individual feels about the past. E.J. Phelps was regarded by his peers as the greatest lawyer of the second half of the nineteenth century. His biographer said of him, "He would not hesitate to say that he loved some things simply because they were old and because the things that were old and had survived are likely to be the best. He loved to find the good in ancient institutions and laws. He loved the old-time manners, old courtesies and reverences." Matthew Henry Buckham, "Life and Public Services of the Hon. Edward J. Phelps," *Proceedings of the Vermont Historical Society, October 16 and November 7, 1900* (Burlington, Vt.: The Free Press Association, 1901), 151.

[13] Redfield Proctor, Charles H. Davenport, Levi Knight Fuller, *Men of Vermont* (Brattleboro, Vt.: Transcript Publishing Company, 1894), 283; Jay Read Pember, "Randolph," *The Illustrated Historical Souvenir of Randolph, Vermont* (Randolph, Vt: Nickerson & Cox, 1895), 76.

[14] Vermont Historical Society, *Proceedings* (Montpelier, Vt.: Vermont Historical Society, 1913-1914), 44.

[15] Sherman Roberts Moulton, *The Boorn Mystery* (Montpelier: The Vermont Historical Society, 1937). See *State v. Woolley*, 109 Vt. 53, 57 (1937), a case where the Chief Justice ruled that circumstantial evidence was sufficient to convict a person of perjury, the same argument used in his Boorn book to justify the brothers' convictions without direct evidence of a killing, as no body had been found.

[16] Charles Warren, *History of the Harvard Law School and of Early Legal Conditions in America* (New York: Lewis Publishing Company, 1908) III, 1913), 292.

[17] Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court* (New York: W.W. Norton & Company, 2010), 434.

[18] The leading cases frustrating the New Deal included *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 581 (1935) (the law compelling a bank to surrender either the possession of or the title to mortgaged property to the bankrupt mortgagor, so long as any part of the debt remained unpaid, in order to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes" was a taking without just compensation, in violation of the Fifth Amendment); *Humphrey's Ex'r v. U.S.*, 295 U.S. 602, 631-632 (1935) (the President's removal of one of the commissioners of the Federal Trade Commission, giving no reasons other than a difference of opinion on federal trade policy, was a violation of the separation of powers for not reciting the grounds for the removal; *A.L.A. Schechter Poultry Corporation v. U.S.* 295 U.S. 495 (1935)(A poultry code enacted by an industry association and approved by the President was challenged after a company was convicted of violating the code and the Supreme Court struck down the law after concluding this a too "sweeping delegation of legislative power," as the legislation contained no standards or rules of conduct, leaving too much discretion in the President's authority, and because it was an attempt to regulate intrastate commerce, without constitutional authority; *U.S. v. Butler*, 297 U.S. 1, 58-59 (1936) (the Agricultural Adjustment Act of 1933 authorized the government to set the prices of farm commodities to ensure farmers obtained a fair price for their goods. A cotton manufacturer challenged the law, and the Supreme Court agreed that "[b]eyond cavil the sole object of the legislation is to restore the purchasing power of agricultural products to a parity with that prevailing in an earlier day; to take money from the processor and bestow it upon farmers who will reduce their acreage for the accomplishment of the proposed end, and, meanwhile, to aid these farmers during the period required to bring the prices of their crops to the desired level." This was an improper use of the taxing power, and the high court struck down, concluding it was not constitutional, as it did not provide for the general welfare.

Justice Owen Roberts wrote the *Butler* decision for the majority. He explained his view of judicial review:

> There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

The Bituminous Coal Conservation Act imposed a tax of 15 percent on the sale price of coal at the mine and 13.5 percent for captive coal. The Supreme Court, finding that as the purpose of the tax was to compel compliance with the act, held it was not a tax but a penalty, and an attempt to regulate beyond the authority of the commerce clause of the federal constitution. It struck down the tax, as well the act's prefixing and regulations of wages and hours by delegating authority to producers, and a denial of due process. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). The Supreme Court held that New York's minimum wage law for women and minors, that forbade wages which were "less than fair and reasonable value of services and less than sufficient to meet minimum cost of living necessary for health," violated the due process clause of the Fourteenth Amendment protecting freedom of contract. *Morehead v. People of the State of New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

Justice Roberts later changed his mind, and in so doing brought on a fundamental shift in the court's decisions. The change became clear in 1937. The minimum wage law for women under Washington State was upheld and forced a reexamination of the federal rulings on the subject. "What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end?" *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937).

[19] *Village of St. Johnsbury v. Aron*, 103 Vt. 22 (1930).

[20] *Vermont Salvage Corp. v. Village of St. Johnsbury*, 113 Vt. 341 (1943).

[21] *In re Opinion of the Justices*, 115 Vt. 524 (1949).

[22] *Village of Waterbury v. Melendy*, 109 Vt. 441, 446-447 (1938).

[23] *Great Atlantic & Pacific Tea Co. v. Harvey,* 107 Vt. 215 (1935).

[24] *State v. O'Brien*, 106 Vt. 97 (1934).

[25] *Town of Hartland v. Damon's Estate*, 103 Vt. 519 (1931).

[26] *Sowma v. Parker,* 112 Vt. 241 (1941).

[27] *Kelbro, Inc. v. Myrick*, 113 Vt. 64 (1943).

[28] *Village of Hardwick v. Town of Wolcott*, 98 Vt. 343 (1925).

[29] *City of Montpelier v. Gates*, 106 Vt. 116 (1934).

[30] *State v. Levy*, 113 Vt. 374 (1943).

[31] *State v. Auclair*, 110 Vt. 147, 156 (1939).

[32] *Clark v. City of Burlington*, 101 Vt. 391 (1928).

[33] *State v. Auclair,* 110 Vt. at 156.

[34] *In re Cornell*, 111 Vt. 454, 460 (1941).

[35] *University of Vermont and State Agricultural College v. Ward*, 104 Vt. 239 (1932).

[36] *Collette v. Town of Charlotte*, 114 Vt. 357 (1946).

[37] Id. At 363.

[38] *Billings v. Billings*, 114 Vt. 512, 517 (1946).

[39] Ibid. at 519-520.

[40] *Wilk v. Wilk*, 174 Vt. 343, 345 (2002).

[41] *State v. Baker*, 114 Vt. 94, 113 (1947).

[42] *State v. Goyet,* 120 Vt. 12. 69-70 (1957).

[43] *Kinsley v. Herald & Globe Ass'n,* 113 Vt. 272, 279-280 (1943).

[44] For example, *In re Miserocchi,* 170 Vt. 320 (2000); *In re Handy,* 171 Vt. 336 (2000); *In re Appeal of JAM Golf, LLC*, 185 Vt. 201 (2008).

[45] *State v. Auclair*, 110 Vt. 147 (1939)

[46] *Schirmer v. Myrick,* 111 Vt. 255, 257-258 (1941).

[47] *Trybulski v. Bellows Falls Hydro-Electric Corporation*, 112 Vt. 1 (1941).

[48] *Nelson v. Bacon*, 113 Vt. 161, 167-168 (1943).

[49] *Lague, Inc. v. Royea*, 152 Vt. 499 (1989).

[50] *Gero v. John Hancock Mut. Life Ins. Co.,* 111 Vt. 462 (1941)' *State v. Godfrey,* 187 Vt. 495 (2010). ¶ 19.

[51] *Domina v. Pratt*, 111 Vt. 166 (1940); Deyo v. Kinley, 152 Vt. 196, 208-209 (1989).

[52] *Watterlund v. Billings*, 112 Vt. 256 (1942); *Demag v. Better Power Equipment, Inc,* 195 Vt. 176 (2014).

[53] *State v. Malmquist,* 114 Vt. 96, 101 (1944).

[54] *Town of Springfield v. Newton*, 115 Vt. 39 (1947).

by Catherine Fregosi, Esq.

WRITE ON
Judge for a Day

Legal writing faculty at Vermont Law School contribute to the Write On department for every issue of this Journal. We generally write about some aspect of legal writing that is meant to help you in your practice, such as citation,[1] the use of rhetoric,[2] or drafting policy analysis.[3] This time around, I am writing to ask for your help and to share an opportunity to meaningfully contribute to legal education and earn a couple of CLE credits along the way.

First, some background on the legal writing program at Vermont Law School. Most law schools require students to take two semesters of legal writing courses. We require three semesters of legal writing. Each semester focuses on a different kind of legal writing. In the first semester of law school, students learn IRAC, how to cite cases and statutes, and work on drafting objective memoranda. Assignments in the first semester are closed universe, allowing students to focus on mastering the basics of writing. The second semester of legal writing introduces persuasive writing, different organizational structures, and different Bluebook rules. Second semester assignments are open universe. Students start developing their legal analysis skills by working through more complex fact patterns and legal arguments. They learn how to synthesize rules and work on sorting out relevant from tangential authority. Students do this through drafting trial court filings and short academic works. At the end of the semester, students present a ten-minute argument as an introduction to oral advocacy.

In the third semester at Vermont Law School, students are required to take Appellate Advocacy. The premise of this class is simple: Students write a full-length brief in a case pending before the United States Supreme Court and then present a twenty-minute oral argument before a panel of judges. The skills required in this class are a leap beyond those required in the first two semesters of legal writing. First, while professors give students a small handful of cases as research prompts, students must conduct a great deal of independent research to support their legal arguments. For many students, this is their first exposure to working with not just cases and statutes, but also secondary sources like treatises and law review articles. And since the cases are pending before the U.S. Supreme Court, they often implicate federal constitutional issues. Thus, students may need to work with at least several decades of jurisprudence on particular constitutional provisions.

Second, students have to put all of that research together to form a coherent and logical legal argument. This is the hard part. Just as legal writing professors give students a few cases as research prompts, we also give students a strong nudge in the direction of the best arguments for both petitioner and respondent. But students need to work out the intricacies of those arguments on their own. For almost all students, this is the first time they have had to independently determine the correct analytic path to the result that they are seeking from the Court. And then they still need to draft that argument in a persuasive, but not over the top, voice with perfect citations. Finally, students need to present a twenty-minute oral argument on their brief.

Appellate Advocacy has become something of a rite of passage for Vermont Law School students. A student recently told me that in this class he started to think that he might, actually, one day become an attorney. Students, of course, learn a great deal of substantive law in their other classes. But Appellate Advocacy challenges them to be self-directed and thoughtful in a way that doctrinal classes do not always require. It is that aspect of this course that my student was commenting on—after writing a brief and presenting an oral argument, he started to believe that he might have the skills and aptitude to become an attorney.

I suggest that, even more than writing a brief, it is the oral argument component of this class that pushes students into believing they can succeed. And this is why I am asking for your help on behalf of Vermont Law School's legal writing department and students.

As mentioned above, students present oral argument before a panel of judges. That panel is comprised of practicing attorneys and judges who generously volunteer their time to help Appellate Advocacy students. Many attorneys and judges have made the trek to South Royalton every year for years and even decades to ask students questions and give students feedback. We are grateful for each of these volunteers. But for those of you who have not heard of this opportunity, please consider this a formal invitation to join us.

Law schools are increasingly moving in the direction of experiential learning. Every law school has its share of clinical and semester-in-practice opportunities, including Vermont Law School. Appellate Advocacy oral arguments offer the same kind of experiential opportunity for students in their third semester, before many of them participate in clinics or semester-in-practice internships. And for students, the experience of presenting an oral argument before practicing attorneys and judges is without parallel. Formal argument teaches students to talk about the law in an organized and thoughtful way, which is just as important as being able to write about the law. The preparation for argument requires students to think through the holes in their arguments, the strengths of the argument on the other side, and the practical consequences of the decision they are asking the Court to reach. By the time my students get to their final arguments, they have heard all of my questions and know exactly how to deal with them. Arguing before new judges pushes students to go deeper in thinking through their legal arguments.

Volunteer judges can earn two CLE credits in a given reporting period for judging a two-hour block of student arguments. We hold arguments twice a year, in late July and again in late November. July arguments take place over a few weekdays and on a Saturday. Arguments are held during the day and in the evening. This year, arguments are scheduled for July 26, 27, 29, and 30. November arguments have traditionally been held on Monday through Thursday evenings over the course of three weeks. We may add arguments during the day on a couple of Saturdays this year. We schedule arguments in two-hour blocks, and ask that judges sign up for at least one two-hour block. Judges are invited to join us for an informal reception and meal before each block of arguments. We send judges the opinion on appeal, a short memo about the case, and the students' briefs about a week before arguments. Judges need to be familiar enough with the case to ask students questions during argument, but we do not expect judges to have mastered the minutiae of each student brief, nor do we ask judges to give students any feedback on their briefs.

Legal writing professors pick a range of cases each year, and judges can choose the case that they want to hear. Last November, the cases selected addressed retaliatory arrests,[4] sentence enhancement under the Armed Career Criminal Act,[5] and ineffective assistance of counsel claims.[6] Professors choose single-issue appeals, and typically pick cases that will be reasonably accessible to second-year law students. Sometimes the cases selected for Appellate Advocacy even touch on the decisions of the

Vermont Supreme Court.

For example, students this summer are working on *Kansas v. Glover*,[7] an appeal from a decision of the Kansas Supreme Court that considered, and ultimately rejected, the Vermont Supreme Court's reasoning in *State v. Edmonds*.[8] *Glover* arises from a traffic stop and asks whether there is reasonable suspicion for a traffic stop when a law enforcement officer knows that the registered owner of a vehicle does not have a valid license but does not have any information supporting the inference that the owner of the vehicle is in fact driving the vehicle.[9]

The facts of the case are straightforward. One day in 2016, a deputy sheriff spotted a 1995 Chevy pickup truck driving down the road. The sheriff could not see the driver and did not see any traffic violations, but nonetheless decided to run the truck's license plate. The sheriff was able to determine that the truck was properly registered in Charles Glover, Jr.'s name and that the State of Kansas had revoked Glover's driver's license. The sheriff "assumed" Glover was driving the truck and initiated a traffic stop.[10] Finding that Glover was, in fact, driving, the sheriff issued Glover a summons to appear and then allowed Glover to drive away. The State of Kansas subsequently charged Glover with driving as a habitual offender. Glover filed a motion to suppress the evidence from the traffic stop, and Glover and the State stipulated to the facts described above.[11] Glover argued evidence that the owner of a car did not have a valid operator's license was insufficient to support the inference that the owner of the car was driving and, therefore, the sheriff lacked reasonable suspicion to support the stop in violation of the Fourth Amendment.[12] The State argued there is reasonable suspicion to support a traffic stop where an officer knows the owner of a car does not have a valid operator's license unless the officer has information rebutting the presumption that the owner is the driver.[13]

The Kansas district court granted Glover's motion to suppress in a decision issued from the bench, concluding "it was not reasonable for an officer to infer that the registered owner of a vehicle is also the driver of the vehicle absent any information to the contrary."[14] The district court judge based her decision in part on her personal experience. She explained three cars were registered in her name, she drove one every day, her husband drove the second, and her daughter drove the third.[15] She concluded that she believed her experience was like that of many other families, and, therefore, the sheriff's assumption that Glover was driving the truck registered in his name was not a reasonable inference that could validate the traffic stop.[16] The State then filed an interlocutory appeal.

The Kansas Court of Appeals reversed. That court relied on a litany of state supreme court decisions, including the Vermont Supreme Court's decision in *Edmonds*, to reach its eventual holding. As the Kansas appeals court explained, every state supreme court to have considered the issue has held an officer has reasonable suspicion to initiate a traffic stop where "(1) the officer knows that the registered owner of a vehicle has a suspended license and (2) the officer is unaware of any evidence or circumstances which indicate that the owner is not the driver of the vehicle."[17] But the Kansas appeals court relied on the Vermont Supreme Court's decision in *Edmonds* for a point that appears to have been directly addressed only in Vermont, that requiring an officer to gather evidence confirming the owner-as-driver presumption, "essentially raises the evidentiary standard from one of reasonable suspicion to the more demanding standard of probable cause."[18] The Kansas appeals court found this persuasive and rested its decision in part on this reasoning.

The decision in *Edmonds* arose from facts similar, but not identical, to the facts in *Glover* and presented essentially the same question that is now before the United States Supreme Court. Like the Kansas appeals court, the Vermont Court relied on the weight of authority from other state courts to reach its decision.[19] And as the Kansas appeals court recognized, the Vermont Supreme Court reached the same decision as those other courts: An officer has reasonable suspicion when the officer knows that the owner of a car does not have a valid operator's license, unless the officer knows additional facts rebutting this presumption.[20]

The Kansas Supreme Court rejected this rule and reversed the Kansas appeals court's decision for two reasons.[21] First, the Kansas Supreme Court concluded that the owner-as-driver presumption rested on impermissible assumption stacking.[22] That is, to get to the owner-as-driver presumption a law enforcement officer has to assume that the registered owner of a vehicle is most likely the driver of that vehicle.[23] But, as the district court pointed out, this assumption is not necessarily supported by practical experience. And this assumption rests on the second assumption that someone without a valid operator's license is likely to violate their suspension or revocation and continue to drive.[24] As the Kansas Supreme Court stated: "This assumption is flawed because it presumes a broad and general criminal inclination on the part of suspended drivers."[25] The Kansas Supreme Court explained this is problematic because "officers cannot assume criminal conduct is taking place and detain someone without 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' "[26] The Kansas Supreme Court took this standard to mean "officers and courts should presume that citizens are engaged in lawful activities and

have a right to remain free from police interference."[27] Because the owner-as-driver presumption necessarily depends on an assumption that the owner of a car is engaging in criminal activity, despite the fact that there is nothing criminal in the simple fact that a car owned by someone without a valid license is being driven, the Kansas Supreme Court concluded it is flawed in its inception and cannot support reasonable suspicion.

The Kansas Supreme Court also rejected the rule adopted by the Vermont Supreme Court and other state supreme courts because the Court concluded that rule impermissibly shifts the burden of proof from the State to a defendant.[28] The Court reasoned that a rule permitting officers to presume that the owner of a vehicle is also its driver "relieves the State of its burden by eliminating the officer's need to develop specific and articulable facts to satisfy the State's burden on the determinative issue of whether the registered owner is driving the vehicle, not whether the vehicle is being driven."[29] The Kansas Supreme Court called the rule's reliance on an absence of information rebutting the owner-as-driver presumption a kind of "judicial gap-filling" that cannot be used to convert an unfounded assumption into a logical inference.[30] And all of those state supreme court decisions that, like *Edmonds*, reach the contrary result? The Kansas Supreme Court dismissed them all, stating: "In our reading of these decisions, none of them discuss the underlying assumptions that the district court needed to make. . . nor do they discuss the problems with inference stacking or with the lack of evidence being produced by the State."[31] The Court read these decisions to rest on an assumption about common experience—that the owner of a vehicle is most likely to drive the vehicle—without considering whether that assumption is either valid or sufficient to support the legal conclusion that there is reasonable suspicion to support a traffic stop.[32]

What will the United States Supreme Court do with this issue? That remains to be seen, but Appellate Advocacy students have been wrestling with this for several weeks. Students will argue this case in late July. They may argue that the Kansas Supreme Court's decision would elevate the evidentiary burden for reasonable suspicion to that necessary for probable cause, in line with the *Edmonds* reasoning.

On behalf of students and the Vermont Law School legal writing faculty, I invite you to join us for what promises to be several days of interesting oral arguments. Feel free to contact me at cfregosi@vermontlaw.edu or Sandy Johnston at sjohnston@vermontlaw.edu for more information or to volunteer to help us make students practice-ready through intensive oral argument and to receive two CLE credits for your contribution to legal education.

Catherine Fregosi, Esq. is admitted to practice in Vermont. She clerked for the Hon. Justice John A. Dooley and the Hon. Justice Karen R. Carroll of the Vermont Supreme Court before joining the VLS legal writing faculty.

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[1] Beth McCormack, *Making Your Writing Out of Cite: Using the Bluebook to Improve Your Writing and Credibility*, 41 Vt. B. J. 30 (Winter 2016).
[2] Brian Porto, *Rhetoric Revisited: A Second Look at How Rhetorical Techniques Improve Writing*, 42 Vt. B. J. 31 (Summer 2016).
[3] Jared K. Carter, *Strengthening Our Legal Analysis*, 45 Vt. B. J. 20 (Spring 2019).
[4] Nieves v. Bartlett, 139 S. Ct. 1715 (2019).
[5] United States v. Stitt, 139 S. Ct. 399 (2018).
[6] Garza v. Idaho, 139 S. Ct. 738 (2019).
[7] 422 P.3d 64 (Kan. 2018), *cert. granted*, 139 S. Ct. 1445 (2019) (mem.).
[8] 2012 VT 81, 192 Vt. 400, 58 A.3d 961.
[9] *Glover*, 422 P.3d at 66.
[10] *Id.* at 67.
[11] *Id.*
[12] Kansas v. Glover, 400 P.3d 182, 184 (Kan. Ct. App. 2017).
[13] *Id.*
[14] *Glover*, 422 P.3d at 67 (quotation omitted).
[15] *Id.*
[16] *Id.*
[17] *Glover*, 400 P.3d at 186.
[18] *Id.* at 187 (*citing* State v. Edmonds, 2012 VT 81, ¶ 9, 192 Vt. 400, 58 A.3d 961)).
[19] *Edmonds*, 2012 VT 81, ¶ 9.
[20] *Id.* ¶ 11.
[21] *Glover*, 422 P.3d at 68-69.
[22] *Id.* at 69-70.
[23] *Id.* at 69.
[24] *Id.* at 70.
[25] *Id.*
[26] *Id.* (*quoting* Terry v. Ohio, 392 U.S. 1, 21 (1968)).
[27] *Id.*
[28] *Id.* at 70.
[29] *Id.*
[30] *Id.* at 71.
[31] *Id.*
[32] *Id.*

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by Therese M. Corsones, Esq.

WHAT'S NEW
VBA Legislative Overview — 2019

The VBA followed a number of bills affecting the bar and the courts this legislative session. Below is a brief summary of those that have been enacted to date in bill number order; please note that a number of them have July 1, 2019 effective dates. The summary includes the bill designation, act number (if assigned), title, date signed by Governor Scott, effective date, and an indication of any VBA Connect Communities where information about the bill was posted during the legislative session. A link to each bill is included with each summary.

Many thanks to VBA Government Relations Coordinator Bob Paolini for so ably tracking these and a variety of other bills affecting the bar, and for making sure that testimony was provided when needed. Many thanks, also, to the numerous lawyers who testified so capably, when needed. Please contact Teri Corsones at tcorsones@vtbar.org if you have any questions about this overview.

H. 278 – **Act 24** "Parentage" bill (an act relating to acknowledgment or denial of parentage); signed by Governor Scott on May 16, 2019; Sections 1–3 and 7 are effective on passage, remaining sections are effective on July 1, 2019. (VBA Family Law Community)

- Clarification of timing for rescission of denial or acknowledgement of parentage
- Clarification of circumstances regarding the release of parentage information
- Clarification of certain details of parentage forms and parentage orders

https://legislature.vermont.gov/Documents/2020/Docs/ACTS/ACT024/ACT024%20As%20Enacted.pdf

H. 287 – Act 36 "Small probate estates" bill (an act relating to small probate estates); signed by Governor Scott on May 28, 2019; effective on July 1, 2019. (VBA Probate Law Community)

- Small estate limit raised from $10,000 to $45,000
- Estate must consist entirely of personal property; time share property may be allowed
- Listing of what needs to be filed
- Interested parties have 14 days to object
- Letters of administration effective for one year
- Spells out process if small estate insolvent

https://legislature.vermont.gov/Documents/2020/Docs/BILLS/H-0287/H-0287%20As%20Passed%20by%20Both%20House%20and%20Senate%20Unofficial.pdf

H. 330 – Act 37 "Repeal of Statute of Limitations" bill (an act relating to repealing the statute of limitations for civil actions based on childhood sexual abuse); signed by Governor Scott on May 28, 2019; effective on July 1, 2019 (VBA Practice and Procedure Community)

- Repeal of statute of limitations for civil actions based on childhood sexual abuse
- Felony sexual exploitation of a minor added to definition of childhood sexual abuse
- Repeal applies retroactively to abuse that occurred prior to July 1, 2019
- Damages against an entity for actions based on abuse that would have been barred by statute of limitations on June 30, 2019 only if there is a finding of gross negligence

https://legislature.vermont.gov/Documents/2020/Docs/BILLS/H-0330/H-0330%20As%20Passed%20by%20Both%20House%20and%20Senate%20Unofficial.pdf

H. 436 – **Act 11** "International Wills" bill (an act relating to international wills); signed by Governor Scott on April 30, 2019; effective on July 1, 2019. (VBA Probate Law Community)

- Based on Uniform Law on the Form of an International Will
- International will in compliance with statute is valid with regard to form, irrespective of place where made, location of assets or nationality, domicile or residence of testator
- Spells out requirements of process for validating international wills
- Certificate by authorized person regarding requirements must be attached to will
- Template for certificate of authorized person included in statute
- A person with active Vermont law license and in good standing is authorized person

https://legislature.vermont.gov/Documents/2020/Docs/ACTS/ACT011/ACT011%20As%20Enacted.pdf

H. 460 – Act 32 "Sealing and Expungement" bill (an act relating to sealing and expungement of criminal history); signed by Governor Scott on May 23, 2019; effective on July 1, 2019 except Sec. 3 (expungement and sealing procedure) shall take effect on October 1, 2019.

- Expansion of nonviolent crimes that qualify for sealing or expungement petitions, including possession of certain controlled substances, driving under the influence (first offense) in certain instances and burglary in certain instances
- Definition of predicate offenses modified to exclude possession of a controlled substance in certain instances

https://legislature.vermont.gov/Documents/2020/Docs/ACTS/ACT032/ACT032%20As%20Enacted.pdf

H. 512 – Act 40 "Miscellaneous Judiciary Amendments" bill (an act relating to miscellaneous court and Judiciary related amendments) signed by Governor Scott on May 30, 2019. Effective date July 1, 2019, but "notwithstanding 1 V.S.A. § 214, Sec. 6, 15 V.S.A. § 752(b)(9) (maintenance guidelines), shall apply to actions filed on or after January 1, 2019". (VBA Family Law Community)

- Option to waive use of commissioners in partition actions
- Probate divisions to maintain electronic databases of notices of intent to retain parental rights
- Confidentiality parameters for use of juvenile records in probate cases
- Records of subjects of delinquency petitions filed after 7/1/06 sealed if case dismissed
- Modifications of maintenance provisions ("long term" instead of "permanent"; retirement benefits provisions; alimony guidelines updated in light of Tax Reform bill)
- Various revisions to marijuana/cannabinoids provisions
- Creation of Task Force on Campus

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Sexual Harm – VBA appointee on Task Force

https://legislature.vermont.gov/Documents/2020/Docs/BILLS/H-0512/H-0512%20As%20Passed%20by%20Both%20House%20and%20Senate%20Unofficial.pdf

H. 526 – Act 38 "Town Clerk Recording Fees" (an act relating to town clerk recording fees and town restoration and preservation reserve funds); signed by Governor Scott on May 28, 2019; sections 1-2 (town clerk fees; town fee report), 6 (recording of tax liens); 7-9 (recording procedures) effective on July 1, 2019; sections 3-5 (survey plats) effective on Jan. 1. 2020. (VBA Property Law and Municipal Law Communities).

- Recording cost per page increase from $10 to $15 for deeds, foreclosure complaints, document that is to be a matter of public record, and property transfer tax returns
- Recording cost per survey sheet increase from $15 to $25
- Examination of record cost per hour increase from $2 to $4
- If land subdivided or boundaries changed after Jan. 1, 2020, the deed shall be accompanied by a survey plat that shows new boundaries and cite book and page of previous deed – failure to do so does not void the deed or render the title unmarketable, however
- Vermont tax lien is deemed filed when the clerk indorses a certificate on the lien
- Clerks shall bear the cost of returning the original copy of a recorded instrument to the filer
- Clerk shall enter the names of parties, type and date of instrument, and date and time of recording in a searchable index open to public inspection within three days following the date an instrument is indorsed (time for entering the information may be extended for good cause shown such as illness or absence of clerk)

https://legislature.vermont.gov/Documents/2020/Docs/BILLS/H-0526/H-0526%20As%20Passed%20by%20Both%20House%20and%20Senate%20Unofficial.pdf

H. 527 – "Judicial Branch Fees" bill (an act relating to Executive Branch and Judicial Branch fees) signed by Governor Scott on June 18, 2019; effective date of Judiciary Branch filing fees is July 1, 2019.

- No filing fee for motions to confirm the sale of property in foreclosure
- Filing fee of $100 for petitions for license to convey real estate or personal property
- Filing fee of $100 to obtain a birth order
- Filing fee of $150 to appeal the denial of an application to amend a birth or death certificate

https://legislature.vermont.gov/Documents/2020/Docs/JOURNAL/hj190523.pdf (judiciary fees on pp. 1985-1986)

H. 541 – "Revenue" bill (an act relating to changes that affect the revenue of the State); signed by Governor Scott on June 18, 2019; act takes effect on passage, except for: (1) Sec. 1 (capital gains exclusion) shall take effect on July 1, 2019 and apply to the sales of assets on or after that date; (2) Notwithstanding 1 V.S.A. § 214, Sec. 2 (medical deduction) shall take effect retroactively on January 1, 2019 and apply to taxable year 2019 and after; (3) Secs. 4 (downtown and village center tax credit), 7–8 (rooms tax), 9–15 (property transfer tax), and 18 (fuel tax) shall take effect on July 1, 2019; (4) Sec. 5 (estate tax exclusion at $4,250,000.00) shall take effect on January 1, 2020 and apply to estates of decedents with a date of death on or after that date; (5) Sec. 6 (estate tax exclusion at $5,000,000.00) shall take effect on January 1, 2021 and apply to estates of decedents with a date of death on or after that date; (6) Secs. 16–17 (land gains tax) shall take effect on January 1, 2020 and apply to gains from sales made on or after that date.

- Capital gains tax exclusion shall not exceed 40% of federal taxable income or $350,000, whichever is less
- Land gains tax modified to only cover land, whether or not improved, that has been purchased and subdivided by the transferor within 6 years previous to the sale or exchange of the land
- New property transfer tax trigger for the transfer or acquisition of a controlling interest in a property
- Estate tax limit increased from $2,750,000 to $4,250,000 in 2020 and $5,000,000 in 2021

https://legislature.vermont.gov/Documents/2020/Docs/JOURNAL/hj190524.pdf (capital gains tax on pp. 2009-2012; land gains tax on pp. 2025-2026; property transfer tax on pp. 2021-2025; estate tax on pp. 2019-2020)

S. 18 – "Unconscionable Terms"" bill (an act relating to consumer justice enforcement) delivered to Governor Scott on June 13, 2019. Effective on October 1, 2020.

- Rebuttable presumption that certain contract terms are substantively unconscionable in certain standard form contracts
- Contract terms include inconvenient forums, waiver of a right to a jury trial, waiver of a right to seek punitive damages, modification of limitation of action periods, and excessive fees or costs to bring an action
- Exclusions for financial institutions, credit unions, contracts regulated by DFR, contracts for recreational activities, sports or competitions, and motor vehicle retail installment contracts

https://legislature.vermont.gov/Documents/2020/Docs/JOURNAL/sj190523.pdf (unconscionable terms on pp. 1615-1617)

S. 131 – Act 57 "Insurance" bill (an act relating to insurance and securities); signed by Governor Scott on June 10, 2019; effective date of July 1, 2019.

- Outline of "innovation waivers" with respect to specific requirements of insurance laws, regulations or bulletins
- New domestic surplus lines insurance provisions
- New HIV-related test requirements
- Parameters of Vermont Financial Services Education and Victim Restitution Special Fund
- Modification of definition of "credit report"

https://legislature.vermont.gov/Documents/2020/Docs/BILLS/S-0131/S-0131%20As%20Passed%20by%20Both%20House%20and%20Senate%20Unofficial.pdf

Other bills that did not make it through this session but may be back next session

H. 1 - Non-compete provisions (H Comm Econ Dev) likely to come back next session (Employment and Intellectual Property Sections)

H. 412 – P R & R (H Jud) possibly back next session (Family Law Section)

S. 99 – Alimony reform (Sen Jud) very likely to come back next session (Family Law Section)

Act 250 Commission – the House Judiciary Committee will likely be asked to review a proposal that jurisdiction over Act 250 appeals be transferred from the Environmental Division to a lay Environmental Review Board. The Environmental Law Section will discuss the proposal during a program at the VBA Annual Meeting on September 27 in Burlington.

Teri Corsones, Esq., is the Executive Director of the Vermont Bar Association.

by Andy Stone

WHAT'S NEW

Vermont's New Electronic Filing System

The times they are a-changing. For the Vermont legal community, they will soon be a-changing fast. Preparations are well underway for the Vermont Judiciary to roll out a new modern electronic case management system that promises to have a transformative impact on the practice of law and the administration of justice in this state. For some, the change will be welcomed and long overdue, while others may feel more challenged by some aspects of the transition, but all will feel its impacts in a myriad of ways. This article is intended to provide members of the bar and other interested readers with a brief project overview and some specific details about what to expect, when to expect it, and how it will affect you.

The Vermont Judiciary has a pressing need to retire its legacy case management system which has served it well for three decades, but which is now antiquated, unsupported and poorly suited for the way the world and the courts do business in the 21st century. To address this, Vermont has contracted with Tyler Technologies to implement its Odyssey Case Management System and associated technologies in our courts. Tyler is a Texas-based company specializing in software solutions for the public sector. The Odyssey system is currently in use in dozens of states, municipalities and other jurisdictions around the country and internationally. It has a proven track record of success and adaptability to a wide range of legal and business processes, and it will offer Vermont the essential tools it needs to move our court system forward.

One of the key pillars in the Judiciary's vision for change is a transition to electronic document management rather than the traditional paper-based processes on which courts have relied. Paper files are prone to loss and damage, require laborious archiving, must be physically transported and can only be viewed in one place at one time. These limitations have all-too-often dictated the speed at which the wheels of justice turn in Vermont. The integrated electronic document management functions of the Odyssey system, on the other hand, will create opportunities for improvements and efficiencies with many of our processes. For instance, cases may now be instantly transferred from one Superior Court unit to another when venue is changed, without needing to assign a new docket number or wait for a physical file to be delivered. Case parties and counsel will be able to access most case information, including documents online, rather than needing to request copies from the court. And all court users, including self-represented litigants, will have access to universal electronic filing in all units and all divisions.

The new electronic filing system, Odyssey File & Serve (OFS), will replace the existing system, known as eCabinet, that is currently in use in several Superior Court units. OFS is a web-based platform that will be available 24/7 for filing all court pleadings in all units and divisions. Users may register as individuals or as firm members and file documents by uploading them in PDF format. For agency attorneys and others with a specialized practice who frequently submit one standard type of filing, OFS will offer some useful efficiencies such as user-defined templates that save preconfigured filing settings to minimize duplicative efforts. Registered users retain online access to all documents that they them-

selves have filed; and, where rules allow, may also electronically serve documents on other registered users who have elected to receive service that way. Documents filed electronically will be subject to a clerk review and acceptance process before officially becoming a part of the case record. Once accepted, the electronically filed document will be considered the original and there will generally be no obligation for the filer or the court to submit or retain a hard copy of any case documents.

Under the new proposed Rules for Electronic Filing, attorneys will be mandated to file documents electronically, while self-represented litigants may elect to file documents either electronically or on paper. Electronic filings will be accepted not only for new cases, but also for subsequent filings on existing and closed cases, which will all be loaded through a data conversion process and will be searchable in the new system. Case documents that now exist only in paper form will remain that way initially; existing paper files for pending cases may still be viewed at courthouses, though all ongoing activity, filing and docketing will take place in the new system.

The benefits of going paperless will be felt not only in the law office and the clerk's office, but also on the bench. Judges will be utilizing Odyssey Judge Edition, another integrated Tyler product that offers an electronic judicial workbench for easy review of all case documents and events and for organizing and managing daily hearing calendars. Judicial officers will have instant access to a statewide database of case and party records and may coordinate actions taken on multiple cases at once.

The first Vermont court to go live with the Odyssey system will be the Judicial Bureau, which is a court of statewide jurisdiction that primarily handles civil violations such as traffic and municipal complaints. The Judicial Bureau is scheduled to begin using Odyssey following final testing and training in late Spring 2019. Like other courts, it will be adopting largely paperless business processes, 24/7 online payment options, and will also feature a range of data integrations with other justice partners improving interagency communication.

For the units of the Superior Court, there will be a phased regional rollout in four stages over the next two years. First will be the Southeast Region of Windham, Windsor and Orange Units in Fall 2019, followed by the Southwest Region of Bennington, Addison and Rutland Units in Spring 2020. The third rollout will include Chittenden, Franklin, Grand Isle and Lamoille Units as well as the Environmental Division in Fall 2020, and the fourth and final phase will include the Northeast Region of Orleans, Essex, Caledonia and Washington Units, as well as the Vermont Supreme Court, in Spring 2021. These timelines are subject to ongoing review and revision as the project progresses; the State Court Administrator will provide the final approval of exact rollout dates for each region.

Although efforts are focused on providing as smooth a transition as possible for all stakeholders, members of the Vermont legal community should, nonetheless, be prepared for some inevitable transitional challenges during the next two years while the Judiciary operates on two separate and largely unconnected case management systems. Checking for attorney scheduling conflicts, for instance, presents a new level of complexity when scheduling is being done in two separate systems, and a variety of complications are likely during this period while cases are being transferred back and forth between Odyssey (electronic) and non-Odyssey (paper) courts. Those are just several examples, and there are sure to be some other challenges that are not so clearly foreseen. It will be a period of adjustment while the Judiciary redefines and refines its internal processes, and while all users of the court system re-orient themselves toward new ways of interacting with it. It will be a collective effort that will involve the entire Vermont legal community, and the Judiciary is asking all members of that community to join with it in a large-scale collaborative effort to help make the system really work.

360-degree communication with all stakeholders throughout the process is a fundamental part of the plan. In coming months, the Judiciary will be ramping up its communications with the bar and initiating a variety of other outreach efforts designed to actively engage with stakeholders across the board. There will also be expanded FAQ sections on the court's website, as well as opportunities for online training and orientation to the new system. Odyssey project leaders are also more than happy to field questions any time from interested parties. Contact information is on the Judiciary's website. Feedback and suggestions for process improvements will be not only welcomed but will be actively sought out throughout the entire transition. Get ready and get excited Vermont. The next two years are going to bring some big changes. It will be uncharted territory for all of us, but there is great confidence that in the end the project will have achieved its most essential purpose: to deliver a transformed modern justice system that is more efficient, fair, responsive and accessible for all Vermonters. Stay tuned…

Andy Stone is a Project Team Leader for the Vermont Judiciary's Next Generation Case Management System Project and a former Court Operation Manager from Windsor County.-

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by Samara Anderson, Esq.

BE WELL
Stressed Much?

How does this stress affect your body and how can being mindful reduce these negative effects? Read below to find out...

The alarm goes off in the morning and despite feeling sheer exhaustion, you rise to quickly start your day so you can fit in a cardio workout before the rest of the house awakes and it is a flurry of breakfast-eating-preparing-lunches-commuting-to-school/work. Of course, there was construction, which delayed your trip to work and caused you to be late for your first morning meeting with a demanding client, who is now even more upset and anxious about the status of their case with the late start to your meeting. This seemingly minor delay has now caused a waterfall of morning problems: this meeting runs late and now you are late for a status interview with a judge that has not been favorable to your cases and is a stickler for timeliness. Opposing counsel will use this to their advantage and you will continue to dig yourself out of the judicial hole that has been dug even deeper. All of this "stress" and you are only 3 hours into your day. Does any part of this schedule resonate for you as an attorney? If so, the negative effects of chronic stress may be occurring in your body and life…

I believe there is ***"Good Stress"*** and ***"Bad Stress***"

- ***"Good Stress"*** is part of our fundamental survival system and is an automatic biological stress response that can save our lives. Your fight/flight/freeze responses are for "acute" or "short-term" stress and last minutes to hours until you return to a resting or relaxed state. So, the norepinephrine, adrenalin and cortisol stress hormone levels rise and then disappear.

- ***"Bad Stress"*** occurs when there is chronic or ongoing situations in your life that do not provide you with time to return to a resting or relaxing state. This chronic stress can be activated for days, weeks, months and even years. In this case, the norepinephrine and adrenalin levels may lower, but the levels of cortisol may remain in the body and start to wreak havoc, as outlined further below.

Both ***"Good Stress"*** and ***"Bad Stress"*** start with a stressful trigger (traffic, late for a meeting, upset client, deadlines, heavy workload, challenging judge or opposing counsel) and your body reacts as though you are being chased by a saber-toothed tiger, which means you need to activate your survival system and marshal the immediate support of your stress hormones within seconds: adrenaline (heartbeat increases, breath rate increases, surge of energy, start sweating, focuses your attention) and norepinephrine (backup to adrenalin, more awake and focused, shifts blood flow from non-crucial areas - skin and brain – to essential areas - muscles - so you can run or fight with superhuman skills and can last). Then in a few minutes cortisol hormones are released to sustain the stress response into the indefinite future, as long as the stressor is present (maintains fluid balance and blood pressure, regulates non-crucial body functions, suppresses the immune system, increases blood pressure, increases blood sugar levels, decreases libido, increases acne and decreases metabolism).

And for many of us as lawyers, the stressor never ends, it just takes a different form. It has been reported that chronic stress is the #1 cause of disease in Americans.

"***Bad Stress***" or "***Chronic Stress***" affects us in varied ways, including:

- ***Physical Effects on our Body:***
  - Negatively affects all of your physical systems, especially your "weak health spots;"
  - Increased respiration and breathlessness;

- Due to energy being mobilized to muscles there may be pain, tension and spasms in neck and back as well as jaw pain from teeth grinding;
- Narrows arteries in the heart, which increases heart rate and the risk of developing cardiovascular disease;
- Lowers metabolism, which leads to weight gain;
- Lowers immunity, which increases illnesses and infections;
- Increases overall inflammation and oxidative damage;
- Skin irritations and acne;
- Decrease in collagen, which keeps your skin elastic;
- Gastrointestinal effects, such as intestinal pain, gas or diarrhea, as the gut bacteria is changed;
- Overall body fatigue: and
- Increases blood sugar levels, which feels like:
  - Headaches and other aches/pains;
  - Hard to concentrate;
  - Thirsty or hungry;
  - Drowsy or tired;
  - Blurred vision;
  - Dry mouth;
  - Bloating; and
  - Frequent urination.

- ***Mental Effects on our Mind:***
  - Unable to focus, looking for distractions;
  - Muddled thinking;
  - Impaired judgment;
  - Negative;
  - Make hasty decisions; and
  - Damage to short term memory due to a reduction in gray matter.

- ***Emotional Effects:***
  - Loss of confidence;
  - More Fussy;
  - Irritable;
  - Depressed;
  - Anxious;
  - Apathetic;
  - Alienated;
  - Apprehension; and
  - Feeling overwhelmed by life.

- ***Behavioral Effects:***
  - More accident prone;
  - Loss of appetite or overeating;
  - Loss of sex drive;
  - Drinking more alcohol;
  - Smoking more – tobacco or marijuana;
  - Insomnia; and
  - Restlessness.

There are many different ways to cope with stress, including:

1. Numb the pain caused by the Stress;
2. Tolerate the stressor until it passes or becomes less troublesome;
3. Change the source of the stress (quit the job, leave the relationship, move, etc.); and
4. Change your perspective of the situation by practicing being mindful.

I have tried all coping mechanisms and have had the most lasting reduction in my stress levels by practicing mindfulness. Mindfulness has been defined by Jon Kabat-Zinn as "Paying attention in a particular way: on purpose, in the present moment, and non-judgmentally." Essentially, you are choosing to be in the present moment instead of allowing your mind to wander. The best part about being mindful is that it is completely free, doesn't require any special clothing or equipment and can occur at any moment. The hard part about being mindful is that despite its simplicity, it is perhaps the most challenging thing you will ever do in a disciplined routine way. There are many paths to practicing mindfulness, including meditation, mindful movement or yoga, awareness of the breath, being in nature, mountain biking, trail running, rock climbing or any activity that requires your complete and utter focused attention.

So, why should you even attempt being mindful in a disciplined and routine manner? Because, in my opinion, the documented benefits of being mindful can lower or eliminate the negative effects of "Bad Stress" or "Chronic Stress" in some really powerful ways, including:

- *Peace of Mind* by increasing the levels of dopamine, serotonin and oxytocin, which are naturally produced during the relaxed state of your parasympathetic nervous system;
- *Better Focus* to have an enhanced ability to sustain your attention despite distractions and with your increased concentration there is a substantial increase in productivity;
- *Less Stressed*, so you are able to cope with challenges, changes and obstacles in your life and work;
- *Improvement in Immunity*, so you can avoid illness and stay healthier;
- *Less Reactive* during conflicts;
- *More Present* during conversations, so you miss less critical information and data;
- *Better Memory*;
- *Increased Self-Awareness*, so you can see destructive habits within yourself and change them;
- *Better Work-Life Integration*, as you are mindfully creating a schedule that makes time for the things you love the most in life;

- *Being More Creative* and able to engage in deeper thinking because it is the space in our minds that allows us to be creative and imaginative;
- *Enhanced Clarity* with the ability to actually see what is occurring without judgment; and
- *Increased Compassion* and empathy as you increase your ability to have a deep understanding and kindness towards yourself and others.

Mica Tucker and Samara Anderson are co-chairs of the VBA Attorney Well-Being Section. Please consider joining the online community so we can share experiences and support each other. If you are ready to dive into the mindfulness pool and need someone to help support you, please contact Samara Anderson at thehappyhumanprojects@yahoo.com to discuss opportunities to incorporate mindfulness and wellness into your stressful lives as attorneys through workshops, courses or coaching.

by Lila Shapero, Esq.

Vermont Bar Foundation Grantee Spotlight

Orleans County Restorative Justice Center

The Orleans County Restorative Justice Center receives a competitive grant from the Vermont Bar Foundation (VBF) to help support its legal clinics.

This article is part of the VBF *Vermont Bar Journal* series that highlights different grantees who receive funding through the VBF. The VBF is able to support those non-profit organizations providing legal advice or representation to low-income Vermonters through IOLTA funds and contributions.

The Orleans County Restorative Justice Center (OCRJC) started over 20 years ago as part of the restorative justice movement in the United States. Every Vermont County has a restorative justice program focusing on conflict resolution between an offender and victim and/or community and focusing on offender reentry into the community. Restorative justice programs focus on accountability and healing.

Barbara Morrow is the Executive Director of the OCRJC, a 501(c)(3) non-profit agency located in Newport. Morrow has been Executive Director for 7 years.

According to Barbara Morrow, OCRJC was the first community justice center in Vermont and the first program in the United States to hear a documented, restorative panel case. OCRJC presently has 25 trained volunteers. About 5 years ago, OCRJC expanded it focus and started a civil legal clinic.

In talking to Morrow, it is clear that she is committed to her community and to bringing the underlying principles of conflict resolution to disputes and problems. Orleans County is part of the Northeast Kingdom, a beautiful but struggling area of Vermont. Orleans County is profiled in *Vermont's Northeast Kingdom: A Community Profile* by Vermont State Data Center at UVM's Center for Rural Studies (2018). The population is 27,076. Labor force participation is 58.4% (second lowest county in Vermont) and the median household income is $41,437 (second lowest county in Vermont) while the poverty level is 16.7% (second highest county in Vermont).

Adding a civil clinic has been a way of addressing equal access to justice according to Morrow. She explains many are confused as to how the law works and what it can do.

Their understanding may come from word on the street, a sometimes "creative" explanation of the law and courts.

VBF funds enable OCRJC to screen potential clients, schedule clients, and support the operation of the clinic. Morrow states that they field about 20 telephone calls each month for screening. The funding provides the space and a laptop.

Once the calls are screened and scheduled, a pro bono attorney sees 6 to 8 clients monthly at the clinic. Each appointment is slated for 30 minutes, but clients are able to return to follow up on their legal issues. The majority of cases are family law related. Cases also include employment, small claims, housing and other matters.

Another pro bono attorney sees 6 to 8 clients quarterly at a second clinic dedicated to elder law issues including probate law, wills, financial issues and bankruptcy. In some of these cases, the legal issue may stem from conflicts within families.

Morrow explains that an in-person conference rather than a telephone conference makes communication easier for clients, especially elders. Moreover, she meets with the local Council on Aging and St. Johnsbury office of Vermont Legal Aid to brainstorm projects, including ways to produce educational materials to disseminate.

OCRJC brings the principles of conflict resolution to their clinics. Morrow notes that sometimes hearing what the law can and cannot do enables a person to think differently about a conflict. This is especially true in matters when the attorney explains that there is not a legal case to bring. This information can help the person let go of the conflict or dampen strong emotions. In addition, Morrow explains both sides may share in the cause or escalation of a dispute and the attorney can help the person find a resolution.

Sometimes a telephone call from the attorney can solve the issue. In one case, a person had moved to a different town and ran into protracted difficulties trying to register to vote. A telephone call solved the problem.

Morrow would like to see more clinics and more education. By the time this article appears, an Expungement Clinic sponsored by Vermont Legal Aid will have occurred in Orleans County with the help of OCRJC. For this, Orleans County residents will be able to access help without the difficulty and cost of traveling to Burlington or other sites in the State.

Morrow describes one of OCRJS's goals as building upon its coordination efforts with their community partners to broaden access to justice for Orleans residents. The OCRJS also seeks to expand restorative services in a broad array of settings. It continues to narrow the access to justice gap in Orleans County by providing these clinics and other services with the assistance of the VBF and others, through your contributions.

Lila Shapero is a pro bono emeritus attorney and a member of the Vermont Bar Foundation.

by Mark Bassingthwaighte, Esq.

Password Insecurity - Lessons from a Personal Story

Sometimes married couples see things differently and the only way to resolve the tension is by finally deciding to agree to disagree. That's how things played out in our home for a number of years on the issue of passwords. My wife viewed my focus on computer security and passwords as something approaching mild paranoia. I, on the other hand, viewed her insistence on using one easily remembered password for everything in her life the equivalent of tattooing the phrase "victim here" on her forehead. The only way for us to move forward was to reach an accord. We agreed to disagree, and things were good, at least for a while.

A few years later, after receiving an email from one of our sons, our accord began to crumble. I was informed that my wife's email account had been hacked and was actively being used to send out spam email. Of course, I did what one normally does to remedy that situation and hoped all would be good. Sadly, it wasn't to be. Our accord abruptly ended a few months later after we received written notice from a credit union on the opposite side of the country telling us that they were most displeased with my wife. Apparently, credit unions don't like it when someone gets a new credit card, immediately maxes it out, and then fails to make any payments. Unfortunately, given that my wife wasn't the one who applied for and received that credit card, we had a new problem.

While this tale took a number of interesting twists and turns over the next few years, in the interest of time I will simply share that as a result of the initial identity theft a federal and an out-of-state tax return were also fraudulently filed in my wife's name. I spent over three years working to get everything cleaned up; but the one thing I can't do, and honestly no one can, is ever get her identity back. That's been taken and we'll have to deal with the ramifications of that for the rest of our lives. Hopefully, it's over; but only time will tell.

Today things are different around here. My focus on computer security is viewed in a much different light by my wife, and I no longer worry about any unsightly tattoos on her forehead. Our state of marital bliss has been restored because this time around we're both on the same page. Trust me, she gets it now. What's more important, however, is do you? Again, understand this entire saga started with someone managing to figure out a password, a password that, unfortunately for my wife and me, opened all kinds of doors that would have remained locked had she not used one password for everything.

I chose to share this story because I wanted to put a real-world spin on the problems that can arise when too little attention is given to the importance of passwords. Every one of us in our personal and professional lives needs to abide by some sort of password policy, formal or informal, in order to try and avoid becoming yet another victim of identity theft. And heaven help you if an identity theft occurs and it turns out to be the identity of one or more of your clients because someone got into your office network. So not good.

With this tale of woe now told, it's time to talk about how to avoid becoming a victim. I'll start by identifying typical missteps. Here is a list of things no one should ever do. 1) Use the same password on multiple devices, apps, and websites. 2) Write down passwords on easily found sticky notes. 3) Believe that passwords like "qwerty", "password", "1234567", or "letmein" are clever and acceptable. They aren't. 4) Allow computer browsers to remember passwords. 5) Choose passwords based upon easily remembered information such as birth dates, anniversary dates, Social Security numbers, phone numbers, names of family members, pet names, and street addresses. This kind of information just isn't as confidential as you think due to events like the Equifax breach and widespread participation in the social media space.

Knowing the common missteps, however, isn't enough. Such practices should be prohibited in a formal firmwide password policy that everyone at the firm must abide by. There can be no exceptions, period. Of course, policy provisions must also detail what to do. The most important provision of a password policy would be to mandate the use of strong passwords defined as follows. A password is strong if it is long, a minimum of 15 characters, and it should include a few numbers, special characters, and upper and lower-case letters if the device or application you wish to secure with a password will accept it. Additional provisions worth including would be requiring that every application and device in use have its own unique password, requiring that passwords in use with mission critical devices and applications (e.g. banking login credentials, firm VPN login) be changed every 6 months, forbidding the reuse of old passwords, and prohibiting the sharing of user ids and passwords with anyone. Finally, make enabling two-factor authentication for any device or application that allows it compulsory.

Of course, a password policy like this creates a new problem, which is trying to keep track of all the complex passwords now mandated. I can share that between us, my wife and I have over 250 different passwords we need to keep track of in our personal and professional lives. I don't know about you, but I sure can't remember all of that information.

Fortunately, this problem can be easily managed by using a password manager such as RoboForm, LastPass, or Dashlane. (My wife agreed to commit to learning how to use a password manager shortly after her kerfuffle with the credit union and it has

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made a world of difference!) Such tools are often cloud-based software applications that allow users to conveniently store and manage all of their passwords. The data is encrypted and can only be accessed once a master password has been entered. Yes, users will still need to remember a long and difficult to guess master password; but having to remember one is going to be far easier than trying to remember 250. And again, no one should ever write down their master password. Everyone really must commit the master password to memory or find a way to store it in some other secure manner.

One side note here because lawyers are sometimes hesitant to place passwords in the cloud. Try to avoid allowing such a concern to become an excuse for not making any changes at all. As I see it, those of us who use password managers are far more secure than those who simply write everything down on a piece of paper or on sticky notes that are always close at hand. Further, given the robust encryption in use, these applications are also going to also be more secure than keeping a list of passwords in an Excel or Word file. But here's the real value. The use of a password manager provides robust security when compared to relying on easily remembered weak passwords, using the same password on multiple devices or websites, allowing browsers to remember passwords, not changing passwords and re-using old passwords, all of which is what so many do by default.

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*ALPS Risk Manager **Mark Bassingthwaighte, Esq.** has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Check out Mark's recent seminars to assist you with your solo practice by visiting our on-demand CLE library at alps.inreachce.com. Mark can be contacted at: mbass@alpsnet.com.*

SURVEY SAYS?!

We've received 381 survey responses for our broad membership demographic survey! Thank you to all of you who have participated so far. If you haven't, please do so, it's not too late.

What do we know so far? Well, 26% of respondents earn between $91,000-$130,000 per year, which is an improvement over our last survey! We also learned that CLE's and Government Relations are two of the most important services that the VBA can provide for you (followed by online research and networking). Based on the responses, we are already working on training sessions for Casemaker Beta and other improvements suggested by you, our members.

So keep the responses coming, please and please also take the time to answer our gender bias exploration survey coming to your inboxes soon. Thank you for helping us serve you better!

Vermont Bar Foundation

2019 Grants Recipients, Programs, and Service Areas

At their May meeting, the Vermont Bar Foundation's Board of Directors approved the following:
Hon. John A. Dooley Competitive Grants - $54,754
Non-Competitive Grants - $802,000

Funding of these projects are made possible because of your contributions and the interest on your IOLTA accounts. Please visit our web for more details on the grant recipients. https://vtbarfoundation.org

Recipient/Program	**Service Area**
Hon. John A. Dooley Competitive Grants Program:	
Association of Africans Living in Vermont, Inc. *Immigration Project*	Chittenden County
New Story *Legal Assistance Project*	Rutland County
Orleans County Restorative Justice Center *Pro Bono Legal Clinics*	Orleans and Northern Essex Counties
Steps to End Domestic Violence *Legal Clinic*	Chittenden County
The Community Restorative Justice Center *Pro Bono Legal Clinic*	Caledonia County
Vermont Bar Association *County Low Bono Projects*	Statewide
Women's Freedom Center *Legal Representation*	Windham County
WomenSafe *Legal Representation*	Addison County
Non-Competitive Grants:	
New Story *Legal Assistance Project*	Statewide
Orleans County Restorative Justice Center *Pro Bono Legal Clinics*	Statewide
Steps to End Domestic Violence *Legal Clinic*	Addison Chittenden Franklin, Lamoille Orange Rutland Washington Windham Windsor Counties
The Community Restorative Justice Center *Pro Bono Legal Clinic*	Statewide

by Leo Bisson, Esq.

Decision-Making at Mediation

Psychological Factors Influencing Outcomes

We recently saw the 100-year anniversary of the war to end all wars. Sadly, the stream of wars has never ended, and probably never will. All one must do is hear the daily news to realize how fun≠damentally fortunate we are to have a rule of law allowing peaceful resolution of disputes. And to have alternative dispute resolution processes to minimize the inefficiencies of litigation. Mediation and arbitration have supplemented traditional methods of negotiation to enable those involved in disputes to have some decision-making control over the outcome.

As a mediator of civil claims seeking redress for personal and financial losses (most commonly tort cases seeking a sum of money), I have often pondered the factors triggering acceptance or rejection of settlement opportunities arising during sessions. Over the course of about 1,000 mediations in the last 20 years one observation stands out as the most curious – parties sometimes reach agreements they all would have rejected coming into the process. How could that be? What changes to make a "no" a "yes"?

I am not so naive as to credit the role of the neutral alone for success at mediation, nor fault one or both parties for failure. A good and knowledgeable neutral certainly can provide information about multiple issues parties may consider, ranging from the litigation process to points of evidence and substantive law potentially applicable to the dispute. In addition to providing information, a neutral may influence decision-making, either intentionally or accidentally. A mediator savvy in the science of Motivational Interviewing may be able to directly influence a party's decision about settlement.[1] Through empathetic listening, open-ended questioning and restatement of a party's position, a motivational interviewer can demonstrate discrepancies between a party's objectives and current position such that a change of position and movement towards compromise becomes possible.

Naturally, counsel for the parties and other claims professionals involved in the process influence the decision-making of the parties. Again, this may be intentional or accidental. Family and friends likewise may have a bearing on a party's view of case value and thus the position taken at mediation. The quest to understand how and why decision-making at mediations is influenced leads down an interesting path. Here I will discuss some of the commonly encountered psychological factors.[2]

In Michael Lewis' novel, "The Undoing Project," he explores the life-long work of two Israeli psychologists, Amos Tversky and Daniel Kahneman.[3] Working together and employing numerous surveys, they demonstrated that people in every social and economic stratum make decisions about a wide variety of things based on subconscious rules of thumb they labeled "heuristics." They categorized heuristics as certain ingrained principals which define the behavioral contours of human decision-making. Contrary to utilitarian economic theory, which posits that decisions are based on a rational analysis of what is in a person's best interest, they demonstrated that people often do not make decisions in their own best financial interest. For example, most people decide to take a sure $2,000 over a 50% chance to get $5,000, the statistically best choice. Conversely, those same people asked to choose between a sure loss of $2,000 or 50% chance of losing $5,000 chose the latter. In the first case most opted for the sure thing over an even chance to do 2.5 times better, whereas in the second case they chose to chance a 2.5 times bigger loss rather than accept a smaller sure loss. What Tversky and Kahneman came to realize is most of us are risk averse when it comes to a decision about a potential gain, but risk taking when deciding about a loss avoidance.[4] This trait forms the basis for what they labeled as Prospect Theory.

Prospect Theory holds that financial decisions must be viewed in relation to a person's reference point. For example, if offered a raise of $5/hour one may consider that satisfactory until learning that a co-worker is offered a $10/hour raise for the same work. Learning of the co-worker's raise creates an anticipation that one is entitled to the same, thus changing the point of reference from which the offer of $5 is measured. Prospect Theory also recognizes certain other human characteristics that factor into decision-making. Loss aversion is a strong influence. Studies show most people are willing to take greater risks to avoid a loss than to realize a gain. Optimism is another influential bias most share. Kahneman describes how optimism creates an "illusion of validity." These and many more behaviors routinely appearing in financial decision-making influence the mediation process, whether consciously or subconsciously. Prospect Theory and heuristics impact the course of mediations in many ways.

Anticipation. It is normal at mediation for each party to anticipate the claim resulting in a gain or loss. But whether an amount of money either paid or received is viewed as a true gain or loss depends on each party's reference point. And a party's reference point will surely include anticipation of some level of gain or loss from the matter. The claimant likely anticipates recouping some level of financial gain to compensate from their perceived loss, and the defendant anticipates some loss in order to resolve the claim. Anticipated gain or loss informs that party's status quo which in turn forms the reference point from which a party will view a potential settlement as being a true gain or loss.

Claimant's anticipation of gain is undoubtedly influenced by their counsel, but also by factors unrelated to the merits of the claim, such as anecdotal information about other cases, and personal needs. For institutional clients and those represented by claims professionals, like insurers, a more regimented hierarchical system for anticipating status post resolution is in place. In both cases, pre-determined anticipated outcomes limit the flexibility of the mediation process and require considerable effort by the neutral to understand when a proposal will be viewed as a true gain by a claimant who is unlikely to forfeit for a chance of doing better at trial, or a loss by a defendant who is willing to take a chance to avoid.

Learning what each party anticipates from the outcome of the dispute is critical to understanding each party's reference point from which proposed settlements will be viewed. It is further instrumental in measuring any discrepancy between a party's position and anticipated outcome. And it is the starting point from which the mediator can begin to address the reasonableness of a party's ultimate goal for dispute resolution.

Anchoring. The uncertainty of a verdict or judgment in any given case affords considerable room for both disagreement among parties and influence by a skilled neutral. When a sum cannot be calculated mathematically and is subject to variables and imprecision, it has repeatedly been shown that a suggested amount will affect the opinion of value decided on by an individual. An example used by Kahneman is to ask: "Do you think the average life expec-

tancy in Chile is 100 and if not, what do you think it is?" Of those who don't happen to know the actual answer the average guess will be a larger number than if the question were simply "What do you think the average life expectancy in Chile is?" Likewise, if the question is asked using the number 60 the average guess will be lower than that for an open-ended question. The influence of a suggested figure is called anchoring. Studies show that people are reluctant to stray too far from the suggested number if they do not know the actual number.[5]

Anchoring occurs in mediations at various levels. Pre-mediation it happens when counsel advises a decision maker of her or his opinion about the value of a claim. I am grateful for those instances when counsel has not tried to lock in a value by anchoring her or his client to a set figure. This is especially important to the flexibility of parties in cases with multiple moving parts. Anchoring can happen inadvertently when a neutral solicits counsel's view of case value in the presence of her or his client. And it happens when the neutral states an opinion of value, or even value range, especially if done early in the session. A neutral has an opportunity to suggest value ranges that a party should consider on target with what an eventual trial might bring. But it is best for a neutral to avoid rendering an opinion of value unless deemed necessary to avoid failure and continue progress towards resolution. [6]

It often happens that a claimant's counsel will have a strong opinion of case value and minimum acceptable settlement amount. In most cases the lay claimant will defer almost completely to the views of his or her counsel, especially in non-quantifiable damages cases like personal injury. In such situations the neutral must explore the basis for counsel's views without becoming seen as an advocate for the other side. The stronger the reasoning, the more talking point the neutral has to work with in the other room; the weaker the basis, the more inroads the neutral can make in suggesting flexibility.

In cases involving an insurer for the defense, anchoring has been methodically completed before most mediation sessions. Not only are value figures pre-determined, often by superiors not present at the session, but regulatorily mandated reserves are set in advance. Insurance claims professionals are generally not allowed to settle claims for an amount beyond the reserve without first going through an internal process to adjust the reserve. So, what can a mediator hope to do other than elicit the full authority posted on a given claim?

It turns out that insurance claims professionals' settlement authority on a claim is normally substantially lower than the case reserve. Reserves are usually generously set to avoid regulatory displeasure resulting from settlements or judgments exceeding them. It is unlikely the true reserve will be shared with the neutral, though commonly we are told the authority level has been reached. The discrepancy between the reserve and authority figures allows for some flexibility at mediation, and that is where an anchoring effect may influence how far into that gap the defense is willing to go.

Contrast and Reciprocity. I often hear parties complain at mediation that they have moved much more than the other side. Neutrals typically will respond to such complaints by pointing out that starting points are often unrealistically high or low and the relative size of ensuing moves is unimportant compared to the ultimate amount the opponent is willing to pay or accept to resolve the dispute. But I have come to understand that this response lacks an appreciation of two related psychological principals – the contrast principal and the reciprocity rule.

The **contrast principal** is well understood and utilized by claims professionals, even if not by name. It holds that something larger following a smaller similar item will appear even larger than if it was not preceded by the smaller item, and vice versa.[7] Thus, an offer to pay a sum following an offer of a much smaller sum may be perceived as more significant than if made without the prior move. Conventional negotiating wisdom says never make a move larger than preceding moves, but the contrast principal says there may well be a marginal benefit in doing just the opposite.

The **reciprocity rule** offers a powerful tool commonly used by marketers and salespeople. Reciprocity holds that by giving a person something a deep-rooted psychological sense of obligation to re-pay is created.[8] We see examples of this rule at work when a charitable organization sends unsolicited free items, like address stickers, pens, T shirts etc., along with a request for a donation. Time and again it has been demonstrated that the success rate for raising donations increases significantly when the request is accompanied by a gift. The life insurance salesman who delivered my free atlas when I was in college made good use of the gift to leverage at least tolerance for listening to a pitch I would have rejected out of hand otherwise.

Likewise, a concession made at a mediation which is perceived as genuine may instill a sense of obligation to reciprocate, especially if the concession is made when not required by the process. Astute counsel and parties have made good progress towards resolution by making concessions at critical times in the mediation to avoid impasse and demonstrate a willingness to compromise deserving of reciprocity by the opponent.

The effect of the reciprocity rule may be compounded by what has been described as the compliance factor. Compliance recognizes that a party is more likely to attain their objective if offered as a concession to an earlier demand.[9] So a request to pay an amount to settle followed by a reduction in an earlier demand, as a concession to the position of the other party, can create a sense of obligation to comply with the reduced request as a fair quid pro quo. Parties seeking a just resolution of a dispute will respond in fairness if they believe the opponent is being fair.

Framing. A lesson from surveys of participants in psychological studies is that opposite answers to essentially the same question may result from how the question is framed. Thus, the same responders who would gladly pay $X for treatment of a condition would not opt to make the same payment to prevent the condition. In the mediation context a party who is asked: 1. Are you willing to settle for a sure $X, or will you take a chance to recover 130% of $X at trial? [Yes, case settled for $X] versus 2. Given you are anticipating recovery a verdict of 130% of $X, are you willing to take $X to settle now? [No, case not settled].

There are many examples of framing used to focus a party's analysis on what they are risking by seeking to attain a recovery matching their anticipation of gain from the claim. Conversely, the defensive party may be asked to consider if they are willing to spend $Z in future costs and assume the risk of being wrong about verdict value in order to avoid adding some sum beyond their anticipated loss.

Parties should be wary of framing by neutrals because of the effect it may have on decision-making. Even when motivated by a legitimate desire to focus attention of the consequences of alternative settlement decisions, the effects of framing can be manipulative. As observed in the *American Psychologist* about the effects of framing: "They can also be exploited deliberately to manipulate the relative attractiveness of options."[10]

Confidence and Confirmation: Kahneman discusses what he labels as an *illusion of validity* supporting human decision-making. One or all parties to a mediation commonly espouse high confidence in their view of likely case outcome. As Kahneman observed:

Declarations of high confidence mainly tells you that an individual has constructed a coherent story in his mind, not necessarily that the story is true. [11]

Feeding the illusion of validity is what has been called the strongest cognitive bias we share, the **confirmation bias**. This bias is manifest when people look for evidence supporting their viewpoint and discount or ignore evidence to the contrary.[12] The confirmation bias causes a party to latch onto evidence consistent with their view and ignore evidence to the contrary. Not uncommonly, a party will discount the points offered by the opposition simply based on their source.[13]

The mediator or attorney facing a strong illusion of validity has several tools to impart a more objective view. All parties must be confronted with the reality that verdict values are subjective and speculative, not lending themselves to the level of certainty a confident party may try to impose on them. The confirmation bias may be lessened by asking parties to focus attention on contrary facts previously discounted or ignored. At least this exercise will force a rational party to confront and provide a cogent explanation why alternative views are insubstantial. To the extent the party fails this task, it weakens the illusion of validity. To the extent the party succeeds, it provides the neutral better points with which to confront illusions of validity by the other party. Either way, the process moves forward with a new sense of appreciation for all of the parties with less rigidity.

Overconfidence affords resilience and resolve to continue, though at the cost of self-deception and ultimate disappointment. As Kahneman observes: "An unbiased appreciation of uncertainty is a cornerstone of rationality-but it is not what people and organizations want."[14] A mediator must appreciate the tension between a party's disappointment at reaching a settlement falling short of anticipated results as contrasted with the regret of losing an opportunity for a sure thing. A helpful tool is to ask a party who may be over-confident to identify the reasons for a bad result, assuming one should occur following trial. To the extent the party is unable to imagine such a result the neutral can be helpful.

Overconfidence should not be confused with an injured party's view that justice requires a certain level of recovery for the loss. Especially in severe trauma and death cases, it is not uncommon for the aggrieved party to set a minimum level of recovery required to dignify the extent of loss. This party is not overconfident but rather righteous in seeking justice. Neutrals commonly respond by saying all the civil justice system can deliver is an amount of money, which no one would accept for the loss. A good discussion to have is about the process a jury will employ in reaching a decision, including following the judge's instructions and ultimately making a subjective determination of the amount of money to award for an unquantifiable loss. If the party has set an unrealistic amount as representing justice, then it can be pointed out that they are asking a group of strangers to make a difficult decision that the aggrieved party is in a better position to make.

Each of these factors is in play in varying degrees at any session. Parties making decisions about claims resolution at mediation employ the same heuristics as they do in making other decisions. Understanding some of the common psychological factors influencing decision-making can be helpful to neutrals and counsel alike. It is especially important for a mediator to understand the roles of anticipation and framing in establishing reference points from which settlement opportunities will be measured. It is equally essential to recognize the effects of anchoring and to be prepared to work with parties who may demonstrate over-confidence or a strong confirmation bias. All parties to a mediation should consider using the influence of the reciprocity rule and the value of making concessions aimed at triggering compliance with a compromise, as well as being wary of manipulation via the contrast principal. In the final analysis, the role of the mediator is to move parties closer to an objectively rational view of their prospects at trial in order to accurately understand the relative merit of any settlement opportunity.

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*Following over 40 years of civil litigation practice, **Leo Bisson** now operates ADR, LLC providing mediation and arbitration services.*

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[1] Beth McCormack, *Making Your Writing Out of Cite: Using the Bluebook to Improve Your Writ*1 See, Saunders, Merriam, *The Application of Motivational Interviewing In A Mediation Caucus.* Mediate.com (Sept. 2009).

[2] A thorough discussion of the psychology of decision-making in tort mediations is beyond the ability of this author and would require more space than this journal allows.

[3] Lewis, Michael, *The Undoing Project*, (W. W. Norton and Company 2017).

[4] Tversky A. and Kahneman, D. *Prospect Theory: An Analysis of Decision Under Risk.* Econometrica, Vol. 47, No. 2. (Mar., 1979), pp. 263-292.

[5] Kahneman, D. *Thinking Fast and Slow*, Ch. 11 (Farrar, Straus and Giroux 2011).

[6] Jim Spink is most effective in describing scenarios supported by varying views of the evidence which lead to relatively larger and smaller verdicts, thus affording the parties an opportunity to measure how their case may end without suggesting a particular figure.

[7] Cialdini, Robert B. *Influence*, Harper Collins e-books (Business Essentials edition 2009) at 11.

[8] Influence at 17.

[9] *Influence* at 36.

[10] *American Psychologist* v. 34 *Choices, Values and Frames* (1984).

[11] Kahneman, D. *Thinking Fast and Slow* p. 212 (Farrar, Straus and Giroux, 2011).

[12] Yagoda, B. *The Cognitive Biases Tricking Your Brain* (Science, Sept. 2018).

[13] The polarization in this country today is fueled by the confirmation bias – depending on your views there is a ready source of confirming information, be it from Rush Limbaugh or Rachel Maddow.

[14] *Thinking Fast and Slow* at 263.

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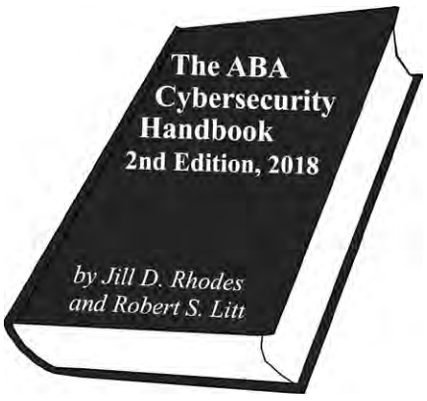
BOOK REVIEW



The ABA Cybersecurity Handbook (2nd Edition, 2018)
By Jill D. Rhodes & Robert S. Litt
Reviewed by James Knapp, Esq.

This well-organized book creates a good balance between describing the current state of cybersecurity risks while simultaneously reminding readers that the nature and scope of cyber incidents is always expanding and changing. The information provided in the book is sufficiently generally applicable so as not to risk becoming obsolete as the landscape of cybersecurity shifts and changes with time.

The ABA Cybersecurity Handbook is organized in four sections, beginning with the basic concepts of cybersecurity and proceeding through the basis for attorneys' legal and ethical obligations regarding cybersecurity. The middle section includes chapters on when and how to discuss cybersecurity with clients, with discussion addressed to different types of practices including small firms, in-house counsel, government attorneys, and public interest attorneys. There is an entire chapter on insurance aspects of cybersecurity as well. The substantial appendices include relevant federal and state statutes and case law, and a collection of ethics opinions related to cybersecurity. Section I of the book includes three chapters, one of which provides a primer on cybersecurity risks. That chapter discusses the general nature of common cybersecurity risks that might confront an attorney in whatever area she or he might practice. The material is addressed in language that a person with a basic grasp of technology will understand, making the material accessible to those who may feel that they do not have enough knowledge to understand the scope of the cybersecurity issues. The third chapter in Section I speaks to the concepts of networking, both locally and on the internet. Those with an interest in the topic, but limited familiarity, will find helpful content.

Section II of the book contains information that any attorney using technology in their practice should understand. Through the course of three chapters, the authors and contributors explain in detail an attorney's legal obligations to manage cybersecurity issues in their practice and the ethical obligations regarding protection of data in the attorney's custody. The chapters on legal obligations and ethical obligations should be read by every attorney who has any responsibility for management of a law firm, whether a solo, small firm or large firm. The risks of failing to understand the scope of the duties regarding data in the possession of law firms are too great to leave to a general concept gleaned from a one or two-hour seminar.

Section II, Chapter 4 addresses the legal basis for the obligation to secure data derived from statutory law, common law, and touching on the ethical requirements. Within that discussion the authors of the Chapter helpfully point out the kinds of data that are covered and more importantly discuss the legal standards for what constitutes "reasonable security" in the context of the practice of law.

Section II, Chapter 5 provides a basic explanation of the international framework imposing obligations for securing data in the possession of a law practice. Generally, local law firms may not think about the international impacts of their practice, though many Vermont firms have clients who live and work in other countries. It is wise to consider what impact, if any, that laws and treaties may have when dealing with people living and working in other countries. That is particularly so, given the ease with which communications can cross national boundaries when conducted in cyberspace.

Section II, Chapter 6 examines the spectrum of ethics opinions addressing attorneys' obligations related to data security. At the beginning of the Chapter, the authors examine ABA Formal Opinion 477R addressing data security. The remainder of the chapter includes commentary on the text of the ABA Model rules as those rules apply to technology and data security, referencing a mix of State and ABA opinions. The chapter also discusses favorite topics such as encryption of email, the duty to warn clients about potential third party access to shared computers, cloud computing and social media. The final section contains an interesting list of 10 points regarding the intersection of ethical obligations and technology. The appendices collect references to ethics opinions from the ABA and State ethics advisory committees on technology and cybersecurity issues, making it easier to find guidance from around the country.

The seventh chapter introduces a topic that is not often considered by most attorneys practicing in Vermont: "Occasions When Counsel Should Consider Initiating a Conversation about Cybersecurity with the Client." The chapter provides an introduction to a number of situations when technology and cybersecurity will impact a client's interests. The authors also provide suggestions to help the practicing attorney think about certain cybersecurity and technology topics to discuss with clients. The discussion points are organized by subject matter, for example, there is a subsection providing discussion points for use with clients when litigation is threatened or becomes a possibility. Every attorney, not just litigators, should have enough knowledge to give clients clear instructions on their obligations regarding preservation of digital information in the case of potential litigation. The talking points in that section offer up a primer for the non-litigator and a good reminder for the occasional litigator.

Section III of the book switches focus from cybersecurity and technology competence generally to offering guidance to several types of practices. There is chapter dedicated to each category of large firm, small firm, in-house counsel, government attorneys and public interest attorneys. Each chapter focuses on aspects of the practice type and how the general topics offered up in the first part of the books would apply in the practice setting.

Section III ends with "Get SMART on Data Protection Training and How to Create a Culture of Awareness." As the authors and contributors regularly point out throughout the book, being aware of the risks and creating an awareness in everyone in the firm, department or division, about the types of cybersecurity risks is the start of limiting exposure. One of the most difficult challenges for the average Vermont law firm or small corporate department is finding the resources to create a viable training program. Chapter 13 provides a framework within which a firm manager or department head can develop a program for the individuals in their firm or department.

For all the useful information presented in Sections I, II and III of the book, there is significant value for any attorney practicing law in any setting without a dedicated information security department in Section IV of this book. The final chapter of Section III and the two chapters in Section IV

address three key topics by aggregating ideas and best practices that would require significant additional effort to assemble without the book. In fact, these three chapters alone would justify the purchase of the book.

Based on this reviewer's experience at several recent technology programs sponsored by the Vermont Bar Association, many Vermont attorneys would benefit from the information contained in Chapter 14. Almost everyone will have heard by now the statement: "It isn't whether you will be hacked (or be subjected to a ransomware attack), but when, and will you know when it happens." Chapter 14, with the related Appendix, helps attorneys begin the formation of an incident response plan. Bear in mind that the incident response plan is one element of a business continuity plan, that every attorney, law firm, legal department, and legal division within an agency or department should have. Chapter 14 does not provide a pre-prepared plan for law firms departments or divisions because no plan encapsulated in a single chapter would address every situation. Instead the Chapter points the reader to resources from which the appropriate elements can be drawn to formulate a bespoke plan for a specific firm, department or division.

The final chapter of Section IV addresses the basics of cyber insurance. There is also a brief discussion of potential coverage for some cyber events under malpractice policies. Several pages explore the benefits of cyber insurance but with a section that points out potential issues with the language in a cyber insurance policy. The chapter also includes an interesting matrix assessing the insurance coverage for various cyber events, using the nature of the damage and nature of the loss as the elements against which to compare the coverage. Every solo practitioner and law firm should have cyber insurance, but simply buying the policy offered as an add-on by a malpractice carrier or other business partner is not sufficient if the principals of the firm do not understand what events are covered by the policy and what kinds of coverage are provided. It is important to be able to identify the likely risks to yourself, or your firm, and then determine if you have the appropriate coverage. The materials in Chapter 15 will help with that analysis.

Generally speaking, the information in this book is presented in a well-organized format and is written in language that lawyers and law office administrators can understand. The authors and contributors provide examples of cyber incidents and their consequences which are helpful in illustrating the points being addressed.

Jim Knapp, Esq. is the State Counsel for First American Title Insurance Company in Vermont and co-chair of the VBA Property Law Section. He has generally concentrated his practice in real estate and property law, with a strong secondary interest in the application of technology to the practice of all areas of the law.

IN MEMORIAM

Laurie Ann LeClair

Laurie Ann LeClair, 57, passed away on April 4, 2019. Born in Burlington, Laurie graduated summa cum laude from UVM and magna cum laude from the Vermont Law School in 1990. She also attended the University of Nice Sophia Antipolis in Nice, France for opera and the Institute for European Studies in Vienna, Austria for opera and Lieder performance. Laurie devoted her legal practice to helping young people and fighting for social justice and was a longtime board member of Vermont Dental Care. She was a vivacious, gifted, kind and intelligent woman. Laurie was the Programs and Publications Director of the Vermont Bar Association for a few years and was a member of the VBA. Laurie was predeceased by her parents and sister and brother-in-law and is survived by her son, Julien LeClair Katims, her nephew, her beloved cat Glinda and many friends.

Samuel Crawford Fitzpatrick

Samuel Crawford Fitzpatrick passed away on April 22, 2019 at the age of 83. Samuel was born in Norfolk, VA and graduated from Montpelier High School, Yale University and Cornell Law School. He also served as an officer in the Navy. Sam was a real estate practitioner in Montpelier and was active in the community, volunteering as both a baseball and hockey coach and serving proudly as a board member of Northfield Savings Bank for many years. He enjoyed duck hunting, sailing and going to camp and was known for his zest for life, honest and strong opinions and a sense of humor. Sam leaves behind three children and three grandchildren and was predeceased by his brother.

Allen Martin

Allen Martin, 81, died peacefully on June 19, 2019 surrounded by the enduring love of his wife Bonnie. Allen received his BA, cum laude, from Williams College, where he lettered in football and lacrosse, and received a scholarship to attend Oxford University in England. He graduated from Oxford with a first class honours degree in Philosophy, Politics and Economics, playing on the Oxford lacrosse team as well. Allen received his LL.B. cum laude from Harvard Law School and served on the Harvard Law Review for two years, as the articles editor in his final year. Upon graduation he moved to St. Johnsbury, clerked for the Honorable Sterry Waterman of the Second Circuit Court of Appeals and practiced at Foley Hoag and Eliot in Boston for several years. Allen then joined a small firm in St. Johnsbury which later became Downs Rachlin Martin, the largest firm in Vermont, practicing for 33 years there before he retired in 2002. Allen specialized in public utility law, mergers & acquisitions and health care law. Allen served as Vice Chairman of the Vermont Judicial Responsibility Board and was the Chair of the Vermont Board of Education. He served on many corporate boards and as trustee at Vermont Law School. Allen is survived by his wife of 40 years, his son, daughter-in-law and their children and his sister, brother-in-law and nephews.

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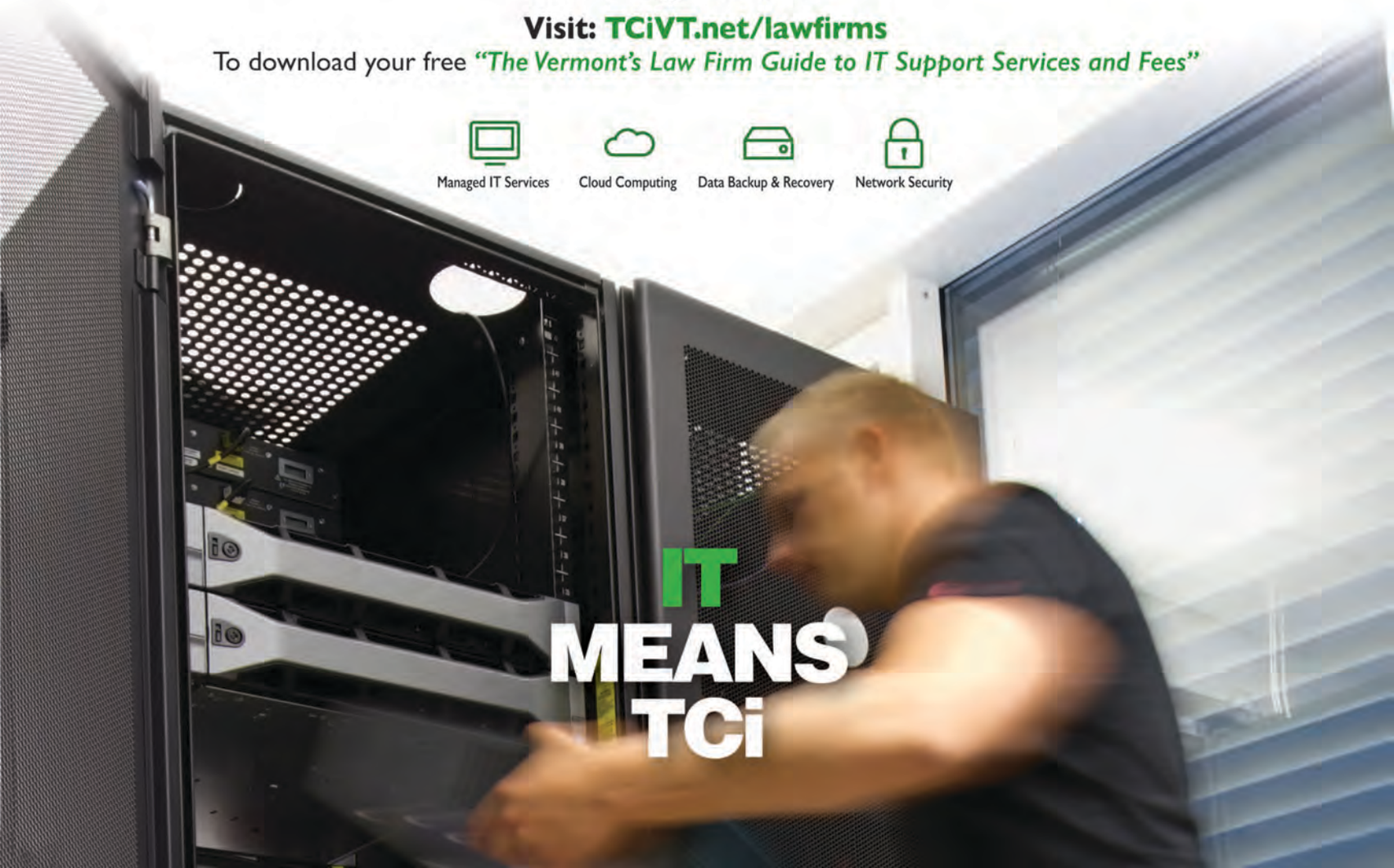

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