

THE

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BATTLE OF WITS! TIME TO VOTE!

The VBA *Journal* needs your input to select the victor in this round of our "battle of wits." Below you will find 3 potential captions for Kathy Fechter's headless snowman cartoon. Email (or send a Facebook or Twitter reply) with the word "lawsuit," "sneeze," or "drone" to jeb@vtbar.org to vote for the winner! The voting deadline is April 16th, tax day, the opposite of funny.

Captions:

"We are going to submit our settlement demand once we get the permanency evaluation."

"Gesundheit!"

"I told you he was too young for a drone!"



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 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

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Layout/Design

Alicia Anthony

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PRESIDENT'S COLUMN

The Good Life

Today, our society exhibits high levels of division and competition. There is clear evidence that people in our country are working hard to get ahead and to be their best for purposes of self-fulfillment and financial benefit. With the attempt to be better than that last person -- that struggle to gain increased recognition, status and financial benefit -- comes a stress that can cause imbalance in one's health, wellness and ability to be all they can be.

As attorneys, we are not immune to these social circumstances and it is important to consider ourselves in the context of our profession with an emphasis on well-being and health. When we take care of ourselves, we are able to care for others. When we do not, we fall down, do not meet expectations of those around us, and often negatively impact our relationships with others including with those to whom we are responsible under our ethical guidelines.

There has been much attention paid to the challenges of substance abuse, depression, anxiety, and workaholicism in our profession. Last year Past President Michael Kennedy raised the red flag in his *Journal* article where he cited the findings of the National Task Force on Lawyer Well-Being. The February 2016 report authored by the ABA and the Hazelden Betty Ford Clinic found substantial and widespread levels of problem drinking and other behavioral health problems in the U.S. legal profession.¹ Although Vermont did not directly participate in the study he saw no reason not to conclude that if Vermont's numbers mirror those reported in the study, then approximately:

- 500 active Vermont attorneys are problem drinkers.
- 500 active Vermont attorneys exhibit signs of problem anxiety.
- 720 active Vermont attorneys struggle with some level of depression.

The numbers are significant – and staggering. And yet the idyllic picture painted of becoming a successful and well-regarded attorney lingers in the minds of those who have not taken this path. The lay person may ask, 'Why would attorneys ever be depressed or anxious? They have the world on a string!' However, addiction, substance abuse and mental health issues are an equal opportunity employer and we, as a profession, are not immune. The reality is that the pressures associated with our work

do become overwhelming at times. Practicing law requires great strength of character and courage to make life-lasting decisions on behalf of our clients. We agonize over the smallest of details, trying to create change for those to whom we are responsible. We work so hard for our clients knowing that our decisions have an ever-lasting impact upon them.

How do we address these pressures within our profession? It is an important question because without self-care, our positive impact suffers.

We all should be aware of initiatives taking place to address this very issue. On January 2, 2018 the Vermont Supreme Court, spear-headed by Chief Justice Paul Reiber, authored a Charge and Designation to create the Vermont Commission on the Well-Being of the Legal Profession. In support of the creation of the Commission, the Court cited the ABA/Hazelden study and its recommendations as well as another recent report expressing similar and alarming concerns for the well-being of law students. The Commission is charged with creating a state-wide action plan with specific proposals. By the end of this year the Commission shall report on the following areas:

1. Develop a policy for confidential interventions for lawyers, judges and law students struggling with mental health, well-being and/or substance abuse challenges.
2. Develop a plan to support and sustain a Lawyers Assistance Program in Vermont, to assist lawyers, judges, and law students with mental health, well-being and/or substance abuse challenges.
3. Provide on-going educational opportunities for lawyers, judges and law students regarding mental health, well-being and/or substance abuse assessments, programs and resources.

Further, the Court requested that the Vermont Bar Association provide the Commission with necessary staff and administrative support as well as other technical assistance. The VBA welcomes the opportunity to partner with the Court. Please see the article in this issue by Teri Corsones, VBA Executive Director, setting forth more details about the Commission.

The Commission will be co-chaired by Chief Justice Reiber and Judge William D. Cohen. Members include Teri Corsones;



Michael Kennedy, Vermont Bar Counsel; Thomas McHenry, Dean and President, Vermont Law School; Joshua Simonds, Director, Vermont Lawyers Assistance Program; Ian Carleton, Principal, Sheehy, Furlong & Behm; Laura Wilson, Morrisette, Young & Wilson and Christopher Newbold, Executive V.P., ALPS Corporation, Lawyer's Malpractice Insurance.

A plenary session devoted to the topic is scheduled for our Mid-Year Meeting on March 23, 2018. Newly retired New Hampshire Lawyers Assistance Program Executive Director Cecie Hartigan will be the keynote speaker at the plenary session, joined by Terri Harrington, Cecie's successor at NHLAP.

The Vermont Bar Association supports initiatives that improve the health of our members. Our membership's health is critical as we consider the next decade of innovation that will be impacting us all. We must be at our best to consider how we will address the increase in alternative legal service providers, the aging of the Vermont Bar, the loan repayment issues of our youngest members, the need to maintain public confidence and the affordability of legal services for Vermonters. Full engagement of our membership is necessary to tackle these issues and work toward a better future. It is with this in mind that I offer two alternative concepts to improving the wellness of our members:

- volunteering and providing pro bono services and

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-- renewing our focus on the Guidelines of Professional Courtesy from the VBA Directory.

Volunteering and Providing Pro Bono Services

A recent study of the health benefits related to the level of volunteering one does shows a significant positive health outcome correlation with volunteer work (mental and physical health, life satisfaction, social well-being and reduced depression).² It is worth reviewing this research on the mental and physical health benefits of spending time serving others within the context of improving our profession. Rule 6.1 of our Vermont Rules of Professional Conduct references the professional responsibility to provide legal services to those who are unable to pay. Specifically, 50 hours per year is reflected as a minimum aspiration in the rule. In addition to legal pro bono service, many of us have the opportunity to find ways to volunteer in our communities in areas of personal interest. The idea of increasing our focus on volunteering and providing pro bono services in the profession as a whole is worth a refreshed effort.

The VBA provides a myriad of resources and avenues to engage in pro bono work and these are highly worth everyone's review. I would also offer that volunteering generally may be worth considering as a new way to approach being overwhelmed within our practices. The rejuvenation that can come from an afternoon of truly helping others in need is well worth the effort it takes to make it happen, for you and for others.

A Focus on the Guidelines of Professional Courtesy from the VBA Directory³

In addition to spending time supporting others in need, it is also important to revisit our own interactions within our profession. As President of our Association, I meet monthly with members of the Supreme Court and administrative staff. Building supportive and collaborative relationships is essential to the continued success of the Bar Association but also to the effective the administration of justice. Recently, it was brought to my attention that there is a growing concern about civility in Vermont courtrooms. Given the nature of our judicial system, such a phenomenon might be easily explained away as a natural by-product of adversarial conflict. But it doesn't have to be.

Our practice is one of conflict by design and so, in our effort to ensure we are protected from the stress of conflict, it is incumbent upon us to consider our own engagement with others as we work together

within the profession and the judicial system. The Guidelines of Professional Courtesy provide a start --they help us ensure that our relationships with each other are professional, respectful, and considerate while we simultaneously uphold our responsibility to be diligent advocates. These two concepts can and should coexist but only when our interactions reflect a genuine affinity and kindness toward each other while still holding strong to our necessary positions. I encourage all attorneys to review these guidelines and work hard to live by them. We all benefit from maintaining positive relationships even while the natural conflict of opposing sides in the legal field exists by necessity.

Relationships and social connections are the cornerstone of healthy living. A recent Harvard study of human development found that social engagement was one of the top factors in a long life.⁴ It has always been said that laughter is the best medicine, and now science has found some backing for that assertion. The Greek philosopher Aristotle determined that the essence of life is "To serve others and do good."

It is with these concepts in mind that I leave you with a quote from Paul Bloom, a professor at Yale and accomplished psychologist and author: "We are constituted so that simple acts of kindness, such as giving to charity or expressing gratitude, have a positive effect on our long-term moods. The key to the happy life, it seems, is the good life: a life with sustained relationships, challenging work, and connections to community."⁵

Help others, smile often, and be well.

¹ Also cited was a NH Bar Association February 2016 article interpreting the national statistics: "Lawyers drink two to three times more than physicians, and nearly three times as much as the general population, according to a new national study."

² Yeung, Zhang, & Kim, *Volunteering and health benefits in general adults: cumulative effects and forms*, BMC Public Health. 2018; 18:8, corrected: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5504679/>

³ The VBA Directory contains a reprint of the Guidelines of Professional Courtesy on Page 5.

⁴ <http://www.adultdevelopmentstudy.org/>

⁵ Bloom, Paul, *The Long and the Short of It*, Opinionator, NYT online, September 15, 2009: <https://opinionator.blogs.nytimes.com/author/paul-bloom/>



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PURSUIITS OF HAPPINESS

Ultra Runner: An Interview with Gavin Boyles

Jennifer Emens-Butler: I am here in the State Department of Financial Regulation with the newly appointed General Counsel of this Department, Gavin Boyles, correct?

Gavin Boyles: That is correct.

JEB: Gavin, congratulations on your new post! I didn't realize you had changed positions when I hunted you down to interview you for our Pursuits of Happiness column, where we explore the interests and talents of lawyers outside of the practice of law.

I thought of interviewing you after my son had done the Spartan Race junior in Killington a few years ago. Looking at the list I found that you ran it that year, right?

GB: Yes, I did it that year with a couple of my coworkers from the Attorney General's Office, both lawyers.

JEB: And you loved it?

GB: It was great. I loved it, yes. I really had fun, but had to get over my general fear of getting hit with objects and having to be coordinated.

JEB: So people are aware, the Spartan Race is not just running, right? They put you through the wringer with all sorts of weird obstacles and....

GB: Yes, right, and I didn't know much about it going in, but I generally knew it involved running up and down Killington a couple of times and stopping at various stations to lift things or crawl under barbed wire, or climb nets or walls, all while being sprayed by fire hoses or something, so it was definitely a funny idea of "fun."

JEB: For fun, you thought, but then I outed you as the real deal because I read that you had finished first for your age group, is that right?

GB: Um, that could be right. I don't remember. I felt like I definitely should've been in the running for "Had the Most Fun" too!

JEB: In preparing for the Spartan Race, did you think they would be more like simple obstacles or did you know that they were going to be grueling? I mean, I have seen people come out with barbed wire scars and bruises all over their bodies. Seems pretty harsh.

GB: Yeah, I had some idea going in, but I didn't know how many there would be, or how hard they were. I had seen some of the more photogenic tasks that they use in the advertisements, like jumping over fire and getting hit with the padded sticks and



I thought that they would be more that, but some of them, I physically couldn't do, or could barely do. Lifting heavy weights isn't really in my wheelhouse!

JEB: Oh, and then they make you do burpees or something, right?

GB: Yes, they penalize you. I was also surprised at how much running there was in it. It was a long day of running.

JEB: Well they had people that were there well into the night, I don't know if they had to pull them off the mountain or if they just waited.

GB: I think they just waited.

JEB: Nine hours later or something?

GB: Yes.

JEB: That seems crazy. So, it was "only" 11 miles, do you remember?

GB: Yeah, something like 12, I think, but it is hard to measure because it is a lot of going through forests and obstacles. Most of what I did to get ready for it was really just run, which is something that I have always done, basically since 7th or 8th grade. It is definitely a lifelong passion of mine.

JEB: So, were you on the track team or cross country in high school?

GB: Yeah, so I have a family history with my mom, who was an avid runner down in New Jersey where I grew up. I remember going with her to some of the early all-women's road races in New York City when I was about four. I was mesmerized by watching that.

JEB: Coming by in groups with water stations, encouragement, the excitement of watching them all go by...

GB: Right! My sister and I would go with

her on those and she'd bring us to her running club's track workouts every week. Running was really a constant in my childhood. And our father was a competitive runner in high school and in college. Then my older sister started running track when she was in 8th grade so I sort of followed her.

JEB: A lot of times, kids will do the exact opposite of what their parents do.

GB: Right, I know! I did rebel in some other ways, but I was never going to be much of a football player, so...

JEB: American football --you could be a soccer player though, right?

GB: I did play a little soccer but the running was the first sport that I was ever any good at and it happened that a bunch of my friends from late middle school and high school were into it too, so it was a great social thing too.

JEB: Was that track or cross-country?

GB: Both. I ended up running year-round in high school. But for me, I wasn't a great competitor -- I really loved going to practice and I loved just being as good as I could be and running with my friends, but I never really enjoyed racing that much.

JEB: You pushed yourself with your own goals? So, did you prefer cross country then?

GB: Yeah. I did prefer the cross-country races, but I never loved racing for competition. It just seemed like a lot of pressure.

JEB: Just running for running's sake?

GB: Right.

JEB: So, did you run in college?

GB: Yes. I went to a little tiny college in Pennsylvania, Haverford College, which is



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PRESENTERS



F. Lee Bailey –

F. Lee Bailey was born in Massachusetts in 1933. After graduating high school, he attended Harvard University for two years before dropping out to join the military, eventually becoming a legal officer. Upon completing his service, he attended Boston University Law School and passed the Massachusetts bar. In 1960 he set up his practice and immediately laid the foundations for what would be both a sensational and controversial career. Among the notable clients Bailey defended were murder suspect Sam Sheppard, Boston Strangler suspect Albert DeSalvo, publishing heiress Patty Hearst, U.S. Army Captain Ernest L. Medina and football legend O.J. Simpson.



Justice Harold Eaton -

Justice Harold Eaton of Woodstock, Windsor County, was born in Windsor, Vermont, on August 25, 1955. He attended schools in Woodstock before graduating from the University of Vermont (BSEd, 1977) and Vermont Law School (JD, cum laude, 1980). He was a deputy state's attorney (1980–1982) and chief deputy state's attorney for Chittenden County (1982–1983), then entered the private practice of law in Rutland (1983–1991). He was a partner in the Woodstock firm of Eaton & Hayes from 1991 to 2004. He is a member of the American Law Institute. On April 16, 2004, he was appointed to the Superior Court by Governor James Douglas. On October 27, 2014, he was sworn in as an associate justice of the Vermont Supreme Court by Governor Peter Shumlin



Jack McGehee -

Jack McGehee is the president of the National Board of Trial Advocacy, the ABA - recognized board certification organization, which permits successful applicants to publicly claim specialty status. He is a partner in McGehee, Chang, Barnes and Landgraf in Houston, Texas and tries cases for injured parties throughout the country. Before coming to Houston, Jack was a lead medical malpractice trial attorney with the Pentagon in Washington, DC, personally responsible for a docket of over \$1 billion against Army doctors and hospitals. He traveled throughout the country representing the United States in medical malpractice cases and has been lead counsel in some of the largest class action cases filed throughout the United States. (www.nbtalawyers.org)

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about 1000 students. It's right outside Philadelphia and sort of the brother school to Bryn Mawr. I took a bunch of classes at Bryn Mawr and had a great academic experience. The school was tiny but the track and cross-country programs were disproportionately large – we had about 70 men on the cross-country team when I was there. The coach was fantastic, a sort of a father away from home for me, and it was a great culture. Nobody got cut from the team as long as they tried and were a good presence, and I just loved that atmosphere.

JEB: So, there wasn't any sense of trying to go for an Olympic program or All American or anything, you just ran to run?

GB: Not for me, or at least not for long. Running tends to get rid of delusions of grandeur pretty quickly. I just had a great group of friends that I loved to run with. I competed in cross-country, ran in the summers, and did the steeple chase in track, which is almost a 2-mile race with barriers, hurdles and a little water pit.

JEB: Ah, the precursor to the Spartan race!

GB: Right! I think I partly liked it because it was made lighter with these interludes of almost silly little tasks, in the middle of the race. I was a little bit better at that than I was at just running around in circles.

JEB: After college, how did you get here, to Vermont?

GB: My wife grew up in Charlotte/South Burlington. She went to high school with a good friend of mine from college and I came up to Burlington to visit the friend after I graduated, and she was living with my wife.

JEB: So you met your wife, fell in love, and as they say, the rest is history.

GB: Exactly!

JEB: So, you stayed here, where did you go to law school?

GB: I went to VLS. We were already living here in Woodstock and I was working at outdoor education center in Plymouth, Vermont, Farm and Wilderness. I worked there for a few summers teaching rock climbing and taking kids backpacking. Eventually I was the staffing coordinator, working year-round in the office, when I decided I wanted to go to law school. We weren't going to leave the state at that point, so, VLS it was.

JEB: So did you continue running all this time, for your own piece of mind?

GB: When I could, definitely. When I was leading backpacking trips, that was immersive, and I didn't really do much running. I really missed it. It has always been sort of a leveling influence on me.

JEB: Well that is why we are here; to talk about this leveling influence. So, in law school did you run often to overcome the stress of school?

GB: Yes. Not as consistently as I should have, and it really was a lesson for me, personally, just realizing how important it was for me to do it regularly. To get some exercise, because I had a couple periods where I didn't do any running, and that's when I kind of had some classic law-school low points where I wasn't all that happy.

JEB: You found your way out of the dark spiral, though, by running?

GB: Yes, among other things. And VLS was a great place for running. It reinforced for me that one of the things I really love about running is that you can really build relationships that way and during the times when there was someone else that I could run with there, I did it more.

JEB: So, you do prefer to run with somebody? I mean can you carry on a conversation the whole time or is it just having that person there?

GB: A little of both. It is always nice to have company when you are doing a hard workout and you aren't talking then, but then you talk afterwards. But I have done a lot of running alone; don't get me wrong.

JEB: Have you ever run marathons?

GB: Yes! I first did the one in South Hero, the little tiny one, with 200 people and intense winds coming off the lake, dirt roads and just one or two aid stations, and then the next one I did was Boston.

JEB: Which was a totally different experience.

GB: Right! Crowds of people. It was the year that Lance Armstrong ran it, so there was this whole circus atmosphere, but it was really great. Both were great for their own reasons

JEB: Now most people who run marathons run for time, I mean they run to either beat themselves or someone else, but did you just want to see if could just run 26.2 miles and enjoy it?

GB: Well, I was trying to go as fast as I could. But I think the thing that I have enjoyed about running after college is that is about whatever I want it to be about. Not necessarily the competition with others; more with myself.

JEB: So you pushed yourself, but it seems exploratory, you are right, a marathon here, a Spartan there, and now to the ultimate topic for this interview, the Ultra Trail. Have you done many mountain races?

GB: No, not formally. Just a few. One of my friends I run with here in town, sort

of turned me on to running the mountains around here, you know like the Worcester Range, Camel's Hump and Mt. Mansfield, so I have done that, a lot. And it's funny to call it running, because a lot of it you are truly going as fast as you can, but you are power walking. I got into that about 5 years ago, I started doing that. I had some friends from Burlington and we would meet at Camel's Hump and run up it as fast as we could and then run down it. I thought that was such a cool thing--we were all trying hard, but it was all in good fun and it was gorgeous. When running it, I could go there before work—up and down and then to work.

JEB: Wait, what?! You would run up and down Camel's Hump before work?

GB: Yes.

JEB: Don't people take like 6 hours to hike Camel's Hump?

GB: Yes, right, so if you are running, especially on the way down, it is a lot faster, so you can do it in maybe 3 hours, so if you go there and start at like 4:30 or 5 a.m., get down at 8 and come back to Montpelier.

JEB: Wow, ok. So up and down Camel's Hump in a few hours before work, no problem.

GB: [Laughs], But I was running pretty hard, and that was this really cool, eye opening thing for me, having a little sublime experience before work.

JEB: And you would get to see the sunrise, starting with a headlamp?

GB: Yes, we'd usually start with a headlamp, depending on the time of year. Sometimes you get the fog in the valley or you get a beautiful bluebird sunrise...

JEB: and you must see some cool animals?

GB: Yes, more animals tend to be out in the early morning, you know it is just great. So, I was doing that quite a bit, and then we were planning this family vacation up to the Gaspé [Gaspésie] Peninsula in Canada, and I have always wanted to go there. And then I heard about this race that was happening and it worked out that we could arrange the family vacation so that the first day of the vacation would just be me running this race, and then for the rest of the week, vacation! It was just a fun way to get to know the mountains up there, which are pretty different than ours-- the tree line is much lower, and it is a lot colder up there.

JEB: A lot of open ridge. I looked it up on what parts I could see of the website and it looked like even though it is in June or July, there is some snow, right?

GB: Yeah, it was wild. It was June 30th or something, and it was in the high 80's at the

start, brutally hot, but we also ran across a snow field for half a mile and saw caribou! I got really overheated and got dehydrated, because I just couldn't get it through my head that it was actually hot outside. It was incredible.

JEB: Well let's just make this absolutely clear for our readers the Mont Albert sky running series in the Gaspé Peninsula that you did is 26 miles of mountain running?

GB: It is a marathon.

JEB: But up a mountain?

GB: It is up and down and up and up and up and up....

JEB: Ok, mostly up?

GB: [Laughs] Yes, it definitely seemed like mostly up! I did a lot of walking on flat ground on the way down, my legs just shut down, completely.

JEB: Was there any scrambling or climbing...

GB: No, nothing real technical but the main challenge of it, for me, was that you were just running on like loose angular small stones for hours.

JEB: So it was 26 miles and a marathon time, is maybe, what 2 plus hours?

GB: So I ran the Boston Marathon in about 2:40 years ago, and probably at the time that I ran Gaspé race, it would have been like 3 hours for a marathon, but the Gaspé race took me 6 hours. It was really hard, really humbling, for sure.

JEB: But the scenery was beautiful! Did you have a lot of people around you or were you mostly alone?

GB: It is nice and with races that long, you can kind of talk and you are not really panting you are just sort of going at a pace that you can maintain for 6 hours. I ran a good part of it with a guy I have never seen since, who was very nice, and we chatted some. He was from Nova Scotia, I think.

JEB: So, what did you have to bring with you on a 6-hour mountain run?

GB: They had some requirements for that one, you had to bring like a waterproof layer and a hat, and...

JEB: Really, they make you wear a hat?

GB: Well, they make you bring it. Yeah, they actually checked your bag, which I was a little surprised by. They make you bring like a whistle and a space blanket or something.

JEB: Did you have to stop to have any energy bar or did you just make the whole 6 hours because you didn't want to eat anything?

GB: Pretty much tried to run. I just tried to go the whole way. I had these little Gummy energy cubes

JEB: Those Gatorade energy chews or something?

GB: They were disgusting.

JEB: Would you do it again?

GB: Yeah, I would love to do that one again. Really, the way it turned out was my legs really just shut down, so I was basically a tourist. I really just started walking at a certain point. It was beautiful, though, so I really just tried to enjoy being out in a wild place!

JEB: Were you able to enjoy your family vacation or were you out of commission for the recovery?

GB: The family vacation was fantastic – I really recommend for folks who love the outdoors. Because I bonked so badly, the recovery was actually easier, I think.

JEB: What was the winning time, do you remember?

GB: I think like 4 ½ or something like that.

JEB: Then you did something different later that same summer, which is equally extreme it sounds like. Didn't you say you ran the Mansfield Double Up?

GB: Yes, just a few weeks later. That one started at base of the lift on the Stowe side and went straight up the Haselton Trail to near the Chin and then around the back down Maple Ridge, across the CCC Road to near Sunset Ridge and then up Laura Cowles almost to the summit and then part of the Long Trail, Rimrock and Perry Merrill back down. So, a lot of up and down!

JEB: You said 11 miles but 5500 feet of elevation or something like that? So, it is the same thing where you think 11 miles would be, you know, an hour or 2, but no!

GB: It was at least 3, but it was fun, like a reunion of some folks that I hadn't seen in a while. It was the first race at least in recent memory that has been on Mansfield. It was the first year. They sent people off in waves of 7 or 10.

JEB: Being environmentally cautious.

GB: Yes. It was a neat way of doing it because you kind of ended up with a little bit of company, but you also had some solitude. So that was sort of the last big running race I did and since then I have kind of dialed back the running and dialed up the climbing.

GB: I would like to do more of those long races but it is just harder to find the time for it, training included, as I get older. I've been rock climbing instead, which is something I share with my daughter.

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JEB: How old is your daughter?
GB: She is almost 9.

JEB: And she rock climbs?!
GB: Yeah, she loves it.

JEB: Real rocks or just the like climbing walls?
GB: Both, but mostly climbing walls so far.

JEB: And you said you had built one in your house?

GB: Yeah, we built one in our garage. I'm trying to focus more on that, because it is something I can do with family and it brings me some of the same mental benefits or emotional benefits that I get from running. It sort of balances out the work day and I can get a good climbing session in with much less time commitment.

JEB: And you don't disappear for 11 hours.

GB: Yeah, so that has been great.

JEB: So, you just have 1 child or 2?

GB: 2. I have a son as well.

JEB: Is he into rock climbing too?

GB: He plays soccer.

JEB: YES! So how do you find time to

pursue this running passion. You are in the Department of Financial Regulation, but you were in the AG's Office before. Were you in a private firm before you worked for the State?

GB: Yes, I worked at Paul Frank & Collins in Burlington before I worked for the AG's Office and then before that I was clerking. With any of the jobs that I have had, it has always been sort of a challenge, to make or find the time. I just figure out a way. There have been times when my kids were really young, when it made sense for me to run extremely early in the morning and now I've got a bit more flexibility because they are more self-sufficient. There was a period in there when the only real time I could run was either at lunch or at night.

JEB: And so, you would just run around town at lunch?

GB: I tried to do that, yes, and there is a pretty good culture in Montpelier with people sneaking in a bit of exercise at lunch.

JEB: I go up to the tower at lunch often because it is so nice just to be in the woods.

GB: Exactly! It's a great town for physical activity; a lot of parks and trails.

JEB: Do you find it's easier working for the State than when you were in private

practice?

GB: It is hard to say, I mean, when I was in private practice, I was right out of school and I was the youngest associate and I am not sure if I was right to feel that I shouldn't go exercise during the work day, but I did feel that way. Not because of anything anyone said to me; I think a lot of it was in my own mind. I think in retrospect it would have been fine as long as I had gotten the work done.

JEB: There is more recognition these days of the importance of exercising and keeping yourself balanced. Employers want their attorneys to be healthier, generally, and take care of themselves. It is like the oxygen mask thing, right, you cannot take care of other people unless you take care of yourself. Do you see that happening more?

GB: I hope so. And now that I am in this new role hopefully I can support other attorneys to do things that keep them on an even keel and happy in the profession. I know that for me, the times when I have felt at all dissatisfied with the profession are the times when I have not been finding time for the things outside of work that I need to do, for myself.

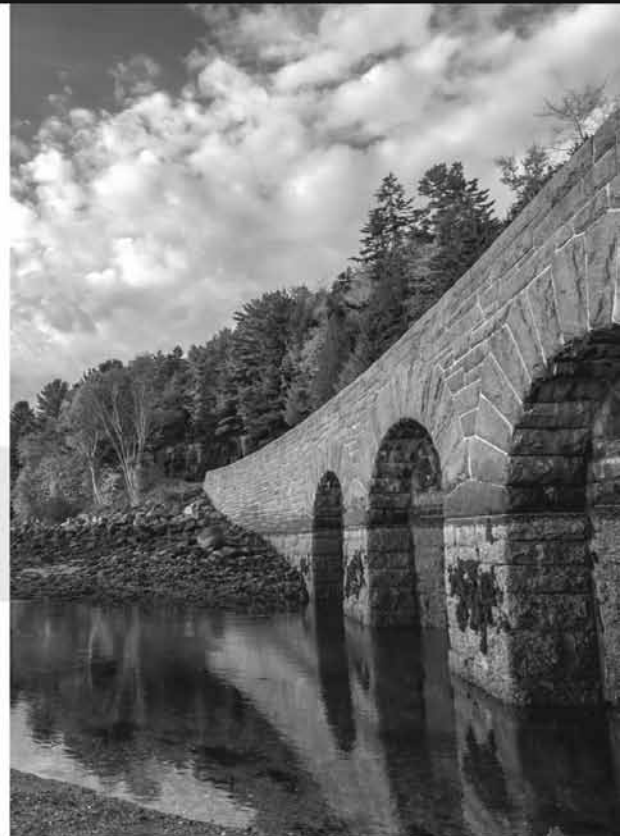
JEB: So, you know how important it is to make the time.

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GB: Yeah, I feel that personally, and I know everybody needs it, but not everybody needs the same things.

JEB: It is definitely a conscious decision to put that time aside for yourself, whatever it is. Some people like to run, some people like to knit, some sing, what have you. When I was thinking about interviewing you, though, I was thinking that your passion, at least the ultra-races that you have done are a little more intense and lawyerly than just sort of wandering in the woods and hiking. But in interviewing you, I am hearing that you do these things for fun and balance, not competition. And I originally thought that they have to have some sort of lawyerly quality, right? That you chose a more intense thing?

GB: I definitely enjoy trying hard at things. I just don't especially care if I beat that person or that person, it is more like I just want to know that I tried hard and did as well as I could do. And the physicality and adventure provides a balance to a sedentary job.

JEB: Do you let yourself think about cases while you are running?

GB: Yes, absolutely. I think your mind wanders a little and allows you to come up with some creative thoughts. At least for me.

JEB: And that is ok, you still find it peaceful that you are doing something for yourself even if work creeps in? Because some people say they have to shut everything off to have peace.

GB: Yes. I think it is okay. I try not to be purely thinking about those, but you have to think about something.

JEB: Especially when you are on a trail for 6 hours-- a lot of things that can go through your head!

So, just to end with your renewed focus on rock climbing, are there competitions or do you just do it for fun?

GB: Yeah, there are some great outdoor cliffs in Bolton and some down in Killington and up in the Northeast Kingdom, there some really good stuff. I have mostly just been focused on what my daughter wants to do, which is so far mostly indoor.

JEB: Well she is only 9 so the big rocks are a little scary.

GB: She has been on this team that goes to an occasional competition but mostly they just have these very sweet friendly practices with college-age coaches who are just helping them improve and have fun. That has been my challenge --the tricky work schedule thing is trying to get her to practice.

JEB: And you have to be careful what you wish for because all I seem to do is drive my son to soccer matches and watch them in a chair! At least when you are climbing you at

least get to do it with her and then get some exercise.

GB: Yeah, that has been the interesting transition, because I have experienced some of that too when I take her to her competition and we just walk around. But it is interesting, I get some of the same benefits out of just watching her do it.

JEB: Good point! I do enjoy it. It's peaceful and will be over before I know it. It's just that you can't spend as much time keeping yourself in shape when you are running around for kids, but you just have to make time I guess. Now do you go still go on rock climbing adventures by yourself?

GB: Yes.

JEB: The big rocks with ropes and I imagine someone else.

GB: Yes, it is a two-person endeavor, definitely. I only get outdoors occasionally, it's a hard one to sort of fit into the family schedule, but a couple of times a year I manage to get out for a big climb.

JEB: But you do find that running, mostly, but also mountain runs, rock climbing and climbing with your daughter definitely help with work life balance, keeps you happy and able to focus better on your work?

GB: Yes, absolutely.

JEB: It's so important to take care of yourself. We are finding so many lawyers who are doing all of these great things.

GB: Yeah, well it has been fun to read the column because, like you said, everybody does something different while serving the same purpose. It's fun to see that someone loves looking at mushrooms, or birdwatching, or table tennis, or knitting or what have you. And I think a lot of us as lawyers don't end up knowing those things about each other, so I think that is a nice effect through the column to learn about lawyers doing their stuff.

JEB: And I appreciate you sharing your stuff! Thank you for allowing me to interview you.

GB: Sure thing. Thank you.

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RUMINATIONS

The Militia Governed by the Civil Power

The Fitful Collision

As required by Vermont law, the St. Albans militia gathered on the town green on the first Tuesday of June 1821 to perform its annual exercises. Captain Heman Green was commanding officer. At the courthouse, adjacent to the green, Judge Joseph D. Farnsworth was presiding over a jury trial.

The sounds of fifes and drums disturbed the trial, and Judge Farnsworth sent a court officer outside to order the Captain to move off the green. Green replied, that "he was not aware that a judge of the court possessed any authority to issue a military order; that himself and his men were engaged in the performance of duties required of them by the statute law of the state; that the public green was the place where the trainings had always been holden, and was, in fact, the only place where a company could be maneuvered; that he should disturb the court as little as possible, but that the training must go on."¹

Judge Farnsworth, hearing this, ordered the arrest of Captain Green. Green responded by commanding the troops to fix bayonets and surround the courthouse. As he stood at the door of the building, he left orders that if he was not out in five minutes that the force should take possession of the courthouse. He went inside, strode into the courtroom, and when he asked the judge what noises were distracting him, he suggested the "gabble of the lawyers" might be the cause, or perhaps the sounds of June training. "Let me hear no more of it," said the judge.

But the training resumed, with "increased energy." Nothing more dramatic came of this collision of civil and military powers that day, although historian L.L. Dutcher's telling of the story concluded with a scene in the tavern that evening, when the judge said to the Captain, that he "guessed he had been a little too fast, and that he wished the matter buried in oblivion."² Thank you, Mr. Dutcher, for not heeding this prayer.

Was Captain Green right, that a judge had no authority to issue a military order?

Legal History of the Militia

The Vermont Constitution includes four direct references to the militia. The first, in Article 16, provides that the "military should be kept under strict subordination

to, and be governed by the civil power." Article 17 guarantees that "no person in this state can, in any case be subjected to law-martial or to any penalties or pains by virtue of that law except those employed by the army, and the militia in actual service." Section 20 makes the Governor the "Captain-General and Commander-in-Chief of the forces of this state," but prohibits the Governor to command in person in time of war or insurrection without the advice and consent of the Vermont Senate "and no longer than they shall approve thereof."³ Section 59 directs that "inhabitants of this State shall be trained and armed for its defense, under such regulations, restrictions, and exceptions as Congress, agreeably to the Constitution of the United States, and the Legislature of this State, shall direct."

The U.S. Constitution grants Congress the power to organize, arm, and discipline the militia, treating all state militias as its own, its purpose "to execute the laws of the Union, suppress insurrections, and repel invasions."⁴

The Vermont militia statute was first enacted in 1778, but no copies have survived. The 1779 act, which was preserved, is believed to be the same as that of the previous year. Every man age 16 to 50, unless exempted, was enrolled. Each had to come equipped to the training. Every man had to appear with a well-fixed firelock, the barrel not less than three feet and a half long, or other good firearm, plus a "good sword, cutlass, tomahawk or bayonet; a worm, and priming wire, fit for each gun; a cartouch box or powder and bullet pouch; one pound of good powder, four pounds of bullets for his gun, and six good flints."⁵ Failing to appear or failing to appear properly armed, resulted in a fine of 18 shillings. There were no uniforms; each man tucked a sprig of evergreen into his hat as the only emblem to identify him as a member of the militia. Fifers and drummers had to supply their own instruments.

Ministers of the gospel, justices of the peace, judges, college presidents and teachers, physicians and surgeons, schoolmasters, attorneys, one miller for each gristmill, sheriffs and constables, tanners who make it their constant business, and persons "disabled in body (with certificate from two physicians or surgeons)" were exempt from militia duty.

The essential duty of the militia was to be ready to respond, to be called out on a Colonel's orders, "upon any alarm, invasion, or notice of the appearance of an enemy, either by water or land." The militia was obliged by "force of arms to encounter, repel, pursue, kill and destroy such enemy, or any of them, by any fitting ways, enterprizes or means whatsoever."


Militia companies were organized on a democratic principle. The soldiers could elect their own captains. This helped promote respect, but it also worked against a too heavy hand in enforcing the laws on the militia, as officers were less likely to act knowing that their position depended on the continuing loyalty of their soldiers.

The elite avoided military service. Farmers and laborers made up the ranks, and this class distinction was not lost on them.⁶ Rank mattered politically, as well as militarily, and titles stayed with the officers to the end of their days. There was a tinge of class leveling in the early law. It required the Captain of the town militia to organize the company into divisions, ensuring they were of equal size, "by connecting men of interest, poor men, and those that have been at most expence in the present war, together in one class."⁷

There was training and there was war and rebellion, which engaged the militia, and occasionally there were other duties. In 1778, ten soldiers were ordered to march and tread snow from Charlestown, New Hampshire to Wilmington, Vermont, to pack the ground for the sleighs that would follow.⁸

Training was at the heart of the militia law. One or two days a year, each man had to appear, properly equipped, to participate in drills. Discipline was everything. It must have been a challenge. It was the noisiest holiday on the calendar, louder than the celebrations of the fourth of July. The day began with a cannonade at dawn, called "saluting the Captain," which announced to the entire town what would follow.⁹

In 1792, Congress enacted the first federal law on the militia, enrolling all members of a state militia as federal militia. The President was the commander-in-chief of the federal militia, just as Vermont's Governor was commander-in-chief of the state militia.¹⁰ The federal power preempted state authority, but left the administration of the



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state militia in local hands.

The Vermont legislature fiddled with the militia law nearly every session after that. In 1793, it revised the law entirely, explaining that the statutes had become “too complicated for practical use.” The maximum age was reduced to 45 years, and lawyers were no longer exempted from service. Field and commissioned officers of town militias were still elective offices. There was if anything a greater concern for record-keeping and for enforcing the militia law than in previous years, including an elaborate structure for courts-martial. Each company was obliged to meet for training twice a year, on the first Tuesday of May, and each regiment at least once a year. When mustered out, each officer and soldier had to provide himself with three days’ rations. The legislature promised relief to injured soldiers and to the families of those who were killed in action. And just to be clear, and safe, the act ended with a restriction against any non-commissioned officer or private firing a musket in any public road or near any house on the evening preceding, on the day or evening of the training, without a direct command, as “the good citizens of this State are often injured in the discharge of single guns on a muster or training day, or evening preceding.”¹¹

Successive gubernatorial inaugurals always included a recommendation to revise the militia laws, and in particular to provide arms to the soldiers, but the legislature balked at the expense. Some old muskets were provided by the federal government to the State, but most soldiers had to purchase their own weapons. A good rifle cost \$14 in 1830.¹²

The law was reworked in 1818, when June and September trainings were ordered. September training was abolished in 1837, and June extended to two days, with a state muster every three years.

The Council of Censors reviewed the 1818 militia act in response to a claim that the act violated Article 16 of the Vermont Constitution. The militia was authorized to adopt rules governing the militia *when not in actual service*, which suggested to some that this was imposing law martial on the soldiers. The committee appointed to review the question concluded that the article “was not intended to limit the powers of the Legislature in the enactment of laws regulating the militia not in actual service, to secure the citizens from an infringement of their rights by military commanders in *actual service*,” but rather to avoid any acts of “arbitrary will of a military commander.”¹³

The 1837 revision of the Vermont militia laws required every “able-bodied white male citizen of this state, or of any other of the United States residing within this state,” age 18 to 45, to be subject to military duty. It added a conscientious objector

exemption, requiring an annual payment of two dollars to the town for use of the common schools by those who claimed it.¹⁴

Once the immediate threat of invasion or rebellion ended, the enrolled militia became a farce and an embarrassment.¹⁵ In 1840, the population of Vermont was 291,948.¹⁶ A census of the enrolled militia for that year showed four regiments, with a total of 26,304 men.¹⁷ The ideal of universal service was far from realized, given the disparity. Its glory days were over. It became a mockery of good order and discipline.

Delaware had abolished the enrolled militia in 1831, Massachusetts in 1840, and other states followed.¹⁸ Finally, in 1844, the legislature repealed every act relating to the non-volunteer militia, “abolishing all military organizations and trainings, and leaving the State with no defence against foreign aggression, or force to secure internal tranquility.” L.L. Dutcher thought this was a mistake. “The martial spirit of the people was not merely allowed to decline, but through the example of law-makers, was made the subject of idle jest and ridicule.” He waxed nostalgic at the loss of June training as an institution. “The noisy drum and ear-piercing fife were silenced—banners were furled, and plumes went drooping. Swords and guns were put aside to rust and corrode, and dashy uniforms were packed away to become the pasture of moths.”¹⁹

In 1864, the Vermont legislature reenacted an enrolled militia law. Every able-bodied male citizen 18 to 45 years was liable for military duty.²⁰ This law remained in effect until 1941, when a revised chapter on the National Guard was enacted, and the practice of requiring universal manhood military service finally ended for good in Vermont.²¹

The Vermont Militia

The militia was not a voluntary service. It was not a draft. It was, with some exceptions, universal enrollment for all adult males, from 1779 to 1844, when the law was repealed. It was a grand, democratic idea, essential to the defense of Vermont at critical times, including the battles of the Revolutionary War, the War of 1812, and the Fenian Rebellion of 1837. It was also, in time, as Dutcher called it, the “[v]enerable old humbug—admirable burlesque of every thing military...Saturnalia of fun, frolic and roystering good humor, jovial, grotesque, obstreperous, grand carnival of fizz-pop-BANG.”²² It was at times the savior of Vermont, at other times, sadly, a drunken clown.

There were local militia in place throughout the colonies, long before the first settlers came to Vermont. The first local Vermont militia was organized about 1764, to oppose New York troops’ attempt to

force James Breckenridge to abandon his Bennington farm. The first formal exercises date from 1772, also in Bennington.²³ Towns established their militia to protect their residents from attack by the French, the British, and allied Indians. The Green Mountain Boys were a Vermont militia. The taking of Fort Ticonderoga was a surprise to the Congress, but in gratitude the Congress later voted to pay the soldiers, even though Vermont’s status as a government was yet to be recognized by the colonies. The relation between the State and the nation would later be tested.

The war service of the Vermont militia is legendary. At Hubbardton, Bennington, and Saratoga, their fighting helped turn the tide of the Revolutionary War in the north. The militia was called out as needed, following the Royalton raid of 1780, the court riots of 1786, the response to the remnants of Shay’s Rebellion the following year, the enforcement of the embargo in 1808, among other crises.

They were called “flood wood,” because of the motley nature of their appearance, also known as the “enrolled” militia, to distinguish them from the volunteer rifle and cavalry companies that were formed in some towns. The companies required uniforms. The Guilford volunteers wore blue uniforms “trimmed with yellow, large eagle buttons, white drill pants, gaiters or boots, white vest, leather stock, and leather helmet with high tin crest from which flowed long, red horse-hair, while from a cockade on the left ‘rose a tall, read feather plume with white top.”²⁴

The War of 1812 was the occasion for major conflicts between the State and the militia. In one instance, a contingent of soldiers were marched to Colchester in September of 1813, and ordered to vote for the Democratic-Republican candidate Jonas Galusha, on penalty of being “cobbed” when they returned to camp.²⁵

Writing the official history of the Vermont National Guard, Peter Haraty called the exchange of paperwork between Vermont Governor Martin Chittenden and the Vermont militia stationed at Plattsburgh in November of 1813 either an appalling example of insubordination or something admirable.²⁶ In November of 1813, Governor Martin Chittenden issued a proclamation, ordering the Third Division of the Vermont Militia home from New York to protect the Vermont frontier.²⁷ The Governor sent General Jacob Davis to deliver the proclamation, but he was made a temporary prisoner of the Vermont militia, until the battle was over. The militia wrote Chittenden a stern rebuke in reply:

We are not of that class who believe that our duties as citizens or soldiers are circumscribed within the narrow limits of the Town or State in which we

reside; but that we are under a paramount obligation to our common country, to the great confederation of States...

We consider your proclamation as a gross insult to the officers and soldiers in service, inasmuch as it implies that they are so ignorant of their rights as to believe that you have authority to command them in their present situation, or so abandoned as to follow your insidious advice [and] regard[] it with mingled emotions of pity and contempt for its author, and as a striking monument of his folly.²⁸

These were tough words for a Governor.

Some soldiers did leave New York, and one was killed by a member of the militia sent to bring back the deserters. The soldier who fired the shot was Alvah Sabin, who was tried twice for murder in Franklin County, but not convicted. Sabin later served as Vermont Secretary of State and in Congress.²⁹

Before winter set in, the troops returned to Vermont. War hibernated when the lake was no longer a scene of battle.

When word reached the Congress, the exchange between the Vermont Governor and the Third Division triggered one member to propose a resolution urging the President to instruct the Attorney General to prosecute Martin Chittenden for procuring or enticing soldiers to desert. A Representative from Maryland called it treason, a violation of the federal constitution. Vermont's representative James Fisk, a Barre lawyer and Democrat, while no fan of the proclamation, urged caution, explaining that "very few Vermonters approved of the petition."³⁰ The House, recognizing it had no constitutional power, tabled the resolution.

Chittenden lost the next election as a consequence, the last Federalist to hold that office. That the Vermont militia would defy its Commander-in-Chief this way is still shocking, but it perfectly illustrates the principle of preemption. The historic record does not include any involvement of federal officers in this brutal exchange.

The 1813 Council of Censors objected to the law that suspended civil process against officers and soldiers during actual service, passed the previous year, believing it violated the U.S. Constitution's prohibition against impairment of contracts and the militia provisions of Vermont's Constitution and urged its immediate repeal. The Censors stated it raised the military over the civil authority. A few weeks later, the legislature repealed the act.³¹

The Fall from Grace

G.N. Brigham described training day as "a day of jollity for old and young; a regu-

lar carnival of fun and masquerade, as well as parade—a display of the cocked hat, gorgeous epaulette and bright cockade; day of salutes, waking up of officers; which wake up was a rousing volley from the under officers and privates, sometimes taking the door off its hinges, to be followed with a treat, marching and countermarching, drinking, toasting and sham fights; a day opened with the obstreperous clamor of the Sargeant's call, and following with the shriek of the fife and the noise of the drums. . . . Yankee Doodle, fizzle-pop-bang, and the mock capture of the Red Coats, were all there."³² The "ring of wrestle" was a feature of trainings, and to be the "bully of the town" was an honor, duly celebrated.³³

The heroism inherent in the idea of a local militia began to wane, as more men failed to turn up for trainings or were found to have "delinquencies in equipment." Worcester and Middlesex had combined to form one militia company, alternating June training every other year. Justice of the Peace Cyrus Ware came to Worcester one year and tried 17 for disobedience to the militia laws. He empaneled two juries, who worked for three days hearing the cases; while one was deliberating the other was hearing another. The juries didn't take the process seriously, and in the end found only one man guilty. Justice Ware was annoyed by noises from the street by boys. In response, one officer opened the window and "gravely commanded a flock of geese underneath the window to stop their noise, as they were disturbing the court." The Justice commented, as he left town, that the people of Worcester "had managed this thing the d-----d'st of anything he ever saw."³⁴

The militia became a source of embarrassment throughout Vermont. In Montpelier, the company lacked *esprit du corps*, considering "military duty a thing to be gotten rid of when it could be, and when it could not, then to be endured and got along with in the easiest manner possible." Captain Taplan led the militia in parade down one of the town's streets at June training. He turned into a side street, but neglected to order the militia to wheel, and looked back to see them continuing straight down the highway.³⁵

At the first June training held in Irasburgh, one man took the sham fights too seriously. His name was Kittredge, who bit off a man's thumb while wrestling, and thereafter known as "cannibal Kittredge."³⁶ The Glover militia was part of the crew that were working to open up the outlet to Long Pond in 1810. They too became too excited, and the entire pond was released from what was later called Runaway Pond, down into Glover and all the way to Lake Memphremagog. Rum played an important role.³⁷



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Drunkenness was a feature of June training. The parade ground would be surrounded by retailers. In Brattleboro, they sold yellow gingerbread, smoked herring, beer, cider, and “the contents of those beautiful cut-glass decanters of the olden time.”³⁸ At Westminster, “Toddy was abundant, dealt freely to the company by the officers, and to the multitude at the store and the hotel” during June training.³⁹ This led to tragedies that became legend. In Halifax, in 1778, Captain John Gault was killed by one of his men. At the time there was a custom to “honor an officer by firing over his head.” Gault was leaving the tavern, and made an unexpected hop, which brought his head into contact with a bullet that killed him.⁴⁰

These and other stories litter the town histories. By 1830, June training began to decline.

Temperance was the spirit of the age, and the drunken troops at the muster demonstrated everything concerned citizens needed to know about the need for prohibition, which finally came in 1852. Even after the enrolled militia system ended, a few towns continued training, unofficially, but by the time of the Civil War, as one town historian explained, “Vermont had no effective military organization. Her uniformed militia consisted of a few unfilled companies, in some of the principal villages, while the enrolled militia was a myth.”⁴¹

Beginning in 1846, students at the University of Vermont started an annual satiric recreation of June training. It ended in 1855 after students fired a cannon that shattered every window in Old Mill.⁴²

The Militia in Court

The militia laws were largely self-executing. The fines collected from those who failed to appear or failed to appear properly equipped were kept by the militia. When punishments were ordered for nonappearance or lack of equipment, the process started with a formal notice and a court-martial. But the militia was not entirely free of judicial review. In several cases reported by the Vermont Supreme Court, there were fights over property seized to pay fines and charges.

The constitutionality of state statutes authorizing the levying against property for failure to serve in the militia when called into actual service was settled by the U.S. Supreme Court in *Houston v. Moore* (1820).⁴³ In 1824, *Mower v. Allen* first confronted the question under Vermont law. Two men who took another’s ox were sued for trespass. In their defense they produced a writ of execution from an officer, ordering the seizure as a penalty for the ox’s owner not appearing at the annual muster. The Supreme Court affirmed the decision to uphold the seizure of the animal. The Plain-

tiff claimed the process was defective as his name wasn’t on the official list, but the Court held he was still obliged to serve. That detail was unimportant. Chief Judge Richard Skinner carefully avoided “a more careful consideration of the question as to the effect of a military tribunal in imposing fines” by recognizing that the judgment by the regimental field officer was judicial, not ministerial, and as the judgment of a court having jurisdiction over a matter cannot be collaterally attacked and as no appeal had been filed with the field officer, the judgment was final.⁴⁴

Benjamin Fry’s horse was taken, with its saddle, by Samuel Canfield, by a writ of attachment. In court, Fry argued his horse and saddle were exempt from attachment under the state’s militia laws, as he was a cavalryman. On appeal, Judge Samuel K. Williams first wondered if a saddle could be included as an “accoutrement,” as the term was used in the militia law, as the term usually meant “dress and military trappings,” but found a saddle and bridle were not free from attachment, as they are “kept for common and ordinary use, and a benefit and profit” and derive a “benefit and profit” to the owner, believing that the legislature would not have intended to include that equipment among its exemptions.⁴⁵

Morris Kingsbury sought to collect a fine for the failure of two captains of the militia to make the required returns of the 1830 June training. The captains had been jailed as a consequence. The jury had agreed with Kingsbury. On appeal, the captains argued the process was flawed. Chief Judge Titus Hutchinson disagreed. That the assessment of the fine was more than 60 days before the filing of the collection action was not a problem, as long as demand was made by the militia within that period. That no record was made of the demand was also not fatal. The judge explained, “Men are not appointed to military offices because of any supposed acquaintance with legal proceedings: and more must not be required of them, than is either directed by statute, or clearly implied as a matter of duty.”⁴⁶

The militia law was challenged in 1834 as unconstitutional because it allowed a military officer to serve as prosecutor and judge, with no right to a trial by jury. The Eighth Amendment and Article 12th were invoked by Joseph H. Brainerd, who was “amerced for delinquency of military duty.” A small quantity of cloth was taken from him by Daniel Sanborn, executing an order from Captain Cornelius Stilphin, Jr. Stilphin hadn’t included the “Jr.” after his name on a part of the order, and the trial court refused to accept the document into evidence. On appeal, Brainerd raised the constitutional claim for the first time, and this was fatal to his claim. Judge John Mattocks went on to explain that as “this law has been so long

acquiesced in, we have not thought it necessary to go into that point.” As for the irregularity, it was excusable. “And it would be the height of injustice to hold military officers, whose main duties are not of a clerical cast, to a greater strictness in such matters than would be required of the judiciary, whose duty it is especially to know and to follow the forms of law.”⁴⁷

John A. Warner claimed exemption from the militia laws and from a fine for non-appearance at a training. Warner had been committed to jail on execution of a fine, and appealed his conviction. Warner claimed he was disabled, having fractured ribs from childhood, and was not “able-bodied.” Judge Josiah Royce was not persuaded Warner had a point. Because Warner’s condition was not “visible and notorious,” Warner should have presented a certificate from the regimental surgeon to justify his claim for exemption from the militia law. “The excuse would seem to be enjoined as a measure of mere prudence, to prevent the inconvenience of an unjust or groundless prosecution; not as an appeal to any judicial authority.” Royce looked back to the 1824 decision in *Mower v. Allen* as settling the question of how, “in imposing and remitting fines, militia officers act judicially, and that their final decisions are conclusive.”⁴⁸

Hiram Darling sued to recover a mare, seized on account of his delinquency of military duty. Darling claimed he had been in feeble health for two years on account of a bodily infirmity called a breach, and was disabled. Judge Samuel Phelps ruled that physical infirmity is not an absolute exemption from duty. “What is to be its effect, in any given case, is a question for the exercise of discretion and judgment, and which must necessarily be left, like all questions of a similar character, to the adjudication of some tribunal, whose decision is conclusive, and which cannot be made accountable, in a civil action, for errors in the exercise of its judgment.” Defining “able-bodied,” Phelps understood it could not mean freedom from all physical ailment. But even if there were some invisible defect that would incapacitate a soldier that was not found by the officer, the remedy should be sought before the regimental officers, and not the courts, as the militia laws provided.⁴⁹

Harvey C. Gilman failed to appear for a parade of his local militia. He was court-martialed, and appealed the decision. He claimed that while he did not attend the June training in 1838, the law did not expressly allow the county court to fine him for non-attendance. The decision turned on the effect of the statute of 1837, which had repealed the militia law of 1818 and reformed how the Vermont militia was organized. Judge Jacob Collamer was unconvinced. “As a general rule the repeal of a

law puts an end to that which was created directly by the law itself. But when a matter is authorized by the law to be done, and it is done, and rights and duties of a public or private concern, are thereby created and accrue, they are not undone nor affected by a repeal of such law."

The judge held that the authority to organize a militia was based on an act of Congress. "The state legislature could no more *disorganize* or disband the militia, which it had organized, by direction of congress, under the constitution, than the board of officers could disorganize it after having completed their duty of organization under the act of the legislature. The states, *severally*, cannot thus *destroy* this branch of the national defence, nor do we think our legislature intended or attempted so to do."⁵⁰

Daniel M. Brown attempted to resist his court martial for failing to appear for duty. He was amerced a fine, which was then levied on his cow. Brown claimed unlawful trespass for the taking of the animal. He had not been provided with written charges, which had been delivered to him orally. Judge Isaac Redfield held him to the fine,

in spite of circumstantial irregularity of the proceeding. As the militia had jurisdiction, that would suffice.⁵¹

Samuel Spear demanded a jury after he was amerced a fine for non-performance of military duty. Judge Milo Bennett found it unnecessary to consider whether he was entitled to a trial by jury in the Justice's court, as he had had his day in court, and he had no right to challenge the outcome after the fact.⁵²

That decision was the last of the appeals relating to the enrolled militia. With the end of that system, there was no longer any contest over fines, seizures of property, or fine points of exemption. The history of the militia after 1844 relates only to the volunteer force, later organized by the Vermont National Guard, which has served honorably in foreign and domestic conflicts, emergencies, and disasters. Vermont soldiers served in every war or conflict since that time with distinction, and the memory of the rough nature of the enrolled militia was forgotten. There were still incidents. The first losses Vermont suffered in the Civil War were eight residents of Benson, shot

accidentally by members of the local militia company during a drill.⁵³

Governor Madeleine Kunin joined other governors in 1986, announcing she would not consent to any request to send the Vermont National Guard to Honduras for training exercises, calling it a "backdoor escalation" of the American military presence in Central America. The U.S. Supreme Court ruled in 1990 that governors do not have the power to resist orders to send their state's National Guard for overseas service.⁵⁴

Captain Green was wrong. The militia was never entirely separate from the civil or criminal law, or the intervention of courts, although the Supreme Court certainly gave significant deference to the decisions of the officers of the militia. Governors Chittenden and Kunin were also wrong. The federal government overrules the states when a national emergency arises.

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retains the common law idea that a sheriff or other law enforcement officer may require the aid of all persons to enforce the law.⁵⁵ You needn't show up with a prescribed weapon, but you can be fined \$500 for not giving assistance when asked.

The Right to the Common

In Whittingham, there was a similar struggle to that experienced by Green. The militia had traditionally used the common for its June training, but when the day arrived the field was full of boys engaged in a baseball game. To show its power, the militia marched onto the field with fixed bayonets to drive the boys off. But the boys protested. As the militia moved to engage the boys, they proceeded to knock off the bayonets from the rifles with their bats. The militia retreated in disorder. "And finally the Captain, with his men, peaceably withdrew to drill, a wiser, if not a better man." Later, their Captain asked a lawyer to draft a warrant to arrest the boys. John E. Butler told them that the boys had as good right to the public common, or highway, as "he had with his bayonets."⁵⁶

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.

¹ L.L. Dutcher, *The History of St. Albans, Vt.: Civil, Religious, Biographical and Statistical* (St. Albans, Vt.: Stephen E. Royce, 1872), 353.

² *Id.*, 354-355.

³ The words "in time of war or insurrection" were added in 1836. *Records of the Vermont Council of Censors*, ed. Paul S. Gillies and D. Gregory Sanford (Montpelier, Vt.: Secretary of State, 1991), 761-762.

⁴ U.S. Constitution, Art. 1, Sec. 8.

⁵ "An act for forming and regulating the militia, and for encouragement of military skill, for the better defence of this State," February 16, 1779, *State Papers XII*, 37-65. A worm is a device to

clear the touch hole of debris.

⁶ Peter H. Haraty, "Dual Obligation and Loyalty," in Haraty, *Put the Vermonters Ahead*, 75.

⁷ "An act for forming and regulating the militia," *State Papers XII*, 62.

⁸ Volney Forbes, "The Early History of Wilmington, 1751-1870," in Abby Maria Hemenway, ed., *Vermont Historical Gazetteer V:II* (Brandon, Vt.: Carrie E.H. Page, 1891), 8.

⁹ Walter F. Glover, "June Training at Fenton's Store," *Vermont* 29 (1924), 172.

¹⁰ Burton Rubenstein, "From Bennington to Ticonderoga," in Peter H. Haraty, *Put the Vermonters Ahead: A History of the Vermont National Guard 1764-1978* (Lansing, Mi.: University of Michigan Press, 1979), 2.

¹¹ "An act regulating and governing the militia of the state of Vermont and for repealing all laws heretofore passed for that purpose," October 29, 1793, *State Papers of Vermont XV*, 211-230.

¹² John K. Mahon, *History of the Militia and the National Guard* (New York: Macmillan Publishing Company, 1983), 82.

¹³ *Records of the Vermont Council of Censors*, 248.

¹⁴ "An act, for regulating and governing the Militia of this State, Acts and Resolves Passed by the Legislature of the State of Vermont 1837 (Burlington, Vt.: Chauncey Goodrich, 1837), 19-59.

¹⁵ Karl Marx began his *The Eighteenth Brumaire of Louis Bonaparte* with this: "Hegel says somewhere that all great historic facts and personages occur twice. He forgot to add: 'Once as tragedy, and again as farce.'" Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*, trans. Daniel De Leon (Chicago: Charles H. Kerr & Company, 1913), 9. He went on, "Man makes his own history, but he does not make it out of whole cloth; he does not make it out of conditions chosen by himself, but out of such as he finds close at hand. The tradition of all past generations weighs like an alp upon the brain of the living."

¹⁶ <https://www.census.gov/dmd/www/resaport/states/vermont.pdf>

¹⁷ G.G. Benedict, "Military History," in Charles Spooner Forbes, Charles R. Cummings, eds., *The Vermont: The State Magazine* 7-8, 263.

¹⁸ Mahon, *History of the Militia and the National Guard*, 83.

¹⁹ "An act in relation to the militia," *Acts and Resolves of the Vermont General Assembly* 1844 (Burlington, Vt.: Chancey Goodrich, 1844), 8-10; Dutcher, *St. Albans*, 354.

²⁰ "An act for organizing the militia," No. 1, *Acts and Resolves Passed by the General Assembly of the State of Vermont* 1864, 3-20.

²¹ V.S. § 7161 (1947).

²² Dutcher, *St. Albans*, 352.

²³ William L. Greenleaf, "The Vermont Militia," *Vermont* 3 (August 1897), 1.

²⁴ J.W. Phelps, "Guilford," in Hemenway, *Vermont Historical Gazetteer V:II*, 56.

²⁵ *Assembly Journal* 1813, 144-147.

²⁶ Peter Haraty, "Dual Obligation and Loyalty," in Haraty, *Put the Vermonters Ahead*, 55.

²⁷ E.P. Walton, ed., *Records of the Governor and Council of the State of Vermont IV* (Montpelier, Vt.: Steam Press of J. & J.M. Poland, 1876), 492. Chittenden's letter was intended to rally Vermont itself to the cause of repelling the enemy. He urged citizens, in the event of a British invasion, to "fly at once to be nearest post of danger, and that the only rallying words will be—OUR COUNTRY."

²⁸ E.P. Walton, ed., *Records of the Governor and Council of the State of Vermont VI* (Montpelier, Vt.: Steam Press of J. & J.M. Poland, 1878), 493-494.

²⁹ Dutcher, "St. Albans," in Hemenway, *Vermont Historical Gazetteer II*, 295.

³⁰ *Id.* at 495.

³¹ *Records of the Vermont Council of Censors*, 198, 229.

³² G.N. Brigham, "Washington County—Introductory Chapter," Abby Maria Hemenway, ed., *Vermont Historical Gazetteer IV* (Montpelier, Vt.: Vermont Watchman and State Printers, 1882), 5.

³³ David Reed, "Essex," in Abby Maria Hemenway, ed., *Vermont Historical Gazetteer I* (Burlington, Vt.: A.M. Hemenway, 1867), 780.

³⁴ Charles C. Abbot, "Worcester," in Hemenway, *Vermont Historical Gazetteer IV*, 909.

³⁵ L.L. Dutcher, "June Training in Vermont," in Abby Maria Hemenway, ed., *Vermont Historical Gazetteer II* (Burlington, Vt.: A.M. Hemenway, 1871), 350.

³⁶ E.P. Colton, "Irasburgh," in Abby Maria Hemenway, ed., *Vermont Historical Gazetteer III* (Claremont, N.H.: The Claremont Manufacturing Company, 1877), 249.

³⁷ Federal Writers' Project, *The WPA Guide to Vermont: The Green Mountain State* (Boston: Houghton Mifflin Company, 1937), 241. "At the time people regarded Runaway Pond as a warning to men against rashly tampering with the work of Nature and God."

³⁸ Charles Kellogg Field, "Addenda to Biographical Sketches," in Hemenway, *Vermont Historical Gazetteer V*, 189.

³⁹ Clark Jillson, "Whittingham," in Hemenway, *Vermont Historical Gazetteer V*, 700-701.

⁴⁰ H. Eastman, "Halifax," *id.*, 420.

⁴¹ Joseph Clarke, "Goshen Gore," in Hemenway, *Vermont Historical Gazetteer I*, 436.

⁴² John D. Thomas, *University of Vermont* (Carleston, S.C.: Arcadia Publishing, 2005), 26.

⁴³ *Houston v. Moore*, 18 U.S. 1 (1820).

⁴⁴ *Mower v. Allen*, 1 D.Chip. 391, 393 (1824).

⁴⁵ *Fry v. Canfield*, 4 Vt. 9, 10 (1831).

⁴⁶ *Kingsbury v. Whitney*, 5 Vt. 470, 478 (1833).

⁴⁷ *Brainerd v. Stiphin*, 6 Vt. 9, 14 (1834).

⁴⁸ *Warner v. Stockwell*, 9 Vt. 9, 18-19 (1836).

⁴⁹ *Darling v. Brown*, 10 Vt. 148, 152 (1838).

⁵⁰ *Gilman v. Morse*, 12 Vt. 544, 552-553 (1840).

⁵¹ *Brown v. Wadsworth*, 15 Vt. 170, 173 (1843).

⁵² *Spear v. Flint*, 17 Vt. 497, 498 (1845).

⁵³ Anthony Marro, "Vermont's Local Militia Units, 1815-1860," *Vermont History* 40, 28.

⁵⁴ *Perpich v. Department of Defense*, 496 U.S. 334 (1990).

⁵⁵ 24 V.S.A. §§ 300, 301.

⁵⁶ Clark Jillson, "Whittingham," in Hemenway, *Vermont Historical Gazetteer V*, 700-701.





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TECH TIPS

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Did you know that 90% of modern data breaches now involve a phishing attack?

These attacks usually consist of fake emails designed to look like they're coming from a brand, person or institution you trust.

Their goal is to entice your clients to click a link or download an attachment, which, in turn, puts malicious files on your computer. This can enable hackers to steal your identity, breach your system and more.

The best way to defend yourself against phishing attacks is to train yourself and your staff to identify phony emails before they click on them.

Five Easy Ways for you to spot a fake Email;

- 1) Who's the real sender?
 - Make sure the organization name in the "From" field matches the address between the brackets.

Watch out for addresses that contain typos in the organization name (think amaz0n.com)

- 2) Check the Salutation
 - If you do business with an organization, the first line of the email should always contain your name. Don't trust impersonal introductions like "Dear Customer."
- 3) Use your mouse over
 - Hover over an email link to see the full URL it will direct you to. Do NOT click the link- just over. If the address isn't where you'd expect to go, don't click it. Check all the links – if the URLs are all the same, it's likely a phishing email.
- 4) What's in the footer?
 - The footer of any legitimate email should contain, at minimum:

- A physical address for the brand or institution
- An unsubscribe button
- If either of these items are missing it's probably fake.

- 5) When in doubt, delete
 - If you don't know the sender, or even if something seems off, delete the email. If it's not fake, the sender will contact you another way or send the message again.
 - To protect your local computer and office network you may want to look at it on a tablet like an iPad. Also do this when you are not connected to your local office network but outside of your network.



BATTLE OF WITS!



Last contest was too close to call—but we will have a victor soon. Keep those submissions coming.

Members are once again invited to bring forth their truly dizzying intellect and join the battle of wits!

We'd love to hear from you! Montpelier cartoon artist (and lawyer) Kathy Fechter has once again graciously provided us the above cartoon for our fierce competition. Submit your proposed caption to the above 'Vermont spring canyon' cartoon to jeb@vtbar.org. The deadline to submit your caption is June 1, 2018.

WHAT'S NEW?

The Vermont Commission on the Well-Being of the Legal Profession

On January 2, 2018, the Vermont Supreme Court established the Vermont Commission on the Well-Being of the Legal Profession. In the Commission's Charge and Designation, the Court referenced recent studies that reveal alarming statistics regarding mental health and substance abuse among legal professionals. For example, a December 2016 national study of practicing lawyers found that between 21 and 36 percent of lawyers qualify as problem drinkers, approximately 28 percent struggle with some level of depression, 19 percent suffer from severe anxiety and 23 percent have elevated stress.¹ A similar study of law students revealed that 25 percent of students were at risk for alcoholism, 17 percent experienced some level of depression, 14 percent had severe anxiety, 23 percent suffered mild or moderate anxiety and 6 percent had serious suicidal thoughts in the past year.²

Although formal studies particular to Vermont have not been undertaken, Vermont Bar Counsel Mike Kennedy has commented in his weekly "Ethical Grounds: The Unofficial Blog of Vermont's Bar Counsel" that there's no reason to presume that the statistics in Vermont are any different.³ In fact, since September 2016, "as many lawyers have had their licenses transferred to disability inactive status due to mental health or substance abuse issues as did in the previous 16 years."⁴

In a recent *Ethical Grounds* edition, Mike discussed even more sobering statistics. Citing a recent Substance Abuse and Mental Health Services Administration national survey on drug use and health, he noted that the survey estimated that approximately 4% of Vermonters had experienced serious thoughts of suicide over the past year. Extrapolating the 2,700 lawyers with active licenses in Vermont, one could posit that 108 Vermont lawyers have had serious thoughts of suicide over the past year. The tragic facts are that five Vermont attorneys have committed suicide in the past 3.5 years-- two in 2018.⁵ We need to do all that we can to ensure that help is readily available to anyone in the legal profession who needs it.

Towards that end, the Commission was established to create a state-wide action plan with concrete proposals for the Supreme Court to consider with three specific directives: (1) Develop a policy for con-

fidential interventions for lawyers, judges and law students struggling with mental health, well-being and/or substance abuse challenges; (2) Develop a plan to support and sustain a Lawyers Assistance Program in Vermont, to assist lawyers, judges and law students with mental health, well-being and/or substance abuse challenges; and (3) Provide on-going educational opportunities for lawyers, judges and law students regarding mental health, well-being and/or substance abuse self-assessments, programs and resources.⁶

There are resources available for creating a state-wide action plan. The National Task Force on Lawyer Well-Being issued a report in August 2017 entitled "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change."⁷ The Report contains 44 recommendations, including recommendations for judges, regulators, legal employers, bar associations, law schools, lawyer assistance programs, and lawyer professional liability carriers.

Vermont's Commission includes each of these stakeholder groups in the form of committees that have been tasked with reviewing the recommendations for each of the separate stakeholder groups. Each committee will meet over the next several months, and will then submit a report to the Commission regarding the feasibility of the National Task Force recommendations for Vermont, as well as the feasibility of any other recommendations applicable to the committee's subject area. By December 31, 2018, the Commission will compile the committee recommendations into a state action plan with specific proposals and any accompanying related proposed rule changes, for submission to the Vermont Supreme Court. It is anticipated that the plan will include a recommendation that the Court support and sustain a Lawyers Assistance Program to assist those in the legal profession with mental health, wellness and/or substance abuse challenges.

In order for the Commission to do its job well, it needs input from legal professionals throughout the state in the coming months. A plenary session about the Commission is scheduled at the VBA Mid-Year Meeting on Friday, March 23. Information about the Commission, its committees, and how to provide input is posted on the VBA website under "For Attorneys." The more input the

Commission receives from lawyers, judges, law students, paralegals, and anyone else connected with the legal profession willing to provide input, the better.

We owe it to ourselves, to our families, to our clients, and to our profession to do all that we can to address this critical issue

Teri Corsones, Esq. is the Executive Director of the Vermont Bar Association and is the Chair of the Vermont Bar Association Committee of the Commission.

¹ Patrick R. Krill, JD, LLM, Ryan Johnson, MA & Linda Albert, MSSW, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, J. Addict. Med. 2016 Feb; 10(1); 46-52.

² Jerome M. Organ, David B. Jaffe & Katherine M. Bender, Ph.D., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. Legal Educ., Autumn 2016, at 1, 116-56

³ Michael Kennedy, *Lawyers Helping Lawyers*, Ethical Grounds: The Unofficial Blog of Vermont's Bar Counsel, March 3, 2016: <https://vtbarcounsel.wordpress.com/2016/03/03/lawyers-helping-lawyers/>.

⁴ Michael Kennedy, *Five For Friday #108*, Ethical Grounds: The Unofficial Blog of Vermont's Bar Counsel, March 2, 2018: <https://vtbarcounsel.wordpress.com/2018/03/02/five-for-friday-108/>.

⁵ *Id.*

⁶ Vermont Commission on the Well-Being of the Legal Profession, Charge and Designation, January 2, 2018: <https://www.vtbar.org/FOR%20ATTORNEYS/Vermont%20Commission%20on%20the%20Well-Being%20of%20the%20Legal%20Profession.aspx>. (can be found on the vtbar.org website under For Attorneys).

⁷ Bree Buchanan and James C. Coyle, Chairs, National Task Force on Lawyer Well-Being Report: *Creating a Movement to Improve the Well-Being in the Legal Profession*, August 14, 2017. August 2017 Report at: <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf>.



WHAT'S NEW

Interview with VLS Dean Thomas McHenry

Teri Corsones: Tom, on behalf of Vermont Bar Journal readers everywhere, thank you for the chance to visit with you today.

Thomas McHenry: It's my pleasure.

TC: Now, it's been about 8 months since you began work in July as the 9th President and Dean of the Vermont Law School. Does it feel like that was just yesterday, or do you feel like you've been here forever?

TM: Both. It feels like I started yesterday because it's still so new, and it feels like I've been here for years on certain issues. I came from private practice, where I managed my time in increments of one tenth of an hour. That was both demanding, but at the same time, freeing, because it gave me a clear direction in terms of what I was supposed to do – solve a particular client's problem. At Vermont Law School, my responsibilities are so much broader. There aren't enough hours in the day to do all of the things that I need to do. I do like doing a lot of different things at the same time, though, and I have found that I like being the dean of a law school. I don't know whether I'm any good at it yet. And I guess we won't know for another couple of years. Nonetheless, it's been really, really fun so far.

TC: That's great to hear! Getting into your background a bit, I was curious about your schooling. You majored in history in college, and then got a master's in forest science, at Yale of all places.

TM: Seems pretty strange, particularly a master's in forest science at Yale, which is not well known for its forestry programs. Here's the answer in two parts. The first part is that the degree is now called a Master of Environmental Management, and that's what it essentially was at the time that I obtained it. The second part is that Yale was the first forestry school in the nation, founded in 1901 by Teddy Roosevelt's chief forester, Gifford Pinchot, whose family gave half a million dollars to start a forestry school.

TC: A complement to the national forests that Teddy Roosevelt is so well known for?

TM: Exactly, Roosevelt had designated these national forests, but there were no professionally trained foresters in the U.S. to manage them. The first eight heads of the U.S. Forest Service were graduates of the Yale Forestry School, as well as most of the first deans of the state forestry schools.



TC: That degree must have tied in nicely with your career as an environmental lawyer.

TM: It turned out that way. After college, I taught English for a year at a school in Boston, and then applied to both law and forestry school at the same time to combine my interest in both. I should confess that family may have played some role as my great grandfather, my father, my wife's father, and my wife's brother were all lawyers.

TC: Sounds like law is in your blood.

TM: I pretended that wasn't the case, but I suppose it was. I was admitted to law school the same year I was admitted to the Yale forestry program, so I deferred for two years before entering NYU Law School. I helped to re-start the Environmental Law Society at NYU, which was really fun, and I worked for an environmental law firm as well as for the NRDC, a nonprofit environmental group, so I really had the chance to explore environmental law early on.

TC: Your timing was great in terms of when environmental law started taking off.

TM: It was. All the major federal environmental laws were enacted in the 1970s, starting with the National Environmental Policy Act in 1969, the Clean Air Act in 1970 and the Clean Water Act in 1972. By the late 1970s, there was a set of regulations to enforce those federal laws, so the prosecution and enforcement of environmental law grew rapidly. At the same time,

Vermont Law School benefitted greatly from its early emphasis on environmental law -- there was a great need for people who understood environmental laws and we were teaching it.

TC: My Journal article at Cornell in 1982 was about NEPA's extra-territorial effect.

TM: There you go! That was the time environmental law took off, and Vermont Law School was both lucky as well as clever in focusing early on environmental law, because the practice grew greatly in the 1980s, 1990s and into the 2000s.

TC: It looks like you spent quite a bit of time working internationally. How did that come about?

TM: When I graduated from law school, I was eager to work overseas so I applied for a number of positions and was lucky enough to spend a year working in the National Parks Department of the Republic of China, located on the island of Taiwan. I was a research fellow in their main office earning \$750 a month – paid in cash at the beginning of each month. Working with some Chinese law professors and governmental regulators, I helped write a wildlife law for Taiwan. I then clerked for a federal judge in Sacramento for two years, and he had a lot of environmental cases. As a result of the wildlife law research I had done in Taiwan, I was retained as a consultant by the United Nations to write a Wildlife and National Parks Law for Liberia in West Africa, and then got to go to the Caribbean to

do the same, including forestry.

TC: You developed quite the niche!

TM: Much to my own surprise. As I advise students, if you look forward into your career, it's like pushing a rope. But when you look backward, you see the thread.

TC: That's a great way to look at it! Another thing I was curious about was how you ended up in LA.

TM: I met a very pretty girl between my 2nd and 3rd year of law school. She's from San Francisco.

TC: That's a good reason.

TM: After Taiwan, Sacramento, Liberia and the Caribbean, we were trying to decide where we wanted to live and start our careers. What appealed about Los Angeles was the variety of environmental issues -- air quality issues, because of the basin, water quantity and water quality, hazardous waste management, coastal issues, mountain issues, and desert resource issues.

TC: Not to mention impervious surface issues.

TM: True! Lots of impervious surfaces, including a vast network of freeways. I went to work for a boutique law firm of 7 lawyers that did a lot of work in the environmental area. We grew to 55 lawyers over the 11 years that I was there and I became a partner during that time. I then moved laterally to Gibson, Dunn & Crutcher, one of the oldest firms in LA, which now has over 1,250 lawyers in 22 offices worldwide.

TC: Did you work exclusively in environmental law?

TM: Yes. My practice included almost everything but hard core litigation in the environmental arena. I did a lot of compliance work on new laws and regulations, and a certain amount of enforcement work when clients got sued. I'm not expert on the criminal side, but I would work with white collar lawyers in our firm in environmental cases. Both firms were generous about allowing me to do a lot of pro bono work for non-profits and land trusts. I also

had a lot of business-related work, assisting real estate lawyers and corporate lawyers on transactions involving a contaminated property, sales of companies with asbestos liabilities, allocations of responsibilities for clean-up. That was the subject matter that brought me to Vermont Law School. I taught a two-week environmental business transactions class during Summer Session.

TC: Now that was through a college friend?

TM: Yes, John Echeverria, now a professor at VLS, was in my class in forestry school. He went on to Yale Law School and we worked on several pro bono projects together. He convinced me to come up in the summertime to teach -- and that was an easy sell! Two years ago, he and I taught a course together on comparative land use law in California, Vermont and France, affectionately referred to as "le boondoggle!" I taught the California portion, he taught the Vermont portion, and then we took ten students over to France for 10 days, which was *fantastique*.

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TC: Those were ten lucky students!

TM: Yes! Despite the “boondoggle” term, they learned a lot. I learned a lot. It was a great class and really fun. I hope we can repeat it.

TC: How did working in all of those different cultures, in so many different parts of the world, affect your views about environmental law?

TM: I started off with the naïve approach that I was going to be enlightening people in another country, and, of course, I ended up learning much more than I taught. We have a very rich environmental law jurisprudence in the United States, so one question was how could that be used to protect resources and manage the environment better in other countries? A lot of the work I did was in developing countries and I learned more about the political and social structures of these countries than I learned about the application of environmental law.

TC: What was the primary thing you learned?

TM: The success, or failure, of environmental law in a developing country is much more tied to the functioning of political and social systems than it is to any strict environmental issues. If you want to have good environmental laws, then it's critical to have the rule of law, which we tend to take for granted in the United States. We have the rule of law, we have an independent judiciary, we have a legal system that generally makes sense, and we have a political system that is by and large fair.

TC: There's a respect for the rule of law here.

TM: Exactly; we also have that in Western Europe, and certain parts of Asia, but much of the world is not there yet. You get very cynical when you're writing a wildlife law in a country where, essentially, all that you're doing is writing a report that sits on a shelf. So one of the things I did when I was a consultant was spend more of my time working on the policy side. Policy is what government says it's going to do. If you write a law for a developing country and the government adopts it but ignores it, nothing happens. But if the government adopts a policy on the management of wildlife or national parks or forestry, it's harder to ignore. It's easy to ignore a law, but it's harder to ignore a policy.

TC: That's really interesting.

TM: So I actually spent more time pushing the policy side, which was a way of getting the government to think about policy. I did a lot of outreach to government officials, and ultimately, it's all politics, right?

TC: You could say that's true everywhere.

TM: Including the United States. I went to the World Parks Congress a year ago, which is the gathering of the IUCN (International Union for Conservation of Nature) that meets every four years, like the Olympics. It was interesting to see that the IUCN Legal Commission was focusing its attention on reducing corruption and establishing the rule of law, and stating there could be no adequate environmental protection without these.

TC: To your point!

TM: There's now a broader realization that protecting nature and managing natural resources requires respect for the rule of law.

TC: It looks like during your very busy environmental law practice, you also consistently taught quite a bit.

TM: Yes, I did; I had a traditional private law practice, and we represented a broad range of clients, from Walmart to the mom and pop dry cleaner down the street. I loved working with lots of different clients. I always encourage law students to consider just how varied and interesting a private law practice can be. As for teaching, I got a call out of the blue, after I had been practicing for a couple of years. Claremont McKenna College wanted someone to teach environmental law to undergraduates, because they had a new major that included environmental policy. I agreed to teach a seminar course for just one semester, and I liked the students so much and I liked the teaching so much that I kept teaching there for 26 years!

TC: How did you fit that in your schedule?

TM: I taught on Tuesdays from 1:15 to 4 p.m. For the last ten years, I co-taught the course with a friend who works for the Nature Conservancy in California. The best part of the class was a three-day field trip to Death Valley National Park, when we met with the National Park Service and Fish & Wildlife and local conservationists—the students love it.

TC: Well, I think it's great that the dean of the law school has such a love for teaching. What do you enjoy most about teaching?

TM: What I like most about teaching is the process of watching students grapple with tough issues and work their way through them, and come to a greater understanding of their complexity. I would love to teach more classes here at Vermont Law School, but at the moment there are other things I need to be working on.

TC: Was the prospect of teaching part of the appeal when you considered the position of Dean and President?

TM: Absolutely. I had been in private practice for 30 years, and I could have kept practicing for several more, but I had lots of energy and I wanted to do something different, valuable and important. I also wanted a job that would be challenging. As my friends advised: “Be careful what you wish for!” The greatest appeal is being involved with teaching at the premier environmental law school in the United States, if not the world. And I love a good challenge.

TC: At a time when all law schools are certainly facing challenges.

TM: I was not aware of just how daunting those challenges are, but they are one that all law schools are facing, as is higher education generally. And working on those challenges matters, it matters to our present and future students and to practice of law. I like to think that every bit of energy I put into this effort is benefitting the students, the school, and the development of the environmental law. That is immensely satisfying.

TC: It's interesting that you've favored practical learning opportunities throughout your legal career, because I feel like that's one of Vermont Law School's strengths. It offers so many clinical, intern/extern and experiential learning opportunities. Is that a big reason why students are applying to Vermont Law School today?

TM: Yes, they are drawn by our strong clinical and experiential programs, and by our strong environmental programs. The other draw is the State of Vermont. Many simply want to be at a lovely, rural law school with a strong sense of community. We have a really high yield rate, which means that students who come visit the school are very likely to attend. They immediately get a sense of our warm and welcoming community.

TC: And that's what you recommend about the School?

TM: Yes. It's less important which courses you take in law school. What's important is that you begin to understand the law, you learn to write and think like a lawyer. That is what we teach well. All of the hands-on learning opportunities we offer contribute to that. This shows in our VLS alumni. We have two alums on the Vermont Supreme Court. We have alums in the AG's and States Attorney Offices. We have alums in the environmental agencies, in the private bar, and in small towns with rural practices. Our graduates are everywhere in Vermont.

TC: Did I read that whereas one out of ten incoming VLS students is from Vermont, two out of ten VLS graduates stay in Vermont?

TM: That's right, in fact, two out of ten of our alumni now live and work in Vermont. We have a large number who come not necessarily planning on staying, but who do stay after experiencing all the benefits. One of the nice things about the state of Vermont, because of its small size and its very strong sense of community statewide, is that it's a laboratory for our students to learn about law, not to mention the chance to learn about the governmental process. And the Vermont Bar Association has been terrific about minimizing the cost to members, as you only charge the students for the cost of food for the events and no administrative costs. I notice how much our students enjoy meeting private lawyers.

TC: Well, I'm thrilled with the relationships that we are building with the law school. I think you had been here just a week when we did the Trial Academy at VLS.

TM: That was great. It gave me the chance to meet so many private and governmental lawyers right off. Because we are the only law school in Vermont, we need to work closely with the VBA. It is incumbent upon us to assist the members of the bar in all ways possible. Hosting events and making the law school here in South Royalton both a forum and a meeting place for lawyers in the state are a couple of the ways VLS can be supportive. We are also now the state's law library, with services open to the public, and receive funding from the state to support that. We look forward to continuing to work together to effectively train new attorneys—as well as policy leaders, because of course we have master's students, too—for the legal challenges in Vermont, and to addressing legal and policy issues of statewide significance. Best of all, we get to work with you and get cookies!

TC: Glad to oblige!

TM: I sometimes worry that Vermont Law School is viewed as only an environmental law school and not broadly as THE law school in the state of Vermont. I want everybody to understand that is what we are, and I would like to see us be engaged in the full spectrum of legal and policy issues that affect Vermonters. If we're not doing that, then we're not doing our job.

TC: Well, I know how much good the South Royalton Legal Clinic is doing through its Vermont Immigration Assistance Project, Children First Legal Advocacy Project, Vermont Veterans Legal Assistance Project, and other initiatives. It's a

tremendous amount of good that the students are doing in just those respects.

TM: I think it goes directly to some of the things that Governor Scott and others would like to see—ways to bring very talented people into Vermont, which is great. We do have a 50th anniversary of our charter coming up in 2022, the fall of 2023 will be the 50th anniversary of our first entering class, and the fall of 2026 will be the 50th anniversary of our first graduating class, Class of '76.

TC: What are some of the plans for those milestones?

TM: We plan to celebrate the heck out of our 50 years in Vermont! We're certainly going to be collecting memories from some of our early alumni, faculty and staff, and we'll publish a commemorative book or video. We'll also host some great celebrations. In the meantime, we're also planning a 40th anniversary celebration for the Environmental Law Center this coming June 22 at the School – I hope many lawyers around the state will join us.

TC: Well, whatever the VBA can do to help in that regard, we are happy to. Like you said, so many of our licensed attorneys have Vermont Law School roots.

TM: My one goal before I step down as Dean, and maybe I'll get in trouble if I say it, but I think it would be fun: Two of the five members of the Vermont Supreme Court are graduates of Vermont Law School; we want to have a majority on the Supreme Court before I step down as Dean!

TC: That seems like a reachable goal.

TM: We'll see.

TC: Well, the VBA is delighted to do whatever it can to encourage VLS students to stay in Vermont. We're very proud to call it our home, and are proud that now you do as well.

TM: Thank you, Teri, this has been a real treat.

TC: Likewise!



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WRITE ON

Appellate Practice: Tips for Effectively Defining and Using Standards of Review in Appellate Practice

Every year at about this time, I start preparing my students for two important events at Vermont Law School. The first is the Vermont Supreme Court's annual visit to the law school during which the Court hears arguments in pending cases before a large group of eager law students. The second, and the one that tends to give students more trepidation, is the student's own classroom practice oral arguments. In talking with my students about these two events, I always start with a similar discussion. That discussion focuses on appellate process and the importance of effectively using standards of review in their advocacy. I'm not certain how much the standard of review discussions come up in their other courses, but in my experience, both practitioners and law students often miss out on the opportunity to effectively define and use the proper appellate standard of review in their writing and advocacy.

1. The Purpose of Standards of Review

Before we can delve into the most common standards of review and how to use them effectively, it's worth developing a working definition of, and purpose for, the standard of review concept. At its core, the standard of review determines how much deference an appeals court should give to a trial court in reviewing the trial court's decision on a given issue.

To my mind, there are two fundamental purposes that underlie the standard of review concept. First, having various standards of review promotes judicial efficiency because the standard ultimately drives the likelihood of success on appeal. The more deferential the standard of review, the less likely an appellant is to prevail and therefore, the less likely they are to appeal at all. The standard of review acts as a sort of gatekeeper, informing potential appellants as to the prudence of appealing a given issue. Second, the standard of review provides a lens through which the parties on appeal can focus and frame their arguments. The flip side of this is that the standard of review also helps direct the appellate court to the parties' most relevant facts and legal arguments. As the Vermont Supreme Court pointed out, one of the main purposes of determining the proper standard of review is to "unify precedent" across a jurisdiction.¹ This uniformity assists litigants and the lower courts in assessing a party's claims.

2. Defining Different Standards of Review

While there are many variants on standards of review that are applied in both state and federal court, there are three key standards that all practitioners should know and understand: *de novo*, clear error, and abuse of discretion. Within each of these three broad standards of review different jurisdictions may apply slight variants and use different terminology to describe these nuances. Accordingly, practitioners should research the precise standards of review in a particular court or jurisdiction before making a standard of review argument on appeal. However, it is at least helpful to consider the "big three" standards and become familiar with some basic principles that inform and underlie each.

De Novo

When parties appeal questions of law, such as interpreting a statute or a constitution, those appeals are generally reviewed under the *de novo* standard of review.² When an appellate court reviews an issue under the *de novo* standard of review it means that it gives no deference to the lower court's decision.

The logic to applying this standard of review is twofold. First, an appellate court can rule just as readily as a lower court on a question of law because there is no need for the direct examination of evidence. Second, the *de novo* standard is most useful for questions of law because it is the appellate court that must settle such issues for the sake of uniformity across an entire jurisdiction.

From an appellant's perspective, the *de novo* standard of review is preferable because it allows the appellate court to review the lower court's decision without giving deference to the lower court's legal conclusions. Thus, the possibility of reversal is arguably more likely under the *de novo* standard of review.

Clearly Erroneous

When it comes to a trial court's findings of fact, the standard of review is known as the clearly erroneous or clear error standard.³ Under this highly deferential standard of review, the appellate court will only overturn a lower court's finding of fact if the appellant can show that there is no credible evidence to support a factual finding.⁴

The rationale for applying such a deferential standard of review to findings of fact

is that an appellate court does not hear the evidence or witness the testimony. Therefore, as Federal Rule of Civil Procedure 52(a) explains "due regard shall be given to the trial court to judge the credibility of the witness."⁵ In short, since an appellate court does not review evidence first hand, it is not in a good position to judge whether a particular piece of evidence or witness testimony should be adopted as fact. Since the trial court sees and hears the evidence in the first person, its decisions on factual findings must be given significant deference.

Under this standard of review, the likelihood of an appellant successfully convincing an appellate court to reverse a trial court is very low. As the Vermont Supreme Court explained "a finding [of fact] will not be disturbed merely because it is contradicted by substantial evidence...."⁶ Therefore, appellants should think carefully before arguing on appeal that the lower court erred in making a finding of fact. Unless the appellant can show clear error, the appellate court will not disturb the trial court's finding and the appellant will lose on that issue.

Abuse of Discretion

Typically, evidentiary issues such as a trial court's decision to admit a particular piece of evidence is reviewed under the abuse of discretion standard.⁷ While the abuse of discretion standard is quite deferential, as the Vermont Supreme Court explained, it "does not mean, however, that [the court] will not engage in a substantial and thorough analysis of the trial court's decision and order to ensure that the trial judge's decision was [correct]."⁸ Because trial court judges must make discretionary decisions on a regular basis, there would be significant impacts on judicial efficiency if appellate courts reviewed those discretionary decisions under a *de novo* standard.

While each jurisdiction sets forth what trial court decisions are "discretionary" a good general rule of thumb is that evidentiary issues and those decisions that are committed to the discretion of the trial court by statute typically fall into the category of discretionary. Accordingly, an appeal based on an argument that such a trial court decision was in error, would be subject to the less deferential abuse of discretion standard.

3. Using Standards of Review Effectively

By giving short shrift to the standard of review component of an appellate brief, many attorneys miss the opportunity to be a more

effective advocate. There are at least three important junctures in the appellate process where successful litigators can make effective use of the standard of review. First, successful appellate litigators use the standard of review in deciding whether and what to appeal. Second, appellate attorneys use the standard of review in briefing the case. And, third, appellate attorneys should use the standard of review during oral argument. In summary, not only does determining the appropriate standard of review help an attorney decide which issues to appeal but it can also be the difference between a successful appeal and failure.

The Role of Standards of Review in Deciding Whether and What to Appeal

As practitioners, when we are not successful in the trial court we often believe that the court made numerous mistakes. After having worked a case for a long period of time, it is only natural to feel as though our position or our client is right. Indeed, that is what vigorously representing a client in an adversarial legal system often requires. To that extent, we may consider attempting to appeal every perceived error without considering how the standard of review will impact our likelihood of success. Recognizing that findings of fact are reversed only for clear error or that evidentiary decisions are reversed only for abuse of discretion is a critical step in helping to focus an appeal. Because we have limited time and space in which to draft an appellate brief, it makes sense to prioritize arguments that are subject to *de novo* review. In short, knowing the standard of review helps us decide whether and what to appeal.

The Role of Standards of Review in Briefing an Appeal

Once you've decided to appeal, it becomes important to appropriately brief the standard of review issue. To be sure, not every appellate case turns on the standard of review. However, in writing every appellate brief, attorneys should clearly, and as succinctly as possible, set forth the relevant standard of review at the beginning of the brief. In many cases, there might be several different standards of review. If the appellant chooses to appeal both a question of law and a question of fact, then the appellant should set forth both standards of review in their written brief.

If the standard of review is not in dispute (and often it is not) then the appellant should succinctly set forth the standard of review with appropriate citation to support that standard of review at the beginning of the brief. If, on the other hand, the standard of review is in dispute, then both parties to an appeal should brief the issue just as they would any other legal issue. This means writing about the appropriate standard of review in the argument or discussion section of a brief.

Obviously, each party should argue for a standard of review that is most beneficial to their side. If you are the appellant and you can argue for *de novo* review rather than clear error, you should do that. If you are the appellee the opposite is true – obviously you'd want the most deferential standard of review because you were successful below. Because the standard of review can have such a major impact on how an appellate court reviews an appeal, attorneys should not short shrift the issue or assume that it is unimportant in the briefing process. Determine the proper or best standard of review for your side and argue the issue as needed.

The Role of Standards of Review in Oral Argument

After law school I clerked for several appellate judges who almost always asked a question or two at the beginning of an oral argument about the proper standard of review. Not all appellate judges do this but it is common enough that appellate practitioners should be prepared to state the appropriate standard of review at oral argument. Even if no member of an appellate court asks directly about the standard of review, it can be a good practice to set forth the standard of review early in an oral argument. It helps frame the issues and focuses the court. Accordingly, the standard of review should generally be part of your oral argument outline.

Ultimately, as practitioners our job is to persuade a judge or jury that our arguments are legally sound. At the trial court level, that means writing and presenting our arguments as clearly and persuasively as possible. On appeal, the same applies but we have the added opportunity to use standards of review to increase our likelihood of success before an appellate court. Whether we represent the appellant or appellee, determining and, if necessary, effectively arguing a beneficial standard of review, is a vital part of good appellate advocacy.

Jared Carter is an Assistant Professor of Law at Vermont Law School. Jared teaches legal activism, legal writing and appellate advocacy at VLS. He also directs the Vermont Community Law Center, a non-profit legal services organization focused on social justice, constitutional rights and consumer protection.

¹ *State v. Weisler*, 190 Vt. 344, 356 (2011).

² *State v. Eldredge*, 180 Vt. 278, 280 (2006).

³ *Mullin v. Phelps*, 162 Vt. 250, 260 (1994).

⁴ *Highgate Assocs. v. Merryfield*, 157 Vt. 313, 315 (1991).

⁵ Fed. R. Civ. P. 52(a).

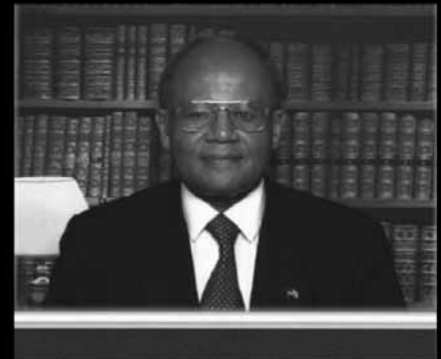
⁶ *Mullin*, 162 Vt. at 261.

⁷ *USGen New England, Inc. v. Town of Rockingham*, 177 Vt. 193, 202 (2004).

⁸ *958 Associates, Ltd. v. Daewoo Electronics America*, 183 Vt. 208, 214 (2008).



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Going Behind the Headlines: Spotlight on Sexual Harassment Law

Introduction

Explosive news reports of the serial sexual misconduct of movie mogul Harvey Weinstein and men of a similar ilk – powerful, dominating, career-making – have dominated the headlines since October 2017, making sexual harassment a compelling topic of discussion on social media, in the workplace, at school, around the dinner table, and in its most glamorous form, at award shows. In these different forums, the term “sexual harassment” encompasses a wide range of behaviors, and what people perceive and experience as sexual harassment might not actually fit the legal definition that has evolved since the enactment of Title VII of the Civil Rights Act of 1964 (“Title VII”).

Title VII prohibits discrimination with respect to terms and conditions of employment “because of such individual’s race, color, religion, sex, or national origin.”² Although the media often focus on sexual harassment litigation, the establishment of a theory of harassment as a form of prohibited discrimination was the result of a case involving offensive conduct based on national origin.³ In fact, Title VII’s coverage of discrimination based on sex was a last minute addition to the legislation by a Southern Congressman, who opposed civil rights and believed that the addition of protection for women in employment would kill the bill.⁴

Of all the charges received by the EEOC in Fiscal Year 2017, 30.4% involved claims of sexual discrimination, whereas 48.8% involved claims of retaliation and 33.9% were due to race-based discrimination. In 2017, the EEOC received 6,696 sexual harassment charges (16.5% by males) and recovered \$46.3 million in monetary benefits for victims of sexual harassment.⁵

Discrimination because of sex in employment is similarly prohibited under Vermont state law pursuant to the Fair Employment Practices Act (“VEPA”), 21 V.S.A. § 495. The Vermont Attorney General’s Office is the designated fair employment practice agency for resolving discrimination complaints. There is a work-sharing agreement between the EEOC and the Vermont Attorney General’s Office that allows for a complaint of discrimination filed with either agency to effectively result in a filing with the other agency.⁶ Based on EEOC statistics, there were 46 charges alleging discrimination filed with the EEOC and the Vermont Attorney General’s Office, 16 of which involved claims of

sex discrimination (34.8% of all state charges).⁷ Of those filed, 6 alleged sexual harassment (five by females and one by a male).

Primer on Sexual Harassment Law:

Sexual harassment has been recognized as a form of discrimination prohibited by Title VII since 1986, when the United States Supreme Court recognized such a claim in its landmark ruling *Meritor Savings Bank, FSB v. Vinson*.⁸ “Harassment” *per se* is not explicitly prohibited by the statute; nevertheless, the Supreme Court has interpreted the statute as a whole to prohibit harassment. The Supreme Court has found that that “[t]he phrase ‘terms, conditions or privileges of employment’ evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment.”⁹

Courts and practitioners often characterize sexual harassment discrimination claims as either “*quid pro quo*” or “hostile work environment” but a plaintiff can plead a claim of sexual harassment without necessarily using those specific terms.¹⁰ “*Quid pro quo* sexual harassment refers to situations in which ‘submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting such individual.... It is enough to show that the supervisor used the employee’s acceptance or rejection of such advances as the basis for a decision affecting the compensation, terms, conditions or privileges of the employee’s job.’”¹¹ Simply stated, “*quid pro quo*” harassment is when a supervisor offers “this for that” – i.e., a job or promotion for sex or a denial of such job opportunities for failing to acquiesce.

The Supreme Court defined a “hostile work environment” actionable under Title VII as one in which the “workplace... [is] permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment. . . .”¹² As for cases involving sexual harassment, “[t]o be actionable, the conduct at issue need not contain any sexual component or any reference to the victim’s sex; on the other hand, it must be ‘reasonably interpreted as having been taken on the basis of plaintiff’s sex.’”¹³

Similarly, to establish a claim of sexual ha-

arrassment under VEPA, a plaintiff must first “prove that the harassment was sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment” and then “show that a specific basis exists for imputing the conduct that created the hostile environment to the employer.”¹⁴ “[A]n employer will be liable if the plaintiff demonstrates that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it.”¹⁵

An actionable claim of hostile work environment harassment has both subjective and objective components: the environment must be one that a reasonable person *in the plaintiff’s position* would find hostile or abusive, and one that the victim in fact did perceive to be so.¹⁶ “The objective hostility of a work environment depends on the totality of the circumstances, viewed from the perspective of a reasonable person in the plaintiff’s position, considering all the circumstances [including] the social context in which particular behavior occurs and is experienced by its target.”¹⁷

To determine whether an environment is sufficiently hostile or abusive, courts consider the totality of the circumstances, including the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”¹⁸ An oft-cited passage from the Supreme Court decision in *Oncale v. Sundowner Offshore Servs., Inc.*,¹⁹ is illustrative of the fine line courts frequently walk to separate Title VII from a “general civility code:”

[Title VII] does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the “conditions” of the victim’s employment.... We [the Supreme Court] have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace – such as male-on-male horseplay or intersexual flirtation – for discriminatory “conditions of employment.”²⁰

Defining "Sex"

Despite the legislative history surrounding the introduction of "sex" to Title VII, and its specific (albeit sardonic) reference to women, the statute protects both men and women, and prohibits discrimination by members of the same sex. "Title VII's prohibition on discrimination 'because of...sex' protects men as well as women" and situations where the "plaintiff and the defendant...are of the same sex."²¹

Less well-settled is the notion that Title VII prohibits discrimination based on sexual orientation. The Second Circuit recently found that "sex" encompasses sexual orientation in *Zarda v. Altitude Express, Inc.*, decided on February 26, 2018. In *Zarda*, the court overruled precedent in its circuit and held that "Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of...sex'."²² All states within the Second Circuit already have anti-discrimination laws expressly including sexual orientation and/or gender identity/expression as a protected category.²³

The plaintiff in *Zarda* was a skydiving instructor who had informed a client that he was gay in order to assuage any concerns she or her boyfriend might have regarding the close physical proximity required between *Zarda* and the girlfriend by being strapped together for a tandem skydive. The boyfriend then advised *Zarda's* boss, who terminated *Zarda*. *Zarda* filed a discrimination charge with the EEOC, and subsequently a federal lawsuit, alleging that he was discriminated against because of his sexual orientation and because of his gender.

At the time *Zarda* filed his complaint, only the EEOC and one circuit court had found that discrimination due to sexual orientation was discrimination "because of sex" under Title VII.²⁴ The Second Circuit found in favor of *Zarda* on the theories of sex-based discrimination, gender stereotyping and associational discrimination:

[S]exual orientation discrimination is a subset of sex discrimination because sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account. Sexual orientation discrimination is also based on assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted. Finally, sexual orientation discrimination is associational discrimination because an adverse employment action that is motivated by the employer's opposition to association between members of particular

sexes discriminates against an employee on the basis of sex.²⁵

As a result of the *Zarda* decision, individuals employed within that Court's jurisdiction will now have available to them a claim of sexual orientation discrimination under Title VII as well as state law claims, including claims of a hostile work environment. This decision eliminates a significant barrier for individuals advancing harassment claims based on their sexual orientation because when pursuing gender-based discrimination claims evidence of conduct directed at an individual due to their sexual orientation -- for example, epithets such as "fag," "queer," "butch" -- rather than their biological sex, is now relevant evidence of discrimination.²⁶

The Affirmative Defense

An employer's liability hinges on the status of the harasser. If the harasser is an executive or other employee of sufficiently high rank that his or her actions "speak" for the employer (e.g., a sole proprietor, owner, partner, corporate officer, or high-level supervisor), then an employer will be held strictly liable for the harasser's actions.²⁷ If the harasser is a supervisor, and there is a tangible job action taken against the harassed employee (i.e., termination, demotion, suspension), such as in cases involving *quid pro quo* harassment, the employer will be vicariously liable.²⁸ Absent a tangible job action, typically with hostile work environment claims, the employer has available to it a two-part affirmative defense: (i) the employer took reasonable steps both to prevent the harassment and to remedy the harassing conduct; and (ii) the harassed employee unreasonably failed to avail himself or herself of any corrective or preventive opportunities offered by the employer.²⁹ Based on two Supreme Court cases decided in 1998, this affirmative defense is referred to as the "*Faragher/Ellerth* Defense."³⁰

As a result of these two Supreme Court cases, many employers drafted sexual harassment policies and set forth complaint procedures in an effort to evade liability even if harassment occurred. Such employer actions have not been a fail-safe to avoid sexual harassment claims and in the current climate, it is incumbent upon employers to review these policies and ensure that their policies and procedures create a meaningful and accessible process for receiving and responding to complaints, and for taking corrective action, if warranted. Indeed, the EEOC and a designated Select Task Force on the Study of Harassment in the Workplace, recently issued a comprehensive report on sexual harassment. The report includes several key recommendations for employers to implement policies and con-

duct trainings with a preventative focus such as bystander intervention training, training tailored to the employer's actual workforce and workplace culture,³¹ and workplace civility training.³²

When is Enough Enough? The Severe or Pervasive Standard.

Courts today still struggle with just how much the offending behavior must "permeate" the workplace to be "sufficiently severe or pervasive." There is no one-size-fits-all test for harassment claims. As one federal judge noted: "[D]etermining the intensity/quantity of sexual gesturing, touching, bantering and innuendo that it takes to render a work environment sexually hostile is now no less difficult than 'trying to nail a jellyfish to the wall.'"³³

Cases finding sufficient "severity" to constitute unlawful harassment often involve physical contact. "Even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability."³⁴ The Second Circuit has offered guidance on distinguishing between physical contact that rises to the level of actionable harassment from other forms of physical contact between coworkers and, unsurprisingly, a crucial component is consent.

Casual contact that might be expected among friends - a hand on the shoulder, a brief hug, or a peck on the cheek - would normally be unlikely to create a hostile environment in the absence of aggravating circumstances such as continued contact after an objection. And even more intimate or more crude physical acts - a hand on the thigh, a kiss on the lips, a pinch of the buttocks - may be considered insufficiently abusive to be described as severe when they occur in isolation. But when the physical contact surpasses what (if it were consensual) might be expected between friendly coworkers it becomes increasingly difficult to write the conduct off as a pedestrian annoyance. *Direct contact with an intimate body part constitutes one of the most severe forms of sexual harassment.*³⁵

"[R]epeated touching of intimate parts of an unconsenting employee's body is by its very nature severely intrusive' and not considered 'normal' in the workplace...Though reasonable people expect to 'have their autonomy circumscribed in a number of ways' in a workplace, 'giving up control over who can touch their bodies is usually not one of them'."³⁶

As for "pervasiveness," depending upon

the nature of conduct, in particular the comment or epithet that engenders the claim, courts have found that even very few utterances may be sufficient to state a claim.³⁷ For example, the Second Circuit found that a supervisor's comments were sufficiently beyond the line drawn by the Supreme Court in *Harris* where a male supervisor said to a female employee, repeatedly over several weeks, that her husband was "not taking care of [her] in bed." The Court opined that a trier of fact could reasonably interpret that statement to be a solicitation for sexual relations, especially when coupled with the supervisor's claim of his own sexual prowess, and when considered in light of sexual advances made by the male supervisor to the plaintiff and another employee, and therefore, the plaintiff proffered sufficient evidence of a sexually hostile work environment.³⁸

The Impact of Harvey Weinstein: Challenging the Secrecy of Sexual Harassment Settlements

Non-Disclosure Agreements

Historically, a standard part of nearly every settlement agreement resolving claims of sexual discrimination, and most other forms of discrimination, is a confidentiality clause or non-disclosure agreement ("NDA"). In the wake of revelations about the decades of sexual abuse by the legendary – and now infamous – Harvey Weinstein, and the fact that his behavior had been challenged in the past but kept hidden through NDAs (and extremely onerous ones at that), the inclusion of such provisions is under tremendous scrutiny. Legislators in states such as Vermont, New York, Pennsylvania and California³⁹ have reacted swiftly to try to put an end to these clauses, or at least restrict their use in cases involving sexual assault. Congress has also taken up the issue of NDAs with the introduction of the "Ending Secrecy About Workplace Sexual Harassment Act," which would require companies to annually report all court settlements involving sexual harassment, assault and discrimination to the EEOC.⁴⁰

Currently under review by the Vermont legislature is a bill, H.707, which proposes several amendments to VEPA § 495h to address the use of NDAs in connection with sexual harassment claims. In particular, the bill includes a prohibition on the use of NDAs as part of any employment agreement as a condition of employment, such that an employee or prospective employee could not be "prohibit[ed], prevent[ed], or otherwise restrict[ed]...from opposing, disclosing, reporting or participating in an investigation of sexual harassment."⁴¹

Until any such legislation is passed, employers and employees will grapple with

the desire to keep a settlement confidential. Contrary to assumptions, NDAs do not necessarily benefit solely the employers at the plaintiffs' expense. Victims of harassment often prefer confidentiality clauses in order to minimize damage to their reputation if their claims become public. The victim may be concerned about how he or she may be perceived by potential employers or the community-at-large if the fact of his or her complaint becomes known. Or, the victim may prefer not to have the conduct to which he or she was subjected publicized, especially in cases of sexual assault, coerced sexual activity and/or any other behavior that caused the victim to be demeaned, denigrated or harassed. Although we are now bombarded with stories of high-profile harassers, i.e., individuals who have protected their image and livelihood through NDAs, and victims who are able to garner media attention for openly discussing their victimization, there are vast numbers of victims and harassers for whom publicity would be equally unwelcome.

Further, employers may resist settling certain claims if they are not able to obtain an NDA because a major benefit of settlement to the employer is a contractual right to the victim's silence. Absent non-disclosure, the employer may seek alternatives to addressing the situation. Moreover, if employers become more aggressive about investigating claims of misconduct and taking corrective action, litigation risk would be minimized, creating an additional hurdle for victims seeking damages for the economic and non-economic injuries as a result of the harassment. Although it is unlikely that employers will seek to publicly capitalize on the fact that they were employing harassers, the fact that they quickly acted to redress the situation, particularly, if the harasser is terminated, may be viewed positively if it becomes public or at a minimum, not risk significantly tarnishing the employer's image.

Arbitration Agreements

Employment agreements that include clauses mandating arbitration for claims of sexual harassment are also under scrutiny. Although the trend of favoring arbitration agreements has remained steadfast in many areas of the law (for example, arbitration agreements that contain a waiver of an employee's right to pursue a class or collective action), the same wave of criticism about the secrecy of NDAs has also targeted the non-public adjudication of sexual harassment claims through private arbitration. The Vermont Attorney General, T.J. Donovan, recently joined Attorney Generals from all 50 states, Washington, D.C. and five U.S. territories in penning a letter to Congress calling on the leadership to enact legislation ending the use of such arbitration clauses.

The Attorney Generals were clear in their goal: "Ending mandatory arbitration of sexual harassment claims would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims."

Non-Waivable Right to File a Claim with the EEOC

Notwithstanding an NDA, mandatory arbitration provision or a release and waiver of claims, the EEOC has long held that even though an individual may enter into a settlement agreement, he or she still has a non-waivable right to file a complaint with the EEOC and cooperate with any EEOC investigation. The EEOC has interpreted Title VII's language prohibiting an employer from "interfer[ing] with the protected right of an employee to file a charge, testify, assist, or participate in any manner in an investigation, hearing, or proceeding" as guaranteeing an employee the right to pursue a claim with the EEOC.⁴² In its Enforcement Guidance, the EEOC advises that "[a]greements that attempt to bar individuals from filing a charge or assisting in a Commission investigation...have a chilling effect on the willingness and ability of individuals to come forward with information that may be of critical import to the [EEOC] as it seeks to advance the public interest in the elimination of unlawful employment discrimination."⁴³ This continues to be a strategic enforcement priority for the Agency.⁴⁴ However, no court has thus far adopted the position of the EEOC. Some Vermont legislators have been seeking to codify EEOC's position and extend it to the filing of a complaint of sexual harassment with the Attorney General, a State's Attorney, the Human Rights Commission, or any other State or federal agency.⁴⁵

Despite the existence of this right recognized by the EEOC, and based strictly on anecdotal information, it seems that victims who settle their claims privately with their employer rarely choose to subsequently file a claim with the EEOC.

Conclusion

For over a half-century, federal law has prohibited discrimination because of sex, yet employees experience discrimination in the workplace day-in and day-out. Discrimination in the form of sexual harassment and a hostile work environment has been actionable for over thirty years. Sexual harassment has been at the forefront of the news before, perhaps most dramatically during the Clarence Thomas hearings when Anita Hill graphically testified (to no avail) about the harassment she suffered while his subordinate at the EEOC. It is too soon to tell whether the public dialogue taking place around sexual harassment will cause judg-

es and juries to use a different lens in evaluating whether the complained of conduct is sufficiently “severe” or “pervasive” to impose liability. In the meantime, the #metoo movement, the very public takedown of superstar harassers, the emphasis on renewed training and education focused on bystander interruptions to stop sexual harassment in its tracks, and the undoing of how victims have been silenced, may be the enduring legacy of the Weinstein revelations more than any material change in Title VII jurisprudence.

Hope Pordy Esq., is a Labor/Employment attorney representing employees in discrimination cases, wage and hour violations (e.g., non-payment of overtime), employment/severance agreements and unions in various industries, particularly creative artists in the entertainment industry, as well as workers in the public sector

¹ Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352), as amended, 42 U.S.C. § 2000e et seq.

² 42 U.S.C. § 2000e-2(a)(1).

³ *Rogers v. EEOC*, 454 F.2d 234, 237-38 (5th Cir. 1971) (holding that plaintiff’s allegations that she was abused by white co-workers and limited in her job duties by bias against her stated a claim because “the relationship between an employee and his working environment is of such significance as to be entitled to statutory protection”).

⁴ Congressman Howard W. Smith (Virginia) proposed the amendment to add “sex” as one of the protected categories to delay committee consideration of the bill in the hopes that racial protests occurring around the country would trigger a backlash against an antidiscrimination bill perceived to be favoring African-Americans. The disingenuousness of his amendment is demonstrated by some of his supporting remarks:

The census of 1960 shows that we had 88,331,000 males living in this country, and 90,992,000 females, which leaves the country with an “imbalance” of 2,661,000 females. Just why the Creator would set up such an imbalance of spinsters, shutting off the “right” of every female to have a husband of her own, is, of course, known only to nature. But I am sure you will agree that this is a grave injustice to womankind and something the Congress and President Johnson should take immediate steps to correct, especially in this election year. Would you have any suggestions as to what course our Government might pursue to protect our spinster friends in their “right” to a nice husband and family?

110 Cong. Rec. 2577-78 (1964). The amendment did receive vocal support from a few female lawmakers backed by women’s rights advocates.

⁵ EEOC FY 2017 Enforcement and Litigation Data, <https://www.eeoc.gov/eeoc/newsroom/release/1-25-18.cfm>.

⁶ *Kubler v. Heritage Auto. Grp., Inc.*, Case No. 5:16-dv-180, 2017 U.S. Dist. LEXIS 187998, at *25-26 (D.Vt. June 14, 2017).

⁷ https://www1.eeoc.gov/eeoc/statistics/enforcement/charges_by_state.cfm#centercol. It is interesting to note the decline in sexual harassment charges over the period of time data was collected between 1997-2017, with 29 being the highest number of sexual harassment charges, filed in 1998.

⁸ 477 U.S. 57 (1986).

⁹ See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (S.Ct. 1993) (citing *Meritor Savings Bank, FSB*

v. Vinson, 477 U.S. 57 (1986)).

¹⁰ “The terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility.” *Schiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 603 (2d Cir. 2006) quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998); See also *Jones v. Needham*, 856 F.3d 1284, 1291 (10th Cir. 2017)(sufficient to “describe generally” alleged sexual discrimination without specifying claim is one of *quid pro quo* or hostile work environment).

¹¹ *Perks v. Town of Huntington*, 251 F. Supp. 2d 1143, 1154-55 (E.D.N.Y. 2003) quoting *Karibian v. Columbia Univ.*, 14 F.3d 773, 777-78 (2d Cir. 1994); *Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84, 91 (2d Cir. 2002) (“requiring an employee to engage in unwanted sex acts is one of the most pernicious and oppressive forms of sexual harassment that can occur in the workplace”).

¹² *Harris*, 510 U.S. at 21; *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000).

¹³ *Scott v. City of New York Dep’t of Corr.*, 641 F.Supp.2d 211, 224 (S.D.N.Y. 2009) (quoting *Gregory v. Daly*, 243 F.3d 687, 695 (2d Cir. 2001)); see, e.g., *Howley v. Town of Stratford*, 217 F.3d 141, 153-54 (2d Cir. 2000)(conduct that was not overtly sex-based constituted part of hostile work environment where plaintiff was the only woman among 100 firefighters and other harassing conduct was explicitly sexual in nature).

¹⁴ *Connolly v. Alderman*, 2017 U.S. Dist. LEXIS 198359, at * 5-6 (D.Vt. Dec. 1, 2017) (quoting *Perry v. Ethan Allen Inc.* 115 F.3d 143, 149 (2d Cir. 1997)).

¹⁵ *Id.*

¹⁶ *Redd v. N.Y. State Div. of Parole*, 678 F.3d 166 (2d Cir. 2012)

¹⁷ *Id.* (quoting *Petrosino v. Bell Atlantic*, 385 F.3d 221) (internal quotations omitted).

¹⁸ *Desardouin v. City of Rochester*, 708 F.3d 102, 105 (2d Cir. 2013) (quoting *Harris*, 510 U.S. at 23) (internal quotation marks omitted).

¹⁹ 523 U.S. 75, 80 (1993).

²⁰ *Id.* at 81.

²¹ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78-79 (1998).

²² 2018 U.S. App. LEXIS 4608, at *10 (2d Cir. Feb. 26, 2018).

²³ VEPA, 21 V.S.A. § 495(a); New York State Human Rights Law (“NYSHRL”), Exec. Law Art. 15, § 295(1)(a); Connecticut Fair Employment Practices Act (“CFEPA”), Conn. Gen. Stat. Chap. 814c, §§ 46a-60, 46a-81a.

²⁴ *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 EEO PUB LEXIS 1905, 2015 WL 4397641 (July 15, 2015)(holding that sex discrimination includes sexual orientation discrimination); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017)(en banc); cf. *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 12561257 (11th Cir.), cert. denied, 138 S. Ct. 557, 199 L. Ed. 2d 446 (2017) (collecting circuit court cases holding that sexual orientation discrimination is not actionable under Title VII).

²⁵ *Zarda*, 2018 U.S. App. LEXIS 4608, at *61.

²⁶ *Boutillier v. Hartford Pub. Schs.*, 221 F.Supp.3d 255, 269 (D.Conn. 2016)(sexual orientation discrimination must be excluded from the equation when determining whether allegations or evidence of gender non-conformity discrimination are sufficient); *Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist.*, 169 F.Supp.3d 320, 332-33 (N.D.N.Y. 2016)(homophobic slurs permitted only when directed at a heterosexual).

²⁷ *Townsend v. Benjamin Enterprises*, 679 F.3d 41, 52-55 (2d Cir. 2012).

²⁸ *Burlington Indus. v. Ellerth*, 524 U.S. 742, 760-61 (1998).

²⁹ *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

³⁰ *Id.*

³¹ For example, in my work in the entertainment field, I conduct training to address industry-specific issues such as nudity on set, sex scenes, guided physical movements by directors, choreographers, etc. Another example is where an employer may frequently hold off-site events and rules of conduct should be in place and disseminated for situations outside the traditional work setting.

³² https://www.eeoc.gov/eeoc/task_force/harassment/report_summary.cfm

³³ *Breda v. Wolf Camera, Inc.*, 148 F.Supp.2d 1371, 1377 (S.D.Ga 2001) (quoting *Rosanova v. Playboy Enterprises, Inc.*, 411 F.Supp. 440, 443 (S.D.Ga. 1976), *aff’d*, 580 F.2d 859 (5th Cir. 1978)).

³⁴ *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995).

³⁵ *Redd v. New York Div. of Parole*, 678 F.3d 166, 177 (2d Cir. 2012) (emphasis added) (internal quotations and emphases omitted).

³⁶ *Delsasso v. 1249 Wine Bar*, 2017 U.S. Dist. LEXIS 50050, at *8-9 (D.Conn. 2017) (quoting *Redd v. New York Div. of Parole*, 678 F.3d 166, 177 (2d Cir. 2012)).

³⁷ See *Mathirampuzha v. Potter*, 548 F.3d 70, 79 (2d Cir. 2008) (“extraordinarily severe” single event, or a series of incidents that were “sufficiently continuous and concerted” to alter the conditions of a plaintiff’s working environment); Cf. *Petrosino v. Bell Atl.*, 385 F.3d 210, 223 (2d Cir. 2004)

³⁸ *Desardouin*, 708 F.3d at 105-06.

³⁹ PA State Senate, SB999 (prohibits non-disclosure agreements within contracts or secret out-of-court settlements related to sexual harassment or sexual misconduct); NJ State Senate, No. 121 (bars agreements that conceal details relating to discrimination claims); NY State Senate, No. (prohibits any provision in any contract or agreement which has the purpose or effect of concealing the details relating to a claim of discrimination or harassment); CA Code, Code of Civil Procedure, CCP § 1002 (prohibits non-disclosure provisions in cases involving a felony sex offense, childhood sexual abuse, sexual exploitation of a minor, and sexual assault).

⁴⁰ H.R. 4729 (115th Congr.), Introduced by Rep. Carolyn Mahoney on December 21, 2017.

⁴¹ H.707 was introduced into the Vermont House of Representatives on January 25, 2018, and was referred to the committee on General, Housing and Military Affairs.

⁴² EEOC, Understanding Waivers of Discrimination Claims in Severance Agreements, https://www.eeoc.gov/policy/docs/qanda_severance-agreements.html.

⁴³ EEOC, Notice No. 915.002, Enforcement Guidance on Non-Waivable Employee Rights (April 10, 1997), <https://www.eeoc.gov/policy/docs/waiver.html> (“Agreements that attempt to bar individuals from filing a charge of assisting in a Commission investigation run afoul of the anti-retaliation provisions because they impose a penalty upon those who are entitled to engage in protected activity under one or more of the statutes enforced by the Commission.”).

⁴⁴ <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

⁴⁵ H.707, Sec. 1-(g)(2)(h)(2)(A)-(B). The bill has 56 sponsors including Republicans, Democrats, Progressives and Independents.



Steps to End Domestic Violence

The Vermont Bar Foundation (VBF) continues its series highlighting grantees that provide legal services for low-income Vermonters. Through IOLTA monies and other contributions, the VBF is able to help fund a range of competitive and noncompetitive grants throughout Vermont.

Steps to End Domestic Violence (formerly Women Helping Battered Women), is a recipient of a competitive grant; the grant helps fund a weekly legal clinic for victims and survivors of domestic violence. Steps to End Domestic Violence is located in Chittenden County. The VBF has provided grant monies to them for different programs since 2004. The weekly legal clinic has received grant money since 2010.

I met over coffee with Susan Gordon, Kim Jordan, and Sharon Rotax to discuss the workings of the legal clinic. They describe the weekly clinic as one that empowers their clients by giving information about the law and court processes so that the clients can make their own decisions whether and how to proceed with their cases and can do so more confidently. Gordon is a private attorney who regularly staffs the legal clinic. Jordan is the legal advocate at Steps to End Domestic Violence. Rotax is the grant administrator at Steps to End Domestic Violence.

Women Helping Battered Women chose the name "Steps to End Domestic Violence" to reflect the inclusivity of the different groups of people impacted by domestic violence and the different types of domestic violence. As Gordon stated, the name change tells the community that the doors are open to all who are looking for relief from domestic violence.

The legal clinic is an outgrowth of the services Steps to End Domestic Violence provides and has provided since its inception. These types of services started with its predecessor, the House of Refuge, founded in 1974 and subsequently morphed into Women Helping Battered Women in 1980. Over the years, the initial focus on the safety needs for victims of domestic violence for services such as emergency housing and hotline services expanded to transitional housing, children's programs, support groups, and legal advocacy.

The legal clinic builds on the legal advocacy program by giving clients a place where they can seek information about their ongoing legal issues stemming from domestic violence.

Jordan, Gordon and Rotax agree that the operation of the legal clinic is a team

effort with Steps to End Domestic Violence, volunteer lawyers and a paralegal. The legal clinic is scheduled on Mondays for 1.5 hours during the afternoon three weeks per month and in the evening one-week per month.

Jordan staffs the legal clinic by screening requests, scheduling appointments, providing referral information and being part of the team approach at the clinic. She may receive referrals from the hotline at Steps to End Domestic Violence or from other entities. She screens for the type of case and whether any referrals for other services are applicable. Each clinic has three half-hour slots and she confirms appointments. The clinic is typically booked two weeks out. Jordan confers with the attorney and paralegal at the clinic prior to the client's appointment and they confer after the appointment, which may include providing referrals to the client.

Gordon specializes in family law and is a solo practitioner. She relocated to Vermont, opening her practice in 2007. That same year, she started to volunteer at Women Helping Battered Women. Starting in 2010, Gordon has volunteered for the legal clinic and has been a mainstay at the clinic. In recognition of Gordon's work, she was awarded a Vermont Bar Association Pro Bono Award for her work at the legal clinic. Mary Ashcroft's profile of Gordon can be found in the Vermont Bar Journal, Spring 2017, page 44.

Gordon is joined at the legal clinic by Lucia White, a paralegal at Dunkiel, Saunders, Elliot, Raubvogel & Hand. When Gordon is not available, Jordan can call on several other attorneys to take Gordon's place including our two clinic back-up attorneys, Laura Bierley and Celeste Laramie.

Cases may range from exploratory to ongoing advice over years according to Gordon. In terms of an exploratory case, a client may question whether she has grounds to bring a court action. The client receives information about what is needed to bring a court action and the legal process. They try to demystify the court process and the client can then decide.

Sometimes, the questions are not so much exploratory as dispelling myths. One myth according to Gordon is a threat by an abuser made to keep the other parent in the relationship. One example is threatening that the other parent will lose custody since he/she takes prescribed antidepressant medication while coping with the abuse.

STEPS TO END DOMESTIC VIOLENCE

According to Jordan, clients can come back over time to deal with their case as the case wends its way through the court system or as an ex-partner brings sequential court cases. Gordon related a case in which the ex-partner brought a new motion every time the prior motion was granted.

Both Jordan and Gordon agree that when a client returns over time, the attorney/client relationship is fostered and the client is better able to continue as a pro se within the court system. In addition, if a client changes their mind, they can return and receive the information they need to go forward. They have received feedback that the clients felt heard and empowered by being able to return for information and advice.

Given the demographics in Chittenden County, they are seeing more New Americans. They use the language translation line to better insure the client's anonymity. In one case, they were able to make a referral to an immigration attorney knowledgeable about immigration relief for abused spouses to help a New American wife whose American husband was threatening her immigration status to continue to control and abuse her.

The statistics bear out that a majority of the legal clinic cases are family law. During the grant cycle for the 2017 fiscal year, 22 adults and 39 children were served. Twelve cases involved custody/visitation and eight cases involved divorce. Many of the cases involve post-judgment relief according to Gordon.

The legal clinic augments the legal advocacy program that includes attendance at court for the Relief from Abuse docket and maintaining a referral list to attorneys who will provide pro bono case representation.

Jordan, Gordon and Rotax invite attorneys to look into pro bono opportunities with Steps to End Domestic Violence. Volunteering to assist Steps is a rewarding experience that brings real results.



Certified v Certificated Paralegals

What's the Difference and Why You Should Care

This article is designed to explain what paralegal certification entails and the differences between the three organizations' certifications and credentials.

Vermont requires no formal training to hold the title "paralegal." A paralegal is defined by the American Bar Association (ABA) as "a person, qualified by education, training or work experience, who is employed or retained by an attorney, law office, corporation, governmental agency or other entity and who performs specifically delegated substantive legal work for which an attorney is responsible." The VBA has adopted the ABA definition and standards in its Constitution.

The National Federation of Paralegal Associations (NFPA) and the Vermont Paralegal Organization (VPO) go a bit further and define a paralegal as "a person qualified through education, training or work experience to perform substantive legal work that requires knowledge of legal concepts and is customarily but not exclusively performed by a lawyer."

The VPO is the formal paralegal group in Vermont and is affiliated with NFPA. Therefore, all members of the VPO are also members of NFPA.

To be a voting member of the VPO, a paralegal must have a combination of education, experience, and an affidavit by an attorney that he or she has a certain number of years of service as a paralegal and that 60% of that work performed is substantive legal work. However, a paralegal has no obligation to have any formal training, certification or designation. Obtaining these additional credentials is solely a personal desire or a requirement of an employer.

"Certificated" or "Certified" – There is a difference.

It can be challenging to understand the different paralegal credentials. There is a difference between being a certified paralegal and a paralegal with a certificate.

A paralegal may obtain a paralegal "certificate" through a number of educational programs completely online, in classrooms, or by a combination of the two. Most of these courses take 9 to 24 months to complete and cover either a general course of paralegal studies or a specific area of law. These programs also can be independent or a part of a larger program.

Obtaining a paralegal certificate can be a

challenging but rewarding process. While there are a number of institutes who offer such a program, only some of these programs are ABA approved. There are paralegal certificate programs that only require a high school diploma or equivalent; however, most are designed to run concurrently with an associate or bachelor's degree or are post-degree programs.

While it is not necessary for a program to be ABA approved, it is more beneficial to the holder of the certificate if it is. There are over 200 programs approved by the ABA for a paralegal certificate. ABA-approved programs require 60 semester hours (including 18 hours of general education and 18 hours of legal specialty courses).

Entry into a paralegal certification program will vary depending upon the program. Many programs require only a high school diploma or equivalent, but others require some post-secondary education. The requirements for obtaining a certificate in paralegal studies vary slightly from program to program. However, all programs require course work completion in legal principles, legal research and ethics.

Paralegal certification programs are a beneficial way for a person to start out into the legal field, especially if they have no prior legal experience. A paralegal with a certificate or post-secondary educational background in the legal field has proven advantages over other applicants without any training (either formal or on-the-job) for legal positions. An educational foundation into the field of law offers a "certificated" paralegal a solid background to be able to assist in a legal matter from beginning to end.

Once a paralegal has successfully completed a program of this type, he or she receives a certificate and is "certificated." However, they are not able to accurately state they are "certified." For a paralegal to accurately state they are "certified," they would need to successfully complete a paralegal certification exam. A paralegal certification exam allows one to obtain professional credentials through a vetting process which involves a successful passing of an exam.

Who offers "certification" exams?

There are several national certifying organizations that offer a paralegal an opportunity to obtain a paralegal credential.

NFPA; The National Association of Legal Assistants (NALA); and The Association for Legal Professionals (NALS) (formerly the National Association for Legal Secretaries) all offer both entry-level and advanced exams. Each requires certain prerequisites in order to be eligible to take the exam. After earning the credential, the paralegal must renew the credential by earning approved CLE credit during the licensing period mandated by the organization.

Who Can Take These Certification Exam(s)?

In order to take these certification exams, a paralegal has to meet certain criteria as set forth by NFPA, NALA and NALS. The specific credentials are explained in further detail below.

If the paralegal does not have a bachelor's degree, he or she would need the following in order to be *eligible to take* the any of the credentialing exams:

- at minimum, high school diploma or GED, 5 years working as a paralegal under the supervision of a member of the Bar, plus evidence of 12 hours of CLE within two years prior to the examination date [for the CRP credential];
- at minimum, high school diploma or GED, 7 years working as a paralegal under the supervision of a member of the Bar, plus evidence of 20 hours of CLE within two years prior to the examination date [for the CP credential]
- an associate degree in paralegal studies plus 6 years of paralegal work experience [for the RP credential];
- graduation from an ABA-approved legal studies or paralegal studies program, or a minimum of 5 years of paralegal work experience [for the PP certification].

Even with a bachelor's degree, the paralegal still needs to meet the following criteria before taking each exam:

- If the bachelor's degree is not in paralegal studies: one year's experience as a paralegal, or 15 semester hours of substantive paralegal courses [for the CP credential].
- If the bachelor's degree is not in paralegal studies: three years' experience of substantive paralegal work [for the RP credential].

- If the bachelor's degree is not in paralegal studies: a paralegal certificate [for the CRP credential].

There are other combinations that would enable a paralegal to take these exams, but the above is the bare minimum for being qualified to take the exams.

National Federation of Paralegal Associations

The National Federation of Paralegal Associations (NFPA), founded in 1974 and the first national paralegal association, is dedicated to promoting the growth, development and advancement of the paralegal profession. In 1994, NFPA began developing an exam to measure a paralegal's knowledge of legal practice, ethics, technology and general legal competency. NFPA has developed two levels of certification, the Paralegal Core Competency Exam (PCCE™), which gives the paralegal the ability to use the credential Core Registered Paralegal (CRP™) and the Paralegal Advanced Competency Exam (PACE®), which gives the paralegal the ability to use the credential PACE Registered Paralegal (RP®).

PCCE and PACE paralegal exams; each requires an application and fee prior to sitting for the exam as well as specific educational and work prerequisites similar to the requirements to join the VPO.

Paralegal Core Competency Exam™:

The NFPA CORE (PCCE™) exam is the newest credential to the profession, having just been established in 2011. The PCCE is an exam established for many types of paralegal work. The PCCE exam is 125 questions which cover areas such as Paralegal Practice; Ethics and Professional Practice; U.S. Legal System; Legal Research; Legal Writing and Critical Analysis; Communication; Law Office Management; Legal Technology as well as Substantive Areas of Law. Once the application for the exam is submitted and the paralegal is approved to take the exam, they will receive a letter and have 90 days to take the exam. A paralegal who passes the PCCE exam will receive a letter from NFPA indicating their passing and granting permission for the use of the CRP™ designation. In order to maintain the CRP certification, the paralegal must complete 12 hours of CLE every 2 years, including at least 1 hour of ethics.

The PCCE exam does not require a minimum post-secondary degree, but does require an applicant to have obtained five (5) years of experience in the two years before taking the exam if the candidate does not hold an associate or bachelor's degree.

Since 2011, 777 applicants have sat for PCCE and 599 have passed nationally. Ver-

mont has 4 CORE Registered Paralegals: Julie Anderson-Adams, CRP; Jill Drinkwater, CRP; Jennifer McGean, CRP; and Robyn Sweet, CRP.

Paralegal Advanced Competency Exam®:

In 1996, the PACE® exam was established. The PACE exam focuses on paralegal practice and substantive areas of law covered in 200 questions. The PACE exam questions cover 5 areas: Administration of Client Legal Matters; Development of Client Legal Matters; Factual and Legal Research; Factual and Legal Writing; and Office Administration. Questions on ethics, technology and terminology are included in all areas. Once the application for the exam is submitted and the paralegal is approved to take the exam, they will receive a letter and have 90 days to take the exam. A paralegal who passes the PACE exam will receive a letter from NFPA indicating their passing and granting permission for the use of the designation RP following their name. In order to maintain the RP certification, the paralegal must complete 12 hours of CLE every 2 years, including at least 1 hour of ethics.

The PACE exam has higher educational and work experience prerequisites than the PCCE Exam. The PACE Exam is a more advanced exam which requires, among other things, that an applicant have a minimum of an associate degree specifically in Paralegal Studies, plus six (6) years of substantive paralegal experience prior to being eligible to take the exam.

Since 1996, 1,803 applicants have sat for PACE and 1,094 have passed, nationally. Vermont has 12 PACE Registered Paralegals: Julie Anderson-Adams, RP; Sara Boyden, RP; Corinne Deering, RP; Ashley LaRose, RP; Tracy Lord, RP; Heather Moreau, RP; Michelle Perlee, RP; Lisa Pettrey-Gill, RP; Kristin Provost, RP; Carie Tarte, RP; Lynn Wdowiak, RP; and Bernice "Missy" Woessner, RP.

National Association of Legal Assistants

NALA offers the Certified Paralegal exam. A paralegal who passes this exam earns the "CP®" designation. Once a paralegal has passed the Certified Paralegal exam, NALA offers courses to earn the Advanced Certified Paralegal, "ACP®" credential. This differs from the NFPA CRP™ and RP® because the paralegal must first pass the CP® exam, then take additional classes and pass additional exams relating to specific topics in order to earn the ACP® credential. It also differs from NFPA in that, under NFPA's certification, a paralegal can automatically take the advanced PACE Exam without first having to take the PCCE as long as he or she meets the minimum educational and experience require-

ments to take the examination.

Certified Paralegal®:

The exam was updated for the 2018 testing year to ensure the examination content was up-to-date with current rules and laws, and to update the roles and responsibilities of paralegals.

The CP® exam has two required sections; one is a knowledge exam with multiple choice questions on each of the following areas of law: US Legal System, Civil Litigation, Contracts, Corporate/Commercial Law, Criminal Law and Procedure, Estate Planning and Probate, Real Estate and Property, Torts, Professional and Ethical Responsibility. If this section is passed, then the paralegal can take the "Skills Exam" which is a written assignment consisting of writing skills and critical thinking skills. The Skills Exam can be taken after 2 weeks have passed since passing the Knowledge Exam, but the Skills Exam must be taken and passed within 365 days after receiving notification of eligibility in order to earn the CP designation. Examinees who fail either part of the exam must wait 90 days before re-taking either part.

In order to maintain the certification, the paralegal must complete 50 hours of CLE every 5 years, including 5 hours of legal ethics. There are 19,284 Certified Paralegals in the US. Vermont currently has one Certified Paralegal®, Lucia White, CP®.

Advanced Certified Paralegal:

There are specific areas of law for which a paralegal can earn the ACP® designation. These generally require a 20-hour self-study course, with exams both during the course and at the end. NALA is working to add courses in Business Organization, Commercial Bankruptcy, Contracts Management, Estate Planning, Family Law – Dissolution Case Management, Child Custody, Child Support, Visitation, Division of Property and Spousal Support, Personal injury with 8 practice course areas, and Real Estate – Land Use and Principles, and Trademarks. Until then, the current courses include Criminal Litigation, Discovery, e-Discovery, Family Law – Adoption and Assisted Reproduction, and Trial Practice.

NALA is working to add ACP® certifications. There are currently no Advanced Certified Paralegals in Vermont. There are 1,165 ACP certified paralegals in the US and Canada.

Association of Legal Professionals

NALS offers three certifications, the Accredited Legal Professional (ALP), the Professional Legal Secretary (PLS) [also called the Certified Legal Professional (CLP)], and the Professional Paralegal (PP) certification. The ALP exam is a four-hour exam

designed for students and entry-level professionals working to break into the legal profession. The PLS and/or the CLP exam is a one-day, four-part exam for individuals with at least 3 years of legal work experience. The PP is a one-day, four-part exam designed for individuals who have graduated from a paralegal studies program, or have a minimum of 5 years paralegal/legal assistant experience.

Each of NALS credentials must be renewed every 5 years, with a 50-hour CLE credit requirement for the ALP credential, and a 75-hour CLE credit requirement for the PLS/CLP credential and a 75-hour CLE credit requirement which must include a minimum of 5 hours ethics credits for the PP credential.

Why Should Your Firm Hire a Paralegal with a Certification or Encourage Your Current Paralegal to Earn Certification?

A paralegal that has voluntarily taken a certification exam and passed it is showing that he or she is invested in the paralegal

field and is interested in elevating and maintaining a level of education and competency in his or her work. It is an indicator to you as the employer that he or she possesses some level of proficiency and skill. Certification exams also serve as background verification for the employer since all of these examinations require certain levels of education and experience in order to sit for them. This will all translate to a higher quality of work product generated for your firm. In addition, having a certified paralegal on staff may justify your firm charging a higher hourly rate for that paralegal's work. It also may make it easier to receive an award of prevailing market rates for paralegal work in a case where your firm is awarded attorney's fees.

In addition, employees who feel valued will put more effort into their work, increase their standards, and increase their job-based self-worth, making them a bigger asset to your firm. While it is nearly impossible to say which credential or program is the best in producing a paralegal ready for work at your practice, it is clear

that those paralegals who have sought out these certifications or credentials have made an investment into their career.

About the authors:

Robyn A. Sweet, CRP™ is a Vermont Paralegal Organization member and a member of the VBA Paralegal Section. She has been a CORE Registered Paralegal since October of 2016 and has worked at Cleary Shahi & Aicher, P.C. in Rutland for over 7 years. Robyn is also the Internal Marketing Coordinator for NFPA.

Lynn C. Wdowiak, RP® is a Vermont Paralegal Organization member and a member of the VBA Paralegal Section. She has been a PACE Registered Paralegal since November of 2012 and has worked at Ryan Smith & Carbine, Ltd. for 8 years. Lynn graduated from Woodbury Institute in Montpelier in 2009 with a post-graduate Certificate in Paralegal Studies and holds a Bachelor of Business Administration degree from Northwood University in Midland, Michigan.



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Watch Out for These Common Conflict of Interest Traps

I've spent years trying to encourage solo and small firm lawyers to develop and consistently use a formal conflict checking system that tracks all of the information best practices currently dictate. In all honesty, I will admit that I have had limited success in this endeavor. This doesn't mean I won't keep trying; but it does mean I've got to accept the reality of the situation because, truth be told, conflict missteps in the solo and small firm arena are not typically a "whoops, we missed that name" kind of thing. More often than not the attorney simply failed to recognize that a conflict was in play, or if she did see it, decided that the issue wasn't significant enough to worry about. Given this, I'm changing my approach and instead of trying to convince you to expand your conflict database and run every name under the sun through it, I thought I'd share a few general tips that can help you avoid many of the more common conflict missteps.

Be wary of representing two or more parties at once such as a divorcing couple, a husband and wife wanting wills, multiple plaintiffs in a personal injury matter, multiple partners forming a new business, or the buyer and seller in a real estate transaction just for starters. I'm not saying you can never take on multiple parties. There are situations where it is ethically permissible and entirely appropriate. However I would advise that if you do, fully disclose to each of the multiple clients the ramifications of agreeing to joint representation. Discuss how both potential and any actual conflicts will affect your representation of everyone. Advise the clients that on matters concerning the joint representation there is no individual client confidentiality among the group. In addition, consider advising each of them to seek independent outside advice as to whether they should agree to joint representation. Regardless, do not proceed with the representation until all clients have given you their informed consent which should be in writing.

Now, two quick side notes are in order. First, I can share that non-waivable conflicts do exist, in spite of what some of our peers choose to believe, and they often appear in these types of settings. When in doubt, seek advice from someone well versed in our ethical rules. Second, in an attempt to avoid dual representation problems some attorneys will agree to represent one of the parties and document that the other has

been advised to seek independent counsel. Should the remaining non-client decide to proceed without representation, understand that you don't get it both ways. In spite of any documentation to the contrary, if you continue to interact with this individual by answering questions to help move the matter along you can unintentionally establish an attorney client relationship and undo the precautions taken. Your actions will always speak louder than your written words. Never answer any legal questions from the non-client. Simply advise them to seek independent counsel, and if that slows things down, so be it.

Avoid joint representation in those potential conflict situations where there is a high probability that potential conflicts will evolve into actual conflicts such as with criminal co-defendants or with certain situations involving multiple plaintiffs. Remember Murphy's Law. More often than not the actual conflict will arise. If it does and is one that cannot be waived, your only option will be to completely withdraw from the entire matter. Stated another way, in most multiple client representation matters if you're conflicted out for one client, you're conflicted out for all. This is just one of the risks that come with joint representation. In the world of ethics and malpractice, we call an attempt to stay in with one client while dropping another the "Hot Potato Drop." Should a claim ever arise as a result of your dropping all but one as a client, the lawyers on the other side will put this spin on your actions. They'll argue that you put your financial interests above the interests of the client or clients you dropped and that rarely turns out well for the lawyer being sued.

Always document the conclusion of representation with a letter of closure. In terms of conflicts, an interesting question that arises from time to time is when does a current client become a past client for conflict resolution purposes? The temptation is to rationalize that the passage of time coupled with a bright line gets you there. After all, doesn't the fact that the deed was delivered four months ago, the settlement proceeds were disbursed two years ago, the judge signed the final order last year, or the contract was signed over five years ago mean these various matters are concluded and all of these clients are now past clients?

Our conflict rules don't speak of bright lines or the passage of time as being determinative. Keep it simple. For conflict resolution purposes, once someone becomes a current client, they are always a current client unless and until you clearly document otherwise. So, for example, one would be well advised to never alter a will for one party after having done wills for both parties a year or so earlier absent clear documentation that the prior representation of both had ceased. I would also caution you to keep this in mind if you ever get to the point where you're considering suing a client for fees. You can't sue current clients so make sure documentation that the client is a past client exists. Again, this is typically done in a closure letter that plainly states something along the lines of "this concludes our representation of you in this matter." In fact, this is the reason why conflict savvy firms keep all letters of closure even after destroying the related file years after closing it. The closure letter is part of the conflict database because it documents who is a current client and who is a past client.

Avoid becoming a director, officer or shareholder of a corporation while also acting as the corporation's lawyer. This dual role can create all kinds of problems to include loss of attorney client privilege, an increased risk of a malpractice claim, and an inability to participate in certain decisions. If you do find yourself on a client corporate board, do not further compound the conflict issues by taking an ownership interest in the company that exceeds 5%. At that point the potential conflict problems reach a point where malpractice carriers will often decide to exclude the risk. The safest play is to never take a financial interest in a client entity due to the difficulty in proving down the road that you never put your financial interests above the interests of your client.

Periodically stop and remind yourself just who the client is and act accordingly because sometimes it can get messy. For example, an attorney was approached by the son of two long-term clients. Son introduced several non-clients to the attorney and asked the attorney to incorporate a startup business and handle related matters for a small stake in this new company. The son's contribution was to be his intellectual capital and the non-clients were the

money guys. The attorney accepted the work and had frequent contact with the son and the investors throughout the process. Sometime later, one of the investors contacted the attorney and asked him to remove a preemptive rights clause from the organizing documents in order to facilitate a needed cash infusion from two additional investors who would only make a contribution if they were granted a substantial stake in the company. There were no funds available to pay the attorney for this additional work but he was offered the opportunity increase his own stake in the company. This request forced the attorney to determine who his client was. At that point he realized that his failure to clarify and document who was a client and who wasn't, coupled with past actions that seemed to allow corporate constituents and investors to believe that he represented everyone, resulted in his correctly deciding that he had no other option but to withdraw.

Never solicit investors on behalf of a client's business. If and when that business goes south, you will be the one targeted for the recovery of all losses and guess what? Malpractice policies do not cover investment advice. This one will be on you.

Be extremely cautious about entering into business relationships with clients. At the outset, Rule 1.8 is clear. The transaction must be fair and reasonable to the client. The client must be made fully aware of and clearly understand the terms of the transaction, the material risks and disadvantages to the client, any reasonable alternatives, the attorney's part in the transaction, and any potential conflicts of interest. The client must not only be advised to seek independent legal advice but actually given a reasonable amount of time to do so. Finally, the client must provide written consent.

The problem here is that the attorney needs to be particularly mindful that he cannot continue employment if his independent professional judgment will be affected by the business interest taken. Additionally, the full disclosure requirements of the rule brings about an obligation to disclose the fact that at some point the attorney and the client may potentially have differing interests in this business transaction that would preclude the attorney from continued service. Further, while the client should be encouraged to seek independent legal counsel, many times the reason that the issue comes up is that the client has no money to pay for legal services and the business deal being considered is an offer of stock in exchange for legal services. At a minimum, the client should be counseled to seek independent advice from another source, perhaps their CPA or

financial advisor.

One real risk with these deals is that the business really does prosper or terribly falters. In either case the attorney can be in a difficult position. It's either that he has been substantially overpaid from the client's perspective or is now facing the reality that no payday is coming. While there are no specific boundaries as to how much of an ownership interest is too much, certainly the degree to which an attorney can maintain independent legal judgment would seem to be directly correlated to the percentage of ownership interest owned. As a guideline I would recommend that the ownership interest obtained never exceed 5% as the conflict concerns become too high at that point and beyond.

Last but not least, **remember that memory doesn't cut it** and conflict checking systems are only as good as the people who use them. Always keep the system current and use it consistently or it will be ineffective. Check and update your conflict database every time you consider taking on a new matter, regardless of whether the matter was accepted or declined. Circulate new client/matter memos throughout the firm. Make sure the memo affirmatively documents that all attorneys and staff have reviewed the memo to include thinking about personal and business interest conflicts they may individually bring to the table. Finally, don't forget to look for potential conflicts that might exist if the firm has gone through a recent merger with another firm or had any new lateral or staff hires.

(I know, I just couldn't stop myself.)

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

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Thank you for Supporting the Vermont Bar Foundation

All Vermont-licensed attorneys in active status, as well as all judges and justices on the Vermont bench, are members of the Vermont Bar Foundation. For over 35 years, the Vermont Bar Foundation has dedicated itself to improving access to justice in Vermont. Thanks to its members' generous donations, as well as through their IOLTA accounts, the VBF has provided funding for legal assistance to thousands of low-income Vermonters. The monies have also provided funding for a variety of public education programs about the courts and the legal system.

We'd like to recognize the many contributions lawyers and judges have made to the Vermont Bar Foundation in calendar year 2017. Your Foundation awarded a total of \$890,772 to 19 different legal service grantees in 2017. Those grantees include, among others, the South Royalton Legal Clinic; Vermont Bar Association County Bar Legal Assistance Projects in several counties; Vermont Legal Aid; Have Justice Will Travel; and the Community Restorative Justice Center. A full list of the grant programs can be found at www.vtbarfoundation.org.

The primary source of VBF funding is through Vermont lawyers' IOLTA (interest earned on lawyers' trust accounts) accounts. A special thanks to our Prime Partner institutions who pay interest rates of 1.50% to 2.00% on your IOLTA accounts. Their continuing generosity allows the Foundation to fund more of the valuable programs. In addition to IOLTA monies, during 2017 lawyers contributed a total of \$5,590 through the "opt-in" option on the attorney license renewal form, contributions totaling \$2,965 were received from United Way, which includes the State of Vermont's VTSHARES program and the Rutland County Bar Association donated a total of \$2,000, which was passed through to the Rutland Pilot Project. We'd also like to extend special thanks to Leslie Black and Graham Govoni from Black & Govoni, PLLC for generously donating a week's stay in their Caribbean vacation property; the Caribbean Vacation Raffle netted \$3,675 for the Foundation!

Lastly, we thank the many lawyers who have provided pro bono and low bono assistance to Vermonters in need. Many of the grant programs that receive funds from the VBF would not be able to function without Vermont lawyers' selfless generosity of their time and expertise.

Listed below are individuals and law firms who donated to the Vermont Bar Foundation in calendar year

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June 12, 2018 • Environmental Law Day • @ Trader Duke's Hotel (fka DoubleTree), S. Burlington

Get the environmental year in review and learn about the current state of Act 250 on its anniversary year. The day will include an overview of the Act 250 Commission and where we think the Commission is headed. Representatives of state agencies and land use lawyers will assess the magnitude of the changes coming our way. Judges from the Environmental Division will give an update and the year in review will include decisions from the District commission, Environmental Division, Public Utility Commission and the Vt Supreme Court!

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

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

AND SAVE THESE DATES:

Late June (TBD): Procrastinator's Day and Probate Law update

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

Late October (TBD): Pro Bono Conference @ The State House, Montpelier

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

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

THE CHILDREN'S CORNER

"Low Bono" Programs Expand to Help Vermont Children and Families



Ten years ago, the Vermont Bar Association, the Rutland County Bar and the Vermont Bar Foundation piloted a low bono legal project in Rutland County. Patterned after the old Judicare program, the Rutland Pilot Project recruited, trained and paid private attorneys to provide unbundled representation to low-income litigants in certain non-criminal cases. Payments to the attorneys were at the "low bono rate" of \$60 per hour for between 3-5 hours per case, and were funded with a grant from the Vermont Bar Foundation.

Over the years, this low bono program has expanded geographically and in scope. Now in 9 Vermont counties, low bono attorneys cover landlord/tenant, foreclosure and collection defense cases in Civil Division, child support contempt defense cases in Family Division, and adult involuntary guardianship cases in Probate Division. Over 1,400 clients have been directly served by these projects.

This Vermont low bono model is cost effective and flexible. Now it is being expanded further with new grant funds from the Vermont Supreme Court. The grants will provide low bono representation in all 14 counties for adopting couples in PACA negotiations, and for respondents in adult involuntary guardianship proceedings. A separate recent grant from the US Department of Justice funds representation of victims of crime in various civil issues arising from their victimization.

Vermont lawyers are needed to provide low bono service for all of these programs.

Post Adoption Contact Agreements

In 2015, the Vermont Legislature created a means by which relinquishing parents and adopting parents could enter into post adoption contact agreements.¹ These PACAs are voluntary agreements intended to allow relinquishing parents some contact with their children after the parents' rights are voluntarily terminated and the adoption process is complete. The PACAs are enforceable through a process in Vermont Probate Division², and can extend as an obligation on adopting parents throughout the minority of their children.

Because PACAs must be entered into when the child is in DCF custody prior to any termination of parental rights ("TPR"),

and because the relinquishing parents must agree to a voluntary termination of parental rights, PACAs are often negotiated as a way of settling contested TPR cases.

Termination of parental rights cases are a time-consuming and rapidly expanding component of the Family Division docket. TPR petitions have increased by 60% between FY'12 and FY'16.³ This trend is likely to continue over the next few years due to a comparable increase in CHINs cases.⁴

In TPR cases, the Vermont Department of Children and Families, parents and children all have party status and all have attorneys representing them and/or provided for them by law. Adoptive parents have neither party status nor legal representation. But enormous pressure is brought on them in particular to enter into a post adoption agreement which will impact their new family for many years to come.

Last spring, recognizing the unequal bargaining position of adopting foster parents and facing a growing docket of final TPR hearings, Family Judge Nancy Corsones asked for help from the Rutland Pilot Project, the local low bono program.

The Rutland Pilot Project agreed to run a trial PACA program. A CLE program trained and recruited local attorneys, and PACA cases were added to the list of low bono cases covered at the rate of \$60 per hour for up to 3 hours each. Since April of 2017, 16 adopting foster parents have been provided with limited representation by the Rutland Pilot Project's local low bono attorneys.

Inquiries about expanding this project were received from Windsor, Washington and Windham attorneys and judges. Because of this growing interest, the Vermont Bar Association was invited to apply for a grant from the Vermont Supreme Court to create statewide PACA representation. The grant was awarded in January of this year, and the process of recruiting and training attorneys is underway.

The Vermont Bar Association is presenting a panel on PACA representation at its mid-year meeting on March 23, 2018 in South Burlington. The presentation will be recorded for further training for lawyers interested in joining the PACA low bono panels in counties in which they practice. More information about the Mid-Year Meeting panels is available at www.vba.myevent.com.

Attorneys can also contact VBA's Legal Access Coordinator Mary Ashcroft at mashcroft@vtbar.org, for more information or to sign up for the PACA low bono panel.

Adult Involuntary Guardianships

While many adult involuntary guardianship proceedings are brought because elderly respondents have growing difficulty managing their affairs, a number of guardianships are requested to assist young adults who have developmental or mental health disabilities, or who have suffered a traumatic brain injury.

Vermont law requires the Probate Division to appoint counsel for respondents in adult involuntary guardianship proceedings when the initial petition for guardianship is filed.⁵ The role of counsel is to safeguard the due process rights of the client, ensure that the client's wishes are presented to the court, ensure that there is no less restrictive alternative to guardianship and that the proposed guardian is qualified, and ensure that the need for guardianship is proven by clear and convincing evidence.⁶

Because this statutory mandate is unfunded, probate courts have traditionally drawn on the local legal community to provide pro bono services in cases where the guardianship estate does not have sufficient assets to compensate an attorney. Statute requires that the Court maintain a list of pro bono counsel from the private bar to be used before appointing non-profit legal services organizations to serve as counsel.⁷ But in a number of Vermont counties the pool of volunteer attorneys is diminishing as the bar itself ages and retires.

This trend was evident a number of years ago in Rutland County. When the low bono Rutland Pilot Project was established in 2008, among its priority cases were adult involuntary guardianship establishment proceedings. Instead of calling on the decreasing number of pro bono attorneys, the Rutland Pilot Project began paying local counsel \$60 per hour for up to 3 hours per guardianship case. Now in its 10th year, the Rutland Pilot Project has been very successful, having received and provided representation in over 275 adult involuntary guardianship cases over its lifetime.

The low bono model of representing low

income/low asset respondents in adult involuntary guardianship matters was expanded to other county low bono projects. In January of 2018, the Vermont Supreme Court awarded the VBA a generous grant to expand low bono representation in these guardianships to all 14 Vermont Counties.

The VBA is recruiting attorneys interested in serving on low bono referral panels in each probate division. The Vermont Bar Association is presenting a CLE program on the law and process of adult involuntary guardianships at its mid-year meeting on March 23, 2018 in South Burlington. The presentation will be recorded for further training for lawyers interested in joining the guardianship low bono panels in counties in which they practice. More information about the Mid-Year Meeting panels is available at www.vba.myevent.com. Attorneys can also contact VBA's Legal Access Coordinator Mary Ashcroft at mashcroft@vtbar.org for more information or to sign up for the local adult involuntary guardianship low bono panel.

Victims of Crime Act Project

In 2016, the Vermont Center for Crime Victims Services knit together a coalition

of Vermont legal services providers to obtain a US Department of Justice Victims of Crime Act ("VOCA") grant. The grant funds programs which provide legal services to those who have been the victims of a crime and who are suffering legal consequences of that victimization. Some of those victims are children.

The Vermont Bar Association is part of that coalition. The VBA's role is to link crime victims with attorneys willing to represent them in legal matters outside the usual scope of services provided by Vermont Legal Aid, the South Royalton Legal Clinic, Have Justice-Will travel, and other partners. With its share of the grant, the VBA pays private attorneys \$60 per hour for up to 10 hours per case in a wide range of matters such as partition actions, visitation and custody, property transfers, estate planning, collections, stalking orders, boundary disputes and credit card fraud.

The VBA is recruiting attorneys for the VOCA low bono panel. Attorneys are needed in all 14 counties and in all types of cases. For more information or to sign up, please contact the VBA's Mary Ashcroft, Esq., at mashcroft@vtbar.org.

Mary C. Ashcroft, Esq., is the Legal Access Coordinator at the Vermont Bar Association and maintains a private practice in Rutland Town, Vermont.

Would you like to submit an article for the Children's Corner? *The Vermont Bar Journal* is soliciting authors for its regular column, the Children's Corner. Submit yours to jeb@vtbar.org. The deadline for the Summer issue is June 1, 2018.

ciation and maintains a private practice in Rutland Town, Vermont.

¹ 33 V.S.A. Sec. 5124.
² 15A V.S.A. Sec. 9-101.
³ Vermont Judiciary Annual Statistical report for FY'16, page 8. https://www.vermontjudiciary.org/sites/default/files/documents/FY16%20Statistical%20Report%20-%20FINAL%20020617_1.pdf.
⁴ Id., page 6.
⁵ 15 V.S. A. Sec. 3065(a)(1)(A).
⁶ 15 V.S.A. Sec. 3065(b).
⁷ 15 V.S.A. Sec. 3065 (c).



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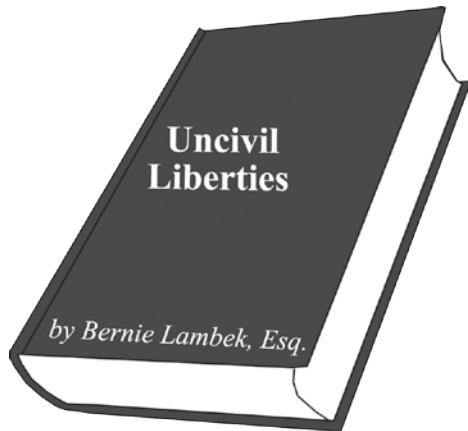
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BOOK REVIEWS



Uncivil Liberties

By Bernie Lambek, Esq.

Reviewed by Jennifer Emens-Butler, Esq.

Imagine my excitement and surprise to receive an advance reader copy of a brand new, first novel, from Montpelier lawyer, Bernie Lambek. As journal readers may recall, Attorney Lambek was the subject of my first "Pursuits of Happiness" interview, written after I discovered that the attorney I knew as an excellent lawyer and adversary, was an accomplished ping-pong player. And now, I find, again by surprise, that the attorney I see enjoying Wilaiwan's lunch, almost daily, is also a published author of legal fiction. Of course, the photo of the author on the back cover shows Bernie at his regular luncheon hangout spot.

What a treat to be able to set aside my electronic "stack" of nationally acclaimed legal thrillers and courtroom dramas to read *Uncivil Liberties*, by Bernie Lambek. While I tend to riffle through legal thrillers like bad TV --and they keep me returning with their sensationalist twists and heavy action-- these novels tend to blend together as I search through my kindle struggling to recall which legal thrillers I've already read.

Uncivil Liberties immediately feels refreshing, if alone because it is set in Montpelier. From the start, the feeling is almost like being part of an inside joke, as the author drops plays on local names left and right, like the town of Riverbury to the North and Northwood to the south, or as the characters dine at the all too familiar Sacred Grounds Café or the Byway Diner on Route 302. The setting feels cozy and familiar, right down to the scene of the novel's focal death in Mahady park.

The main character, Sam Jacobson, emulates the author himself, which gives the character depth, and highlights some endearing self-deprecation. The combination of what can only be perceived as real

emotions and experiences with the fictional character renders Sam a truly believable and lovable character. The reader glimpses life as a small-town, Vermont lawyer, dealing with high-profile cases, as well as low-profile cases, all while heavily immersed in a small, vibrant community.

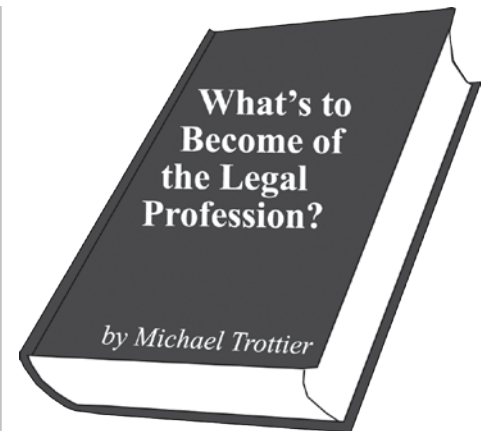
The novel balances seemingly basic lessons on civil liberties and equality, which could be interpreted simultaneously as too simplistic but yet too heavy-handed, with higher-level refreshers for lawyers on old friends in the First Amendment world like the *Tinker* or *BONG HiTS 4 JESUS* lines of cases. Those of us who have visited high schools to speak about the Constitution, and particularly the First Amendment, never tire of discussion about the nuances of those cases. Even Constitutional scholars can put aside the lesson and enjoy the entertaining characters in a gripping whodunit that is set beautifully around such fundamental civic issues.

Despite its fast pace and veiled simplicity, *Uncivil Liberties* demonstrates so well how being true to the basic concept of free speech can put you squarely on opposite sides of politics and popular opinion, while defending the Constitution. The brief case descriptions intertwined with the main characters' social interactions in the community, allows any reader to sympathize with the main characters as they grapple with some unpopular consequences of protecting freedoms.

Uncivil Liberties is worth the read. Explore hate-speech, equality, religious freedom, community and the practice of law in Vermont, all without getting bogged down, and all while enjoying a fast-paced legal mystery, cozy and familiar.

Visit www.bernielambek.com to order your copy!

Jennifer Emens-Butler, Esq. is the Director of Education and Communication at the Vermont Bar Association.



What's to Become of the Legal Profession?

By Michael Trottier

Reviewed by Joe Frank, Esq.

This is the title of the self-published paperback written by Michael H. Trottier, a 1962 graduate of Harvard Law School who most recently has practiced in a large firm located in Atlanta, Georgia. I offered to review this book because I had thought it daring to predict the future of the profession when so much has changed since I graduated from law school as an LL.B. in 1959.

The author catalogs and discusses the myriad significant changes in the practice of law that have taken place since World War II. Some of these changes have been conspicuous in Vermont. Advertising, which used to be severely restricted, is now rampant in multiple media. The use of word-processing computers for the preparation and storage of documents has been a revolution in the mechanics of practice. Communication within and among law firms is commonly done via the internet. Photocopying is easy. The non-judicial resolution of disputes has expanded to the extent that judicial resolution is seldom reached. The lateral movement of lawyers among law firms, and the reshuffling of law

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firms, has become fairly common.

The author predicts that various social and economic factors will create a need for many more lawyers in the future. These factors are said to include (1) increased national and international economic and political activity, (2) growing bodies of law and regulations to manage this activity, (3) a large current unmet need for legal services, and (4) the inadequacy of automation to properly manage legal services.

The author's prediction for the near future is not as rosy (at page 141): "It is nonetheless likely over the near term that many law graduates will have to find oth-

er ways to sustain themselves and their families---there are just too many of them now to be absorbed into the profession--and many may find better opportunities in other fields." The apparent truth of this prediction is reflected in law school enrollments. The first-year enrollment in ABA-accredited law schools fell from 52,488 in the fall of 2010 to 37,058 in the fall of 2015. With the yearly tuition at most law schools now reaching \$50,000 or more, any college senior considering law school has to give thoughtful consideration to the economics of the education and the prospects for use of the education.

This book is a readable review of the development of law and the legal profession since World War II and a thoughtful guess on future developments. Practicing lawyers and potential lawyers will gain a perspective on our profession by reading it.

Joseph E. Frank, Esq. is a retired attorney who was a founder of Paul, Frank & Collins in Burlington and Past President of the Vermont Bar Association.



IN MEMORIAM

John W. Barnett

John W. Barnett, 89, died peacefully at his summer home on Swans Island, Maine on August 10, 2017. He was born in Ohio and served in the US Army at the tail end of World War II. He attended Harvard Law School and joined the New Haven law firm of Wiggin and Dana, where he was a partner for over 50 years. During that time, he was married to Elizabeth Sargent for over 50 years, who died in 2001. He was very active in the North Haven community and town government. In 2008, John married Elizabeth Mills and moved to Westminster West, Vermont, where he joined the VBA, served on the board of Senior Solutions and the Westminster Town Planning Board and did pro bono legal work for non-profits and members of the community. He enjoyed tennis, travel, photography, reading and baseball. He is survived by his wife, three children and their families, one stepson, and nine grandchildren.

Alexander W. Banks

Alexander W. Banks, died on December 18, 2017 after a spell of illness at the age of 56. Born in Pennsylvania, Banks attended Bates College and received his JD from the Vermont Law School in 1987. A lifelong Quaker, Alex demonstrated a heartfelt interest in helping those less fortunate. From 1987-1995, he served at Northwest Legal Services in PA, and then went on to teach and serve as staff attorney at the VLS South Royalton Legal Clinic from 1995-2017, where he advocated for victims of domestic violence and children. He designed and implemented the clinic's Children First! legal advocacy program, mentoring its stu-

dent clinicians. He has received several awards from the Vermont Supreme Court and from the Vermont Center for Crime Victim Services for his work with victims and children. A skilled and compassionate lawyer, a generous and engaged teacher of law and a loving father and friend, Alex is survived by his two young sons, Carter and Cole, their mother and his stepmother and brother.

Albert A. "Al" Raphael

Albert A. "Al" Raphael, Jr., 92, formerly of Waitsfield, Vt., passed away on January 2, 2018 at North Andover, MA. Al graduated from Phillips Andover Academy in 1942, Yale University in 1945 and Harvard Law School in 1950, where he was a member of the winning Harvard Law School moot court competition team. He served in World War II in the US Army, seeing combat in France and Germany. Al practiced law for 50 years, specializing in real estate, first in New York City and then in Waitsfield, as a solo and as a partner at Raphael and Ware with Sheila Ware. He retired in 2000. He is predeceased by his wife of 46 years, Dorothy, whom he met skiing and with whom they followed their passion for skiing and Vermont, eventually moving here in 1972. Mr. Raphael served the Town of Waitsfield in many capacities, and the Valley Rotary Club and enjoyed skiing for over 65 years. He is survived by his son, Bruce, a partner in the international law firm Jones Day, his daughter-in-law and twin grandchildren of Andover, MA.

Keith Thompson Aten

Keith Thompson Aten, 58, chose to end his life on January 11, 2018, leaving his friends and family heartbroken by this final act that contradicted their knowledge of Keith as the joyful, witty and compassionate man that they loved. Born in Geneva, NY, he reunited with Geneva friend, Bonnie, when he lived in Boston and the two married in 1986 and moved to Vermont. After an early career as a Vermont State social worker, Keith's interest in social justice led him to VLS where he received his JD in 1993. He and his friends formed Aten, Clayton & Eaton, PLLC in Littleton, NH (jokingly referring to the firm as "ACE") where he practiced as a trial attorney for over 20 years. Keith enjoyed the outdoors and traveling with his family, and had donated over 140 pints of blood in his life. Despite outward appearances, this last year brought on a severe depression that he was unable to overcome. He is survived by his wife, Bonnie, and their two sons.

Timothy J. O'Connor, Jr.

Timothy J. O'Connor, Jr., the first modern Democrat to be elected speaker of the Vermont House of Representatives, died on January 16, 2018 at the age of 81. He was born in Brattleboro, graduated from the College of the Holy Cross in Worcester, MA and Georgetown University Law Center in DC, in 1961 (the same year he attended JFK's inauguration). In 1961, he married Martha Elizabeth Hannum of Putney, with whom he celebrated their 56th wedding anniversary last year. O'Connor was admitted to the bar in 1961 and worked as an attorney for half a century

and as municipal court judge until his retirement in 2011. He was first elected to the State House of Representatives in 1968, was elected as speaker in 1975, despite a slight majority of the opposing party and was reelected in 1977 and 1979 before leaving the Legislature in 1980. O'Connor served as the Brattleboro town moderator for over two decades. He is survived by his wife, a son, two daughters, three grandchildren and his brother.

L. John "Coach" Cain

L. John "Coach" Cain, 92, peacefully and quietly passed away in the presence of his family on January 19, 2018. John was a Burlington resident for over 65 years, having attended Cathedral High School and the University of Vermont. He graduated from Boston College Law School in 1950 and was a World War II combat veteran. John was politically active and served as Burlington Alderman, Chairman of the Burlington Airport Commission, City Representative and State Senator. He was in private practice until 1973, when he became Probate Judge in Chittenden County. He was a member of the ABA and VBA as well as the Ethan Allen and Burlington Country Clubs. John and his first wife, Paulina Woodbury Powers were married in 1948, and had seven wonderful

children. Paulina died in 1989, and John married Erika Geir Emmons in 1993, who rescued John from deep grief. Erika predeceased him in 2015. John is survived by his seven children and their families, many wonderful grandchildren and great-grandchildren, five step-children, a brother and sister, and is predeceased by one brother.

Benson D. Scotch

Benson D. Scotch, died on January 29, 2018 after a brief illness at the age of 83. Born in Elizabeth, New Jersey, Scotch received his BA from Yale University, served in the Army for two years as a writer for the recruiter service and graduated from Harvard Law School in 1961. Scotch practiced law in New York and Zurich before serving as an assistant AG in Vermont commencing in 1972. There, he was instrumental in defending the Vermont Container Deposit Law. Scotch served from 1981-1985 on Leahy's Constitution Subcommittee of the Senate Judiciary Committee in DC and then returned to Montpelier as the chief staff attorney of the Vermont Supreme Court for 15 years. Before retiring, Scotch served as the executive director of the ACLU for 3 years. He was an activist and advocate for free speech, civil rights and peaceful

conflict resolution his whole life. Scotch was also a founding member of the Onion River Arts Council and performed a radio commentary "That's the Way I See it" on WNCS for many years. He is survived by his wife of 54 years, Barbara, 2 daughters, a son, a sister and a granddaughter.

Michael P. Harty

Michael P. Harty, 68, of Bellows Falls, passed away unexpectedly on February 11, 2018. Harty was born in Bellows Falls, graduated from UVM and from the Western New England School of Law. He worked as a teacher for 14 years at the Green Mountain High School, served as Deputy States Attorney and retired from private practice approximately 6 years ago. Michael served as town moderator for many years, was a lister for the Town of Rockingham for 6 years and served one term in the State House of Representatives. Michael was known to be an outstanding citizen, committed to the greater Bellows Falls communities, in law and education. He is survived by his wife of 43 years, Wendy, two children, his mother, his brothers and grandchildren.

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