THE
VERMONT BAR JOURNAL

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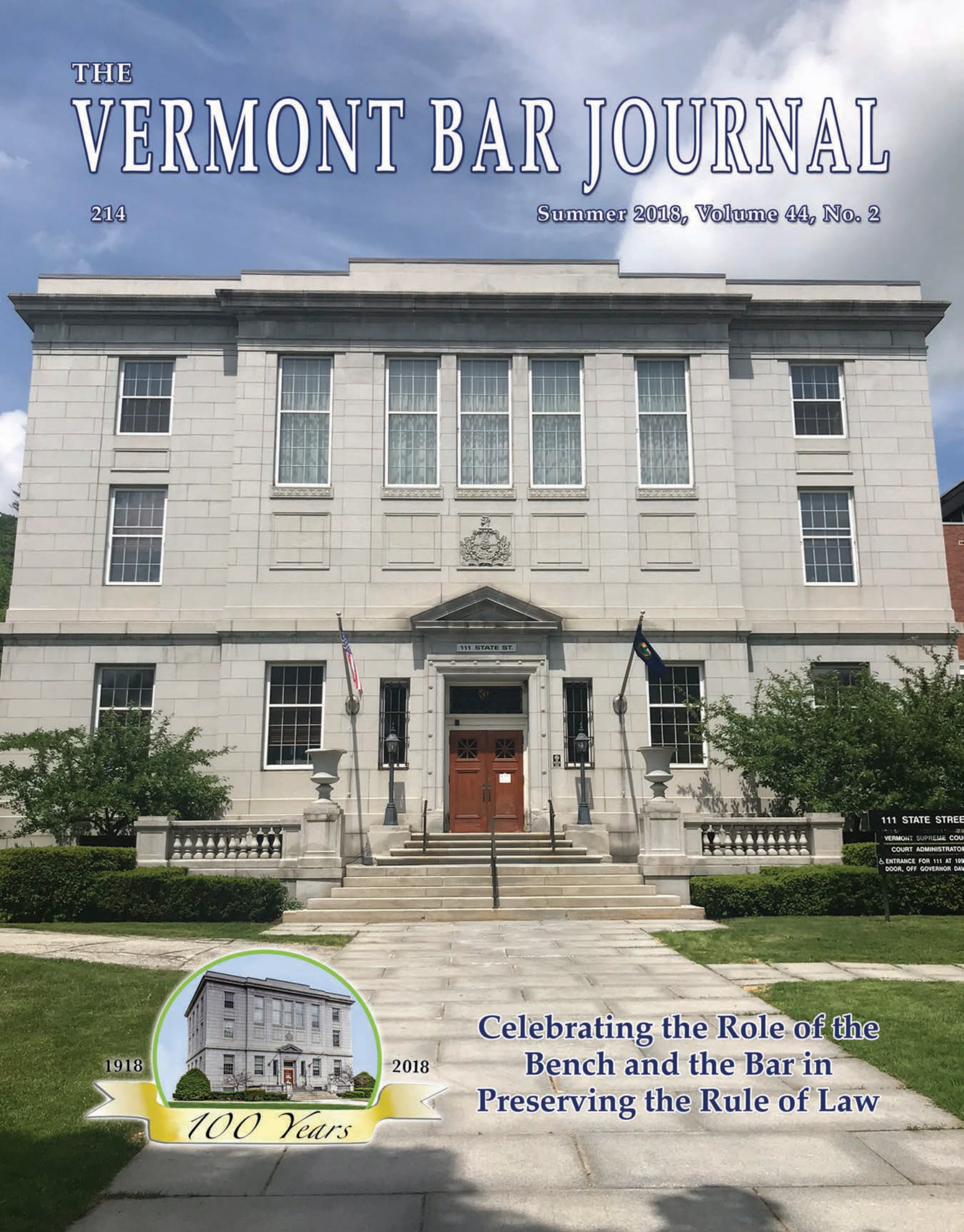

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DEPARTMENTS

Supreme Court building in June, photo by Jennifer Emens-Butler; celebration logo by Jason B. Gould. 100-year celebration event photos are available at: http://vbablawg.blogspot.com/2018/05/

FEATURES

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100th Anniversary of the Vermont Supreme Court Building – A Celebration of the Vermont Bench and Bar

On May 18, 2018, the Vermont Bench and Bar collaborated to celebrate the centennial anniversary of the Vermont Supreme Court Building in Vermont. When discussing the initial plans for the event many months ago, Chief Justice Paul Reiber made it clear that he viewed the occasion as an opportunity to recognize and celebrate both the courts and the bar, and the role they play together in our justice system. He and a small planning committee that involved the Vermont Bar Association, the Vermont Supreme Court, the State Curator's Office, the Court Administrator's Office and the Washington County Sheriff's Department laid the groundwork for an event that sought to not only celebrate the 100th anniversary of the Vermont Supreme Court Building, but to celebrate all of the courts and the bar throughout Vermont, and the work done by each to ensure that equal justice is afforded all Vermonters.

Montpelier attorney and historian Paul Gillies was enlisted to pen an essay focusing on the theme of the event: "The Role of the Bench and the Bar in Preserving the Rule of Law." Attorney Gillies generously not only researched and wrote a fascinating essay about the history of the Vermont Supreme Court Building (*See Ruminations*, p.), but he researched and compiled the materials for a re-enactment of one of the first cases heard by the Vermont Supreme Court in the then-new building that opened in early May, 1918. Attorneys Michael Tarrant and Stephen Coteus expertly presented a re-enactment of the oral argument before the full court of Justices, held at the conclusion of the event.

In accordance with the desire to recognize each of the counties, the ceremony highlighted displays depicting the state courthouses in the fourteen counties, and the presiding judges and county bar presidents for each of the counties were invited to represent their respective counties at the event. Commemorative marble plaques cut from marble used in the original courthouse construction were presented to the county delegations, after short historical accounts for each county (also researched and written by Attorney Gillies) were read by the county representatives. Examples of some of the historical facts, in the order in which Vermont's fourteen counties were established, include:

Bennington County – In 1778 the first Vermont Legislature split Vermont into two counties, Bennington County to the west and Cumberland County to the east. The Green Mountain Boys met in the Catamount Tavern, where Vermont's very first court trials were heard.

Windham County – Westminster was the first county shire in Windham County, and New York built the first courthouse there in 1772. Residents opposed the opening of the courthouse, however, and the "Westminster Massacre" resulted. When Newfane was later established as the county shire, the first building erected in the village was a courthouse.

Rutland County – When established in 1781, Rutland County included all of western Vermont north of the present Bennington County/Rutland County line. A case from Rutland County was one of the first heard in the new Supreme Court Building in 1918. George La Mountain had been killed working as a laborer removing snow from a Rutland crossing when he was hit by a locomotive. The court held that the "least watchfulness for his own safety while engaged in the crossing would have saved him," and that failure destroyed any claim for damages.

Orange County - The town of Chelsea raised the money for a jail and courthouse, which was a condition for the location of the Orange County shire in that town. The first jury trial was held there in 1796, when Asahel Chamberlain sued Jonathan Barrett for the value of two potash kettle. The courthouse was the site of the famous murder trials associated with the 1957 death of Orville Gibson, whose frozen body was found bound and gagged in the Connecticut River. There were two trials, and neither resulted in a guilty verdict.

Windsor County – In 1786 the legislature named Woodstock the county shire, provided that the town construct a proper courthouse. In 1928, John Winters was convicted of murder at the Woodstock courthouse by a jury of his peers. On appeal, he was represented by Clarence Darrow, then 71 years of age. The conviction was reversed and a new trial ordered following a lengthy oral argument.

Addison County - Once Addison County was created in 1787, the Supreme Court met in various private homes and taverns. The first courthouse was built by subscription, and occupied in 1798. It was replaced by a courthouse in 1883, that cost $22,000. In 1996, the Frank Mahady Courthouse was constructed in a field east of the former site. The old courthouse reverted to

Middlebury College, since it was no longer used for court purposes.

Chittenden County - The first court proceedings in Chittenden County, after its formation in 1787 out of the northern part of Addison County, were held at the home of Ira Allen in Colchester. Burlington replaced Colchester as the county seat in 1790. In 1798, the first courthouse was constructed in City Hall Park. A large pine tree adjacent to the courthouse served as the public whipping post. The Vermont District Court began using the former post office on the corner of Church and Main Streets in 1960, after the federal government vacated the building. The building was acquired by the county in 1973. Here the case *Baker v. State* was heard in 1998. On appeal, the Supreme Court ruled that same-sex couples should enjoy the same benefits and protections as other couples, citing the common benefits clause of the Vermont Constitution.

Caledonia County - The courthouse was the scene of the county's most infamous crime, when Bristol Bill Warburton stabbed State's Attorney Bliss Davis in the neck following his sentencing, in 1850. Bristol Bill was a bank robber, who also dabbled in counterfeiting. His accomplice, Christian Meadows, was an excellent engraver. Bristol Bill was sent to State Prison, but Meadows was pardoned by the governor, at the request of Daniel Webster, to begin working for the U.S. Treasury Department as an engraver.

Orleans County - Orleans County was formed in 1792, out of northern Orange County. In June of 1984, the State raided the Northeast Kingdom Community Church in Island Pond and took 112 children into custody in response to accusations of child abuse. The children were released following a hearing in the Newport District Court the following day.

Franklin County - Franklin County was created in 1792 out of what was then the northern part of Chittenden County. When the Supreme Court opened its May 1918 session, it heard arguments in *State v. Warm*, an appeal from a Franklin County jury verdict of manslaughter. After the trial was over, it was disclosed that one juror had made a bet that Warm would be found guilty, wagering cigars as the prize, before the jury was empaneled. The Supreme Court reversed and remanded for a new trial. The amount of the wager, wrote the court, is immaterial. "The due administration of justice is the question at stake."

Essex County - The legislature created Essex County out of a part of northern Orange County in 1792. A hundred years ago, the lawyers for the Estate of Felix Goulette and for the Grand Trunk Railroad argued whether the railroad was responsible for his death. Goulette was killed while on duty as a brakeman, at Island Pond. Before the case was given to the jury, the judge granted a directed verdict to the railroad. The Supreme Court affirmed the decision, concluding that Goulette's administrator had failed to show any defects in the equipment that caused his death.

Grand Isle County - Grand Isle County was established in 1802, out of Franklin County. At the first session of the Supreme Court in May of 1918, Justice William H. Taylor read his opinion in *McBride v. McNall*, a case decided by the Grand Isle Superior Court. At stake were damages of $5.60 plus cost, awarded the plaintiff, but he sued for additional recovery. The issue was the value of hay and sileage. The high court ruled the plaintiff was not entitled to more, holding him to the terms of the lease.

Washington County - Montpelier became the Capital City in 1808, when the first State House was constructed. Two years later Montpelier became the shire town of Jefferson County, newly formed from parts of Orange, Addison, Chittenden, and Caledonia counties. In 1810, as a direct response to the embargo, Jefferson County was renamed Washington County. The present courthouse was constructed in 1880. *Brigham v. State* was tried here in 2004. The trial court dismissed the complaint, and the Supreme Court on appeal held Vermont's system of financing education to be in violation of Article 7 of the Vermont Constitution.

Lamoille County - Lamoille County was the last county to be formed in Vermont, in 1836, out of towns from Chittenden, Franklin, Washington, and Orleans Counties, at the same time as the Vermont Senate was established. The idea was a county that was neither east nor west, and arguably wouldn't side with one region or the other. The Hyde Park Courthouse, recently renovated, stands in the center of the village. In May of 1918, Justice Willard Miles read his decision in *Morgan v. Village of Stowe*, a claim by a Stowe resident that the village was negligent for having installed a fire hydrant in the street. The hydrant leaked, there was ice in the road, and a man was injured. The Supreme Court affirmed the judgment of the Superior Court, that the village was exempt from liability, protected by sovereign immunity.

Chef Justice Reiber, Governor Phil Scott, and House Judiciary Chair Maxine Grad, representing the three co-equal branches of Vermont government, spoke eloquently about the role of the bench and the bar in preserving the rule of law. Chief Justice Reiber also read letters from Senators Patrick Leahy and Bernie Sanders for the occasion. After the county delegation presentations, Attorney Gillies was presented with his own commemorative marble plaque, in appreciation for all that he did to make the 100th anniversary celebration such a memorable event. A video of the program and oral argument re-enactment, as well as a full story and numerous photos about the event, can be found at the VBA website www.vtbar.org and the VBA Blawg at www.vbablawg.blogspot.com.

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PURSUITS OF HAPPINESS

Oil on Canvas: An Interview with Carole Obuchowski

Jennifer Emens-Butler: I am here in the offices of Joe and Carole Obuchowski to interview Carole Obuchowski for our Pursuits of Happiness column. As our readers know, the column focuses on our members' interests and talents outside of the practice of law, that help keep them balanced in their lives. I chose to interview you because you had submitted a photo of one of your paintings for our 2016 cover contest—it was one of my favorites.

Carole Obuchowski: Thank you. It was an oil painting of two farmers.

JEB: We ended up picking just something that was lovely fall Vermont cover, with a field with hay, where we could still clearly add the title of the journal.

CO: I remember, it was Judge Toor's photo of the haystacks with great light.

JEB: Yes, that's right. But I recall really liking that painting and thinking: "I am going to have to interview her." I have a particular interest because my grandmother was an oil portrait painter, which you don't see as much of anymore.

CO: Oh, really? Did it pass down?

JEB: No. No talent here. My family thinks so, but they are biased. I do great chicken scratches. So, do you always paint with oil?

CO: I paint with oil, yes.

JEB: Seems like a more traditional or more difficult medium that you don't see as often.

CO: I find it a lot easier than watercolor.

JEB: Do you use a large pallet to mix all the tubes of colors? I think that looks so cool.

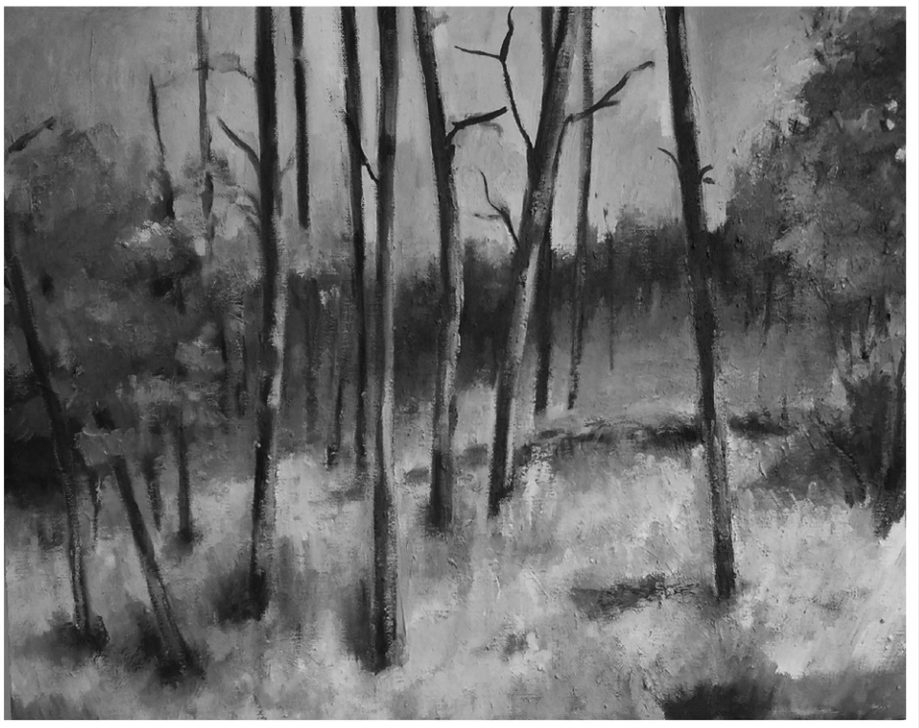
CO: I lay out the oils on the pallet that I think I will be using that session. And then I mix. Very rarely is anything that ends up on the canvas the same that came out of a tube. I can paint on paint. You can't do that with watercolor; you need to be precise.

JEB: That's true, you can work it over and keep changing it.

CO: Right. Every time I have used watercolor, I have ended up using it like oil paints, which doesn't work. It just does not suit me as a medium.

JEB: When did you first start painting?

CO: With oils? Probably when I was about 14 or 13 years old. I was doing a lot of drawing and…



JEB: So, you did drawing when you were younger than that?

CO: Yes, I did. I really started probably when I was 10 or 11.

JEB: With the official training or did you just like to do it? I mean did you think you were going to be an artist when you grew up?

CO: I don't think I ever had any official training. Maybe in High School. I do remember bringing a drawing pad with me and drawing people's faces when I was on the subway. I didn't have any feelings about being an artist; I just did it.

JEB: You just did it?

CO: It's like, remember, like in the 6th grade they would give you book reports and you had to do a drawing for it with crayons?

JEB: Right, and yours were great?

CO: Mine were better, so I knew. I grew up in Queens and my 6th grade class was essentially 36 little geniuses; let's put it that way. We had a reunion when I was 32 and I think only the failures showed up. The Nuclear Physicists and the MIT Economics Professor didn't show.

JEB: They all went off and did great things.

CO: Yes, they went on to great things, so being able to paint or draw was probably a way that I differentiated myself because I was surrounded by some really accomplished kids.

JEB: So were you pressured to never even think that art could ever be a career?

CO: No, not at all. But in the environment I grew up in, the girls weren't really encouraged toward any career choices…the option was to get married and have kids. Maybe teach school if you were really ambitious.

JEB: So you just enjoyed the art and drew and painted for fun, what happened after that? Did you draw in HS or were you in art class?

CO: Yes. I graduated from HS when I was 16, not such a good idea, but I took art and painted in high school which was sort of cool because the art teacher gave us assignments to go into Manhattan -- to go to the Art Galleries and give reports on what we had seen, so that is something that not most kids are exposed to. I was assigned to go to the art galleries on Madison Avenue as opposed to the 2 or 3 major museums, something that most kids hadn't even heard of.

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JEB: Most people don't go to any of them, anymore, I guess.

CO: Actually, a very wealthy subset of people do buy from art galleries. And they look or hire agents to look for them. In the 6th grade we went to the Museum of Modern Art, where they gave us a separate art room, and they gave us craypas, which is a mixture of oil and pastel (I still have the them!), and we worked on drawings at the Museum.

JEB: Oh, that's cool.

CO: There was a lot that I was exposed to because I grew up in NYC.

JEB: We went to museums, which is surprising because most kids didn't. My mom would have us pick a few postcards that we liked and we would have to go find the actual piece and write down something about it on the post card and bring it back.

CO: Oh, clever.

JEB: I tried to do that with my son a but they don't really have the post cards version of the art in that particular museum anymore –they certainly don't have the full selection and they aren't cheap like they were.

CO: My parents never took me to a museum.

JEB: Isn't that funny? But you developed a love for it.

CO: It was all through the school, before I graduated early.

JEB: So then where did you go to college?

CO: I went to Cornell. But my grades were lousy in High School, so I applied to the School of Home Economics as a design major. And that is where my degree is. It is a BS in design.

JEB: I didn't know that.

CO: If you are in a state school, which home economics was, and the ILR school was, you can take 40 credits in those schools but also 80 credits in Arts and Sciences, really anything, so I took a whole bunch of what they called Government courses, which is what Cornell calls political science. I was probably the first Home-Ec design major that ever applied to law school.

JEB: Design but you must have really liked your government courses.

CO: I loved my government courses. Allan Bloom was one of the professors, along with Walter Berns and Andrew Hacker. They were great.

JEB: So, you took those initially because you were interested or when did you first think about becoming a lawyer?

CO: I only thought about it because everybody I hung out with was taking the LSAT's. I attended Boston University School of Law for a semester, only.

JEB: You didn't think of pursuing architecture, art or design as a career when you were there?

CO: I was too young to make decisions, I was just taking classes, but what fascinated me was urban planning. The concept of creating environments for municipalities, enhancing people's lives, and a lot of that, I think is good design.

JEB: Good design, yes. So that was your intentions of what you were going to do next.

CO: Well I was thinking that when Joe was at Columbia in law school, I took an urban design class at Columbia after I met Joe in Cornell. And I applied for an urban planning degree at Hunter College. But then we moved to Vermont.

JEB: Oh, so during this time, did you paint throughout, or did you have a studio?

CO: Oh, I would love a studio.

JEB: So, you didn't have one then and you don't have one now?

CO: I painted a lot on the floor or anywhere…

JEB: Wherever you can?

CO: Yes, wherever you can. So, my goal

is to create a space in the house that is all mine and I leave out all the stuff, which is quite strong-smelling.

JEB: Do you use turpentine?
CO: Actually, I use soap.

JEB: Soap? Are they water-based now?
CO: They do have water-based oil paints, but I don't like those nearly as much as I like traditional oil, but they make special soap that will dissolve the oils. Sometimes I use dishwashing liquid. It works.

JEB: Interesting, that there are modern advances in oil painting! So you were painting, but finished with Cornell and then…
CO: We lived in Manhattan.

JEB: And Joe went to Columbia Law School?
CO: Right, yes.

JEB: And what were you doing? Were you painting?
CO: I was working as. Let's see I worked for Americans for Democratic Action, and I worked for General Motors.

JEB: You worked for General Motors?
CO: Yes, in their legal department. I was the Assistant Law Librarian.

JEB: Oh, funny, I did a law librarian stint too!
CO: My library had all these windows overlooking Central Park.

JEB: So, it wasn't too bad.
CO: No, it wasn't too bad!

JEB: Did you do a lot of painting when you were working in General Motors?
CO: I don't remember exactly but our first apartment was a studio with no room so painting probably took a back seat.

JEB: Ok, so, then you moved to Vermont, or you moved, right, when Joe graduated from law school?
CO: No, a year later. Joe is from Vermont.

JEB: He is the native, ok. And I bet he always knew he wanted to come back here. There are a lot of things to paint here-- it is quite beautiful.
CO: Yes, it is quite beautiful, but I went ahead and took a masters in poli-sci, and then I taught American Government Poli-Sci 21 at UVM for 5 years. Then I did a series of jobs. I tried to become a teacher and became certified in Math. The way I work is I am really bad in some things and I am really good in some things.

JEB: I think a lot of people work that way.

CO: There isn't this happy medium, with me. I am really really good in math, and I am a disaster in music. I have no clue about music at all. I am totally visual, so I got certified in math, tried to get a teaching job but that didn't work, couldn't get hired. Then I worked, starting in 1991 for Green Mountain Power, also in the legal department.

JEB: Ok, the legal department.
CO: Again, and while I was there, I began reading for the law.

JEB: Ok, yeah. Alright, so you began reading for the law through Green Mountain Power. Did you do all 4 years there?
CO: All 4 years there.

JEB: So, these paintings here, that you said were about 20 years old, were they painted when you were at Green Mountain Power?
CO: Yes, it was when I was working for Green Mountain Power. My kids were older. I mean we had two daughters, so you know, that caused a hiatus.

JEB: Yeah, they took a lot of time, don't they?!
CO: I remember trying to paint on the dining room table and Laura, our youngest was about 3 years old, and I could not keep her away and she eventually put oil paints in her eyes and we ended up in the Emergency Room!

JEB: Oh my gosh, so painting had to wait.
CO: So, about 20 years ago, the kids were older and I started painting again.

JEB: Yeah, you found some time to do painting work.
CO: Right, because she wasn't putting paint in her eyes.

JEB: That's good, she grew out of that! Thank goodness. So…about these paintings. So, I assumed that these outdoor scenes, with great light, make me think of Vermont as a great place to paint, but you have told me that you paint a lot from photographs that inspire you?
CO: Yes. Right, you know there's only about 4 months of the year you can go outside and paint in Vermont. So, typically, I look at certain pictures and say, that's a great composition. I can fix that, I can make that better, I can….

JEB: I am going to paint this.
CO: Exactly. I am going to paint this. So, I tend to do it from photos or somebody else's stuff and I say, "Oh my god, I can fix that; I can make that better."

JEB: So, the farmers that you submitted

to the Journal….

CO: That was from a photo.

JEB: And this beautiful river and the mountains too? You said Burlington Free Press? And how about all these people standing in front of a railing?

CO: That was a photo I took when I was in England in the 60's, in Piccadilly Square.

JEB: So, do you have a collection of photos that you are hoping to paint someday?

CO: Oh, yeah, I have a lot of them, I put them in a drawer.

JEB: You haven't found the time as much or you just are looking for a place to do more?

CO: I think it's time and I need to set up a place that is all mine, which is really, I have been thinking about it lately and I think I have finally gotten to the point where I know where I am going to do it.

JEB: For peace of mind or creation?

CO: To fulfill my own self, because I have never sold anything.

JEB: I was going to ask you that next. So you have never sold anything? These are beautiful.

CO: No.

JEB: But you've never tried either.

CO: True. I just think people don't appreciate paintings, generally. They may see a tree and say, "oh, that doesn't look like a birch." So many people can't see anything except like what it should be. Is it looking as real as the photo?

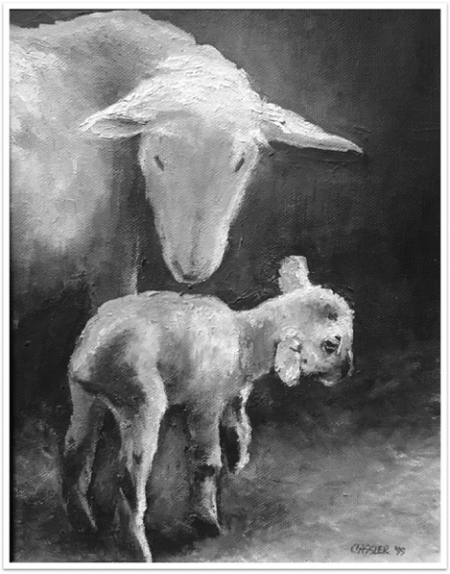
JEB: I would say that the lamb and the sheep is extremely realistic, right? And then the nature scene --I mean they are not impressionistic, they are definitely realistic, but they have their own style and impressions.

CO: I'm one of those people that notices composition, color, art, generally. Where the majority of people wouldn't notice the wall color or décor in an office, I definitely would. I'm more visual.

It is a different way of perception. I think there are at least 10 times the amount of people who appreciate music than appreciate art or know what they are looking at.

JEB: It also seems to be a lost art, can I say, to appreciate art. I don't know anybody else's kids that are going to museums and hunting down postcards and really looking at paintings like I did when I was a kid.

CO: I am not saying that I am better, I am just saying that I see the world differently. So many people perceive the world through their ears and they really get music, and I



wish I did, but my way is visual. I think I see a lot more than most people; I wish I could hear as they hear when they listen to music.

JEB: Now when you were in school, do you have a photographic memory in terms of how you remember stuff to help you do well in tests, like "Oh, I can see the answer line on that page"

CO: I can say yes, I can sometimes see it

on the page to help me remember. One of my quirky things, if I am drafting a pleading, I have got to print it out, page by page and look at it on the page. I have got to see it on the page not on the screen.

JEB: You have to print, and not just because it is old-school.

CO: No, because how can you convince the judge of your argument if it looks lousy, visually, on the page.

JEB: Right. It has to look good.

CO: Yes, it has to be formatted right. It has to have the right font, it has to have the right size, it has to look good because otherwise, the reader is not going to read it.

JEB: What it looks like? Right. Or maybe that is a lost art too, the attention to detail that would be required for something to make something visually pleasing, like art even if it is a pleading.

CO: Exactly.

JEB: So when you are painting, are you stressing-out over all of the little changes and trying to rework the oil or do you feel at peace in the process? I mean can you only relax when it is finished or the whole time?

CO: It is two things. It is total concentration, which is a wonderful thing.

JEB: Yes.

CO: Sometimes I wish I could be a woodworker or do things with my hands.

JEB: Do things with your hands and total concentration. Yes! A lot of people that I have interviewed with passions that are outside of practicing law are hands-on based, because it is the ability to totally focus your mind and direct it onto something else tangible.

CO: Everything around you is shut down.

JEB: Exactly.

CO: It is total 100% concentration. You are not thinking about client matters or is it time to put a wash load in the dryer.

JEB: So you do like the process too, even with all that attention to detail, because there is something really freeing about putting paint to canvas. You indicated there is so much pre-planning but just that moment when you get to put paint on the canvas is just really rewarding.

CO: Yes, at some point, I want to do a Jackson Pollock thing. Just throw it on.

JEB: So yeah, there is something satisfying about that as well, right?

CO: It is very satisfying, except then of course if I haven't pre-planned, it doesn't come out well, so I am back to that, but even so, I love the way it allows me to shut the world out and have total concentration, absolutely.

JEB: Right. And you are pleased with, I mean you have said you see all these things that you don't like, but you are generally pleased with the ones that you finish, right?

CO: Certain things.

JEB: Yeah, we are always most critical of our own work.

CO: But the lamb one is my favorite, because there is very little I would change on that.

JEB: Yes. I love that. The light is coming in through the barn, it's just lovely.

CO: Thanks, I mean there are lots and lots of things that we enjoy, I mean, everybody likes to take a hike or a walk or a bike ride or something like that, but, in terms of finding something that you can totally lose yourself in, I feel lucky.

JEB: That you can totally lose yourself in painting?

CO: In something that I can do. It is always in the back of my mind, that I can always paint.

JEB: Right. And it is rewarding. Before we end, I want to say you are committing, that I can put it publicly in the article that you will be creating a space in your home where you can paint so you can have more balance and happiness in your life -- to paint and work at the same time.

CO: You have heard this from every attorney. How do you turn off your mind? I need to make the studio.

JEB: So hopefully if you could paint you can get the inner peace that you need when you are practicing full time.

CO: Right, I think we all need that.

JEB: Yes.

CO: It's finding the thing that works for us.

JEB: Right. And painting works for you -- they are beautiful.

CO: Well thank you.

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

The Centennial of 111 State Street

The Home of the Vermont Supreme Court

When the first settlers came to Montpelier, they found the grounds later to be used as the site of the three successive State Capitols and the Supreme Court building covered with tall maple trees. This meadow was pitched by Jacob Davis, and cleared by Jacob and his sons, in 1787. Jacob, who was the first permanent settler, was reputed to have the strength and stamina to clear an acre of land of trees, cut to log lengths, in a day, by himself, and continue the same for many days in a row. Once the meadow was cleared, the land produced four hundred bushels of potatoes a year. Jacob grew ten years of Indian corn on that land, without a shovelful of manure. One year he planted wheat, and reaped eighty bushels per acre, all of superior quality.[1]

Jacob Davis had an idea this meadow would be an ideal spot for the seat of government, long before Montpelier was chosen as the capital city in 1805. That year, Thomas Davis, Jacob's son, donated the land to the use of the State. State Street was laid out and the first Pavilion Hotel was built by Thomas to serve the needs of legislators shortly before the first State House was completed and occupied in 1808. The first capitol was an octangular wooden structure, located to the west of the Pavilion, sited twelve rods back from State Street and about the same distance from the back of the Pavilion.[2]

The Supreme Court was created by the 1777 Constitution. Moses Robinson, the first Chief Judge, and the other four Associate Judges, started hearing cases in 1778, using the county courthouses in the shire towns as their temporary homes, first at the Westminster courthouse and the Catamount Tavern in Bennington, and later, as the counties grew, on a grand tour that took the judges to fifteen different shire towns, at times twice a year, to conduct the court's business. Not until the State House annex was constructed in 1888 was there a place the high court could call its home.

The 1786 Constitution first established the principle of separation of powers of the three branches of state government. Physical separation was not what was intended, although the Capitol housed the legislative and executive branches from 1808, leaving the judicial branch to move week by week throughout the state, before the three branches were at last joined together in 1888. The present legislative lounge, that long room on the west side of the Capitol, with the elegant fireplace, and the rooms northerly of the courtroom, served the court for nearly 30 years before the legislature finally voted to erect a building to reduce the overcrowding at the State House. That project did not come to fruition without controversy.

Capitol Construction

The State House was the first building constructed by the State of Vermont. A year later, the State Prison was erected at Windsor. Montpelier paid for the first State House.[3] The State raised a special tax of one cent on a dollar of each acre of land in the state to pay for the prison. The early legislatures were suspicious of public debt. But the State's needs continued to grow, as government expanded into new areas of regulation and services.

The sum of $36,000 was appropriated to construct a separate building for the State Library, Supreme Court, and the Vermont Historical Society in 1884.[4] The committee assigned to oversee the construction decided to expand the Capitol instead. The Annex was constructed in 1886-1888, and the Supreme Court first held its sessions in the new west wing of the State House in 1888.[5]

According to Thomas Valentine Cooper, in 1883 Vermont had no State debt, except $131,000 in bonds for the Agricultural College.[6] In 1919, the state's debt had grown to $1,580,787, including bonds for the Agricultural College, School Fund, and for public buildings ($170,000), among others. Those public buildings bonds were issued in 1917 and were due for repayment by 1935.[7]

By 1914, there were a few properties owned by the State other than the State House. There was the Vermont Reform School in Vergennes (established in 1837; renamed the Vermont Industrial School in 1900 and the Weeks School in 1937); the Vermont State School for the Feeble-Minded (authorized 1912, constructed 1915; renamed the Brandon Training School in 1929); and the Waterbury State Hospital, established in 1891. The new Supreme Court, State Library, and Vermont Historical Society building was the second structure to be built to serve the needs of the State in Montpelier, after the State Houses. Today, state buildings ring the capitol grounds.

The Need

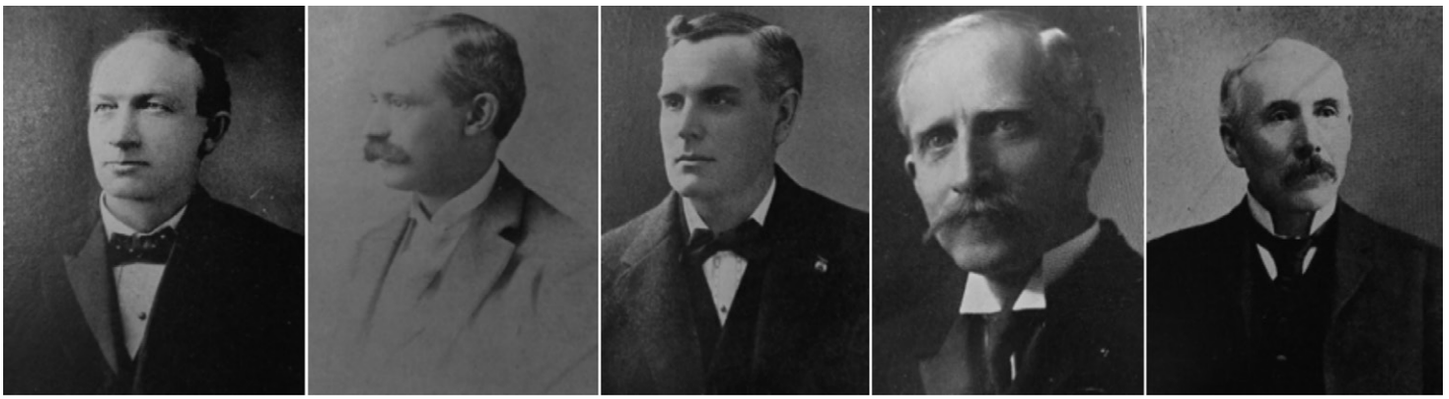
The legislature's special committee to study the space needs of government reported in 1915 that a separate building was the answer, as any additional increase in the size of the Capitol would destroy the beauty of the present building. The State House was crowded. The Secretary of State had one room, 18' square, and its stenographer had to work inside the vault. Thousands of volumes of the State Library had to be stored away for lack of display space.[8] The Treasurer had to use the window sills of the main hallway of the building for meetings. There were 65 Senate and House Committees in 1915, and only six or seven hearing rooms to accommodate them. There were occasions when three or four committees would meet in the Senate chambers at the same time. The treasures of the Vermont Historical Society were "stored in old-shoeboxes and in case of fire would be lost forever to the state."

The Supreme Court courtroom was too small and so were the Justices' quarters. The committee reported, "The judges' chamber is so small that they can all shake hands with each other without leaving their chairs. The consultation of the judges on cases heard is held in a bed room at the Pavilion and the lack of consultation room or rooms in connection with the state library is one of the chief reasons for the delay of decisions."

The committee recommended $200,000 for alterations of the State House, and the construction of a separate building for the VHS, State Library, and Supreme Court, "confident that the proposed act submitted herewith will not involve burdensome taxation and will not greatly add to the biennial appropriation."[9]

The Times

These were perilous times. The world was at war. Vermonters were in Europe, fighting the War to End All Wars. Woodrow Wilson was President. Horace Graham was Governor. The world was changing rapidly. Daylight savings time began on March 31, 1918. The first report of the devastating flu in the United States was published that month. That July, Czar Nicholas II, the Czarina, and



John H. Watson | Seneca Haselton | George M. Powers | William H. Taylor | Willard W. Miles

their children were killed. The Armistice was signed November 11. In April of 1918, the first telephone service was installed at the State House, with two trunk lines.[10]

It had been only three years since the Vermont Supreme Court had suffered a crisis of authority.

The Court

While the political process for erecting its new home proceeded, the Vermont Supreme Court suffered a shock to the system. For most of the state's history, with very few exceptions, the legislature had respected a seniority system for the election of judges. Judges and Justices who indicated a willingness to continue in office were reelected year after year, biennium after biennium, replacing those who died or retired by moving each remaining judge up the rank until it was his turn to serve as Chief Judge. In 1912, the Court consisted of Chief Judge John Rowell, Loveland Munson, John H. Watson, Seneca Haselton, and George M. Powers. Chief Judge John Rowell retired on September 30, 1913, and Governor Allen Fletcher appointed George M. Powers to replace him as Chief, rather than Loveland Munson, who would have taken the first chair by order of seniority.

The constitutional amendments of 1913 changed the opening date of the legislature from October to January, and made provision for the holding over of terms that ended under the old system on the last day of November, 1914 until a new election could be held. The Supreme Court doubted the effectiveness of this transitional provision. To avoid any question of the court's legitimacy, the entire court resigned effective November 30, 1914. No one expected Governor Allen Fletcher to change the constituency of the court, but after he reappointed Powers, Watson, and William H. Taylor, he passed over Chief Judge Loveland Munson and Seneca Haselton and named Robert Healy and Leighton Slack instead, advancing Powers to Chief Justice.[11] This was not received well.

In his December 1914 appointments, Fletcher's actions created a storm of protest. The annual meeting of the Vermont Bar Association was postponed a month, until January 5, 1915, when the Association resolved that "the solution of this matter rests with the General Assembly," and that the legislature "will meet that responsibility and perform its duty faithfully, considerately, and temperately."[12] Fletcher, condemned for mixing politics into the choice of justices, explained his reasoning in his Farewell Message, alluding to the age of the men he replaced, and essentially defying the bar association:

> As to the personnel of the court I have this to say, it is absolutely true that the primary consideration in my mind was not necessarily to do that which absolutely met the wishes of the bar association. The bar association is made up of two hundred or more men, but I did have in view primarily as one who had been in this Legislature for ten years and who was in touch with conditions both as such and as executive. I did have in view primarily in the personnel of that court that which I thought best not for the bar association but for the 350,000 people in this State for whom I had taken the oath of office to do the best I could for those were the people I had in view when I took that action.[13]

Governor Fletcher claimed he had the opinion of the Chief Justice that his appointments would extend to two years, and that he had it in writing, signed by Justice Watson.[14]

With Fletcher retired, the legislature voted two bills and sent them to Governor Charles W. Gates for signature, calling for legislative elections of justices and judges, which created a fear that if the present Court did not resign, there would be two Supreme Courts, and judicial confusion. Gates sent word to the Court that he was poised to sign the legislation, and this caused the Justices to resign, in order to avoid the problem. The legislature then elected Loveland Munson Chief Justice, and Watson, Haselton, Powers, and Taylor as Associate Justices in that order, the order of seniority that would have been followed without Fletcher's independent thinking.[15]

In 1915, there was another significant change to the judicial system. That year the legislature passed a modern civil code, the Practice Act of 1915, signaling the end of common law pleading, the system that all Vermont lawyers and judges had used throughout their careers. The modern civil code had been enacted in other states, beginning in New York in 1849, and Vermont was one of the last states to change.[16] The Code was a legislative act. "No pleading shall fail for want of form" is a fair synopsis of how the law changed. It was an instruction manual for the conduct of court proceedings. There would be four civil actions—contract, tort, replevin, and ejectment. Pleadings would be simple and direct. Suddenly, a whole set of lawyer's skills and judicial precedent became obsolete. Anybody should be able to file a lawsuit and survive a procedural challenge based on technical imperfection of the pleadings. Amendment would be liberally allowed. Form would take a back seat to substance.

The five-member court in 1918 was led by Chief Justice John H. Watson. Before the 1914 constitutional amendments, the position was named Chief Judge. Watson was 57 years old, in his 19th year on the court and third year as Chief. Seneca Haselton was 60, George M. Powers 47, William H. Taylor 55, and Willard 63. All had been members of the high court for at least a dozen years, and all had served as Superior Judges before rising in rank to the high court.

Referendum

A referendum is a public vote approving or disapproving legislation. It may be binding or non-binding; it may have some legal effect or merely serve as a poll of public opinion. In Vermont's experience, the voters have been asked their opinion 30 times

in 16 different elections, between 1784 and 1976.[17] These are not constitutional amendments, where voters have the power to adopt, amend, or repeal the fundamental law. Referenda, in Vermont's experience, have been non-binding. They address issues of public morality—whether the use and sale of alcohol should be prohibited, whether there should be a state lottery or pari-mutuel gambling, a direct primary, or women serving on juries. In the early years, before Vermont joined the union, its General Assembly turned to the voters for their opinion on the trial of land titles or issuance of paper money by the state. In 1969, the legislature asked the public for its sentiment on calling a constitutional convention, accelerating the methods for amending this primary law through legislation. In 1912, the Assembly asked the voters their view about the building of a $300,000 State Library and Supreme Court building.

At 1914 annual town meetings, the voters cast ballots on a ballot that asked, "Shall an act of the general assembly of 1912, entitled, 'An Act to provide for erection of a building for the use of the state library and supreme court, and for other state purposes,' become a law July 1, 1914?"[18] A majority of voters opposed the referendum by a vote of 16,820-19,284, which meant the law would take effect on July 1, 1915, instead of July 1, 1914. On March 31, 1915, the legislature repealed the 1912 act and appropriated $150,000, half of the amount proposed three years earlier, for the construction of a building to relieve the State House of its overcrowding.[19] A second referendum was not part of the act.

The 1915 act left the decision on what and where to build to a commission, appointed by the Governor, who was ex officio chair. Improvements of the State House without a new building were also within the commission's discretion. The State Treasurer was authorized to borrow the money, and the trustees of the permanent school fund were authorized to loan the money "at the then average rate [of interest] at which such fund is invested." The act required the work to be done by the first day of September, 1917.

After the work had begun, more was needed to ensure that the building was finished, and by a 1917 act, the legislature appropriated an additional $50,000 to the budget. The improvements included "classical detailing on the front façade, including the balustraded terrace, and finer finishes on the interior including plaster cornice molding and classical ornamentation in the lobbies," and in the Supreme Court courtroom.[20]

The Site

Before the Supreme Court and State Library building could be erected, the State had to deal with Thomas J. Heaphy, the owner of the Pavilion Hotel, who claimed he owned that land. For many years, the lands westerly of the hotel had been used by its patrons. On Sanborn Insurance maps from as early as 1889, that area was described as "Pavilion Park."

The Attorney General sued Heaphy to eject him from the land. Heaphy responded by claiming adverse possession for over 50 years. He argued the statute of limitations applied, even though the state was exempt from the statute, but the Supreme Court was unpersuaded, concluding that the hotel's owners had no claim of right to justify adverse possession.[22]

Eastern Avenue ran from the east side of the State House down to State Street, paralleling Western Avenue on the other side of the green, and providing a circular drive to the back of the Capitol, where legislators and state officials could enter the building. With the new building, Eastern Avenue was discontinued, and the drive from Court Street was extended to access the Capitol from the east.

Parking was provided by the Capital Garage, located at the rear of the Pavilion, its three floors capable of storing 65 cars reachable by an elevator. The garage employed 20-25 men in the summer.[23]

The Building

The plans for the new building were drawn by the firm of Densmore & LeClear, Architects & Engineers, of Boston. Joseph R. Richards and William P. Richards, another Boston firm, contributed to the design as

well. The total estimated cost of the new building was $198,735. The building is located 140 feet from State Street, three and a half stories in height, constructed of ashlar granite from Barre's Wetmore & Morse quarry, to match the State House.[24] The structure of the building is made largely of reinforced concrete, chosen for strength and because it was fireproof.

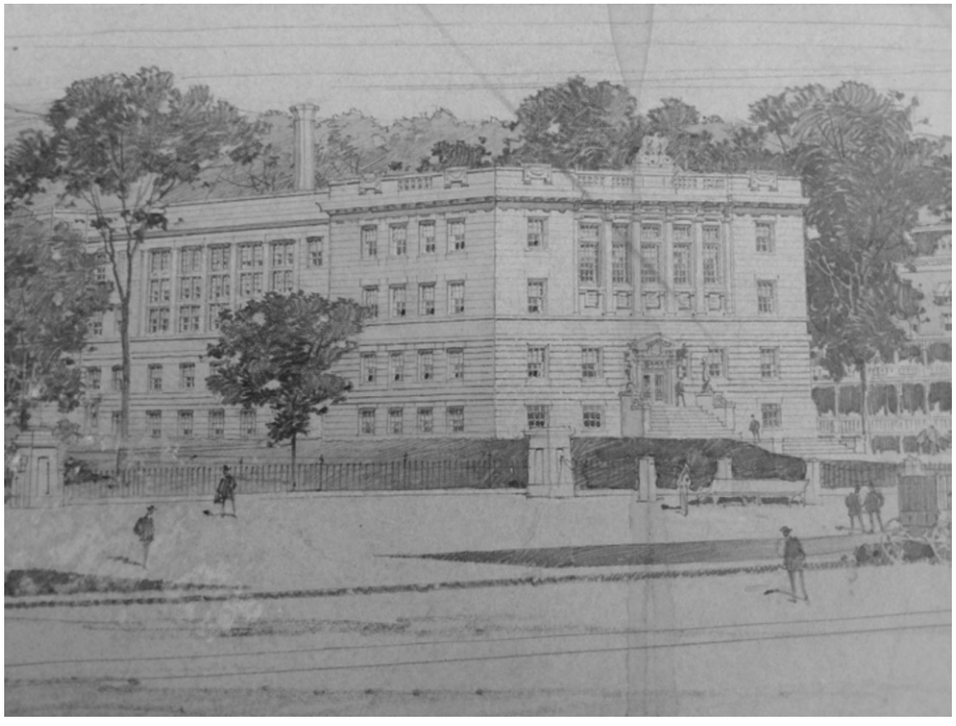
The Vermont Historical Society occupied the first-floor front, the Supreme Court some of the second floor, and the third was originally used for other state offices. The State Library was located on all floors, using the back half of the building. The Attorney General's office was located between the state library and the lawyer's room, adjoining the supreme court room.[25] The Department of Education had offices on the third floor, but even before the building was opened there was a concern that it was "increasing so fast lately that it may be impossible to accommodate it in the new building."[26]

The building is neoclassical in style. This is reflected in the "grandeur of scale, simplicity of geometric forms, Greek—especially Doric or Roman detail, dramatic use of columns, and a preference for blank walls." It is a reaction to "the excesses of the Rococo style."[27]

The bench, clerk's desk, sheriff's desk, chairs, and lower parts of the walls are mahogany, "while above the mahogany the finish is blended colors, to some extent resembling the sky with the sun setting, which adds a great deal to the brilliance of the room. The chairs used by the justices will be uniform instead of there being one odd chair. The floor is covered with blue carpet, which adds to the beauty of the room. It matches the draperies at the windows, which are also set off by a cream-colored curtain back of these. Some 40 mahogany chairs are placed the right side of the entrance to the court, for the convenience of the members of the bar." The doors are white pine, veneered with Vermont red birch. Portraits of former Chief Judges Isaac Redfield and John W. Rowell were hung above the clerk's desk on the left side of the courtroom. Matching that desk, on the right side, is the desk of the Sheriff. The bust of Jacob Collamer was displayed at the back of the courtroom.[28] The *Burlington Free Press* concluded that the "court room is a great improvement over the one formerly occupied. . . .The Vermont Supreme Court is now in a home that is as fitting to that assembly of jurists as any supreme court room in this section of the country."[29]

The Opening Day

Something else was different on the morning of May 7, 1918. For the first time, the Supreme Court wore robes when hearing oral arguments. Chief Justice Loveland



Munson had disapproved of robes, believing them to be pompous and unnecessary, and only after his death did the practice of wearing robes become the custom.[30] A new rule was first applied that first day, when an appeal was dismissed after no attorney on either side of the case appeared to argue before the Court. The local newspaper explained that the high court need not consider appeals "if attorneys do not look after them."[31]

A call of the docket started the proceedings, followed by the reading of six opinions issued by the Court, "so that one of the heaviest day's work in the first day of the term of court occurred."[32] There were 106 cases on the docket, including two murder cases and one significant public trust case.[33] Seven cases were argued. There were many lawyers in attendance at the opening session. Many were moved by the beauty of the new home of the court. Sheriff Frank H. Tracy read a proclamation: "Hear ye! Hear ye! The honorable supreme court appointed by law to be holden at this time and place is now open. All persons having business herein draw near and you shall be heard. God save the state of Vermont."[34] Rev. H.J. Long, Catholic clergyman, conducted devotional exercises.[35]

The First Cases

The first cases decided once the Court was in its new quarters were largely private disputes. The seller of land boasted there was "no better land in Vermont" than this, and could support 40 cows in the pasture. The buyer sued for rescission of the sale, claiming these statements were false. The Supreme Court concluded that no one would mistake the first statement as the truth, being part of the natural puffery that comes with land sales, but took the claim about the capacity of the pasture seriously, as that was a claim that could be verified.[36]

The Court allowed a non-expert to testify about the signature of the seller, as he was familiar with the seller's handwriting. That the Chief Justice had testified at the trial was no reason for reversal. The Chief didn't participate in the decision. The trial court's decision to allow a witness to testify but not to disclose his conviction for selling liquor without a license was within the discretion of the court. This was *In re Barron's Estate*, a matter decided on the briefs, without oral argument.[37]

Five colts escaped their pasture, and blew through a gate at a crossing before being killed by a locomotive, and the high court was faced with a decision on whether the farmer or the railroad was liable. The gate's hook was so loose that it "might be displaced by the whisk of a tail or rubbing of a nose." The jury ruled for the farmer. The Supreme Court reversed the decision, awarding victory to the railroad. Justice George M. Powers explained, "The gate was provided for the use and benefit of the plaintiffs. The defendant made no use of it and derived no advantage from it. We cannot regard an open gate as an insufficiency in the fence. If it and its fastenings were 'good and sufficient' within the meaning of the law, the duty of keeping it closed was upon the plaintiffs, and the fact that it was found open is not enough to impute negligence to or establish liability on the part of the defendant. This view seems to be supported by the weight of authority and harmonizes better with our statutory provisions."[38]

A man signed a will, following all of the necessary steps required by law. A month later his son was appointed his guardian, and in the hearing the father was loud when he should have been quiet. The jury regarded the will as invalid, based on the father's behavior and his failure to oppose the guardianship, but on appeal the high court reversed the decision, finding the judge's charge to the jury "well calculated to prejudice the minds of the jurors against the proponents' case," justifying a new trial. The decision is interesting as Justice Willard Miles filed an uncharacteristic dissent to the majority opinion, believing that the failure to object to the charge on the part of the lawyer for the attorney for the appellant should be fatal to the issue on appeal.[39]

In another matter, the Supreme Court ruled that the State had a right to challenge a not guilty verdict in a murder case, without violating the due process rights of the defendant.[40]

The most important decision of the 1918-1919 term was *Hazen v. Perkins*, long remembered and relied on in subsequent years as a critical articulation of the public trust doctrine. Sumner W. Perkins installed a gate at the outlet of Lake Morey and used it to raise and lower the level of the water. He owned several mills below the lake, and made changes to the lake as needed to maintain a proper flow of waterpower. He owned no land on the lake. Other owners sought an injunction to prevent his meddling with the natural level. The case is the first substantive exercise of the public trust doctrine in Vermont caselaw. The Supreme Court held that Perkins could not continue with his practice. The lake bottom was owned in trust by the public, and only the legislature could exercise control over it, and even then, only for public, not private purposes. The court held that Lake Morey is boatable and therefore public waters. Perkins's prescriptive easement claim was no match for this higher species of property.[41]

The Supreme Court has heard and decided thousands of appeals since that time. Nearly that many oral arguments have been heard, and the decisions of the court have filled at least 111 volumes of *Vermont Report*s since 92 Vt., covering the 1918-1919 term. Finally, there was a quiet place and ample quarters, dedicated to the use of the justices, which must have had an impact on the deliberative process. No longer would the justices cram themselves into a Pavilion hotel room to reach consensus. And the five chairs of the Justices would be at last uniform, and proper.

Afterwards

For reasons not explained in the record, the building was closed per order of the State Board of Health in October of 1918 for two weeks.[42] That month Governor Horace Graham described the final costs of the building in his farewell address.

> During the present biennium, the new state building for the Supreme Court, State Library, Vermont Historical Society and state offices has been completed and occupied. The appropriations for this building totaled two hundred thousand dollars and the entire cost, including new stacks for the library and the complete furnishing of the Supreme Court room was $202,873.87. The commission, believing that the State should have a Supreme Court room in keeping with her dignity and the standing of her Court, took the initiative and furnished the room at an expense of $4,203.37. To do this they were obliged to borrow

> $2,356.62 and hope you will see fit to reimburse them therefore. Of the appropriation of thirty thousand dollars for the expenses of the changes in the wings of the State House, formerly occupied by the library, for a central heating plant, and for repairs elsewhere $26,957.71 was used, leaving a balance unexpended of $3,042.29. I suggest that this balance be made available to reimburse the commission, thus keeping the entire cost of the new building, the necessary changes in the interior of the State House, and the central heating plant within the appropriations. Of the work you can judge without further comment on my part.[43]

Horace Graham's long service in Vermont state government began with his election as Auditor of Accounts in 1902, a position he held until his election as Governor in 1917. The irregularities in his years as Auditor were revealed shortly before his term ended in October 1919, and he was promptly charged with larceny. His trial began in January. He was convicted following a sensational jury trial, and sentenced to serve three to five years in the State Prison. The day he was sentenced he was pardoned by the man who succeeded him in office, Governor Percival Clement.

Seneca Haselton resigned from the court on May 1, 1919 due to ill health, and John H. Watson became Chief Justice. Leighton P. Slack was appointed an Associate Justice. John Watson remained Chief until his death on December 7, 1929, when George M. Powers took the center chair.

The building filled up quickly, and various state officials were housed there. These included the Civil Works Administrator, State Finance Commissioner, the Commissioner of Industries, the Public Service Commission, Purchasing, the Tax Department, and the Attorney General, among others.[44] Then the building began to empty out, leaving the court with more space. The Free Library Service, part of the State Library, moved to Berlin in 1967.[45]

The 1927 flood spread the Winooski River over State Street, but did not do significant damage to the Supreme Court building.

For many years, the door between the State Library and the Supreme Court on the second floor was open. The librarian was willing to lend a key to attorneys and justices to use the library during hours it was closed to the public. In 1940, Daniel Boone Schirmer's lawyer from Boston, Sidney Grant, who was arguing to place Schirmer's name on the General Election ballot, "was given permission to use the facilities of the State library tonight, where he worked preparing his arguments on two points of law."[46] The door was locked in the 1980s, isolating the court from the State Library.

The Supreme Court building appeared as a backdrop in many newspaper stories over the century. In February 1948, a *Burlington Free Press* reporter wrote, "In spite of the snow and the ice, a cheerful song from the throat of a robin filled the air around the supreme court building the other morning, lifting the spirits of those trudging up the hill."[47]

The Pavilion Hotel, built in 1876, was beyond repair by the 1960s, when an idea was advanced to replace it with a modern building. This was opposed on grounds of historic preservation. The State had been using eight rooms at the hotel as offices. After the State purchase of the building, a compromise was struck, recreating the façade and porches of the hotel, while constructing five floors of offices. In December of 1969, a wrecking ball demolished the old building, and Governor Deane Davis cut the ribbon on the new Pavilion in August, 1971.[48] The first floor contained the museum, offices, and library of the Vermont Historical Society, which vacated the Supreme Court building, and allowed more space for the judiciary.

A tunnel for heat pipes was constructed across the front lawn of the State House in 1978, supplying heat to the Pavilion and Supreme Court building. The cost was a million dollars.[49]

The Supreme Court building was added to the National Register of Historic Places in November of 1978. It is part of Montpelier's Historic District designated as a "contributing" building to the district.

> Granite, three stories, seven-bays, flat roof behind parapet. This Neo-Classical Revival style institutional building has a central door with pedimented surround within a five-bay projecting central pavilion. The building is fronted by a balustraded terrace. There is a deeply molded cornice and plain frieze. Another molded course delineates the first story and is in line with the bottom of the pediment above the front door. The central pavilion has tall recessed window bays with twelve-over-sixteen light sash over simple molded panels. There are three bays in the center flanked by single bays separated by shallow pilasters. The pavilion is flanked by single window bays on the main façade. The first floor has twelve-over-twelve light sash windows in line with the bays above. This building was built to house the Supreme Court and state library between 1915 and 1918. It provides visual balance for # 505 (133 State Street) – another granite building adjacent to the State House.[50]

In March of 1980, with "the sound of rock music bouncing off the walls of the Vermont Supreme Court building, about 100 anti-nuclear power sympathizers gathered on the State House lawn Saturday to commemorate the first anniversary of the Three Mile Island in Pennsylvania."[51]

In 1987, the Pavilion Office Building was substantially enlarged, at a cost of $3.7 million, including a two-story bridge linking it to the Supreme Court building. During construction, the Court had to move to temporary quarters.[52]

Protesters dumped fifteen 60-pound bags of sand in front of the Supreme Court building in October of 1992, reacting to a decision affirming the Abenaki tribe's status. "Stop police brutality of the Abenaki" and "Abenaki and Cree lands: Not for Sale" were among the signs held by the crowd.[53]

In November of 1998, on the day of the oral argument in *Baker v. State*, there was a rally for gay rights in front of the Supreme Court building. The *Free Press* reporter explained how 60 tickets for seating for the argument were issued on a first-come first-serve basis. In the article, the reporter described the courthouse as "an unremarkable granite structure just down the hill from the Statehouse."[54]

An art gallery was created in a back corridor in 1999. In 2005, a security officer and a scanner became the visitor's first stop before entering the courthouse.

The final step in the continuing expansion of the Court's quarters occurred in 2016, when the State Library vacated its space in the building, its books and records relocated to the Vermont Law School, the State Archives, and the Vermont Historical Society. The State Library will soon have rooms in the VHS headquarters in Barre.

A Unified Court

Chief Justice Paul Reiber shepherded the reorganization of the judiciary in 2010 that fulfilled the promise of a unified court, long discussed but not fully achieved with the constitutional amendments of 1974. The Commission on Court Reorganization had been formed in 2008 to propose a design for the system. In part a reaction to the recessionary cuts mandated by the legislature among all of state government, the legislation seated the administration of the court system entirely within the Supreme Court. It addressed the role of Assistant Judges, whose administrative control of courthouses in some shires had created a tension over who was in charge and whose judicial duties had been unclear before the effective date of the new law, by authorizing them with special training to perform other judicial duties, including uncontested divorces. The county clerk had been the clerk of the civil court for as long as there had been courts in Vermont. After 2000, the judiciary appointed the clerks of the court, who an-

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swered directly to the Court Administrator. The District, Family, and Superior Courts were merged into a single Superior Court, with Criminal, Family, Civil, Probate, and Environmental Divisions. All trial judges became Superior Judges.

The Supreme Court was given full authority over the courts in 2000 and full tenancy in the Supreme Court building in 2016.

Statistics

During 2017, the Supreme Court received 403 appeals and closed 384 cases. It heard 170 oral arguments and decided 86 cases on briefs. It issued 118 written decisions of the full court, and 134 from the rocket docket. Each justice wrote about 20 majority decisions. There were nine dissents, two concurring, and two concurring and dissenting opinions. Of the cases decided by the full court, 58 were affirmed, ten were reversed, and 23 were reversed and remanded.[55]

During the 1918-1919 term of the Supreme Court, the justices issued a total of 24 decisions. Justices Willard Miles and William H. Taylor wrote three, Seneca Haselton four, George M. Powers six, and Chief Justice John H. Watson eight. There were 14 affirmances and eight reversals. There were three dissents filed. Nearly all of the 24 decisions had been heard by the Court in oral argument, and a majority had been decided by a jury trial.

In the centenary, in this building, a total of 50 Justices (out of the 134 judges and justices in all) have served on the Court. Dozens of Superior judges have sat with the high court when one or another of the justices has been conflicted or absent. In that time there have been 15 Chief Justices (out of a total of 37). And the many lawyers, the best Vermont has bred, have stood behind that dais and faced the justices and their penetrating questions.

Over the century, while the Supreme Court building has remained in place, the court itself has changed markedly. At the time Clarence Darrow argued for the defendant in State v. Winters (1929), the Court waved the one-hour maximum oral argument, and he spoke for 90 minutes.[56] Today, oral argument for cases heard by the full court is limited to 15 minutes per side, ending when the red light on the rostrum blinks insidiously. Cases that present no novel issue to add to the body of case law, that qualify for the Rocket Docket (1990), are limited to five minutes per side.[57] There are clerks and supporting legal and administrative staff for the Court now, a Court Administrator, and a Chief Administrative Judge.

In that building, law happens. There, what the legislature has drafted is construed, what state and local officials have done is reviewed, and what the trial courts and juries have decided is affirmed or reversed. The building, mistaken by some visitors for a bank, projects the sober, Solomonic character of the highest court in the state, the last word on most controversies, the keeper of the constitution.

Paul S. Gillies, Esq., is a partner in the Montpelier firm of Tarrant, Gillies & Richardson and is a regular contributor to the Vermont Bar Journal. A collection of his columns has been published under the title of Uncommon Law, Ancient Roads, and Other Ruminations on Vermont Legal History by the Vermont Historical Society.

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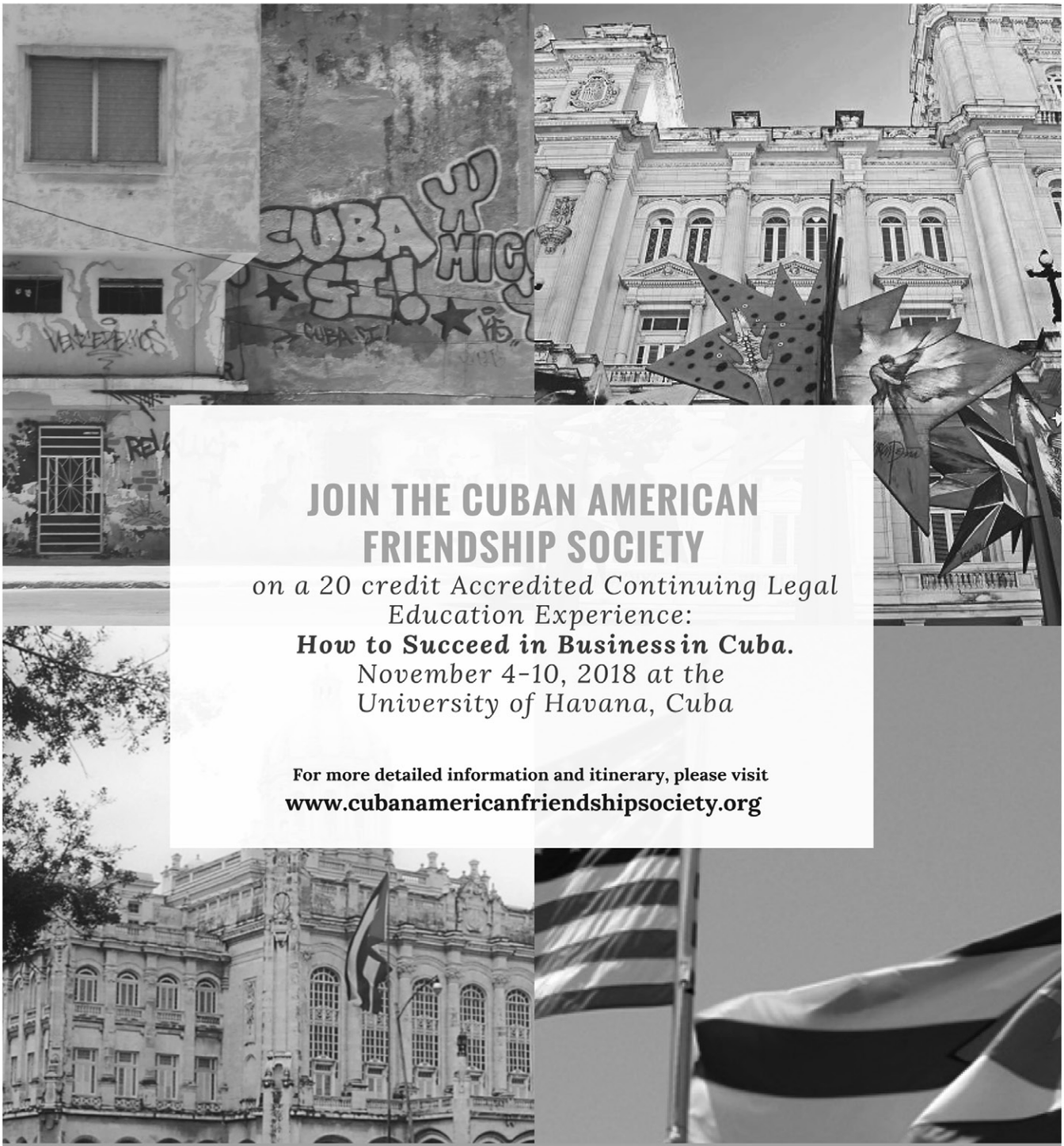
[1] Daniel Pierce Thompson, *History of Montpelier, Vermont* (Montpelier, Vt.: E.P. Walton, 1860), 40, 42.
[2] Id., 110; *Burlington Free Press* October 23, 1994, 16.
[3] Thompson, *Montpelier,* 104.
[4] "An act for the erection of a building for the use of the state library and other like purposes," No. 227, *Acts and Resolves passed by the General Assembly of the State of Vermont* 1884, 245-246.
[5] Nancy Price Graff and David Schutz, *Intimate Grandeur Vermont's State House* (Montpelier, Vt.: Friends of the Vermont State House, 2015), 102-104.
[6] Thomas Valentine Cooper, *American Politics (non-partisan) from the Beginning to Date* (Boston: Russell & Henderson, 1883), 100.
[7] *The Commercial and Financial Chronicle* 1918 (New York: William B. Dana, 1919), 17.
[8] The report noted that the books, appraised at $250,000, constituted the "greatest single asset of the state." "Report of the joint special committee to investigate the necessity of additional rooms or buildings for certain state purposes, *Journal of the House of Representatives of the State of Vermont* 1915, 802-806.
[9] Id.; Graff and Schutz, *Intimate Grandeur*, 107.
[10] *Burlington Free Press*, April 2, 1918, 2.
[11] William C. Hill, "Vermont's Judicial Crisis of 1914-1915," 38 *Vermont History* 124-138 (1970).
[12] Id., 126.
[13] http://vermont-archives.org/govhistory/gov/govinaug/inaugfare.htm
[14] Id.
[15] Id., 137. George M. Powers' first stint as Chief Justice had lasted a little less than two months. After Munson retired in 1917, Watson was elected Chief, and when Watson died in 1929, Powers was appointed Chief by Governor John Weeks, as the seniority system directed. Order was restored for another several decades.
[16] Lawrence M. Friedman, *A History of American Law* (New York: Simon & Shuster, 1985), 391-398.
[17] Paul S. Gillies, "The Role of Voters in Legislation: Vermont Experience with the Referendum," *Vermont Bar Journal* (June 2001), 11-17.
[18] "An act to provide for the erection of a building for the use of the state library and supreme court, and for other state purposes," No. 13, *Acts and Resolves* 1912, 12-14.
[19] "An act to repeal No. 13 of the acts of 1912, providing for the erection of a building for the use of the state library and supreme court, and other state purposes," No. 9, *Acts and Resolves* 1915, 73; "An act to provide for the erection of a building for the use of the state library and supreme court, and for other state purposes," id., 72-74.
[20] CRM Associates, *Supreme Court, State Library, and Historical Society Building 1916-1918, Historic Context and Description*, January 2017, 5; "An act providing for an additional appropriation for the erection of the new state building," No. 11, *Acts and Resolves* 1917, January 23, 1917, 8.
[21] Digital Sanborn Maps 1867-1970, July 1889, Sheet 2.
[22] *State v. Heaphy*, 88 Vt. 428 (1915).
[23] *Capital Garage v. Powell*, 99 Vt. 244 (1925).
[24] Densmore & LeClear, Architects & Engineers, *Contract for Supreme Court, State Library, and Office Building for the State of Vermont at Montpelier, January 1916,*; Joseph R. Richards and William P. Richards, *Building for the State Library, Supreme Court, etc. Montpelier, Vermont,* unpublished, 1916; CRM Associates, *Supreme Court, State Library, and Historical Society Building 1916-1918, Historic Context and Description,* 1.
[25] *Barre Daily Times*, December 26, 1918, 8.
[26] *Barre Daily Times,* March 20, 1918, 8.
[27] Kathleen Kuiper, "Neoclassical architecture," *Britannica Concise Encyclopedia* (Chicago: Encyclopedia Britannica, Inc., 2008), 1342.
[28] *Barre Daily Times*, May 6, 1918, 8. Today Jacob is balanced by a bust of Elijah Paine, formerly a member of the court and for more than 40 years U.S. District Judge. Some attorneys have slyly rubbed Elijah's bald pate for luck before their arguments.
[29] *Burlington Free Press*, May 9, 1918, 10.
[30] *Burlington Daily News*, May 8, 1918, 3.
[31] *Barre Daily Times*, May 9, 1918, 1.
[32] *Barre Daily Times*, May 8, 1918, 2.
[33] *Burlington Weekly Free Press*, May 2, 1918, 9.
[34] *Barre Daily Times*, May 7, 1918, 1.
[35] *Burlington Daily News*, May 8, 1918, 3.
[36] *Nichols v. Lane*, 93 Vt. 87 (1919).
[37] *In re Barron's Estate*, 92 Vt. 460 (1918). As the parties had agreed to submit the appeal on briefs, the cause was not summarily dismissed, as the first case had been that day. The dismissal of that first appeal was a penalty for non-appearance at oral argument, without court approval to rely on the briefs.
[38] *Dodge Brothers v. Central Vermont Railway*, 92 Vt. 454 (1918).
[39] *In re Clogston's Estate*, 93 Vt. 46 (1919).
[40] *State v. Felch*, 92 Vt. 477 (1918).
[41] *Hazen v. Perkins*, 92 Vt. 414 (1918).
[42] *Bennington Banner,* October 17, 1918, 1.
[43] Horace Graham, *Farewell Address*, October 1919, 2.
[44] *Burlington Free Press*, April 6, 1925, 2; *Burlington Free Press*, May 25, 1925, 14; *Burlington Free Press*, February 15, 1934, 2; *Burlington Free Press,* December 21, 1938, 7.
[45] *Burlington Free Press*, October 9, 1967, 11.
[46] *Burlington Free Press*, October 10, 1940, 2; *Schirmer v. Myrick*, 111 Vt. 255 (1941).
[47] *Burlington Free Press*, February 8, 1943, 2.
[48] *Burlington Free Press*, December 28, 1965, 6; *Burlington Free Press,* February 20, 1970, 27; *Bennington Banner*, August 25, 1971, 9.
[49] *Burlington Free Press*, July 27, 1978, 15.
[50] National Park Service, United States Department of the Interior, *National Register of Historic Places Continuation Sheet*, 202. http://www.montpelier-vt.org/DocumentCenter/View/1076.
[51] *Burlington Free Press*, March 30, 1980, 13.
[52] *Burlington Free Press*, September 17, 1987, 14; *Burlington Free Press*, August 6, 1988.
[53] *Burlington Free Press*, October 10, 1992, 18.
[54] *Burlington Free Press,* November 17, 1998, 11
[55] Vermont Judiciary, *Annual Statistical Report for FY17,* 53-54.
[56] *Burlington Free Press*, January 13, 1928; *State v. Winters,* 102 Vt. 36 (1929).
[57] Kevin B. Smith, Alan Greenblatt, *Governing States and Localities* (CQ Press, 2016), 110; V.R.A.P. 33 & 33.1.



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by Allan Keyes, Esq. & James Dumont, Esq.

WHAT'S NEW?

Expert Witness Disclosure in Vermont – The Advisory Committee On Civil Rules Seeks Your Input

The Advisory Committee on Civil Rules has proposed a revision to V.R.C.P. 26 (b)(4), concerning expert witness disclosure. The Committee seeks more input from the bar on this proposed rule. A copy follows this article.

The purpose of the Vermont Rules of Civil Procedure is to secure the just, speedy an inexpensive determination of every action.[1] Rules of procedure should not be pitfalls for the unwary, which would defeat justice; nor should they impose unnecessary procedures and documentation, which would delay and increase the cost of litigation.

The rules governing pretrial discovery of expert witness testimony implement this purpose by ensuring fair notice to litigants of an expert's testimony, enabling litigants to decide whether it is necessary to depose the expert, and, if so, to prepare for the deposition.[2]

Vermont initially followed the federal rules governing expert witness disclosure, when the Vermont rules were adopted in 1971. In 1993, however, a major change was made to the federal rule that was not followed in Vermont – the requirement that expert witnesses provide a report. The federal rule now requires a report from any expert witness "if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." Any other witness who will provide opinion testimony under Rules of Evidence 702, 703 or 705 must be disclosed, and a summary of their facts and opinions must be provided, but no report from the witness is required. Counsel can provide the summary.

The federal change was part of a broader imposition of mandatory duties of disclosure that do not hinge on discovery requests. Vermont has never adopted the requirement of a report or the broader requirement of automatic disclosures.

Vermont continues to rely on expert witness disclosures, by counsel, in response to interrogatory. The interrogatory may ask for the subject matter of the expert's testimony, the substance of the expert's facts and opinions, and a summary of the grounds for each opinion.[3]

In Vermont, the question of whether to follow the federal automatic expert witness report requirement has arisen in the context of a wider question – must there be any disclosure, regardless of whether by statement or by report, when the expert is a so-called "event witness."

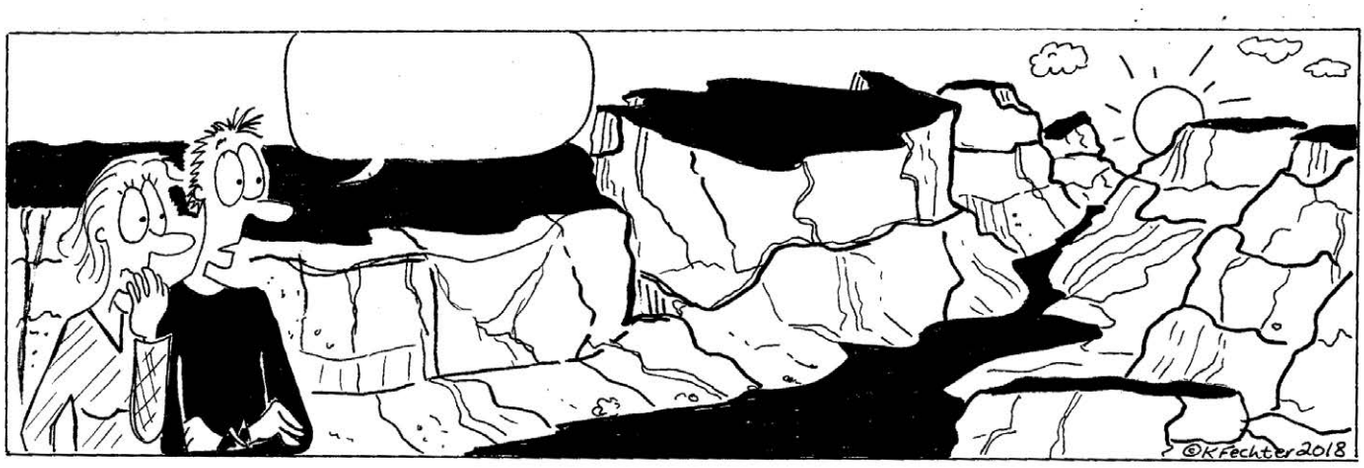
An event witness is an expert whose knowledge and opinions arose from participation in an event, as distinguished from a witness hired to testify. A common example is the treating physician. The Advisory Committee has long had a consensus that the goal of fairness requires disclosure of all expert opinion, including the opinions of event witness.

In *Hutchins v. Fletcher Allen Health Care*, Inc., 172 Vt. 580 (2001), the Court held otherwise. There, the hospital called five physicians to testify as experts at trial. Each physician had participated in the medical procedures that were challenged as malpractice. At trial, they testified as expert witnesses, stating their opinions. The testimony of the five physicians had not been disclosed pretrial. The Supreme Court affirmed the trial court's ruling that disclosure had not been required. It was not required because the physicians had not been specially retained for trial. They were event witnesses. The Court concluded:

> "Defendant did not have the same obligation to disclose the opinions of its doctors because these opinions were formed as a result of the doctors' participation in the events that gave rise to the litigation and *not 'in anticipation of litigation or for trial.'*"[4]

This language relied on in *Hutchins*, requiring disclosure only of opinion formed "in anticipation of litigation or for trial," is no longer in the Vermont rule. But Vermont has not adopted the clarifying federal language requiring disclosure of all facts and opinions for all witnesses with opinion testimony under Rules of Evidence 702,

BATTLE OF WITS!



"Once mud season is over, it fills right in again."

Caption by this issue's Battle of Wits winner, member Gregory S. Clayton, Esq.

703, or 705. Courts and practitioners are uncertain, under the current Rule, whether *Hutchins* still insulates event witnesses from disclosure.

Further, practice varies as to whether or the extent to which lawyers are disclosing opinions of defendants or employees of defendants sued for professional negligence, or of plaintiffs' treating physicians. Where the witness is "hybrid," i.e. has opinions formed both during the event and after consultation with counsel, there is no predictability of how a court might rule.

As an example, in *Stella v. Spaulding*, the majority affirmed the trial court's order imposing sanctions because of inadequate disclosure of a treating physician's opinions.[5] The treating physician was an event witness. The two dissenting justices in Stella, without recognizing that the language of the Rule has changed, opined in passing that under *Hutchins*, disclosure was not required. (Because Appellant had not relied on *Hutchins* at trial level, the issue had not been preserved for appeal.) This issue continues to be fairly frequently litigated in federal courts, because litigants disagree whether a report is required, for example, when a treating physician provides an opinion outside the scope of her treatment records.

The Committee feels that clarity and fairness will be advanced by adopting the federal language to require that all witnesses with opinions under Rules of Evidence 702, 703 or 705 be disclosed.

The question then turns to the form and depth of the disclosure.

The Advisory Committee has recommended that attorneys may continue to author the disclosure, if they choose to do so. Requiring event witnesses such as treating or ER physicians to write a report would unnecessarily delay and increase the cost of litigation, closing the courthouse doors to some. The Committee has unanimously recommended that the federal rule not be followed to the extent it requires the witness to write a report.

On the other hand, to implement the purposes of disclosure, the Advisory Committee has recommended that the rule make explicit that disclosure must include more than the subject matter of the expert's testimony, the substance of the expert's facts and opinions, and a summary of the grounds for each opinion. The committee has received comment that these barebones interrogatory disclosures are often inadequate for the opposing party to decide whether to take a deposition or hire an opposing expert -- thus forcing up litigation costs by requiring depositions where a more adequate disclosure would suffice.

The Committee has proposed a more robust disclosure than the current rule, adding three new areas, but short of a recitation of the actual proposed testimony:

> The opinions the witness will express, the bases and reasons for the opinions, the facts or data considered by the witness in forming them, the qualifications of the witness, and a statement of the compensation charged by the expert for the work in the case, must be disclosed.

The Advisory Committee understands that where a party intends to call a treating physician whose opinion testimony will be restricted to that which is set forth in her treatment records, production of those records will suffice for disclosure, if coupled with disclosure of any compensation being charged.

These proposed standards track the federal rule governing the contents of a report, but do not include the following federal rule requirements: production of an expert's exhibits, a list of all publications authored by the witness in the previous 10 years, and a list of all other cases during the previous 4 years in which the witness has testified at trial or in deposition.

These recommended standards also depart from the federal rule in a significant respect: the standards apply to all witness with opinion testimony under Rules of Evidence 702, 703 or 705, which would include event witnesses and hybrid witnesses. The federal disclosures (beyond a summary of facts and opinions) are required only of witnesses who have been retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony.

In order to provide predictability and uniformity of application, regardless of the timing and wording of interrogatory requests, these disclosures should be automatic. Proposed Rule 26(b)(5)(A)(iii) provides that the disclosures must ordinarily be made by the date set by stipulation or a scheduling order under Rule 16.2.

These and other, related issues, deserve more widespread debate among the bar than has occurred to date. Perhaps because an earlier proposal (which required the witness to draft the report) remained on the Judiciary's website, many commenters appear to have understood that the earlier proposal is the current proposal. It is not.

The Advisory Committee seeks more input from the bar before making a final recommendation to the Supreme Court on the current proposal, including the following issues:

1) Should all expert opinions under V.R.E. 702, 703 or 705 be disclosed?
2) Should all of the items required to be disclosed by the federal rule be included, or just the three new areas in the draft rule (the facts or data considered, the qualifications of the witness, and a statement of the compensation charged by the expert for the work in the case), or instead just facts and opinions, and the bases for them?
3) Should there be a reduced duty of disclosure for event witnesses, as in the federal rule, or would this distinction lead to unnecessary litigation (such as arises under the federal rule)?
4) How should rebuttal experts be addressed? The latest draft follows the timing of the federal rule. The Committee believes that Zinn v. Tobin, 140 Vt. 410 (1981), which generally allows rebuttal experts to be disclosed after trial has commenced, needs to be overruled, but also that adoption of the federal 30-day rule seems too demanding and unrealistic for state practice.
5) Should the Rule 26(e) duty to supplement be broadened, to follow the federal rule, so it includes deposition testimony by experts (not just interrogatory disclosures of the expert's opinion) and deposition testimony by parties?

The Advisory Committee urges those interested to attend the VBA Annual Meeting to discuss these issues, at a CLE that will be held on September 28, 2018. The Committee also invites written comments.

Allan Keyes is a second-generation appellate lawyer, practicing at Ryan, Smith & Carbine, Ltd. in Rutland. Keyes is a longtime Member of the Vermont Supreme Court Advisory Committee on Civil Rules, currently serving as Chair since 2015.

James Dumont is an attorney in Bristol, Vermont, concentrating in the fields of personal injury, environmental law and employment law. Jim frequently presents education courses on procedure, evidence and employment law.

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[1] VRCP 1.
[2] See, e.g. *Stella v. Spaulding*, 2013 VT 8 ¶ 17, 193 Vt. 226, 234; *Green v. Bell*, 171 Vt. 280, 283-84 (2000).
[3] VRCP 26(b)(5).
[4] *Hutchins v. Fletcher Allen Health Care, Inc.*, 172 Vt. 580, 582 (2001)
[5] *Stella v. Spaulding*, 2013 VT 8 ¶ 17, 193 Vt. 226.

by Teri Corsones, Esq.

WHAT'S NEW?
2018 Legislative Overview

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; please note that a number of them have July 1, 2018 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. The postings are searchable and can be reviewed at http://vbaconnect.vtbar.org. A link to each bill is included with each summary.

H. 300 (Act 117) "Notice of Tax Sale" bill (an act relating to the statute of limitations for recovery and possession of property actions against the grantee of a tax collector's deed); signed by Governor Scott on May 2, 2018; effective on July 1, 2018. (VBA Connect Municipal Law Community and Real Property Law Community)

https://legislature.vermont.gov/assets/Documents/2018/Docs/ACTS/ACT117/ACT117%20As%20Enacted.pdf

- Period during which a tax sale can be challenged as a fraudulent conveyance reduced from four years to two years; runs concurrently with Federal Bankruptcy Code provision regarding fraudulent conveyances
- The statute of limitations for challenging a tax sale is reduced from three years to one year after tax collector's deed delivered to successful bidder
- Service requirements generally modified; if certified mail process fails, first class mail or option for personal service

H. 526 (Act 160) "Notary Public" bill (an act related to regulating notary publics); signed by Governor Scott on May 22, 2018, effective on July 1, 2019 (except commission requirements take effect on December 1, 2018, and exam and education requirements take effect on Feb. 1, 2021) (VBA Connect Real Property Community)

https://legislature.vermont.gov/assets/Documents/2018/Docs/ACTS/ACT160/ACT160%20As%20Enacted.pdf

- Secretary of State will have notary public commissioning authority beginning with the February 10, 2019 term; applications will be on-line
- Two-year term instead of four; $15 application fee each term
- Attorneys are exempt from new exam and education requirements that commence with February 2021 term
- Codifies content of notary acknowledgements; specifies methods of verifying identification
- Option of stamp, seal or notary commission number
- Remote notarizations not allowed – personal appearance required
- Two notary advisors for rule-making process – VBA representative to be one of the two

H. 562 (Act 162) "Parentage" bill (an act related to parentage proceedings); signed by Governor Scott on May 22, 2018, effective on July 1, 2018. (VBA Connect Family Law Community)

https://legislature.vermont.gov/assets/Documents/2018/Docs/ACTS/ACT162/ACT162%20As%20Enacted.pdf

- Expands definition of parent to potentially include birth parent, adoptive parent, acknowledged parent, adjudicated parent, presumed parent, and de facto parent
- Sets forth criteria to meet each expanded definition
- Sets forth criteria regarding genetic parentage
- Sets forth criteria regarding gestational carrier agreements
- Also applies to a pending proceeding to adjudicate parentage commenced before July 1, 2018 for an issue on which a judgment has not been rendered.

H. 707 (Act 183) "Sexual Harassment" bill (an act related to the prevention of sexual harassment); signed by Governor Scott on May 28, 2018, effective on July 1, 2018, except Section 5 effective on passage.

https://legislature.vermont.gov/assets/Documents/2018/Docs/ACTS/ACT183/ACT183%20As%20Enacted.pdf

- Numerous changes to Vermont's laws related to sexual harassment
- Prohibitions regarding certain provisions in employment contracts
- Requirements regarding certain provisions in settlements of claims for sexual harassment
- Notice requirements for claims of sexual harassment

H. 859 (Act 152) "Lease lands" bill (an act related to requiring municipal corporations to affirmatively vote to retain ownership of lease lands); signed by Governor Scott on May 21, 2018, effective on July 1, 2018. (VBA Connect Municipal Law Community and Property Law Community)

https://legislature.vermont.gov/assets/Documents/2018/Docs/ACTS/ACT152/ACT152%20As%20Enacted.pdf

- Unless municipality votes to retain all or portion of lease lands by January 1, 2020, lease lands revert to titled lessee
- UVM and State Agricultural lease lands are exempt
- Municipality can release lease lands prior to January 1, 2020

H. 899 (Act 155) "Town Clerk Recording Fees" bill (an act relating to a town fee report and request); signed by Governor Scott on May 21, 2018; effective on July 1, 2018 . (VBA Connect Municipal Law Community and Real Property Law Community)

https://legislature.vermont.gov/assets/Documents/2018/Docs/ACTS/ACT155/ACT155%20As%20Enacted.pdf

- Amount of recording fees unchanged for now but can request recording fee increase every three years, starting January 2019
- Requirement for towns to provide consolidated town fee report every three years, starting in January 2019

H. 910 (Act 166) "Open Meeting" bill (an act relating to the open meeting law and the public records act); signed by Governor Scott on May 22, 2018; effective on July 1, 2018 (except Section 3 effective on January 1, 2019). (VBA Connect Municipal Law Community – discussion under H. 700 reference)

https://legislature.vermont.gov/assets/Documents/2018/Docs/ACTS/ACT166/ACT166%20As%20Enacted.pdf

- "Meting" shall not mean occasions when a quorum of a public body attends social gatherings, conventions, conferences, training programs, press conferences, media events, or otherwise gathers, provided that the public body does not discuss specific business of the public body that, at the time of the exchange, the participating members expect to be business of the public body at a later time.
- Public Records provisions modified generally
- Requires head of a state agency or department to designate a person

accountable for overseeing PRA requests, and to post contact info for that person on applicable website

S. 29 (Act 195) "Probate" bill (an act related to decedents' estates); signed by Governor Scott on May 30, 2018; effective on July 1, 2018 (applies to wills executed or offered for admission on or after July 1, 2018) (VBA Connect Probate Law Community)

https://legislature.vermont.gov/assets/Documents/2018/Docs/ACTS/ACT195/ACT195%20As%20Enacted.pdf

- Updates Vermont law regarding wills and decedents' estates generally
- Allows self-proving wills
- Modifies statute of limitations for claims against estates
- Terminology modernized generally

S. 128 (Act 95) "Executive Session" bill (an act relating to executive sessions under the Open Meeting Law); signed by Governor Scott on April 11, 2018; effective on passage. (VBA Connect Municipal Law Community)

http://legislature.vermont.gov/assets/Documents/2018/Docs/ACTS/ACT060/ACT060%20As%20Enacted.pdf

- Allows public body to go into executive session to discuss security or emergency responses measures, the disclosure of which could jeopardize public safety

S. 244 "Spousal Support" bill (an act related to extending the repeal date for the guidelines for spousal maintenance awards); signed by Governor Scott on May 30, 2018; effective on passage. (VBA Connect Family Law Community)

https://legislature.vermont.gov/assets/Documents/2018/Docs/BILLS/S-0244/S-0244%20House%20Proposal%20of%20Amendment%20Unofficial.pdf

- Spousal support guidelines repeal date extended to July 1, 2021
- Provision calling for new summer study committee removed

S. 269 "Blockchain" bill (an act relating to blockchain business development); signed by Governor Scott on May 30, 2018; effective on July 1, 2018. (VBA Connect Property Law Community)

https://legislature.vermont.gov/assets/Documents/2018/Docs/BILLS/S-0269/S-0269%20As%20Passed%20by%20Both%20House%20and%20Senate%20Unofficial.pdf

- DFR directed to prepare a report on how block chain might be implemented in insurance and banking areas
- Agency of Commerce and Community Development directed to incorporate promotion of blockchain and fintech development into programs, including education and workforce trainings
- New type of limited liability company authorized – Blockchain Based Limited Liability Company (BBLLC) – special roles for participants outlined

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. 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 any of the legislation.

by Robert Pratt, Esq.

WHAT'S NEW?

A Modest Proposal: Limited New Approaches to Decedents' Probate

In 2010, a committee was formed as part of the Probate and Trust Law Section of the VBA to review comprehensively our laws governing decedents' probate estates. The committee comprised four probate judges, approximately 12 lawyers (some serving only on subcommittees, others serving on the central committee as well), and three trust officers.[1] We allocated responsibilities by chapter in Title 14 and embarked on an eighteen-month journey to evaluate what worked, what could work better, what didn't work, what wasn't needed, and what needed editorial adjustment for consistency and modernity. The eighteen months turned out to be the first leg of a seven-year journey.

This article will describe several significant changes to or additions to the law, designed primarily to simplify the processes of opening and administering estates, including: self-proving Wills, waiver of a spouse's election rights, avoidance of accounting requirements for closing an estate, and a simplified administration process when the sole fiduciary and the sole beneficiary are the same person. The bulk of the changes involve modernization of language, employment of more consistency in terms, and implementation of current standards for statutory language. The new law applies to Wills made or offered for probate on or after July 1, 2018.

1. **Self-Proving Wills.** Current requirements for opening a testate estate are consents of the surviving spouse and heirs-at-law, or a hearing at which at least one of the attesting witnesses testifies to the execution process for signing the Will. The self-proving Will affidavit does not affect Wills that are challenged for failure of proper execution, undue influence, incapacity, or other objections where, if available, both Will witnesses must testify and other evidence can be presented on the issues raised in the objections.

   Contents of self-proving affidavit, to be acknowledged by the testator and the witnesses before a notary public:

   (a) The testator signed the instrument as the testator's will or expressly directed another to sign for the testator in the presence of two witnesses.
   (b) The signing was the testator's free and voluntary act for the purposes expressed in the will.
   (c) Each witness signed at the request of the testator, in the testator's presence, and in the presence of the other witness.
   (d) To the best knowledge of each witness at the time of the signing, the testator was at least 18 years of age, or emancipated by court order, and was of sound mind and under no constraint or undue influence.

   The key objective of self-proving Wills is that they permit admission of a Will without written consents and without a hearing if there were no objection. A typical fact pattern that highlights the value of this alternative is the proffer of a Will that omits from any benefits a surviving child but the child, while having no interest in giving consent, also has no interest in challenging the admission. Without the need for a hearing with at least one witness testifying, the Will can be admitted on the basis of the self-proving Will affidavit.

   The changes do allow for judicial discretion. Absent objection by any party, it would be expected that the Will would be allowed if the affidavit complies with the requirements, but the probate judge could still inquire further if the judge were not satisfied with something about the Will as presented.

   The Will affidavit components have been written to align with other self-proving statutes around the country, providing the opportunity for additional case law resources, and also allowing for admission of Wills with a complying affidavit executed in Vermont prior to the passage of this law, but that anticipated that self-proving Wills would one day be the law in our jurisdiction.

   One objection we've heard about the notary requirement in the affidavit, which is uniform where these laws apply, is that it takes away the relief that was given to small office practitioners when the witness requirement was reduced from three to two, but without that extra feature, the self-proof is an empty standard and opportunities for abuse would be more available.

2. **Witness as Beneficiary.** All beneficiaries who witness a Will will be subject to scrutiny but the benefit conferred will be voidable, not automatically void. Heirs at law receive no preferential treatment.

3. **Direct referral to Superior Court.** The new law allows for direct referral of a matter to Superior Court as a kind of accelerated appeal. It has to be agreed to by both parties and the referring probate judge and it must have the consent of the court to which it is referred. This is intended to avoid a tendency toward a sham trial at the probate level, conducted solely for the purpose of qualifying for appeal, because at least one party will appeal whatever the result at the probate level. Appeals from probate are not common and these restrictions will allow focus to be on those for which appeal is certain, and will save judicial resources.

4. **Effect of Divorce.** A fiduciary appointment of a person who was the spouse of the testator when the Will (or other instrument) was made is automatically nullified by a divorce order, unless overridden by the appointing party.

5. **Spousal Waiver.** Although prenuptial agreements have long been recognized and enforced, with some significant exceptions usually based on disclosure, fairness when made, opportunity for advice from independent counsel, and fairness when proposed for enforcement, agreements made during marriage have had uncertain status. A notable factor in enforceability is whether the agreement will leave a spouse with insufficient assets for self-support so that the State of Vermont might have to provide that support.

   Conditions for effective waiver:

   A written waiver of spousal rights is presumed to be valid unless the party contesting the waiver demonstrates that:

   (a) the waiver was not voluntary;
   (b) The waiver was unconscionable when signed or is unconscionable in its application due to a material change in circumstances that

arose subsequent to the execution of the instrument through no fault or no action of the contesting party;

(c) before signing the waiver, the waiving spouse was not provided fair and reasonable disclosure of the property and financial obligations of the decedent; or

(d) before signing the waiver, the waiving spouse did not have an opportunity for meaningful access to independent counsel.

The committee believes that protections comparable to those identified for enforceability of prenuptial agreements should be a sound basis for allowing agreements for property and support agreements made during marriage but not in anticipation of divorce (which are already permitted, usually limited to those made within a year of commencing a divorce proceeding). A similar proposal by a different group was rejected in 2009, primarily on the grounds that elder female spouses could be dominated by male spouses to sign these kinds of waivers under duress. We think this kind of agreement, or waiver, makes sense during marriage in part because it can provide greater protection than the current law, and because a waiver executed as part of a property and support agreement can protect the interests of both spouses based on financial and nonfinancial factors. We consider that such a waiver might be well suited to protecting a spouse who needs financial protection because of the excessive zeal of an entrepreneurial spouse. There are many other examples that can be described where a marriage can be held together because of the protections of an agreement made with a waiver.

6. **Omitted Descendant.** We recognize the incongruity of an omitted descendant taking an intestate share when that appears to be so far out of line with what a testator has provided in a Will for other descendants. We proposed no change because we could not find a compromise that was rationally based and elected to live with the very rare result that the finding of an omission by mistake would cause.

7. **Limitation on Claims.** To be more consistent with surrounding states and to avoid the long period of time when an estate, even if closed, can face new creditor claims, the law now requires claims not governed by the 4-month time bar, to be made within one year of the death of the decedent, reduced from the 3-year "outside" limit.

8. **Accounting format.** Although we recognize the individual judges may still limit what they will accept for modern accounting formats, the law now specifically authorizes the use of computerized fiduciary accounting and spreadsheet accounting that provide in understandable form the information needed for an accounting.

9. **Selling Assets.** The changes in the law seek to improve the coordination between necessary and beneficial sales of assets and remove the priority given to sales of personal property over sales of real property, attempting to recognize the changes in the composition of probate assets and the preference of the parties for sales of real estate from probate when beneficial but not necessary.

10. **Mortgages and Leases.** The law will now make it possible to obtain a license when only the general outline of terms is available, so that the time problem of getting a license and negotiating the terms of a lease or mortgage loan do not interfere with each other, in a chicken-egg kind of way.

11. **Reports of Sale.** These will not be separately required unless court-directed because they will be included in the next official accounting. There will be many times when a more prompt report will be important to the case and to one or more parties, so that a separate report of sale can be required.

12. **Funeral arrangements.** The law currently provides that proof of proper disposition of remains and payment can be a condition of a final decree. Not all courts require this. The law now makes sufficient the fiduciary's representation in the closing process that funeral arrangements were properly made and paid for.

13. **Partition.** The law currently provides that the probate judge determines a partition result; some judges would prefer the option of using the standard Title 12 approach of commissioners and the related process. The law now directs the Title 12 process but permits the parties and the probate judge to agree that the probate judge will determine the partition results. In many circumstances, this should provide for a much faster and less complicated process and result.

14. **Distributions.** We have sought to con-

solidate distribution provisions, to avoid the current law in which partial distributions are separated by several sections from final distributions. And we have sought to recognize the apparently unavoidable problem of fiduciaries making distributions of personal property without court order, allowing them for half the residue when debts, claims, costs of administration and taxes have been paid or provided for.

15. **Accounting avoidance.** We probably all have the experience, when trying to close an estate, of having to continually remind fiduciaries to provide and explain f financial information to support a final accounting. Regardless of written instructions (if read, never re-read) and regular admonishment, getting current information and getting explanations of old transactions can significantly raise the cost of administration and materially delay completion. This special procedure allows the interested parties, by written waiver of accounting after the estate has been open for six months (and there is or remains no real estate to be disposed of), to waive a final accounting. We recognize the risk that a fiduciary may hide things or fail to be transparent, and that trusting beneficiaries may be duped, but we have elected to advocate this result and let competent adults make their own decisions about whether they are satisfied with the estate administration without the need for an official, court-approved accounting.

WAIVER OF FINAL ACCOUNTING. If an estate has been open for at least six months and the remaining assets include no real estate, a final accounting may be waived if the executor or administrator files with the court:

(a) the fiduciary's verified representation that all claims and all other obligations of the estate have been satisfied;
(b) a schedule of remaining assets to be distributed;
(c) a schedule of proposed distribution;
(d) a waiver of a final accounting and consent to the proposed distribution by all interested parties; and
(e) a tax clearance from the Vermont Department of Taxes.

16. **Administration Truncation, Chapter 80.** We have borrowed, but will not repay, this approach from New Hampshire. When the sole beneficiary of an estate is also the sole fiduciary, there are no competing interests internal to the estate to be satisfied. The risk, as we perceived it, is to creditors. Creditors have certain times within which to pursue their claims and they can suffer if they sit on their rights. We have reduced the outside statute of limitations from 3 years to 1 year, consistent with states surrounding us, so that creditors will have the four-month time bar, notice period, or a one-year statute limiting the assertion of claims.

With this in mind, the sole beneficiary-sole fiduciary can request permission to ignore the various steps of administration, other than getting appointed, and seeking a discharge at the closing of the estate. The estate must not have real estate, must pay any taxes owed to the State of Vermont and the satisfaction of other creditors, and must assert proper disposal of the decedent's remains. With these limited duties, the estate becomes a check-in and check-out proceeding with limited supervision by the courts, except when called upon by creditors for relief.

The relevant statutory revisions are set forth below:

§1852

…(b) The court may grant the motion to waive further administration if it finds that:

(1) the moving party is the only estate beneficiary under the will of a decedent or the only heir of a decedent who died intestate;
(2) the moving party is the sole fiduciary of the estate; and
(3) the decedent owned no real property in the State of Vermont.

(c) If the court grants a motion to waive further administration filed under subsection (a) of this section, it shall issue an order waiving the duty to file an inventory, waiving or discharging the fiduciary bond, and dispensing with further filing with the court other than the final affidavit of administration.

§ 1853. ADMINISTRATION

(a) Administration of an estate under this chapter may be completed upon the court's approval of the executor's or administrator's affidavit of administration. Unless extended by the court, the affidavit shall be filed not less than six months or more than one year after the date of appointment of the executor or administrator.

(b)(1) The affidavit of administration shall state that to the best of the knowledge and belief of the executor or administrator:

(A) there are no outstanding expenses of administration, or unpaid or unsatisfied debts, obligations, or claims attributable to the decedent's estate; and
(B) no taxes are due to the State of Vermont, and tax clearance has been received from the Department of Taxes.

(b)(2) [Failure to file affidavit]

Robert Pratt, Esq. has been admitted and actively practicing in Vermont since 1975; he has been the chair or co-chair of VBA Probate and Trust Law section for more than ten years.

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[1] Probate Judges Balivet, Ertel, Fowler, Scanlon and Smith; Attorneys Orland Campbell, Steve Magowan, Sarah Tischler, Aaron Goldberg, Steven Schindler, Jake Wheeler, Roger Bloomfield, Joseph Cook, Glenn Jarrett, Jonathan Secrest, Chris Pingert, Denise Clark, Jesse Bugbee; Trust officers: Kay Mosenthal (also an attorney), Amy Thompson, and Deb Partlow.

by Brian Porto, Esq.

WRITE ON

The Rhetorical Elegance of Robert Jackson

Introduction

Robert H. Jackson, the seventh of Franklin Roosevelt's eight appointees to the United States Supreme Court,[1] served as Associate Justice from 1941 until his premature death, from a heart attack, in 1954, at age sixty-two.[2] His death prompted the following tribute at a meeting of the American Society of International Law:

> If the wit and clarity so characteristic of Justice Holmes
> [are] to be found in the writings of any of his successors
> on the Supreme Court bench, [they are] in those of
> Robert H. Jackson.[3]

Two close observers of Jackson's writing, fellow Justice Sherman Minton and Professor Philip Kurland, echoed the international lawyers' praise for his talent as a writer. Minton said of Jackson,

> He had a keen analytical mind and courage of his
> convictions and a facility for expression unsurpassed
> by any man who ever sat on the Court.[4]

To Kurland, Jackson's opinions represented "probably the best writing that a Justice of the Supreme Court has ever produced."[5]

Despite such praise, Jackson long received scant attention from legal scholars, political scientists, and historians, perhaps because his Court tenure was relatively short or because his lack of a hard-and-fast ideology deprived him of devoted disciples to burnish his legacy.[6] But, over time, the legacy burnished itself and caught scholars' attention, due at least in part to the power of his prose.[7] Jackson's powerful prose – especially as it reflects the creative use of rhetorical devices – is the focus of this article. He deserves to be heralded for the quality of his writing alone, although his compelling biography and his constitutional philosophy merit discussion too.

From Country Lawyer to America's Lawyer

Jackson's path to the Court surely ranks as among the most unlikely and unusual in that tribunal's storied history. Jackson began life in his family's farmhouse in Spring Lake, Pennsylvania. When he was five, the family left the farm and moved north across the state line to Frewsburg, New York, where Jackson's father would later run a hotel and a livery stable.[8] At Frewsburg High School, Jackson exhibited early signs of the advocacy skills for which he would later become renowned. Judge Harley N. Crosby of Falconer, New York saw the young Jackson's penchant for oral advocacy up close, which he recalled years later.

> As a (then) young lawyer, I was called to Frewsburg, [Jackson's]
> home town, to sit on a board of judges in a high school debate
> between Frewsburg and Sinclairville. The debate was going very
> well indeed for Sinclairville until the last speaker from Frewsburg
> burst into song. He was a mere stripling of a boy, wore knee
> pants, I recall, and was not more than fourteen years old. Holy
> Moses! You should have heard that boy debate. I was astounded.[9]

After graduating from Frewsburg High School in 1910, Jackson, who could not afford to attend college, wisely decided to take a one-year graduate course at the high school in the small nearby city of Jamestown, where he came under the tutelage of English teacher Mary Willard and American History teacher (and Principal) Milton Fletcher, who also tutored Jackson privately in economics.[10] Mary Willard was especially influential because Jackson spent many evenings with her and her sister in their home, listening to opera and classical music and reading Shakespeare, George Bernard Shaw, and other writers.[11] Both she and Fletcher encouraged him to study law, which one could then do through an apprenticeship and without having obtained an undergraduate degree.

Fortunately for Jackson, Frank Mott of Jamestown, a cousin of Jackson's mother, invited him to become an apprentice in Mott's law office after his postgraduate year at Jamestown High School.[12] Although he helped Mott prepare for trials and joined Mott in after-hours political discussions, Jackson learned the law primarily from Mott's partner, Benjamin Dean, a scholarly sort who directed Jackson's reading of Blackstone, Kent, and other authorities, discussed them at length with the young apprentice, and taught him how to research the law too.[13]

After a year in Mott's office, Jackson borrowed money from his mother's brother to attend Albany Law School for a year because his father, who wanted him to study medicine instead, refused to pay for law school.[14] The law school gave Jackson one year of credit for his apprenticeship, so after the year at Albany, he had completed the then-two-year program.[15] But because he was only twenty years old and ineligible to take the New York Bar Exam, the school granted him only a diploma of graduation, not a law degree, in 1912.[16] Jackson then returned to Frank Mott's law office for another year as an apprentice before passing the bar exam in 1913 and being admitted to practice at the age of twenty-one.[17]

Despite his youth and inexperience, Jackson would soon have a law practice of his own, as Mott departed Jamestown for a new job in Albany in the summer of 1913, leaving his practice to Jackson.[18] The newly minted attorney practiced alone for awhile, then with several Jamestown firms of which he was a named partner, until 1934, when he moved to Washington, D.C. to work for the federal government.[19]

Initially, Jackson's practice was strictly small-time, including trials before nonlawyer Justices of the Peace in unlikely venues, including a school, a church, and the dance hall of a Masonic temple, wherever space was available.[20] On one occasion, Jackson later recalled, the JP's house lacked room for a trial, so "we put up some oil lanterns, put some boards across potato crates for people to sit on, and we tried the case in the barn."[21] Jackson's practice did not remain small time, though. Indeed, it grew along with the industrialization of upstate New York and eventually featured an interesting mix of clients, including the Jamestown Telephone Corporation, the Jamestown Street Railway, the Central Labor Council, and the Bank of Jamestown.[22] As a result, Jackson amassed a considerable fortune that enabled him to keep a thirty-foot boat on Lake Chautauqua and to take his family on vacations to Cuba, Florida, California, and Arizona during the Great Depression.[23]

Just as Jackson's law practice and personal wealth grew, so did his public visibility. His four-year term (1928-32) as president of the Federation of Bar Associations of Western New York brought him statewide prominence, which, in 1933, prompted Democratic National Committee Chair James Farley, a New Yorker, to invite Jackson, a lifelong Democrat from a largely Republican region,

to tour New York state with Farley to promote the election of a Democratic State Assembly the following year.[24] Afterwards, Farley asked Jackson if he would take a job in the federal government; initially, Jackson declined the offer, but in 1934, he accepted a position as counsel to the Bureau of Internal Revenue.[25] The rest of Jackson's service in the federal government is the stuff of legend; within the next seven years, he would become a close friend of FDR, Assistant Attorney General, Solicitor General, Attorney General, and, in 1941, a Supreme Court Justice.[26] In 1945 President Truman would tap Jackson to be the chief American prosecutor at the Nazi War Crimes Trials in Nuremberg, Germany, the first such prosecutions in history.[27]

Robert Jackson became a close friend of Franklin Roosevelt by making himself indispensible to the Administration. In his first Washington job, he salvaged the Treasury Department's botched prosecution of its former Secretary, Andrew Mellon, by winning a civil judgment, resulting in an $800,000 tax recovery for the government and Mellon's promise to support the creation of and donate paintings to a new National Gallery of Art.[28] As Assistant Attorney General, Jackson vigorously and deftly defended FDR's ill-fated plan to remake the conservative Hughes Court by appointing a new Justice for every sitting Justice over age seventy.[29] As Solicitor General, he won thirty-eight of the forty-four cases he argued before the Supreme Court.[30] And as Attorney General, he drafted a legal opinion that enabled the United States to provide warships to Great Britain in exchange for access to British naval bases in the Atlantic and the Caribbean, an arrangement that benefitted both countries during World War II.[31] FDR rewarded Jackson for these important contributions by nominating him to the Supreme Court, where he took his seat as Associate Justice in July 1941, at age forty-nine.[32]

The Jurisprudential Pragmatist

In Jackson's Supreme Court chambers hung a framed 1919 Life magazine photo of a man working alone at his desk; its caption read: "He travels fastest who travels alone," quoting "The Winners" by British poet Rudyard Kipling.[33] Jackson lived by that motto. The late Chief Justice William Rehnquist, who clerked for Jackson in 1952-53, remembered his former boss years later as "maintaining throughout his life a sturdy independence of view [that] took nothing on someone else's say-so."[34]

In light of his individualism, it is not surprising that Jackson developed his own constitutional philosophy during his Supreme Court years. His tendency toward judicial restraint situated him closer to conservatives Felix Frankfurter and Stanley Reed than to liberals Hugo Black, William Douglas, Frank Murphy, and Wiley Rutledge, but he did not share Frankfurter's reliance on democratic majorities to rectify all social ills. For Jackson, the Court played a key role in overseeing and occasionally adjusting the constitutional balance between majority rule and minority rights.[35] Put another way, sometimes the Court had to decide wrenching controversies, such as the school desegregation cases it heard during Jackson's last full term.[36]

Jackson also rejected, though, the civil liberties absolutism of Black and Douglas. Professor Louis Jaffe observed that Jackson believed the Court should hesitate to interfere with state action under the Fourteenth Amendment, such as speech restrictions and police investigative procedures.[37] Jaffe added that Jackson's experience at the Nuremberg trials likely left him fearful that if class hatred, religious and racial divisions, and rampant violence spread because of unrestricted speech and unduly restricted police procedures, the United States would likely lose the "social integrity" that held it together.[38]

Spurning what he viewed as extreme positions, Jackson espoused a constitutional pragmatism under which he viewed both sides of an issue, weighed them against each other, and chose what for him was the practical solution to the case, thereby favoring one point of view without completely dismissing the other.[39] This approach led Jackson to write for the majority in *West Virginia State Board of Education v. Barnette*, in which the Court affirmed an injunction that prohibited public school authorities from requiring children to salute the flag in spite of their religious objections.[40] To the state's argument that the flag salute promoted national unity, which in turn fostered national security, Jackson memorably replied:

> If there is any fixed star in our constitutional constellation,
> it is that no official, high or petty, can prescribe what shall
> be orthodox in politics, nationalism, religion, or other
> matt-ers of opinion or force citizens to confess by word or
> act their faith therein. If there are any circumstances
> which permit an exception, they do not now occur to us.[41]

But Jackson's pragmatism also led him to dissent in *Terminiello v. City of Chicago*, in which the majority reversed the conviction of a speaker who had been found guilty of disorderly conduct for making an inflammatory speech that precipitated a "breach of the peace" inside and outside the hall where he spoke.[42] In another memorable passage, he wrote:

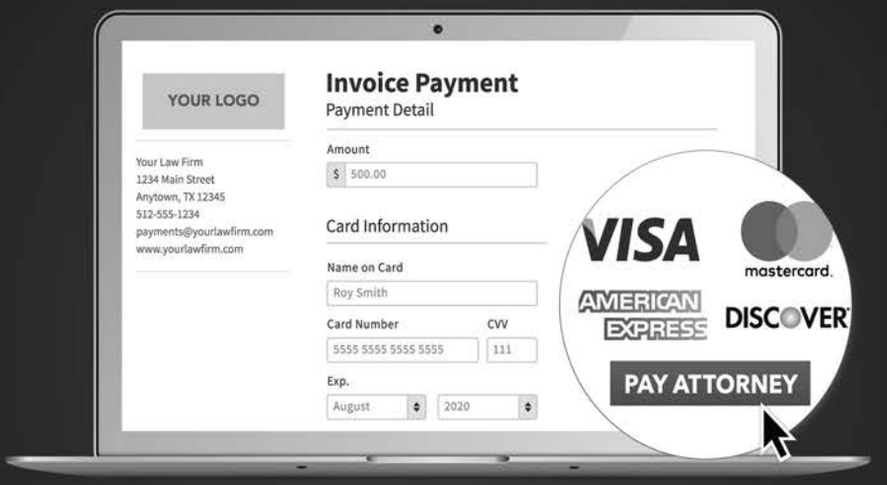
> This Court has gone far toward accepting the doctrine that
> civil liberty means the removal of all restraints from these
> crowds and that all local attempts to maintain order are
> impairments of the liberty of the citizen. The choice is
> not between order and liberty. It is between liberty with
> order and anarchy without either. There is danger that,
> if the Court does not temper its doctrinaire logic with a
> little practical wisdom, it will convert the constitutional
> Bill of Rights into a suicide pact.[43]

Both *Barnette and Terminiello* underscore Robert Jackson's uncanny talent for expressing himself in vivid language easily recalled years after first hearing or reading it. Thus, it is no wonder that William Douglas, who often disagreed with Jackson, described him as an "essayist whom one was always glad to have on one's side."[44]

Jackson the Rhetorician

A key to the vividness of Jackson's prose is his use of rhetorical devices, which are sprinkled throughout his opinions. Consider, for example, the previously quoted language from his majority opinion in *Barnette*. The phrase "If there is any fixed star in our constitutional constellation" is notable for its use of *metaphor* and *alliteration*. Metaphor is an implied comparison between two things (e.g., a constellation and the Constitution) of unlike nature that nonetheless have something in common.[45] Alliteration is the repetition of initial or medial consonants in two or more adjacent words, such as "constitutional constellation."[46]

The remainder of the opening sentence in the above passage is also easy to remember because of the rhetorical skill embedded in it. The proposition that no official may "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein" rolls off the tongue thanks to its use of *parallelism*. That device refers to a similarity of structure in a pair or series of related words, phrases, or clauses.[47] In this instance, the parallelism lies in a series of nouns – politics, nationalism, religion, and other matters of opinion – and in a pairing of verbs – prescribe and force – that lend the sentence structural continuity, making it easy to understand. The final sentence in the passage then appeals to the reader's common sense, noting that if any exceptions to the prior statement exist, Jackson is unaware of them. This sentence sounds as if neighbors could have spoken it across a



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The above language from Jackson's *Terminiello* dissent also employs rhetorical devices. In writing that "[t]he choice is not between order and liberty," Jackson uses *antithesis,* which is the juxtaposition of contrasting ideas, often in parallel structure.[48] In adding that "[i]t is between liberty with order and anarchy without either," he uses antithesis again, plus *isocolon*, which occurs when the parallel elements are similar not only in structure, but also in length (e.g., "liberty with order" and "anarchy without either").[49] Finally, the reference to limitless free speech converting the Bill of Rights into a "suicide pact" illustrates metaphor and *hyperbole*; the latter is the use of exaggerated terms for emphasis or heightened effect.[50]

Jackson's best-known opinion may be his concurrence in *Youngstown Sheet and Tube Co. v. Sawyer,* in which the Court held that President Truman lacked authority to seize control of this country's steel mills to counter a threatened workers' strike during the Korean War.[51] Although it has endured for its thoughtful assessment of the limits of presidential power, it also reflects Jackson's rhetorical skill.

Early on, Jackson challenges the reasoning in Hugo Black's majority opinion that Truman could not seize the steel mills because no constitutional language authorized him to do so. Never an adherent of Black's originalism, which sought to identify the Framers' intent from the meaning of their words when written, Jackson wrote:

> A judge, like an executive officer, may be surprised
> at the poverty of really useful and unambiguous authority
> applicable to concrete problems of executive power
> as they actually present themselves. Just what our
> forefathers did envision, or would have envisioned
> had they foreseen modern conditions, must be divined
> from materials almost as enigmatic as the dreams
> Joseph was called upon to interpret for Pharoah.[52]

More than just a pithy putdown of originalism, this passage is a wonderful example of a *simile* (equating constitutional materials to Pharoah's dreams) combined with a literary (in this case Biblical) allusion. The simile is an explicit comparison, typically using like or as, between two things of unlike nature that nonetheless have something in common.[53]

Later in his opinion, Jackson again exhibits rhetorical skill, this time in reply to the Solicitor General's argument that the President's Commander-in-Chief role authorized his seizure of the steel mills. Jackson wrote:

> The purpose of lodging dual titles in one man was to insure
> that the civilian would control the military, not to enable
> the military to subordinate the presidential office. No
> penance would ever expiate the sin against free government
> of holding that a President can escape control of executive
> powers by law through assuming his military role. What
> the power of command may include I do not try to envision,
> but I think it is not a military prerogative, without support
> of law, to seize persons or property because they are
> important or even essential for the military and naval
> establishment.[54]

"No penance would ever expiate the sin" is, of course, metaphorical; it highlights Jackson's point that to expand presidential power excessively by relying on the Commander-in-Chief authority is to strike at the heart of democratic government. Employing a literary device of one's own – the rhetorical question – one might reasonably ask whether the *Youngstown* concurrence would have endured so well if it read: "Nobody would ever forgive this Court for holding that the President can exercise unlimited executive power through his role as Commander-in-Chief."

Conclusion

Robert Jackson's prose lives on because of its power to startle, inspire, amuse, and persuade. A key component of his exquisite prose is the effective use of rhetorical devices. Lawyers who wish to enhance the persuasive power of their own prose would do well to read Jackson's opinions and learn from the master.

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2 EUGENE C. GERHART, ROBERT H. JACKSON: COUNTRY LAWYER, SUPREME COURT JUSTICE, AMERICAN ADVOCATE iii (2003).
3 Proceedings of the American Society of International Law, April 28-30, 1955, p. 118.
4 GERHART, ROBERT H. JACKSON, at 302.
5 DAVID M. O'BRIEN, JUSTICE ROBERT H. JACKSON'S UNPUBLISHED OPINION IN BROWN V. BOARD: CONFLICT, COMPROMISE, AND CONSTITUTIONAL INTERPRETATION 15 (2017).
6 NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 413 (2010).
7 See, e.g., Bryan A. Garner, Celebrating the Powerful Eloquence of Justice Robert Jackson, American Bar Association Journal, October 2016, http://www.abajournal.com/magazine/article/powerful eloquence justice r… (last visited May 19, 2018); Laura Krugman Ray, Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions, 59 Wash. & Lee L. Rev. 193 (2002).
8 GERHART, ROBERT H. JACKSON, 30.
9 Id.
10 John Q. Barrett, Albany in the Life Trajectory of Robert H. Jackson, 68 Albany L. Rev. 513, 517 (2005).
11 Id.
12 Id. at 518.
13 Id. at 518-19.
14 Id. at 520.
15 Id. at 523.
16 Id. at 529. Albany Law School finally awarded Jackson a law degree during its June 5, 1941 graduation ceremony, at which he was the featured speaker. Id. at 535.
17 GERHART, ROBERT H. JACKSON, 35.
18 Id. at 35-36.
19 Id. at 36-37.
20 FELDMAN, SCORPIONS, 45.
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25 FELDMAN, SCORPIONS, 49.
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28 FELDMAN, SCORPIONS, 101.
29 Id. at 111-12.
30 Id. at 129.
31 Id. at 199-200.
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33 Id. at 48; see also O'BRIEN, JUSTICE ROBERT JACKSON'S UNPUBLISHED OPINION IN BROWN V. BOARD, 7.
34 William H. Rehnquist, Robert H. Jackson: A Perspective Twenty-five Years Later," 44 Albany L. Rev. 533, 536 (1980).
35 O'BRIEN, JUSTICE ROBERT H. JACKSON'S UNPUBLISHED OPINION IN BROWN V. BOARD, 24.
36 Id.
37 Jaffe, Mr. Justice Jackson, 68 Harv. L. Rev. at 981.
38 Id. at 997.
39 Laura Krugman Ray, Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions, 59 Wash. & Lee L. Rev. 193, 211 (2002).
40 319 U.S. 624 (1943).
41 Id. at 642.
42 331 U.S. 1 (1949).
43 Id. at 37.
44 GERHART, ROBERT H. JACKSON, iii-iv.
45 EDWARD P.J. CORBETT AND ROBERT J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT (4th ed. 1999), 396.
46 Id. at 388.
47 Id. at 381.
48 Id. at 382-83.
49 Id. at 382.
50 Id. at 403.
51 343 U.S. 579 (1952).
52 Id. at 634.
53 CORBETT AND CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT (4th ed), 396.
54 343 U.S. at 646.

by David Boyd, Esq.

Appellate v. Trial Advocacy: Tips & Traps

If you are like most lawyers in Vermont handling an appeal, appellate work is just one of many things that you do, but in venues that have a specialized appellate bar, studies show that experience matters. For example, at the United States Supreme Court level, experienced counsel are more likely to draft successful certiorari petitions and to succeed on the merits when they do.[1] So, what is a busy practitioner supposed to do? The suggestions in this article come from highly experienced jurists, the Honorable Geoffrey Crawford and Justices Marilyn Skoglund and Harold Eaton, who shared their wisdom during a panel session at the 2016 Vermont Bar Association annual meeting.[2]

First, as Justices Eaton and Skoglund emphasized, know your audience. Before you start writing, learn what arguments and approaches have been effective, and with whom, and take that into account when drafting your brief. Most jurists have been on the bench for long enough to have well-established bodies of decisions. As Justice Eaton observed, knowing your audience is key at both the trial and the appellate level.

Second, lead with your best or most important arguments. Which arguments are likely to succeed at the trial and appellate levels can be very different and appellate judges have a strong preference for briefs organized with their most persuasive arguments first.[3] Justice Eaton's first tip for inexperienced appellate counsel would be to know the standard of review. The standard of review can make arguments that would be strong at the trial level fail on appeal. Becoming familiar with the applicable standard and knowing the difference the standards can play on appeal should be a significant consideration when deciding what issues to raise.

For example, in Justice Skoglund's experience, one of the more common errors made by trial counsel handling an appeal is treating the Vermont Supreme Court like a jury and arguing facts. Fact findings from below will not be reversed "unless they are clearly erroneous, meaning there is no credible evidence in the record to support them."[4] This high standard of review must be taken into account and will often necessitate emphasizing alternative arguments.

Whether or not a potential argument was properly raised below, and hence preserved, is another critical consideration. More generally, as Justice Eaton noted, counsel who tried a case can have blinders on when pursuing an appeal and need to be able to step back from their trial strategy. One tip to help with this problem is to have someone who was not involved in the trial review your outline, or brief, to help identify any gaps that need attention or to spot arguments that were strong at the trial level, but are not on appeal.

Third, as Judge Crawford and Justice Skoglund explained, write your brief in simple, plain English and support it with scrupulously accurate pin sites. Appellate judges in both federal and state courts strongly prefer briefs that use plain English and avoid long sentences and acronyms.[5] Appellate judges also widely agree that citations "should almost always include a specific page reference."[6] As Justice Skoglund observed, lawyers who stretch or mischaracterize citations can lose their audience in their current case and also become known for doing so in future cases.

Fourth, all of the panelists agreed that snarkiness is a credibility killer. As Justice Skoglund put it, being snarky makes a terrible first impression. Appellate arguments should focus on the case – not the character or conduct of opposing counsel. Filings that contain personal attacks are "salt[ed] . . . with plenty of distractions that will divert attention from the main issue."[7]

Fifth, when it comes to oral argument, when you are asked a question, answer it. Whenever possible, answer questions clearly – yes or no – and then explain as necessary. Do not fight or duck hypotheticals. This requires advocates to know their case cold. As Justice Skoglund noted, the Vermont Supreme Court does not preconference before oral arguments. The Justices are watching each other when questions are asked and are expecting responsiveness from each answer.

More importantly, the jurists asking the questions will be deciding the case. What they view as important matters more than what the advocates view as important. Oral argument is the only time in an appeal when an advocate can learn from the decision-makers what issues they view as close questions and have the opportunity to respond in real-time. When preparing for oral argument, learn the case cold, and triage potential arguments by importance. An advocate with a stackable argument outline that can last anywhere from three to ten minutes can hit all of the points they view as critical while also fully answering every question they are asked.

Finally, when handling an appeal before the Vermont Supreme Court that involves a question of first impression, as Judge Crawford observed, advocates should focus on secondary authority like the ALI, in addition to cases decided in other jurisdictions. Secondary authorities like the Restatement can be persuasive both because they reflect the common-law in other jurisdictions and because they take a thoughtful approach to attempting to select the best rule when courts have reached conflicting results.

For advocates interested in taking a deeper dive, there is a wealth of helpful literature available. In preparing to moderate the panel, I found the following sources helpful: David Lewis, *What's the Difference? Comparing the Advocacy Preferences of State and Federal Appellate Judges*, 7 J. App. Prac. & Process 335, 350, 351 (2005); Antonin Scalia & Brian Garner, Making Your Case (2008); Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 Geo. 66 L.J. 1487, 1526, 1545 (2008); and Alex Kozinski, The Wrong Stuff, 1992 BYU L. Rev. 325 (1992).

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1 *See* Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 Geo. 66 L.J. 1487, 1526, 1545 (2008).

2 I moderated the panel, which was recorded and can be viewed in its entirety in the CLE library on the VBA website (*See Appellate v. Trial Advocacy: Tips & Traps (10-14-16)).*

3 *See* David Lewis, *What's the Difference? Comparing the Advocacy Preferences of State and Federal Appellate Judges*, 7 J. App. Prac. & Process 335, 346 (2005).

4 *Lawson v. Brown's Home Day Care Ctr.*, 2004 VT 61 ¶ 18.

5 *See* Lewis, 7 J. App. Prac. & Process at 351.

6 *Id.* at 356.

7 Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. Rev. 325, 328 (1992).

by Mary Ashcroft, Esq. Legal Access Coordinator for the VBA

Four Years of Success for the Environmental Court Free Legal Clinic

Four years ago, the Environmental Division of Vermont Superior Court moved from Barre to its new offices at the Costello Court Building on Cherry Street in Burlington. Shortly after the move, a new legal advice clinic was founded at the Court to provide pro se litigants with guidance through the court process. By all accounts, the clinic has been a success.

On the second Thursday of each month, people attempting to represent themselves in matters before the Environmental Court visit the legal advice clinic. Not all *pro ses* take advantage of this Burlington clinic, or a branch in South Royalton held on the third Wednesday of each month. The clinic is voluntary: litigants are not required to attend—although most are glad they did—and the consulting attorneys volunteer their time.

Usually between two to four clients attend each afternoon clinic. Regular pro bono attorneys such as Salvatore Spinosa and Nicole Killoran spend an hour or more with each *pro se* litigant to review the case, spot issues, advise on next steps and suggest arguments to make. Sometimes attorneys Hans Huessy and Kate Ellerman volunteer their advice as well.

A key player in promoting the use of the clinic is the court's docket clerk Diane Chamberlain. "Most of the people who call in aren't aware that there is a free legal clinic," she said. "I offer the legal clinic as soon as I can when a *pro se* litigant calls in to ask questions."

Chamberlain confirmed, "I don't get as many calls or questions from litigants once they have talked with Sal or Nicole." While the docket clerk has become adept at answering questions without giving legal advice—"a fine art," she acknowledged—that burden is lighter because *pro ses* now have access to the legal clinic.

Most of the litigants who appear at court are involved in municipal matters—Judge Thomas Walsh estimates that about 2/3 of the cases are appeals from municipal panel determinations. They include applicants who were denied zoning or subdivision permits at the local level, or neighbors who are unhappy with permits issued or conditions that were not to their liking. One recent appeal concerned a fence.

Act 250 cases are also appealed to Environmental Court, but they are fewer and often the interested parties come to observe, not to actively participate. The remaining scattering of cases are ANR enforcement actions.

The Judges' View

Judge Thomas Walsh considers the clinic a success. From the bench he has observed that the litigants seem better informed of the process and of how to make their case. "For me, it's a time savings—I spend less time with them explaining the process."

Pro ses benefit most from the clinic when they sign up as early as possible in the process—preferably even before the statement of questions is due. Judge Walsh confirmed that the clinic attorneys are helpful in framing the questions, reviewing the timelines and especially explaining the process.

He also has seen that self-represented litigants are more capable of presenting their case once they have visited a lawyer at the clinic. "There are generally no unprepared people or people uninformed about the process," he said. "In the rare situation someone is in the court pre-trial, with no understanding of the process, I can refer them to the clinic and fulfill the court's obligation to provide a full and fair hearing."

Judge Thomas Durkin concurs with his colleague's assessment. "I think the environmental clinic is working in a fantastic way," he declared. "It provides a great service to self-represented litigants, especially those who have never been to our court--or to any court."

The clinic attorneys not only educate, but also calm and reassure litigants. Judge Durkin has noticed. "Self-represented litigants are already frustrated with the process because they don't understand it. If those individuals haven't spoken with Sal when I see them at the first status conference, I encourage them to do so. Later at the pre-trial conference, their attitude and approach to the case is so much different. They know they have a job to do, that it's not just up to the court. They must present their evidence if they want the court to rule in their favor."

Local land use cases can be particularly frustrating. The concept of fair hearing and notice is very important, but some local officials don't understand that. Nicole Killoran does. Judge Durkin appreciates her work advising pro se litigants on these matters. "She has handled some of these cases and found resolution," he said.

The Volunteer Attorneys' View

Sal Spinosa enjoys his time as volunteer attorney at the environmental court clinic, and finds it to be a rewarding experience. When he was a government attorney, he didn't think that pro bono work was for him. But after retiring and starting the clinic, he sees things differently. "The pro bono clinic work is something that is different and something that is really valuable in service to *pro se* litigants."

Spinosa should know. He has visited with many clients at the clinic and has invited a number to return for more work on their environmental cases. He has connected them with outside counsel, with enforcement attorneys, and he has even called some of them after hours to give additional advice or to pass on an additional resource.

Attorney Nicole Killoran started helping at the clinic when she went to work at Vermont Law School and gave up her practice—then she realized how much she missed environmental practice. But working with pro se litigants at the Environmental Law Clinic in Burlington, and at its fledgling counterpart in South Royalton, helps her stay current with evolving environmental issues.

Attorney Killoran has seen a good range of litigants at the clinics. "It's just fascinating," she enthused. "I get to see everyone from a salt-of-the-earth farmer who just wants to dig a ditch or put a shed up on his land, to someone who has had a violation appealed all the way up to the Vermont Supreme Court and ended up at the clinic."

"You try to problem-solve with them," Attorney Killoran explained, "but your advice depends on their level of education. Some have no clue; they may not even understand whether they are in front of a court or not. Others can competently represent themselves up to trial."

"I love doing it," she says of her clinic work with these *pro se* litigants. "It's a great way to serve the underserved."

The *Pro Se* Litigants' View

At the conclusion of each clinic session, *pro se* litigants who have consulted with a volunteer attorney are asked to fill out an evaluation form. The form asks whether the appointment length was appropriate, whether the litigants have a better understanding of the court process, of what the court can and can't do, and of what they need to do to prepare their case. They are

also asked whether they understand about the mediation process and whether they now understand the legal issues in their case. They are asked if they intend to hire an attorney.

For most, hiring an attorney was not within their budget. The clinic was the only opportunity they had to obtain legal help with their case. For others, their time at the clinic had made them think that perhaps they should have counsel.

Litigants are asked to rate the program overall. Invariably, the questionnaires returned rate the clinic experience as very positive. One of the comments confirmed what the judges and attorneys had hoped: "I gained some insight as to how this all works. Thank you."

Clinic Expansion to South Royalton

When the Environmental Court Legal Advice Clinic first started in Burlington, some litigants could not travel to consult with an attorney on their cases. Attorney Nicole Killoran, a professor at Vermont Law School, found a solution: start a branch clinic at South Royalton. She discussed the idea with Sal Spinosa and Judge Durkin, and they agreed.

The Environmental Court Legal Advice Clinic in South Royalton is open for client consultations on the third Wednesday of each month. "It's not that big of a thing yet," Killoran noted, but she hopes that with increased publicity for its work and convenience more litigants will attend.

The work done at both clinics is the same. An attorney volunteer—usually Killoran or Spinoza—meets with a *pro se* litigant one-on-one for an hour. That's a longer appointment than is offered at most legal clinic, but Killoran feels that it's necessary and sometimes not enough. She points out that the lawyer has to get the history of the project and the neighborhood, decipher the paperwork involved, determine where the litigants are in the process, and identify the issues. And that's just the beginning, before any advice can be given.

Pro Bono Opportunities

Whether at the Environmental Court Legal Clinic in Burlington or in South Royalton, volunteer attorneys are needed.

Judge Walsh encourages participation by those attorneys who have working knowledge of the environmental court process and the main rules of environmental court procedure, especially those rules involving pretrial issues, evidence and the appeal rule.

Judge Durkin urges attorneys interested in helping at the clinics to step forward. "This is a great opportunity for younger attorneys who think they might enjoy this area of the law. They can get a feel for what goes on, as well as help the people in need."

"We are always looking for more volunteers," Durkin said.

Nicole Killoran hopes other attorneys will volunteer at the legal advice clinics. She thinks the pro bono work would be ideal for an attorney on emeritus licensing status. "I wouldn't give it up for the world," said Killoran of her work at the clinic. But she would be willing to share it. "It is incredibly rewarding and definitely worthwhile for other members of the bar who may want to volunteer."

Sal Spinosa would like to see other attorneys volunteer to talk with *pro se* parties at the clinics. "This is not an exclusive club," he observed. "The pro bono clinic work is something that is different and something that is really valuable in service to *pro se* litigants." Sal invites prospective volunteer attorneys to give him a call, and sit in with him on an afternoon session or two. "It's a way that attorneys can do their pro bono time."

For more information about volunteering at either environmental court legal clinic, contact the Environmental Court staff in Burlington at (802) 951-1740, or contact Sal Spinosa or Nicole Killoran.

by Teri Corsones, Esq.

Spotlight on Vermont Legal Aid

Since 1986, the Vermont Bar Foundation (VBF) has overseen the distribution of funds to local and statewide projects that provide either civil legal services to disadvantaged Vermonters, or education to the general public about the courts and legal matters. VBF funds are primarily generated by the interest earned on lawyers' trust accounts (IOLTA). In the most recent grant cycle, the VBF approved nineteen different grants totaling $943,381.00. In appreciation for the fact that the bulk of VBF funds is made possible through IOLTA's, the VBA highlights one of the grantees in each Vermont Bar Journal for our members to read about their great work. This edition's "spotlight grantee" is Vermont Legal Aid.

Vermont Legal Aid, Inc. (VLA) was incorporated in 1968, after the VBA voted to create an organization designed to provide civil legal services to low-income Vermonters. Starting with eight attorneys in one-attorney offices located throughout Vermont, VLA has grown to 34 attorneys in five offices located in Burlington, Montpelier, Rutland, Springfield and St. Johnsbury. VLA helps over 21,000 Vermonters each year who are living in poverty, have a disability, or are over age 60. They also serve anyone who is discriminated against in housing and help anyone one in the state, regardless of income level, who has a problem with health insurance, access to health care, or concerns about the quality of care. VLA does not provide legal services for criminal cases or for traffic violations.

Eric Avildsen, who has been Executive Director of VLA since 1988, is very grateful for the funding that VLA has received from the Vermont Bar Foundation since its inception in 1983. Eric states: "The Vermont Bar Foundation is our only funding source not directly tied to state or federal funding and thus has become an ever more critical [source of] support. VLA is able to use a relatively small amount of VBF funds as a required match on a number of state and federal grants, thereby supporting services to an even larger number of low-income and disadvantaged litigants."

The specific VLA projects currently utilizing VBF funds include the Poverty Law Project (75%), the Senior Citizens Law Project (10%) and the Disability Law Project (10%). The different projects primarily assist low-income Vermonters with "necessities of life" issues, including shelter, safety, income stability and individual rights. Below are some examples of how VBF funding has recently been used to assist individuals in the different categories of cases. In addition, VLA sub grants approximately 5% of its VBF Funding to its partner agency, the Legal Services Law Line. Law Line operates a hotline, staffed by attorneys, which serves as the intake and screening portal for VLA services.

Housing constitutes the single largest area of requests for help by VLA clients through the Poverty Law Project. VLA successfully assisted a pregnant tenant and her two children who were sued for eviction after complaining about a bed bug infestation. The landlord had testified under oath that there was no infestation, and that there had never been an infestation problem. VLA's investigation into the case revealed that the local health officer had ordered the building to be treated by a licensed exterminator, and that the landlord recently had sought to have his property taxes reduced because of infestation issues. The landlord ultimately agreed to pay damages and attorney's fees, and stipulated to a dismissal of the eviction.

An 83-year-old living woman living alone in her family home in rural Vermont came to VLA after being assaulted by her adult son. The attack came in the midst of a long-running dispute between them about ownership and control over an adjoining parcel that the woman had deeded to her son. After a contested hearing, VLA succeeded in getting a restraining order keeping the son away from her.

The Disability Law Project represents children with disabilities in a range of proceedings, including access to special education and governmental services. A young man with developmental disabilities was told that he would be required to graduate even though he had not yet met his agreed-upon Individual Education Plan (IEP) goals. VLA developed the evidence and convinced the school that he was still in need of special education services and the school agreed not to graduate the student. In addition, VLA persuaded the school to take several additional steps to help the student meet his IEP goals and maximize his development while in high school. These included transitional Vocational Rehabilitation services, an evaluation for assistive technology needs, extended school year services through the summer, and exploring Think College as part of the student's IEP for the next semester.

The Senior Citizens Law Project (SCLP) represents seniors on legal issues like public housing, health care, government benefits and guardianship. A nursing home filed a lawsuit against an elderly woman seeking appointment as her Medicaid representative, in an apparent effort to take control of her finances. Although she was residing in the nursing home temporarily, she intended to return to her home. When the case was referred to Legal Aid, it moved to dismiss the case, citing the lack of a legal basis for the case. The nursing home amended the complaint, seeking an immediate injunction for her to turn over her pension directly to the nursing home. VLA moved to dismiss the second claim on the same basis. The Court dismissed both claims.

Given the high demand by low-income persons in Vermont for legal services, VLA is not able to provide direct help to everyone who is eligible for VLA services. However, everyone who calls will get to speak with an attorney who will provide advice or a referral. In addition, VLA and Law Line provide invaluable screening and case input assistance to the many county bar association "low-bono" projects that the VBF also funds. Callers with problems handled by the low-bono projects are screened for financial eligibility and referred to the appropriate County's project. This efficient and effective collaboration allows VLA and the counties to avoid duplication and confusion, ensuring that more low-income Vermonters in need of legal services are able receive the legal assistance they need.

by Mary Ashcroft, Esq. Legal Access Coordinator for the VBA

Pro Bono Profile: Pauline Law

Pauline Law, Associate with the firm of Gravel and Shea in Burlington, was a recipient of the VBA's Pro Bono Service Award in 2017 for her work with indigent refugees. Attorney Law was nominated by Judge Nancy Waples who wrote: "Due to her deep sympathy for individuals attempting to navigate the legal system despite their limited English proficiency, she has for years served refugees as a pro bono attorney in the Probate Court….Pauline's assistance in these guardianship proceedings makes a meaningful difference for these families."

Pauline Law was born in Boston, Massachusetts to immigrant parents. Her academic credentials are impressive: she's a graduate of Carnegie Mellon University with a BS in Economics and Chinese Studies and a minor in physics. She is a graduate of the University of Pennsylvania Law School and holds a certificate of Business and public Policy from The Wharton School. She was admitted to practice in Vermont in 2013.

Throughout her academic career, Pauline Law volunteered to help those less fortunate. While at U Penn she was recognized for her many hours of pro bono work for the Human Rights Commission in Pennsylvania, researching and writing memoranda of law. She also volunteered for Victim/Witness Services of South Philadelphia, reviewing files and assisting with legal research and general office tasks.

At Gravel & Shea, Pauline Law meshes her pro bono work on adult involuntary guardianships with her transactional legal work. It's an unexpected juxtaposition that makes sense. "The 7th floor is for transactional legal work", Law explained about G&S offices in Burlington. She practices employment law, corporate and commercial law, and some does some estate planning. It was the last area that led her to probate court. "Jeanne Blackmore [an attorney at Gravel and Shea] suggested I go to court and introduce myself, as I would be participating in the Probate Bar," Attorney Law recalled. It wasn't long before she signed up for that court's volunteer opportunity: representing respondents in adult involuntary guardianship cases.

Law likes these cases because the scope is limited and she has some level of control over the cases she takes. She represents those who are indigent and who are often new Americans. "They have no idea what a court system is," she observed. Many are from Asia, and are more comfortable with Attorney Law, a Chinese American.

Law remembered her first guardianship case as a volunteer. "It was a new American family—and really complicated because the family had lots of expectations about caste and who would be suitable as a guardian." Pauline worked with family members to satisfy the court but also to find someone acceptable in their eyes as a guardian.

Her approach with guardianship cases is to visit with a client/respondent, talk with them about the petition, and confirm that the petitioner is someone they want to be managing their life. Initially, Attorney Law took cases as her number came up on the court's list, but as time progressed, she let the clerks know that she really wanted to be assigned cases for indigent immigrants. "I felt that there was a need for someone who could understand the challenges faced by new Americans," she explained. As the daughter of immigrants with limited language proficiency, Pauline Law had that understanding, empathy and personal experience.

The clerks were happy to oblige and assigned many immigrant guardianships to Law. She has been taking these volunteer cases since 2013.

Pauline senses her responsibility is greater than just providing representation to the indigent. She understands her position as a role model, too. "There is value in in people seeing people of color and women of color—you don't see that a lot in Vermont." There are new Americans who may not know that 'yes they can' succeed in their new country. Attorney Law provides that reassuring proof.

Attorney Law credited Judge Nancy Waples with helping to advance young professionals of color. She is gratified by the Judge's mentorship, and her nomination for the VBA Pro Bono Award. The feeling of gratitude is mutual. Judge Waples acknowledged Law's enthusiasm for assisting indigent immigrants, writing: "Refugees in Chittenden County are sorely underserved by the legal community and some refugee families do not even have English proficient family members able to help them navigate the labyrinth of ordinary American life." With Pauline Law's help and expertise, they can and do.

Attorney Law is a proponent of pro bono service for all attorneys. She sees involuntary guardianship work as a good fit for many new to the bar. "The Court

was always respectful of my time and constraints," she noted. "There is a learning curve for someone who is not a litigator. But after a while you see the similar fact patterns."

Law's pro bono work in the Chittenden Probate Court will end soon. She is moving with her spouse to Baltimore, MD where he has accepted a position with Johns Hopkins and where she will be working in a large law firm. But her volunteer work will continue. She carefully interviewed with firms that have a strong commitment to pro bono service— "I only want to work for nice people," she commented.

She puts the team at Gravel & Shea firmly in the column of nice people. "They take work seriously, but they also appreciate different individuals and personalities." Not only did her law firm support her pro bono work, but the firm paid for interpreters for her indigent immigrant cases. "They did it because it was part of representation." Law praised the interest and enthusiasm within Gravel & Shea for pro bono work. "They were always looking for opportunities that were interesting and meaningful but that didn't threaten to overwhelm."

Attorney Pauline Law leaves Vermont with some advice to new—and older—attorneys. "Anyone who has the motivation and the desire to help should just go for it," she encouraged. "The practice area may have a learning curve, but the courts and community want to see you succeed in helping clients."

Law practice and volunteer work don't have to take over your life, Paul advised. "It's all very manageable." From the organized bar, Attorney Law would like to see

more promotion of pro bono and low bono opportunities. "Make it clear that there are ways that people can contribute and serve while still being able to get home in time for their kids' bedtime."

Law believes that the mentoring of younger attorneys is important, which includes supporting and promoting the work of the Young Lawyers Division in the VBA. "If you want to attract and retain young, talented lawyers, you must put your money and other resources into the YLD." Attorney Law also believes the VBA should take promotion of women of color seriously. "This is the world we live in. Vermont can't be as insular as we have been." Law suggests we all should work to tap Vermont's talented people with varying backgrounds, ethnicity, and sexual orientation. "To change, we have to bring difference perspectives," she said.

Pauline Law closed the interview with expressions of gratitude for the mentoring and opportunities she had received at Gravel & Shea, and from the judges and court staff she had worked with. "This is a special place. We have a small bar, and I've managed to meet a lot of people because I was not always hunched over a computer."

UPCOMING VBA CLE'S NOT TO BE MISSED!

July 13, 2018: VBA 2nd Annual Trial Academy
@ Vermont Law School, S. Royalton

Join us again for this interactive CLE where participants prepare a segment or segments of a civil, criminal or family mock trial and receive feedback from Vermont Judges and members of the American College of Trial Lawyers.

September 27-28, 2018: VBA Annual Meeting
@ The Equinox Resort, Manchester

Ethics, Wellness, Labor & Employment, Municipal, Landlord/Tenant, Intellectual Property, Goats & Guns, Sexual Harassment, Arbitration and more…
enjoy well activities, hot topics CLE's and networking in this beautiful setting.

AND SAVE THESE DATES:

September 27, 2018: Basic Skills in VT practice & procedure
@ The Equinox Resort, Manchester

October 18, 2018: Pro Bono Conference
@ The Statehouse, Montpelier

November 7, 2018: Real Estate Law Day
@ The DoubleTree (fka the Sheraton), S. Burlington

December 7, 2018: Annual Bankruptcy Holiday CLE
@ Location TBD

January 18-19, 2019: YLD Mid-Winter Thaw
@ The Hotel Omni Mont-Royal, Montréal, CA

…And stay tuned for a Family Law Day announcement for October!

by Mary Ashcroft, Esq. Legal Access Coordinator for the VBA

Pro Bono Profile: Sal Spinosa

Attorney Salvatore Spinosa of Waitsfield was instrumental in establishing the Environmental Division Free Legal Clinic in 2014, and has consistently volunteered at the monthly clinic since then. He received the VBA's Pro Bono Award in 2017 for his work. He was nominated by Environmental Division Judges Thomas Durkin and Thomas Walsh, who wrote "His efforts improve the quality of the Division's work, educate and comfort many participating individuals and are a key aspect of resolving environmental and land use disputes in Vermont."

Salvatore Spinosa is rooted in New England. He was born and raised on a dairy farm just north of Boston and migrated further north to attend Bates College in Maine. He spent a year working for what was then a new start-up company known as Tom's of Maine, then he headed west to attend law school at McGeorge School of Law in Sacramento, California, Sal stayed in the Golden State for the next two decades, although admitting "it felt like being away from home."

Spinosa's legal career on the West Coast spanned 17 years with the Sacramento DA's office. He started with criminal prosecution—his first trial was a murder case—then moved into the DA's Consumer and Environmental Law Division, ultimately becoming its chief. Attorney Spinosa spent one year as a Deputy Assistant US Attorney for the Eastern District of California, briefly tried private practice, but soon moved back to the Sacramento DA's office.

Sal's deepening interest in environmental law led him to seek a Master's Degree in Environmental Law at Vermont Law School. That sabbatical was a good year for him. He was back home in northern New England and making contacts in the environmental law field through his internship with Vermont Agency of Natural Resources. And he was exploring the possibility of a position with ANR. But when nothing came up, Sal headed back to California to his old job at the Sacramento DA's office. Within 2 weeks of his return, however, Spinosa got a phone call from John Kassell with a job offer at Vermont's ANR. Sal took it, packed up his truck again and headed back east—and home. Within a few months, Spinosa was leading the enforcement division of ANR, a position he held for the next 14 years. He had returned to his New England roots.

As the ANR's enforcement chief, Spinosa oversaw an office of 4 attorneys and 20 investigators, and worked on actions throughout Vermont. While his work was administrative, he teamed with the Vermont Attorney General's Office on serious enforcement prosecutions. He remembered dealing with water law violations at Jay Peak and storm water overflows into Lake Champlain from Burlington's wastewater treatment facility. He particularly recalled bringing an action to require the removal of a $250,000 house intentionally built in a wetland. "Even the cellar hole had to be filled in," Sal recalled. "And no one ever lived in that house."

After retiring from ANR, Sal Spinosa had time and talent to share. A conversation with his friend Thomas Walsh, one of Vermont's Environmental Court judges, led Spinosa to explore the idea of a legal clinic to help pro se litigants in environmental court cases. Sal had wanted to re-engage with environmental law, and this seemed a good way to do so. With the help of Environmental Court Clerk Jackie Fletcher and the VBA's Mary Ashcroft, and with the encouragement of Judges Walsh and Tom Durkin, Spinosa drafted the framework for the Environmental Court Legal Clinic. The Clinic opened its doors in mid-2014 and has been going strong ever since.

The legal clinic is held on the second Thursday afternoon of each month at the Environmental Court, 32 Cherry Street in Burlington. The attorney volunteer—usually Sal, but sometimes Nicole Killoran from Vermont Law School—sees 2 to 4 litigants each afternoon for at least an hour each. Sometime the session last longer. And sometimes the *pro ses* return with more questions.

No clinic visitor leaves without some direction. Sal's approach is to focus on where in the process the *pro se* litigant finds himself, then map out the next steps. "Anyone that asks can come back—sometimes I invite them back." One litigant visited three times for advice. And if Sal thinks of some other avenue of approach, he will call the client back.

Over the three plus years Sal has run the Environmental Court clinic, he has had very few days with no clinic clients; usually he averages 2 or 3 clients. Four clients in one afternoon are a challenge. Sal finds the clients "nervous, sometimes not articulate, and always confused."

It's not just *pro se* litigants who learn at the clinic. Sal's students at Champlain College have learned, too. Last fall, some of his Environmental studies students asked if they could attend the clinic. "Two showed up and observed," Sal recalled. "Their take after it was over--they were bug-eyed over the whole thing. It was a great experience for them to hear real facts in real situations."

Sal has learned, too, especially about the different ways towns implement their zoning regulations. He has coached people from some towns who are disenchanted with the regulatory process—for good reason. "Some people are not given a fair shake by their local zoning board," Sal notes. "It's easy for the system to sideline them." So Sal reviews the process and points out procedural errors that have occurred. "Here's how I think you got mistreated," he will tell a client. "There is your case; you have some recourse."

Attorney Spinosa sees a real need for training for zoning board and DRB members on due process, fair hearing and proper notice requirements. In some of the cases Sal has seen, some parties did not even get notice of the zoning hearing that affected them. "If zoning boards, DRBs or zoning administrators were aware of the importance of administering due process, a lot of heartache could be avoided," he opined. Sometimes, a simple adjustment could have been made at an earlier stage and eliminated the appeal.

Sal Spinosa lives a full life. In addition to teaching at Champlain College and volunteering with the Environmental Court clinic, Sal serves on the Waitsfield Select Board, a position he has held for 13 years. "I like the authority, and I like being relied on, as well as the responsibility and the need to be accountable." He never had time for this work before retirement. But when an opening appeared, he went door to door, hit every house in town, and won. He came to like the broader thinking and discussion of theories that comes with running a town.

Following his roots back home to northern New England was a good choice for Sal Spinosa. "Being in Vermont was a great choice in the end. It is a remarkable place."

by Gary Franklin, Esq.

Second Amendment Case Law Informs the Debate

The Bill of Rights was adopted on December 15, 1791, providing a guaranty of certain fundamental rights to citizens of the United States. Among the most hotly debated rights today are those guaranteed by the Second Amendment securing the right to bear arms. A closer look at the Supreme Court case law interpreting the Second Amendment hopefully better informs that debate.

The Second Amendment reads:

> A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.

The interpretation of these few words has taken on heightened importance given recent and recurring high-profile mass shootings and overall gun violence awareness in the United States.

Gun violence in the United States is staggering. On average, there are more than 32,900 gun-deaths in the United States per year. An additional 75,000 plus citizens are injured by guns.[1] In the United States, there is on average a little more than one mass shooting a day in which four or more people die or are injured.[2]

According to the Congressional Research Service, there are more than 300 million guns in the United States, or approximately 1 gun for every man, woman, and child in the country.

Clearly, an individual does not have a constitutional right to keep and bear any "arm." The Merriam Webster Dictionary defines "arm" as "a means (such as a weapon) of offense or defense." We are all familiar with the term "nuclear arms" as one such category of weapons that indisputably cannot be possessed by individuals as a constitutional right. But where, then, do we draw the line?

While the political debate has been highlighted, the legal debate is lesser known. The U.S. Supreme Court first addressed the meaning of the Second Amendment in 1939 in the case of *U.S. v. Miller.*[3] In that case, the Supreme Court ruled *unanimously* that the Second Amendment does not guaranty an individual the right to keep and bear a sawed off double-barrel shotgun. The Court reasoned that a sawed off double-barrel shotgun does not have a reasonable relationship to the preservation or efficiency of a "well regulated militia." The Court stated, "with obvious purpose to assure the continuation and render possible the effectiveness of [a Militia], the declaration and guaranty of the Second Amendment were made. It must be interpreted and applied with that end in view."

Eighty years later the Supreme Court made another significant Second Amendment decision in the *District of Columbia v. Heller.*[4] The Supreme Court in the *Heller* case reviewed the District of Columbia's gun control laws which forbade almost all civilians to possess hand guns and required other firearms to be stored unloaded and mechanically disabled. In a 5-4 decision, the Court interpreted the right to bear arms as not being bound by participation in a militia and concluded that individuals have the right to bear arms for self-defense. Accordingly, the District of Columbia's law was struck down as too restrictive. The Court stated: "the inherent right of self-defense has been central to the Second Amendment right. The hand gun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose." The Court further went on to state:

> We are aware of the problem of hand gun violence in this country, and we take seriously the concerns raised by the many amici who believe that prohibition of hand gun ownership is a solution. The constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating hand guns… Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our nation, or well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the rule of this court to pronounce the Second Amendment extinct.

After his retirement from the Court Justice Stevens, a dissenter in *Heller*, added to the debate by writing that the adoption of the Second Amendment was based on a concern that a national standing army might pose a threat to the security of the separate states, a relic of the 18th century.[5]

More recently, in *Caetano v. Massachusetts* (2016), the Supreme Court re-affirmed its position that "the Second Amendment extends, *prima facia*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding and that this Second Amendment right is fully applicable to" the states.[6] In *Caetano*, the Court considered the Massachusetts law prohibiting the possession of stun guns. Noting that a weapon may be banned if it is both dangerous and unusual, the Court found that stun guns are neither uncommon nor unusual and comfortably fit within the lawful purpose of self-defense.

While the political debate and public discourse about the Second Amendment can be emotional and adversarial, it should be well informed. Understanding the language drafted by our founding fathers and how it has been interpreted by the highest court in the land is an important foundation for such debates and discussions.

Gary Franklin, Esq. is a partner at Primmer in Burlington and serves on the VBA board of managers.

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[1] The Brady Center to Prevent Gun Violence at http://www.bradycampaign.org/bradycenter.
[2] Mass shooting tracker: http://www.gunviolencearchive.org/reports/mass-shooting
[3] United States v. Miller, 307 U.S. 174 (1939).
[4] District of Columbia v. Heller, 554 U.S. 570 (2008).
[5] https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html
[6] Caetano v. Massachusetts, 577 U.S. ____ (2016).

by Mark Bassingthwaighte, Esq.

Cybercrime and Social Engineering

Some time ago I was nearly stunned by a conversation with a few lawyers who had almost been scammed into sending several hundred thousand dollars overseas. While we all were pleased that the scam was recognized in time, I was floored by their response to what had happened. In talking about it, the lawyers acknowledged that they were fortunate to have listened to the wisdom of their firm administrator when they agreed to wait to release any funds until the deposited check had actually cleared. Yet, oddly enough, after the check finally did bounce these lawyers felt unable to do anything about it due to a perceived attorney-client relationship and the loyalties they believed flew from that. Apparently the scammers had invested enough time and become so involved with the firm that even after nearly being taken in, the lawyers still believed confidentiality trumped. They were hesitant to even consider having the situation investigated. Wow. Whoever was behind that scam knew what they were doing.

I wish that I could say this particularly story was an unusual situation and that lawyers needn't worry but I can't. In the years since, these types of scams have only gotten more frequent and more sophisticated and it's all about social engineering. For the uninitiated among us, social engineering has nothing to do with a group of happy outgoing guys that get to put on those great blue and white stripped hats before heading out to drive their trains. Social engineering in the context of cybercrime is really about the use of psychological manipulation to trick a person into doing something that isn't going to be in their best interests. The goal may be to gain access to confidential information, to steal personal identities or money, to gain access to computer network resources, and the list goes on.

An attacker has any number of methods at his or her disposal. If the goal is to insert some type of rogue software onto a computer network, perhaps they leave a USB flash drive in the parking lot or send a "lucky winner" a free digital music player. Of course once the device is connected to the network, in order to see what's on the flash drive or to start enjoying that unexpected prize, the network is now compromised. This type of attack is called baiting, and law firms are not immune. Other attack methods include, but are by no means limited to, fake callbacks from technical support-- where the attacker randomly calls numbers at a business until someone falls prey; pretexting-- where the scammer impersonates a bank employee, tax authority, insurance investigator, etc. to try and trick someone into disclosing information; and phishing-- which is something we all need to know more about due to the sheer number of phishing attacks occurring.

First, the basics: phishing is the criminal attempt to trick another into providing personal or sensitive information such as a birth date, their address, a credit card number, or their user name and password to some account typically by requesting a response to an email or text message that the scammer has sent. Many of us have some sense of this general approach and would just delete an email that says our bank account will be closed unless we open the attachment or click on some link in order to verify our logon credentials simply because the email came from the wrong bank. But what if the email does purport to be from the correct bank? What if the email looks exactly like the bank's website and has all the correct official logos? What if, instead of having you verify login credential online, the email asks you to call a number and the automated system that answers asks for your login credentials?

Phishing attacks have become very sophisticated. Not only are all of the above examples real, there are many other approaches out there. Who hasn't received one of those important emails informing you of a change in the delivery schedule of your UPS package or letting you know your eBay or email account is about to be closed unless you verify your credentials? I have personally received an email that appeared to be from a close friend stating that he had had his wallet stolen and was stuck in London. He was hoping I would wire some money to help him return to the States and he would pay me back upon his return. Then there was the one claiming to be from Microsoft. They wanted me to know about a serious security problem in their software and suggested I immediately click a link to download the necessary update so that I would remain secure. Honestly, I almost fell for that one. The level of sophistication with the Microsoft email was that good. In truth, the possible variations on phishing attacks seem to only be limited by the imagination and programming skills of the criminals behind them. Unfortunately, we'll keep seeing these attacks and they'll continue to evolve because they work.

Hopefully you now have a sense as to how ugly the situation has become. In my opinion, all lawyers need to be more proactive with computer security because the real risk comes from all who use your systems including yourself. Please understand that the security hardware and software in place at your firm is the last line of defense. It is you and your users that are on the frontline. It's time to get in front of the problem because no one else is going to take care of it for you. It simply isn't possible for your IT support to protect your systems from all phishing attacks because these attacks are directed at people not hardware or software.

The good news is that there are a few things we can all do to protect our personal information as well as our client confidences and it begins with training. Every-

one within your firm should be made aware of the nature of phishing attacks and learn how to spot them. Use online resources as training tools such as this Windows Safety & Security Center post,[1] this Wikipedia entry[2], or this Ten Tips for Spotting a Phishing Email post[3] on TechRepublic.com. If you have in-house IT, invite them to provide an annual in-house seminar on phishing and other online hazards.

In addition to training, keep all software updated in terms of critical security patches as they become available. Use reputable antivirus tools as well as spyware identification and removal tools on all computers that are part of the office network and don't overlook remote and mobile computers such as home computers, personal laptops, and computer tablets. Check with your IT staff or consultant to see if you are running the most current version of your Internet browser. If your browser has anti-phishing capabilities built in make certain that this functionality is enabled on all devices that are on the network or that login to the network remotely.

That said, the most important piece of advice is to remember that no matter how sophisticated the security systems and tools that are deployed are, the user will always remain a vulnerability. Awareness and training will continue to be key and should occur on a semiannual or annual basis in order to keep the issue front and center. Everyone at your firm needs to be on the lookout for phishing emails or text messages because law firms are a target for scammers. Lawyers have a significant amount of valuable data residing on their computer systems that scammers want. Yes, lawyers can be a trusting bunch; but as I shared at the beginning of this piece, that attribute doesn't always serve us well.

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.

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[1] Windows Safety & Security Center link: https://www.microsoft.com/en-us/wdsi/threats/support-scams

[2] Wikipedia on Phishing link: https://en.wikipedia.org/wiki/Phishing

[3] Ten Tips on Phishing link: https://www.techrepublic.com/blog/10-things/10-tips-for-spotting-a-phishing-email/

Access to Justice Campaign

The Access to Justice Campaign gives us an ability to focus on particular legal issues impacting low-income communities and individuals through funding of a fellow for a two-year term. You can find a list of the Access to Justice Fellows and a description of their projects at https://vtbarfoundation.org.

Due to your generosity and support, Access to Justice completed its 2017-2018 campaign. We will be sending off our fifth Vermont Poverty Law Fellow, Mairead O'Reilly, and we will be welcoming Jill Rudge as our sixth fellow.

O'Reilly concentrated on the Vermont legal system's response to the opioid epidemic include both case work and public policy collaboration in Administrative Rulemaking in the Vermont Legislature, the Attorney General's office, and the Public Defenders to name a few. Mairead deserves credit for taking up this important cause and advancing the interest of the Vermont bar to address the adverse impact on our legal system.

Rudge will focus on low-income Vermonters with mental health concerns and the housing issues they face.

We thank Deborah Bailey for all of her hard work, along with Campaign Co-Chairs Rob McClallen and Gary Karnedy and all of the County level campaign attorneys who made many calls.

We are pleased to announce that Primmer Piper Eggleston and Cramer PC, Dinse Knapp & McAndrew, and Langrock Sperry and Wool, LLP have reached $100K in contributions. They join Downs Rachlin Martin and Vermont Attorneys Title Corporation who reached the $100k mark during the 2016/2017 campaign.

In addition, the Rutland and Windham County Bar Associations continued their support of the Access to Justice program.

We would also like to thank the following businesses who donated their services in full or in part to the Foundation during Justice Fest:

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BOOK REVIEW

Seeing Through Legalese
By Joseph Kimble, Esq.
Reviewed by E. Sebastian Arduengo, Esq.

Seeing Drafting Tips Through Footnotes

As lawyers, we're always looking for ways to make our writing style clear and concise. It comes as no surprise then, that reams of literature have been written about legal writing by everyone from federal appeals court judges, to law professors, to even non-lawyers pleading with the bar for some measure of sanity in common legal documents. Adding to the mix is Joseph Kimble's third foray into "the good fight for clear, plain legal writing"—*Seeing Through Legalese*.

Kimble is a professor emeritus of legal writing at Western Michigan University – Thomas Cooley Law School and served as a drafting consultant during the redraft of the Federal Rules of Civil Procedure and the Federal Rules of Evidence in the mid-2000s. *Seeing Through Legalese* is a collection of Kimble's articles and shorter pieces written since 2006, along with some interviews and remarks. Unfortunately, the book's format—Kimble's articles are largely reprinted with minimal edits—doesn't lend itself well to easily or quickly separating useful drafting tips from repetitive and often block-quoted material in most of the essays.

The meat of the book consists of Kimble's observations from the redraft of the federal rules. Although many of his observations, like "use lists to the best advantage" are unique to legislative or regulatory drafting, there are a few gems that we could all do well to remember:

First and foremost, don't use legalese—terms and phrases rarely used outside of legal writing. These include rhetorical flourishes like "heretofore," "pursuant to," "wherein," "therein," and "thereto," as well as legal Latin ("*inter alia*") that muddy the waters for lawyers and non-lawyers alike, and can almost always be replaced or removed for clarity (for example, substituting "pursuant to" with "under") with no loss to precision.

Another good writing tip Kimble offers is to eliminate unnecessary prepositional phrases, especially ones that begin with "of." This can be done by either making them possessive ("the law of the foreign country" to "the foreign country's law"), converting them to adjectives ("trial by jury" to "jury trial"), or turning them into gerunds ("the identification of witnesses" to "identifying witnesses.")

Kimble also suggests breaking up long sentences whenever possible. Long compound sentences using "and" can be simply converted into two sentences. Exceptions and conditions can be signaled using "Ordinarily" for the main clause and "But" for the exception ("*Ordinarily*, Vermont law favors jury trials. *But*, a bench trial may be required when. . .") And, a key word from the previous sentence can be repeated or echoed at the beginning of the next sentence ("A party may *move* for summary judgement under Vt. R. Civ. P. 56. The *motion* must contain a separate, short, and concise statement of material facts.")

There's other good writing advice scattered through *Seeing Through Legalese*. But, trying to find it feels like going on a buried treasure hunt. Many of the examples are in a hard-to-read dual-column format or in even less readable footnotes. Each time I came upon something that was usable in my everyday writing, I had the thrill of discovery. But it's not exactly an ideal format for busy lawyers looking to sharpen a brief or memo on an impending deadline.

All and all, reading *Seeing Through Legalese* felt vaguely like clicking on a clickbait link. The title provided just enough information to make me curious, but the content left me wanting. So, if you're looking for a handy desk companion to improve the quality of your writing, stick with *The Redbook*. But if you're willing to do some digging, *Seeing Through Legalese* might have what you're looking for.

Sebastian Arduengo is a staff attorney with the Green Mountain Care Board. Prior to joining the Board, Sebastian clerked for U.S. District Judge Christina Reiss—a master class in legal writing. He lives in Montpelier with his fiancée.

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Fancy yourself a fiction writer? The next Grisham? The Vermont Bar Journal is not just for scholarly legal dissertations! Call it a fiction contest or an active solicitation for your works of fiction, either way, if we love it, we may print it! Submit your brief works of legal fiction (6,000 words or less) to jeb@vtbar.org. Our next deadline is September 1, 2018.

IN MEMORIAM

Kenneth Mark Appel

Kenneth Mark Appel, 68, died on March 19, 2018 after a raging battle with Progressive Supranuclear Palsy (PSP). Ken was born on May 24, 1949 in New York City. He moved to Vermont in 1975, practicing law in Saint Johnsbury and Saint Albans with Vermont Legal Aid. Ken went into private practice in St. Albans in 1980 and retired in 2016 due to illness. He was a past president of the Franklin-Grand Isle Bar Association and practiced in the area of personal injury, family law, real estate and other areas of general practice. He is survived by his wife Janis and their four children, as well as four grandchildren.

Philip H. Hoff

Philip H. Hoff, former Governor of Vermont, died on April 26, 2018 at his Shelburne home at the age of 93. Born in Massachusetts, Hoff enlisted in the US Navy during his years at Williams College, seeing WWII action in the South Pacific aboard the USS Sea Dog. After obtaining his law degree from Cornell in 1951, he moved to Vermont with his wife, Joan. Hoff's election as Governor in 1962 was the culmination of an effort to make the Democratic party a force in Vermont elections for the first time. While in office, Hoff established the Vermont District Court, the Judicial Nominating Commission, the Governor's Commission on Women, the Vermont Council on the Arts and the Vermont Student Assistance Corporation. On the national stage, Hoff was involved in a ground-breaking project to address racial inequality, became the first Democratic Governor in the nation to split with Lyndon Johnson over Vietnam and was seriously considered as Hubert Humphrey's vice-presidential running mate in 1968. Back in Vermont, Hoff served in the Vermont Senate from Chittenden County from 1982 to 1988 and was chair of the Vermont Democratic party in 1972 and 1973. Hoff practiced law for many years and served on many commissions, boards and committees. He is survived by his wife of approximately 70 years, their four daughters, six grandchildren and two great-grandchildren.

Allen David Webster

Allen David Webster, 73, of South Burlington, passed away on May 5, 2018. Born in Burlington, Al attended Burlington High School and UVM, where he was active in Sigma Alpha Epsilon and was student manager of the baseball and basketball teams. Al received his Masters of Business Administration from Tuck at Dartmouth, served as a First Lieutenant in the US Army, obtained his CPA degree and then his JD from Cornell Law School in 1976, with an LLM in tax law from Boston University School of Law in 1990. Starting as an associate at Lisman & Lisman practicing estate planning and tax law, he went on to become partner of Lisman, Webster, Kirkpatrick and Leckerling. He practiced at Paul Frank & Collins as Of Counsel from 2012 until he retired in 2016. Al was an officer of the American Academy of Attorney CPA's and was a fellow of the American College of Trust and Estate Counsel. He boasted near perfect attendance at his children's sporting events and was an avid Boston Celtics fan. Al is survived by his wife of 47 years, Marti, and their son and daughter and their families, with one son having predeceased him.

Angela Jean Prodan

Angela Jean Prodan passed away peacefully at home on May 6, 2018 at the age of 50. Angela was born in Norwalk, CT on February 21, 1968. She was her class president in high school and attended Lehigh University on an athletic scholarship as a fastball pitcher. She received her JD and MS in Environmental Law and Policy from VLS, graduating magna cum laude in 1994. At VLS, she took advantage of the surroundings by hiking and playing ultimate frisbee on the school's team, Ultimate Justice. On graduation, she joined the firm of Fitts, Olson & Giddings, focusing on family law, and she continued her family law focus at Corum Mabie Cook Prodan Angell Secrest & Darrow since 2005, becoming a premier family law attorney. Angela was proud to have helped launch a task force which developed into the Windham County Family Visitation Center, Inc.; she also served on the board of the Boys & Girls Club. She enjoyed hiking, sports and concerts and was a talented artist working with paints and stained glass. She is survived by her partner of 7 years, John Miller, her 14-year-old son and her parents. Angela developed a rare form of melanoma in 2016, but her determination to enjoy life and her unique ability to live in the moment persisted as she continued to travel and spread her joie de vivre to all those around her.

Charles E. Capriola, Jr.

Charles E. Capriola, Jr. was born on June 9, 1934 in Port Chester, NY and passed away on May 9, 2018. Charles received his BS from Columbia University and his JD from Fordham University School of Law in 1967. He honorably served in the US Marine Corps from 1953-1956 serving as Brig Warden at several duty stations. An outstanding linebacker, he played for the University of Alabama, Parris Island Marine Corps Recruit Depot and Kaneohe Hawaii Marine Corps Air Station, before playing professional football in the Easter League with the Father Alphonso Boys Club of Westchester County, NY in 1958. Before passing the Vermont bar in 1970, Charles worked in the claims department at Allstate Insurance. He was appointed by Governor Deane Davis as the first public defender of Bennington County in 1972. He was an accomplished trial attorney and tried over 120 civil and criminal jury matters to verdict. He was still practicing at the time of his death. Charles is predeceased by his wife, Joan, of 59 years (in 2016) and his son, and is survived by a daughter and a son, and five grandchildren and three great grandchildren.

Robert T. Gaston

Robert T. Gaston, formerly of Montpelier, but residing in Lakewood Ranch, Florida, died on May 9, 2018. Born on February 9, 1940 in Passaic, New Jersey, he grew up in DC, after surviving polio, and played football. He attended the College of William and Mary and George Washington Law School, first opening a practice in Georgetown and also working as a public defender. To escape the city, Bob moved to Vermont and taught in Woodbury College before setting up a general practice firm, having practiced for more than 40 years before retirement. Bob was a dedicated lawyer and avid defender of civil rights. He camped and traveled extensively throughout the states and was devoted to the Kiwanis Club of Montpelier. He earned his pilot's license in his 40's and also became an avid boater, true to his adventurous self. Bob practiced transcendental meditation daily. He is survived by his wife of 38 years, Patricia Jane, two sons and a daughter and their families.

John G. Kirstensen

John G. Kirstensen passed away peacefully at his home in Guilford on Memorial Day at the age of 94. John was born in New York City on March 31, 1924. He attended Ursinus College, Collegeville, PA and received his LLB in 1950 from Harvard Law School. After law school, John served as a law clerk for federal judge and former Governor Ernest Gibson. John was a long-time member of the Judicial Conduct Board and the town moderator in Guilford since 1975. A former Vermont Bar Association President (1985-86), he also served on the Guildford School Board, the State Board of Education and was Brattleboro Union High School Moderator. He was partner and later Of Counsel at Kristensen, Cummings, Phillips, Carroll & Melendy, PC. He is predeceased by his wife, Calista, and survived by their three daughters and two sons.

John Powers Cain

John Powers Cain, 68, passed away on June 16, 2018, at home and surrounded by his loving family, after a long and courageous battle with various illnesses. Born in Burlington in 1950, John married his high-school sweetheart, Betsy in 1973, and they had two children. John went to UVM and the University of Notre Dame Law School, and became a loyal Fighting Irish. John spent his legal career helping those less fortunate, first starting a practice with three friends and later becoming a partner at McCormick, Fitzpatrick, Kasper & Burchard, PC, practicing there until he retired in 2010. Despite dealing with a serious illness for 18 years, John always had a positive outlook and spent more time caring for those around him, never complaining. He was a devoted family man, attending sporting events, providing guidance and being a doting grandfather. He is survived by the love of his life and best friend, Betsy, their son and daughter and their two grandchildren.

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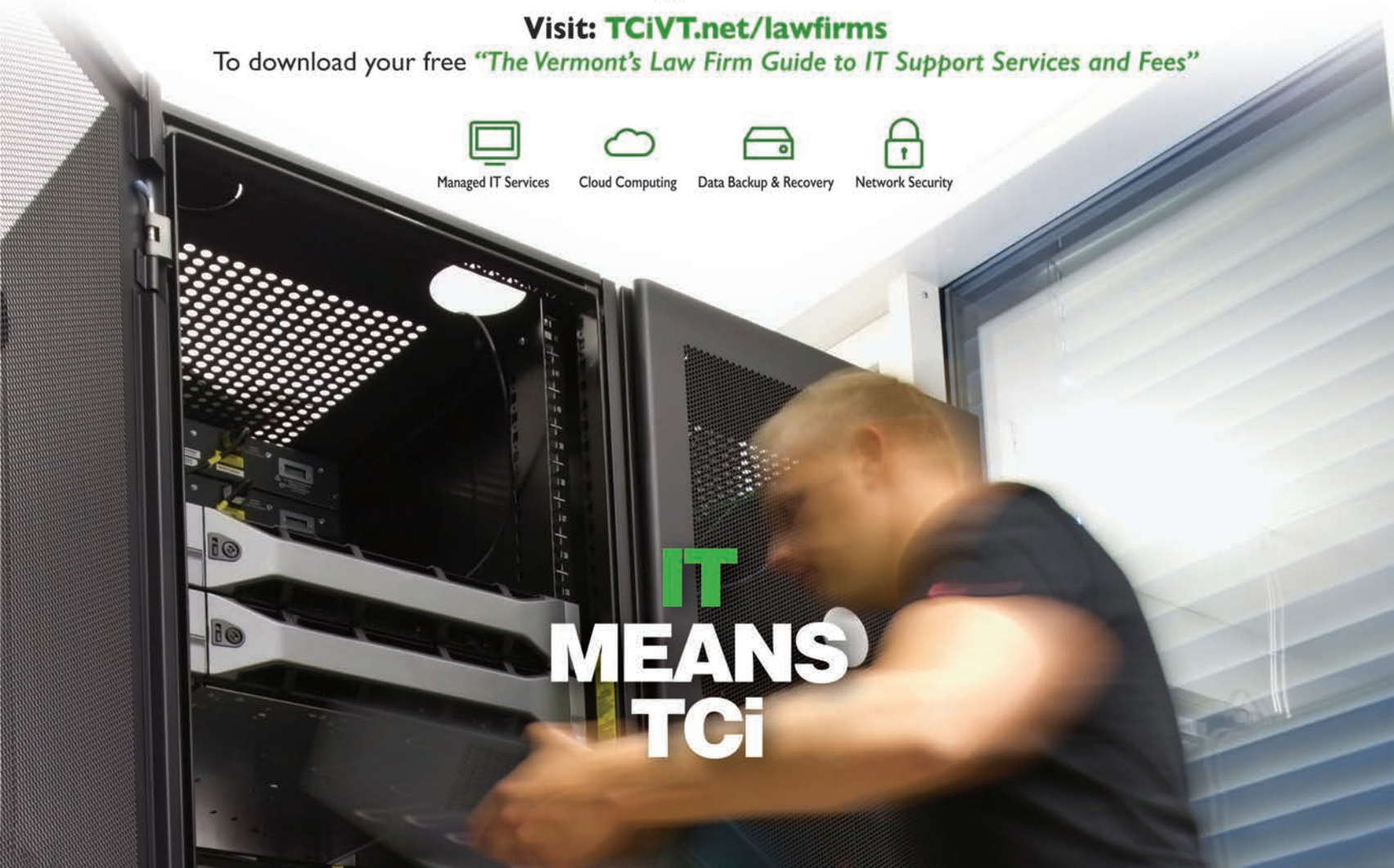

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