

THE
VERMONT BAR JOURNAL

223

Fall 2020, Volume 46, No. 3





Need a Partner in Estate Planning Work? let's work through it

Tailored Solutions, with a Comprehensive Scope

We work with clients of all levels of wealth to understand the dynamics of their families and to identify their particular objectives. Our team is also equipped to handle the litigation of Wills, trusts, and beneficiary designations, when necessary. This allows us to work with you to recommend individually tailored, comprehensively considered estate plans.

Delivered with a Partnership Approach

We work collaboratively with other professionals, including financial advisers, insurance professionals, CPAs and corporate counsel to provide an integrated and efficient approach to planning.

Six Offices, Three States, One Team

Burlington, VT	Littleton, NH	Portsmouth, NH
Montpelier, VT	Manchester, NH	Washington, DC



PRIMMER PIPER
EGGLESTON &
CRAMER PC



Let's Discuss Your Estate Plan

You can schedule a consultation by calling **802.864.0880** or by emailing Jon, Molly, or Kevin using the emails above.

VERMONT BAR JOURNAL

DEPARTMENTS

5 PRESIDENT'S COLUMN

PURSUIITS OF HAPPINESS

8 — *An Interview with Mike Donofrio, Bassist*

RUMINATIONS

16 — *Limitations of Law and History*

WRITE ON

24 — *Past Tense: The Legal Prose of Justice Robert Larrow*

WHAT'S NEW

28 — *Updates from the VBA*

BE WELL

35 — *How to Feel in Control When Things are Out of Control*

50 BOOK REVIEW

54 IN MEMORIAM

54 CLASSIFIEDS

FEATURES

36 VBF Grantee Spotlight: South Royalton Legal Clinic
Teri Corsones, Esq.

38 Access to Justice Campaign

41 Invisible Bars: The Collateral Consequences of Criminal Conviction Records
Kassie R. Tibbott, Esq.

42 Can Lawyers Add Surcharges to Their Bills?
Mark Bassingthwaighe, Esq.

43 Vermont Paralegal Organization, Inc. Celebrates 30 Years!
Lucia White, VPO President

44 Justice Delayed Is Reunification Denied
Hon. Howard Kalfus

48 Pro Bono Award Winner: Thomas French
Mary Ashcroft, Esq.



VERMONT BAR JOURNAL

Vol. 46, No. 3

Fall 2020

The Vermont Bar Association
 35-37 Court St, PO Box 100
 Montpelier, Vermont 05601-0100
 802-223-2020 • 1-800-639-7036
 Fax: 802-223-1573
 E-Mail: jeb@vtbar.org
 On the Web: www.vtbar.org

President
 Elizabeth Kruska

Past President
 Elizabeth Novotny

Secretary
 Edward J. Tyler III

Treasurer
 Matthew F. Valerio

Board of Managers
 Katelyn Atwood
 David Carpenter
 Amy E. Davis
 Joshua Diamond
 Judith L. Dillon
 Hon. Thomas S. Durkin
 Robert E. Fletcher
 Molly Gray
 Andrew Manitsky
 James Rodgers
 Ben Traverse
 James Valente
 Alfonso Villegas

Executive Director
 Therese M. Corsones, Esq.

Director of Education & Communication
 Jennifer Emens-Butler, Esq.

CFO / Member Benefits
 Lisa M. Maxfield

Programs Coordinator
 Laura Welcome

Lawyer Referral Service/Membership
 Michelle Abajian

Legal Access Coordinator
 Mary C. Ashcroft, Esq.

Layout/Design
 Alicia Anthony

Published four times a year by the
 Vermont Bar Association
 Subscription rates: 1 year \$35. 2 years \$65.
 Printed by Stillwater Graphics
 VBA assumes no responsibility for claims
 arising in connection with products or services
 advertised in the *Vermont Bar Journal*.

ADVERTISERS INDEX

ALPS	18
BCM Environmental & Land Law, PLLC	20
Berman & Simmons.....	10
Biggam Fox & Skinner.....	4
Caffry Law, PLLC.....	6
Cleary Shahi & Aicher, P.C.....	19
Dinse	13
Economic & Policy Resources	6
James A. Johnson, Jr.....	34
Law Pay	11
Leighton Detora	35
Marks Powers LLP	21
Medicare & Life Care Consultants	30
National Academy of Distinguished Neutrals.....	7
Northeast Delta Dental	45
Preferred Properties.....	31
Primmer Piper Eggleston & Cramer PC.....	Inside Front Cover
TCi Technology Consultants, Inc.....	Inside Back Cover
Trust Company of Vermont	Back Cover
Unsworth LaPlante, PLLC	17
Vermont Attorneys Title Corporation	9
Vermont Lawyers Assistance Program	15
Vermont Legal Food Hub.....	12

To advertise in the *Journal*, call Lisa Maxfield at 802.223.2020

Our Montpelier office has moved to 535 Stone Cutters Way, Suite 204, Montpelier, VT 05602

With more than 40 years of experience,
 we know how to handle complex Workers' Compensation issues
 that can significantly alter the outcome of a case.

Local | Caring | Experienced



Ron Fox

Kelly Massicotte

Heidi Groff

Pat Biggam



BIGGAM FOX SKINNER
 LLP

Attorneys Representing Injured People

802-229-5146

Montpelier | Burlington | www.bfslaw.com

PRESIDENT'S COLUMN

Interview with Incoming VBA President, Elizabeth Kruska

TC: I'm meeting with VBA Board President-Elect Elizabeth Kruska, just before the VBA Annual Meeting where she will officially take office. Elizabeth, on behalf of *Vermont Bar Journal* readers everywhere, thank you for taking time to meet with me today.

EK: My pleasure!

TC: First, can you tell us a bit about your background. Where did you grow up and where did you go to school?

EK: I grew up near Kalamazoo, Michigan. Luckily, we have many really great public colleges and universities in Michigan, and I went to the University of Michigan (hooray for in-state tuition!). I earned a BS in Natural Resources and Environment. I took a lot of policy classes, and also a lot of forestry classes. While my classmates were sitting in lecture halls, I was canoeing to soil pits and measuring tree diameters. It's one of the best decisions I've ever made.

Since I seemed to be focused on environment and policy, I looked at law schools with those focuses, and ultimately picked Vermont. Even though my focus changed while I was in school, I'm glad I ended up here!

TC: A fellow Mid-westerner! What led you ultimately to consider law school as a path?

EK: The OJ Simpson trial was fascinating for me. It happened in the summer between my junior and senior year of high school. I remember watching several days of Kato Kaelin's testimony and thinking, "how does anyone possibly know what they did at 10:20 or 10:25 on a particular day?" and also thinking that the lawyers must have known why that was important. That sort of gave me the idea about going to law school.

Then in college I took several policy classes, and an environmental law class. I found that I understood the method of analysis and thought it was something that might work for me. I've always been a fan of puzzles and I like figuring out things – it seemed like kind of a natural fit.

TC: Did you consider practicing anywhere else besides Vermont?

EK: I had considered moving back home to Michigan. My parents still live there, and it's hard to get to see them very often when I know I have to drive fourteen hours each way to do it. My husband, who I met in law school, is from New Jersey and felt like he

wanted to stay in Vermont. We made the decision together to stay here.

TC: I can relate! What law jobs have you had during your career so far?

EK: I did mostly public defender work in White River Junction from 2004-2016 and then started my solo firm in early 2017. I have taught a criminal procedure course (and now also evidence lab) at Vermont Law School since 2012. I also taught criminal justice ethics at Norwich University in 2017.

TC: Is there one case that stands out from your years in practice, that you consider the most significant to you personally?

EK: I represented a child in a juvenile matter several years ago. I can't say much, of course, because juvenile matters are confidential. It was a really hard case because there were three possible outcomes, all of which would have been equally good for the child. But my client – a whip-smart 11-year old who was wise beyond her years – had a really strong opinion. I learned to listen to her and to advocate very strongly for her position. Thankfully, the judge agreed with us, and also was able to see the child's point of view. That case also showed me the goodness in people; there were some participants in the case who really went out of their way to do what they thought was right for a little kid. They didn't have to do that, but they did. I'm very thankful to them for just being good people.

TC: Thank you for your work in the juvenile docket. What do you find most interesting about your work and what do you find the most challenging?

EK: I'm currently in solo practice, and sometimes it's hard to be alone. I feel really lucky that our bar is as friendly and collegial as it is. I have no hesitation about calling a fellow practitioner if I'm having trouble figuring out something and if I need another set of eyes or ears. Others have called me with similar situations. I generally find we're all happy to help one another.

In terms of what's interesting, I often find when an unusual, discrete issue pops up in a case that I become very curious about, I do a lot of research that ends up being fascinating. I enjoy that a lot.

TC: I know that you also regularly volunteer on different boards and committees. First, thank you for your service in that re-



gard! Second, what would you recommend to new lawyers in terms of volunteer opportunities for them?

EK: I do think it's important for new lawyers to get involved with opportunities that interest them. I would suggest finding things that seem interesting in your geographic area, and volunteering to participate. I didn't do that as much as a young lawyer – it felt like a lot to practice full time and also to try taking on volunteer work. I also sometimes felt like events I wanted to participate in were far away and at times that were hard to get to.

It seems like some county bars are fairly active and have regular meetings. That seems like a good way to get acquainted with practitioners in your local area, and to get involved in the community.

TC: When did you become interested in serving on the VBA Board?

EK: I received a call from Dan Richardson in 2014 or so, asking if I would be interested in running for a seat. I thought it seemed like a great opportunity to meet more lawyers around the state. Even though we're a small state and a small bar, it's easy to feel like you're in a silo with attorneys in your own practice area or your own geographic area. For example, I was elected in the same year as Lauri Fisher, who lived and practiced in northern Vermont, and who I would not otherwise have met. (She has since moved away, and I miss her!)

TC: Lauri just renewed her VBA membership – she's very loyal! What did you think Board service was going to be like, and, what did it turn out to be?

Lost in a maze of numbers?



Our economists can help.

Don't Get Lost in the Numbers...

EPR has been providing easy to understand, fact-driven economic analyses of damages in personal injury, wrongful death, medical malpractice, commercial, marital, and employment cases since 1983.





802.878.0346 | 800.765.1377
 info@epreconomics.com
 www.epreconomics.com
 400 Cornerstone Dr., Ste. 310 | P.O. Box 1660
 Williston, VT 05495-1660

SPECIAL NEEDS & ESTATE PLANNING

CAFFRY LAW, PLLC

Consulting or co-counsel with personal injury, family law and estate planning attorneys across Vermont regarding special needs planning and disability benefit matters

JAMES A. CAFFRY, ESQ.
KAITLYN LEWIS KEATING, ESQ.

- Jim is a parent of a child with special needs
- He is the only member of the Special Needs Alliance – attorneys dedicated to the practice of disability and public benefits law

www.caffrylaw.com • 802.882.8163
 46 South Main Street, Suite 3A
 Waterbury, VT 05676

EK: I really didn't have any preconceived ideas. It's turned out to be a very positive experience, though. I don't think I realized how incredibly involved the VBA is with the legislature until I joined the board. It's definitely helped me to be more attuned to legislative work.

TC: What has been the most satisfying part about serving on the Board so far?

EK: There is a very strong sense of cooperation on the Board. Sometimes individual members disagree about details, but generally the Board understands very well that our task is to work for the members of the VBA. I have also found the Board to be very welcoming. If anyone's considering running for an open board seat, I'd encourage it.

TC: Has there been a least satisfying part?

EK: Honestly, I've generally found the experience to be a positive one. I do think it would be stronger if more people participated in bar events and committees. I sometimes feel like the VBA has a very reliable group of participants – section and division chairs/participants, county bar presidents, and others who are usually quick to volunteer. While that's great, it also sometimes feels like we often go to the same people for help. I'd love to see us expand that group so more people participate.

TC: Sometimes VBA Board presidents have a focus or theme for their year in office. Do you have a particular focus in mind for your upcoming year in office?

EK: Let's get through this year in one piece! I'm kidding. Sort of. 2020 has been bizarre and challenging on so many fronts. From the sounds of things, we may not fully be back to "normal" for some time. To that end, I would like to see this year continue to be cooperative and supportive for our membership so we all come through stronger on the other side. When I agreed to accept the nomination I immediately started thinking about ways to make our association feel more inclusive for all attorneys statewide. I think we can still do that. COVID-19 has been a challenge, but has also started to teach us how to connect in different ways. I'd like to see us take the lessons we're learning right now – because we have to – and figure out how to incorporate them into our practices and into our interactions for the future so we can be more effective advocates.

TC: What's your favorite past time when you're not working?

EK: What is this "not working" you speak of? [Laughs]. As a solo practitioner I'm sort of always "on." I always answer my phone, although people are generally pretty respectful of normal business hours. I have

been known to take business calls in odd locations, always with a promise to call back.

I love seeing live music. I'm a big Phish fan – some of my good friends are people I know from parking lots at Phish shows. I enjoy sports, especially thoroughbred horse racing. I'm a part owner of some race horses with a couple different partnerships. I also really enjoy going to the races. I've often compared going to the Kentucky Derby to going to church on Christmas – it's crowded and full of people who don't usually go, and everyone wears their finest (and giant hats!), but there's no way on earth I'd miss it.

TC: I see a "Pursuits of Happiness" article in your future! Elizabeth, what advice would you give to a young person thinking about law as a profession?

EK: I would encourage them to think about why, and what they hope to achieve. I'd also encourage them to spend some time with real life lawyers to see how it works. It's also important to understand just how much work the job really entails. I told my law students the other day that practicing law is like having homework for the rest of your life. That's the best description I can give for how much work it takes to get to do the cool courtroom work we envision when we think of lawyers.

TC: Last question: What would you like to be remembered for, as the 141st president of the Vermont Bar Association?

EK: This is an enormous question. I want us to work together to make the practice healthier. I'm not sure how we're going to do that, but we have this spectacular opportunity to completely re-create how we practice. Let's make it what we want it to be, not what generations before us have given to us.

TC: Thanks so much, Elizabeth. We're all excited to have you at the helm!



Stay Current.



Visit
WWW.VTBAR.ORG

2020
MEMBERS



THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

America's Most Experienced Civil-Trial Mediators & Arbitrators

VERMONT CHAPTER

www.VermontMediators.org

*The Academy Recognizes The Following Vermont Chapter Members For
Excellence In The Practice of Alternative Dispute Resolution*



Gregory Clayton
Montpelier
(207) 706-4977



David Cleary
Rutland
(802) 775-8800



Ellen Coogan
Burlington
(802) 864-4555



Eric Johnson
Burlington
(802) 863-3494



Michael Marks
Middlebury
(802) 388-2211



Phyllis Phillips
Williston
(802) 363-3126



Tad Powers
Middlebury
(802) 388-2211



James Spink
Burlington
(802) 864-9891

APRIL 2020						
Su	Mo	Tu	We	Th	Fr	Sa
	1	2 AM	3	4	5 PM	6
7	8 PM	9	10	11	12	13
14	15	16	17 AM	18 AM	19 AM	20
21	22	23 AM	24 AM	25	26	27
28	29	30				

**Check your preferred available dates or
schedule appointments online, directly
with Academy Members - for free.**

VermontMediators.org is funded by local members

PURSUIITS OF HAPPINESS

An Interview with Mike Donofrio, Bassist

JEB: I'm at home, COVID-style, interviewing Mike Donofrio via phone. Mike, we interview people who have interests and talents outside the law. My understanding is that you have an interest and a talent. So I guess we should start with your interest in music. Were you always interested in music when you were a child?

MD: I didn't play music as a child. I had a short-lived attempt at piano lessons during elementary school. I was always interested in music though, as a listener. I have very early memories of going through my parents' records and eight tracks and random things striking my fancy. The first record I remember being really excited to buy myself was Kiss Double Platinum when I was like eight years old.

JEB: That's so funny, I guess I'm dating myself as older, but I remember the same thing, but it was a box of 45's with oldies like Tan Shoes and Pink Shoelaces and Beep Beep although the house was filled more often with slightly more recent music like The Beatles.

MD: My parents had kind of a random smattering of records. I remember really liking their eight tracks of Beach Boys Endless Summer and Stevie Wonder's Songs in the Key of Life. I wore them out!

JEB: Oh my gosh, me too! Mine was an album but Songs in the Key of Life was my favorite and I still like to listen to that. So you didn't play any musical instrument in high school?

MD: I was very into music in high school, sitting around and listening and talking about it with my friends. A lot of the hair metal bands came through Burlington in rapid succession during the mid-80s, like Ratt and Twisted Sister, so we went to all those shows, which was really fun. By junior year of high school, I was sort of gravitating more toward college radio, bands like REM, The Replacements and The Smiths. I used to call WWPV, the St. Mike's station, make requests, cue up a tape, and then sit there waiting to hit "record."

JEB: Isn't that funny? We used to wait for our favorite songs to come on and hit record to make a mix tape-- kids don't understand these days!

MD: Exactly. And then it's on a 90-minute tape, so if you want to hear it, you have to hunt and peck through the tape! So to continue, I didn't have any clear plan to start playing music until my freshman year of col-



Saturnine, with Mike at the far right.

lege. One of my roommates showed up with a bass guitar he had just acquired. Neither of us knew how to play it. He just liked the bass because he was a big Rush fan. To my friend Joe's great credit, he was playing Geddy Lee basslines by sophomore year! But in the beginning, we would put on simple songs where you could really hear the bass—The Police were a great source—and we'd sit there and try to figure out how to play. And by sophomore year, we each ended up as the bass player in "rival" campus bands!

JEB: Wow! Talk about self-taught!

MD: Yup, I just kind of started playing without any real strong musical background nor any particular talent. I was playing these very dumbed down versions of recognizable songs, but the whole thing really spoke to me and I was becoming just much more interested in music all the time and feeling even more connected to music generally. I was also hanging around the college radio station a lot and learning about both new music and old stuff that was new to me.

JEB: So how long did you play in that band?

MD: Well, that was college where I played from sophomore year through the end of college. We got started by jumping into an outdoor music fest sophomore year. We only had about 5 songs, all covers, including the Stones' Sympathy for the Devil. I was so inept, I played almost the entire song, a full step too high, because I plopped my

left hand down on the wrong fret and just played the note pattern I had memorized! It didn't occur to me to, like, LISTEN to what it sounded like!

JEB: Well, maybe it was a whole new version that sounded great.

MD: Well, it was a whole new version alright. One of my friends who was an actual musician, came up to the stage about halfway through yelling you're sharp!

JEB: Too funny. Where did you go to college? And what was the name of the band?

MD: Williams College in Western Massachusetts, and that band was called The Mules. And I'm still hoping that at one of our reunions, we'll be able to get it back together. I've tried a couple of times.... Maybe our 30.

So then I went to law school at NYU and I didn't go in thinking about being in a band or anything. By happenstance, one of the first people I became friends with in my section first year, Matt Galloway, was interested in starting a band. He had played in a band in college and was much more of a musician than me. We liked all the same music at that time, so we were spending a lot of time going to all of the kind of indie rock clubs clustered around NYU in the East Village and Lower East Side. Great places like Brownies, the original Knitting Factory, Mercury Lounge, Under Acme....

JEB: Why not? When in NYC...

Personal attention. Unmatched support.
A commitment to our strong attorney network.

Our focus is on
you.

We're Vermont's top choice in title insurance for a reason.

Vermont Attorneys Title Corporation makes your job easier with responsive service, online resources, timely educational information, and the best claims service in the state.

Partnering with us, you'll enjoy the peace of mind that comes with the financial strength of CATIC. And you'll appreciate knowing that you'll never be cut out of the title insurance process. Our commitment to attorneys will always be our focus.



CATIC: #1 in Title Insurance in Vermont

Totals may not include policies that national underwriters issued through Direct Operations where no attorneys were involved.

Source: American Land Title Association, Market Share Reports and Position Analysis, 2012



vermontattorneytitle.com
802.876.6800 800.649.3366

MD: Right. So we were going to a lot of shows together and always talking about music. Matt knew Jim Harwood, a drummer, and had an apartment in Brooklyn where he had the whole basement of the building, which we soundproofed. Then he met Jennifer Baron, a guitar player with compatible tastes, and the four of us formed a band called Saturnine. It's a word that means melancholy. Matt saw it in an article and thought it worked for us. Our music was kind of contemplative. Loud, but not hyper. Actually, our very first public performance was at a law school friend's party—we called ourselves Learned Hand for that one!

JEB: Of course, a perfect law school band name!

MD: We switched to Saturnine after we got a gig at a club called Brownies in the East Village on Avenue A and thought we should have a name that wasn't so law oriented. They gave us a Monday night, to sort of test us out. We did a good job getting our friends at law school and around the city to turn out, so we had this huge crowd show up on a Monday night. We used to hand-make little paper fliers and hand them out—Jennifer had an awesome artistic flair for that. And she kept most of them! Anyway, the folks at Brownies were psyched that we packed the place on a Monday. More importantly, they liked our music. They didn't know us from a hole in the wall, but they liked us enough to start putting us on really good bills, usually with 3 or 4 more established indie rock bands with compatible sounds which gave us a great chance to meet other bands and make connections.

JEB: How often were you playing at Brownies while in law school?

MD: They were booking us pretty consistently, probably like every six weeks or so.

JEB: I think you are being modest about your ability then because you didn't mention that you guys were that good. Sounds like you had a following.

MD: Well, people liked our music. I remain proud of it and I think we were good song



Mike on the left at the Whammy Bar with Anachronist.

writers, and over time we really gelled as a band and grew a lot as individual players. We started making records and touring and for a relatively unknown band had a really good time. It helped that we were very easy to deal with. We were very functional and organized—we would show up when we were told and play without demands. It's kind of amazing thinking back to all the touring we did without a cell phone, using road atlases and pay phones!

JEB: Organizational skills definitely would have been key then. So for Saturnine you weren't playing covers anymore?

MD: That's right. We had a couple of covers but 95% were original songs. Matt was the primary songwriter—he would bring songs or parts he had written to practice, and we would all work on it together, developing our own parts and changing things around. And there were a handful of songs that developed spontaneously at practice. But probably for 90% of our own songs, the core of the song was an idea that Matt had. He's always been a super creative productive person—he's published two outstanding novels, in addition to his day job.

JEB: What was the most famous band Saturnine played with?

MD: We had a very fun, very crowded East Coast tour where we were opening for a great band called Versus. Amazingly enough, Matt and I went to see Versus when I was visiting NYC last December! We also did a show once in Boston, where we opened for Helium, a stellar band from Boston, and Scrawl, an amazing post-punk band from Columbus, Ohio. As I think about it, these bands all had women in prominent roles (Scrawl consisted of three women), which stands out, because the indie rock world at that time was still pretty male.

JEB: I'm from Columbus and sad to say I hadn't heard of them...but I wasn't very cool.

MD: They're amazing. Actually, just a couple of weeks ago, I thought of them out of the blue, downloaded some albums and I've been listening to them a lot lately.

JEB: As historically a huge Throwing Muses fan, I'll have to check them out then for sure.

MD: Definitely! While I was in Saturnine, one of our favorite bands at the time was a band from Texas called Bedhead. We opened a show for them once and really hit it off. One of the band's two songwriters (Matt Kadane; his brother Bubba is the other) was living in New York at the time, so Matt Gallaway, Matt Kadane and I started hanging out a lot and playing together now and again. Every time Bedhead would tour the east coast, Saturnine would open for them and supply amps and drums, because they were scattered around the country and didn't want to fly amps and gear all over the place. Bedhead eventually broke up and the Kadanes started a new band called The New Year, which I joined. It was amazing to play music with those guys, since I admired them so much as songwriters. And they were a bit higher profile than Saturnine, so I got to travel to more places, play bigger venues and play with some bigger bands.

JEB: And you were doing all this while you were in law school?

MD: Well, The New Year came about after law school but Saturnine, yeah.

JEB: Saturnine was all through law school and you were able to actually go to class and study for exams?

MD: Yes! And we managed to squeeze in a tour during our winter break of my third year and we made two records during law school too. I was thinking I was lucky enough to be at NYU law school, which pretty much means if I do okay, I'm going to be fine, job wise. So rather than try for straight A's (which I probably wouldn't have gotten anyway!), I decid-



VERMONT LEGAL FOOD HUB

Are you an attorney interested in working with farm and food clients?

The new Vermont Legal Food Hub at Vermont Law School connects income-eligible farmers, food entrepreneurs, and food system organizations with skilled attorneys willing to provide pro bono legal services.

Join the hub for an opportunity to:

- ✔ Get involved in a quickly growing practice area;
- ✔ Access educational resources and networking opportunities; and
- ✔ Help build strong businesses and healthy communities.

legalfoodhub.org

legalhub@vermontlaw.edu

802.831.1035

"To know you are providing legal services to a community that nourishes us all is reason alone to get involved and sign up as a volunteer lawyer." - Attorney Elizabeth (Beth) Boepple



CENTER FOR
AGRICULTURE &
FOOD SYSTEMS



This project is funded by the National Agricultural Library, Agricultural Research Service, U.S. Department of Agriculture.

ed to put in the effort to do well enough and give myself time for music. Looking back, I'm really glad and grateful I was able to make that choice.

JEB: And, on theme with this column, it enabled you to keep your sanity while you were in law school to be able to do something that you love at the same time. Did you find the breaks helped you focus more when you got to studying?

MD: Yes, I'm sure it kept me in a better frame of mind than law school would have by itself.

JEB: You were enjoying the music more than the law?

MD: When Matt and I were graduating from law school, the band was all set to tour full-time, but I had done a summer associate position at Proskauer Rose and had an offer to return, so I was a little bit torn. I stewed on it for a while and realized that I'd have regrets if I let the band go, and I didn't think that was going to be true in the opposite direction. Fortunately, Proskauer was nice enough to give me a year and said they'd hold a spot for me until the next summer—like a rock clerkship! When the deadline rolled around for me to get back to them, we were on the road couch surfing from small show to smaller show. We were in Pensacola I think, after playing to maybe 12 people and sleeping in a VERY sketchy house with very questionable goings-on going on. I felt like, again, I had plenty of time ahead for work and probably not as much time for odd, memorable experiences, so I called the person at Proskauer and said, "I really appreciate your flexibility, but I'm going to keep doing this for a while."

JEB: So you really enjoyed the life of sleeping on people's floors and constantly touring?

MD: You know, yes, every single time where we had a bad show or a bad day, I would think if I weren't doing this, I'd be sitting in an office, probably feeling really stressed out. And indeed, I had some years like that later! So I'm so grateful for all the time I spent touring, especially as someone who didn't grow up particularly musical—it always seemed like a surprising and awesome thing to be doing!

JEB: But financially?

MD: Basically, the first year after law school we toured on and off, coming back for a couple of weeks at a time and we were making just enough to scrape by. I moved into an apartment with a bunch of friends essentially living in a corner of the place! I had worked my first summer for a great small firm called Wachtel & Masyr (now Wachtel Missry) and I had stayed friends with the people there. After our first long tour, I called them

up and asked if they would be willing to give me hourly work when I was around. And that worked out—whenever the band was home, I'd call them and say, I'm here for X amount of time and they'd kind of look around and see what they needed help with. So for a couple of years, that was my life.

JEB: Why would you ever stop?!

MD: I know, right! Well, a couple of things happened. One, we had started touring at the peak moment for the indie rock scene, a few years after bands like Nirvana had blown up. Major labels were pumping tons of money into small bands like ours (though not us, specifically) which in turn was invigorating music scenes in smaller places. Our first couple tours, we tapped into that energy—playing to 100-200 people as an unknown band in towns like Dayton, Ohio or Green Bay, Wisconsin. But by our third tour, the labels had sort of moved on, crowds were shrinking, venues were closing, and touring for a small band like us got a lot harder. Two, we were getting older and needing money and stability. So our respective work lives started to pick up. I had teamed up with a partner named Jerry Bernstein at Wachtel, and I moved with him to a larger firm, Holland & Knight. Jerry and I had (and still have) a great relationship. He was a true mentor, plus he's a longtime musician himself, he was really encouraging and supportive of my music.

JEB: When did you move to Vermont?

MD: I left the firm in 2002, taught at Brooklyn Law School for two years and then moved to Montpelier.

JEB: When you were teaching full time, were you still in a band?

MD: Yes, both bands. And a small brag: twice on the BLS campus, students who I didn't know recognized me from the bands, which was pretty awesome.

JEB: Wow! Uber famous!

MD: More importantly, both times I had a witness! So I can prove it really happened!

JEB: I want to get to your present-day endeavors, being a Vermont practicing attorney and still having a band. So what was the demise of Saturnine and The New Year, and then how did you get started up here?

MD: When I moved up here Saturnine ended. We really relied on getting in a room together once a week to make our music, and no one wanted to be a long-distance band. Saying good-bye to them was definitely one of the hardest things about leaving New York. I've been able to continue with The New Year because we've always been a more centralized and episodic band—the Kadane brothers write the songs and send demos to Chris Brokaw (our drummer, but an absolute legend of a guitar play-

THE LAW OF
**straight
talk**

Legal solutions for
managing your employee
benefits and executive
compensation plans.



dinse

A LAW FIRM SERVING THE EMPLOYEE
NEEDS OF BUSINESSES AND INSTITUTIONS.

Please visit dinse.com
or call us at 802.864.5751

er) and me, and the we'd get together every so often for touring and recording.

JEB: I guess we skipped how you ended up coming here.

MD: I had mostly grown up in Vermont and always wanted to move back. And my wife Kelly was on board because she loves it up here, and we didn't want to either live in the suburbs of New York city and commute or live in NYC proper but endure the [lack of] work-life balance most law jobs there entail.

The first two years I was here, I clerked for Justice Skoglund and she, as you can imagine, was very supportive of the whole music thing, as long as I was getting my work done. Then I went to the AG's office and they were extremely supportive and kind as well, letting me go off payroll a couple times to go on tour with The New Year.

JEB: And then you started a Vermont band!

MD: Yes, I started a band here with one of my best friends, Brian Clark, called Anachronist. It's great because it's more like Saturnine in how it operates—we all live around here and get together every Wednesday night, so I have music built in as a regular part of life again. I met Brian very shortly after moving here—we have kids around the same age who were in the same day care as toddlers. He's supremely talented and supremely modest, so for years we would talk about music and while I was blabbing about touring and whatnot, Brian would say "yeah, I play a little guitar." Years into our friendship, he played me some demos of some of his songs, which floored me. They were amazing, and very much in line with the stuff I like. He and I like a lot of the same music, and at times his songwriting reminds me of the other bands I've been in. The first incarnation of the band was Brian, Jay Ekis on guitar and vocals, Phil Carr on drums, and me. Phil is an amazing drummer and a joy to play with as a bass player. He's extremely musical and responds to stuff that's going on really naturally.

JEB: Oh I know Jay!

MD: Jay's awesome! It was really fun to play with him. He left after a year or so, because he was getting much busier with his own stuff. Right around the same time, our friend Craig Jarvis—an esteemed member of the Vermont Bar!—who played classical guitar said he wanted to try being in a rock and roll band. Then Angela Paladino jumped in at some point after Craig had joined. She is an amazing vocalist and can play numerous instruments as well. The five of us had a great run of several years and a couple recordings. Two years ago, Craig moved to Hinesburg and couldn't make the commute, so we sadly said good-bye to him and we've soldiered on as a 4-piece since then.

JEB: And it all started because your kids were friends. That's how we've made so many of our connections, for sure. How many kids do you have?

MD: We have two: 16 and 13.

JEB: You've been in a full-time practice, in a band and raising two kids?

MD: Yeah well this band just fits into this life, you know? We don't play that many gigs. Before COVID we were probably playing four to six gigs a year. Keeping at that kind of a mellow pace makes it thoroughly enjoyable. But we do get together every other week. Anachronist now has 3 studio albums, so we always have new stuff in the works.

JEB: Does the name have anything to do with your age combined with being in an indie band?

MD: Ha! Not the intended effect, but there it is!

JEB: I used to listen to Sonic Youth, Bob Mould, Galaxie 500, The Pixies, what have you—bands like the ones referenced on your page. But I feel like as I age, the heavy guitar can be a bit much, so the question is do you think your style has mellowed over the years as sort of a natural progression of musical taste with age or no?

MD: I think it varies from person to person. I've seen a lot of friends for whom their style has mellowed, just like you said. But that definitely hasn't happened for me! I like to listen to a lot of different kinds of music, but I probably listen to more loud, harder music than I did at various points in the past. When you asked about big bands I've "opened for," I forgot to mention that when I did a tour with The New Year we played in a festival with, on a different stage and hours before, but we technically played in a festival with Sonic Youth. And the big headliner of that festival was Neil Young. Mind you, we played at like 4:00 p.m. on the smallest stage at the festival, but still!

JEB: Wow that's so impressive! What festival was this?

MD: It's called Primavera. We played at the original festival site in Barcelona about 10 or 12 years ago. It was incredible.

JEB: You are too modest. I didn't realize you were internationally famous and going on world tours when we scheduled this interview. Was it just the one time you toured in Europe?

MD: We went to Europe a few times. We had a good friend in Italy, so we did an Italy tour that he arranged. We did that festival twice. We did a festival in England once and the great thing about those gigs is the festival pays all of your expenses like airfare. A few we were invited for I couldn't do as I was

at the AG's office, with young kids at home, and couldn't justify taking 3 months off for a tour.

JEB: That makes sense. But it sounds like you've been able to have it all! You still do have several albums and you still get together with your band.

MD: Yes, Anachronist is still a completely ongoing, but The New Year has gone into a dormant phase. We released a record a couple of years ago, but we haven't toured for quite a long time.

JEB: I can't wait to come see a gig. I almost went to the Whammy Bar to see you a few months ago but life got in the way. Now with COVID who knows when you're going to be able to tour again. Right?

MD: We actually played at the Whammy Bar right before everything's shut down.

JEB: I bet you are itching to get back out! Perhaps a drive-in concert a la Grace Potter or one of those amazing zoom mixes.

MD: I can't imagine the technology that goes into those to make them sound good, so for now we are just hoping to get back out there soon.

JEB: Well, I'm excited that you took the time to tell me about your bands, plural. I was thinking one and didn't even know you're internationally famous. It was an honor to interview you. So back on theme, you agree that the music helped you with your balance through law school right on through to your busy private practice today.

MD: Undoubtedly, it's just a part of my life now. I can't really imagine life without playing music in some way. It would throw me way out of balance!

JEB: Truly a Pursuit of Happiness. Thanks so much for your time. Want to drop some links here for your albums?

MD: Thank you so much for having me. And sure....

Saturnine: <https://saturnine.bandcamp.com/>

The New Year: <https://www.thenewyear.net/>

The New Year, Mayday, on NPR: <https://www.npr.org/2017/05/26/530139307/songs-we-love-the-new-year-mayday>

Anachronist: <http://www.anachronist.band/>

7 Days review of Anachronist, Stay Late: <https://www.sevendaysvt.com/vermont/anachronist-stay-late/Content?oid=30888145>

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



Vermont Lawyers Assistance Program

The Vermont Lawyers Assistance Program provides confidential, meaningful assistance to lawyers, judges, law students and their families in coping with alcoholism and other addictions, depression, and other personal or professional crises.

COUNSELING, PEER SUPPORT, AND
PROFESSIONAL ASSISTANCE

CALL FOR HELP

Help Line:
1-800-525-0210
(the Boston LAP
can help refer you
to a Vermont LAP
Volunteer)

ALL
COMMUNICATIONS
ARE CONFIDENTIAL
UNDER RULE 8.3(C)

Vermont LAP:
1-800-355-4352
www.lapvt.org

RUMINATIONS

Limitations of Law and History

Time runs out on most things. Bread has its official expiration date, followed by inedible mold. Fruit and radioactive waste decay. Life has death. Library books become overdue after two weeks, and threaten fines. Iron erodes. Faces and other body parts sag. Recess is over with the bell.

In law, there are statutes of limitations; in equity, there is laches. There comes a time when it's too late—to prosecute most crimes or with civil or equitable claims to raise your objection to something that's happened to you. Once the period tolls, whatever was wrong or unjust is beyond challenge. Justice must be timely sought; late-claimed rights wither and die. You've slept on your rights, and you may never have heard the alarm.

Limitations exist for practical reasons. If a party could bring a claim at any time, the courts would be filled with cases for which evidence would have been lost, memories polluted, stories enhanced by retellings, and resources wasted. If you could be prosecuted for a crime no matter how many years had passed since the date of the offense, there is a risk there would be more innocent people convicted, based on false testimony. Limitations play a role in redemption. They shrive our sins and crimes, our bad behavior, allowing a reset, a cleansing of history that need not come back to haunt us.

Lately, the statues of Confederate generals and of those who promoted slavery have come down hard, toppled by protesters. Columbus has been decapitated and thrown into the river. Military bases, sports teams, and even the UVM library are being renamed, as a way of condemning racism and other wrongs, as a form of expiation or atonement. These judgments altering our view of people and events know no time limit, and there is no due process, no appeal, no hearing beyond the chanting of slogans. The sins and crimes of men and women found to be lacking in lasting respect are unforgivable and swiftly punished, justified by revisionist historical thinking and the mores of the present. Time never runs out on them.

Still, there needs to be some process, even with an inquisition and sanctions that know no temporal bounds.

Statutes of Limitations

The law sets limits on how long most crimes can be prosecuted, although the



Vermont legislature has decided that some crimes have no limits and others have longer terms. Those without limits include "aggravated sexual assault, aggravated sexual assault of a child, sexual assault, sexual exploitation of a minor as defined in subsection 3258(c) of [Title 13], human trafficking, aggravated human trafficking, murder, manslaughter, arson causing death, and kidnapping."¹ These crimes can be prosecuted at any time, no matter how long a time since the offenses were committed. Forty years is the limit for prosecution of lewd and lascivious conduct with or against a child, maiming, sexual exploitation of a child, and sexual abuse of a vulnerable adult.² Eleven years is the limit for arson and first degree aggravated assault.³ Prosecutions for lewd and lascivious conduct, sexual abuse of a vulnerable adult under subsection 1379(a), grand larceny, robbery, burglary, embezzlement, forgery, bribery offenses, false claims, fraud under 33 V.S.A. § 131(d), and felony tax offenses made after six years from the commission of the crime are unactionable.⁴ Most all other felonies and misdemeanors have a statute of limitations of three years.⁵ Most civil actions have a six-year statute of limitations.⁶

According to William Blackstone, the purpose of statutes of limitation is "to preserve the peace of the kingdom, and to prevent those innumerable perjuries which might ensue if a man were allowed to bring an action for any purpose at any distance of time."⁷

Back at the beginning, in 1779, Vermont

adopted a one-year statute of limitations for most crimes, except capital crimes.⁸ Capital crimes had no limitations. It treated rape as a capital crime, with a type of statute of limitations. The crime could be prosecuted at any time, "provided that, in time of distress," the victim "did make an outcry on the occasion."⁹

The first civil statute of limitations came eight years later, in 1787, when Vermont first established a six-year limit to the filing of most actions. That year the 15-year period to prove adverse possession and prescriptive use was adopted. That act suspended the limitation periods for minors under the age of 21, femes covert, those who were non compos mentis or in prison or beyond the seas. The clock would restart itself for minors, after coming of age, and others if they recovered their mental capacity, were released from imprisonment, or returned from overseas.¹⁰

The general law of statutes of limitation changed little over the years, but the exceptions increased. Legislation or rules narrowed or expanded the usual period. The crime of profane cursing or swearing in 1821 had to be prosecuted within ten days of the incident or there could be no fine.¹¹ The Human Rights Commission must bring charges against the State within six months of the end of the conciliation period.¹² The Uniform Commercial Code provides a four-year statute of limitations for suing for a breach of a contract for the sale of cattle.¹³ When a crime is a continuing offense, such as escape, the period of limitation of prosecution begins only upon retaking of the

escapee into custody.¹⁴ Easements of necessity which are not clearly observable on the ground are abandoned after 40 years if not renewed on the record, according to the Marketable Title Act.¹⁵

The most dramatic change in the law of statutes of limitation occurred in 1989, in a pair of cases that abandoned the traditional firm deadlines set in legislation. The high court decided the commencement date for calculating the limitation of civil actions was the date of discovery, not necessarily the date of the act that had previously started the stop clock. For some years the court had resisted adopting a discovery rule, but in *Lillicrap v. Martin* and *University of Vermont v. W.R. Grace and Company*, the Supreme Court finally reversed itself. The period of limitation begins when "the plaintiff has or should have discovered both the injury and the fact that it may have been caused by the defendant's negligence or other breach of duty."¹⁶ The expansion of this rule to cover any civil action was a bold move on the part of the high court, although proving or arguing against discoverability is not an easy task in most cases.

There is a story behind every statute. There is a one-year statute of limitations for recovery for skiing injuries, adopted after the Supreme Court's ruling in *Sunday v. Stratton Corp.* (1978), in which a novice skier was injured after an accident caused by loose snow on a novice trail. The case shocked the ski industry and threatened that large part of the Vermont economy, and the legislature's decision to reduce the statutory period for filing complaints was a direct response to the decision.¹⁷

Attempts to expand the general statute of limitations, however, are difficult. The high court has ruled that exemption for lands belonging to the state from the six-year limit does not apply to suits claiming injury to the State's groundwater, which are barred by the general six-year statute of limitations. This is because the statute never intended that groundwater be included as an interest in land. The statute, enacted in 1785, was adopted to provide a remedy for settlers who had improved land without legal title, who would be compensated for their investments prior to any forfeiture by the true title holder.¹⁸

Parties fight over when the period begins. The court has recently held that a cause of unjust enrichment between unmarried inhabitants does not accrue until the domestic partnership ends, because only once the relationship ends is there any loss or injury.¹⁹ Incarceration does not toll the statute unless the plaintiff is imprisoned at the time the cause of action accrues.²⁰ In cases of fraudulent concealment, the fraud must occur before the cause of action accrues.²¹

A rule of civil procedure explains that the

issue of a statute of limitations is waived if not raised as an affirmative defense.²² But if raised at trial, when court gives the parties the opportunity to file written argument on the issue, the claim has been allowed to proceed.²³ Even if not raised in the pleadings, the trial court is authorized to decide *sua sponte* that a statute of limitations barred recovery of damages on a motor vehicle retail installment sales contract, and dismiss the case.²⁴

This year, late in the session, the legislature passed an act providing that "[a]ll statutes of limitations or statutes of repose for commencing a civil action in Vermont that would otherwise expire during the duration of any state of emergency declared by the Governor arising from the spread of Covid-19 are tolled until 60 days after the Governor terminates the state of emergency...."²⁵

In the civil law, there are limitations that come with the conduct of the case. Failing to answer can amount to default.²⁶ Failing to provide evidence in discovery prevents its use at trial. There's a one year limit on challenging a judgment for mistake, inadvertence, surprise, or excusable neglect; newly-discovered evidence that was undiscoverable in time to move for a new trial; or fraud, intrinsic or extrinsic, misrepresentation, or other misconduct by opposing parties.²⁷ In the criminal law, there is the constitutional obligation for a speedy public trial.²⁸

All the various moving parts of the law contain some restrictions, penalties, or risks associated with pleading, discovery, the trial, and the appeal, and before the Supreme Court with deadlines for filings. There are so many intrinsic and extrinsic stops and catches, it's a wonder as many cases make it to judgment.

Appeals

An appeal deadline is as ruthless and unforgiving as a statute of limitation. File now or accept what has happened is the rule. The old Justice of the Peace courts had a two-hour appeal deadline.²⁹ Today, thirty days is the default, unless a statute sets a shorter or longer deadline.

Appeals from local and state government routinely require something in writing filed with the proper office in 30 days after decisions are made.³⁰ Decisions of the zoning administrator must be appealed within 15 days.³¹

There is an 18-month statute of limitations for claims against the State, before it is too late to file in Small Claims Court. No claim can be filed before the claimant has exhausted any administrative grievance procedure. There's a 90-day deadline for decisions to be made by departments or agencies on such claims, and if none is is-

Estate Planning, Elder Law & Medicaid Planning

*Peace of mind for families
and loved ones*

What we do:

- Protection of assets without spending all down to qualify for Medicaid
- Wills & Living Trusts
- Assistance with Medicaid Applications

Wendy S. Hillmuth, Esq.
Stephen A. Unsworth, Esq.
Ellen B. LaPlante, Esq.
Geoffrey A. Rafalik, Esq.

Members of the American
Academy of Estate Planning
Attorneys & National
Association of Elder Law
Attorneys.



26 Railroad Avenue | Essex Jct.,
VT

(802) 879-7133

415 New Karner Road | Albany, NY
(518) 389-6020

*For FREE consumer reports,
articles and estate planning
seminars, please visit us at
www.unsworthlaplante.com*

sued by that time the grievance is deemed granted.³²

The idea that government's failure to act in a timely manner should result in the grant of a claim or appeal is a feature of several statutes. When zoning administrators take more than 30 days to rule on permit applications, the permits are granted by operation of law.³³ If the zoning board or development review board takes more than 45 days to render a decision on an appeal after the close of evidence, a conditional use permit, or a subdivision, it too is deemed approved.³⁴ State permits are not treated that way in the law.

Laches

Laches is to equity what statutes of limitation are to law, except there are fundamental differences. Laches has no time limit. It requires proof of substantial merit, and is more likely to be denied as a defense to a claim than granted in Vermont. The purpose of laches is to forbid one to speak against his own act, representations or commitments to the injury of one to whom they were directed and who reasonably relied thereon.³⁵ Justice John Doolley has written, "Laches is not an elixir that automatically relieves landowners of the effects of any erroneous assumptions they may make as they use and develop their

property—particularly in the face of public policy determinations that conflict with the assumptions in question."³⁶

In his *Commentary of Littleton*, Sir Edward Coke explained that laches is "an old French word for slackness or negligence, or not doing."³⁷ As with the statute of limitation, laches is an affirmative equitable defense.³⁸ Plaintiffs' attorneys routinely add it to the list, along with statute of limitations. It is frequently not used beyond the answer.

Laches once had more clout than it does today, when law and equity were separate systems. Laches is tough. Most Vermont decisions seem to hesitate even discussing it. On appeal, the deference to the trial court is a steeper hurdle to overcome.³⁹ The evidence supporting the defense must show prejudice, actual or implied, resulting from the delay, making it inequitable to enforce the right.⁴⁰ Laches claimed as a shorter period than a statute of limitations is bound to fail. It's where there is no applicable statute where laches can work.

In 1986, a utility company wrote the Village of Derby Line that it reserved the right to challenge the village's legal ability to condemn property of the electric cooperative. In 1994 it raised the issue before the Public Service Board. On Appeal the Supreme Court found this supported a finding of laches. This 'reservation' could not

preserve the claim in the indefinite future. "Otherwise, parties in positions similar to VEC could always wait and see how the case developed, and then make procedural claims as 'trump cards.'"⁴¹

The Supreme Court didn't find laches in the appeal of the fight over Burlington's waterfront, where a railroad's claim to own filled land was rebuffed. The railroad had argued that "prerevolutionary public trust doctrine" had passed its due date, but the court was unpersuaded.⁴²

Equity brings other stops. There are claim and issue preclusion, barring not only issues actually litigated but those which should have been raised.⁴³ Equitable estoppel plays on the same team, preventing a party from "asserting rights which may have existed against another party who in good faith has changed" position in reliance on earlier representations.⁴⁴ Success in that claim is rare.

The law and equity favor repose. Time passes, parties don't act, without excuse, and the right to make a claim or defense is lost.

Death as a Limitation

Death terminates criminal charges. There's no point in pursuing the accused beyond the veil. Under the common law,

ALWAYS PLEASANT TO DEAL WITH.

"I have been insuring with ALPS for about 10 years. Always pleasant to deal with. Excellent service. I think my needs are met better with ALPS than any company that I have dealt with in the past. I have great confidence in the company and that the folks there care about their customers."

► Law Office of William P. Neylon, St. Johnsbury, VT

Vermont law firms can connect directly with ALPS Insurance Specialist, Kurt Whitmire, at kwhitmire@alpsinsurance.com or by calling (800) 367-2577.

Learn more about how ALPS can benefit your firm at

www.alpsinsurance.com/vermont

PROUDLY ENDORSED BY



in civil cases, when a party to a suit sounding in defamation, malicious prosecution, false imprisonment, or invasion of privacy died, the claims became null and void.⁴⁵ In Vermont, statutes have largely changed this rule, but the principle remains: unless a statute alters the common law, death usually means the end of civil litigation. In 1844, Chief Judge Charles K. Williams ruled that a suit against a bank director's bond does not survive his death. He reiterated that only actions expressly exempted by statute from the common law survive.⁴⁶

Death of a party can terminate civil actions pending at the time of death in Family Court. The Vermont Supreme Court has ruled that a death of a party during the nisi period abates the divorce, although it doesn't nullify the parties' agreement dividing the marital property, as that contract would be enforceable independently of the divorce order.⁴⁷ Maintenance awards in divorce end with the death of the obligor.⁴⁸ The death of a principal automatically revokes a power of attorney given by the principal.⁴⁹

By statute, executors or administrators may commence, prosecute, or defend "actions which survive to the executor or administrator and are necessary for the recovery and protection of the property or rights of the deceased and may prosecute or defend the actions commenced in the lifetime of the deceased," in the name of the deceased.⁵⁰ Actions for the recovery of damages for a bodily hurt or injury, occasioned to the plaintiff by the act or default of the defendant, if either party dies during the pendency of the action, also survive.⁵¹ These actions may be commenced and prosecuted by or against the executor or administrator, whether commenced in the decedent's lifetime or after death.⁵²

Violations of the Consumer Fraud Act and Act 250 survive the death of the developer. In a case involving the violation of a permit, the court substituted the developer's wife (executrix and distributee of developer's estate) for her husband after his death. Because the survival act was remedial in nature, the court looked past the limitations of the survival statute to justify continuing the case, even though the damages may be called penalties.⁵³

There are many ways to skid off the runway of our lives because of how long we waited or the mistakes we've made along the way. The stops are cold and hard; they show no sympathy for the valid claims that are lost, the crimes that go unprosecuted. These are limits imposed by the law. Then there are the limits we impose upon ourselves. The egg timer, the microwave, the alarm clock, the Echo Dot ("Alexa, 10 minute stop watch!")—we can set limits, and when they are ripened, there's a sound—a ping, a chime, a buzzer, in relative rhythms

and sound levels, charming or irritating, signaling when the time is up. The law's deadlines come without such alarms, other than the shrieks and bellows that accompany the discovery that the end has arrived or worse, past. The recent rule changes, allowing electronic filing up to midnight of the day things are due has saved many an appeal and many a panic attack.⁵⁴ But time creeps up on us, when we're not paying attention.

History

History is always vulnerable. There are facts, but how we regard them is not limited by time. Every generation rewrites its past, and often condemns the traditional conclusions about important persons and events made by its predecessors. Time reveals prejudices that color how we treat history.

First came the pandemic, then the heightened awareness of the killing of George Floyd and others, and marches and demonstrations, and the pulling down (or the official removal) of statues. Marble, granite, and bronze statuary erected to Confederate Generals of the Civil War, at a time when their reputations were honored in the southern states were particular targets. The statue of Theodore Roosevelt with a Black man and an Indian man walking on either side of his horse is gone from front of the New York Museum of Natural History. Columbus has suffered rough treatment by demonstrators. Andrew Jackson's statue on a rearing horse could not be budged, even though only the back legs hold it up, because of a set of iron bars cast into the bronze legs and trunk. But it might come down in time, if we are to punish all slaveholders, all racists or other terrible characters in the long drama of history.

History is always open for reinterpretation, as new evidence arises or new challenges to conventional wisdom come into fashion. That does not make the study of history unreliable. No science is so firm in its conclusions that resists rethinking. The revisionists refine (or upend) what we've always accepted as true.

One recent example is *The Rebel and the Tory*, the new history by John J. Duffy, H. Nicholas Muller III, and Gary Shattuck. Their research into early New York court records on the legal fights in the 1760s and 1770s over land titles proves that the traditional view of Vermont's origins that relied on what Ethan Allen said he did when he returned from Albany was plainly wrong. The courts weren't as partisan as Vermont historians had held, or as committed to driving settlers off their land. The failure of the Vermonters' claims belonged to Ethan Allen himself, whose negligence in not providing the necessary certified copies of es-



David L. Cleary
Cleary Shahi & Aicher, P.C.

Mediations, Arbitrations, and Early Neutral Evaluations

National Academy of
Distinguished Neutrals

American Arbitration
Association.

Past-President of the
International Academy
of Trial Lawyers

Cleary Shahi & Aicher, P.C.
110 Merchants Row, 3rd Floor
Rutland, Vermont 05701
(802) 775-8800, ext. 17
dlc@clearyshahi.com

check availability at:
www.nadn.org

sential documents (including copies of the New Hampshire titles) in time for the trials, left the court no alternative but to favor the New Yorker patent holders' claims.

When the first histories of Vermont were written, the myth became 'fact.' Historians from Samuel Williams to Walter Hill Crockett consequently wrote and "sustain[ed] the satisfying characterization of a Vermont David confronting and defeating a New York Goliath; of freedom-loving democrats resisting autocratic New York tyrants skillfully manipulating a biased legal system."⁵⁵ Historians were complicit in repeating the myth. Samuel Williams relied on Ira Allen for details of his first history of Vermont (1794).⁵⁶ In letters to Allen, Williams revealed he was not above applying a little cosmetic on the face of the founders. "I have inserted every thing that you mentioned to me, and I believe it now stands in a light that cannot be construed unfavorable to any person who is concerned in it, and by the British in Canada or elsewhere."⁵⁷ His candor condemns Williams and leaves questions that undermine reliance on his story.

In a 1978, J. Kevin Graffagnino wrote an article tracing the major Vermont historians from Williams to the present. He showed how often the authors relied on previous works, without researching whether there

was proof of what was told, beyond the words of their predecessors. He wrote, "Critical statements and judgments about events, movements and individuals in Vermont's early heritage passed from one generation to the next virtually unaltered, having accepted them as the foundation of their discussions of the Vermont of following years."⁵⁸

New sights into old myths are often refreshing as an academic exercise. When it comes to pulling down statues, however, the process is rougher. This process doesn't wait for scholarly analyses. The offensive object must be taken down, and sometimes vandalized, to prove the depth of the feelings of the actors.

When there is deliberation, it often becomes confused and complicated. Consider two recent decisions, made after hearings. The Vermont Board of Libraries changed the name of the Dorothy Canfield Fisher Award. Guy Bailey's name was removed from the front of UVM. Eugenics was the culprit in both cases. Both Fisher and Bailey supported the movement to sterilize what were called "dependent, delinquent, and deficient families."⁵⁹

Dorothy Canfield Fisher was regarded as one of Vermont's great writers. Her *Vermont Tradition* is a classic.⁶⁰ According to a *Vermont Digger* article by Luke Zar-

zecki, Fisher's name was struck from the library award after evidence was presented to the board of her writings disparaging American Indians and French Canadians. The board also heard testimony from those who argued Fisher's connections to eugenics were slim, and the final version of the resolution contained no reference to it, instead concluding that her name was "no longer relevant to today's young people."⁶¹

Guy Bailey was UVM's President from 1919 to 1940. He was Vermont Secretary of State from 1908-1917. As President he supported the work of Professor Henry Perkins, whose work included a challenge to Vermont couples to have children "in sufficient numbers to keep up to par the 'good old Vermont stock.'" Perkins' inspired Commission on Country Life, through its principal publication *Rural Vermont: A Program for the Future* (1931), supported practices to prevent the marriage and reproduction of "feeble-minded persons."⁶² Nearly 80 years after his death, Guy Bailey became the subject of embarrassment to the university, and now only the name of a generous donor remains on the façade of the library.

If Bailey and Fisher are rejected, what should we do with Oliver Wendell Holmes, Jr., who is remembered for so many important opinions, but who also wrote, "Three

Two Northern New England Locations, One Exceptional Firm

Preserving the beauty of Northern New England through innovative and sustainable solutions to conserve land, working farms, and open spaces. BCM Environmental & Land Law remains at-the-ready to assist you with all of your environmental and land use needs.

3 Maple Street
Concord, NH 03301-4202

148 Middle Street, Suite 1D
Portland, ME 04101



☎ 603-225-2585

📞 603-225-2401

✉ Contact@nhlandlaw.com

🌐 www.nhlandlaw.com



generations of imbeciles are enough." In his majority decision authorizing sterilization, he explained,

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.⁶³

Where should this stop? Vermont Supreme Court Judge Stephen Jacob owned a slave named Dinah. While he is heralded for his defense of a claim by the Selectmen of Windsor to pay for her maintenance, after she became a pauper, shielding himself by the Vermont Constitution's express prohibition against slavery, he was still a slaveowner.⁶⁴ He bought Dinah at a slave auction. What punishment should he receive?

Many Vermont officials and other citizens supported the return of slaves to Nigeria. They included Jonas Galusha, who had served as Governor 1809-1813 and 1815-1820; Cornelius Van Ness, who was Governor 1823-1826; Ezra Butler, Governor 1826-1828; Samuel Prentiss, who served on the Vermont Supreme Court, in the U.S. Senate, and as U.S. District Judge; Timothy Merrill, Supreme Court; and William Slade, Jr., Governor and Congressman. Vermont abolitionists treated those favoring colonization as racist, and so does history. How should our disgust with their position be memorialized?⁶⁵

The possible candidates for purging are part of an ever-expanding list. The work ahead, if every objectionable thought, word, or deed is punished, will take generations. In that time, it is possible that the arc of history will bend in a different direction, and the actions taken this year seen as further indication of our own time's prejudices.

To what end is the sanitizing of the past? Is it for our own consciences that we seek to punish the reputations of no-longer-righteous citizens?⁶⁶

A Constitutional Amendment

One of the proposed constitutional amendments adopted in this legislative session is to alter Article 1 to read, "That all persons are born equally free and inde-

pendent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." Excised from the wording adopted in 1777 are the words at the tail end of the above, which read, "therefore no person born in this county, or brought from over sea, ought to be holden by law, to serve any person as a servant, slave or apprentice, after arriving to the age of twenty-one years, unless bound by the person's own consent, after arriving to such age, or bound by law for the payment of debts, damages, fines, cost, or the like." Testimony before the legislature promoting the amendment focused on the belief that the article actually authorized slavery.⁶⁷

What's interesting about the proposal is the sensitivity of the movers of the amendment to the wording of the article, which had remained essentially in place without controversy for 243 years.

Statues of Limitation

There is no value in putting a limitation on history. The very point of historical analysis is to enlighten, and it would be ridiculous to be bound to some former historical conclusion or honored writer because too much time has passed since something written became gospel. It isn't asking too much to insist that the judgments of the present about the past that are based on what we now believe is acceptable should be done with greater caution. We need a set of standards, and some attempt at due process, ensuring a fair hearing before disinterested decision-makers, rather than a chant or a spray-painted slogan.

Unlike law, history is entirely retrospective. You can't be guilty of violating a statute that wasn't in place when you committed the act it condemns. Realizing this, there ought to be some consideration given to the context of those acts. We should pause before we sentence people for holding opinions we now find disagreeable, as if they should have known better. Presentism is just wrong.

We ought to be sure of our history, recognizing that what we believe today may be rejected in the years to come. We must never forget that not all historians are correct in every detail, or even honest in reporting what they have found. The truths of history are largely provisional.

We need to sort out just how severe to be with the dead respondents we seek to hold liable for their sins and opinions. Washington was a slave-owner. He was more than that, of course, but should the slave-owning part of his biography outweigh his other accomplishments, enough to order the

MARKSPOWERS^{LLP}

**Offering
ZOOM
MEDIATION
and
ZOOM
ARBITRATION**



DONALD (TAD) POWERS, ESQ.⁺

MICHAEL MARKS, ESQ.⁺

ADAM L. POWERS, ESQ.

Prepared. Patient. Persistent.

**+National Academy of
Distinguished Neutrals**

**+Best Lawyers for
Mediation & Arbitration**

www.markspowers.com

1205 THREE MILE BRIDGE ROAD
MIDDLEBURY, VT

(802) 388-2211

*Call Kristin or check
website for availability.*

removal of the Washington Monument? What about people who believed something now regarded with horror and then changed their minds? Suppose Guy Bailey later recanted his support of eugenics and persuaded the legislature to repeal the sterilization law. Could his name be retained on the library wall?

We might adopt a bill of rights for dead people. It would guarantee due process to them, the right to a fair hearing before a disinterested decision-maker. It would require all charges be supported by verifiable facts. The dead would be entitled to representation. They would not be guaranteed a speedy trial, but at least they would have an opportunity to be heard before any judgment was rendered. In keeping with history's lack of any limitations, the dead would have a right to a new hearing at any time, without having to prove excusable neglect or defend against accusations of claim or issue preclusion. No judgment would be final. The dead can never sleep on their rights.

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. Paul is also the author of The Law of the Hills: A Judicial History of Vermont (© 2019, Vermont Historical Society).

¹ 13 V.S.A. § 4501(a). The Vermont Supreme Court has ruled that attorney misconduct prosecutions are not limited by the time that may have passed since the offensive conduct occurred. *In re McCarty*, 194 Vt. 109, 75 A.2d 589 (2013).

² 13 V.S.A. § 4501(c).

³ 13 V.S.A. § 4501(d).

⁴ 13 V.S.A. § 4501(b).

⁵ 13 V.S.A. § 4501(e).

⁶ 12 V.S.A. § 506.

⁷ William Blackstone, *Commentaries on the Laws of England; in Four Books* (Albany, N.Y.: Banks & Company, 1902), 777.

⁸ "An act for the limitation of prosecutions in diverse cases," 12 February 1779, *Laws of Vermont 1779-1780*, ed. Allen Soule, *Vermont State Papers XII* (Montpelier, Vt.: Secretary of State, 1964), 146.

⁹ "An act for the prevention of rape," *ibid.*, 40.

¹⁰ "An act for the limitation of actions," March 10, 1787, *Laws of Vermont 1785-1791*, ed. John A. Williams, *State Papers of Vermont XIV* (Montpelier, Vt.: Secretary of State, 1966), 339-341.

¹¹ "An act for the punishment of certain inferior crimes and misdemeanors," November 15, 1821, *Laws of Vermont of a Publick and Permanent Nature* (Windsor, Vt.: Gideon Ide, 1825), 270.

¹² 9 V.S.A. § 4554; *Vermont Human Rights Com'n v. State, Agency of Transportation*, 192 Vt. 552, 60 A. 702 (2012).

¹³ 9A V.S.A. § 2-725(1).

¹⁴ 13 V.S.A. § 1501(b)(2); *State v. Burns*, 151 Vt. 621, 151 A.2d 593 (1989).

¹⁵ *Gray v. Trader*, 209 Vt. 210, 204 A.3d 1117

(2018).

¹⁶ *Lillicrap v. Martin*, 156 Vt. 165, 176, 591 A.2d 41, 46 (1989); *University of Vermont v. W.R. Grace and Company*, 152 Vt. 287, 290, 565 A.2d 1354, 1357 (1989).

¹⁷ *Sunday v. Stratton Corp.*, 136 Vt. 293, 390 A.2d 398 (1978).

¹⁸ *State v. Atlantic Richfield Co.*, 202 Vt. 212, 148 A.2d 559 (2016); 12 V.S.A. § 462f.

¹⁹ *McLaren v. Gabel*, 2020 VT 8, ¶ 36.

²⁰ 12 V.S.A. § 511(a).

²¹ 12 V.S.A. § 555; *Jadallah v. Town of Fairfax*, 207 Vt. 413, 186 A.3d 1111 (2018).

²² V.R.C.P. 8(c).

²³ *DBI/Coinvestor Fund III, LLC v. Cowles*, not reported, December 2, 2019.

²⁴ *DaimlerChrysler Services North America, LLC v. Ouimette*, 175 Vt. 316, 175 A.2d 38 (2003).

²⁵ "An relating to the emergency judicial response to the COVID-19 public health emergency," No. 95, *Laws of 2019-2020*.

²⁶ V.R.C.P. 55.

²⁷ V.R.C.P. 60(b).

²⁸ Vt.Const. Chap.I, Art.10; *State v. Brillon*, 129 U.S. 81, 129 S.Ct. 1283, 173 L.Ed2d 231 (2009).

²⁹ *Vermont Statutes Revision of 1947* (Montpelier, Vt.: Secretary of State, 1948), § 1507.

³⁰ 3 V.S.A. § 815(d); V.R.C.P. 74 & 75; 24 V.S.A. § 4447.

³¹ 24 V.S.A. § 4465.

³² 32 V.S.A. § 932(b).

³³ 24 V.S.A. § 4448(d).

³⁴ 24 V.S.A. § 4464(b)(1).

³⁵ *Dutch Hill Inn, Inc. v. Patten*, 131 Vt. 187, 193, 303 A.2d 811, 815 (1973).

³⁶ *Chittenden v. Waterbury Center Community Church, Inc.*, 168 Vt. 478, 494, 726 A.2d 20, 31 (1998).

³⁷ J.H. Thomas, ed., *Systematic Arrangement of Lord Coke's First Institute of the Laws of England I* (Philadelphia: Alexander Towar, 1936), 143.

³⁸ V.R.C.P. 8(c).

³⁹ *Preston v. Chabot*, 138 Vt. 170, 172, 412 A.2d 930, 931 (1980) (observing that "a trial court's determination on the issue of laches is a matter of much discretion").

⁴⁰ *Comings v. Powell*, 97 Vt. 286, 293, 122 A. 591, 594 (1923); *Wilder's Ex'r v. Wilder*, 82 Vt. 123, 129, 72 A. 203 (1909).

⁴¹ *Petition of Vermont Elec. Co-op., Inc.*, 165 Vt. 634, 635, 687 A.2d 883, 885 (1994).

⁴² *State v. Central Vermont Ry.*, 153 Vt. 337, 353, 571 A.2d 1128, 1136 (1989).

⁴³ *Berlin Convalescent Ctr., Inc. v. Stoneman*, 159 Vt. 53, 56, 815 A.2d 141 (1992).

⁴⁴ *Fisher v. Poole*, 142 Vt. 162, 168, 453 A.2d 408, 411 (1982).

⁴⁵ *Whitcomb's Adm'r v. Cook*, 38 Vt. 477 (1866).

⁴⁶ *Treasurer of Vermont v. Raymond*, 16 Vt. 364 (1844).

⁴⁷ *Estate of Lord v. Estate of Ladd*, 161 Vt. 270, 640 A.2d 29 (1994).

⁴⁸ *Justis v. Roy*, 159 Vt. 240, 617 A.2d 148 (1992).

⁴⁹ *Davis v. Windsor Sav. Bank*, 46 Vt. 728 (1874).

⁵⁰ 14 V.S.A. § 1451.

⁵¹ 14 V.S.A. § 1452.

⁵² 14 V.S.A. § 1453.

⁵³ *State v. Therrien*, 161 Vt. 26, 32, 633 A.2d 272 (1993).

⁵⁴ V.R.C.P. 6.

⁵⁵ John J. Duffy, H. Nicholas Muller III, and Gary G. Shattuck, *The Rebel and the Tory* (Montpelier, Vt.: Vermont Historical Society, 2020), 161.

⁵⁶ Samuel Williams, *The Natural and Civil History of Vermont* (Walpole, Ma.: Isaiah Thomas and David Carlisle, 1794).

⁵⁷ Samuel Williams to Ira Allen, July 28, 1794, John J. Duffy, *Ethan Allen and His Kin Correspondence, 1772-1819* (Hanover, N.H.: University Press of New England, Spring 1998), 423-424.

⁵⁸ J. Kevin Graffagnino, "The Vermont 'Story': Continuity and Change in Vermont Historiogra-

phy," 46 *Vermont History* No. 2, 77-99 (Spring 1978).

⁵⁹ *Rural Vermont: A Program for the Future* (1931); <https://www.uvm.edu/uvmnews/news/uvm-trustees-approve-removal-baileys-name-bailey/howe-library>; "We reached our recommendation based primarily on the fact that Bailey's active involvement as president of the University in supporting and promoting the Eugenics Survey of Vermont is fundamentally at odds with the University's mission. We also considered Bailey's mismanagement of University financial resources," said trustee and committee chair Ron Lumbrá.

⁶⁰ Dorothy Canfield Fisher, *Vermont Tradition: The Biography of an Outlook on Life* (Boston: Little, Brown & Co., 1953).

⁶¹ <https://vtdigger.org/2019/03/31/15-months-unanimous-vote-still-no-change-book-award-name/>.

⁶² *Two Hundred Vermonters, Rural Vermont A Program for the Future* (Burlington, Vt.: The Vermont Commission on Country Life, 1931), 294-296.

⁶³ *Buck v. Bell*, 274 U.S. 200, 207, 47 S.Ct. 584, 585 (1927).

⁶⁴ *Selectmen of Windsor v. Jacob*, 2 Tyl. 192 (1802).

⁶⁵ Abraham Lincoln also once embraced colonization as a remedy for slavery, both before the Civil War and as late as 1863. Phillip W. Magness and Sebastian N. Page, *Colonization After Emancipation: Lincoln and the Movement for Black Resettlement* (Columbia, Mo., University of Missouri Press, 2011).

⁶⁶ One answer might be the creation of a Vermont Historical Reckoning Commission, to try the officials who held opinions that are no longer courat and respectable, and issue formal findings condemning the memory of these former worthies.

⁶⁷ Imprisonment for debt was abolished in Vermont in 1846, and the last 15 words of the sentence became irrelevant that year. No one will miss them, as they have no force or effect. But the 40 words before them will be missed. The only mention of abolishing slavery is among those words. A better change would be to remove everything after "apprentice," so that the article would read, "That all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety; therefore no person born in this county, or brought from over sea, ought to be holden by law, to serve any person as a servant, slave or apprentice."





Vermont
Bar Association

CONNECT

WITH LEGAL PROFESSIONALS



inPRINT

Vermont Bar Journal

The official magazine of the VBA
Published quarterly - 4 issues a year
Circulation - 95% of VT licensed attorneys

VBA Directory

The VBA Directory is a comprehensive listing complete with contact information of Vermont licensed attorneys, judges, and law firms, as well as a complete listing of the Vermont Court system and local, state and federal offices associated with the legal profession.

Published once a year in January
The VBA Directory is provided complimentary to all Vermont Bar Association members as well as sold to thousands of other legal professionals in and outside of Vermont.



inPERSON

VBA Conferences

The Vermont Bar Association offers many unique opportunities to connect with the legal community in Vermont. Our larger events such as our Annual Meeting, Mid-year Meeting and bi-yearly Solo & Small Firm Conference and Tech Conference can connect you or your company with the right people in the legal profession.



onLINE

Legal Vendor Directory

The Vermont Bar Association Legal Vendor Directory is a directory of legal vendors that offer a variety of services for lawyers and legal professionals. Vendors may advertise in several categories, such as case management software, time and billing, etc.

Become an affinity benefit partner and grow your clientele!

Advertise with us!

Contact: Lisa Maxfield p. 802-223-2020 e. lmaxfield@vtbar.org w. www.vtbar.org

WRITE ON

Past Tense: The Legal Prose of Justice Robert Larrow

Introduction

In the Winter 2019 issue, Paul Gillies introduced readers to the prose, politics, and public career of Robert Larrow, who served on the Vermont Superior Court from 1966 until 1974 and on the Vermont Supreme Court from 1974 until 1981.¹ He was the last justice to serve on the Supreme Court after being elected by the General Assembly.² Soon after Larrow's election, Vermont moved to its current system of choosing justices: gubernatorial nomination followed by senate confirmation.³

But Larrow's service on the Vermont Supreme Court was more interesting than the circumstances by which he joined the Court. Paul Gillies, in the concluding paragraph of his article, wrote:

Robert Larrow was a brilliant jurist. He wrote crisp, articulate, strong decisions, and he held strong opinions. Clearly his political principles influenced his legal decisions, but they were not always revealed in his writings. Still, he could not hide his character behind his robe.⁴

Drawing on those words, this article will examine Justice Larrow's legacy as a legal writer. Before assessing that legacy, though, one must identify the standard on which the assessment will be based. A brief discussion of effective legal writing follows.

Effective Legal Writing: A Short Primer

The "twin pillars" of effective nonfiction writing—including legal writing—are clarity and brevity.⁵ To achieve both goals, lawyers should shun wordy, vacuous expressions such as "it is agreed that" and "herein set forth," which add words, but not meaning, to a sentence.⁶ Similarly, lawyers should omit "It is significant that ...," "It is important to remember that ...," "It should be noted that ...," and "It is well established that ..." from sentences because these expressions not only add words without adding meaning, but sometimes obscure a sentence's intended meaning.⁷

Clarity and brevity require the omission of wordy idioms, too, such as "the fact that," "despite the fact that," "at this point in time," "the question as to whether," and "pursuant to." The writer should substitute "although" for "despite the fact that," "now" for "at this point in time," "the ques-

tion whether" or just "whether" for "the question as to whether," and "under" or "by" for "pursuant to."⁸ Replace "the fact that" with the word or words for which the bulky idiom is a poor substitute. If the first draft stated: "The fact that she had died spawned litigation over her will," the subject of the sentence is the decedent's death. The redrafted sentence should state: "The decedent's death spawned litigation over her will."⁹

Lawyers should omit fancy words, too, especially when simple ones will make the point equally well (e.g., use instead of utilize, house instead of residence, pay instead of remuneration). And they should reject intensifiers, such as "clearly" and "certainly," which do not clarify the unclear; like the other word crutches that lawyers use, intensifiers add words, but not meaning, to a sentence.¹⁰

But clarity and brevity are not merely functions of simple words and concise sentences; they are also the happy results of a well-constructed legal document. Such a document "leads from the top"; the first paragraph identifies the key background facts, the issue to be decided, and the writer's view about the proper resolution of the case.¹¹ The first paragraph of each section should make clear the author's conclusion about the subject of that section.¹² Similarly, the first sentence in each paragraph should summarize the author's conclusion about the subject of that paragraph, meaning that each paragraph should proceed from the general to the specific, with the last sentence stating the most narrowly focused idea or information in the sentence.¹³ And the author should not "tread water" by using words that fail to advance the argument, making a follow-up sentence necessary.¹⁴ For example the first sentence below is unnecessary.

This court has had to deal with the issue of a child's suit for parental consortium. In a recent case, this court has held that the child has no cause of action.¹⁵

A better alternative is one sentence that states: "Recently, this court has held that a child has no cause of action for loss of parental consortium."¹⁶ Careful editing is the key to paring this thought down from two sentences to one.

A well-constructed legal document is

fundamentally sound at the paragraph level as well as at the sentence level. Paragraphs should be less than a page long, and sentences should vary in length to inject an engaging rhythm into the writing, but they should not exceed twenty-five words.¹⁷ The character in the sentence (e.g., Judge Jones, the defendant, or the Ways and Means Committee) should be the subject, and the verb should describe what the character did, does, or should do.¹⁸ The author should use the active voice, following a subject-verb-object sequence that explains who did what to whom.¹⁹ For example, write that the Ways and Means Committee amended the tax code, not that the tax code was amended by the Ways and Means Committee.²⁰

Last, but not least, effective legal writing steers clear of "nominalizations," which convert assertive verbs to hesitant nouns, draining the punch and persuasiveness from legal writing. So "contribute," do not "make a contribution"; "decide," do not "make a decision; and "indemnify" someone, do not "make a provision for indemnification."²¹

Legal writing need not be dull, though. Judicious use of several rhetorical techniques can help lawyers to produce documents that are not only clear and concise, but also interesting and persuasive. One such technique is vivid imagery—what the ancient Greeks who invented rhetoric called *energeia*—which can enliven colorless language.²² For example, in a statement of facts in a drunk-driving case, a prosecutor could write: "On his way out the door, Smith staggered against a serving table, knocking a bowl to the floor."²³ But the following, more vivid description, would suggest intoxication more dramatically: "On his way out the door, Smith staggered against a serving table, knocking a bowl of guacamole dip to the floor and splattering guacamole on the white shag carpet."²⁴

Like vivid imagery, "figures of speech" can add drama and emphasis to a written text. Among the most familiar figures of speech are metaphors and similes. Rhetorical cousins, they nevertheless differ in that metaphors make implicit comparisons, whereas similes use "like" or "as" to make explicit comparisons.²⁵ To use a simple example, "Bob is a pit bull in court" is a metaphor because the comparison between Bob and the pit bull is implicit, whereas "Bob acts like a pit bull in court" is a simile be-

cause it uses “like” to make the comparison explicit.

Unlike metaphors and similes, which enhance language by assigning unfamiliar meanings to familiar words, other figures of speech rearrange the order in which words are customarily used. One familiar example is “parallelism,” which features a similar structure in a pair or a series of related words, phrases, or clauses.²⁶ It fosters word economy while achieving a pleasing cadence that aids reader comprehension. An example is: “Attorney Smith spent Thursday speaking to a client, writing a memo, and attending an afternoon seminar.”²⁷

A close relative of parallelism is “antithesis, which juxtaposes contrasting ideas, often in parallel structure.”²⁸ The following sentence illustrates antithesis: “The patent system rewards those who can and do, not those who can but don’t.”²⁹ The clauses “those who can and do” and “those who can but don’t” exhibit antithesis because they present a direct contrast by juxtaposing a word and its opposite twice in quick succession. “The juxtaposition of opposites makes the sentence above more memorable than if it merely stated that ‘the patent system rewards action.’”³⁰

Thus, clarity and brevity are the key ingredients of effective legal writing, but rhetorical techniques, used sparingly, can add spice to ordinary prose, enhancing comprehension and persuasion. The remaining discussion will consider the writings of Justice Larrow according to these criteria.

Justice Larrow as a Writer

Majority Opinions

Robert Larrow wrote more than 250 opinions in his seven years on the Court.³¹ He often wrote majority opinions about workers’ compensation, municipal law—including zoning—and unemployment compensation, reflecting his professional background, especially his nineteen years as the City Attorney for Burlington.³² *Gilbert v. Town of Brookfield* illustrates the strengths and the weaknesses of Justice Larrow’s writing.³³ Three Brookfield residents, who owned property on two highways, petitioned the Orange Superior Court to require the Town to reclassify the roads from

Class Four to Class Three. The trial court, concluding that the Town had used discriminatory standards to classify the two roads, ordered their reclassification to Class Three, requiring the Town to maintain them in the winter.

Larrow’s majority opinion provided this information and more within its first four paragraphs. Curiously, though, it waited until the fifth paragraph to state the issue at hand: “whether the [property owners] can get the Town to keep their roads open in winter.”³⁴ This arrangement conflicts with the earlier suggestion to “lead from the top” by stating the issue at hand in the first paragraph³⁵ and with the idea that the reader should know “within thirty seconds” the nature of the dispute.³⁶

To be sure, Justice Larrow could encapsulate an issue by using parallelism and antithesis to good effect. For example, his *Gilbert* opinion stated, “In all important respects these highways are indistinguishable from others which the Town has elected to repair, maintain, and keep open during the winter, yet it has sought to avoid its obligation with respect to them.”³⁷ But he could also write an unwieldy sentence made more confusing by its designation of the parties by their legal status instead of their names. It states:

While we might proceed by reference to determine what damages, if any, were sustained by appellees by reason of the appellant’s failure to timely brief its appeal, it seems apparent that those damages would be in the nature of winter maintenance on the highways in question, occasioned by failure, if any, of the appellant to comply with the provisions of the interim order at the trial level.³⁸

A better strategy would have been to keep the sentence under twenty-five words and refer to the Appellees as “the property owners.” Writing issues aside, the *Gilbert* Court found for the property owners and remanded for a determination of damages.

In *Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, Larrow waited until the seventh sentence of his opinion to identify the issue at hand. In the previous sentenc-

es, he identified the parties, observed that both entities ran gravel pits and sold gravel, and noted that between 1972 and 1975, the Town’s earnings from gravel sales had increased dramatically, whereas the Company’s earnings had declined. Stating the issue on appeal, he wrote, “In its action below plaintiff sought injunctive relief against operation of the gravel pit by the Town as a private business and the sale of gravel therefrom other than to the Town.”³⁹ Alternatively, his opening sentence should have stated, “Hinesburg Sand & Gravel appeals from the trial court’s denial of its claim for injunctive relief against the Town’s operation of a gravel pit as a business and sale of gravel to buyers other than the Town itself.”

Still, *Hinesburg Sand & Gravel* showed that Larrow could be forceful and direct in his writing, even when using “the fact that.” He acknowledged that the Town’s sales, even to nonresidents, could be permissible if “incidental” or “subordinate” to its maintenance of Town roads. But, he observed, “[n]o amount of good faith rationalization can gloss over the fact [that] the principal activity at the Hinesburg pit is a private business operation by the town, in direct competition with the plaintiff.”⁴⁰ Using vivid words and parallelism, he added that “[t]here is nothing “incidental” about processing eight times its own requirements of gravel, selling it in tax-free competition with the plaintiff, and realizing therefrom a \$30,000 annual profit.”⁴¹ The Court reversed the trial court’s judgment and remanded for an order enjoining the Town’s offending activities and for a rehearing on damages.

In *State v. Woodmansee*, a criminal case, Larrow got right to the point in the opening paragraph, stating, “Appellant Woodmansee was charged below with violation of 13 V.S.A. s. 5, by assisting one Frank Bernard to avoid arrest and punishment for the crime of murder.”⁴² Later, Larrow provided a clear, fairly concise statement of the pertinent law, writing:

This Court has long adhered to the view that where evidence of guilt is entirely circumstantial the circumstances proved must exclude every reasonable hypothesis except the one that the de-

WANTED: LEGAL FICTION

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 December 15, 2020.

defendant is guilty. And this conclusion cannot be reached by basing one inference from established fact upon another inference. Under these tests the evidence was indeed sparse, and cannot support the verdict.⁴³

Thereafter, in applying the law to the facts, including the burning of the decedent's car, Larrow noted:

There was no evidence that Woodmansee burned the vehicle or was present when it was burned. In fact, beyond testimony that the fire seemed to have started in the passenger compartment, there was no evidence of its cause. On this state of the evidence, we agree with [Woodmansee's] contention that there is at best established a conjectural theory of his activity, which falls far short of excluding every other reasonable hypothesis.⁴⁴

Thus, Larrow concluded crisply that "[t]he conviction must be set aside and the cause remanded for a new trial."⁴⁵

Larrow also got right to the point in *Sunday v. Stratton Corporation*, perhaps his best known and most consequential decision because of its implications for the skiing industry, in Vermont and nationwide.⁴⁶ His opening sentence is clear and illuminating, noting that Mr. Sunday, a young adult, was injured while skiing at Stratton. The second sentence is powerful, stating simply: "His injuries resulted in permanent quadriplegia."⁴⁷ The remainder of the first paragraph explains that Sunday sued Stratton for "negligently maintain[ing] its ski trails and fail[ing] to give notice of hidden dangers" and that he won a \$1,500,000 verdict, prompting Stratton's appeal.⁴⁸

Larrow's reasoning in support of Mr. Sunday is equally clear. Noting that ski areas had greatly reduced the safety risks associated with alpine skiing, he turned on its head Judge Cardozo's famous aphorism about the assumption-of-risk doctrine—"the timorous should stay at home"⁴⁹—by countering that "the timorous no longer need stay at home."⁵⁰ Indeed, ski areas make a "concerted effort to attract [timorous skiers'] patronage and to provide novice trails suitable for their use."⁵¹ Under these circumstances, if the small bush or clump of brush in which Mr. Sunday (a novice skier) became entangled before he fell was "a hidden danger," known to Stratton but not to him, Stratton had a duty to warn him about it.⁵²

Using antithesis, Larrow distinguished between a fall by a skier not caused by a ski operator's breach of duty, to which the assumption-of-risk doctrine applies, and a fall caused by the ski area's assumption and breach of a duty of care. In the latter

case, the skier assumes "not the risk of injury, but the use of reasonable care on the part of the [ski operator]."⁵³ Because Stratton's grooming did not live up to its advertisements of smooth, easy novice trails, the Court affirmed the trial court's judgment for Mr. Sunday.⁵⁴

Finally, in *Palucci v. Dep't. of Employment Security*,⁵⁵ Larrow again wrote clearly, simply, and effectively. Ms. Palucci was an experienced, but unemployed, waitress from Rutland City to whom the Department denied unemployment benefits for "failure to apply for or accept suitable work when so directed, without just cause."⁵⁶ She had refused a referral to a waitressing job seven miles from home because she lacked personal transportation and the employer required her to arrive at work early in the morning, when public transportation was unavailable. The Department had concluded that Mendon, where the job was located, was within the Rutland labor market and that claimants who lived in that market should furnish their own transportation.⁵⁷

Larrow rejected that conclusion because the Department had extended Ms. Palucci's "labor market area" beyond Rutland City, to include Mendon, "without evidentiary basis."⁵⁸ "Whatever the responsibility for furnishing transportation within the Rutland City area," he wrote, the [Department's] conclusion that claimant must supply it outside that area is completely unsupported."⁵⁹ Using parallelism and vivid imagery again, he observed: "It cannot reasonably be said that one drawing \$27.00 per week unemployment benefits must move, buy a car, or hire a cab to reach a job outside the area, seven miles distant, paying \$1.50 per hour plus tips for work as a breakfast waitress."⁶⁰ The Court reversed and remanded for an award of benefits.

The discussion thus far has focused on majority opinions, in which Justice Larrow may have felt constrained in his language by the need to build and maintain consensus among his colleagues.⁶¹ To gain a fuller picture of his writing, the rest of the discussion will address two Larrow dissents and one concurrence.

Two Dissents and a Concurrence

Justice Larrow's dissents were infrequent and short, perhaps reflecting a wish to express disagreement without calling undue attention to himself. In *Vermont State Employees Association, Inc. v. State*, non-management-employees alleged unfair labor practices by the State, specifically, a refusal to bargain collectively on guaranteed overtime-minimum-compensation under the previous employment contract, now expired.⁶² The Labor Relations Board (Board) ordered the parties to undertake good faith bargaining and directed that the overtime pay be restored pending a new contract

or an impasse in bargaining.⁶³ The State moved to set that order aside and for dismissal of the complaint, but the trial court dismissed the State's motion, and the State appealed.⁶⁴

The Vermont Supreme Court held that the Board exceeded its authority by setting employment terms for an interim period and that the termination of bargaining is not an unfair labor practice because the governing statute recognizes it.⁶⁵ Thus, the Court dismissed the employees' complaint.

In a two-paragraph dissent, Justice Larrow took issue with the second part of the Court's rationale. Using antithesis, he noted that [t]ermination is indeed recognized, but termination in the manner here shown is not.⁶⁶ Because the State did not follow the proper interim process, administered under 3 V.S.A. s. 982(e) by the Secretary of Administration, with gubernatorial approval, he observed, "the unilateral change made here in workweek and wages is an unfair labor practice."⁶⁷ "It is, in effect," he added, "a refusal to bargain collectively, and it cannot be justified under the statute as a matter of right, because the statutory procedure was not followed."⁶⁸ Despite Larrow's brisk analysis, only Justice Franklin Billings joined his dissent, so the dismissal stood.

Larrow filed a similarly brief and direct dissent in *Simpson v. State Mutual Life Assurance Company of America*, in which Ms. Simpson suffered hearing loss, earaches, and discomfort in her jaw joint, consulted a physician, and was referred to a dentist, who repositioned her jaw, using medication and oral prosthetic devices.⁶⁹ She then sought reimbursement from the defendant insurer for the services of the doctor and the dentist and sued the insurer when it denied her claim.⁷⁰ The trial court found that the policy covered both treatments, and the Vermont Supreme Court affirmed.⁷¹

The insurance policy denied coverage for dental care unless the care repaired damage to natural teeth caused by an accident. At issue was whether the work of both the doctor and the dentist fit within that exclusion.⁷² After reviewing the governing statute, dictionary definitions of "dentist" and "dentistry," and the parties' contract, the Court concluded that the term "dental care and treatment" was ambiguous; hence, it should be construed in Ms. Simpson's favor.⁷³ Accordingly, the Court affirmed.

Exhibiting the dissenter's freedom, Larrow indulged in a bit of sarcasm, writing, "I do not think that the phrase 'dental care or treatment' became unclear or ambiguous until the opinion was written."⁷⁴ He added, "I would give the phrase its plain, ordinary, and popular sense."⁷⁵ Consequently, he read the statutory definition of dentistry in 26 V.S.A. s. 721, which included "correct[ing] malpositions [of the teeth] or

of the jaws," to encompass the treatment Ms. Simpson received, which her insurance policy excluded.⁷⁶

Under these circumstances, Larrow concluded, "I find no ambiguity or lack of clarity in the policy exclusion"... "and would limit recovery to the [medical doctor's bill]."⁷⁷ But the Court required the insurer to reimburse Ms. Simpson for the dentist's bill, too.

A single concurrence will complete our brief survey of Larrow opinions. In *In re ETC*, to which Larrow was specially assigned after his retirement from the Court, a fourteen-year-old boy appealed from a juvenile order that committed him to the custody of the Department of Corrections.⁷⁸ The boy, who lived at a State-run group home in Stowe, was suspected of breaking into two residences located nearby.⁷⁹ During questioning by a police officer, he made incriminating statements regarding the break-in, which he later moved to suppress, saying he was denied the right to consult with an "interested adult" before deciding whether to waive or assert his right to counsel and privilege against self-incrimination.⁸⁰ The trial court denied the motion to suppress.

On appeal, the Court noted that it had previously approved the summoning of a juvenile's representative before questioning and held that a minor accused of a crime could not waive counsel without having a guardian or a responsible advisor present.⁸¹ Then it added that although its prior cases applied only to waivers in court, it now applied "the same principles ... to police interrogation of juvenile suspects."⁸² Moreover, the adult must be "not only generally interested in the welfare of the juvenile, but completely independent ... of the prosecution"⁸³ Because the director of the group home, although present, was neither independent of the prosecution nor attentive to the boy's interests during questioning, the trial court erred in denying the suppression motion.⁸⁴

Justice Larrow's concurrence sought to expand the Court's reasoning to hold that the director of or a houseparent in a juvenile home, when employed by or under contract with the State, cannot "possess the independence and impartiality which the majority holding requires."⁸⁵ In a rare use of metaphor, he stated, "I am willing to invade the thicket into which we here venture. Fundamental fairness requires it."⁸⁶ Thus, despite joining the Court's opinion, Larrow would have barred employees of state-supervised group homes from playing the role of "interested adult" during police questioning of a juvenile.

Conclusion

Lawyers would be wise to study Justice Larrow's opinions. Like most of us, he was not a gifted stylist, and he could be wordy

and slow to identify the issue at hand. He often overcame those tendencies, though, to produce clear, concise, and direct opinions. Occasionally, he even showed some rhetorical flair in his prose. More importantly, his opinions reveal a jurist who understood the struggles of ordinary people (e.g., *Gilbert, Palucci, Vermont State Employees Ass'n.*), and the importance of fair competition (*Hinesburg Sand & Gravel Co.*) while respecting the rule of law, whether in the context of statutory language (*Simpson*) or constitutional rights (*Woodmansee, ETC.*). Any judge, whether a great literary stylist or not, would be proud to leave that legacy.

Brian Porto, Esq., is a Professor of Law at Vermont Law School, where he teaches legal writing, sports law, and election law.

¹ Paul S. Gillies, *Ruminations: Justice Robert Larrow and His Legacy*, 45, no. 1 Vermont Bar Journal 14 (Winter 2019).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Brian Porto, *Six Simple Steps to Improved Writing*, 41, no. 2 Vermont Bar Journal 34, 34 (Summer 2015).

⁶ *Id.*

⁷ *Id.* at 34-35.

⁸ *Id.*

⁹ *Id.*

¹⁰ Brian Porto, *Reluctant Literati: Lawyers as Professional Writers*, 39, no. 2 Vermont Bar Journal 16, 18 (Summer 2013).

¹¹ *Id.* at 16, citing MARIE BUCKLEY, THE LAWYER'S ESSENTIAL GUIDE TO WRITING: PROVEN TOOLS AND TECHNIQUES 6 (2011).

¹² Porto, *Reluctant Literati*, supra note 10, at 18.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ HELENE S. SHAPO, MARILYN R. WALTER, & ELIZABETH FAJANS, WRITING AND ANALYSIS IN THE LAW 205 (6th ed., 2013).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 226.

¹⁹ *Id.* at 230.

²⁰ Porto, *Reluctant Literati*, supra note 10, at 18.

²¹ *Id.*

²² EDWARD P.J. CORBETT AND ROBERT J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT, 4th ed. 275 (1999).

²³ LINDA H. EDWARDS, READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD 70 (2012).

²⁴ *Id.*

²⁵ MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 200 (2nd ed. 2008).

²⁶ MICHAEL H. FROST, INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE 463 (2005).

²⁷ Brian Porto, *Rhetoric Revisited: A Second Look at How Rhetorical Techniques Improve Writing*, 42, no. 2 Vermont Bar Journal 31, 31 (Summer 2016).

²⁸ Corbett and Connors, supra note 22, at 382-383.

²⁹ Edwards, supra note 23, at 72.

³⁰ Brian Porto, *Making It Sing: How Rhetorical Techniques Can Improve Writing*, 40, no. 2 Vermont Bar Journal 36, 36 (Summer 2014).

³¹ Gillies, *Ruminations*, supra note 1, at 16.

³² *Id.* at 17.

³³ 134 Vt. 251, 356 A.2d 524 (1976).

³⁴ *Id.* at 252, 356 A.2d at 525.

³⁵ BUCKLEY, THE LAWYER'S ESSENTIAL GUIDE TO WRITING, supra note 11, at 6.

³⁶ NOAH MESSING, THE ART OF ADVOCACY 193 (2013).

³⁷ 134 Vt. at 253, 356 A.2d at 526.

³⁸ *Id.* at 254, 356 A.2d at 526.

³⁹ 135 Vt. at 485, 380 A.2d at 65-66.

⁴⁰ *Id.* at 486, 380 A.2d at 66.

⁴¹ *Id.*

⁴² 133 Vt. 449, 452, 344 A.2d 26, 28 (1975).

⁴³ *Id.* at 455, 344 A.2d at 29.

⁴⁴ *Id.*, 344 A.2d at 29-30.

⁴⁵ *Id.*, 344 A.2d at 30.

⁴⁶ 136 Vt. 293, 390 A.2d 398 (1978).

⁴⁷ *Id.* at 297, 390 A.2d at 400.

⁴⁸ *Id.*

⁴⁹ *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 483, 166 N.E. 173, 174 (1929).

⁵⁰ 136 Vt. at 300, 390 A.2d at 402.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 302, 390 A.2d at 403.

⁵⁴ One commentary has noted that "[i]nsurers and ski mountain operators reacted to the Sunday decision with "unmitigated panic," predicting "an avalanche of lawsuits." Eric A. Feldman and Alison Stein, *Assuming the Risk: Tort Law, Policy, and Politics on the Slippery Slopes*, 59 DePaul L. Rev. 259, 276 (2010). In the short run, ski areas experienced higher insurance premiums in the wake of the Sunday decision, which they passed along to their customers. Within a few years, though, "most ski states had passed legislation that imposed liability on skiers for the assumed risk of skiing" *Id.* at 278.

⁵⁵ 135 Vt. 156, 376 A.2d 14 (1977).

⁵⁶ *Id.* at 157, 376 A.2d at 15.

⁵⁷ *Id.*

⁵⁸ *Id.* at 158, 376 A.2d at 16.

⁵⁹ *Id.* at 159, 376 A.2d at 17.

⁶⁰ *Id.*

⁶¹ Regarding the dissenter's freedom, Justice Antonin Scalia noted in a 1994 lecture that writing dissents was "fun" because "you just write for yourself." See Antonin Scalia, *A Look Back: 1994 William O. Douglas Lecture Series Transcript*, 51 Gonzaga Law Review 598 (2016).

⁶² 134 Vt. 195, 357 A.2d 125 (1976).

⁶³ *Id.* at 195-196, 357 A.2d at 126.

⁶⁴ *Id.* at 196, 357 A.2d at 126.

⁶⁵ *Id.* at 200, 357 A.2d at 129.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 200-201, 357 A.2d at 129.

⁶⁹ 135 Vt. 554, 555, 382 A.2d 198, 199 (1977).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 559, 382 A.2d at 201.

⁷⁴ *Id.*, 382 A.2d at 201.

⁷⁵ *Id.*

⁷⁶ *Id.* at 557, 382 A.2d at 200.

⁷⁷ *Id.* at 560, 382 A.2d at 202.

⁷⁸ 141 Vt. 375, 376, 449 A.2d 937, 938 (1982).

⁷⁹ *Id.*

⁸⁰ *Id.* at 377-378, 449 A.2d at 939.

⁸¹ *Id.* at 378, 449 A.2d at 939.

⁸² *Id.*

⁸³ *Id.* at 379, 449 A.2d at 940.

⁸⁴ *Id.* at 379-380, 449 A.2d at 940.

⁸⁵ *Id.* at 380, 449 A.2d at 940.

⁸⁶ *Id.*



WHAT'S NEW

Updates from the VBA

Despite the need once again to go virtual, we had over 200 people attend one or more of our Annual Meeting programs this year. One thing that is new, unfortunately, is no networking pictures! We are so looking forward to the day where we can see you all again in person. But we want to thank all of our loyal members, sponsors and presenters for supporting the VBA and participating in this year's virtual Annual Meeting, making it a success. Our small staff brought over 22 credits of CLE's to our members via webinar for this year's Annual Meeting.

Survey results have been very positive, with two of our favorite comments being: (1) *I really do believe that the topics and panelists you set up for this meeting were the best substantive topics I've ever attended at ANY conference or bar meeting to date and I'm more than happy to complete the questionnaire. That you could do this in the midst of a pandemic is stunning;* and (2) *I also attended the ABA meeting. The VBA meeting was far better. Technology was better. Speaker's use of technology was better. Well done VBA!* Not to say that our meeting was tech-glitch free, but we were fortunate to have very little disruption by the way of technological glitches.

As we go forward this winter with more virtual programming such as Real Estate Law Day, Elder Law Day, Bankruptcy Annual Holiday CLE, Family Law Series, Tech Week and the like, we wanted to respond to one common feedback theme about the meeting format. Some commented that the meetings with no participant list felt impersonal or lonely. Rest assured, if you attend a VBA virtual meeting and it looked like no one else was there, chances are that meant there were 50 or more participants, and we utilized the standard webinar format rather than the zoom meeting-type format.

Just like any large national webinars you may have attended, with over 50 participants, in order to run the meeting smoothly, a webinar format is preferred, with the focus being on the presenter. In a meeting setting, we've had participants repeatedly unmute themselves to say things like "can you see me?" or to ask about their own computer audio issues, unmute themselves by mistake and interrupt the meeting with dogs barking or cell-phone calls or our favorite, start sharing their own screen by mistake and steal the powerpoint presentation from the presenter! In meeting-interruption bingo, our card is quite full, and interruptions simply cannot be managed well with over 50 participants. Inter-



Emily Davis, Justice Ruth Bader Ginsburg and Wendy Morgan.



Anna Saxman, Justice Ruth Bader Ginsburg and Hon. Amy Davenport.

ruptions add personality and humor but can't be tolerated on a large scale in quality educational programming. We did have some requests for more break-out sessions and small group discussions, so we hope to fulfil those wishes in our upcoming meetings. Thanks to everyone who provided feedback—we hear you.

We'll close out our What's New section with our VBA Annual Report and our Annu-

al Section-Chair report, as we do every Fall edition, but before then, we will share these pictures from Justice Ruth Bader Ginsburg's visit to Vermont in 1998 to honor her passing. The VBA mourns the loss of a true legend and champion of equal justice under the law.



WHAT'S NEW

2019-2020 Sections and Divisions Annual Report

APPELLATE LAW SECTION

Chairs: Benjamin Battles and Bridget Asay, Esqs.

Amidst all of this year's disruptions, appellate practice in Vermont has continued at a steady pace. Both the Vermont Supreme Court and the U.S. Court of Appeals for the Second Circuit have been holding oral arguments remotely since April and appear likely to continue doing so for the foreseeable future. Appellate practitioners should also be aware that although the Vermont Supreme Court will not be using electronic filing for some time, the Court has already begun to see appeals in cases from trial courts where there is electronic filing. Under recent amendments to the Vermont Rules of Appellate Procedure, parties in appeals taken from e-filing courts may not file a printed case and instead must cite to the "appeal volume" created by the e-filing system. See V.R.A.P. 28(d)(3), 30(a), (b). In other news, Appellate Section co-chair Ben Battles presented this past July as part of a CLE program on the U.S. Supreme Court's recent *Bostock* decision. The program, which was moderated by attorney Steve Ellis, also featured Vermont Supreme Court Justice Beth Robinson, and attorneys Emily Adams and Lisa Rae. At the VBA's annual meeting, Ben's co-chair Bridget Asay will be presenting on the U.S. Supreme Court's recent decisions concerning the electoral college, along with attorneys Mike Donofrio, Jason Harrow, Peter Langrock, and Carl Lisman.

BANKRUPTCY LAW SECTION

Chairs: Nancy Geise and Donald Hayes, Esqs.

The bankruptcy bar section held its annual Holiday CLE on December 6, 2019 at the Killington Grand Hotel. It was a snowy, stormy evening but despite the weather there was impressive attendance. Along with the annual Year in Review of bankruptcy case law, Judge Colleen Brown's report on the State of the Court, and Mike Kennedy's ethics seminar, topics included an overview of Chapter 12 bankruptcy and its benefits for family farmers; the intersection of Vermont's burgeoning cannabis and hemp industries and the Bankruptcy Code; and another follow-up to the previously-offered CLE on student loan management in and outside of bankruptcy.

There have been important changes to Chapter 12 bankruptcy law this year and the bankruptcy bar section, along with Vermont Law School and the Vermont Bankruptcy Court, will be hosting a series of

seminars aimed at informing the legal, financial and extended farm and agricultural communities on the advantages of Chapter 12 as a tool in estate and succession planning, tax accounting and debt structuring. These seminars will be offered in two separate sessions – October 21, 2020, primarily for attorneys and accounting professionals; and November 6, 2020, focusing more on the broader farm community and agencies servicing those communities. Both will be offered remotely. Another session is planned for March 26, 2021 and will be a follow-up to the previous sessions as well as a primer for bankruptcy attorneys who might want to learn more about a Chapter 12 practice.

Due to COVID-19, the bankruptcy bar will not be able to host its annual Holiday CLE in the usual fashion. Instead, there will be three separate days of seminars, offered over three weeks: December 3, December 10, and December 17. Along with the yearly reviews of case law, ethics seminar, and the Court's report, the bar will offer a seminar on Small Business Subchapter V reorganization. This is a new section to the Bankruptcy Code and one that could greatly benefit business adversely effected by COVID.

BUSINESS ASSOCIATION LAW SECTION

Chair: Tom Moody, Esq.

It was an unusually quiet year for the Business Associations Section. After several years of active involvement with the Vermont Legislature, there were no business-law related bills that required the particular attention of the Business Associations Section, although some were related. Tom Moody and Jon Eggleston presented at the VBA virtual Mid-Year Meeting on "Business Law: Incentive Equity" which was well-received. We also plan on adding a half or full day webinar on business law basics to be recorded and added to the VBA digital library.

COLLABORATIVE LAW SECTION

Chair: Nanci Smith, Esq.

The Collaborative Law Section invites members from the larger VBA membership who are interested in Collaborative Practice to reach out and create your own local practice group or join an existing practice group, such as CPVT (Collaborative Practice Vermont). This past year, CPVT has expanded to welcome 3 attorneys and a mental health professional, all of whom recently completed the IACP introductory Interdisciplinary training online. We are doing cases,

continue to meet monthly, and formalized our free public service program called Divorce Options, on the third Thursday of every month, using zoom. This event informs the public about their divorce options-litigation, mediation and Collaborative Divorce. Like everyone else this year, we had to pivot away from our in person plans for an Introductory training, but the International Academy of Collaborative Professionals is now offering numerous opportunities for introductory trainings, on line. Please check them out and do the training so you can bring this innovative and healthy approach to divorce, separation, or probate issues. Any dispute where the relationships still matter, after the dispute is resolved.

We also held our 2nd Annual New England Collaborative Project Event on line on September 25, 2020 on the topic: How to Grow Your Collaborative Practice. Attorney members who are interested in joining the CPVT practice group are encouraged to contact Nanci at nanci@nancismithlaw.com.

CRIMINAL LAW SECTION

Chair: Katelyn Atwood, Esq.

There was a Criminal Law Year in Review presentation with presenters from both the prosecutorial and defense sides at the VBA Annual Meeting, which had positive reviews.

DISPUTE RESOLUTION SECTION

Chairs: Neil Groberg and Richard Hecht, Esqs.

Like the rest of the world, the Dispute Resolution Section confronted the world pandemic and strived to meet its challenges. Members of the DR section quickly seized the advantages of cyber technology to transition to "zoom" mediations and arbitrations.

The Section aimed its focus on informing members of the availability of practical training and strategies for transitioning their practices on-line. This was done primarily through outreach on VBA connect. The Bar, itself, jumped in with a CLE webinar on Best Practices and Ethical Considerations in Mediating Online.

Even during these unprecedented times, with over 120 members strong, the members of the Dispute Resolution Section continues to strive to make mediation, arbitration and facilitation more utilized, accepted and publicized in Vermont's legal community. The Section welcome suggestions from all Bar members regardless of Section on opportunities for Dispute Resolution and



HAVE A CATASTROPHIC INJURY OR ILLNESS CASE?

Connect with certified
and experienced
Nurse Life Care Planners at
Medical and Life Care Consulting today!

Medical and Life Care Consulting
www.medicalandlifecare.com
Tel. (413) 323 - 9705

interaction with the DR Section.

ELDER LAW SECTION

Chair: Glenn Jarrett, Esq.

The Elder Law Section will sponsor Elder Law Day as a two-day webinar series on November 9 and 10, 2020, with speakers discussing capacity planning and end of life issues, long-term care and Medicaid planning, asset preservation, post-eligibility issues for Medicaid recipients, special needs trusts and ethics. Mark your calendars!

ENVIRONMENTAL LAW SECTION

Chair: Gerald R. Tarrant, Esq.

This has been an active year for our section, with Act 250 legislation requiring much of our attention. We also began discussions concerning the employment of the new Odyssey case management system and e-filing, the implementation of which has been recently delayed. Partly due to COVID-19, and in part due to apparent disagreement on how best to proceed, no comprehensive Act 250 bill has emerged from the Legislature. We suspect Act 250 will be high on the list of Legislative goals in 2021. With Climate Change still impacting regulatory and judicial action the practice of environmental law will continue to evolve at virtually all levels. This October 8th our Section will be presenting via webinar a CLE on new developments in several areas, including: i.) new developments on the "waters of the U.S." regulation, comprising an update on the U.S. Supreme Court's decision in Hawaii Wildlife Fund, and developments related to the Clean Water Act Section 401 state water quality certification authority; ii.) the regulatory and judicial response to the toxic chemical known as PFAS that continues to be a rapidly emerging area of the law, and iii.) the passage by the Vermont Legislature of the Global Warming Solutions Act, that, if signed by the Governor, would provide new greenhouse gas reduction targets and new accountability mechanisms. In addition, the Director of the Environmental Justice Clinic at Vermont Law School will ex-

amine the issues of environmental justice in the United States and Vermont.

FAMILY LAW SECTION

Chair: Patricia "Penny" Benelli, Esq.

The Family Law Section has been busy this year, but not in the usual way. Like the rest of the bar, we have been dealing with the COVID-19 restrictions and trying to keep our and our clients' heads above water. Members contributed substantially to the Odyssey Court Users Study Group. This was a group of Section Chairs and other representatives of the bar and other court users which was commissioned to report to the legislature on how the Odyssey e-filing system has been working in the three counties in which it was originally rolled out—Windham, Windsor, and Orange. Believe me, family practitioners had a great deal to say about our experiences with this program and many recommendations for improvements to offer. The section also recently presented a remote CLE on Family Law in Review as part of the virtual fall VBA meeting, and more remote CLEs are in the works. Stay well, everyone!

GOVERNMENT & NON-PROFIT SECTION

Chair: James Porter, Esq.

Not surprisingly, the VBA staff showed its extraordinary competence and dedication in its early and comprehensive response to the COVID-19 pandemic. The Government and Non-Profit Section was pleased to participate in weekly calls of the Section and Division Chairs and County Bar Presidents and the weekly COVID-19 Committee calls. Our section provided information about broadband/cable line extension grants for lawyers and clients – and provided information about money made available by the Vermont General Assembly to help Vermonters pay utility bill arrearages. As always, members of the Government and Non-Profit Section are encouraged to please submit requests or recommendations for new CLE's, to Jim or to the VBA

for consideration at a future bar meeting.

INTERNATIONAL LAW & PRACTICE SECTION

Chair: Mark Oettinger, Esq.

The VBA's International Law & Practice Section has approximately 50 members. We engage in informal member-to-member resource sharing and cross-referral. During the current year, Section members have collaborated regarding changes in US policy around international trade and immigration, among many other topics. We regularly exchange information with the VBA's Labor & Employment Section, and its Immigration Section, due to the relatedness of our subjects. We collaborate on the representation of clients in need of guidance on inbound and outbound immigration, international trade, foreign direct investment, transnational contracting, cross-border enforcement, and much more.

In the field of public international law, Section Chair Mark Oettinger continues efforts to realize a World Court of Human Rights (WCHR), a supra-national court that would unify the jurisprudence and procedure of the growing body of public international human rights law. For further details on this project, please see www.worldcourtofhumanrights.net. In the past year, Mark met with former United Nations General Counsel Larry Johnson to discuss strategies for treaty development through the appropriate United Nations mechanisms. Section members have also reopened collaboration with Karelian colleagues, and are participating in a series of seminars on the expansion of jury trials in the Russian Federation.

During the past year, we learned of the death of long-term Section member John Newman. He was a national expert in French law, who practiced there for a number of years, before relocating to Rutland. He wrote the ALI-ABA loose-leaf service on French law, and his contributions to the Section's work will be missed. Members are encouraged to post comments, questions or international legal developments of note through VBA Connect.

JUVENILE LAW SECTION

Chairs: Linda Aylesworth Reis and Sarah Star, Esqs.

In the past year the Vermont Supreme Court has issued a number of decisions impacting juvenile law practice, including requirements for courts accepting voluntary relinquishments of parental rights. In re A.W. 2020 VT 34. The Court has addressed the extensive delays in the juvenile system, as well as the party status of non-custodial parents in CHINS cases. In re H.T., 2020 VT 3 and In Re C.L.S., 2020 VT1 respectively. In overlapping family law matters, the Court has clarified that the parent (s) with physical rights and responsibilities are the custodial

parents in CHINS cases. *Barrows v. Easton*, 2020 VT 2. It has also ruled that a juvenile court is not authorized to order child support or allocate travel expenses. In re A.M. 2019 VT 79. In other news, the Addison County Bar Association has received a VBF grant to provide low-bono legal support to pregnant women facing child welfare intervention who do not yet qualify for a public defender. Zoom trainings on this topic will be forthcoming, and VBA members outside Addison are welcome to join.

LABOR AND EMPLOYMENT SECTION

Chair: Stephen Ellis, Esq.

Your Labor and Employment Law Section presented two well-attended and well-received webinars in June and July. The June webinar focused on surprising and recurring issues in recruitment, hiring and retention, and the July webinar focused on the landmark *Bostock* decision. A number of Section members, including your Chair, participated in the 21-day Racial Equity Challenge, sponsored by the ABA LEL Section. Your Section Chair has been very active with two VBA-sponsored COVID-related committees, and with the VBA study group devoted to making recommendations relating to the fee structure for the new Odyssey e-filing system. We're planning a program for the near future focusing on imagining the post-pandemic workplace: What will return to "normal", and what will never be the same? Stay tuned and stay well!

LAWYER WELL-BEING SECTION

Chairs: Samara D. Anderson and Micaela Tucker, Esqs.

The Lawyer Well-Being Section was excited to kick off our first year supporting Vermont's attorneys during increasing amounts of stress as the year progressed. We shared our stories of hope and resilience of attorney wellness to kick off the Mid-Winter Thaw in Montreal, also providing morning therapeutic yoga to erase some of the stress in our physical bodies, and concluded with a 2-hour experiential CLE on Mindfulness for Stressed Professionals, where attorneys learned various mindful tools to create calm and ease amidst stressful situations. Then, in immediate response to the COVID-19 Pandemic in March, this Section kicked off bimonthly Mindful Moments for Wellness where every 30-minute session was FREE of charge and the 60-minute sessions required only payment for the first session, with all subsequent sessions FREE of charge! These sessions continue to this day and have increased in number to almost 50 attorneys all mindfully practicing how to de-stress and support each other during this unprecedentedly stressful time. This Section has also supported attorneys with Mindfulness and Stress Re-



As a Certified Divorce Real Estate Expert™ (CDRE) through the Divorce Real Estate Institute and a Senior Real Estate Specialist® (SRES), Barb Trousdale, REALTOR® serves the family law community by offering: *expertise on all real estate matters affecting family law cases, expert court testimony, fair market valuation, and the marketing of real property, and specialized services for the aging population.*

Trained in mediation through the National Association of Realtors, and with over 10 years chairing the Professional Standards Committee for her local REALTOR® Association, Barb is skilled in successfully facilitating complex real estate transactions.



Barb Trousdale, REALTOR®
 Certified Divorce Real Estate Expert™
 Senior Real Estate Specialist®
 Owner/Broker, Preferred Properties

802.233.5590
 barb@preferredpropertiesvt.com
 147 Knight Lane | Williston, VT
 www.preferredpropertiesvt.com

duction CLEs during the Virtual Mid-Year Meeting in June and the Annual Meeting in October. In the Spring of 2019 this Section kicked off a "Be Well" section in the Vermont Bar Journal and then subsequently published articles on the topics of: Good Stress vs. Bad Stress; Lower Your Stress, Increase Your Resiliency; Is it Possible to Do Less to Achieve More?; Time for Holistic Spring Cleaning; and Happiness Hacks for the Summer. We are so excited to continue to provide wellness tools to find inner calm and peace amidst the turmoil that is swirling around not only the legal profession, but the entire World as we navigate an uncertain future.

PARALEGAL SECTION

Chair: Carie Tarte, RP®, AIC

The focus for the Paralegal Section has been and continues to be twofold: exploring the prospect of paralegal licensure in Vermont, and returning paralegal programming and education to Vermont. To those ends, the Paralegal Section submitted a two-part series in the VBA Journal (winter 2019 and spring 2020) regarding paralegal licensure in Vermont, specifically, whether paralegal licensure could bridge the access to justice gap for Vermonters. In follow up, as part of the VBA Mid-Year virtual meeting, I, as Section Chair, participated in a well-attended roundtable WebEx panel with Daniel Richardson and Michael Kennedy for a discussion on "Re-aligning the Profession: Paralegal Licensure and Independence."

Regarding paralegal education and programming, I, along with Paralegal Section member, Tina Wiles, have been working with James Knapp and Marni Leikin, Assistant Director for Adult Education at Burlington Technical Center, to develop a paralegal education program to be taught through partnership with one of Vermont's higher education institutions.

PRACTICE AND PROCEDURE SECTION

Chair: Gregory A. Weimer, Esq.
 Unfortunately, Committee activity was

down this year as folks adjusted to the realities of practice and life in the advent of Covid-19. As Chair I participated and a member of the Covid-19 Committee and the Section Chairs/County Bar Presidents Committee on COvid-19. Each group looked to ways of assisting with lawyer wellness, practice issues and the reopening of the courts. I'm hopeful that as life returns to "normal" over the coming months that the Practice and Procedure Committee can contribute more in the way of seminars and articles for the bar at large.

PROBATE AND TRUST SECTION

Chairs: Bob Pratt and Mark Langan, Esqs.

Statutes: The Probate and Trust Section was active in the passage of two statutes:

The Probate and Trust Section promoted S. 316 – An Act Relating to the Execution of Wills during an Emergency; signed by Governor Scott on April 28, 2020; effective upon passage. The bill allows for remote witnessing of Wills pursuant to 14 V.S.A. § 5 in accordance with Emergency Administrative Rules for Remote Notarial Acts adopted by the Secretary of State. Remote witnessing is allowed while the Emergency Administrative Rule is in effect.

The Probate and Trust Section promoted S. 114, section 2 to amend 14 V.S.A. § 3505 to allow remote witnessing of Powers of Attorney in accordance with the Emergency Administrative Rules for Remote Notarial Acts adopted by the Secretary of State. Remote witnessing is allowed while the Emergency Administrative Rule is in effect.

The Vermont Legislature passed H. 837 regarding Enhanced Life Estate Deeds by adding new Chapter 6 to Title 27 giving some clarity to the requirements of the Enhanced Life Estate Deed (sometimes referred to as a "Lady Bird Johnson Deed"). In an "enhanced" life estate deed, the grantor retains the right to revise, revoke and reconvey the premises.

Probate Rules: The Probate and Trust Section was active in passage of various Rules of Probate:

An amendment to Rule 77(e) deletes paragraphs (1)-(5) and instead incorporates the amended Vermont Rules for Public Access to Court Records, promulgated effective July 1, 2019, as the source of exceptions to the general rule of public access to probate division records. The Public Access Rules support the implementation of the electronic case management system in all dockets in all courts.

An amendment to Rule 3.1 eliminates ambiguous, inconsistent, or obsolete language, including the time-honored but unspecific label "in forma pauperis." The amendment also simplifies the process, consistent with the simultaneous amendments to V.R.C.P. 3.1 and V.R.A.P. 24.

New Rules 80.9-80.11 incorporate, with appropriate modifications, provisions of Rules 6, 6.1, 7, and 7.1 of the Rules for Family Proceedings regarding appointment of a guardian ad litem or an attorney.

New Rule 80.9 regarding representation of minors by guardians ad litem incorporates many provisions of V.R.F.P. 6. Throughout Rule 80.9, "minor" is substituted for "ward," "proposed ward," "person under guardianship," or "child" for uniformity and simplicity of usage.

New Rule 80.10 relates to representation by attorneys and guardians ad litem of adults in specified proceedings. It is adapted from V.R.F.P. 6.1.

New Rule 80.11 concerns representation by guardians ad litem and attorneys of child witnesses. It is adapted from V.R.F.P. 7.1.

The amendments to Rule 66 clarify its provisions in light of the Vermont Trust Code, 14A V.S.A. §§ 101-1204. The amendments clarify that its requirements do not apply to a trustee, consistent with 14A V.S.A. § 201. The amendment adds a requirement to file a supplemental inventory for omitted or newly discovered assets or information in Rule 66 (a) (2) to implement 14 V.S.A. § 1053 (a) as added by 2017, No. 195 (Adj. Sess.), § 6, effective July 1, 2018. New Rule 66 (c) (4), requiring a sworn statement by the fiduciary that there are no outstanding expenses or unpaid debts or other claims against the estate, is added to provide assurance that the estate will not be reopened after compliance with Rules 66 (c) (3) (final inventory) and 60.1 (a) (2), (3) (closure of estate upon submission and court approval of fiduciary's report).

Amended Rule 74 implements the provisions of 14 V.S.A. §§ 1851-1854, enacted by 2017, No. 195 (Adj. Sess.), § 12. The statute provides a process for the court to waive further administration for all estates, other than small estates opened under 14 V.S.A. §§ 1901-1903. The provisions of the rule track the statute with some variations in language and a few additional features.

An amendment to Rule 80.3 makes it consistent with the statutory provisions

governing small estates, 14 V.S.A. §§ 1901-1903, as amended by 2019, No. 36, § 1, effective July 1, 2019.

Rule 40(d) (4) of the Vermont Rules of Probate Procedure was amended to update the cross references to the Code of Judicial Conduct 2019 which became effective on October 7, 2019.

An amendment to V.R.P.P. 5 was made to conform the rule to the 2020 Vermont Rules for Electronic Filing. The amendment explains the certificate of service requirements when documents are filed under the new e-filing rules. The amendment clarifies when references are to the 2010 Vermont Rules of Electronic Filing.

The amendment removes V.R.P.P. 79 (c) because the custodian of records is as specified in V.R.P.A.C.R. 3 (c), effective July 1, 2019.

Amendments to Vermont Rules of Probate Procedure 4 and 79.1 are designed to conform the rules to the adoption of the new case management system and the 2020 Vermont Rules for Electronic Filing. The new case management will be rolled out across the state in phases.

REAL ESTATE SECTION

Chairs: Jim Knapp and Benjamin Deppman, Esqs.

The Real Estate Section offered the annual Real Estate Law Day program on November 14, 2019 that was attended by nearly 200 of our colleagues. Co-Chair Benj Deppman participated as the Bar Association designated member of the Advisory Board for Notaries Public convened by the Secretary of State's Office. As a result of the Covid-19 pandemic, representatives from the real estate section participated in the drafting and adoption of the Emergency Rules for Remote Notarial Acts issued by the Vermont Secretary of State. Members of the real estate section also participated in the committee formed by Senator Jeanette White (Senate Government Operations Committee) to address access to the land records during the pandemic and as a result of that participation, \$2 million was allocated to a program to begin the process of digitizing the land records throughout the State. A number of municipalities were able to apply for grants to pay for equipment and services related to converting more municipal land records to digital records, accessible through various internet portals. In October, the Title Standards Subcommittee reported the 2020 Title Standards to the Board of Managers for approval including several new standards on easements, partnerships and mobile homes.

WOMEN'S DIVISION

Chair: Samantha v. Lednický, Esq.

This year we started off strong with a Vermont Law School round table discussion on September 19, 2019 and the inaugural year of the VLS/VBA Women's Mentorship Program. VBA President Beth Novotny spearheaded a Gender Survey which was closed and reported on in December, 2019. Unfortunately, due to COVID-19 we had to cancel our plans for an end of year celebration for the VLS Students. Likewise, we had to put on hold our plans for a 19th Amendment 100th Anniversary celebration that had been in the works. This week, we are all mourning the loss of the notorious Justice Ruth Bader Ginsburg and hope to find a way to celebrate her legacy and start a discussion about sex and gender discrimination.

WORKERS' COMPENSATION

Chair: Keith Kasper, Esq.

Similar to everyone else, COVID disrupted the WC Section's plans. We did not have our annual Bench Bar Meeting between WC Lawyers and the VT DOL lawyers and ALJs, but we will continue the tradition next year. Early on in the COVID situation WC litigators and the DOL had a conference call to discuss suggested changes in the process and procedures utilized by the Department in COVID claims.

Both before and after the passage of emergency COVID legislation the VT DOL did make certain changes in their processes and procedures to adapt to this new COVID world.

On the good news front, VT appears to be doing well as far as COVID WC cases with a relatively low number of such cases and the vast majority of confirmed COVID employment-related claims having relatively low severity. We hope that trend continues through the end of the pandemic.

YOUNG LAWYERS DIVISION

Chair: Amy Davis, Esq.

The YLD held another successful Mid-Winter Thaw in January at the Omni Hotel. Topics included cannabis law, Facebook and metadata, navigating difficult conversations and more. We have made the difficult decision to hold the Thaw virtually for 2021, but we are excited to offer "Thaw Week" January 11-15, 2021. Due to the pandemic, we have been unable to hold our popular mixers, but have worked closely with the VBA's COVID19 committee to help our group navigate the difficult challenges of the pandemic. We distributed information to the bar about the impact of the CARES Act on student loans, and many members are taking advantage of those benefits while working from home. We hope to see you all in person very soon!



WHAT'S NEW

VBA Annual Report 2019-2020

The VBA Annual Reports cover VBA activities during the September 1 – August 31 time frame. Who would have imagined the challenges we faced together during the second six-months of this reporting period? Thanks to so many members and staff who selflessly dedicated their time and talents to meet those challenges, we are proud to include in this report the different ways your VBA was able to help legal professionals in weathering the pandemic storm.

Immediately after Governor Scott's declaration of a state-wide emergency on March 13, we established the "Lawyers' COVID-19 Resource Page" on the VBA website to provide a continually updated go-to resource for our members. The Resource Page has links to Governor Scott's Executive Orders, the Agency of Commerce & Community Development (ACCD) Guidance materials, Judiciary Emergency Orders, Emergency Rules and Legislation, and numerous employer, tech, wellness and general COVID-19 resources.

The VBA COVID-19 Committee sprang into action to meet weekly to ensure that the interests of lawyers, law office staff and law students were well-represented during the development of the ACCD professional office re-opening phases, during the Judiciary's development of its Ramp Up Report and Jury Restart Plan, and during the Legislature's passage of emergency legislation impacting remote wills, deeds, powers of attorney and advance directives, as well as enhanced life estate deeds. The Committee also worked to develop numerous COVID-19 related volunteer opportunities for lawyers as well as opportunities for bar examinees faced with the challenge of a delayed and remote bar exam.

We also organized weekly Section/Division Chairs and County Bar Presidents Conference Calls, whose participants provided invaluable input for the ACCD guidance, the Judiciary's emergency orders, the Legislature's emergency legislation and critical information for the weekly phone conferences that VBA President Beth Novotny and I had the privilege of holding over the last six months with Chief Justice Reiber, Chief Superior Judge Brian Greason, CAO Pat Gabel and other members of the Judiciary leadership team.

Also unique to this reporting period was the formation of an E-File Fees Study Committee that was created following the initial roll out of the Odyssey e-filing system in April 2020. The Legislature adopt-

ed a number of the recommendations in the Committee's Report in H.951, including requiring the Judiciary to meet with court users to review their experience with the system, and to examine alternatives to the per-use e-filing fee charge. The Judiciary is required to report on the results of the meetings by October 30; in the meantime, the Legislative Committee on Judicial Rules has urged the Judiciary to postpone expansion of the system until the current e-filing issues are addressed.

The Commission on the Well-Being of the Legal Profession issued its First Annual Report on July 1, detailing what each committee on the Commission has accomplished since the CWBLP State Action Plan was submitted to the Vermont Supreme Court on December 31, 2018. Included in the Report are recommendations regarding important next steps in enhancing the Lawyers Assistance Program.

Thanks to the generosity of so many lawyers and judges who are willing to share their expertise, the VBA was able to offer a full smorgasbord of CLE Programs covering the gamut of legal topics, including in-person programs during the first half of the reporting period and remote programs since March. Over 3,600 total registrations show how many of you took advantage of VBA CLE offerings, including 746 registrations for in person programs, 2,102 for webinars, 737 for digital programs and 60 for teleseminars this past year. Many thanks to the amazing VBA section chairs who organized at least one CLE during the year at the Annual Meeting in September, at the Mid-Winter Thaw in January, at the Mid-Year Meeting (originally scheduled in March and re-scheduled and held virtually in June), and during the numerous stand-alone programs held throughout the year. Please don't hesitate to let us know what CLE offerings you'd like to see offered, or if you'd like to present!

We were pleased to offer the Fourth Annual VBA Trial Academy in a modified format due to the pandemic restrictions in place in July. Five trial judges and participating veteran trial practitioners offered individual webinars geared to different aspects of trial practice. Stay tuned for the Fifth Annual Trial Academy in the Summer of 2021!

VBA Members have automatic access to Casemaker, a leading legal research services provider with intuitive search capabilities. Casemaker 4 is available with faster searching capabilities and a new "user

friendly" design—just update your default choice to Casemaker 4. Now the jurisdiction selection menu is on every page and results can be searched by court level. All personalization options have been expanded, including billing folders and annotations. The website includes detailed information about the latest enhancements, and benefits of Casemaker for your research. The tutorial videos in the "help" section of the Casemaker website are concise and informative, or you can call or email Jennifer Emens-Butler for personal Casemaker training!

VBA membership includes unlimited access to section activity through our on-line communication platform "VBA Connect." Developed in response to members' requests for the ability to archive and to search the invaluable information shared among section members, VBA Connect allows members to control the frequency of received posts, and to easily search and retrieve whatever information has been shared in all communities to date. VBA Connect has been an especially convenient way for members to stay abreast of the ever-changing legal landscape during the COVID-19 era. You can join any section with the click of a button, and easily set delivery preferences. If you haven't yet experienced the benefits of VBA Connect, please call or e-mail the VBA office at any time for personal training.

We're honored to work closely with all three branches of the Vermont Government, to ensure that your and your clients' interests are well-represented. The VBA serves as a resource to the Legislature, government agencies and the Judiciary which helps insure our members' needs are considered. The VBA monitors the legislative sessions for any proposals affecting our members and helps coordinate testimony from section chairs and members when needed. Towards that end, we were pleased to co-host "Legislators' Days" with the Judiciary in each of the fourteen counties throughout the Fall. County legislative delegations were invited to their local state courthouses to observe court hearings, and to meet with judicial officers and lawyer "ambassadors" from each division. Those events were followed by a VBA Legislators' Reception in January at the statehouse (the annual Legislators' Breakfast in March was cancelled due to the statehouse closure just before the scheduled event.) Many thanks also to the ambassadors, to the section chairs, and to many other mem-

Polygraph Exams



James A. Johnson, Jr. Attorney at Law

Lieutenant Colonel,
USAF, Retired
Former OSI Special Agent

603-424-6365

www.johnsonpolygraph.com

bers who offered invaluable testimony during the initial and then the special legislative session, when needed.

VBA Access to Justice initiatives have proved invaluable to disadvantaged Vermonters this past fiscal year. Our projects use grant funds to pay private attorneys a stipend of \$60 per hour with a capped number of hours per case to represent low income Vermonters and crime victims. We now have 142 attorneys on our low bono referral panels, an increase due to recruiting efforts by the Young Lawyers Division and our own foreclosure defense outreach. The Vermont Bar Foundation funds our county low bono projects statewide. Case referrals—mostly landlord/tenant matters—slowed due to COVID-19 court closures, but we still received 39 cases. The VBA also funds our foreclosure defense project; with this grant, the VBA offered a 3-part webinar on foreclosure defense and mediation in April and doubled the number of low bono foreclosure defense lawyers. We expect a jump in foreclosure cases as our courts slowly reopen. The Vermont Supreme Court funds our statewide low bono projects for representation in adult involuntary guardianships and for PACA negotiations. We paid lawyers in 167 of these cases last year. Finally, with our DOJ VOCA

grant, our low bono lawyers represent crime victims in legal matters arising from their victimization. We received 143 requests for help last year but were not able to place them all with low bono attorneys. In all of our low bono projects, private attorneys helped over 300 clients. Counsel not only worked for a greatly reduced hourly fee, but also finished many cases pro bono. Our lawyers donated a total of 487 pro bono hours to help disadvantaged Vermonters. Thank you, all! Please consider helping out; contact Mary Ashcroft, Esq., VBA's Legal Access Coordinator, at mashcroft@vtbar.org.

Our Vermont Lawyer Referral Service continues to work well for clients in need of Vermont counsel, and for the 151 LRS panel members who earned more than \$1.2 million in LRS revenue this past year! The VBA fielded 6,119 LRS requests, averaging 510 requests per month. We printed and distributed VBA business cards with the LRS 800 number, the VT Free Legal Answers website, and the "Modest Means" website to all of the Vermont state courthouses, numerous public libraries, and many veteran centers throughout Vermont. If you're not already an LRS member, consider joining for the low cost of \$70.00 per year. Your next big case could be an LRS referral!

A continuing focus in the arena of public education was to encourage lawyer presentations in conjunction with Constitution Day in September. The VBA has now provided over 5,000 copies of "Pocket Constitutions" for lawyers and judges to distribute at presentations they give to school and civic groups throughout the state. We were pleased to organize a fifth annual Constitution Day Panel Presentation, with an esteemed panel including a justice, trial judges and a Vermont Law School Constitution Law Professor, moderated by VBA President Elizabeth Novotny. The panel presented a "virtual" one-hour basic overview of the Constitution, with a focus on "Your Voice, Your Vote, Our Democracy", in conjunction with a celebration of the Centennial Anniversary of the passage of the 19th Amendment. Links to the videos of each Constitution Day presentation are on the VBA website. The VBA is happy to provide this and other resources to whomever would like to make a presentation in their community this year.

The Young Lawyers Division and the VBA Diversity Section organized a Martin Luther King, Jr. Poster-Essay Contest for Vermont middle-school students in the Fall. Governor Phil Scott presented awards to the winners at the statehouse in January; the students and their families also toured the statehouse and the Vermont Supreme Court Building, where their winning posters and essays were on public display for the month of January. Materials for the

2021 MLK, Jr. Poster-Essay Contest are going out soon!

The VBA continues to partner with Vermont Law School in the VBA/VLS Incubator Project. The project provides support for new lawyers starting solo practices in underserved legal and geographic areas of Vermont. The VBA/VLS team provides day to day mentoring, review of business plans, small start-up grants, referral of pro bono and low bono cases, and weekly check-ins. This year, our incubator lawyers set up practices in Burlington, Fair Haven and Bethel.

Since 2012, the VBA has offered training for and has coordinated the Foreclosure Mediation Program where interested lawyers receive specialized training to be foreclosure mediators and agree to be part of a state-wide pool that is offered to eligible litigants who opt for mediation in their foreclosure cases. In the past year, courts referred 116 foreclosure cases to the VBA for mediators, and 58 foreclosure mediators were agreed upon by the parties and assigned.

As always, we strive to bring you the latest membership products and services, as evidenced by the numerous sponsors and exhibitors at our major meetings, and as detailed in the "Affinity Partners" section on the website. Be sure to take advantage of the substantial discounts available for consulting, credit card processing, practice management, health insurance, personal insurances, retirement programs, marketing software, professional liability insurance, rental cars, and shipping services. Our newest partners include EasySoft, Inc., TurboLaw, Red Cave Consulting, healthiestyou, and Smith.ai Virtual Receptionist. We are currently in conversations with other providers of service and will be bringing more options to our members soon.

None of the above accomplishments would have been possible without the hard work and complete dedication of the incredible VBA team, whether working at the VBA office, or remotely since March 17! I am deeply indebted to them, as well as to the VBA Board of Managers for providing excellent leadership for your Vermont Bar Association. Please know that we are all at your service (to meet whatever challenges the next reporting period may have in store) and appreciate whatever recommendations you have to bring even more value to your VBA membership.

Teri Corsones
VBA Executive Director



BE WELL

How to Feel in Control When Things are Out of Control

One of my favorite quotes goes something like, "You can't stop the waves but you can learn to surf." This is perfect advice when it comes to feeling in control when things are out of control around you. Attempting to alter what may not be in your power to change will only exhaust you, but becoming resilient – learning to flex and adapt, in other words, with unpredictability -- will allow you to ride the inevitable waves more easily.

These suggestions will show you the way:

Stop trying to control what you can't control: There is so much we have no command over -- traffic, the weather, the court system, to name just some things from a very long list. And yet all of us waste time and energy worrying about and acting on circumstances outside our jurisdiction. We lie awake at night hoping that we'll pass a particular test, get a certain job, attract an object of our affection, sidestep a contagious illness. We tense ourselves up trying to beat the competition, win over others, prevent loss and heartache, slow the fast pace of America, corral global movements that are much bigger than us. Even though we're old enough to know better, we get caught up in the belief that we can will or force outcomes, avoiding the unpreventable realities of life, if we just push hard enough. Noticing every time that the more we try to control what we can't control, the more out of control we become, we start to see that those things we can't control are best left to do what they're going to do anyway.

Strive to control what you can control: While it's impossible to control what we have no control over, it's actually quite possible to *feel* more in control when we focus on what we actually *do* have control over: our responses. No matter what is going on around you, you and you alone get to decide what attitude to take, how to prepare, what to say, how to greet bad news, how to treat yourself and others, how to cope. All of which adds up to your character -- who you are. The more your character is based on even-keeled, reasonable responses to all that you can't control, the more solid you feel and the more likely it is, because you're not feeling anxious and spent trying to fight a battle you can't win, that circumstances will go more your way. And that of course is the irony of this control issue: it's when we let go of what we can't change that the sense of control we're after begins to emerge.

Take excellent care of yourself. To step away from the ever-evolving cacophony of what can't be controlled and make pragmatic decisions about how to achieve a stature of calm stability despite it, you need to be genuinely rested and awake with a hardy constitution and clear head. This means making sure that you get enough sleep, eat relatively well, exercise sufficiently, protect yourself from people and environments that drain you, and keep your mind adequately nourished. This also means breaking away from work whenever necessary to take the edge off, have fun, and recharge yourself. The advantage of taking full responsibility for your physical and mental health is that you'll be in a better state of mind to discern between what can't be controlled and what can. And you'll be well-anchored with your wits about you when particularly threatening out-of-control situations trigger the all-too-human misleading impulse to try and make the madness stop.

Focus on what's certain. One sure way to feel centered when wayward happenings are challenging your sense of security is to swivel your attention from what's up in the air to what's definite. This translates to recognizing your existing strengths and resources, counting your blessings, recalling the loved ones you know are here for you, remembering the coping skills you've learned from weathering past out of control periods. It's about zeroing in on what you know to be true, regardless of unsteady developments, putting your mind on what's working and what you actually have currently. Even if your health or home or income or family may be seriously at stake, reminding yourself that you are okay *right now*, regardless of what may happen next, will encourage peace of mind.

Make letting go a regular practice. It's most obvious amid a crisis that we don't have control over much, but the fact of our limited influence is a reality every single day. Even when things are going just the way we want them to, anything can happen at any instant to thwart our sense of constancy. And that's why it's critical, if you want to ride the big waves deftly rather than get toppled by them, that you build up a regular practice of balancing what you can't control with what you can. Make it your intention every day, not just when you're utterly stressed by uncertainty, to fortify your mind, body and spirit; let

others be who they are, allow for our up and down, all over the place world order; *consider your responses*, and you will be in the best position possible to stand tall and ride out all sorts of crazy conditions. The more you build your life around steadying habits rather than just resist and react when those waves kick up, the more calm amid the storm you will find.

Through executive coaching and training, Portland, Maine-based psychologist Amy Wood helps attorneys to reach greater levels of achievement and fulfillment. She created the research-based attorney wellness system Law and the Good Life and is the author of *Life Your Way: Refresh Your Approach to Success and Breathe Easier in a Fast-paced World*. She recently presented at the VBA's Mid-Year and Annual Meetings.



**DIFFERENCES OCCUR
IT'S A FACT OF LIFE**

what is important is that they
be heard, addressed and
resolved



**LEIGHTON DETORA, ESQ.
MEDIATION SERVICES**

**EXPERIENCE
JUDGMENT
UNDERSTANDING**

leightondetora@outlook.com
www.DetoraMediation.com
802-253-8803

VBF GRANTEE SPOTLIGHT

South Royalton Legal Clinic



Continuing the tradition of highlighting a different Vermont Bar Foundation grantee in each Vermont Bar Journal edition, this edition will feature the South Royalton Legal Clinic at Vermont Law School in South Royalton, Vermont. The South Royalton Legal Clinic offers no-cost legal representation to low-income Vermonters in a wide variety of civil legal proceedings, while providing the opportunity for meaningful and comprehensive training to law student clinicians. The Vermont Bar Foundation grant specifically helps fund the Children First! Legal Advocacy Project and the Vermont Immigration Assistance (VIA) Project.

History of the South Royalton Legal Clinic

The South Royalton Legal Clinic first opened its doors in January 1979, with a desire to give students at Vermont Law School practical experience through supervised training while providing much-needed legal representation for low-income Vermonters. Since 1979 experienced attorneys have assisted law student clinicians repre-

sent more than 3,500 individuals and have offered significant legal consultation and resources to thousands more. Areas of representation and consultation originally included tenant rights, consumer protection, divorce, bankruptcy and civil rights and liberties, as well as public benefits including public assistance, Social Security benefits and unemployment compensation. As the Clinic has grown over the years, additional practice areas have been offered in the wake of increased needs in the areas of family law, veterans' law and immigration.

The Vermont Bar Foundation has provided funding for the Clinic every year since 2002. Clinic Director Erin Jacobsen describes what the Vermont Bar Foundation funding has meant to the Clinic: "The VBF's steadfast support of the Clinic has allowed us to help thousands of vulnerable Vermonters in high-stakes legal proceedings. Funding from the VBF goes directly to our representation of children in the middle of contentious divorces; people seeking protection from domestic violence; and families fighting deportation. I cannot understate how crucial it is to have the kind of

reliable, consistent, wholehearted support the VBF provides. This is especially true in economic downturns, such as the one we face now, where we contend with increased demands for legal representation and bleak funding forecasts. Knowing that we can rely on VBF support, as we have for nearly twenty years now, is absolutely critical, and something for which we are immensely grateful."

The Children First! Legal Assistance Project

Now in its 20th year, the Children First! Legal Assistance Project was launched in July 2000 in response to an increasing need for attorneys to represent children in contentious family court cases. The vast majority of Children First! cases come directly from court appointments from the Family and Probate Divisions in the Washington, Windsor and Orange Units.

In the past 20 years, Children First! has provided civil legal representation to 556 minor children in 446 cases in guardianship, divorce, parentage, relief from abuse,

emancipation and juvenile cases. The law student clinicians and supervising attorneys have spent thousands of hours meeting with the children, interviewing their primary care providers and other adults involved in their welfare, speaking with school officials and treatment providers, and obtaining needed medical, school and other records for the courts to make informed decisions in the cases.

Each semester up to 24 students participate as clinicians under the supervision of Children First! Project Lead Attorney Michelle Donnelly. Another experienced family law attorney, Margaret York, joined the Clinic in January 2020. Attorney Donnelly describes what a difference Children First! has made for Children First! clients and for the court system: “*Children First!* focuses on ensuring positive outcomes for the families involved and ensuring that children are not only safe in their family environment, but have the opportunity to have a voice and agency during contentious family litigation. Through our program we strive to make sure our children clients know that someone is listening to their wants and needs and advocating for their best results. I have seen families finally resolve years of litigation and fighting once the parents realize and acknowledge what their children really desire.”

Allison Ramelson-Kert, a student clinician who has participated at the Clinic, had this to say: “The Children First! project is an extremely rewarding yet challenging program. The best thing about working as a child advocate is the endless gratification of working with today’s youth and the positive impacts this program can bring. I am continuously surprised and impressed at the resilience, bravery and strength these children manifest on a daily basis in the face of adversity. In sum, Children First! is a life changing initiative! It ignites the power and potential of our youth by giving them a voice in our legal system!”

Vermont Immigrant Assistance Project

Founded in 2003, the Vermont Immigrant Assistance (VIA) project provides civil and administrative legal assistance to Vermont’s growing community of noncitizens. The number of foreign-born Vermont residents has increased from 17,500 in 1990 to 30,000 today. With the assistance of student clinicians, VIA Project Attorney and Coordinator Erin Jacobsen, joined recently by Attorney Jill Rudge (who just completed her fellowship as Vermont’s Poverty Law Fellow for 2018-2020) work to represent clients from 13 of Vermont’s 14 counties, who originally hailed from all over the world. In fact, since 2003 VIA has represented clients from 72 countries.

VIA provides legal assistance to non-

citizens seeking legal status in the United States and also assists abuse survivors, juveniles, and asylum seekers. Thanks to Bank of America Settlement Funds, VIA was recently able to open a satellite office in Burlington, where a majority of immigrants resides. VIA Director Erin Jacobsen explains what opening the new satellite office means to the project: “I love having the Burlington office! I’ve wanted to have a VIA office in Burlington since 2014 when the very first immigration office I worked in, then located on North Winooski Avenue, had to shut its doors for lack of funding. COVID has curtailed some of the community-based work I envision for our new space on St. Paul Street, but once things go back to more-normal, I look forward to working with clients and students in the office, as well as hosting events such as naturalization clinics, pro bono attorney trainings, and educational events, such as Know-Your-Rights workshops.”

During the July 1, 2019 – June 30, 2020 timeframe, VIA and 15 student clinicians represented 57 clients in 52 formally-opened cases. Those cases included filings with the United States Citizenship and Immigration Services (USCIS), removal proceedings, assistance with benefits eligibility (including COVID relief benefits) and housing issues. VIA also handled 58 significant requests for legal information, which requests generally involve research and provision of information, assistance in filling out immigration forms, and helping collect supporting documentation.

VIA Student Clinician Margaret Kelly shares what her VIA student clinician experience means to her: “Working in the VIA project gave me the opportunity to expand my knowledge of substantive immigration law. Being able to communicate with real-world clients is an invaluable experience. If not for the clinic, I would not have had an opportunity for hands-on experience in the field while also completing classes. The Clinic is a perfect complement to the law school’s curriculum. Erin Jacobsen is a fantastic facilitator who works hard to ensure that students have a great experience while also performing exemplary legal work for her clients.”

VIA attorneys and student clinicians collaborate with a number of immigration advocates and stakeholders state-wide, including other immigration attorneys, victim advocates, congressional staff, and attorneys in the Vermont Attorney General’s Office, the Vermont Defender General’s Office, Vermont Legal Aid, the ACLU and immigration non-profits throughout the region. VIA also enjoys a close collaboration with the University of Vermont’s Behavioral Therapy and Psychotherapy Center, which offers free counseling, social work services and forensic evaluations to help support VIA clients’ asylum cases.

VIA Staff Attorney Jill Rudge, the newest member of the VIA Team and fresh off her tenure as the 2018-2020 Poverty Law Fellow, offered these views about the Project: “I am honored to join VIA at this critical juncture in pandemic response and recovery. Non-citizen Vermonters face compounded barriers to accessing COVID-19 supports, which can include limited English proficiency and fear of immigration consequences. I look forward to working with student clinicians, Clinic colleagues, and my former Vermont Legal Aid colleagues to improve access to COVID-19 relief as well as avenues to regularized and permanent immigration status.”

Many thanks to all of the Vermont lawyers whose IOLTA accounts make possible the monies that fund the Vermont Bar Foundation grants, including the grant awarded to the South Royalton Legal Clinic in South Royalton, Vermont. Not only do hundreds of Children First! and Vermont Immigration Assistance Project clients directly benefit from the grant, but dozens of law students receive invaluable training and experience in the process.

Teri Corsones, Esq., is the VBA Executive Director and a member of the VBF promotions committee.



VBA CONNECT

Your Legal Community Resource -- Share, Learn, Stay Connected

Share Collective Wisdom Today!

Access to Justice Campaign

Since 2008 the Vermont Bar Foundation has funded a Poverty Law Fellow for a two-year term. Thanks to all of you who support this important work by contributing to last year's campaign. You can find a list of all the Poverty Law Fellows, and a description of each of their projects on the VBF's website.

Throughout the twelve years of the Access to Justice campaign, over 1,000 Vermonters have benefited from direct legal services and thousands more have seen their lives improve through the advocacy work the Fellows have done. This will only continue as all the Fellows have chosen to remain in Vermont to continue the work they began during their Fellowship.

The 2018-2020 Law Fellow, Jill Rudge, pivoted her work from mental health issues surrounding housing to immediate Covid issues that low-income Vermonters were facing. Initially, no one knew quite what to expect when the pandemic began, but interestingly, the Covid work and support Jill provided to clients with Covid-related housing issues still found mental health at the forefront of this challenging time. Jill has worked tirelessly during her Fellowship to increase access to housing, prevent eviction and afford clients greater access to mental health services. Jill has also just accepted a position at Vermont Law School where she will be an Assistant Professor/Staff Attorney with the Vermont Immigration Assistance project of the South Royalton Legal Clinic.

This year the new Fellow, Emily Kenyon begins her work. She'll be housed at Vermont Legal Aid and will be focusing on issues and challenges surrounding Vermont's low-wage workers. In this time of Covid, these are the people who are most at risk for eviction, safety issues at work and other forms of discrimination. Emily, an eighth-generation Vermonter, is thrilled to come home to help the Vermonters who need it most.

The Vermont Bar Foundation's Access to Justice Campaign has completed its 2019-2020 fundraising. We thank Deborah Bailey for her dedication and hard work on the Campaign. We're also thankful to Campaign Co-Chairs Fritz Langrock and Bonnie Badgewick, and all of the attorneys on the Campaign committee for their good work.

We also thank the Rutland, and Windham County Bar Associations for their continuing support, Vermont Attorneys Title Corporation which continued its match for first-time donor's contributions and our Judges who met their own challenge of raising \$10,000.

Fritz Langrock and Bonnie Badgewick will be co-chairing the 2020-2021 Campaign. If you are interested in volunteering please

contact Deborah, Fritz or Bonnie.

This year's campaign has just begun, and we're counting on members of Vermont Bar to help us continue our mission and make this year our best ever. We'd love to be able to add your name to list of donors who helped make this year's campaign a success. Please text GIVE to 802-231-3101 to donate via text, or donate online at vtbarfoundation.org/donate.

LEADERSHIP DONORS (\$7,500 - \$10,000)

Dinse

Downs Rachlin Martin PLLC

Langrock Sperry & Wool, LLP

Vermont Attorneys Title Corporation

2019/2020 Campaign Contributions

ADDISON

Elijah Bergman, Esq.

Kathleen M. Boe, Esq.

James F. Carroll, Esq. and
Nancy Deppman Law PLC

James A. Dumont, Law Ofc. of

Andrew Jackson, Esq.

Fritz Langrock, Esq.

Langrock Sperry & Wool, LLP

Erin Ruble, Esq.

James Runcie, Esq.

BENNINGTON

Gary Ameden, Esq.

Raymond Bolton, Esq.

Jonathan M. Cohen, Law Ofc of

Robert Cummings, Esq.

Danielle Fogarty, Esq.

John B. Lamson, Esq.

Katherine M. Lamson, Esq.

Peter M. Lawrence, Esq.

McClintock Law Office, PC

Men's Adventure Book Club

Matthew Samuelson, Esq.

Samuelson Law Offices

Amelia W. Silver, Esq.

Welford & Sawyer, P.C.

Whalen, Hand & Gilmour, PLC

John H. Williams, II, Law Ofc. Of

Sarah E. Wilson, Esq.

D. Patrick Winburn, Esq.

CALEDONIA

Adler & McCabe, PLC

Amy E. Davis, Esq.

James C. Gallagher, Esq. and Susan

William P. Neylon, Esq.

Zarina O'Hagin, Esq.

Zuccaro & Willis, P.C.

CHITTENDEN

Anonymous (2)

Sam Abel-Palmer, Esq.

Gretchen S. Bailey, Esq.

Amber Barber, Esq.

Barber & Waxman

Jessa and Justin Barnard, Esqs.

Bauer Gravel Farnham, LLP

David Borsykowsky, Esq.

Rich Cassidy Law, P.C.

Mark F. Chadurjian, Esq.

Daly & Daly, P.C.

Beth Danon, Esq.

George Demas, Esq.

Jeff Dickson, Esq.

Judith L. Dillon, Esq.

Dinse

Timothy Doherty, Esq.

Downs Rachlin Martin PLLC

Arline Duffy, Esq.

Tim Eustace, Esq.

John Evers, Esq.

James Gelber, Esq.

Michael Green, Esq. and Sarah Muyskens

Richard Hecht, Esq.

Erin and Jaimesen Heins, Esqs.

Robert Hemley, Esq.

Lindsey M. Huddle, Esq.

Glenn A. Jarrett, Esq.

Erika Johnson, Esq.

Eric Johnson, Esq.

Jeffrey P. Johnson, Esq. and

Mary P. Kehoe, Esq.

Gary Karnedy, Esq.

Keith Kasper, Esq.

Michael Kennedy, Esq.

F. L. Kochman, Inc.

W. David Koeninger, Esq.

Pamela Kraynak, Esq.

Marjorie Lipson

Ryan Long, Esq.

John P. Maley, Esq. and Lynn
Christopher McVeigh, Esq.
Andy Mikell, Esq.
Suzanna Miller, Esq.
Renee Mobbs, Esq.

Murdoch Hughes Twarog Tarnelli
Attys at Law PC
Susan Murray, Esq.
Elizabeth Novotny, Esq.
Mairead O'Reilly, Esq.
Paul Frank + Collins PC
Fred Peet, Esq.
David Rath, Esq.
Todd Schlossberg, Esq. and Chris Bullard
Nadine L. Scibek, Esq.
Mark Scribner, Esq.
Lila Shapero, Esq.
Sheehey Furlong & Behm P.C.
Tom Sherrer, Esq.
Nanci Smith, Esq.
Jan Spitzen, Esq.
Laura J. Stiller, Esq. and David P.
Stitzel, Page & Fletcher, PC
M. Kate Thomas, Esq.
Benjamin Traverse, Esq.
Vermont Attorneys Title Corporation
Bessie Weiss, Esq.

FRANKLIN/GRAND ISLE

Kissane Associates
Josephine Leavitt
Ruth Lippincott, Esq.
Edward J. Tyler, III, Esq.

LAMOILLE

Julia J. Compagna, Esq.

ORANGE

M. Robin Barone, Esq. and Sydney Lea
Gay & Lesbian Fund of Vermont, Inc.
Henry Vogt, Esq.
Wynona I. Ward, Esq.

ORLEANS

Robert B. Chimileski, Esq.
Vincent J. Dotoli, Esq.
Gregory Howe, Law Ofc. of

RUTLAND

Anonymous
Carolyn B Anderson, Esq.
James Anderson, Esq.
Karl C. Anderson, Esq.

Mary C. Ashcroft, Esq.
Francesca Bove, Esq.
Raymundo Cardenas, Esq.
John A. Facey, III, Esq.
Mark E. Furlan, Esq.
Alan George, Esq.
Matthew Getty, Esq.
Antonietta A. Girardi, Esq.
Kenny & Gatos, LLP
Allan R. Keyes, Esq.
Zachary Manganello, Esq.
John McCamley, Esq.
McClallen & Associates, P.C.
Meub Associates, PLC
Glenn Morgan, Esq. and Betsy
Ogden Law Offices, P.C.
Daron Raleigh, Esq.
Readnour Associates, P.C.
Barbara Richter, Esq.
Rutland County Bar Association
Morris Silver, Esq. and Tobi
Mark Werle, Esq.

WASHINGTON

Anonymous
Brian M. Amones, PC
E. Sebastian Arduengo, Esq.
Bridget C. Asay, Esq.
Deborah Bailey
John Beling, Esq.
Patrick L. Biggam, Esq.
Gavin Boyles, Esq.
Malachi T. Brennan, Esq.
Scott Cameron, Esq.
Danforth Cardozo, Esq.
Charity Clark, Esq.
Sidney Collier, Esq.
Therese Corsones, Esq.
Maguire and Lauren Curran, Esqs.
Todd Daloz, Esq.
Mark DiStefano, Esq.
Susan M. Ellwood, Esq.
Jennifer Emens-Butler, Esq.
Geoffrey M. FitzGerald, Esq.
Jordan Gonda, Esq.
Elizabeth Hannon, Esq.
Nate Hausman, Esq.
Sarah Hofmann, Esq.
John Hollar, Esq.
Zachary Hozid, Esq.
Jacqueline A. Hughes, Esq.
Sarah Katz, Esq.

Kevin Kelly, Esq.
Bernard D. Lambek, Esq.
Sandra Levine, Esq.
Lisa Maxfield
John J. McCullough, III, Esq.
Wendy Morgan, Esq.
Susan M. Palmer, Esq. and
Christopher Jeffrey
Sandra Paritz, Esq.
Nick Persampieri, Esq.
William J. Reedy, Esq.
Stephen Reynes, Law Ofc of
Daniel P. Richardson, Esq.
Lila M. Richardson, Esq. and Allen Gilbert
Alan Rome, Esq.
Phyllis Rubenstein, Esq.
Ken Schatz, Esq. & Trinko Kerr
David Scherr, Esq.
Mary Just Skinner, Esq.
Therault & Joslin P.C.
Rory Thibault, Esq.
Oliver L. Twombly, Esq.
Alfonso Villegas, Esq.
Thomas A. Waldman, Esq.
Wilschek Iarrapino Law Office, PLLC
Sophie Zdatny, Esq.

WINDHAM

Buehler & Annis, PLC
Wendy Collins, Esq.
Costello Valente & Gentry, P.C.
Jeremy Dworkin, Esq.
Fitts, Olson & Giddings, P.L.C.
Samuel Griffis, Esq.
Patricia A. Killigrew, Esq.
Massucco & Stern, P.C.
Jennifer Rowe, Esq.
Rowell Law Office, PLC
Margaret Shugart, Esq.
Windham County Bar Association

WINDSOR

Anonymous
Bonnie Badgewick, Esq.
Patricia G. Benelli, Esq.
David Farnsworth, Esq.
Kathleen A. Hassey, Esq.
Hayes Windish & Badgewick, PC
Elizabeth Kruska, Esq.
C. Robert Manby, Jr., PC
Marsicovetere & Levine Law Group, P.C.
Scott McGee, Esq. and Cathy

Dean Thomas JP McHenry
 Brian Porto, Esq.
 Barbara Rodgers, Esq.
 Kinvin and Deborah Wroth

OUT OF STATE

Ned Andrews, Esq.
 Lisa Birmingham, Esq.
 Travis Cote, Esq.
 Matthew Dendinger, Esq.
 Will Irwin, Esq. and Fran
 Raymond James, Esq.
 Christopher Johnson, Esq.
 Pamela P. Little, PLLC, Law Ofc. of
 Martin, Harding and Mazzotti, LLP
 D. Michael Mathes, Esq. and Marcia
 Jesse Mautner, Esq.
 Thomas Melone, Esq.
 Polivy, Lowry & Clayton, LLC
 Anne Siarnacki, Esq.
 David Sime, Esq.
 Andrew V. Urbanowicz, Esq.

JUDICIARY

Hon. David A. Barra and Barbara
 Hon. Lawrence H. Bruce
 Hon. Tom Carlson and Nancy
 Hon. Karen R. Carroll and Rich
 Hon. Cortland T. Corsones and Therese
 Hon. Geoffrey Crawford
 Hon. Thomas J. Devine
 Hon. John Dooley and Sandra
 Hon. David Fenster
 Hon. Susan L. Fowler
 Hon. Michael Harris
 Hon. Sam Hoar and Eve
 Hon. David Howard

Hon. Christine Hoyt
 Hon. Howard Kalfus
 Hon. Ronald F. Kilburn
 Hon. Michael Kupersmith
 Hon. Stephen B. Martin and Nancy
 Hon. Robert A. Mello
 Hon. Walter Morris
 Chief Justice Reiber and Sandi
 Hon. Christina Reiss
 Hon. Beth Robinson and Kym Boyman
 Hon. D. Justine Scanlon
 Hon. Kirstin Schoonover and
 Hon. Brian Valentine
 Hon. Eleanor W. Smith
 Hon. Mary Miles Teachout
 Hon. Timothy B. Tomasi
 Hon. Helen M. Toor

TRIBUTE GIFTS

In Honor of Pat Barr and Rolf Sternberg
 Peter M. Lawrence, Esq.

In memory of Frank F. Berk, Esq.
 C. Robert Manby, Jr., PC

Gay & Lesbian Fund of Vermont, Inc.
 Directed by Eileen Blackwood &
 Lynn Goyette

In Memory of James Burton
 John B. and Katherine M. Lamson, Esqs.

In Memory of Charlie Capriola
 D. Patrick Winburn, Esq.

Dedicated to Ruth Eileen Collins
 Wendy Collins, Esq.

In Memory of Jane Gans, Esq.
 Nanci Smith, Esq.

In Memory of George Floyd
 Scott McGee, Esq. and Cathy

In Memory of Ralph A. Foote, Esq.
 D. Michael Mathes, Esq. and Marcia

In Memory of Thomas H. Jacobs, Esq.
 McClintock Law Office, PC

In Memory of Harry Kochman
 F. L. Kochman, Inc.

In Memory of Professor Gil Kujovich
 M. Robin Barone, Esq. and Sydney Lea
 Zachary Manganello, Esq.

In Memory of Laurie LeClair, Esq.
 Judith L. Dillon, Esq.

In Memory of Larry Mandell
 Alan Rome, Esq.

In Memory of Judge McCaffrey
 Hon. Cortland Corsones and Therese
 Hon. David Howard
 Hon. Michael Kupersmith

Dedicated to Northfield Savings Bank First
Quality Customer Service
 Travis Cote, Esq.

Dedicated to Past, Present &
Future Poverty Law Fellows
 Mairead O'Reilly, Esq.

In Memory of Paul R. Rexford
 Robert B. Chimileski, Esq.

In Honor of Justice Beth Robinson
 Susan Murray, Esq.

In Memory of Zander Rubin, Esq.
 Hon. Walter Morris

Dedicated to Robert P. Scanlon
 Hon. David Fenster

In Memory of Scott Skinner, Esq.
 Phyllis Rubenstein, Esq.

Dedicated to Sierra and Michael Sowa (Jr.)
 Jordan Gonda, Esq.

In Honor of James Spink
 Arline Duffy, Esq.

In Honor of Wynona Ward, Esq.
 Patricia A. Killigrew, Esq.

Dedicated to Environmental &
Social Justice in Climate Action
 David Farnsworth, Esq.

**Check out the
 VBA Facebook Page!**

www.facebook.com/VTBAR



We use our Facebook page to communicate more detailed information about upcoming events and to keep you informed on developments in the legal profession in Vermont and throughout the nation. We'll also be posting photos and videos of VBA events. Become one of the many fans of the VBA!!

Invisible Bars: The Collateral Consequences of Criminal Conviction Records

One in three Vermonters has some type of a criminal record.¹ Many Vermonters are unaware that old convictions and non-convictions remain on their record until they are denied access to opportunities such as employment, housing, licensing, and loans. This discovery occurs when they are told that they cannot coach their child's soccer team or chaperone their grandchild's field trip; after they graduate from cosmetology school but are denied a professional license; when they cannot purchase a hunting rifle to share a generational pastime with loved ones; when they are told that unless they move out of their home, their fiancé's in-home day-care cannot operate.

The collateral consequences of old convictions create barriers that most individuals cannot overcome, resulting in a second sentence, where every opportunity to improve one's circumstance is just out of reach, and poverty is the inevitable consequence.

When Vermonters with past convictions are provided the opportunity to get a job and make higher wages, they are able to better support their families and can afford to pay for the services that they once relied on the state to provide. To get to this place we must remove the barrier that a criminal record creates between an individual and affordable housing, gainful employment, educational programs, and state services. Previously incarcerated individuals are already at a disadvantage due to gaps in work history, and often a conviction on an individual's record has no relevance to the work they apply for. When an individual completes their criminal sentence, they deserve to have their rights and privileges restored in order to help them move forward with their lives. Additionally, the individual will be more equipped to pay restitution that in turn supports crime victims through Vermont's Center for Crime Victim Services (CCVS).

In Vermont, after someone is convicted of a crime, their record often cannot be expunged from their criminal history. Expungement means all the records related to a criminal charge are physically destroyed by court order. This includes all information documenting one's contact with the criminal justice system such as police reports, records in the prosecutor's office, and court records. Currently, all non-convictions are automatically expunged after a certain period unless there is an *interests of justice* objection made by the prosecution to maintain that record. But in a 50-state report published last month by the Collateral Consequences Resource Center (CCRC), Vermont received a letter grade of "D" for expungement, sealing, and set-aside of convictions for felonies and a "C" for misdemeanors. Vermont received a "C" in fair employment law and an "F" in licensing. Along with other grades, Vermont is tied for

19th place for overall restorative rights. As a state with a policy that requires that restorative justice principles be used to shape response to crime, we must hold ourselves accountable and do better.

Most felonies and most predicate offenses – whether classified as a felony or a misdemeanor – can never be expunged. Individuals with this type of conviction on their record are not even allowed to inquire about an expungement, regardless of how old the conviction is. All convictions must meet multiple statutory requirements to be eligible for expungement, and the process is complex and expensive. The expungement process requires access to the individual's up-to-date criminal record; they must pay for that information. They can visit the criminal court where they were charged or convicted and pay per page for a copy of their docket sheets; for people with interactions with multiple courts, this would necessitate contacting multiple county courts for those documents. Alternatively, individuals can contact the Vermont Crime Information Center (VCIC) and purchase a copy of their criminal record for \$30. Many Vermonters with old convictions do not get past this first step. Eliminating this financial hurdle so individuals can find out if expungement is even an option for them will help many on the path toward reintegration and social success.

Assuming an individual has the resources to get a copy of their record, other cost prohibitive steps in the process follow, despite recent improvements in Vermont's expungement laws. Usually they will need an attorney to read the docket sheets, review the applicable law, and determine if a particular conviction is eligible. If eligible, a petition to expunge must be drafted and filed in each court where there is an eligible conviction. Last year, the petition filing fee was eliminated, and the list of expungement eligible items was expanded in Act 167.² This is a significant access to justice measure enacted by Vermont's legislature.

Yet, expungement of a criminal record in Vermont is still conditioned on a person's financial status. Until last month's passage of Act 147, the full payment of court surcharges (administrative fees of \$147 levied on every conviction), fines, and restitution were required before the court would grant an expungement. Now, judges have been given the discretion to waive the surcharge balance owed, but how will this be interpreted? If Vermont is to make progress on achieving its restorative justice ideals, judges must seize this as an opportunity to make expungement easier for petitioners.

Continued reform, such as allowing a judge who will not waive the balance owed, to grant an expungement before the balance is paid, instead allowing installments after expungement, is necessary to provide access to justice for all

Vermonters. If a petition is successfully filed for an eligible offense and is denied for financial reasons, an individual may remain unemployed, without stable housing, and unlikely to continue their rehabilitation. Disadvantaged petitioners will have their disadvantage heightened.

Additionally, time frames for eligibility must be shortened. For the average individual, the expungement process can take up to six months from the initial point of contact for assistance to the record being erased from all databases. For petitioners personally, this time frame can come at another price, one that isn't monetary - six months is a missed child's soccer season, semester of trade school, or youth hunting trip. It expands the employment history gap and creates homelessness. It makes a trade certificate useless, works against goals of financial independence, and creates stigma. Coupled with the 5 – 10 years that an individual must wait before they are even eligible to petition for an expungement (and possibly longer with current proposed legislation), our expungement process is inefficient and counterintuitive at best. At worst, it's bad for society, a waste of resources, and prejudicial to petitioners. Changes to Vermont's expungement law, such as shortening these time frames, would ultimately have positive impacts for the entire community and would help shift our criminal justice approach to one that is more restorative than punitive.

Similar to Vermont's motor vehicle point system, once a conviction becomes eligible for expungement, there should be a petitionless process that eliminates the obstacle course of paywalls and sand traps that currently stands between rehabilitated individuals and the opportunity to improve their circumstances. The burden should not be on the individual, as they have already paid their debt to society. Rather, it is our responsibility as neighbors and community members to make it our mission to hear more individuals matter-of-factly state, "I got my life back!"

Kassie R. Tibbott, Esq. is a Staff Attorney for the Access to Justice Expungement Project at Vermont Legal Aid and a Research Assistant for the Center for Justice Reform at Vermont Law School. She has been practicing Vermont expungement law since she was admitted to the bar in 2018 and is enrolled in the VBA/VLS Incubator Lawyer Project.

¹ Goggins, Becki R. & Dennis A. DeBacco, Survey of State Criminal History Information Systems, 2016: A Criminal Justice Information Policy Report (Washington, DC: 2018), page 17. <https://www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf>

² <https://legislature.vermont.gov/Documents/2020/Docs/ACTS/ACT167/ACT167%20As%20Enacted.pdf>



Can Lawyers Add Surcharges to Their Bills?

Two quick stories. Years ago, I had a plumbing emergency. The short version is I discovered a broken water line in my kitchen on a Thanksgiving eve. That line needed to be repaired immediately or Thanksgiving was going to be a bust. Trust me, that service call cost me. My second story is about packages. Now that all of our kids are grown and living throughout the US, my wife sends more packages than she used to. I'm often tasked with the responsibility of boxing things up and getting them shipped off. Unfortunately, I'm not always as prompt with that as I should be, which means I sometimes must pay a premium to make sure those packages get to wherever they're going on time. Heaven forbid something arrives a day or so late.

These two stories describe common situations where we all know going in that we're going to have to pay a little more than we would under normal circumstances. A plumber's rates are higher for holiday emergencies and shipping rates are higher for expedited service. That's just the way it is. Given this reality, I'm led to ask this question. Is it ethically permissible for a lawyer to add a surcharge to a client bill for having to respond to an emergency or agreeing to provide an expedited legal service? As with so many things in life, the answer is it depends.

To understand why, we need to start by looking at ABA Model Rule 1.5 Fees. Most lawyers know that, in general, this rule states a lawyer's fee is to be reasonable and the basis or rate of the fee and expenses are to be communicated to the client. So, if you tell your clients in advance that your practice is to add a 10% surcharge to your fee for work you have to do on weekends, is that reasonable? Perhaps; but here's the problem. Where's the line? If 10% is reasonable, is 50%? How about 200%?

Rule 1.5 also sets forth factors a lawyer is to consider when trying to determine whether a particular fee is reasonable. Take note that section (a)(5) under Rule 1.5 states that "the time limitations imposed by the client or by the circumstances" is one of the factors set forth. Given this language it would appear that a surcharge might be appropriate in certain circumstances, as long as the other seven factors listed aren't overlooked, which leads me to another story.

From time to time I still come across situations where lawyers have played fast and loose with Rule 1.5. One memorable story concerns a lawyer who apparently found the idea of surcharges as an opportunity not to be missed. Unfortunately for her, she took

it the extreme. She decided to let all her clients know she surcharged for time spent working evenings and on weekends and then she made sure the evenings and weekends were the only time she worked!

Don't go there. Just because you have a day that spins out of control or agreed to take on more work than you can handle between the hours of 8 and 5 doesn't mean you get to surcharge a client whose work you couldn't get to until the weekend. Stated another way, a surcharge for an emergency that was of your own making is an unreasonable surcharge. Long days come with a decision to practice law. This too is just the way it is.

Of course, if a current or new client comes to you with a true legal emergency that requires you to drop everything and this client understands that he is asking for expedited and prioritized service, well that's a different matter entirely. Here a surcharge may very well be reasonable and appropriate. Sometimes clients truly do have a need to be moved to the front of the line and they are willing to pay for the service. Does this mean the surcharge can be whatever you can get the client to agree to and the sky's the limit? Absolutely not! Again, remember that Rule 1.5 (a) sets forth a total of eight factors to be considered in the determination of what reasonable is and none of them say anything along the lines of if some fool agrees to a ridiculously high fee, that fact alone will make the fee reasonable. Think about it. If your fees are ever questioned, discipline counsel is going to review your fee practices from his or her objective belief as to what the eight factors of reasonableness means. Consider yourself forewarned.

Here's where I come out on this topic. It would seem it is reasonable for a lawyer to add a surcharge to a fee if the client is made aware of the circumstances that could or already has given rise to the need for a surcharge and the client agrees to the surcharge in advance. Further, the circumstances giving rise to the surcharge must be something beyond the circumstances that ordinarily come into play in any type of legal matter, and nothing about these circumstances can be of the lawyer's own making. Finally, I have no idea where to draw the line in terms of saying a 20% surcharge is reasonable, but a 200% surcharge isn't. All I can say is there may be a circumstance where 20% isn't and a different circumstance where 200% is.

Now, one last item. If any of you happen to know a good plumber who charges a reasonable rate for after-hours work, can you

let me know? I'd sure appreciate it because the guy who helped me out that Thanksgiving years ago was a real piece of work. He even left with a few of my own tools and I'm not kidding.

Hopefully you get this last takeaway. Client memories can be long, and they often share their stories, just like I have here, only they will name names. You really don't want to be known as that lawyer who always tries to take his clients to the cleaners. Here's a thought. A good business practice might be to always keep the eight factors of Rule 1.5 in mind whenever you are reviewing and setting fees for any and all clients. Seems like a no brainer if you ask me.

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.

Disclaimer: ALPS presents this publication or document as general information only. While ALPS strives to provide accurate information, ALPS expressly disclaims any guarantee or assurance that this publication or document is complete or accurate. Therefore, in providing this publication or document, ALPS expressly disclaims any warranty of any kind, whether express or implied, including, but not limited to, the implied warranties of merchantability, fitness for a particular purpose, or non-infringement.

Further, by making this publication or document available, ALPS is not rendering legal or other professional advice or services and this publication or document should not be relied upon as a substitute for such legal or other professional advice or services. ALPS warns that this publication or document should not be used or relied upon as a basis for any decision or action that may affect your professional practice, business or personal affairs. Instead, ALPS highly recommends that you consult an attorney or other professional before making any decisions regarding the subject matter of this publication or document. ALPS Corporation and its subsidiaries, affiliates and related entities shall not be responsible for any loss or damage sustained by any person who uses or relies upon the publication or document presented herein.



Vermont Paralegal Organization, Inc. Celebrates 30 Years!

Thirty years ago, the role of a paralegal in Vermont law firms and corporations began to grow and expand. Trudy Seeley, a paralegal at that time, and a founding member of the Vermont Paralegal Organization (VPO), reached out to other legal professionals around the state and asked if they would be interested in forming a group to share information and support one another in their expanding roles. This effort led to a small group of enterprising paralegals forming what would become the VPO. In November of 1990, the group had their first meeting at the Vermont Law School. It was an informal 5 hour bring-your-own lunch event held on a Saturday. In 1992, the VPO became a member of the National Federation of Paralegal Associations (NFPA) in an effort to have a presence and voice on the national level. In 2016, paralegals from all over the country convened in Burlington for the NFPA Annual Convention, hosted by the VPO. A small but mighty group of VPO volunteers coordinated and managed the four-day event that included a day of seminars, and two full days of policy meetings. The VPO officially incorporated in 2019.

After Champlain College discontinued its Paralegal program, members of the VPO sought another higher education institution to take on the program. In January of this year, two VPO board members met with Marni Leikin at the ACE Academy at Burlington Tech Center to discuss how to bring a paralegal program back to Vermont. As of today, we are on a path to creating such a program with a partnership of the VPO, ACE Academy at Burlington Tech Center, and a state higher education institution. It is expected that the Paralegal Certificate Program will roll out in January of 2021. We owe a very special thank you to Marni Leikin for embracing our ideas for the program and making it happen in a short 8 months, and to James Knapp, Esq., of First American Title Insurance Company, who from the day Champlain College announced the discontinuance of the only paralegal program in Vermont, has been our biggest supporter and partner to finding another institution to carry on a Paralegal Program and who will be one of the instructors when the program rolls out. We are very excited to celebrate this undertaking as part of our 30-year celebration.

The VPO is proud to be a statewide non-profit organization dedicated to advancing

the paralegal profession by offering its members networking opportunities, continuing legal education (CLE), pro bono opportunities, leadership training, and a quarterly newsletter filled with information to keep paralegals up to date on legal issues. The VPO maintains a code of conduct, promotes high standards of integrity among paralegals, and fosters relationships with local and state bar associations. The VPO's Annual Meeting and Conference includes seminars presented by generous and supportive members of the Vermont Bar Association and individuals who specialize in related fields. All VPO members are afforded membership in NFPA. Through affiliation with NFPA, VPO members stay current on paralegal issues on a national level as well as contribute to the development of NFPA policy. The VPO offers an annual scholarship and guidance in the process of earning certification through the NFPA Paralegal Advanced Competency Exam (PACE®) and/or the Paralegal CORE Competency Exam (PCCE), which involves educational or experiential prerequisites and passing a standardized exam.

The VPO owes much of its current success to the many past and present members, and the attorneys, law firms and corporations who have supported its mission since 1990. The VPO is fortunate to have attorneys who present seminars on a regular basis and the list of supporting presenters continues to grow every year. The VPO would also like to thank the following firms and attorneys with VPO members:

Atlas Legal Services, LLP; Barber & Waxman; Behrens Venman & Sussman, PLLC; Cleary Shahi & Aicher; Darby Thorndike Kolter & Nordle, LLP; Dinse P.C.; Downs Rachlin Martin PLLC; Dunkiel Saunders Elliott Raubvogel & Hand, PLLC; Facey Goss & McPhee P.C.; Green Mountain Power; Hehir Law Office, PLLC; Heilmann, Ekman, Cooley & Gagnon, Inc.; Joseph Greenbaum; Lab Partners Associates, Inc.; Langrock Sperry & Wool, LLP; Law Office of David I. Schoen; Law Office of Ruth Kinney, Esq.; Law Offices of Fred V. Peet; Law Offices of Steven A. Bredice PLC; Law Offices of F.J. von Turkovich, P.C.; Liberty Mutual; Lisman Leckerling, P.C.; Little & Cicchetti, P.C.; Lynch & Foley, P.C.; Lynn, Lynn, Blackman & Manitsky, P.C.; Main Street Mid-



dle School; Maley and Maley, PLLC; Marathon Health; Martin, Harding and Mazzotti; McClintock Law Office, P.C.; McCormick, Fitzpatrick, Kasper & Burchard; Nanci A. Smith, Esq. PLLC; Northern Vermont Paralegal Services, LLC; Numbers Matter; Oliver L. Twombly Law Office, P.C.; Paul Frank + Collins P.C.; Pease Mountain Law, PLLC; Pinto MacAskill PLLC; Primmer Piper Eggleston & Cramer PC; Ryan Smith & Carbine, Ltd.; Sheehy Furlong & Behm P.C.; Stackpole & French Law Offices; Stark Law, PLLC; State of Vermont; The Law Office of William J. Fisk, PLC; Unsworth LaPlante, PLC; Vermont Attorney General's Office; Vermont Attorneys Title Corporation; Vermont Department of Labor; Vermont Energy Investment Corporation; Vermont Land Trust, Inc.; Vermont Law School; VOSHA Review Board; VT Office of the State Judge Advocate; VT Army National Guard; and Zalinger Cameron & Lambek PC.

The all-volunteer Board of the VPO began planning a dinner event to celebrate its 30th anniversary. Unfortunately, as with so many similar events restricted by COVID-19, the event has been cancelled. The VPO hopes to hold its celebratory event in 2021.

If you are interested in more information about the VPO, becoming a member, membership benefits, or its history, please visit the VPO website at www.vtparalegal.org.

Lucia White is VPO President and is a paralegal with Nanci A. Smith, Esq., PLLC.



Justice Delayed is Reunification Denied

We've had this maxim drilled into our heads since probably even before we entered law school: justice delayed is justice denied. That concept is rooted in the notion of fundamental fairness that is the backbone of our legal system. But delays often have a more pragmatic, scarring impact than just being left with the feeling that one was treated unfairly. I believe that the most tragic example of this impact occurs in our child abuse and neglect dockets where delays in court proceedings mean delays in, and sometimes denials of, family reunification.

When children are removed from their home because they cannot safely remain there, the court process often dictates when they will be reunified with their families or find new, permanent homes. Delays in court proceedings can, therefore, delay this resolution. Myriad causes of delay include overloaded dockets, lack of community resources, overburdened family services workers, attorney scheduling conflicts and inability to locate or even identify parents. Some of these factors are beyond the control of the court system. Others are not.

In many cases, judges are called upon to exercise discretion in either granting or denying requests for continuances. What may seem like a trivial decision, particularly considering the many other decisions being made every day, may very well have a profound impact on the life of a child. Some continuances are necessary, but others are not. It must be determined whether the delay is acceptable because of a better outcome such as a greater assurance that the child will remain safely in the home.

Research was done last year to determine if there is any correlation between continuances in CHINS¹ cases and the length of time that children remain out of the home. The study also examined whether a correlation exists between the number of continuances and whether reunification occurs at all.

Each year between 2011 and 2015, there were, on average, approximately 720 children removed from their parents or guardians' custody in Vermont. 100 cases, weighted by county, were randomly selected for each of those five years. Data collected from these cases include the age of the child at the time of removal, the number of continuances granted, the length of each continuance, the reasons for the continuances, the types of hearings continued, the disposition of the case and the length of time from removal to permanency. Using both quantitative and content analyses,

patterns were sought in comparing time in substitute care and factoring in the number of continuances being mindful that the age of the child may have a confounding impact on trends and being mindful of the reasons for the continuances and the types of hearings continued. It was expected that a correlation would be found between the number of continuances and the length of time that a child remains in substitute care. Indeed, such a correlation does exist although no patterns emerged to suggest that certain hearing types or reasons for continuances resulted in more time in substitute care than others.

The findings of the study indicate that there is room for improvement in avoiding delays in Vermont's juvenile court process. Even where all parties jointly request a continuance, judges must be vigilant in guarding against avoidable delays as often a continuance believed to be necessary to advance a more swift reunification (such as parties working toward a settlement which would obviate the need for a contentious hearing) simply postpones the hearing rather than eliminate it. Where there were no continuances, children in the study remained out of the home an average of 273.5 days. Where there was one continuance, the average was 510 days. Awareness of such statistics by attorneys, family services workers, guardians ad litem, court staff and, most especially, judges is critical to ensuring timely permanency for all children.

In addition to the trauma suffered by child victims at the hands of abusive or neglectful parents, guardians or custodians, removal from parental figures, even those who are abusive or neglectful, often creates an additional trauma for these children.² The risk of trauma from removal is almost always, we assume, outweighed by the risk of leaving a child in an abusive or neglectful setting. This is the cornerstone of child welfare systems and the justification for state interference with the fundamental right to parent.³ Particularly for younger children, as the length of removal increases, so may the detrimental impact on the child's wellbeing.⁴

Passed by the United States Congress and effective on November 19, 1997, the Adoption and Safe Families Act of 1997 (ASFA)⁵ mandates that if a child is removed from his or her home for at least 15 of 22 consecutive months, that child should be freed for adoption absent a compelling reason for continuing the child in substitute care (foster care or another non-permanent

living arrangement).⁶ Prior to ASFA's enactment, it was not at all uncommon for a child to spend many years in foster care without much concern on the part of the child welfare system, including the courts. Although ASFA has led to significant improvements in reunification rates, children still spend more time out of the home prior to reunification than is desirable even where great progress is being made by the family. Delays in juvenile court proceedings contribute to this as do other factors such as addiction, incarceration and lack of treatment resources. Each continuance of a hearing in a juvenile case where a child has been removed from the home may well result in the reunification of that child with his or her parents being delayed. At some point, the delays may result in the child never returning home.

If there exists a correlation between the number of continuances and the rates/timing of reunification, then the juvenile court can theoretically reunify children and families more quickly by adjusting practices to reduce the number of continuances. This assumes, of course, that other delays do not result from the reduction of continuances and that other factors in a case are not negatively impacted by the reduction in continuances. Equally important, perhaps, to the number of continuances are the reasons for the continuances. Failure to timely file required reports, lack of clarity in expectations and lack of preparedness are quite common but also avoidable. Other reasons such as lack of community resources for mental health, substance abuse or sex offender assessments or treatment are often unavoidable and can cause significant delays in the progress of a case.

Explanation of Terms

The following terms are used throughout the article for the sake of clarity and efficiency. They generally encompass other terms found in statute although these terms do not necessarily appear in statute or have the same meaning in this article as they do in statute.

CHINS- Juvenile cases include children alleged to be in need of care or supervision (abused, neglected, truant and unmanageable), delinquent or youthful offenders.⁷ It is unusual for a child in a delinquency or youthful offender case to be removed from the home absent a companion CHINS case. When that does happen, the circumstances are generally so extraordinary that the removal tends to be for a very long time be-

cause significant out-of-home treatments or other services are needed. Unmanageable youth tend to also require significant services that keep them removed from their parents' custody for much longer than other children in need of care or supervision. They often remain out of the home for years regardless of how efficient or inefficient the court process might be. Thus, the data from those cases would likely skew the analysis. For those reasons, delinquency, youthful offender and unmanageable cases were excluded from this study. The study consequently focuses on abuse, neglect and truancy cases. For ease of reading, the remainder of the article will refer to abuse, neglect and truancy cases collectively as CHINS cases.

Continuance- Continuance requests must be made in writing unless made orally during a hearing.⁸ Written motions are easily tracked through review of court files. Oral motions, on the other hand, may or may not be noted in the file. The court may also reschedule a hearing on its own initiative to resolve a scheduling conflict, because of illness or foul weather. Additionally, hearings may commence on the date scheduled but run out of time to conclude testimony and need to be scheduled for additional hearing time. As used in the study and this article, "continuance" refers to any incident of a hearing being scheduled for a given date and not concluding on that date. There are exceptions as follows. Where a hearing is scheduled to take place over several days, whether or not those dates are consecutive, a continuance was not noted unless the hearing went beyond the last, originally-scheduled date. Furthermore, there are circumstances where a continuance will unquestionably have no impact on the length of time that the case is pending or that a child remains away from his or her parents. An example of this is where there is a pre-trial conference scheduled to be held two weeks before the hearing on the merits and the pre-trial is continued for two days. This did not cause a delay in the merits hearing so it was not tracked as a continuance.

Removal order- There are several types of orders pursuant to which a child may be removed from his or her parents or guardians by the juvenile court. An ex parte emergency care order (ECO) may be issued transferring custody to the Vermont Department for Children and Families (DCF).⁹ After a hearing with notice, the court may issue a temporary care order (TCO) in the form of

(1) a conditional custody order [(CCO)] returning or granting legal custody of the child to the custodial parent, guardian, custodian, noncustodial parent, relative, or a person with a significant relationship with the child, subject to such conditions and limita-

tions as the court may deem necessary and sufficient; (2) an order transferring temporary legal custody of the child to a noncustodial parent or to a relative; (3) an order transferring temporary legal custody of the child to a person with a significant relationship with the child; or (4) an order transferring temporary legal custody of the child to [DCF].¹⁰


As used in this article, "removal order" refers to any of the aforementioned orders, except for a conditional custody order to the child's parent, whether that person was the custodial parent or a noncustodial parent at the time the petition was filed. It includes TCO's transferring custody to DCF even if the child is placed with a parent for two reasons. First, because the TCO itself divests the parent of significant rights.¹¹ Second, because, on a more practical level, it is impossible to determine when a child was placed with or removed from his or her parent using solely the review of court files. As custodian, DCF may move children between foster homes and parents or other family members without an order or even the knowledge of the court. Such moves can and sometimes do occur daily.

The analysis does not distinguish between TCO's to DCF and CCO's to a family member. This is because the research conducted could not reasonably determine whether the nature of the custodial relationship created by the CCO fostered or inhibited reunification. While it may seem intuitive that placing a child with kin is more likely to lead to a faster and more successful reunification, that is hardly true all of the time and perhaps not even most of the time.

Correlation Between the Number of Continuances and the Length of Removal

The study revealed that the more continuances granted in a juvenile case in Vermont, the longer the subject child will remain out of the home and at some point the child will never return home. This may seem intuitive, but at least one other study, from Baltimore, Maryland, reached a different conclusion.¹² The question for juvenile court practitioners in Vermont is what, if anything, can be done to mitigate the problem. First, we must look to the actual impact. In other words, how much time in the custody of another does each continuance add and does it vary by age group? If the impact is significant, we must next look to the reasons for the continuances to determine if they are avoidable.

For the purposes of this study, children were divided into age groups based upon their age at the time of the first removal order. The age groups are: under one year



Make oral health a priority.

Oral health is a critical component of overall health. Dental insurance encourages preventive habits and procedures that benefit everyone, at every age.

To enroll in the Vermont Bar Association dental plan, call Pinnacle Financial Corporation at 800-200-5434.

Northeast Delta Dental
www.nedelta.com

of age; one through two-years old; three through five-years old; six through ten-years old; eleven through fourteen-years old; and fifteen through seventeen-years old. These age groups were determined based upon child development and the needs of children as they grow, bond with caregivers, enter school etc.

CHINS cases average 2.53 continuances per case. The average length of time that a child will be removed from her parents' custody where there are no continuances is 273.5 days. On average, each continuance correlates with 94.5 days added to the average length of the removal. That increase is more indicative for children up through five years of age. Continuances correlate with the greatest increase in length of removal for children ages six through ten with an average of 215.4 days of removal added for each continuance.^{13, 14} Thus, for children up to eleven years old, each continuance will mean that she will likely remain out of her parents' custody for an additional three to seven months. Additional continuances seem to have a lesser impact on the length of removal for older children with each continuance adding an average of 25.4 days for 11- through 14-year-olds and an average of 52.5 days for children ages fifteen through seventeen.

The problem is even worse, howev-

er, than the statistics above may suggest. Those numbers assume a consistent increase with each continuance. That is not the case. In reality, the first two continuances correlate with an alarming increase in the length of a child's removal. As indicated above, the average length of removal without a continuance is 273.5 days. Where there was one continuance, the average length of removal increased by 237 days to a total of 510 days. Where there were two continuances, the average removal was 672 day, almost two years. After that, there is little change in the average length of removal until the sixth and subsequent continuances where the upward trend resumes at a significant degree: 224 days per continuance. Where there are eleven continuances, the average length of removal is 1977 days, almost five and half years. It is safe to say that where a child is removed for five years, the continuances are not a significant factor in the length of removal. Arguably, the challenges in those cases are so severe that continuances may have no impact at all on the length of removal.

Correlation Between the Number of Continuances and Rates of Reunification

After analyzing the data, we now know that children removed from their parents' custody remain in the custody of another for an average of nine months without any continuances, for seventeen months with one continuance and for twenty-two months with two continuances. ASFA mandates that a child removed from his parents' custody for fifteen of twenty-two consecutive months should presumably be freed for adoption. That means that we should expect that in most cases where at least one continuance is granted, there will be a TPR petition filed. Of the 480 cases subject to this study, 366 had at least one continuance. This means that, in theory, just over 75% of juvenile cases should see a TPR petition being filed. That is not the case nor would we reasonably expect for that to be the case. In fact, only about 26% of CHINS cases in Vermont result in a TPR petition being filed.¹⁵

As indicated above, there is an expectation of TPR where a child has been removed for fifteen of twenty-two consecutive months. Not surprisingly, as the number of continuances increases, so does the likelihood that the child will not be reunified with his parents. Of the cases studied, ten had eight or more continuances and had been disposed of at the time of review. Of those ten cases, only one child was reunified with parents. Seven cases resulted in TPR, one in a permanent guardianship and one child turned 18 before any other form of permanency could be achieved.

Even when a case does not result in a TPR, we know that children experience emotional harm when removed from their parents' custody. While we assume that this harm is outweighed by the harm or risk of harm if left in the home, we also know that additional time out of the home takes its toll on children's emotional and psychological wellbeing particularly for younger children. This leads to the next question: are some of the continuances, and, consequently, delays in reunification avoidable?

Types of Hearings Continued

For the cases studied, a total of 1,221 continuances were granted. Before we can determine whether they were avoidable, we need to know what types of hearings were continued and the reasons for the continuances. Following is a list of hearings continued and the percentage of the total continuances constituted by each hearing type: status conference (26%); disposition (24%); permanency (12%); merits (9%); temporary care (8%); post-disposition (8%); termination of parental rights (8%); motion (5%); conditional custody review (<1%); and permanent guardianship (<1%).

Average lengths of removal were determined for all cases where a specific type of hearing was continued. Most cases, of course, had multiple types of hearings continued. It is difficult to determine, therefore, which continuance had a greater impact. However, the data does show that, in cases where permanency hearings and TPR hearings are continued, the average length of removal is greater than the overall average regardless of how many continuances were granted.

There were some cases where all continuances were for the same type of hearing. Logically, this was the situation for all cases with only one continuance, but there were cases with two, three and four continuances all for the same type of hearing. Interestingly, among cases where only one type of hearing was continued, where two or more continuances of temporary care, merits, disposition, post-disposition review hearings and status conferences were granted, the average length of removal was less than the overall average for the same number of continuances. Only motion hearings and termination of parental rights saw greater removal lengths where only that one type of hearing was continued.

After considerable analysis, no discernable pattern exists to suggest that the continuances of certain types of hearings may lead to increased removal lengths.

Reasons for Continuances

We now turn to the reasons for continuances. Some continuances are beneficial

to the child. An example of this is a continuance of a disposition, post-disposition, permanency or conditional custody review hearing so that a parent can complete a substance abuse assessment so DCF can include treatment recommendations in a case plan. Ideally, the assessment would be done as early in the case as possible, but limited number of licensed substance abuse assessors and scarce funding often delay assessments. Going forward with one of these hearings without that information is likely to be counterproductive as substance abuse is often the central issue in CHINS cases.

Four reasons for continuance were identified as being presumably beneficial: completion of treatment by a parent or child; the completion of an assessment or test; parties negotiating a settlement; and the need to provide updated information because of recent, unanticipated changes in circumstances. The hypothesis had been that continuing hearings for these reasons would, in fact, shorten the time to permanency. The lengths of time that children were removed from their parents' custody in cases where hearings were continued for these four reasons were compared to the length of removal time in all cases with the same number of continuances.

There were ten cases in which at least one hearing was continued because a parent (nine cases) or child (one case) was in residential treatment. There were twenty-six cases in which at least one hearing was continued because a test or assessment needed to be completed. In twenty-eight cases, at least one hearing was continued because updated information was needed. Finally, there were one-hundred, forty-seven cases in which at least one hearing was continued to allow the parties to continue negotiating an agreement.

There were a few outliers because only one case fell into a given category. For example, there was only one case where a hearing was continued because a parent was in treatment and the case was continued a total of six times. That child was removed from the home for a total of 1,944 days. The average length of removal for all children whose cases were continued six times was 728 days. Disregarding those outliers, the trends in lengths of continuances for each of the four bases for continuances identified was virtually identical to the trends for the larger sample of cases for each category of cases distinguished by the number of continuances. Thus, it appears that the assumption that those four bases of continuances lead to faster reunifications is disproved by the data analysis. It is also worthy of note that for all instances where an evidentiary hearing was continued because the parties were negotiating an agreement, approximately 70 percent

still required the evidentiary hearing because the parties failed to reach an agreement on at least one issue. This may well be the case across all dockets, but that research is left for another day.

Conclusion

Children who are alleged to be without proper parental care often need to be removed from their parents' custody. Such removal is a necessary evil; the harm that we know to be created by the removal is, we believe, outweighed by the benefit of protecting the children from whatever abuse or neglect they were suffering at the hands of those parents. State and federal laws as well as common sense mandate that the removal be as short as possible and that children removed should achieve some form of permanency as quickly as possible.

There are many obstacles to permanency in CHINS cases. Those include addiction, incarceration and lack of treatment resources. However, delays in the court process also impede timely permanency. Crowded dockets and attorneys whose presence are required in multiple courts at the same time are significant contributors to that delay. There is little if anything that can reasonably be done about that. But continuances of scheduled hearings are another significant source of that delay and there is opportunity for improvement here.

We have learned from this study that, in Vermont, neither the reason for the continuance nor the type of hearing continued impacts the length of time that a child is removed from his or her parents' custody. At the same time, we need to be aware that each continuance correlates with, on average, about three months added to a child's removal. Some continuances are unavoidable while others are not. Practitioners including attorneys, DCF family services workers, guardians ad litem and court staff need to be mindful that continuances may delay permanency and to be mindful of the impact that delays in permanency have on children. Judges, however, bear the greatest responsibility for ensuring that only those continuances that are unavoidable are granted. A change in the juvenile court culture is needed as this study shows an appalling trend. That change must start with judges being willing to make difficult, unpopular decisions on continuance requests even if the decision is contrary to the wishes of all parties.

The Vermont Supreme Court has adopted a rule indicating that, in CHINS cases, merits hearings and disposition hearings "shall be continued only for good cause shown and found by the court." "Good cause" is not defined in the rule and the Court has not established criteria for the

determination elsewhere. Whether there is good cause is left to individual judges to decide. Beyond V.R.F.P. 2(b)(3), which does not establish an objective standard and, as to continuances, is limited to merits and disposition hearings, neither the Vermont Supreme Court nor the Vermont Legislature has adopted a policy regarding continuances. One might argue that setting the bar as high as a "no-continuance" policy is appropriate and perhaps even necessary. Many more would argue that the CHINS docket is the least appropriate venue for the tying of judges' hands. Even if such a policy were enacted as an advisory directive, it creates an unrealistic expectation likely to lead to mistrust or at least skepticism.

The Vermont Supreme Court could, however, develop guidelines for continuances in juvenile cases if not all cases. The guidelines could address specific stages in CHINS proceedings with or without taking into consideration such factors as the age of the child and the length of time that child has been removed from the home. The struggle, of course, is that the decision to grant or deny a continuance is not made in a vacuum. Judges need to be mindful of other cases that will necessarily be impacted by scheduling decisions in the case at bar. As CHINS dockets increase, so too does the effect that a single continuance has on all pending cases. Guidelines will only be as effective as the crushing impact of the docket's volume allows.

The dilemma around continuances is not unique to the CHINS docket and is not unique to Vermont. But at stake here is the welfare of the state's most vulnerable population and its future. We must continually strive for shorter removal lengths while ensuring the safety and wellbeing of every child whose circumstances and fate are at the mercy of a court system that often never sees their face.

*Howard Kalfus is the Presiding Hearing Officer for the Vermont Judicial Bureau and has been specially assigned to preside over numerous juvenile dockets throughout the state since his appointment in 2011. He was formerly a public defender, where he handled both criminal and juvenile case-loads, and an assistant attorney general, where he represented DCF. The research that informed this article was undertaken for his master's thesis: *When Can I Go Home? The Impact of Continuances on Rates and Timing of Reunification in Vermont's Child Abuse and Neglect Dockets*, ProQuest Publishing, December of 2019. A version of that work is scheduled to be published in the Volume 45 of the Vermont Law Review.*

¹ 33 V.S.A. § 5102(3) ("Child in need of care or

supervision (CHINS)" defined).

² American Academy of Pediatrics' Committee on Early Childhood, Adoption and Dependent Care (2000), *Developmental Issues for Young Children in Foster Care*, Pediatrics, Volume 106, Number 5.

³ Santosky v. Kramer, 455 U.S. 745 (1982); Lasser v. Department of Social Services of Durham County, N. C., 452 U.S. 18 (1981).

⁴ *Developmental Issues for Young Children in Foster Care*, supra.

⁵ Pub. L. 105-89.

⁶ 42 U.S.C. 675(5)(E).

⁷ See generally 33 V.S.A., Part 4.

⁸ V.R.C.P. 7(b)(1) made applicable through V.R.F.P. 2(a)(1).

⁹ 33 V.S.A. § 5305(a).

¹⁰ 33 V.S.A. § 5308(b).

¹¹ 33 V.S.A. § 5102(16)(A).

¹² "One Family, One Judge, No Continuances," Alicia Summers and Corey Shdaimah (2013)

¹³ It is noteworthy that of the 56 cases where six or more continuances were granted, 19 were for children ages six through ten. These figures suggest that there may be other factors to consider for this age group.

¹⁴ It is also important to note that there were two cases involving children in the six through ten age group who were removed from the home for seven years or more at the time of the study. This undoubtedly impacted the averages for that age group.

¹⁵ Statistics from the Vermont Court Administrator's Office for Fiscal Years 2011 through 2015.

¹⁶ Studies have shown that "children with a history of maltreatment, such as neglect, who additionally endure the trauma of being separated from parents and experience feelings, for example of fear and confusion, are vulnerable and susceptible to posttraumatic stress disorders (PTSD)." "Children in Foster Care: A Vulnerable Population at Risk," Delilah Bruskas (2008) (citing Dubner & Motta, 1999; Racusin, Maerlender, Sengupta, Isquith & Straus, 2005).

¹⁷ *Developmental Issues for Young Children in Foster Care*, supra.

¹⁸ It is asserted that settlement is beneficial because a contested, evidentiary hearing will almost always involve the testimony of the DCF worker or other service provider who must work with the family for as long as the case remains open. Necessarily-negative statements about the family tend to corrode the working relationship between the DCF worker and/or other service provider and the parents and even, in some cases, the child.

¹⁹ Vermont Rules for Family Proceedings 2(b)(3).



Pro Bono Award Winner: Thomas French

The ABA challenges retiring lawyers to consider a 'second season of service' doing legal work for the disadvantaged. Brattleboro lawyer Thomas French has done one better—now completing his third season of service, French helps veterans win disability benefits. He was honored with the VBA's 2020 Pro Bono Service Award for his outstanding efforts on their behalf.

Attorney Tom French's first season of service was when he served as a Judge Advocate in the US Air Force. After graduating from the University of Michigan with a BA in economics, he attended the University of Wisconsin Law School, graduating in 1961 and winning admission to Wisconsin Bar. Later in 1961, after graduating from the USAF Chaplain's School at Lackland AFB Texas, Lieutenant French was first assigned to Hunter Air Force Base in Savannah, Georgia, then promoted to Captain and transferred as a Judge Advocate to Wiesbaden AFB in Wiesbaden, Germany. There he met and married his wife Cecilie, and there their two children were born.

Captain French's work in the military resembled a small general practice. He worked with four other attorneys, represented officers and enlisted men, and appeared in court martials and administrative board hearings. He also assisted both civil and military personnel assigned to the US forces in Europe, was a claims officer, defended clients against charges ranging from petty theft to AWOL to murder, and acted as counsel to the USAF hospital in Wiesbaden.

After completing his military service in late 1965, French contemplated his second season of legal service. He and his wife were intrigued with New England, and Tom looked at law firms in Connecticut and the Boston suburbs. Then he responded to an invitation to interview with Osmer Fitts in Brattleboro—"he was persuasive," French recalls. He accepted the offer to join Fitts and Olson and was admitted to the Vermont bar in 1966. French quietly boasts that he never took a bar exam. He was admitted in Wisconsin on motion because he had successfully completed a practice course prior to graduating from law school there, then was a JAG with its national accrediting, then was admitted in Vermont, Massachusetts and before the US District Court for Vermont—all on motion.

Attorney French wanted more challenge than working as a junior lawyer at Fitts Olson, so it wasn't long before he set up his own solo practice in Brattleboro. "I was a true generalist" he recalls. He represented individuals and corporations; he did bill col-

lections and divorces, real estate, immigration, bankruptcy and intellectual property. Part of his practice dealt with negligence law—personal injury cases, some worker's compensation law and even a bit of Social Security work. Throughout it all, French gave his time pro bono to help elderly and impoverished clients, and willingly served when courts needed his help.

With his German wife's connections, French also started getting German clients. That expanded to several European companies, and his international work grew. He represented a dairy importer of milk from Egypt and worked on an estate for client who had an interest in a Brazilian estate. He had connections with 85 out of the 86 regions in Russia. "I had clients from every continent except Antarctica—and I'm waiting for the penguins there to bring a class action suit," French quipped.

And then there was his advocacy which resulted in the export of the first electronic scoreboard to China. Zhou Enlai, first premiere of the People's Republic of China, had seen an electronic scoreboard while in Europe for talks that would eventually settle the Vietnam War and open up China. Zhou wanted this unique electronic scoreboard for the racetrack near Beijing. French's wife, Cecilie, knew the spouse of the inventor of the scoreboard. Enter Tom French, who became the lawyer to break down the barriers to allow the import of the electronic devices into China.

It was no mean feat. In the mid-1970's, US law severely restricted the export of technologies to communist countries. Attorney French battled more than two years with US Defense Department bureaucrats in its export licensing department to get the permission needed to send his client-inventor's devices to China. Then they got a very high-level break. Future US President George H.W. Bush, then US Ambassador to China, sat next to Zhou Enlai at a banquet in Beijing, where Bush got an earful about the scoreboard. Ambassador Bush leaned on Henry Kissinger, President Ford's National Security Advisor, who spoke to then Secretary of Defense Donald Rumsfeld. Shortly thereafter Attorney French got the word—two electronic scoreboards were headed to China.

With that case successfully concluded, attorney Tom French's international reputation was secured.

In 1989, Tom was invited to Russia as part of a 750-person legal and economic team charged with helping the soon-to-be-former Soviet republic reconstruct legal and economic systems. The distinguished gathering

included judges and lawyers, law professors and politicians, and economists including former White House Counsel Abner Mikva, civil rights champion Alan Dershowitz, and constitutional scholar Laurence Tribe. Attorney Tom French was tapped to MC a symposium on constitutional law with four Russian legal experts on one panel, and Tribe, Dershowitz, Chief Judge Joseph Campbell of the 1st Circuit Court of Appeals, and Mikva on the other. "Not that I was an expert in Constitutional law" admitted French. "I felt like a tractor in a Cadillac factory."

Thomas French was instrumental in forming the San Francisco World Trade Associates, a small and nimble organization that helped foster commerce between the US and international entities. He chaired the SFWTA until it was disbanded in 2002 a few years after Vladimir Putin came to power in Russia. "All of the contacts we had formed in Russia were suddenly out of power," French explained of the SFWTA's demise. But French's work with SFWTA brought more international service and recognition—and answered a question that had long puzzled him: why had he been chosen as part of the US delegation to Russia in 1989?

The answer came at a conference convened by the U.S. State Department to promote a software program developed by RHTOP, a Russian chemical weapons manufacturer specializing in poison gas. RHTOP opted to participate in a program which subsidized by the US Government to develop alternative products to chemical weapons as a part of the Nunn Lugar act. In exchange for the subsidies, RHTOP agreed to leave the chemical weapons program entirely and to develop alternative products.

One program it developed was a software program that could identify any unknown chemical causing any injury to a person and the identity of the curative antidote. RHTOP also had worked closely with the Lawrence Livermore Laboratories. The State Department conference and the Lawrence Livermore Laboratories requested RHTOP for a demonstration of this software. A delegation was convened at the State Department in Washington, D.C. Representatives from the Defense Department, the Energy Department, and the Environmental Protection Agency represented the public sector. The private sector representatives included executives from RHTOP, the Lawrence Livermore Laboratories and SFWTA.

Tom French couldn't be present. He sent SFWTA Vice Chairman Peter Caldwell to this conference as the representative representing SFWTA's American officers. Mr. Caldwell

had been recently a legislative assistant to U.S. Senator James Jeffords (VT). Vladimir Tchernov, an officer of the Russian chemical weapons company was also a SFWTA vice president.

When Anne Harrington, a high-level employee at the State Department and the chairwoman of the conference recognized SFWTA's involvement in the conference, after seeing the two SFWTA business cards, she asked Mr. Caldwell and Mr. Tchernov if SFWTA was Tom French's brainchild. She asked Caldwell and Tchernov: "Does Mr. French know how he became involved in Russia?" They both said that he had always wondered why he had been selected. She then related the story of Tom's work on the export of the electronic scoreboards to China and confirmed that Tom's invitation to Russia was a reward for his role in the success to open up China. Twenty-three years had elapsed from the time Tom started negotiating for export permits allowing the scoreboards to enter China to the date of this conversation.

After 50 years of a rich and varied law practice, Tom French closed his solo law practice in 2016. But he wasn't through with the practice of law—he was entering his third season of service.

A USAF Veteran himself, French became intrigued with the notion of helping fellow veterans obtain disability benefits to which they were legally entitled. He attended a seminar taught by Poverty Law Fellow Katelyn Atwood, then dove into the 2000-page Veterans' Benefits Manual while pursuing additional training through the National Organization of Veterans Advocates—NOVA. Although the field of veterans' disability law was new to him, he did have two solid credentials for the work. He was conversant with medical causation due to his prior legal work in negligence, personal injury and workers' compensation law. And he has an infinite amount of patience, necessary, he says, "because the VA does not follow its own rules and sometimes fails to agree with generally accepted medical principles," he notes, and only after an appeal has been filed.

In 2016, Attorney Tom French set up a new law office—this time in Post #5 American Legion Hall on Linden Street in Brattleboro. Every Thursday for nearly the next four years, French held office hours at a table in a small office off the back of the Legion's dining hall, and saw every veteran who wanted to talk with him. John Hagan, the Legion's Commander when French began his work, commented that French's "knowledge and understanding of veteran benefits, and how the system works, has been almost as amazing as his dedication."

Attorney French concedes that it is "virtually impossible" for private practitioners to make money on veterans' benefits cases. It is illegal to charge a veteran for the ini-

tial part of the work, he notes, and the only charge allowed is 20% of a lump sum recovery from the veteran's back only once the veteran starts receiving benefits. But as a pro bono emeritus attorney, Tom is licensed to work without fee for his clients.

It didn't take long for word to get out about this pro bono lawyer who helped veterans. Tom has had clients in Vermont, New Hampshire and Massachusetts, as well as in Washington State, Iowa, New Jersey, Virginia and even Cambodia. Attorney French's work is all done with paper, from the comfort of his home. "I could opt for a hearing," French observes, "but they take a long time to occur and it slows things down to a snail's pace."

Veterans who have turned to Tom for legal help have served through 75+ years of US military history, from WW II through the Persian Gulf Wars.

--The oldest client, a much-decorated WWII Army Air Corps veteran with PTSD, was helped by Tom to win a 100% disability rating and monthly benefit of \$3,057 which was finally awarded in 2018. This man served many bombing missions over Germany, and on one was required to climb through bomb bay doors to pry loose two bombs which had failed to release. He was the only war survivor out of the 100 people he had trained with.

--A Persian Gulf War veteran who served two tours of duty in Iraq was suffering from the effects of exploding roadside IEDs and from parachute jumps and other horrific experiences. His injuries included traumatic brain injury, amnesia, PTSD, respiratory problems, spinal compression fracture, migraines, knee and leg damage, and more—so much so that if all disability ratings were added together (as opposed to using VA math) Tom estimates that they would amount to a total of 450% disability. Attorney French helped this veteran get the \$3,106 per month 100% disability to which he was entitled.

--A US Navy enlisted man was exposed continually to asbestos while repairing asbestos-clad pipes in engine rooms of US Navy ships. He did this work for 13 years without masks or protective gear, and was diagnosed with asbestosis, pulmonary fibrosis and chronic bronchiectasis, from which he eventually died. Attorney French was able to help the man receive a 60% disability rating in early 2017, which was increased a year later to 100% disability rating. The sailor's widow now receives a benefit of \$1,300 per month due to her spouse's military service.

--A marine who fought in Vietnam received a 30% disability rating due to service-related PTSD. He also was diagnosed with hepatic cellular carcinoma which he believed was due to exposure to Agent Orange. When his disability from that cause was denied, Tom French dug deeper to learn that his client's particular cancer was caused in-

stead by exposure to the drinking water at Camp Lejeune, NC, where the marine had once been stationed. Tom was able to eventually win 100% disability rating for his client.

--Another Camp Lejeune marine who also fought in Vietnam suffers from another form of cancer which is recognized to be causally related to the chemicals in the drinking water also received a 100% disability rating, thanks to Tom's efforts.

Over the 4 years he has been helping veterans, Attorney French has been tremendously successful. Statistics compiled by Attorney Thomas Costello, current Commander of American Legion Post #5, tell the story. "He has brought 15 actions and succeeded in 14 of them, resulting in more than \$1 Million awarded to those who served our country and didn't receive benefits to which they were entitled." Costello, who with fellow lawyer James Valente, nominated French for the VBA's 2020 Pro Bono Service Award, called French's work for his clients "life-changing." Costello wrote "most of the recipients are of limited means, on fixed incomes, and suffer from lasting mental and physical consequences of war."

The award of increased benefits to these veterans can indeed change their lives for the better. Tom has won 100% disability rating decisions in nine cases, which resulted in average monthly awards of \$3,400 for the veterans, and increased benefits for their survivors.

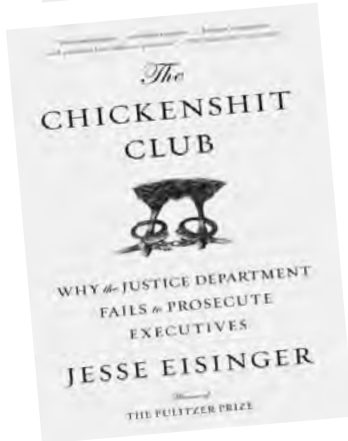
Attorney Tom French is about to close his third season of service. Some health challenges have prompted him to wrap up his work and turn his remaining files over to Attorney John Pritchard who practices with Costello, Valente and Gentry in Brattleboro. Tom's assistant, a 22-year US Army veteran and trained psychologist, (and also a veteran with a 100% rating) will work with Pritchard to continue his support and claims work.

And the work will continue because the need remains. The US Census Bureau estimates that there were 38,625 veterans living in Vermont as of 2018. According to the US Bureau of Labor statistics, 25% of all veterans have a disability, and that number jumps to 41% among gulf war era veterans. Tom French hopes that lawyers in or nearing retirement, "who still have gas in their tanks", will take on this pro bono challenge of helping veterans capture the disability benefits to which they are entitled.

Attorney Tom French has done his part. As noted by Thomas Costello: "We in Windham County are grateful for French, who exemplifies all of the good things about our profession and elevates us all."



BOOK REVIEWS



"America Compromised"

by Lawrence Lessig
(2018)

and

"The Chickenshit Club - Why the Justice Department Fails to Prosecute Executives"

by Jesse Eisinger
(2017)

Reviewed by Rick Hubbard, Esq.

Do our rules of professional conduct that require us to act in our clients' best interest combine with wage inequality to actually prevent us from achieving justice? Both of these books raise troubling questions about whether the way we attorneys practice law fails to regularly deliver the justice our legal system is supposed to deliver.

As stated in the book jacket description of *America Compromised*, "through case studies of Congress, finance, the academy, the media, and the law, Lessig shows how institutions are drawn away from higher purposes and toward money, power, quick rewards - the first steps to corruption." This review is limited to only his thinking about our legal profession.

Lawrence "Larry" Lessig is the Roy L. Furman Professor of Law and Leadership at Harvard Law School with a formidable

CV, including clerking for Justice Scalia. He is well prepared to raise ethical questions about how the practice of Law in accordance with our attorney Rules of Professional Conduct interferes at times with achieving justice.

His book begins with a story. While Lessig, an expert on internet law, was at Stanford Law School, he accepted a side-gig to work "of counsel" at a major San Francisco law firm on issues related to his expertise. Within a week there was a problem.

In a meeting with partners, the managing partner explained that a client had told the firm either the client or Lessig had to go. It seems the client was upset by Lessig's writing in *Wired* magazine and other popular and broadly read publications about how aspects of internet law worked against certain public interests. The managing partner proposed a solution, that Lessig restrict his writing to legal publications like the *Stanford Law Review*. A second partner explained that the firm had an ethical issue since lawyers for the firm had an ethical duty to advance the business interests of their clients, and a third partner added that Lessig had an obligation not to act or write in a way that threatens those interests.

In response to Lessig's assertion that what he wrote in *Wired* and other popular magazines was true, the partner stated that truth was not the issue.

Lessig briefly reflected on the nice retainer check he'd just deposited, and how easy this extra money was going to be, before he replied: "I do think there's an ethical issue here. It is my ethical obligation to myself. I'm sorry this didn't work out." With that, the meeting was over and Lessig's job "of counsel" was ended.¹

Lessig comments: "There's no clear rule that guides the conflict I was alleged to have created. A lawyer has a fiduciary obligation to her clients and from using information acquired in the course of representation to the client's disadvantage.² That duty is not unlimited. It does not trump a lawyer's obligations to her profession. But the rule does create ample opportunity for a firm to bend the independence of the lawyers toward better service toward the clients."³

"But when an ethical rule tells the lawyer that her views should be at least consistent with the "business interests" of her client, then she's not free to do what's right. If her view conflicts with those business interests, then the rule of ethics comprises her obligation as a lawyer to the profession. She can choose to do what's right, or choose to obey the rule. She can't do both."⁴

Here Lessig turns to Jesse Eisinger's book *"The Chickenshit Club - Why the Justice Department Fails to Prosecute Executives"* to incorporate Jesse's argument of corruption of outcomes within the Justice Department. Eisinger is a Pulitzer Prize winning senior reporter at ProPublica. His work has appeared in the *New York Times*, the *Atlantic*, and the *Washington Post*. In 2009, Eisinger began work on a series of stories, "The Wall Street Money Machine," that revealed how Wall Street's morally questionable practices had led to the worst financial crisis since the Great Depression. It was co-authored with Jake Bernstein and was awarded the Pulitzer Prize for National Reporting in 2011.

Eisinger's book opens with a story about a new U.S. Attorney for the Southern District of Manhattan giving his first speech to staff of the criminal division. These lawyers were the nation's elite.

The speaker opened with: "We have a saying around here: We do the right things for the right reasons in the right ways." He then asked the seated prosecutors a question: "Who here has never had an acquittal or a hung jury? Please raise your hand."

Hands shot up from those in the office who thought themselves to be the best trial lawyers in the country. "Me and my friends have a name for you guys," the speaker said. "You are members of what we like to call the Chickenshit Club."⁵

That speaker was James Comey in 2002. Eisinger then goes on to explain Comey's subsequent comments to his trial attorneys. "I don't want any of you to make an argument you don't believe in." Prosecutors - unlike other lawyers - are not simply advocates for one side. They are required to bring Justice. They should seek to right the biggest injustices, not go after the easiest targets. Victory in the courtroom should be a secondary concern, meaning that government lawyers should neither seek to win at all costs nor duck a valid case out of fear of losing.⁶

Lessig then incorporates the argument Jesse makes in his book that white collar prosecution in America has changed in more recent years. Both authors then dig into why this has changed and how these changes work against delivering justice.

In earlier times, our government prosecuted white collar criminals while prosecuting white collar crime. It prosecuted more than 1000 people in the 1980s after the savings and loan crisis, and subsequently aggressively pursued the leaders of the junk bond crisis in the late 1980s, and after the tech bubble burst in the late 1990s and early 2000s it pursued fraud again, in-

cluding fraud within major telecommunication and energy firms like World Com, Qwest Communications, Adelphia and Enron, with many ending up in prison.⁷

These prosecutions were not political, they were important for both Republicans and Democrats.⁸ But as Eisinger tells it, this all changed. "After the 2008 financial crisis, the government failed. In response to the worst calamity to hit capital markets and the global economy since the Great Depression, the government did not charge any top bankers. The public was furious."⁹

As Eisinger relates it – "While a Republican president had presided over the crisis and a Democratic one had saved the financial system, Hillary Clinton, Obama, and the Democrats could not claim to be the protectors of the working class and the scourges of investment bankers. That was due, in large measure, to the lack of corporate prosecutions."¹⁰ Lessig then poses the question, "Why?"¹¹

Lessig writes that while many experts have written in answer to this question, and while no doubt the causes are many, he focuses on the incentives affecting the many great trial attorneys in our Justice Department because, in that one dynamic, we can see the pattern that is the subject of Lessig's entire book: institutional corruption.

Perhaps the book jacket cover states it best:

And it's our fault. What Lessig shows, brilliantly and persuasively is that we can't blame the problems of contemporary American life on bad people, as the pundits all too often tend to do." Rather, he explains, 'We have allowed core institutions of America's economic, social, and political life to become corrupted. Not by evil souls, but by good souls. Not through crime, but through compromise.' Every one of us, every day, making the modest compromises that seem necessary to keep moving along, is contributing to the rot at the core of American civic life. Through case studies of Congress, finance, the academy, the media, and the law, Lessig shows how institutions are drawn away from higher purposes and toward money, power, quick rewards – the first steps to corruption.¹²

With respect to our legal profession, Lessig's critical analysis is so central, and so important to the way we practice law, to our reputation as a profession, and to its relation to the core of American civic life, that I hope each of us will carefully consider his argument and think about its implications, as well as what we should be doing in response, if anything.

Lessig begins with an analysis of prosecutors, who are simply people with families

and expectations. At a certain point, when in law school, all aspiring attorneys are equal. But after graduating, all scramble in different directions based on our expectations as set by our families, friends and our own dreams. Some go to big firms, others to small firms, and some become prosecutors, and more.

Lessig goes on to say that:

Thirty years ago, that choice was less significant than it is today, at least financially. Thirty years ago, a prosecutor in New York could "afford" to be a prosecutor for his (and it was mainly his) or her whole life. 'Afford' not in the sense that they would starve on a prosecutor's salary. Obviously, even today, the top prosecutors with the most experience get paid \$160,000. But "afford" relative to others – their contemporaries, their friends, and their colleagues in private practice. And 'afford' relative to what relative sacrifice they could expect their families to bear. No doubt there has always been a gap. But the gap was tolerable. No one was going to get rich, but no one need feel poor.

In the past thirty years, that gap has grown. While the top pay-scale for federal prosecutors increased by as much as 60%, the average salary at the top firms increased by almost 160%. As the gap has grown, the ability to be a prosecutor for life has changed. Again, not in an absolute sense – a New York US Attorney gets paid three times the median income in America. But changed in a relative sense. Earlier, the choice was not difficult. If you liked the work, you could stay. Today, it has become increasingly difficult. The sacrifice feels real, not just to the lawyers, but to their families. And more and more are beginning to think about how they can make the law work better for them, or at least, better for their families.¹³

Lessig continues:

To revolve (as in the revolving door) successfully, the prosecutors need to be hireable. Which means they need to do their job in a way that lawyers in the white-collar defense firms respect. Which means they need to prosecute in ways that lawyers in white-collar defense firms agree with. Which means they need to prosecute in a way that doesn't get the clients of the white-collar defense firms too upset. 'The revolving door was not just a way for government employees to cash in,' Eisinger says. 'Both sides were changing the other – ultimately to the benefit of corporations.'¹⁴ ...A symbiotic relationship developed between Big

Law and the Department of Justice.' 'The business had become much more commercial and more mercenary.'¹⁵

...Those needs are consistent with the changing practice of criminal prosecution in America today. As Eisinger says, more and more, prosecution is not against individuals. It is against corporations. And more and more, those corporations settle the prosecution without admitting guilt, with something called a 'deferred prosecution agreement,' and by paying a tiny fine. Criminal prosecution becomes, as Eisinger has described it, a simple cost of doing business.¹⁶ And corporations become repeat offenders, taking the profits from the crime, and using a small part of those profits to buy the ability to commit those crimes again.¹⁷

Although there are exceptions, Lessig notes that "the rule is not set by the exception." 'More and more, the expectation is that great lawyers will 'subsidize' their practice by practicing privately for at least some time. And who could think that subsidies have no effect on the subsidized?'"¹⁸

Lessig names dependency as "the lens through which this example fits the model of institutional corruption. The purpose of prosecution is to do justice. That means never prosecuting anyone believed to be innocent; it means never declining to prosecute just because the case might be difficult. It also means not bending the prosecution to make the lawyers defending the alleged criminals happy. Yet in a world where prosecutors depend upon jobs from the lawyers defending the alleged criminals, the temptation to that bending is endemic. It is unavoidable. And the history of the change of practice by prosecutors over the past decades is consistent with the consequence one might expect; from such an influence."¹⁹

However, Lessig is careful to say that corruption is not the only cause, and he cites Eisinger as doing "an admirable job of highlighting the bizarre activism of the judges carving back on prosecutions and discovering all sorts of new rights that happen to apply to white-collar criminals but not so clearly to the rest."²⁰

Lessig goes on to make the point that "prosecuting individuals is costly – especially when their corporations pay the legal fees. It takes time. One mistake on appeal can start the whole process over again. It takes a real commitment by the Justice Department to see these prosecutions through. And, more importantly, to convince the potential white-collar criminals that breaking the law is not costless."²¹

But, as Lessig says:

If there is a reason for laws against fraud, or insider trading, or manipu-

lation of the market, then we ought to have a Justice Department that enforces those laws enough to convince the criminals not to violate them. For these are not street-level crimes. They impose real costs on society. No doubt, crime doesn't explain 100% of the cause of the financial crisis. But it does explain a significant slice of it. Had the law been enforced fully and reliably, there is a significant chance that these crimes would not have been committed. And that means that the millions who actually suffered from that crisis – not so much the individuals in companies that received massive government bailouts, but the homeowner who lost her home, or job, or future – have a fair complaint against this culture of corruption.

...Indeed, when you think about where criminal law is severe and where it is lax, it's pretty clear the law has it exactly backwards. The law is very harsh against the individuals who are least likely to make calculations based on the expected value of their behavior. Not because they're stupid, but because when you're desperate, you do what you can. But corporations are the perfect machines for tracking the expected cost of their behavior. Make the cost of violating the law high enough, and corporations won't violate the law. That's especially true if the CEO realizes that violating the law means he goes to jail. Here the law treats with a rational actor. Yet the law is lax here with the rational, and extreme with the non-rational.²²

Lessig doesn't believe this balance was selected self-consciously. "It is the product of pressures that manifest incentives not properly aligned – or, more simply, institutional corruption, given the clear purpose of prosecution in a rule of law system."²³

Within his book *America Compromised*, Lessig has at this point described two causes that contributed to the absence of prosecutions after the financial crisis of 2008. In Chapter 2-Of Finance, which is not covered in this review, Lessig "mapped a political cause, grounded in the reality that the Democratic Party simply could not afford to alienate its funders on Wall Street any more."²⁴ However, in Chapter 5-The Law, which is being reviewed, Lessig described a more internal cause. For lawyers protecting their future, aggressive prosecution of Wall Street made no sense. Lessig maintains he has no way of reckoning which of these causes was more significant.

However, to the extent the corruption of justice was driven by dependence on Wall Street's money in political campaigns, Lessig is convinced that problem could be solved relatively cheaply, and that "we could fund political campaigns publicly for a fraction of the cost that we spend on bizarrely expensive weapons of the military each year."²⁵ But to the extent that the corruption of justice comes from the culture of prosecution, Lessig finds it extremely hard to imagine the cost of solving that being borne by anyone. "We're not going to see government lawyers being paid more than the president."²⁶ I could well imagine changing the way campaigns are funded; I can't begin to imagine changing the way government lawyers are paid.²⁷

Lessig ends his Chapter 5 with the observation that "what drives the distortion in the culture of prosecution is much more than lawyers." Indeed. It may well have much to do with the dramatic rise in inequality as well as the increasing dysfunction of our federal political system over the past forty years.

There is much in these two books for attorneys as well as the entire American public to consider. When a real estate mogul, as a business strategy, stifles many building subcontractors and successfully works through attorneys to use the legal process to either avoid payment altogether, or substantially underpay, is justice being served? Most of us know of instances where attorneys, to serve the interests of their clients, use the legal process in ways that do not line up well with justice.

The issues raised in these two books cry out for consideration, discussion and debate. I maintain: who better in Vermont to lead this process than the leaders of our judiciary system, the Vermont Bar Association, and Vermont Law School? But will this happen? Or will the issues raised by Lessig and Eisinger simply pass us by as we continue on our way as before?

Rick Hubbard Esq. is a native Vermonter, retired attorney and former economic consultant now living in South Burlington.

¹ Lessig, *America Compromised*, 161. And See *ABA Model Code of Professional Responsibility*, EC 4-1, 4-5, American Bar Association, adopted August 12, 1969, last amended August 1980; "Restatement Third of the Law Governing Lawyers," Sec. 16, 49 (3rd 2000)

² Lessig, *America Compromised*, 161.

³ Lessig, *America Compromised*, 162.

⁴ Lessig, *America Compromised*, 164, citing Jesse Eisinger, *The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives* (New York: Simon & Schuster, 2017), xiv.

⁵ Lessig, *America Compromised*, 164, citing Eisinger, *The Chickenshit Club*, xv-xvi.

⁶ Lessig, *America Compromised*, 165, citing Eisinger, *The Chickenshit Club*, xv-xvi.

⁷ Lessig, *America Compromised*, 165.

⁸ Eisinger, *The Chickenshit Club*, xvi

⁹ Eisinger, *The Chickenshit Club*, xvi

¹⁰ Lessig, *America Compromised*, 165

¹¹ Lessig, *America Compromised*, jacket cover.

¹² Lessig, *America Compromised*, 166, citing Eisinger, *The Chickenshit Club*, 201.

¹³ *Ibid.*

¹⁴ Lessig, *America Compromised*, 167, citing Eisinger, *The Chickenshit Club*, 192.

¹⁵ Lessig, *America Compromised*, 167, citing Eisinger, *The Chickenshit Club*, 44-45.

¹⁶ Lessig, *America Compromised*, 167.

¹⁷ *Id* at 169.

¹⁸ *Ibid.*

¹⁹ *Id* at 169-170.

²⁰ *Id* at 170.

²¹ *Id* at 170-171.

²² *Id* at 171.

²³ *Ibid.*

²⁴ *Id* at 172.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

Many of you will remember **Meri Nielsen**, a long-time employee of the Vermont Bar Association from 1993-2004. Meri was the "face" of the VBA as Administrative Assistant, the person who warmly greeted you on the phone or made your visit to the VBA office welcoming. Meri's exuberant personality and dedication to her job and those she served was simply amazing. She was a true friend and co-worker who deeply cared and loved all around her. Meri died unexpectedly at her home on November 4, 2020.

We will all miss her friendship and warm smile.

Rest in Peace beautiful soul.



Upcoming VBA Programs

Watch our website for our virtual offerings and save these dates!

Bankruptcy Holiday CLE webinars

Now online with 7 credits available: December 3, December 10 and December 17, from year in review cases to ethics to technology to small businesses issues and more!

Mindful Moments for Wellness

Every other week: upcoming dates December 3 and 17

YLD Mid-Winter Thaw Week

January 11 week, Save the Dates!

VBA Tech Show Week

MOVED to January 25th week, Save the Dates!

REAL ESTATE LAW DAY

MOVED to February 10-12 for a 3-day smattering of webinars

VBA Mid-Year Meeting

March 25 (Equinox Resort in Manchester or virtually...TBD)

And don't forget to check our website for the LIVE webinar and webcast options as well as the latest titles in our digital library!

Do you have an idea for a CLE? Let us know or connect with your Section or Division Chair. Join any of our Sections or Divisions through VBA Connect on our website and customize your sharing experience!

2020/2021 VBA Section and Division Chairs

Appellate	Bridget Asay & Ben Battles	Intellectual Property	Andrew Manitsky
Bankruptcy	Nancy Geise & Don Hayes	International Law & Practice	Mark Oettinger
Business Association	Tom Moody	Juvenile	Linda Reis & Sarah Star
Collaborative	Nanci Smith	Labor & Employment	Steve Ellis
Consumer	Jean Murray	Lawyer Well-Being	Samara Anderson & Micaela Tucker
Criminal	Katelyn Atwood	Municipal	Brian Monaghan
Disability	Marilyn Mahusky	Paralegals	Carie Tarte
Dispute Resolution	Richard Hecht & Neil Groberg	Practice & Procedure	Greg Weimer
Diversity	Alycia Sanders	Probate & Trust	Mark Langan & Bob Pratt
Elder Law	Glenn Jarrett	Property Law/IPR-Realtors	Jim Knapp & Benj Deppman
Environmental	Gerry Tarrant	Solo & Small Firms	Mike Caccavo
Family	Penny Benelli	Tax Law & Accountants	Will Baker
Federal Practice	Tim Doherty	Veteran's	Katelyn Atwood
Govt & Non-Profit Division	Jim Porter	Women's Division	Samantha Lednický
Health Law/IPR-Doctors	Drew Kervick & Elizabeth Wohl	Worker's Comp	Keith Kasper
Immigration	Sidney Collier	Young Lawyers Division	Amy Davis
Insurance	Paul Perkins		

IN MEMORIAM

Anthony Edward Riva Otis

Anthony Edward Riva Otis of Montpelier died peacefully from dementia on July 13, 2020, at the age of 71. Anthony was born Dec. 24, 1948, in New York City, but grew up in Vermont graduating from Montpelier High School in 1966, the University of Vermont in 1970 and Willamette University College of Law in 1976. He returned to Montpelier as a clerk and administrator of the Vermont Supreme Court. In 1982, Anthony opened his first law office and practiced law until 2016. He represented local and national businesses and organizations with legislative matters and public policy. He was often found at the State House in Montpelier with his office a few doors down. He had a very diverse legal career culminating with Concurrent Resolution #401 from Vermont House of Representatives honoring him for "outstanding legal career and his community leadership." Anthony was accomplished as a 1st Dan Taekwondo Black belt and loved music, dancing, nature photography and doing artwork with colored pencils. Antho-

ny was passionate about buying local and supporting the arts. He was an active and dedicated member of the Montpelier Heritage Group, Montpelier Historical Society, Montpelier Historic Preservation Commission and Trash Tramps. Anthony is survived by his wife, Trudy McBride Otis of Montpelier; two children and grandchildren.

William John McNally, III

William John McNally, III, 76, passed away on Tuesday, August 25, 2020. John was born on July 24, 1944 and grew up in Hawaii, Japan, Arizona, and Virginia, as a child of an army officer. After graduating from Duke University, he served for four years as a Lieutenant in the US Navy. After a year at sea, he deployed in 1968 to Vietnam, where he served in combat on a river boat and advised the South Vietnamese Navy. During this time, he was a co-founder of the Concerned Officers Movement, a group of military officers who spoke out against US involvement in the war. John then attended law school at the University

of Virginia, after which he worked as a public defender and lawyer in private practice in Alexandria, VA, Washington, DC, and the Upper Valley. A highlight of his early career came when a Fourth Amendment case he tried was brought to the US Supreme Court. In addition to his law career, John was an artist. In Washington, DC, he published his poetry in magazines and in a personal book collection, Northern Lights. During this time, he co-founded the Washington Writers Publishing House and co-developed a program in Virginia schools to teach grade school students how to write poetry. He was most accomplished as a visual artist, spending decades working in oil painting, watercolor, and digital art, which included several gallery exhibitions in the Upper Valley. He was most content in his beloved home in Thetford, helping others to see beauty in the world through his art, his poetry, and his music. John is survived by his three children.



CLASSIFIEDS

FOR SALE

VERMONT REPORTS

I have a set of Vermont Reports that includes most of the rare original 9 volumes. The old books have a lot of character. Some bear the names of their original owners. The set starts with volume 2 published in 1830 and continues through Volume 185 published in 2010. This is a beautiful piece of Vermont legal history and I would love to pass it along.

Sheila Ware, 802-496-3223, sware@madriv.com.

SERVICES

BRIEFS & MEMORANDA.

Experienced attorney writes appellate briefs, trial memoranda. Legal writing/appellate advocacy professor; author of four books. VT attorney since 1992. \$60 per hour. Brian Porto, 674-9505.

QDROs (QUALIFIED DOMESTIC RELATIONS ORDERS)

I prepare QDROs and other retirement pay and pension benefit domestic relations orders for federal, state, municipal, military and private retirement plans as may be required by the terms of the settlement agreement or the court's final order.

I handle all initial contacts with the plan or third party administrator and provide all necessary processing directions when the order is ready for filing.

Vermont family law attorney since 1986. Contact me for additional information and preparation rates.

Tom Peairs, 1-802-498-4751.

tipeairs@sover.net

www.vtqdro.com

IT MEANS... KEEPING YOUR NETWORK WORKING

At TCI, our team is qualified to make the connection between you and your files. We are a dedicated Vermont IT Consulting and Support Services firm. Unlike most IT companies, TCI has a down-to-earth, cost-sensitive approach with a plan to fit your needs.

"The great thing about TCI's is the fact we no longer have to worry about our staff taking time out of their schedules to monitor our technical systems."

Jason F. Ruwet
Esq. Partner
Kolvoord Overton Wilson, P.C.

"TCi is steps ahead of any other IT company we have worked with, best decision we made."

Lisa Maxfield
CFO
Vermont Bar Association



"The TCI team discovered a significant deficiency in our network that all the other IT firms did not."

William J. Blake
Partner
Ellis Boxer & Blake PLLC

"Always have great response from TCI when we need their help."

Jenifer Keser
Legal Assistant & Office Manager
Broadfoot Attorneys at Law

Call for a free consultation:

(802) 865-4409 Toll free: 888-669-9750

Info@TCiVT.net

Visit: TCiVT.net/lawfirms

To download your free *"The Vermont's Law Firm Guide to IT Support Services and Fees"*



Managed IT Services



Cloud Computing



Data Backup & Recovery



Network Security

**IT
MEANS
TCi**

Vermont Bar Association
PO Box 100
Montpelier, Vermont 05601-0100

PRESORTED
STANDARD
U.S. POSTAGE
PAID
PERMIT NO. 42
BARRE VT

**DATED MATERIAL
PLEASE DO NOT DELAY**



Professional Fiduciaries - that's all we do!
Employee-owned & Vermont-based



Trust Company of Vermont

Brattleboro • Burlington • Rutland • Manchester • St. Albans

www.tcvermont.com