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219

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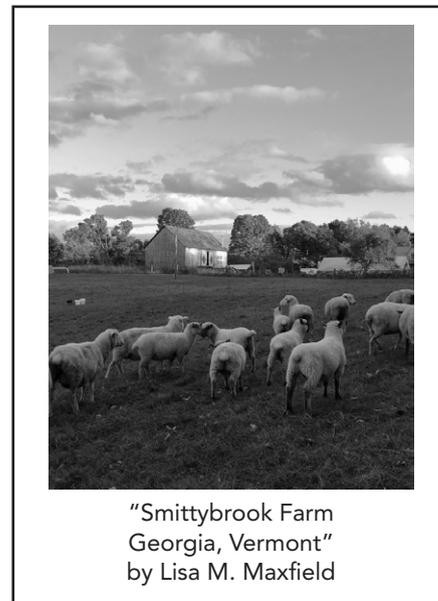
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PRESIDENT'S COLUMN

Listen to be Heard

As lawyers, we are trained to be zealous advocates, which too often translates into a competition of whose plumage is the brightest and attracts the most attention. But, as the old adage goes, God gave us two ears and one mouth for a reason. To be an effective mouthpiece, you also need to be a good listener.

Listening, however, is more than just hearing. It is an intentional and active exercise to better understand and connect to what is being said. In this age of communication, we risk losing meaningful connections under the monumental weight of noise streaming across a circus of devices.

To combat this modern phenomenon, and better understand where we as lawyers can most effectively add value to the social fabric of our communities, Chief Justice Paul Reiber and I embarked on a Listening Tour. Over the last year, he and I, along with the VBA's executive director Teri Corsones, traveled to each county in the State to personally meet with the local bar, local legislators, interested stakeholders in the legal system such as those involved with restorative justice, and occasionally members of the public. Also present were the local presiding judge and county bar president. We had no agenda other than to listen and actively demonstrate our interest in each community we visited.

While it turns out that not everyone is clamoring for the opportunity to meet with us, the meetings proved to be an effective forum for sharing experiences and ideas. To make folks comfortable, we deliberately avoided courthouses and instead met in community venues. Highlights included kicking off the Tour in the Town Hall Theater in Middlebury, gathering in the historic Old Labor Hall in Barre, pulling our chairs into an intimate circle in the Lunenburg Town Hall in the dark dead of winter, feeling the grandeur of the St. Jay Athenaeum – a gathering place for those seeking wisdom, and visiting various museums, libraries, and town halls. Crisscrossing the State offered a time to reflect on how the Bar is more than just a trade association. It is a community of respected, energized and selfless citizens – more role models than loudmouths.

At each stop, we passed out a list of pro bono and low bono programs as well as the ubiquitous green cards for the Vermont Lawyer Referral Service and other legal services that are found in every courthouse. In line with our access to justice mis-

sion, we want to be sure that these services are sufficiently promoted and well known throughout the State. After brief introductions, we opened the floor inviting those in attendance to share their concerns, questions and observations. While often a small gathering, participants were involved and seemed to genuinely appreciate the effort to visit with them. Discussions were typically robust, frank and respectful.

The more common topics raised and discussed included: the juvenile docket, restorative justice, the aging of the bar, drug treatment courts, the impact of the opioid crises, the shortage of lawyers (particularly in more rural areas), challenges to judicial resources and court management, landlord/tenant concerns, and expungements.

So what did we learn? Do more listening! It is often that gift of being heard that resonates the deepest.

While concrete action items are not easy to come by, it became clear how important it is to provide a platform for interactions between not only the bench and the bar, but between lawyers and legislators, various service providers, and members of the general public. Indeed, public outreach has been an important initiative of the VBA. The legal profession is faced with complex issues such as the disconnect between lawyers and self-represented litigants, social issues being presented in a legal system not designed to resolve them, the decline of rural services, the siloing of practice areas, and the need to attract talented young lawyers.



By providing an effective platform of engagement, lawyers have the opportunity to work beyond the confines of their practice and to participate in meaningful activities that highlight our profession, and the VBA fulfills its core function to promote legal services and the rule of law.



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An Interview with Incoming VBA President Elizabeth Novotny

TMC: It's September 4, 2019, and I'm meeting with VBA Board President-Elect Elizabeth (Beth) Novotny. Beth, on behalf of Vermont Bar Journal readers everywhere, thank you for taking time to meet with me today.

EN: It's my pleasure and thanks for taking the time to ask these questions.

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

EN: I was lucky to grow up in VT because I almost grew up in Canada. My parents wanted to live where they could enjoy the outdoors so after my father got his PhD they began looking for jobs in places that suited their interests. One of those places was Saskatoon, Canada, which my father perceived to be the duck hunting capitol of the world. When my father came to Burlington for his interview at UVM he knew immediately that our family would love Vermont.

TMC: How old were you then?

EN: We all moved here when I was about 7. Dad went to work at UVM and my mom held various jobs. She eventually got interested in politics becoming the first woman elected to the Burlington City Council and the first Democrat from her ward. After I graduated from Burlington High School and UVM I went to Suffolk Law School in Boston. I graduated from Suffolk Law in 1987, returned home to VT and have been practicing law in Vermont for over 30 years.

TMC: What led you to consider law school as a path?

EN: Watergate. I was inspired by witnessing one branch of government hold another branch, namely the President, accountable. To me, it was remarkable to observe the Constitution in action.

TMC: Did you consider practicing anywhere else besides Vermont?

EN: Yes. After I graduated law school, I resolved to make my own way in Massachusetts. But during one of my drives back from a visit to VT I had a moment of clarity. I finally acknowledged that I was going to VT on the weekends to enjoy all that VT offered and all that I loved. So, I swallowed my false pride and signed up for the VT bar, passed the exam and started my 6-month clerkship. It's the best decision I ever made.

TMC: What law jobs have you had during your career so far?

EN: Currently I'm general counsel to the Mosaic Learning Center and I've been in that role since 2012. Before that, I was a clerk to the Vermont Department of State's Attorneys and Sheriffs, a prosecutor with the Chittenden County State Attorney's Office, an attorney at Perry and Schmucker (a general practice law firm), General Counsel to the Vermont Department of Public Safety, and Assistant General Counsel to the Department of Financial Regulation.

TMC: That is a real variety! Did you have the benefit of a mentor when you were first starting out?

EN: My mentor is a retired Vermont Attorney-- Charlie Tetzlaff. Charlie has been in my life since I was in elementary school. He was a JAG attorney, prosecutor in Chittenden County, partner in a general practice firm in Burlington, U.S. Attorney for Vermont and General Counsel to the U.S. Sentencing Commission. He was well regarded as a skilled and effective attorney.

Charlie embodied fairness, integrity, and compassion. His decision making wasn't emotionally reactive – it was firmly grounded in the fair and just application of the law. He taught me how to think. He also put me through my paces by playing devil's advocate to any opinion I offered so I was an early student of the Socratic method. The one piece of advice he gave me before I started my first legal job was succinct because it required no explanation: "Always remember your word is your bond."

TMC: Great advice no matter the profession!

EN: Yes! I'd like to talk about another attorney who mentored me briefly but remains a role model. Kevin Bradley was the State's Attorney in Chittenden County who hired me, and he was a police officer at the Burlington Police Department before he became a lawyer. In his first year at BPD Kevin worked as an undercover cop in drug investigations. He was assigned to work with the legendary drug investigator Officer Paul Lawrence. Lawrence had worked all over Vermont and had an impressive arrest and seizure rate, so Kevin was excited to learn from him. Lawrence would send Kevin into a bar to make a drug buy and Kevin would come out empty handed. Then Lawrence would go into the bar and come out with drugs he claimed he bought in the bar. At first Kevin thought he lacked the right skillset but as this pattern continued, he started to question whether Law-



rence was honest. Even though Kevin was young and new and even though Lawrence was a legend, Kevin smelled a rat and confided his concerns to another officer. They took their concerns to BPD supervisors and to the then Chittenden County State's Attorney Patrick Leahy. They undertook an undercover operation that culminated in Lawrence's arrest. The people Lawrence arrested who were wrongly convicted eventually were pardoned – a story of both justice served and justice corrupted. Kevin's actions taught me never to be complacent about a claim of innocence, and to have the courage to act in defense of justice even when doing so might not be popular.

TMC: That's an incredible story. Is there one case in your own career that stands out, that you consider the most significant to you personally?

EN: That's a tough question. I have passion for justice in all its forms and have been lucky to meet many people who taught me a lot personally and professionally. One case that comes readily to mind is a case I had as a prosecutor. It was a horrific assault. A young gay man – I'll call him Pete – was repeatedly kicked in the head by a man who had just been released from prison. I'll call this man Monte. The police arrested Monte and seized his steel toe work-boots. The boots were hard to look at because they were saturated inside and out with Pete's blood. The assault took place outside of a gay bar in Burlington and Monte admitted he went to the bar looking to beat up a gay man (he actually used an offensive word for "gay man"). I could not charge Monte with a hate crime because Vermont didn't have

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that crime in the books then. I asked for the case because homophobia was alive and well and I wanted to ensure that Pete, as a victim and as a gay man, was treated with dignity throughout the process—assuming he even survived the assault. The defendant was eventually convicted and went to jail. Pete survived but as a result of the permanent brain injury he sustained his personality was altered and he had serious memory issues. He recalled enough to know he woke up a different person, though. It was gut wrenching watching Pete grieve the loss of himself and try to adjust to a new normal. This case became the catalyst for passage of Vermont’s hate crime law.

TMC: What a significant case to have been involved in.

EN: There’s actually another reason the case stands out for me. When he was in prison, Monte reached out through his attorney to meet with Pete. Pete declined because he suspected that Monte’s motivation for the meeting was early release through an upcoming parole hearing and Pete wasn’t emotionally ready to face Monte. Sometime later, though, there was another request for a meeting and this time Pete was ready to meet with Monte. In my prosecutorial career I seldom heard sincere apologies from defendants, so I was worried that Pete would be re-traumatized. I spent time with Pete preparing him for the possibility

of an unsatisfactory outcome. Pete’s decision to face Monte without guarantee of the outcome was incredibly courageous. Fortunately, and to my surprise, Pete reported that the conversation with Monte brought some measure of healing. Monte had been through intense therapy and was able to share his deep remorse, followed by what he learned about himself and how he’d changed. By all accounts, Monte was genuinely contrite and a different person. What ended up sticking with me the most is not what I expected: Monte found redemption. And Pete demonstrated an impressive capacity for compassion toward a man who showed him none.

TMC: I can see why the case was so memorable. What do you find most interesting about your work, currently? And what do you find the most challenging?

EN: I love everything I’m currently doing. In my capacity as General Counsel for the Mosaic Learning Center I see a variety of legal issues so it’s never boring. What I value the most is being able to contribute and support the client’s mission. The Mosaic Learning Center is an independent school for students with neurological differences who have intensive special needs. It partners with the public schools by providing an appropriate education placement for the students in Vermont. The staff and students inspire me beyond measure. The quality

and commitment of the teachers and clinicians, combined with the culture they maintain, is amazing and effective. I’m privileged to witness real change in our students, their families and ultimately their experience at home. So, I get a front row seat observing success in special education and that’s a gift. It also motivates me to protect their interests at the legislature and with government agencies.

TMC: Speaking of the Legislature, I know I see you frequently at the statehouse.

EN: Yes, I’m there during the session because I’m also the government relations representative for the Vermont Police Association and the Vermont Association of Assistant Judges. The most interesting part of my job as a lobbyist is to ensure that the client’s policy objectives are met by developing an effective strategy for meeting those goals. My approach is to understand the goals and motives of those proposing legislation, rules or policy and, if possible, find a way to meet their objectives in a manner that also works for the client.

TMC: I know that you also regularly volunteer on different boards and committees. First, thank you for your service in that regard! Second, what would you recommend to new lawyers in terms of volunteer opportunities for them?

EN: I know it’s a challenge for new attor-

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neys to find time but if they can find some modicum of time, I highly recommend service to their community or the profession. Service in any capacity yields back tremendous personal and professional growth and satisfaction. The challenge for me is balancing my work, my service as a board member to four organizations, my responsibilities as a Chair of a Hearing Panel for the Professional Responsibility Board and my family.

TMC: Speaking of volunteer board service, when did you become interested in serving on the VBA Board?

EN: Around perhaps 2011, Bob Paolini, the VBA's former Executive Director, talked to me about the role of a VBA Board member and it seemed like an interesting way to start giving back to our profession.

TMC: What did you think it was going to be like, what did it turn out to be, and how do the two compare?

EN: I had no expectations, only a desire to serve. I'm privileged to have worked with some committed and forward-thinking lawyers and for an organization that truly serves and focuses on its members. And I appreciate the dedication of the VBA staff. I wish all of our members knew just how much you and your staff have their best in-

terests in the forefront of everything you all do at the VBA.

TMC: Thank you. We always try to do our best! What has been the most satisfying part about serving on the Board so far?

EN: Building relationships and preserving the quality of the VBA. I think our members are amazing and I'm so proud of their dedication to the profession and their clients. It truly is a privilege to work on their behalf.

TMC: Has there been a least satisfying part?

EN: Yes, and then ultimately No. There are moments of discomfort or difficulty in all aspects of our lives. I've certainly experienced frustration about various issues or problems but that usually falls away when I focus my energy on identifying the opportunity presented by that problem and then leverage at least one positive outcome. So, in the end nothing truly remains unsatisfying.

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

EN: Yes, there are two important issues I would like to focus on. First, I'll continue to support the VBA's ongoing efforts to respond to the demographic changes in VT. We need to ensure adequate access and delivery of legal services in VT, especially in rural VT, as we face a decline in the number of incoming lawyers nationwide. Second, I'd like to work on improving the status of lawyers in Vermont in addition to promoting the importance of the rule of law and an independent and robust judicial system. In 2018 Rasmussen took a poll on the public's perception of lawyers. And the results are troubling—as a profession we have about a 29% approval rating on whether we are trustworthy. I think we need to change the narrative on all fronts.

TMC: Both very laudable goals. Beth, what's your favorite past time when you're not working?

EN: I have many interests, so I'll just name a few. I love being with my family and friends. I also enjoy working out, outdoor activities, puttering around the house and fixing what needs to be mended. But when I really need to relax, I love to create and cook a meal for my family and friends.

TMC: I've heard great things about your culinary skills! Do you have a favorite law-related or justice-related quote?

EN: I do. This quote and the person who spoke these words, inspired me to be a lawyer.

Representative Barbara Jordan from Texas is a hero of mine and I've read her bi-

ography many times for inspiration. During the Watergate hearings, I watched her deliver a speech that moved me then and now. My favorite part of that speech is this:

"We, the people." It's a very eloquent beginning. But when that document was completed on the seventeenth of September in 1787, I was not included in that "We, the people." I felt somehow for many years that George Washington and Alexander Hamilton just left me out by mistake. But through the process of amendment, interpretation, and court decision, I have finally been included in "We, the people." Today I am an inquisitor. I believe hyperbole would not be fictional and would not overstate the solemnness that I feel right now. My faith in the Constitution is whole; it is complete; it is total. And I am not going to sit here and be an idle spectator to the diminution, the subversion, the destruction, of the Constitution."

That speech meant so much to me because Representative Jordan was black, and I understood the significance of her remarks in light of her race. Despite having suffered under Jim Crow laws, Representative Jordan was defending and upholding a Constitution that once failed to protect her, and generations of people of color in America. For me, that speech is my North Star.

TMC: I'm sure that Representative Jordan would be proud of how she inspired you, Beth. Along those lines, what advice would you give to a young person thinking about law as a profession?

EN: I don't have any canned advice in mind. The advice I've given always depends upon the person asking. If I had general advice it would be to consider everything the legal profession offers since there is more to the profession than private practice.

TMC: Last question: What would you like to be remembered for, as the 140th president of the Vermont Bar Association?

EN: I really haven't thought about my year in terms of how I will be remembered. I have thought about my year in terms of how I can contribute and be of service to the VBA and its members. If I had to be remembered it would be that I showed up with integrity, dedication, and purpose.

TMC: I can certainly attest to your showing up in exactly those ways. Thank you for your willingness to serve, and we all look forward to a productive year!



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PURSUIITS OF HAPPINESS

From Sword to Pen - An Interview with Jim Knapp

JEB: I am in Williston at the office of First American Title with Jim Knapp, First American Title State Counsel and I'm here to interview Jim for our Pursuits of Happiness column where we talk about members' interests and talents outside of the practice of law. And you, Jim, have many!

Jim Knapp: Well, I do have an eclectic collection of things I like to do.

JEB: Yes, this collection struck me as even more interesting because of how much time you devote to the bar association and extracurricular law-related pursuits, presentations, articles, title standards, keeping up on the latest tech, serving on committees, assisting with legislation and helping anyone who has title questions. So, with all that time commitment, that's what I thought you did for fun - being a real estate and cyber geek who enjoys helping people in the legal field!

JK: Because there were older lawyers who helped me when I got started, I always felt it was the obligation to answer questions for anybody if I could. And I enjoy the pursuit of a difficult question. So I always tell people, 'I'm not sure when I'm going to figure out the answer to your question-- it may be years from now-- but I will call you with an answer at some point in the future.'

JEB: Have you ever called somebody back a year later with an answer?

JK: I don't think I got quite a year. I've called back several months after someone asked me the question and of course the answer wasn't relevant anymore, but I did finally figure out the answer.

JEB: Because you cannot leave a question unanswered, and there are a lot of quirky things in real estate!

JK: Yeah. Vermont has a reputation for having some real quirks in their real estate practice. I mean, it keeps you very busy. That is what makes it fun.

JEB: So back in the day before your current pursuit of happiness, which we will get to, my understanding is what you did a lot in your spare time was fencing. Is that correct?

JK: It is indeed.

JEB: Now is this competitive fencing or just go to the gym and find someone else who likes fencing?

JK: Actually, there were two time periods in my life when I was a competitive



fencer. The first one was when I was in college at the University of Maine, at Orono. They had a relatively good fencing club. Our club was one of the first clubs ever invited to fence in the New England regional tournaments to compete against schools like Harvard and Yale who've had fencing teams since the 1800's.

JEB: So you competed all through your college career?

JK: Well the end of my sophomore year through senior year.

JEB: Tell the readers a little bit about competitive fencing. I assume all blades are dull?

JK: Yes dull and/or electronic where they have a little switch on the end so you can tell when you hit the opponent. And there are three weapons. There's the foil, which is the lightest of the three. The target is just the torso. So from the seams of the jacket in and down to your legs. And foil fencing has a peculiar set of rules called 'right of way.'

JEB: Oh! I knew there was a real estate connection!

JK: Ah, yes. So at any given point only one fencer can score a point. And before you score you have to take the right of way away from your opponent. The point scoring depends on so many factors. I have

no idea how the referees keep all of its straight.

And the second is *épée*, where the entire body is the target from the tip of the toe to the top of the head, except for the back of the head, which isn't covered by the mask and there are far fewer rules in *épée*. You just get points for touching somebody where in fact both fencers can score points simultaneously. It's called the double touch. And many bouts are decided on the basis of one or two points because many of the touches will be doubled.

JEB: There must be high scores then.

JK: Not really, first bouts are three minutes to five points. In the middle rounds it's six minutes to 10 points. And in the finals it's always a 15 points in nine minutes.

JEB: Oh that's a lot less than I thought. I suppose some people are very good at avoiding getting hit.

JK: Yes, you have two skills, you either are very good at hitting your opponent or you're very good at avoiding being hit.

JEB: Like my son who was the latter in TaeKwonDo because he'd just sneak around and wait for them to make a move and then duck or something.

JK: Like that but in fencing it is a little bit of a challenge because it's fenced on a one and a half or two-meter wide strip, so

you don't get much horizontal movement. Fencing is a combination of physical ability, which has never been my skillset, and tactics, patience and reading the situation which I am better at. You get to understand when, for example, an opponent repeats the same attack over and over again, you know how to counter it.

And finally, the third weapon is a saber and that's an edge weapon, not a tip weapon. So you score with the edge and the target is anything from the waist seam of the jacket up.

JEB: The edge meaning like instead of stabbing or poking somebody it emulates chopping off their head or arms in a swiping motion?

JK: Yes, and typically in competitive levels in saber, it's a point or an edge somewhere along the forearm because of course that's the piece that's closest to you.

JEB: And, like in Monte Python you just start chopping off of limbs and then in theory your rival is rendered useless!

JK: Well, we don't usually do that in competitive....

JEB: [laughs] Just saying the hand would be a very valuable piece to lose, right, thinking about the origins of the sport?

JK: Yes indeed! So, you can summarize the sense of how fencing is done with this really short phrase: foil fencers argue about the rules; épée fencers test the edges of the rules and saber fencers say, 'there are rules?!'

JEB: Knowing you then, loving rules of law and rights of way analyses, I'd guess your favorite is foil?

JK: Actually no, mine is épée! You are right in college my favorite was initially foil, but in order to compete we had to have all three weapons and we needed at least two fencers in all three weapons. Otherwise you had to forfeit the bout. It turned out that I was among the taller of the candidates, which is important in épée fencing. And I was patient, which is a trait among épée fencers who can spend a large amount of the bout staring at each other from just out of the distance where you can score a touch waiting to see who's going to blink first. And so I was delegated to be the first position épée fencer. Which is a bit of a challenge if you're going up against a fencer from Harvard who's been fencing for 12-15 years and you've been doing it for seven weeks!

JEB: Did you win that one?

JK: I did not. The score in that bout was five to zero in 37 seconds.

JEB: Oh, ouch. Yes. But you continued.

So, after college?

JK: I didn't have time in law school. Plus, Syracuse didn't have a real big fencing program. Interestingly, however, I went to law school with the fencer who beat me five, zero in 37 seconds and he remembered me.

JEB: Funny! So when did you pick it up again?

JK: We're going to fast forward this 30 plus years. I'm in Vermont and my son really needed an activity outside of high school and one day when he was rummaging in the closet, he found my collegiate fencing gear. He decided it looked cool and he wanted to learn to fence, to which I responded, 'probably not in Vermont.' But, little did I know that the University of Vermont had both a fencing club for university students and a club for members of the community who would practice together at UVM.

There was this coach who was one of those personalities who, as soon as you walk into his orbit, he simply sucks you in. I brought my son and the coach asked why it was something he wanted to do? And he said, well, my dad fenced in college and it looks fun. He was satisfied but then he looked at me and he said, well, get out here. I said, 'no, I'm 50 plus years old. That was a long time ago.' He didn't seem to care, and he in fact resurrected my fencing career with persuasion.

JEB: Secretly, you really wanted to do it, right?

JK: I did. You hit the nail on the head. It was a great time fencing with them. And so my oldest son and our middle son both took up fencing and because of the limited number of fencers in Vermont, we were all expected to compete, and we competed together. In a good tournament in Vermont, you would have somewhere between 30 and 50 competitors though.

JEB: Did you win competitions?

JK: No, but with good reason. Both of my sons and I competed and I can't tell if they worked out the brackets or if it happened to be simply by chance, but I would always meet one of my sons before going into the medal round.

JEB: So you let them win?

JK: No, I never let them win. I always lost by a close score going into the medal round.

JEB: Because they are younger and they have your skill?

JK: I will tell you that six minutes up against the high school or college age student for a guy who's 50 plus years old is a hard and tiring six minutes!

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JEB: Just six minutes. Is it that difficult?

JK: It depends on the weapon you choose and how you choose to fence that weapon, it can be very intense and physically demanding. In the initial round, you'd fence four or five other people to determine where you fit in the brackets. And then you would fence through the brackets until you were eliminated which would take a full day. And saber is absolutely physical compared to the others.

JEB: So you no longer fence?

JK: No, I continued for about 8 years at which point my then more than 50-year-old elbow wouldn't let me play. Basically, my doctor said you have two choices, you can keep going and that elbow will never heal, or you can stop now and there's about a 50, 50 chance your elbow will come back. I stopped and it did heal but I'm a little bit afraid of that and I've had some problems with an ankle after rolling it in a tournament.

JEB: Now that your elbow, your ankle and your age no longer permit you to continue to fence competitively, you took up another sharp instrument: pens! How did the pen-making start?

JK: For my entire life, I have been a pen

snob. I have chosen the pens that I use very carefully. They have not always been the most expensive of pens, but I have always looked to use the best pen. And for years I used a fountain pen because the fountain pen is, is a wonderful tool because it forces you to write slowly, which means you can think as you compose.

JEB: I never thought of it that way, you mean fountain pens with cartridges or you actually dipped in ink?

JK: I usually did the cartridges because the dip pen was too hard to keep all of the pieces together and not make them mess. But I really did enjoy using them and I did find that when you write with a fountain pen and bear in mind, I started practicing well before there were word processors or anything else, it's more deliberate and it allows you to think.

JEB: I think I'd be frustrated forgetting what I was going to say by the time I wrote it all out.

JK: I don't find that to be a problem. But I always liked nice pens, but nice pens are very expensive. One day my youngest son (not a fencer) started talking about making pens. And I've always wanted to do it but couldn't commit to buying equipment and figuring it all out. It's not like you can go to school to learn how to make a pen. There's no pen making school in Vermont. But we learned the way everyone learns everything today from YouTube.

So one day we decided that we would go and just look at the equipment, which of course means, we drove down to Salem, New Hampshire and came back with about \$700 worth of equipment.

JEB: Wood turning equipment?

JK: Yes. Turns anything up to about 18 inches. Pens. Wands. Table legs. And so we started making pens, learning from scratch, experimenting with various things and broke a lot of stuff. We made Harry Potter wands too.

JEB: I assume a wand or hollow pen would be easy to break as you are learning. The hollow for making a pen must be hard.

JK: Not after you learn. You have a block of wood that you buy it or find (actually some of the prettiest pens I've made are wood that I picked up either walking along the seashore or along Lake Champlain).

JEB: And that makes it more special.

JK: Right. And so you have a block of wood that you cut to the length of what's ultimately going to be the pen, drill a hole in the center, put tubes in the center and then you turn the wood into the shape you want. You have to buy the metal fittings. We haven't quite gotten to the point where

we can make our own fittings, although we have been experimenting with aluminum.

JEB: Wow. I have in my hand, one of your original older pens, and it's very heavy.

JK: Yes, the first ones used brass. But brass fittings are heavy. They are a roller ball type with a screw on top. Now we make the cross-style pens where you twist the two halves and the tip comes out. We made some click pens too, but you have to find a good clicker kit.

JEB: Because you'd worry you spent all that, all that effort and time to replace the innards.

JK: More importantly, once you put a click pen together, you can't take the innards out. And so once the clicker stops working, the pen becomes an art piece but not or usable. But these older ones you could replace all the pieces.

JEB: I see now you use different metals and materials.

JK: Yes, a lighter metal. And we did wood for a while and then we decided to branch into the acrylics. While the wood-grain to me is, is fascinating, they do make some awfully pretty acrylics in colors and patterns.

JEB: So is this a business or hobby?

JK: Well I suppose we could sell them, but we seem to always give them away. In fact, starting in 2016, the first full year after we were making pens, my son decided that he would make a pen for everyone at his company for Christmas. So, over the course of five and a half weeks we made 42 pens.

JEB: Wow, that's a lot of pens. Wood or acrylic?

JK: Both. We probably, between the three of us, myself and two of my sons, we've probably made somewhere between 300 and 400 pens.

JEB: Impressive. Now I have a Jim Knapp original. But it doesn't have your initials on it. Have you considered marking your creations?

JK: We don't typically. We found a way to laser engrave the wood but I don't do it with every pen. It's actually quite a bit of work to get everything to line up and to do what you want it to do. And it takes away the wood grain or pattern.

JEB: And that's what makes them so beautiful. So no sales then?

JK: We sold a few pens to people, but it really is a hobby not a business; I prefer simply giving them away.

JEB: We were at lunch recently where you left a note for the very nice waitstaff and I asked what you were doing as you didn't leave your name or note about the service.

JK: Yes. I just tell them on the note what the materials are and what type of refills they take. That's all, I like to be the mystery giver. At one point we talked about the idea of doing an Instagram or a Twitter type thing where we would simply leave a pen somewhere with coordinates or a cache of some kind to see if people would respond. But we haven't done that yet. So far, we've distributed pens in five New England States and one European country to various people.

In Germany with this nice shop owner, I was signing the credit card receipt, and she was eyeing the pen. So I gave it to her and she said, 'oh no, you can't give me this.' And I said that I'd just make another one. And that always starts the conversation!

JEB: Do you have one style that you make to give away or one color that's for gifting to strangers?

JK: Well we do not give away the most expensive ones, but I can say that yours is one of the moderate ones because it's made from one of the materials that's more expensive than average.

JEB: I love my pen beautiful red swirly pen!

JK: But the most expensive pen I've ever made, the materials were around \$50 or \$60 for the kit itself and the material is actually what they call a tru-stone blend where they grind stones to dust and mix the dust with an acrylic base. This one is a mix of several blue stones; there is lapis in this and it is blended with an acrylic binder so you get these beautiful swirls. You can also get a black and white granite blend.

JEB: It is surprisingly light compared to your original brass models here, even though it is stone.

JK: Yes, the pen kit is about \$30 and then there is the stone. I've seen these pens made from similar materials retailing for somewhere between \$200 and \$300 on Etsy.

JEB: So you'd spend \$50 to make a \$300?

JK: I would, but I'm not selling this. It's my favorite.

JEB: And it's a hobby. I assume it is more about spending time with your sons and working with your hands to create something.

JK: Absolutely. I mean for 35 years I've worked with words, right? Even though those words turned into things like facto-

ries, hotels and multifamily housing, and you could in fact drive around the Northern part of Vermont and I could say this or that wouldn't have existed if I hadn't helped, but this pen is something that you can see for a long time and you can touch it. I can point to a, a display of pens and say I made those.

JEB: I recall many of the people I interview for this column find working with their hands to be an essential part of their well-being.

JK: Yes, it's wonderful because it requires intense concentration but a different kind from the practice of law. And it's almost like meditation to me; you have to let your mind go, but there's also a lot of concentration at the same time. And, oh the finishing process! There is something about seeing that shine come up on the finish. Because the finishing process for a wood pen involves 6 to 8 grades of sandpaper and may take 30 or 40 minutes to get a smooth finish. And the finishing process for an acrylic pen or one of the tru-stone pens involves 12 to 15 grades of sandpaper and up to a couple hours to get the finish to be smooth and shiny and the way you want. It's becomes relaxing and meditative. You get to see the results right away, too, unlike legal work.

JEB: That's a ton of hours per pen! Do you make 40 every Christmas?

JK: No, but I make them if somebody has a charitable auction or raffle or needs a fundraiser, I do that for a couple organizations around here. What I've had the most fun doing is making pens for people to remember things by. For instance, one of my wife's friends finally had to decommission their sailboat so I made them a pen from some of teak from the boat. Or for graduations, we've had people bring us a piece of wood from campus to make their son or daughter a pen.

JEB: Feel good pens. I love it. So I have to ask, on occasion, or after several hours of finish work, when you are feeling a little punchy, have you ever fenced with one of your pens?

JK: Surprisingly, no! I still have my fencing gear, but I just have to look at it and my ankle and elbow start to twinge a little bit. If I need to relax, I'll just go make a pen.

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



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RUMINATIONS

The Constitutional Opinions of the Attorney General of Vermont

"It is my opinion and I so advise."¹

The Attorney General is the prosecutor, defender, and advisor of the State, its chief law enforcement officer. As advisor, the 24 modern Vermont Attorneys General have written and published hundreds of opinion letters to governors, commissioners, and legislators. Together they reveal the cultural and legal changes that bedeviled and inspired Vermont state government during the last 115 years. They also represent an important source of Vermont constitutional law.

For much of the twentieth century, Vermont Attorneys General published their decisions in a biennial report, beginning at the time the office was reestablished in 1904, but the publication ceased many years before the statute mandating the report was repealed in 2009.² The A.G.'s office has a series of three-ring binders indexing the various opinions over the years, and the web page of the office provides links to digital versions of the letters of Bill Sorrell and T.J. Donovan. But those most recent A.G.s have issued significantly fewer public opinions than their predecessors. No lawyers, public or private, want to broadcast their positions on the law before their time, or be held to a particular argument when preparing a case, before it's clear what best fits the objectives of the litigation.³

The Value of an Attorney General's Opinion

What the State's highest-ranking lawyer thinks is not really precedent, in court at least, but the General Assembly certainly listens to what the officer thinks, and governors proceed at their risk in ignoring the advice of the one who will defend their decisions when challenged. Vermont's U.S. District court has acknowledged the opinions are not binding, but are "entitled to weight in determining the legislative intent behind a state statute."⁴ When other sources fail to provide "controlling authority," the opinions take on increased weight, and when exigencies of a particular prosecution or defense require the State's lead attorney to take a position, it's worth exploring whether prior A.G.s might have taken a different position on critical issues.⁵

John Lysobey appeared pro se in a series of cases involving a claim of access to his property on Okemo Moun-

tain 20 years ago, and relied on two opinions of the Attorney General, issued in 1970 and 1987, to buttress his arguments. Justice John Dooley gave them little respect. "The opinions of the Attorney General are, however, merely advisory opinions for the benefit of state officers." They have, he explained, "no binding effect in this Court."⁶

The duty to give opinions is codified in statute.

The Attorney General shall advise the elective and appointive State officers on questions of law relating to their official duties and shall furnish a written opinion on such matters, when so requested. He or she shall have general supervision of matters and actions in favor of the State and of those instituted by or against State officers wherein interests of the State are involved and may settle such matters and actions as the interests of the State require.⁷

This duty was first imposed on the Attorney General in 1904, in the act that created the modern A.G.⁸ The A.G. was also required to attend each legislative session and advise and assist in the preparation of the legislative business, making the A.G. the early version of today's Legislative Council.⁹

Occasionally, one Attorney General overrules his predecessor, as Lawrence Jones did in an opinion about insurance, reversing an earlier opinion by J. Ward Carver.¹⁰

A Short History of the Office of Attorney General

The office was first created by legislation in 1790.¹¹ The Attorney General has never been part of the Vermont Constitution, although attempts to include the office were proposed in 1941, 1971, 1983, 1997, 2003, and 2007, by the Senate, but only in 1971 did the idea make it to a public vote, which was then rejected by the people. The federal constitution doesn't mention the U.S. Attorney General either.

It was all about money. The 1790 act creating the office of Attorney General explained the reasons for the legislation. "There has been great neglect in collecting and paying into the state's Treasury the fines, penalties, & cost, that have accrued to the State in prosecuting criminals,

whereby the finances of the State have been greatly impaired, occasioned by the want of some proper officer to collect, and be responsible for the same." The Attorney General was authorized to "prosecute all matters and causes that are properly cognizable by the supreme court in behalf of the State, to advise with the judges of said court in setting the form of all mandatory and other select writs, to file information ex officio in said court in all matters proper therefore; and who shall have full power to take all legal measures to collect all such fines" The incumbent could appoint a deputy if needed.¹²

Samuel Hitchcock was the first A.G. of Vermont. He was elected by the General Assembly for one-year terms. After three years, when Hitchcock was not interested in another term, the legislature chose Daniel Buck to fill that office, who served until 1795 when the office became vacant, and eventually was abolished. This happened in an unusual procedural process.

The House had passed a resolution in October 1795, ordering an enquiry into "the Benefits resulting from the Office of Attorney General and whether the act constituting said [office] be or be not expedient."¹³ Yet a revised law was proposed and adopted on November 12, 1796. In that version, the legislature would still fill the office, although if a vacancy occurred it was to be filled by the Supreme Court, which also had the duty of advising and consenting to the Attorney General's choice of a deputy. The collection of fines, penalties, and fees was the first duty of the Attorney General under this law.¹⁴ Then something very curious occurred. The office was not expressly abolished; it was just not filled. The House refused to meet with the Governor and Council in joint session to appoint an Attorney General the day following the passage of the reform act, on November 13, 1795.¹⁵ In 1797, the legislature finally abolished the office, by adopting a comprehensive compilation of laws, and abolishing all laws not contained in the compilation.

Why the legislature abolished the office of Attorney General is unclear. Perhaps it was the size of Daniel Buck's bill or because no one wanted the office. The effect of the change was to make State's Attorneys the chief law enforcement officials in the state for more than a century.¹⁶

During the interim 109 years when Ver-

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mont was without a chief law enforcement officer, when the State needed representation in civil matters, leading private attorneys were hired. In the reported decision of *Brackett v. State* (1801), Richard Skinner, Bennington County State's Attorney, and David Fay, the previous State's Attorney, represented the State.¹⁷ When Orleans County sued the State Auditor in 1893, over the county's claim for water rents based on the State's use of the courthouse and jail, F.D. Hale and Bates & May were hired to defend the State.¹⁸ No attorney is listed as representing the State in the report of *Brown v. State Treasurer* (1887), where an old soldier tried and failed to obtain extra pay for his Civil War service.¹⁹

Governor Horace Fairbanks was the first to recommend creating a modern office of Attorney General. His 1876 Farewell Address mentioned that the State had paid out \$3,500 to private attorneys for aiding in State trials that year alone. Not only would an Attorney General save that expense, but would provide assistance and direction to State's Attorneys, particularly in the more important criminal trials. State's Attorneys routinely served for single terms of two years, and needed a mentor to oversee their work. Grand juries would no longer be necessary, except in cases of treason and murder, and the information, the A.G. acting on his own discretion, would replace indictments for most cases.²⁰ Wheelock Veazey had recommended the same in his report on the completion of the *Revised Laws* (1880), and Governor John L. Barstow approved of it in his 1882 Inaugural, as did Josiah Grout in his inaugural of 1896, John G. McCullough in his 1903 Farewell Message, and finally Charles Bell in his 1904 inaugural. The legislature responded to these proposals by passing the 1904 statute.

The first law authorizing the employment of detectives was passed in 1894, and applied to the State's Attorneys.²¹ In 1908, the legislature authorized the Attorney General to employ "such persons as he may choose to search for and pursue, or secure evidence against, persons supposed to have committed crime in this state."²²

Before 1937, the office included the Attorney General, a secretary, and a detective. After that date, a Deputy Attorney General joined the office. Louis Peck was the first Assistant Attorney General, appointed in 1960, and only the third lawyer in the office, hired to handle the litigation expected to come with the laying out of the Interstates. Since that time, the office has grown into the largest law firm in the state.

Who were they?

The 26 men (and there have been only

men) who served as Attorney General were a remarkable group. Sixteen had served as a State's Attorney before being elected, and eight were formerly Deputies Attorney General. Three also served as Municipal Judges (Rufus E. Brown, F. Elliot Barber, Jr., and Charles E. Gibson, Jr.), before or after their years as Attorney General, and one was a Vermont District Judge (John P. Connarn) after his term ended.

Fifteen were graduates of a law school.

The longest-serving Attorney General was William Sorrell, who was 19 years as Attorney General (1997–2016). Jeffrey Amestoy served 12 years and Lawrence C. Jones 10 years. The shortest service was Charles J. Adams, who was appointed to fill the vacancy caused by the resignation of Thomas M. Debevoise and chose not to run for the office at the end of the one-year appointment. Many served one or two terms before moving on to other public offices or private practice.

Two were defeated for reelection (Rufus E. Brown defeated John G. Sargent in 1912; M. Jerome Diamond defeated Kimberly B. Cheney in 1975). Five were first appointed to fill vacancies (Clarke C. Fitts, J. Ward Carver, Thomas M. Debevoise, Charles J. Adams, William Sorrell), and all but Adams then ran for reelection and won the office in their own names. Four resigned while in office (Frank C. Archibald, Frederick M. Reed, Thomas Debevoise, and Jeffrey L. Amestoy).

Herbert G. Barber (1915-1919) and his nephew F. Elliot Barber, Jr. (1953-1955) each served as Attorney General. Alban J. Parker served two terms in the Vermont House and one in the Vermont Senate after retiring from the office of Attorney General. He had succeeded Clifton G. Parker as Attorney General, having the same last name but no family relationship.

The first law authorizing the appointment of a Deputy Attorney General was passed in 1937.²³ Before that time the Attorneys General hired assistants to share the workload, as early as 1908, when Clarke C. Fitts had the help of John Garibaldi Sargent, who succeeded Fitts as Vermont's second Attorney General that year.

The youngest Attorney General was Thomas Debevoise, appointed at the age of 31. The oldest was Frank C. Archibald, who took office at the age of 62. Most Vermont Attorneys General were in their forties when first elected or appointed.

Sixteen of the twenty-six were Vermont natives.

All were Republicans except Democrats John Connarn (1964-1966), M. Jerome Diamond (1974-1980), William Sorrell (1997-2016), and the incumbent T.J. Donovan (2016-the present).

After their service as Attorney General, three served in the U.S. House (Dan-

iel Buck, Robert Stafford, James Jeffords, Jr.) and two of them later in the U.S. Senate (Stafford, Jeffords); one became Governor (Stafford); one became U.S. Attorney General (John Garibaldi Sargent). One became Chief Justice of the Vermont Supreme Court (Jeffrey L. Amestoy) and two were respectively appointed a U.S. District Judge and U.S. Circuit Judge for the Second Circuit (Samuel Hitchcock, James J. Oakes). One served as President of the Vermont Law School (Thomas M. Debevoise).

A Sample of Constitutional Opinions

Of Samuel Hitchcock and Daniel Buck, the first two Attorneys General, there are no extent opinions, and Vermont's first modern A.G., **Clarke C. Fitts, Jr.**, who issued many letters to state officials, included no opinions that addressed constitutional issues in his four years in the office. His successor, **John G. Sargent**, advised Governor George H. Prouty not to sign the bill appropriating \$12,500 to pay the debts of the Town of Jamaica, as it violated Article 9 of constitution. He wrote, "The debt of this town is of its own incurring, is a burden resting on its own citizens and the property in the town, a debt and a burden in which the citizens of the rest of the State have no interest, which they have had no part in creating, and are under no obligation to pay." "When the Legislature assumes to impose the pecuniary burden upon the citizens in the form of a tax, two questions can always be raised. First, whether the purpose of such burden may properly be considered public, and second, if public, then whether the burden is one which should properly be borne by the district upon which it is imposed." "In my judgment the measure is unconstitutional and void."²⁴

Sargent did not sign his opinion letters. That was left to Mildred Brooks, his secretary, who wrote to the various officials herself, explaining that the A.G. had asked her to relate his view of the law.

Sargent told the legislature that a bill authorizing the use of eminent domain for the construction of dams violated Article 2 of the Vermont Constitution, the takings clause, because it exempted any mill owner from condemnation. "The public necessity which requires the taking of one man's property, though a small farm, must be such as required every other land-owner, be he the greatest manufacturer, to yield it."²⁵

The demand on his time to provide opinions caused him to introduce some control over the process. He refused to answer the questions of town listers and the President of the Burlington Humane Society, explaining that his authority was limited to state officials, which was necessary to avoid con-

licts were he to have to enforce the law against them.

Sargent advised Governor John A. Mead that he couldn't call the legislature into special session and limit the subjects that could be addressed. He wrote, "the only authority you have in the matter of what business shall be done is to lay before the General Assembly, when you may call it together, such business as your good judgment directs, and the legislature is at liberty to enact any and all such measures as it may see fit to enact."²⁶

Rufus G. Brown defeated John G. Sargent in the Republican Primary of 1912, and won the office. In his two years in office, Brown issued only one constitutional opinion, advising Senator Frank E. Howe that a bill blending the drawing of jurors and the empaneling of the twelve, in municipal and city courts was not a violation of the constitution's right to a jury. He reminded the Senator that peremptory challenges are a right of exclusion, not of selection.²⁷

Herbert G. Barber took office as Attorney General in 1914.²⁸ He advised Governor Charles W. Gates that he had no constitutional authority to pardon Mildred Brewster, found not guilty of homicide by reason of insanity, as her confinement was not related to a crime but to the decision that she was not a safe person to be at large.²⁹

In 1917, Barber advised Commissioner of Agriculture E.S. Brigham that he had the authority to order domestic creameries to refuse product from Canada until it met state standards, but did not have authority to enter Canada to inspect the farms that were sending the cream into the state. A state inspector might enter Canada to dismiss the reasons for dissatisfaction with the farmers, in the nature of a friendly business visit, not an official inquiry, with no power to order the Canadians to change their methods.³⁰

Barber told Governor Horace F. Graham he couldn't commit a delinquent taxpayer to jail for failing to pay property taxes, in violation of Article 1.³¹ He also advised the Secretary of State that an act passed by the House and Senate, a different version of which was signed by the Governor, was void. The Secretary should not amend the copy presented to him as official in accord with the journals of the respective houses.³²

Carver was succeeded by **Frank C. Archibald** in 1919. Archibald told Governor Percival Clement he couldn't grant a reprieve or pardon to a defendant convicted of murder, as the constitution did not permit it. He wrote H.P. Sheldon, Fish and Game Commissioner, that penalties for violations of the laws he administered could not be remitted by the court, that this is a power only the governor can exercise.³³ He explained to Lieutenant Governor Franklin S. Billings in 1923 that the Senate could not

reconsider its vote concurring on a proposal of amendment of a bill, that ratification "once acceded to by a state legislature" exhausted its power to act.³⁴ And he advised Governor Aaron H. Grout that a bill levying a tax on billboards was no violation of Article 2.³⁵

Archibald resigned his office in May of 1925, and the Governor appointed **J. Ward Carver** to the post. Carver served until November of 1931, and issued no opinions relating to the constitutionality of bills or acts.

Lawrence C. Jones took the Attorney General's office in the election of 1931. That February he advised Representative Proctor H. Page that a bill amending the peddlers' licensing law was unconstitutional in charging nonresidents twice the fee to be paid by resident peddlers. He told Orrin B. Hughes, Chairman of the House Judiciary Committee that the Vermont Constitution left the legislature the discretion to apportion the Senate, and that the courts had no role in the process. He recommended using an expert mathematician to design a plan "by dividing and assigning in JUST proportion and regarding always the counties having the largest aliquot parts of a unit or integer and guaranteeing one Senator to each county."³⁶

Jones found no constitutional problem with the proposed excise tax on electric power manufactured in Vermont, concluding that it was not a direct burden on interstate commerce and that the legislature might exempt municipalities with their own utilities from the tax.³⁷ To Walter H. Crockett, then Director of Publicity, he clarified the law on public access to lakes and ponds for fishing. People cannot cross private property to reach boatable waters without consent or compensation as that would constitute a taking. Jones suggested the answer was to lay out public highways to bodies of water.³⁸

A law regulating transportation of tear bombs would not violate Article 16's right to bear arms, he told the legislature.³⁹ But a law adopting the federal definition of intoxicating liquor would be unconstitutional in his view. "Legislative power is vested exclusively in the General Assembly. It is a power which cannot be surrendered, delegated or performed by any other agency. The enactment of laws is one of the high prerogatives of a sovereign power. It would be destructive of fundamental conceptions of government through republican institutions for the representatives of the people to abdicate their exclusive privilege and obligation to enact laws."⁴⁰

The legislature may regulate nonresident businesses that ship oleomargarine into Vermont from another state and offer it for sale or use and not offend the Commerce Clause.⁴¹ But Article 2 does not authorize

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the state to condemn private property for federal purposes such as the proposed Green Mountain Parkway, the highway that the federal government had planned to construct along the highest parts of the Green Mountains.⁴² With that opinion, Lawrence Jones placed himself squarely in the middle of one of the great political questions of his time. He even took a position in favor of a sterilization law that authorized hysterectomies and vasectomies of persons deemed "mentally defective."⁴³ Neither the Fourteenth Amendment nor Article 1 would be offended, in his opinion.

Jones objected to a proposed old age assistance act on constitutional grounds, citing Articles 1, 7, and 18, believing that it would discourage thrift and industry.⁴⁴ He told Governor Charles M. Smith in 1935 there was no constitutional prohibition against aliens owning land in Vermont.⁴⁵ He told Commissioner of Finance William L. McKee in 1936 that the Governor has no power to commit the State to hospital and doctor's care of an injured state employee, as the legislature had not appropriated funds for that purpose, citing Article 6 and Section 20.⁴⁶

Elbridge C. Jacobs, Assistant State Geologist, asked Jones about the removal of gravel from the beds of rivers, and the A.G. explained the gravel was part of the public trust, and no one, not even the state highway department, had the right to touch it without an express act of the legislature.⁴⁷ Secretary of State Rawson Myrick was advised that members of the Civilian Conservation Corps who came to Vermont from other states to work in the program were not qualified to vote in Vermont elections, even after a year's residence.⁴⁸ Commissioner of Motor Vehicles Murdock A. Campbell was told funds appropriated for one biennium cannot be used in a successive biennium unless put in trust by the legislature.⁴⁹

In 1937, A.G. Jones told Emery A. Melendy, Chairman of the Board of Public Works, that Article 2 did not require compensation to a lumber company that lost access to its timber rights by the submerging of a town highway at the site of the Waterbury Reservoir, and further that the Town of Waterbury couldn't be compensated for the taking of the highway.⁵⁰

Jones wrote Perry H. Merrill, State Forester, in 1938 to advise him that the State has authority to store logs in a lake for several years as long as the lake is boatable.⁵¹ He told Sheriff Fred A. Flint to hire deputies from within his county, at least for now, until the A.G. figured out whether it was necessary.⁵² He concluded it would be proper to give the Conservation Board the power to set limits and seasons on fauna, and no violation of the separation of powers, as long as legislation contained stan-

dards and criteria.⁵³ Section 54 would be violated if a postmaster was appointed a deputy sheriff.⁵⁴

Jones further opined that the Board of Barber Licensing and Examination cannot discriminate against barbers trained in other states, at the risk of violating Article 7 (common benefit).⁵⁵ Nor can the law attempt to fix the prices barbers charge for haircuts.⁵⁶ A law suspending and invalidating all existing pin ball operators' licenses would not violate the Commerce Clause.⁵⁷

Article 13 (freedom of speech, freedom of the press) prevents enforcement of a law that prohibits the press from publicizing decisions to place juveniles in the Weeks School.⁵⁸ Article 7 is violated by a bill that would discriminate between domestic and foreign insurance agents and between agents who sell chattels on a time sales plan and those who sell them outright.⁵⁹

A bill relating to union school districts would violate Section 67 if schools are not located in each town.⁶⁰ A bill to appropriate sums for a parochial college would violate the Establishment Clause of the U.S. Constitution.⁶¹

Lawrence Jones chose not to run for another term in 1946 and **Clifton G. Parker** was elected that November. Parker told Russell P. Hunter of the Fish and Game Service that landowners cannot fish on their own posted lands out of season, even if the land had been licensed as a private preserve.⁶² He wrote Merritt A. Edson, Commissioner of Public Safety, that a mandated blood test for DUI would violate Article 10 against self-incrimination.⁶³ Later, he advised Edson that a witness and his attorney may not be held in contempt for failing to appear before a State Fire Warden hearing as they were exercising their rights against self-incrimination, but that contempt might be found if they refused a second time to appear. Parker urged the warden to be sensitive to claims of self-incrimination.⁶⁴

F. Elliot Barber, Jr. won the office in 1952. Barber found no constitutional objection to a bill that would prohibit the artificial raising and lowering of Lake Seymour, beyond the minimum and maximum levels of 1953.⁶⁵ He advised the Joint Canvassing Committee of the House and Senate to count the votes of a candidate for the House who died, whose election was contested, concluding that the candidate who received the next highest votes was not to be treated as the victor if the deceased candidate had more votes. A vacancy would be created if that happened.⁶⁶

Barber told Governor Lee Emerson his executive order permitting the commissioner of taxes to allow representatives of the Greater Vermont Association to study corporation tax returns was a violation of Section 5, as the returns were confidential.⁶⁷ He advised the Commissioner of Edu-

cation that it would be unlawful for a school to permit religious groups to conduct religious services or classes during school hours, even when they were offered only on a voluntary basis and offered equally to all who chose to participate.⁶⁸ Six months later, Barber agreed that schools might be used for religious purposes, as long as the organizers paid the expense, and that during school hours parts of the New Testament may be read in school, and the Lord's Prayer recited, as long as no commentary accompanied the readings.⁶⁹

Barber told John E. Hancock, Speaker of the House, how to read Sections 9 and 14 together in harmony. Where the constitution requires votes to be by ballot, if the requisite number of members ask for the "yeas and nays," there can be no secret ballot.⁷⁰

Robert T. Stafford succeeded Barber as A.G. in 1955 but issued no opinions that discussed the Vermont Constitution. Two years later, in 1957, **Frederick M. Reed** was elected Attorney General, who issued only a few opinions involving the constitution. Under his watch, the first A.G. Opinion signed by Louis Peck was issued, telling William Poeter, Commissioner of Highways, that the State cannot compensate owners who advance construction on property announced to be condemned, in an attempt to increase the value of the property.⁷¹ Thereafter, many of the succeeding A.G.'s opinions were signed by Peck, as he became the font of wisdom for succeeding A.G.s, who relied on his knowledge and experience.

Reed left office at the end of his term and **Thomas Debevoise** was elected A.G. in 1960. The following April he advised Oren W. Bates, Chairman of the House Committee on Fish and Game, that a bill prohibiting one who has failed to pay a poll tax from having a fishing or hunting license violated Section 67 (right to fish and hunt).⁷² He told William Poeter, Commissioner of Highways, that when it is necessary to eliminate a spring within the public right-of-way, a landowner is not entitled to compensation.⁷³ Debevoise explained to Governor F. Ray Keyser, Jr. that any Senate reapportionment plan must give Chittenden County five senators, Rutland County three, and the other counties the same number they then had.⁷⁴

Debevoise resigned before his first term ended, and **Charles J. Adams**, who was his Deputy, was appointed to serve out the year. Adams told Governor Hoff he couldn't appoint a federal customs officer to a position as trustee of the Vermont State Colleges.⁷⁵ He responded to Speaker Franklin S. Billings, Jr. that a call for the "yeas and nays" eliminates the opportunity for a secret ballot in the House, the same answer provided by F. Elliot Barber, Jr. in 1955 to

a former Speaker.⁷⁶ On his last day in office, Adams advised Governor Hoff that a constitutional convention to reapportion the seats in the legislature was possible, even though that process is not laid out in the constitution, although any proposal adopted would still need to be ratified by the voters.⁷⁷

Adams did not run in 1964 for the office, and **Charles E. Gibson, Jr.** was elected in the General Election that fall. In his two years, Gibson issued one constitutional opinion, where he opined there was no violation of Section 5 (separation of powers) for a legislator to serve on a policy-making committee within the executive branch.⁷⁸

John P. Connarn, the first Democrat to be elected A.G., took office in January of 1965, advised Elbert G. Moulton, Commissioner of the Vermont Development Department, that the constitution was not troubled by the expenditure of public money for the construction, remodeling, and financing of industrial development.⁷⁹ Connarn condemned a plan of the Republican caucus to mandate how all Republican legislators would vote on a bill as a violation of Section 56 (oaths of allegiance and office).⁸⁰

James J. Oakes was elected Attorney General in 1966. He reassured James H. Hunt of the Vermont Home Mortgage Credit Agency that the act creating the agency did not violate Section 5 as an unconstitutional delegation of legislative authority.⁸¹ Oakes told State Senator James M. Jeffords that the legislature cannot convene itself as a constitutional convention and reaffirmed Charles Adams's opinion that any convention, properly convened, could not amend the constitution on its own. The voters would still need to ratify any changes.⁸²

Oakes ruled a statute mandating helmets for motorcycle riders was within the police power of the State, and that a bill authorizing pari-mutuel betting on Sunday would not need to be ratified by the voters nor did it violate Article 2.⁸³ He believed the constitution would not be violated by a law requiring registration and licensing of owners of firearms, but "only insofar as such legislation must provide appropriate standards to allow the people to possess firearms in defense of themselves."⁸⁴ The Swanton School Board was not prevented from leasing rooms in a church for public education, as long as the room and the passageway to and from the room to the outside were free of religious symbols.⁸⁵ A school district may release parochial students from class to attend catechism classes elsewhere than in a public school building, provided there is no public expense involved in transportation and the students are not coerced by public school officials to attend the religious classes.⁸⁶ A land use

tax allowing lower rates for agricultural land was proper under Article 9.⁸⁷

James M. Jeffords was elected A.G. in 1968. Among his constitutional opinions, Jeffords held that a prison rule prohibiting convicts' wearing beards, sideburns, or mustaches did not violate their civil rights.⁸⁸ He advised that the federal voting rights act had effectively eliminated the durational residency requirement of the Vermont Constitution.⁸⁹ The House had no power to amend a proposal of amendment to the constitution; its only power is to concur or refuse to concur.⁹⁰ Town charters can authorize selectboards to set minimum speed limits, even when those limits do not comply with general state law.⁹¹ No statute prevents granting tax exemptions and liquor licenses to private clubs without regard to whether or not they limit membership on the basis of race, creed, color or national origin.⁹²

He believed a zoning ordinance could provide for the termination of pre-existing non-conforming uses and structures, without compensation, as long as termination is deferred for a reasonable period of time, based on the useful economic life of the structure, but also advised that the constitution was unperturbed by a law that mandates compensation.⁹³ A joint resolution signed by the Governor has the force and effect of law.⁹⁴ Section 6 is not offended by a bill originating in the Senate that raises revenue, if that is secondary or incident to its primary purpose.⁹⁵ Aliens may be appointed to state boards.⁹⁶ A State representative employed on staff of U.S. Congressman as a temporary research intern is merely an employee and does not hold federal office in violation of Section 50.⁹⁷

Jeffords was succeeded by **Kimberly B. Cheney** in 1973. Although he served only one two-year term, Cheney wrote more constitutional opinions than any other A.G. before or after his time in office. His constitutional opinions repeat many of the conclusions of his predecessors—that the constitutional right to fish does not authorize access to boatable waters through private property,⁹⁸ that the durational residency requirement to qualify for voting rights is void⁹⁹—and reach new issues, such as the unconstitutionality of a rule of the State Board of Pharmacy that attempted to prohibit advertising of drug prices.¹⁰⁰ He held this rule had no reasonable relationship to the promotion of health, safety, morals and general welfare and was unjustified under the police power. Reflecting the energy crisis of that time, he held that Vermont service stations may not refuse to sell gasoline to out-of-state motorists.¹⁰¹ Probate and Assistant Judges must retire after 70 years of age, pursuant to Section 28c.¹⁰² Once negotiated, contracts for state employees are subject to modification by the



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legislature without violating the Contract Clause.¹⁰³

He concluded that the legislature's Section 14 authority to judge the qualifications of its members is a continuing power, with the right to unseat a member if facts show no proper election.¹⁰⁴ Interstate signs listing private businesses are not exempt from the state sign law.¹⁰⁵ The statute that requires owners of occupied land who do not keep animals to share in the cost of boundary fences may be unconstitutional, as a failure of due process.¹⁰⁶

M. Jerome Diamond defeated Cheney in 1974. His constitutional opinions include his view that a judge who turns 70 during his term may serve out the rest of it,¹⁰⁷ that governor's appointees made while the Senate is in session may exercise the duties of the office pending Senate action,¹⁰⁸ and that the governor may veto a joint resolution when its effect is mandatory and binding on the executive branch.¹⁰⁹ Diamond allowed paying dues to the Council of State Governors even though there was no specific appropriation, although it has no legal obligation to do so.¹¹⁰

He told the Governor he could remove the Commissioner of Public Safety without formal charges or hearing, finding the reorganization powers of the executive overriding a statute establishing a six-year term for the Commissioner.¹¹¹ He advised the Real Estate Commission it had no authority to adopt rules relating to advertising, violative of Article 4, and even if a statute authorized such rules they would be unreasonable and would serve no legitimate state purpose.¹¹² So with the Board of Accountancy's proposed rules to prohibit solicitation, which would be unconstitutional and violative of antitrust law.¹¹³

A.G. Diamond also decided that state agencies have no authority to share receipts of the lease rents of state lands with municipalities in which the property is located.¹¹⁴

John J. Easton, Jr. won the office in the election of 1981, after Diamond retired. In his two terms, his office issued opinions that concluded the Vermont constitutional amendments adopted in 1974 were valid, notwithstanding the Secretary of State's failure to advertise them as required by statute¹¹⁵ and another that approved of campaign finance law amendments relating to political action committees to political candidates.¹¹⁶

After Easton's decision to run for Governor in 1984, **Jeffrey L. Amestoy** won the General Election and as Attorney General over the next 12 years issued several constitutional opinions of note. One upheld the constitutionality of the state aid to education formula on grounds including equal protection.¹¹⁷ He approved the Uniform Traffic Ticket process, holding the lack

of a right to a trial by jury no offense to the constitution.¹¹⁸ He disapproved of the law that prohibited employees of a school district or a school district within the same supervisory union from seeking election to the school board, a violation of Article 8.¹¹⁹

In 1990, Amestoy ruled that a state property tax on second homes would violate neither the equal protection or privileges and immunities clauses of the U.S. Constitution.¹²⁰ Following the death of Governor Richard A. Snelling, Howard Dean succeeded to the office, but the Attorney General advised him he had no power to appoint a new Lieutenant-Governor, as his office wasn't vacated by the ascension to the powers of the Governor.¹²¹ Amestoy approved of the reappointment of members of the Vermont Environmental Board who were rejected by the Vermont Senate.¹²²

Amestoy was appointed Chief Justice of the Vermont Supreme Court in 1997, and Governor Dean filled the vacancy by appointing **William Sorrell** as Attorney General. In 2000, at the request of the Sergeant-at-Arms, the office ruled that officials could prohibit minors from viewing photographic displays of homosexual human sexuality in the State House, without prohibiting access to material depicting similar heterosexual activity.¹²³ Sorrell held that town clerks must issue civil union licenses, or face criminal and civil penalties.¹²⁴ He advised the legislature that it could not adopt instant run-off voting for the offices of Governor, Lieutenant-Governor, and Treasurer without a constitution amendment.¹²⁵

After serving 19 years, Sorrell retired, and **T.J. Donovan** was elected Vermont Attorney General in 2016. To date there have been no constitutional opinions issued by his office, reviewing the office web page and the small number of opinions shown there.

These are not a comprehensive list of the A.G.'s constitutional opinions, and there may be opinions that have not been indexed or published that a diligent searcher might locate. But taken together, the opinions represent a rich tapestry of subjects and issues, reflecting the times of each incumbent. Vermont's Constitution is the shortest and least amended of the state constitutions, and it is also a document with very little written about it, other than the decisions of the Vermont Supreme Court and the records of the Vermont Council of Censors. We should be grateful there were Attorneys General who over time were bold enough to give their opinions on legislation and executive action, applying the fundamental law as they understood it.

What the Opinions Tell

There is little or no analysis of the bases for most of the Attorneys General's constitutional opinions. The letters appear as a lightning round—is it constitutional or not? Only the conclusion is provided. In many instances, the General doesn't even recite the article or section of the Constitution that triggers the conclusion.

History and subsequent constitutional amendments and court decisions have proved some of the opinions were wrong, or at least no longer reliable, but there they are. Some will say an Attorney General is just another lawyer, his opinions worth little more than marshmallow topping, but there is the special magic that comes with high office that endows these decisions with a power and conviction that is worth appreciating. No other lawyer has so many opportunities to exercise the constitution, and no other lawyer's opinions have such an impact on how the legislature and the executive act.

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¹ This is a phrase used by many Vermont Attorneys General at the end of their opinions, signifying the announcement of a conclusion.

² 2009, No. 33, § 83(b)(1).

³ An index of the opinions of Vermont Attorneys General on the Vermont Constitution, compiled from the various sources, is available upon request from pgillies@tgrvt.com.

⁴ *Sprague v. University of Vermont*, 661 F.Supp. 1132, 1138 (1987) (Billings, D.J.).

⁵ 19 C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* § 4507, at 98; *CJS Courts* § 230.

⁶ *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 762 A.2d 1219 (2000).

⁷ 3 V.S.A. § 159.

⁸ 1904, No 57, § 6.

⁹ "An act creating the office of Attorney General and prescribing the duties thereof," No. 57; "An act relating to the election of the Attorney General and the duties of that office," No. 58, *Acts and Resolves Passed by the General Assembly of the State of Vermont at the Eighteenth Biennial Session 1904* (Burlington, Vt.: Free Press Association, 1904), 75-77.

¹⁰ *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1936* (Rutland, Vt.: The Tuttle Publishing Company, 1936), 109.

¹¹ Stephen Row Bradley described himself as Attorney General in 1783, but there is no evidence of any official appointment, beyond his office as State's Attorney. Dorr Bradley Carpenter, ed., *Stephen Row Bradley: Letters of a Revolutionary War Patriot and Vermont Senator*, 2009), 94.

¹² "An act appointing an attorney general and regulating his office and duty," October 28, 1790, John A. Williams, ed., *Laws of Vermont 1785-1791* (Montpelier, Vt.: Secretary of State, 1967), 530-531.

¹³ E.P. Walton, *Records of the Governor and Council for the State of Vermont IV* (Montpelier, Vt.: J. & J.M. Poland, 1876), 87.

¹⁴ "An act directing the mode of appointing an Attorney-General in this State and State's Attorneys in the several counties, and regulating their office and duty," November 2, 1796, John A. Williams, ed., *Laws of Vermont 1796-1799* (Montpelier, Vt.: Secretary of State, 1968), 30-32.

¹⁵ *Ibid.*, 355-356.

¹⁶ Andrew E. Nuquist and Edith W. Nuquist, *Vermont State Government and Administration* (Burlington, Vt.: Government Research Center, University of Vermont, 1966), 242-243.

¹⁷ *Brackett v. State*, 2 Tyl. 152, 169 (1802).

¹⁸ *Orleans County v. State Auditor*, 65 Vt. 492 (1893).

¹⁹ *Brown v. State Treasurer*, 59 Vt. 634 (1887).

²⁰ Horace Fairbanks, "Farewell Address," *The Journal of the House of Representatives of the State of Vermont, Biennial Session, 1876* (Rutland, Vt.: Tuttle & Co., 1877), 25-26.

²¹ "An act authorizing state's attorneys to employ detective service in certain cases," No. 77, *Acts and Resolves Passed by the General Assembly of the State of Vermont at the Eighteenth Biennial Session 1894* (Burlington, Vt.: Free Press Association, 1894), 65.

²² "An act authorizing the Attorney General to employ persons to search for criminals and evidence," *Acts and Resolves Passed by the General Assembly of the State of Vermont at the Twentieth Biennial Session 1908* (Montpelier, Vt.: Capital City Press, 1908), 9. For some undiscernible reason, the legislature reinforced this idea by a joint resolution in 1910. "Joint resolution relating to procuring evidence on behalf of the State," No. 475, *Acts and Resolves Passed by the General Assembly of the State of Vermont at the Twentieth Biennial Session 1910* (Rutland, Vt.: The Tuttle Company, 1911), 506-507.

²³ 1937, No. 203, § 3.

²⁴ *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1910* (Montpelier, Vt.: Attorney General, 1910), 35-36. Sargent relied on Article 9's obligation of every member of society being bound to contribute the member's proportion towards the expense of the protection of life, liberty, and property.

²⁵ *Ibid.*, 38-39.

²⁶ *Ibid.*, 95.

²⁷ *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1916* (Rutland, Vt.: The Tuttle Company, 1916), 21.

²⁸ As the 1914 constitutional amendments left a gap in the terms of state officials, Governor Allen Fletcher reappointed Barber to an interim appointment as Attorney General to cover the period after his term ended on November 1. *Barre Daily Times*, 28 November 1914, 8.

²⁹ *Ibid.*, 272.

³⁰ *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1918* (Rutland, Vt.: The Tuttle Company, 1918), 64-65.

³¹ *Ibid.*, 18-19.

³² *Ibid.*, 31-32.

³³ *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1922* (Rutland, Vt.: The Tuttle Company, 1922), 17.

³⁴ *Biennial Report of the Attorney General of the State of Vermont for the two years ending*

June 30, 1924 (Springfield, Vt.: Springfield Printing Corporation, 1924) 18-20.

³⁵ *Ibid.*, 46-47.

³⁶ *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1932, 249-251.*

³⁷ *Ibid.*, 294.

³⁸ *Ibid.*, 300-302.

³⁹ *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1934* (Brattleboro, Vt.: The Vermont Printing Company, 1934), 340.

⁴⁰ *Ibid.*, 187-189.

⁴¹ *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1936* (Rutland, Vt.: The Tuttle Publishing Company, 1936), 61.

⁴² *Ibid.*, 65.

⁴³ *Ibid.*, 358-359.

⁴⁴ *Ibid.*, 74-75.

⁴⁵ *Ibid.*, 263-265.

⁴⁶ *Ibid.*, 292-294 (Article 6 (officers servants of the people) and Section 20 (powers of the governor)).

⁴⁷ *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1938, 496-497.*

⁴⁸ *Ibid.*, 445-447.

⁴⁹ *Ibid.*, 327-328.

⁵⁰ *Ibid.*, 433-443.

⁵¹ *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1940, 175-177.*

⁵² *Ibid.*, 367.

⁵³ *Ibid.*, 269-272.

⁵⁴ *Ibid.*, 368. Note: The numbers of sections of the Vermont Constitution cited by the Attorneys General in opinions prior to 1974, before the Supreme Court reorganized the text, have been adjusted in this essay to reflect the present version of the constitution.

⁵⁵ *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1942, 370.*

⁵⁶ *Ibid.*, 265-267.

⁵⁷ *Ibid.*, 193-194.

⁵⁸ *Ibid.*, 110-113.

⁵⁹ *Ibid.*, 170-176.

⁶⁰ *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1948, 105-111.*

⁶¹ *Ibid.*, 164-166.

⁶² *Ibid.*, 208-212.

⁶³ *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1950, 192-193.*

⁶⁴ *Ibid.*, 223-228.

⁶⁵ *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1954. 232-234.*

⁶⁶ *Ibid.*, 230-231.

⁶⁷ *Ibid.*, 161-163 (Article 5 (That the people of this state by their legal representatives have the sole, inherent, and exclusive right of governing and regulating the internal police of the same)).

⁶⁸ *Ibid.*, 95-98.

⁶⁹ *Ibid.*, 98-102 (Article 3 (no person compelled to attend religious worship)).

⁷⁰ *Ibid.*, 219-221.

⁷¹ *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1960, 118-120.*

⁷² *Ibid.*, 69-71.

⁷³ *Ibid.*, 55-59.

⁷⁴ *Ibid.*, 110-114.

⁷⁵ *Ibid.*, 119-124.

⁷⁶ *Ibid.*, 224-226.

⁷⁷ *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1966, 93-103.*

⁷⁸ *Ibid.*, 103-104.

⁷⁹ *Ibid.*, 255-257.

⁸⁰ *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1968, 59-61.*

⁸¹ *Ibid.*, 232-235.

⁸² *Biennial Report of the Attorney General of the State of Vermont for the two years ending June 30, 1970, 122-128.*

⁸³ *Ibid.*, 61-63.

⁸⁴ *Ibid.*, 144-145.

⁸⁵ *Ibid.*, 256-258.

⁸⁶ Opinion #284, September 18, 1969. Note: the citations to the following opinions are taken from the index at the Attorney General's office.

⁸⁷ Opinion #100, April 17, 1969.

⁸⁸ Opinion #433, June 9, 1970.

⁸⁹ Opinion #559, July 31, 1970.

⁹⁰ Opinion #656-F, February 4, 1971.

⁹¹ Opinion #669, March 19, 1971.

⁹² Opinion # 766-F, September 9, 1971.

⁹³ Opinion #820-F, November 22, 1971.

⁹⁴ Opinion #889-F, May 22, 1972.

⁹⁵ Opinion #9, January 18, 1973.

⁹⁶ Opinion #66, March 20, 1973.

⁹⁷ Opinion #134, August 29, 1973.

⁹⁸ Opinion #165, November 13, 1973.

⁹⁹ Opinion #983, October 13, 1973.

¹⁰⁰ Opinion #159, November 13, 1973.

¹⁰¹ Opinion #184, December 18, 1973.

¹⁰² Opinion #271, June 28, 1974.

¹⁰³ Opinion #23-76.

¹⁰⁴ Opinion #29-79.

¹⁰⁵ Opinion #14-78.

¹⁰⁶ Opinion #23-77.

¹⁰⁷ Opinion #4-70, July 12, 1977.

¹⁰⁸ Opinion #51-78.

¹⁰⁹ Opinion #58-78.

¹¹⁰ Opinion #32-78, January 5, 1978.

¹¹¹ Opinion #72-79.

¹¹² Opinion #16-80.

¹¹³ Opinion #24-80.

¹¹⁴ Opinion #78-80, May 22, 1980.

¹¹⁵ Opinion #82-44, February 4, 1982.

¹¹⁶ Opinion #83-27.

¹¹⁷ Opinion #86-11, November 12, 1986.

¹¹⁸ Opinion #86-6, March 7, 1986.

¹¹⁹ Opinion #87-03.

¹²⁰ Opinion #90-1, January 4, 1991.

¹²¹ Opinion #91-15, September 3, 1991.

¹²² Opinion #94-2F, January 28, 1994.

¹²³ Opinion #2000-1, March 17, 2000.

¹²⁴ Opinion #2000-3.

¹²⁵ Opinion #2003-1.



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Keepers of the Flame: John Roberts, Elena Kagan, and the Rhetorical Tradition at the Supreme Court

Introduction

In several previous articles, I have discussed the role played by classical rhetorical techniques in some of the Supreme Court's most memorable opinions. Those articles have introduced and illustrated the use of rhetoric by Justices Holmes, Jackson, Black, Brennan, and Scalia, who had different strengths as rhetoricians, but who all communicated effectively with their readers in a modern, conversational style.¹ This article will show that the tradition of rhetorical excellence represented by those justices lives on at the Court in the opinions of Chief Justice Roberts and Justice Kagan, respectively. Before discussing the writing of Roberts and Kagan, though, a brief introduction to classical rhetoric is in order.

A Rhetorical Primer

Rhetoric, the ancient art of persuasion, is traceable to Greece in the Fifth Century B.C.E.² Rhetoric's essence is nicely encapsulated in the following statement by Aristotle: "It is not enough to know what to say—one must know how to say it."³ That statement is a key to the difference between rhetoric and logic; logic (philosophy) seeks to establish certain truth, whereas rhetoric assumes that truth is not certain, but instead, probable at best.⁴ When truth is certain, as Plato believed, "how you say it" (or write it) may not be crucial, but when truth is at most probable, as Aristotle believed, the advocate's ability to persuade, orally or in writing, is indeed crucial.

Accordingly, rhetorical techniques are invaluable to aid persuasion in establishing the best available truth, which is what lawyers seek to do in court and in writing every day. Former federal judge Richard Posner recognized the importance of rhetoric to law when he observed that "[m]any legal questions cannot be resolved by logical or empirical demonstration."⁵ This reality elevates the importance of persuasion through rhetoric.

The ancient Greeks and their Roman successors divided rhetoric into the following canons: (1) Invention, (2) Arrangement, (3) Style, (4) Memory, and (5) Delivery.⁶ The last two apply to oral advocacy only, so this article – which focuses exclusively on writing – will discuss just the first three.

Invention is a means of identifying and

producing the available arguments on a particular question. Its most visible features are the three processes by which rhetoric persuades: *logos*, *pathos*, and *ethos*.⁷ *Logos* is familiar to lawyers because it is rational argument through logical reasoning. *Pathos*, on the other hand, is an effort to influence the reader's or the audience's emotions in favor of the advocate's position. *Ethos* is the speaker's or writer's effort to establish credibility in the eyes of the reader or audience.⁸ Aristotle stressed *pathos* and *ethos* as much as *logos* because he believed that logical reasoning could not always win an important argument in which the decision maker must choose based on imperfect knowledge. In these circumstances, an advocate who demonstrates credibility and whose argument strikes a responsive chord in the decision maker's heart may well gain an advantage over the opponent. Writing is most likely to persuade when it is vivid and evocative, yet scrupulously faithful to the facts of a case.

Arrangement addresses the inherent problem of "sequence" in ordering one's arguments. Modern legal arrangement is traceable to one Corax, who lived in Syracuse in ancient Greece during the Fifth Century, B.C.E. He created an outline for courtroom argument, including an introduction, statement of facts, argument, and conclusion. The Romans later added a summary of the argument between the statement of facts and the argument, creating what has become the modern appellate brief.⁹

Style, the remaining canon, encompasses "the fun stuff," the rhetorical examples we most remember in Supreme Court opinions because they involve word choice. The best-known examples of style are figures of speech, which are comprised of schemes and tropes. Schemes are deviations from customary word order; a familiar example is *parallelism*: the similarity of structure in a pair or series of related words, phrases, or clauses, as in: "Judge Jones tries to make the law clear, precise, and equitable."¹⁰ Another example is *alliteration*, the repetition of initial or medial consonants in two or more adjacent words, as in the ad that described the soft drink Sprite as "tart, tingling, and even ticklish."¹¹ Tropes, on the other hand, are deviations from the customary meanings of the words used. An easily recognized example is the *metaphor*: an implied comparison between two dis-

similar things that nonetheless have something in common. Metaphors abound in the law, sometimes to the point of approximating legal doctrines, such as the "wall" of separation between church and state in First Amendment law or the "fruit of the poisonous tree" in Fourth Amendment law.

The effective use of both schemes and tropes has resulted in many a memorable Supreme Court opinion, as my previous articles have illustrated. The remainder of this article will show the use of those rhetorical devices and others in one opinion each by Chief Justice Roberts and Justice Kagan, the heirs to the Court's rhetorical tradition.

Chief Justice Roberts: Majority Opinion in *Williams-Yulee v. The Florida Bar*, 135 S. Ct. 1656 (2015)

At issue in *Williams-Yulee* was whether the First Amendment permits states to bar "judges and judicial candidates from personally soliciting funds for their campaigns."¹² The Court, speaking through the Chief Justice, held that the First Amendment indeed permits such a restriction; accordingly, the majority affirmed the same judgment by the Florida Supreme Court.¹³ The Court thereby validated Canon 7C(1) of Florida's Code of Judicial Conduct, which included the above prohibition, but permitted judges and judicial candidates to establish "committees of responsible persons" that could "solicit[] campaign contributions and public support from any person or corporation authorized by law."¹⁴

Petitioner Lanell Williams-Yulee, who called herself Yulee, is a Florida lawyer who sought a trial-court judgeship in Hillsborough County, which includes Tampa. She drafted, signed, and mailed to local voters a letter that announced her candidacy and solicited "[a]n early contribution of \$25, \$50, \$250, or \$500" to "launch the campaign and get our message out to the public."¹⁵ Unfortunately for Yulee, not only did she lose the election, but the Florida Bar filed a complaint against her for violating its ban on personal solicitations of campaign funds by candidates. She countered that "the First Amendment protects a judicial candidate's right to solicit campaign funds in an election."¹⁶ After a hearing, a referee appointed by the Florida Supreme Court recommended a finding of guilt, which that Court upheld.¹⁷

Beginning his analysis, Chief Justice Roberts observes that “[t]he Florida Bar faces a demanding task in defending Canon 7C(1) against Yulee’s First Amendment challenge” because a state is rarely able to show that a restriction on speech is “narrowly tailored to serve a compelling interest.”¹⁸ But, Roberts noted, plainly appealing to *ethos*, Canon 7C(1) serves Florida’s “compelling interest in preserving public confidence in the integrity of the judiciary, and it does so through means narrowly tailored to avoid unnecessarily abridging speech.”¹⁹ Accordingly, this litigation is “one of the rare cases in which a speech restriction withstands strict scrutiny.”²⁰

Continuing his *ethos*-themed argument, the Chief Justice notes the “vital state interest” in preserving “public confidence in the fairness and integrity of the nation’s elected judges.”²¹ The judiciary’s authority, he adds, “depends in large measure on the public’s willingness to respect and follow its decisions.”²² Thus, the public’s belief in the integrity of judges is “a state interest of the highest order.”²³ Under these circumstances, personal solicitation by judicial candi-

dates of campaign contributions could appear to the public to bias a judge in favor of contributors when they appear in court. “That risk is especially pronounced,” the Chief Justice emphasized, “because most donors are lawyers and litigants who may appear before the judge they are supporting.”²⁴

To this point, Chief Justice Roberts has used the rhetorical canon of invention to craft an *ethos*-based argument stating that because a public perception of integrity is essential to the viability of the judiciary, states may prohibit judicial candidates from personally soliciting campaign contributions. Legislators and executive branch officials are not bound by the same expectation of impartiality that applies to judges, so they are not subject to the same solicitation restriction. The Chief Justice has also used the rhetorical canon of arrangement, moving smoothly from a discussion of Canon 7C(1) to Ms. Yulee’s campaign solicitation and her punishment by the Florida Bar to strict scrutiny of speech restrictions and to states’ compelling interest in preserving a favorable public image of judges. And

when discussing the compelling state interest that warrants the speech restriction here, he employs the *logos*-careful, logical reasoning based on prior decisions—that we expect to see in a Supreme Court opinion.

But later in Roberts’s opinion, as he responds to Yulee’s claim that because Canon 7C(1) permits personal solicitation by judicial campaign committees, it should permit the same by the candidates, he uses the rhetorical canon of style to powerful effect. For example, he employs an *aphorism* and an *analogy* to justify limiting the restriction to the candidate, stating, “The identity of the solicitor matters, as anyone who has encountered a Girl Scout selling cookies outside a grocery store can attest.”²⁵ “The identity of the solicitor matters” is an aphorism (or “maxim”), a short, pithy phrase or sentence that makes a true general statement about human behavior.²⁶ The reference to the Girl Scout selling cookies is an analogy, which sees similarities in dissimilar things, enabling the audience to understand an unfamiliar concept (the importance of the “solicitor” of campaign contributions) by linking it to a familiar concept

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(the adult shopper's inability to say no to a Girl Scout selling cookies near a grocery store).²⁷

In Roberts's view, just as a shopper may be unable to decline a solicitation by an earnest child, who may remind the shopper of his or her own child, a lawyer may be unable to decline a solicitation by a candidate who could one day sit in judgment of the lawyer's client. The aphorism and the analogy facilitate an appeal to *pathos* because the reader who appreciates the emotional inclination to say yes to the Girl Scout may also appreciate the urge to say yes to the judicial candidate, especially if donor and donee are acquainted.

Reasoning that "Canon 7C(1) restricts a narrow slice of speech," the Chief Justice then uses the trope of *hyperbole* and the schemes of *parallelism* and *antithesis* to rebut Justice Kennedy's claim, in dissent, that the Florida Bar's rule restricts speech unduly. Hyperbole is "the use of exaggerated terms for the purpose of emphasis or heightened effect."²⁸ Recall that parallelism is similarity of structure in a pair or series of related words, phrases, or clauses. Antithesis is "the juxtaposition of contrasting ideas, often in parallel structure."²⁹ The Chief Justice writes:

A reader of Justice Kennedy's dissent could be forgiven for concluding that the Court has just upheld a latter-day version of the Alien and Sedition Acts, approving "state censorship" that "locks the First Amendment out," imposes a "gag" on candidates, and inflicts "dead weight" on a "silenced" public debate. But in reality, Canon 7C(1) leaves judicial candidates free to discuss any issue with any person at any time. Candidates can write letters, give speeches, and put up billboards. They can contact potential supporters in person, on the phone, or online. They can promote their campaigns on radio, television, or other media. They cannot say, "Please give me money." They can, however, direct their campaign committees to do so.³⁰

The hyperbole here lies in the suggestion that Justice Kennedy's dissent equates the majority's decision upholding Canon 7C(1) to validating "a latter-day version of the Alien and Sedition Acts."³¹ That suggestion undercuts the gravity of the dissent by depicting it as overheated and disproportionate to the speech restriction the majority has affirmed. The parallelism lies in similarly structured phrases and clauses, such as "write letters, give speeches, and put up billboards"; "contact potential supporters in person, on the phone, or online; and "promote their campaigns on radio, television, or other media."³² In each example,

parallelism lends a pleasing rhythm to the sentence, eases comprehension, and facilitates retention. Antithesis lies in the juxtaposition between the prohibition on judicial candidates soliciting contributions directly and the authority of their campaign committees to do so. It neatly and compactly makes clear to the reader the limited nature of the speech restriction in Canon 7C(1).

Thus, in his *Williams-Yulee* opinion, Chief Justice Roberts shows a familiarity with rhetorical techniques and an ability to use them effectively. All three elements of invention – *logos*, *pathos*, and *ethos* – are present, as are arrangement and style, the latter represented by both schemes and tropes.

Justice Kagan: Majority Opinion in *Florida v. Harris*, 133 S. Ct. 1050 (2013)

The question in *Harris* was what standard courts should use to decide whether a drug-detection dog's "alert," during a traffic stop, has furnished the probable cause required for a vehicle search.³³ The Florida Supreme Court had held that, in Justice Kagan's words, "the State must in every case present an exhaustive set of records, including a log of the dog's performance in the field, to establish the dog's reliability."³⁴

But a unanimous Supreme Court, speaking through Justice Kagan, reversed, concluding that the Florida Court's announced standard conflicted with the "flexible, common-sense standard" of probable cause.³⁵

This litigation originated with a traffic stop by a Florida police officer of Mr. Harris's truck, which bore an expired license plate.³⁶ Harris, whom the officer described as "visibly nervous," had an open can of beer in the truck's cup holder; when the officer asked for his consent to search the truck, Harris refused.³⁷ The officer then retrieved from his patrol car "Aldo," a drug-detection dog, and walked the dog around the truck.³⁸ Aldo alerted at the driver's-side door handle, indicating that he smelled drugs there, which prompted the officer to conclude that probable cause existed to search the truck.³⁹ The search revealed none of the drugs that Aldo was trained to detect, but instead, "200 loose pseudoephedrine pills; 8,000 matches; a bottle of hydrochloric acid, two containers of anti-freeze; and a coffee filter full of iodine crystals—all ingredients for making methamphetamine."⁴⁰ The officer arrested Harris, who was charged with "possessing pseudoephedrine for use in manufacturing methamphetamine."⁴¹

Harris moved to suppress the evidence removed from his truck because, in his view, Aldo's alert had not established probable cause for a search. At a hearing, the officer testified about the certification courses Aldo had completed in the previous two years and about the four hours weekly he

devoted to training Aldo.⁴² The State introduced logs showing that Aldo had performed "satisfactorily" on each day of training.⁴³ The trial court denied Harris's motion to suppress, and an intermediate appellate court affirmed.⁴⁴

The Florida Supreme Court reversed, stating that "when a dog alerts, the fact that the dog has been trained and certified is simply not enough to establish probable cause."⁴⁵ To establish the dog's reliability, the State must produce additional evidence, especially "evidence of the dog's performance history," such as records showing "how often the dog has alerted in the field without illegal contraband having been found."⁴⁶ The officer in the present case lacked "full records of his dog's field performance"; therefore, he could not establish the dog's reliability in drug detection.⁴⁷

Justice Kagan's *Harris* opinion reflects her familiarity with rhetorical techniques. Arrangement is evident in the opinion's smooth transition from a presentation of the facts to a discussion of the current standard for establishing probable cause concerning informant-furnished evidence to an analysis of why that same standard should apply to dog-sniff evidence too. The analysis uses the *logos* element of invention to derive one standard for achieving probable cause from information provided by both sources. It "is not reducible 'to precise definition or quantification,'" she explains, but is instead a "practical and common-sensical standard" based on "the totality of the circumstances."⁴⁸ She writes:

We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach. In [*Illinois v.*] *Gates* [462 U.S. 213 (1983)], for example, we abandoned our old test for assessing the reliability of informants' tips because it had devolved into a 'complex superstructure of evidentiary and analytical rules,' any one of which, if not complied with, would derail a finding of probable cause. We lamented the development of a list of 'inflexible, independent requirements applicable in every case.' Probable cause, we emphasized, is a fluid concept—turning on the assessment of possibilities, in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.⁴⁹

The above passage certainly illustrates the *logos* inherent in Justice Kagan's advocacy for using the same probable-cause standard for both informant-provided evidence and dog sniffs. But it also features the richness of Justice Kagan's rhetorical style, especially her facility with figures of

speech. The first sentence features parallelism in its reference to “rigid rules, bright-line tests, and mechanistic inquiries.” The remainder of the passage uses hyperbole—here vivid, mildly exaggerated verbs such as “abandoned,” “derail,” and “lamented”—to signal the Court’s replacement of its older, more rigid standard with a new, more flexible one for determining whether probable cause exists for a search. Justice Kagan uses another vivid verb to describe the Florida Supreme Court’s refusal to adopt the newer standard, writing that it “flouted” that standard, thus suggesting an intentional rejection, not an inadvertent mistake or oversight.

To Justice Kagan, the Florida Court’s rule is unduly rigid because “[n]o matter how much other proof the State offers of the dog’s reliability, the absent field performance records will preclude a finding of probable cause.”⁵⁰ “That is the antithesis of a totality-of-the-circumstances analysis,” she adds. Furthermore, she writes, again using vivid verbs (“overhauled” and “sink”):

It is, indeed, the very thing we criticized in *Gates* when we overhauled our method for assessing the trustworthiness of an informant’s tip. A gap as to any one matter, we explained, should not sink the State’s case; rather, that ‘deficiency...may be compensated for, in determining the overall reliability of a tip, by a strong showing as to...other indicia of reliability.’⁵¹

The State should be able to establish a drug-detection dog’s reliability by showing that an appropriate organization certified the dog after proper testing or, absent certification, that the dog “has recently and successfully completed a training program that evaluated his efficiency in locating drugs.”⁵² In other words, according to Justice Kagan:

The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog’s alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test.⁵³

Thus, the analysis ends with playful alliteration in its final sentence, preceded by the metaphorical “lens of common sense” in the previous sentence. Both figures of speech lend color to an otherwise colorless subject—the appropriate standard for establishing probable cause. Because the monthly training logs revealed Aldo’s reliability at the time of Harris’s arrest, the Court concluded that the officer had prob-

able cause to search the truck, reversing the decision of the Florida Supreme Court.

Like the Roberts opinion in *Williams-Yulee*, Justice Kagan’s *Harris* opinion shows the author’s familiarity with classical rhetorical techniques. *Pathos* is absent, but *logos* and *ethos* are evident, along with arrangement and style, the latter represented by both schemes and tropes.

Conclusion

Classical rhetoric lives on at the Supreme Court, as the work of Chief Justice Roberts and Justice Kagan shows. Their comfort with rhetorical techniques is evident even in majority opinions, which restrain author creativity in the name of securing five votes. Readers are encouraged to read more Roberts and Kagan opinions, including dissents, to better understand the influence of classical rhetoric on the current Court.

¹ See, e.g., Brian Porto, *The Rhetorical Elegance of Robert Jackson*, 44, no. 2, Vermont Bar Journal 31 (Summer 2018); *The Rhetorical Legacy of Antonin Scalia*, 43, no. 2 Vermont Bar Journal 28 (Summer 2017); *Rhetoric Revisited: A Second Look at How Rhetorical Techniques Improve Writing*, 42, no. 2 Vermont Bar Journal 31 (Summer 2016); and *Making It Sing: How Rhetorical Techniques Can Improve Your Writing*, 40 no. 2 Vermont Bar Journal 36 (Summer 2014).

² EDWARD P.J. CORBETT and ROBERT J. CONNORS, *CLASSICAL RHETORIC FOR THE MODERN STUDENT*, 4th ed. 15-16 (New York: Oxford University Press, 1999).

³ ARISTOTLE, *ON RHETORIC*, Trans. H. Rhys Roberts (New York: Barnes & Noble Books, 2005), Bk. 3, Ch. 1, p. 397.

⁴ KRISTEN KONRAD TISCIONE, *RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION*, 2nd ed. 39 (St. Paul, MN: West Academic, 2016).

⁵ RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 286 (Cambridge, MA: Harvard University Press, 1988).

⁶ TISCIONE, *RHETORIC FOR LEGAL WRITERS*, 2nd ed., at 47.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 18-19.

¹⁰ CORBETT AND CONNORS, *CLASSICAL RHETORIC FOR THE MODERN STUDENT*, 4th ed., 379.

¹¹ *Id.* at 388-89.

¹² *Williams-Yulee v. The Florida Bar*, 135 S. Ct. 1656, 1662 (2015).

¹³ *Id.*

¹⁴ *Id.* at 1663.

¹⁵ *Id.*

¹⁶ *Id.* at 1664.

¹⁷ *Id.*

¹⁸ *Id.* at 1665-66.

¹⁹ *Id.* at 1666.

²⁰ *Id.*

²¹ *Id.* (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)).

²² *Id.*

²³ *Id.* (quoting *Caperton*, 556 U.S. at 889).

²⁴ *Id.* at 1667 (citing A. BANNON, E. VELASCO, L. CASEY, AND L. REAGAN, *THE NEW POLITICS OF JUDICIAL ELECTIONS* 15 (2013)).

²⁵ *Id.* at 1669.

²⁶ ARISTOTLE, *ON RHETORIC*, Bk. II, Ch. 21, pp. 339-40; CORBETT AND CONNORS, *CLASSICAL*

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RHETORIC FOR THE MODERN STUDENT, 4th ed., 116-17.

²⁷ CORBETT AND CONNORS, *CLASSICAL RHETORIC FOR THE MODERN STUDENT*, 4th ed., 93.

²⁸ *Id.* at 403.

²⁹ *Id.* at 382.

³⁰ *Williams-Yulee v. Florida Bar*, 135 S. Ct. at 1670.

³¹ *Id.*

³² *Id.*

³³ *Florida v. Harris*, 133 S. Ct. 1050, 1053 (2013).

³⁴ *Id.* citing 71 So.3d 756, 775 (2011).

³⁵ *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 239 (1983)).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 1054.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1054-55.

⁴⁵ *Id.* (quoting 71 So.3d at 767).

⁴⁶ *Id.* (quoting 71 So.3d at 769).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 1056.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 1057.

⁵³ *Id.* at 1058.



WHAT'S NEW

VBA Annual Report 2018-2019

It's a pleasure to report to you about VBA activities during 2018-2019.

Thanks to the generosity of so many lawyers and judges who are willing to share their expertise, the VBA was able to offer a full smorgasbord of **CLE Programs** covering the gamut of legal topics. Over 1,605 of you attended 21 different live programs, watched 598 digital programs and attended 97 teleseminars this past year. Many thanks to the amazing VBA section chairs who organized at least one CLE during the year at the Annual Meeting in September, at the Mid-Winter Thaw in January, at the Mid-Year Meeting in March, at the VBA Solo & Small Firm Conference in May, and during the numerous stand-alone programs held throughout the state. Please don't hesitate to let us know what CLE offerings you'd like to see offered, or if you'd like to present!

We were pleased to offer the Third Annual **VBA Trial Academy** at the Vermont Law School in July. This day-long intensive trial practice program featured ten Vermont Supreme Court Justices and Vermont Superior Court Trial Judges, who ran ten different "courtrooms" throughout the day. They, and participating veteran trial practitioners offered individual critiques of the 60 participants' opening statements, direct and cross examinations, and closing statements. Members of the VBA Young Lawyers Division served as volunteer witnesses, and VLS students served as timekeepers. Stay tuned for the Fourth Annual Trial Academy in the Summer of 2020!

VBA Members have automatic access to **Casemaker**, a leading legal research services provider with intuitive search capabilities. Casemaker 4 is now available with faster searching capabilities and a new "user friendly" design. Now the jurisdiction selection menu is on every page and results can be searched by court level. All personalization options have been expanded. The website includes detailed information about the latest enhancements, and benefits of Casemaker for your research. Call or email Jennifer for personal Casemaker training!

VBA membership includes unlimited access to section activity through our online communication platform "**VBA Connect**." Developed in response to members' requests for the ability to archive and to search the invaluable information shared among section members, VBA Connect allows section members to control the fre-

quency of received posts, and to easily search and retrieve whatever information has been shared in all communities to date. You can join any section with the click of a button, and easily set delivery preferences. If you haven't yet experienced the benefits of VBA Connect, please call or e-mail the VBA office at any time for personal training.

We're honored to work closely with all three branches of the Vermont Government, to ensure that your and your clients' interests are well-represented. The VBA also serves as a resource when needed. Towards that end, we were pleased to co-host "**Legislators' Days**" with the Judiciary in each of the fourteen counties throughout the Fall. County legislative delegations were invited to their local state courthouses to observe court hearings, and to meet with judicial officers and lawyer "ambassadors" from each division. Those events were followed by a VBA Legislators' Reception in January and a VBA Legislators' Breakfast in March that we hosted at the statehouse. The 2019 VBA Legislative Overview gives a summary of relevant legislation that was passed during the last legislative session and is available on the VBA website. We're grateful for Bob Paolini's work as VBA Government Relations Coordinator during the 2019 legislative session, and I look forward to continuing that work in the next legislative sessions. Many thanks also to the ambassadors, to the section chairs, and to many other members who offered invaluable testimony during the legislative session, when needed.

The VBA and the Vermont Judiciary co-hosted a "**Vermont Bench & Bar Listening Tour**" in each of the fourteen counties starting with Addison County in September 2018 and ending with Windham County in June 2019. At each tour stop, Chief Justice Paul Reiber and VBA President Gary Franklin invited the presiding judge and county bar president to join them on a panel that invited the public to share their impressions of the court system and legal services available in the respective counties. Many local stakeholders and legislators attended, and cable channels typically recorded the event for airing; links to the programs are on the VBA website on the "For the Public" page.

VBA Access to Justice initiatives expanded significantly over the past fiscal year. Not only did we provide direct representation to hundreds of low-income Vermonters, but we also gave a stipend of \$60

per hour, training and experience for over 100 private attorneys who agreed to take low bono cases. We are grateful to the Vermont Bar Foundation, to the Vermont Supreme Court and to the Vermont Center for Crime Victims Services for grants to fund our low bono projects. The VBF funded low bono projects in 9 counties and has given us the green light to expand representation to all 14 counties. In 2018-19, 41 of these cases were placed with private attorneys, who also donated 288 pro bono hours in addition to the low bono hours for which they were paid. In FY 2019-20, another VBF grant from BOA settlement funds will allow us to offer updated foreclosure defense training and to expand the number of hours of payment per case. A federal "Victims of Crime Assistance" grant allowed private low bono attorneys to represent crime victims in 116 cases; the attorneys also donated 147 pro bono hours over and above the hours they were paid the low bono rate. Two grants from the Vermont Supreme Court funded representation to 124 respondents in adult involuntary guardianship cases and to 28 adopting parents/couples in post adoption contact agreements. More lawyers are needed to provide these expanding low bono services to Vermont's most vulnerable residents. If you would like to join the rosters of participating attorneys, please contact VBA Legal Access Coordinator Mary Ashcroft at mashcroft@vtbar.org

Our Vermont **Lawyer Referral Service** continues to work well for clients in need of Vermont counsel, and for the 156 LRS panel members who earned more than \$840,000 in LRS revenue this past year. The VBA fielded 7,159 LRS calls, averaging 612 calls per month. We printed and distributed VBA business cards with the LRS 800 number, the VT Free Legal Answers website, and the "Modest Means" website to all of the Vermont state courthouses, numerous public libraries, and many veteran centers throughout Vermont. If you're not already an LRS member, consider joining for the low cost of \$70.00 per year. Your next big case could be an LRS referral!

A continuing focus in the arena of public education was to encourage lawyer presentations in conjunction with **Constitution Day** in September. The VBA has now provided over 4,000 copies of "Pocket Constitutions" for lawyers and judges to distribute at presentations they give to school and civic groups throughout the state. We

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were pleased to organize a fourth annual Constitution Day Panel Presentation, with an esteemed panel of five justices, judges and a Vermont Law School Constitution Law Professor, moderated by VBA President Gary Franklin. The panel presented a one-hour basic overview of the Constitution, with a focus on "Free Speech, Free Press, Free Society," at Vermont Law School in September. Links to the videos of each Constitution Day presentation are on the VBA website. The VBA is happy to provide this and other resources to whomever would like to make a presentation in their community this year.

The Young Lawyers Division and the VBA Diversity Section organized a **Martin Luther King, Jr. Poster-Essay Contest** for Vermont middle-school students in the Fall. Governor Phil Scott presented awards to the winners at the statehouse in January; the students and their families also toured the statehouse and the Vermont Supreme Court Building, where their winning posters and essays were on public display for the month of January. Materials for the 2020 MLK, Jr. Poster-Essay Contest are going out soon!

We were proud to continue the **VBA/VLS Incubator Program**, which assists new lawyers in establishing solo law practices in underserved areas of Vermont by provid-

ing general guidance and day-to-day mentoring to the new lawyers, assisting them in refining and revising their business plans, and insuring that appropriate pro bono and low bono cases are directed their way. This year, the Incubator Program included three lawyers setting up practices in Windsor, Caledonia and Franklin Counties. Four new lawyers were recently added to the program for the next fiscal year.

Since 2012, the VBA has offered training for and has coordinated the **Foreclosure Mediation Program** where interested lawyers receive specialized training to be foreclosure mediators and agree to be part of a state-wide pool that is offered to eligible litigants who opt for mediation in their foreclosure cases. In the past year, courts referred 169 foreclosure cases to the VBA for mediators, and 79 foreclosure mediators were agreed upon by the parties and assigned.

As always, we strive to bring you the latest membership products and services, as evidenced by the numerous sponsors and exhibitors at our major meetings, and as detailed in the **"Affinity Partners"** section on the website. Be sure to take advantage of the substantial discounts available for consulting, credit card processing, practice management, health insurance, personal insurances, retirement programs,

marketing software, professional liability insurance, rental cars, and shipping services. Our newest partners include TurboLaw, Red Cave Consulting, healthiestyou and Smith.ai Virtual Receptionist. We are currently in conversations with other providers of service and will be bringing more options to our members soon.

None of the above accomplishments would have been possible without the hard work and complete dedication of the **incredible VBA staff**. I am deeply indebted to them, as well as to the VBA Board of Managers for providing excellent leadership for your Vermont Bar Association. Please know that we are all at your service and appreciate whatever recommendations you might have to bring even more value to your VBA membership.

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

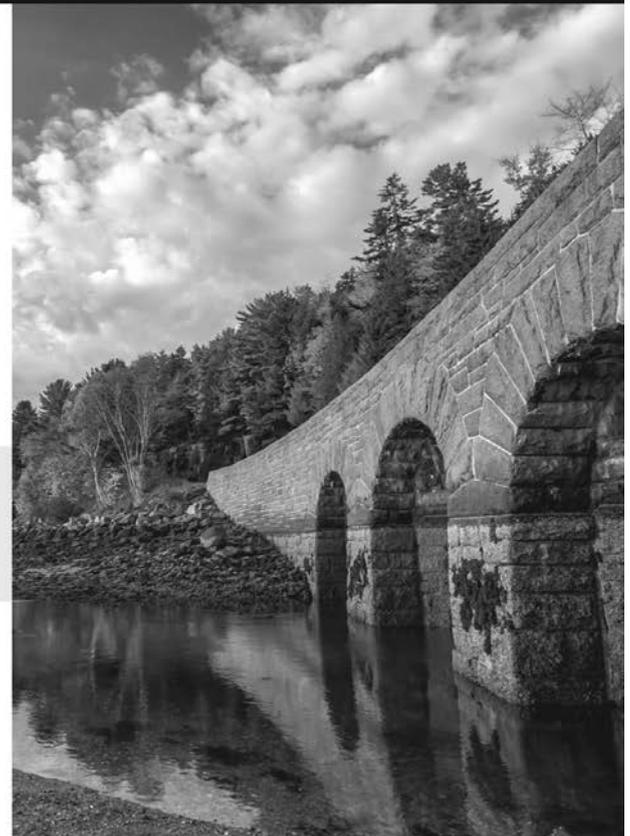


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WHAT'S NEW

2018-2019 Sections and Divisions Annual Report

APPELLATE LAW SECTION

Chairs: Benjamin Battles
and Bridget Asay, Esqs.

The Appellate Section has had a busy year! At this year's Mid-Winter Thaw in Montreal, Section co-chair Bridget Asay moderated a lively conversation with Judge Peter Hall and Justice Marilyn Skoglund that touched on briefing, preparing the record, and arguing appeals at the Second Circuit and Vermont Supreme Court. The Section also hosted a well-attended CLE program on state constitutional law at this year's Mid-Year Meeting at the Lake Morey Resort. The panel for that program featured Bridget and her Section co-chair Ben Battles, as well as retired Vermont Supreme Court Justice John Dooley, Rebecca Turner of the Defender General's Office, and Lia Ernst of the ACLU. And speaking of state constitutional law, Ben published a review of Sixth Circuit Judge Jeffrey Sutton's book *51 Imperfect Solutions: States and the Making of American Constitutional Law* in the Winter 2018 edition of the Vermont Bar Journal. In other appellate news, the Vermont Supreme Court hosted an "Appellate Bench-Bar Meeting" at its courthouse in December, where the justices and attorneys discussed a number of topics including forthcoming rule changes, plans for electronic filing, renovations to the Supreme Court building, and the importance of civility among advocates. And has been discussed on the Appellate Section's VBA Connect page, the Vermont Law School is in the process of launching an appellate advocacy project where VLS students will provide pro bono representation to self-represented litigants at the Vermont Supreme Court who meet certain financial eligibility criteria. The project has also begun providing moot courts for private attorneys who have arguments scheduled at the Court. (Interested advocates should contact VLS Professor Catherine Fregosi).

BANKRUPTCY LAW SECTION

Chairs: Nancy Geise
and Donald Hayes, Esqs.

The bankruptcy bar section held its annual Holiday CLE on December 7, 2018 at Trader Duke's in South Burlington. There were seminars on topics specific to debtor and creditor bankruptcy practice, such as student loan debt, lease assumption and reaffirmation agreements, along with a session on the use of bankruptcy petitions as an estate planning tool. The bar brought in

elder law and estate planning attorneys to speak on that topic that was less familiar but nonetheless very valuable to bankruptcy practitioners. This year's Holiday CLE on December 6, 2019 will be held in Killington and address issues in the emerging field of cannabis law and bankruptcy, Chapter 12 and the family farmer, along with continued discussion on student loans in bankruptcy.

Several bills were introduced in the House and are now in committee regarding student debt dischargeability. The bankruptcy bar will be monitoring the progress of those bills through the legislative process.

We congratulate Jan Sensenich, Esq, Vermont's sole Chapter 12 and Chapter 13 standing trustee, on his being elected President of the Association of Chapter 12 Trustees at that organization's annual conference in July 2019 in Indianapolis. And, congratulations as well to Ray Obuchowski, Esq., who was elected President of National Association of Bankruptcy Trustees at its annual meeting last August. Vermont can be proud to have two of its trustees in the top positions in these national organizations. Congratulations Jan and Ray!

BUSINESS ASSOCIATION LAW SECTION

Chair: Tom Moody, Esq.

It was an unusually quiet year for the Business Associations Section. After several years of active involvement with the Vermont Legislature, there were no business-law related bills that required the attention of the Business Associations Section. We anticipate we will be back in the legislature next session. Also, for the first time in at least a decade, we did not give a business law presentation at the annual meeting. Likewise, we will be back next year. In 2020, we also plan on putting on a free-standing live half or full day seminar on business law basics to be recorded and added to the VBA digital library.

COLLABORATIVE LAW SECTION

Chair: Nanci Smith, Esq.

The Collaborative Law Section invites members from the larger VBA membership who are interested in Collaborative Practice to reach out and create your own local practice group or join an existing practice group, such as CPVT (Collaborative Practice Vermont). This past year, we rolled out our Divorce Options program, modeled on the successful California platform, and of-

fered 4 free community service forums to talk to the public about their divorce options-litigation, mediation and Collaborative Divorce. We continue to meet monthly with our interdisciplinary partners in mental health and financial planning. One member traveled to the CP CAL 15th Anniversary training in San Diego. Next year will be in Redwood City. All are welcome to attend. The IACP (International Academy of Collaborative Professionals) Forum is in Chicago this year, October 25-27. This is a great place to network and expand your skills. We now incorporate zoom as our meeting platform as our membership expands. Attorney members who are interested in joining the CPVT practice group are encouraged to contact Nanci at nanci@nancismithlaw.com.

CONSUMER LAW SECTION

Chair: Jean Murray

The Section has been relatively quiet, but continues to work on debt collection reform legislation throughout the legislative session.

CRIMINAL LAW SECTION

Chair: Katelyn Atwood, Esq.

There will be a criminal law update presentation at this year's VBA Annual Meeting on September 27, 2019 with presenters from both the prosecutorial and defense sides.

DISPUTE RESOLUTION SECTION

Chairs: Neil Groberg
and Richard Hecht, Esqs.

With over 135 members strong, the members of the Dispute Resolution Section continue to strive to make mediation, arbitration and facilitation more utilized, accepted and publicized in Vermont's legal community. This year, the section solicited a few bar journal articles, the Improv program and the VBA Annual Meeting and have actively pursued conversations on VBA Connect. We'd like to see more activity from this diverse group and more discussion about the various mediation strategies. The Section anticipates becoming even more vibrant in the coming year and welcome suggestions from all Bar members regardless of Section on opportunities for Dispute Resolution and interaction with the DR Section.



The Cuban American Friendship Society



Cuba Today: a Comparative Study

The Rule of Law in Two American Republics

November 2 - 9, 2019

This legal seminar at the University of Havana will explore private enterprise in a socialist economy and a comparison of: the Constitution, notions of human rights, criminal law and the rights of defendants, and individual liberties. Lawyers and legal faculty from the University and Law School will offer presentations and discussions. You will visit the Courts of Cuba, legal offices, the Bar Association of Cuban Lawyers, and the Law School at the University of Havana.

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ELDER LAW SECTION

Chair: Glenn Jarrett, Esq.

The Elder Law Section co-sponsored the 9th Annual Elder Law Summit with the Vermont Chapter of the National Academy of Elder Law Attorneys in October 2018. Bob Pratt presented an update of the new law that made many changes to Title 14. A panel of lawyers from New York, Massachusetts, New Hampshire and Vermont spoke about the differences between laws in the various states and issues arising when clients move from one state to another.

On May 19, 2020, the Section is sponsoring an Elder Law Day with speakers discussing capacity planning and end of life issues, long-term care and Medicaid planning, asset preservation, post-eligibility issues for Medicaid recipients, special needs trusts and ethics. Mark your calendars!

ENVIRONMENTAL LAW SECTION

Chair: Gerald Tarrant, Esq.

At the past June 2019 CLE we continued our discussion on proposed changes to Act 250, including a discussion on the Report on Act 250: *The Next 50 Years*; the latest draft of proposed Act 250 changes from the House Natural Resources, Fish & Wildlife Committee and the Administra-

tion's Proposed Act 250 Bill. We also circulated revisions to the Vermont Stormwater Management Rule, the Senate Bill relating to the provision of water quality services (S. 96) and the wetlands and agricultural quality bill (H. 525). We included ANR comprehensive PSFA testing plan; Act 21 (S. 49) relating to the regulation of polyfluoroalkyl substances in drinking and surface waters, S. 55 an act relating to the regulation of toxic substances and hazardous materials, and S. 40 an act relating to testing and remediation of lead in the drinking water of schools and child care facilities.

The most recent Act 250 Committee proposal (Draft 9.2, 4/4/2019): <https://legislature.vermont.gov/Documents/2020/WorkGroups/House%20Natural/Bills/19-0040/Drafts,%20Amendments%20and%20Summaries/W~Ellen%20Czajkowski~19-0040,%20Draft%209.2,%204-4-2019~4-24-2019.pdf>

The Administration's proposal (H. 197) which should be the same as S.104 (below): [https://legislature.vermont.gov/Documents/2020/Docs/BILLS/H-0197/H-0197 As Introduced.pdf](https://legislature.vermont.gov/Documents/2020/Docs/BILLS/H-0197/H-0197%20As%20Introduced.pdf)

S. 104: [https://legislature.vermont.gov/Documents/2020/WorkGroups/Senate Natural Resources/Bills/S.104/S.104~Corey Parent~As Introduced~2-20-2019.pdf](https://legislature.vermont.gov/Documents/2020/WorkGroups/Senate%20NaturalResources/Bills/S.104/S.104~Corey%20Parent~As%20Introduced~2-20-2019.pdf)

Since this is the 50th Anniversary of Act 250 - and its likely neither the Legislature

nor the Governor will ignore its birthday - many people believe a bill will be passed and signed into law modifying Act 250.

This law could well influence some or most of the ten criteria of Act 250, as well as its process. We will keep you informed as the Legislative Session begins in January.

FAMILY LAW SECTION

Chair: Patricia Benelli

Family Law Day fell on May 16 this year, and the Family Law Section put on a well-attended seminar. We began with a year-in-review update of Vermont family law, continued with a thorough review of Vermont law on how relocation of a parent affects parental rights and parent-child contact, broke for lunch, moved on to an important presentation on protecting the benefits of a disabled client or of the disabled child of a client in family law cases, and ended with a fascinating look at brain science and how it applies to both our clients and ourselves and plays out in our work, especially when trying to settle cases. The Section will also be presenting a CLE at the fall VBA meeting on domestic violence, a factor which is all too common in our work. The seminar will focus on how to recognize it, how firearms relate to it, what to do about it when you find it, and how to handle it in the mediation process.

Family Law Section members were very active in the legislature last term, as many family law bills were introduced. Most notably, we were asked to weigh in on the new alimony guidelines, which were made necessary by the recent changes in the tax law. The upcoming term is expected to be very busy for us. Several bills proposing significant changes in our parental rights and custody standards were introduced last year, but not acted upon. They are expected to be taken up again this year, and they will rile the parental rights waters. The section is also undertaking a comprehensive review of relocation law in other jurisdictions with the goal of proposing legislation to fill this void in the Vermont family law statutes. It should be another busy year.

GOVERNMENT AND NON-PROFIT SECTION

Chair: James Porter, Esq.

At the VBA Annual Meeting, Elizabeth Miller and Michael Kennedy will be presenting the CLE *"The Attorney as Board Member."* Though sponsored by the Health Law Section, the session will be very relevant to non-profits. The CLE addresses common questions faced by attorneys: *Should you serve on the board of a client organization? How do you protect yourself from creating an attorney-client relationship?*



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VBA Directory

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



inPERSON

VBA Conferences

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



onLINE

Legal Vendor Directory

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How many boards should you serve on and how do you handle conflicts among organizations when you serve on more than one board? The top dos and don'ts to being a great board member while protecting your license will also be discussed. Members of the government and non-profit section are encouraged to please submit requests or recommendations for new CLEs, to Jim or to the VBA for consideration at a future bar meeting.

HEALTH LAW SECTION

Chairs: Drew Kervick
and Elizabeth Wohl, Esqs.

For the VSA's 2019 annual meeting, the health law section organized a cross-disciplinary presentation on considerations for lawyers serving on non-profits boards of directors. In particular, how lawyers can navigate the thorny issues that inevitably arise in connection with board service? And what ethical issues face attorneys who participate on non-profit boards? Please continue to reach out to dkervick@dunkiel-saunders.com or ewohl@brattleborore-treat.org if you have ideas for future health law events or are interested in becoming more active with the health law section!

IMMIGRATION LAW SECTION

Chair: Sidney Collier, Esq.

Immigration law practitioners are certainly aware of the many recent and continued changes to U.S. immigration law and policy. Absent an injunction, the new public charge rule will take effect October 15, 2019 and is expected to have sweeping impacts on legal immigration. USCIS is also expected to implement an H-1B registration program for the upcoming FY 2021 H-1B cap filing season that will dramatically change the H-1B cap season from prior years.

Recent policy guidance provides USCIS adjudicators increased discretion to deny applications and petitions without first providing applicants an opportunity to fix certain deficiencies, making it critically important to ensure cases are properly filed. In addition, USCIS has begun implementing a policy that expands the circumstances when the agency will issue Notices to Appear for individuals with certain denied benefit applications, which will result in more individuals being placed in removal (deportation) proceedings. The travel ban continues to prevent thousands of visa applicants from the affected countries from entering the United States.

We are also seeing a surge in processing times for adjudicating petitions and applications pending before USCIS; there has been increased scrutiny of social media history usage by visa applicants; and, Immi-

gration Courts are experiencing significant changes. There are many other changes too numerous to mention here but it is certainly an interesting – and busy - time to practice immigration law.

As always, the ILS welcomes members to post questions and comments on VBA Connect and provide suggestions on CLE seminars and how to increase engagement with this group and other members of the bar.

INTELLECTUAL PROPERTY LAW SECTION

Chair: Andrew Manitsky, Esq.

The IP Section was active this year, presenting at the March Midyear Meeting in Lake Morey and at the June Procrastinator's Day in South Burlington. Presenters included Nancy Livak, Walter Judge, Patricia Nelson, and Section Chair Andrew Manitsky. They covered copyright and social media, new developments in trade secrets and non-competes, copyright for the transactional lawyer, and principles of trademark protection and infringement analysis in connection with recent Vermont beer trademark disputes. In addition, Andrew presented on a broad array of copyright issues in visual arts at this summer's Governor's Institute of Vermont, an 8-day residential program for highly motivated teens studying digital media and creative technology and design.

INTERNATIONAL LAW & PRACTICE SECTION

Chair: Mark Oettinger, Esq.

The VBA's International Law & Practice Section has approximately 50 members. We engage in informal member-to-member resource sharing and cross-referral. During the current year, the Section is co-hosting a presentation entitled *Lawyers Without Borders*. We are collaborating with the VBA's Labor & Employment Section and its Immigration Section to produce this event. The presentation is focused on the representation of clients in need of guidance on inbound and outbound immigration and foreign direct investment. We explore transnational contracts and the practicalities of cross-border enforcement.

Section members continue to collaborate on the design, dissemination and implementation of a proposed World Court of Human Rights (WCHR), a supra-national court that would, if implemented, unify the jurisprudence and procedure of the growing body of public international human rights law. For further details on this project, please see www.worldcourtofhumanrights.net. In the past year, Section Chair Mark Oettinger gave keynote addresses on the WCHR at the October 31, 2018 meet-

ing of the Canadian Society of International Law (CSIL), and at the April 11, 2019 annual meeting the ABA Section of International Law. Section members continue to actively engage with the Vermont International Trade Alliance, and the Vermont Council on World Affairs. Members are encouraged to post comments, questions or international legal developments of note through VBA Connect.

JUVENILE LAW SECTION

Chairs: Linda Aylesworth Reis
and Sarah Star, Esqs.

In the past year the Vermont Supreme Court has issued several full court opinions on juvenile law topics including educational neglect, the Interstate Compact on the Placement of Children, special immigrant status for undocumented youth and appeals from denials of termination of parental rights petitions. Also of note is that two Federal lawsuits against the Vermont Department of Children and Families for treatment of children and parents have also been allowed to move forward in U.S. District Court. This year the juvenile law section offered a CLE on helping clients and their extended families access resources in the family and probate courts while avoiding pitfalls of the child welfare system. In Vermont, despite the lowest rates of childhood poverty in the nation, we lead in terminations of parental rights, and have had more children in state custody per population than New York or any other New England state. The juvenile law section is committed to providing support to lawyers looking to enter this field and we invite any interested VBA member to get in touch with us to try to solve Vermont's child welfare crisis.

LABOR AND EMPLOYMENT SECTION

Chair: Stephen Ellis, Esq.

The Labor and Employment Law Section is presenting a two-part CLE program at the Annual Meeting on September 27, 2019. Entitled "Lawyers Without Borders," the program will focus on emerging issues and challenges for labor and employment lawyers dealing with the growing "remote" workforce and the increasingly global workplace. Our outstanding panel will provide important insights and guidance based on real-world practical experience.

Section members (including your Chair) provided important testimony from the employer's perspective in connection with new the elimination of the statute of limitations for claims of childhood sexual abuse. 12 VSA §522. Our input contributed to the inclusion of subsection (d), which requires a finding of gross negligence to

support an award of damages against an entity that employed the abuser if the claim against that entity would have been barred by any statute of limitations in effect on June 30, 2019.

Section members also weighed in on proposed legislation (H-1) which would have added a provision to FEPA (21 VSA §495o) prohibiting “any agreement not to compete or any other agreement that restrains an individual from engaging in a lawful profession, trade, or business.” While some members supported the bill, others (including your Chair) argued that it failed to adequately account for the distinction between agreements whose sole purpose is to restrict competition (*i.e.*, “non-compete agreements”), and agreements that seek primarily to protect confidential and valuable business information and relationships (*i.e.*, “nondisclosure” and “non-solicitation” agreements). We also argued that the Bill failed to account for situations in which an affected individual may be in a position to secure fair compensation for broader restrictions through arms-length bargaining. In light of these complexities, the Committee (Commerce and Economic Development) decided to table the bill until the next session.

MUNICIPAL LAW SECTION

Chair: Brian Monaghan, Esq.

The Section remains quite active in their discussions on VBA Connect sharing information about municipal land-use violations, self-governance, mutual aid and more. The Section will have an annual case law update at the VBA Annual Meeting on September 27th.

PARALEGAL SECTION

Chair: Carie Tarte, RP®, AIC

The Paralegal Section is working on a roundtable presentation for the VBA Tech Conference in May covering various e-discovery tools used by paralegals and the pros and cons of each. In addition, we are hoping to put together a submission for the Winter edition of the Vermont Bar Journal on whether or not paralegal licensure in Vermont could work.

PRACTICE AND PROCEDURE SECTION

Chair: Gregory A. Weimer, Esq.

The past year has been a quiet one for the Committee. In the coming year the Chair will contact members to discuss topics of interest for development into seminar topics and/or possible articles for the *Bar Journal*.

PROBATE AND TRUST SECTION

Chairs: Bob Pratt and Mark Langan, Esqs.

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

The Probate and Trust Section promoted H. 287 – “Small Probate Estates” bill (an act relating to small probate estates); signed by Governor Scott on May 28, 2019; effective on July 1, 2019. The bill increased the limit on small estates from \$10,000 to \$45,000. The estate must consist entirely of personal property. Timeshare units can be considered personal property. Interested parties have 15 days to object. Letters of Administration are effective for one year. The statute spells out what happens if the small estate is insolvent.

The Probate and Trust Section promoted and participated in the passage of H. 436 – Act 11 which is essentially the Uniform International Wills Act. If an International Will is in compliance with the statute it will be valid as to form, irrespective of the place where made, location of assets, or nationality, domicile or residence of the testator. The statute sets forth the requirements for validating an International Will. A Certificate by an authorized person regarding requirements must be attached to the will. The template for the Certificate is in the statute. A person with an active Vermont law license and in good standing is an authorized person under the statute who can sign the Certificate. This statute is helpful for U.S. Citizens who are domiciled abroad and do not have a domicile within the United States. Vermont can probate these estates.

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

New Rule 39 allows expedited proceedings in cases that potentially may be appealed *de novo* to the civil division. Under the amendment, if both parties have appeared, the judge may make a determination on the merits without swearing-in the parties if the facts as represented by them on the record are undisputed and no party objects.

The Probate and Trust Section participated in the special committee composed of judges, court administrators, members of the media and various members of other rules committees (*i.e.*, Civil Procedure Rules Committee, Criminal Procedure Rules Committee, Family Law Rules Committee) relating to the use of electronic devices in the court room. Rule 79 of the Probate Rules sets forth the rules relating to the use of electronic devices in the probate court.

Amendment to V.R.P.P. 43(b) reflect the addition of new V.R.P.P. 43.1 promulgated simultaneously, which permits testimony to be presented by video or audio conference in appropriate circumstances. New V.R.P.P.

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43/1 basically adopts the procedures of V.R.C.P. 43.1 with minor changes in terminology and timing to better reflect probate practices. Administrative Order No. 47 implements these new rules.

Rule 3 (e) was added to provide a "prisoner's mailbox" procedure for the filing of a petition in a probate proceeding by an inmate confined in an institution. The amended rule is virtually identical to V.R.A.P. 4 (f). Rule 5 (f) was redesignated as Rule 5 (f) (1) and Rule 5 (f) (2) was added to provide a "prisoner's mailbox" procedure for the filing of documents after the petition in a probate proceeding by an inmate confined in an institution. The provision is virtually identical to the simultaneously added V.R. P.P 3 (e) and substantially identical to V.R.C.P. 5 (e) (4) and V.R.A.P. 25 (a) (2) (C).

V.R.P.P. 79.1 relating to the appearance and withdrawals of attorneys not admitted to practice in Vermont. The rule deals with appearance through a motion pro hoc vice and the court's discretion to grant, deny and revoke out-of-state counsel in the probate courts.

Legislative Initiatives:

A joint committee between the Probate and Trust Section of the Bar and the Trust Section of the Vermont Bankers Association was formed to review the Uniform Trust Decanting Act ("UTDA"). Some states have passed the Uniform Trust Decanting Act and committee is exploring whether Vermont should pass the uniform act as well.

REAL ESTATE SECTION

Chairs: Jim Knapp
and Benjamin Deppman, Esqs.

The peak achievement for the section was the well-attended and very informative day of CLE programs at Real Estate Law Day in November. Nearly 200 members attended the program. Co-Chair Jim Knapp also presented the real estate segment at each of the Basic Skills programs in September and March for attorneys pursuing admission to the Bar.

The section is very active on the VBA Connect Online community, with numerous distinct discussion threads posted over the last year, almost on a daily basis.

The 2019 Legislature took up bills relating to several topics of interest to Section members: (a) a complete revision of the Land Gains Tax statute that will significantly reduce the number of transactions for which returns have to be filed when the changes take effect on January 1, 2020; (b) a significant increase in recording fees, coupled with updates and revisions to the recording statutes addressing processing of instruments delivered for recording; (c) revisions to the Property Transfer Tax pro-

visions which now impose a transfer tax on the transfer of a majority of the interest in an entity, even if there is no deed recorded; and (d) in support of the Vermont Banker's Association, a significant change in the Current Use program, resulting in the reclassification of Land Use Change Tax liens as contingent liens, until such time as development occurs. Members Jim Knapp and Andy Mikell provided extensive testimony on the bills in numerous committee meetings.

As the new provisions for notaries took effect on July 1, 2019, Co-chair Jim Knapp was a co-presenter for a well-attended webinar discussing the technical aspects of the new provisions.

The Title Standards subcommittee of the Real Estate Section is presently working on new title standards for easements, mobile homes, partnerships and other topics of interest. New standards will be released in September of 2020.

WOMEN'S DIVISION

Chair: Samantha v. Lednický, Esq.

After our annual meeting at the Equinox last September, the Women's division appointed a new set of officers who have come together to plan a number of successful events both within the bar and the broader community. In December 2018, we hosted a panel discussion on Women in the Judiciary. Judge Christina Reiss, Justice Marilyn Skoglund, Justice Beth Robinson, and Judge Helen Toor were asked about their respective paths to their current positions in the judiciary, obstacles they faced, any challenges or perceptions they continue face, and the importance of having women in these positions of authority. This lively discussion was followed by a social mixer. On March 8, 2019, we collaborated with the Vermont Council on World Affairs to put together a panel discussion and celebration for International Women's Day. We heard from four remarkable Vermont women, including retired Vermont Supreme Court Justice Denise Johnson, who shared her stories and perspectives from her career in law. We hosted a wellness CLE at the VBA meeting titled "Us Too" to address the #metoo movement, we heard compelling personal stories and discussed topic such as "how the #metoo era changed you" and "how do we integrate our personal experiences in the #metoo era into our professional lives, especially as attorneys working here in Vermont." This fall we are kicking off a Women's Division mentorship program with Vermont Law School students with a round table discussion down at VLS September 19, 2019. If you are interested in participating as a mentor, please reach out to me via email: SLednický@mhttpc.com.

The gender discrimination survey has been distributed and exciting events and collaborations in the works for 2020, the 100th anniversary of the 19th Amendment!

WORKERS' COMP

Chair: Keith Kasper, Esq.

A quiet year for the VBA Workers' Compensation Section this year. We had expected a significant debate in the Legislature as to Vocational Rehabilitation issues, but nothing ever really came of it. A number of long time Vermont Department of Labor Staff have retired over the past year and the VBA WC section has shown their appreciation of these staff members many years of dedicated service to the public. Beginning work on a potential series of joint seminars with our neighboring states' Bar Associations of NH, MA and NY for choice of law issues and the differing WC benefits available in each of these states.

YOUNG LAWYERS DIVISION

Chair: Ben Traverse, Esq

This year, the Young Lawyers Division ("YLD") has dedicated its efforts to recruitment and retention challenges within our new lawyer community. Members of the YLD board have been participating in a statewide working group on these challenges. The board is also working on a comprehensive survey for its members, focused on the opportunities presented by practicing law in Vermont.

The YLD has continued to host regional mixers throughout the state. The YLD has also continued its "Dinner with a Judge" series, which is designed to provide newer lawyers an opportunity to have small, informal discussions with members of the judiciary on general topics related to the profession.

Additionally, the YLD membership has been giving back to the legal community. Members were eager to volunteer as witnesses for the VBA Trial Academy. The YLD also organized a long-awaited update to the "On Your Own" booklet, a free legal guide for Vermonters entering adulthood.

Moreover, this past January, the YLD held another successful annual Mid-Winter Thaw in Montreal, keynoted by Governor Madeleine Kunin. The YLD is looking forward to hosting the Thaw again at the Omni-Mont Royal, on January 17 and 18, 2020.



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Lower Your Stress, Increase Your Resiliency

I have always been interested in resilience--the ability to face adversity productively. From a wellness perspective, I do not buy in to the concept that we are each responsible and capable of handling all the world throws at us. I, for instance, would not have survived the crisis of raising a son with disabilities, had my community not carried us through his childhood. Impossible. Recent work at Harvard in childhood resilience has reinforced my belief in the importance of connection to resilience and how this connection might have some use for our legal community.

At the spring benefit lunch for our local Vermont Parent Child Center, I learned about Harvard's Center on the Developing Child and their work with Vermont babies and toddlers to boost resilience in our kids. Studies of resilience show that stress kills learning and development. This research, at a high level, has a two-pronged approach: first, prevent toxic stress by encouraging healthy interactions and second, build resilience by focusing on executive function development. Toxic stress in children comes from extreme, frequent, or prolonged adversity without the protection of a strong adult buffering relationship and is linked to lifelong health effects including high rates of diabetes, heart disease, suicide and obesity. The presence of toxic stress is also shown to interrupt executive function development, which is needed for successful progression of natural human development as well as economic and social success. Thus, the first step in ensuring resilience is to reduce toxic stress.

Preventing toxic stress on the brain through responsive interaction with children

The most reliable factor in reducing toxic stress among children is consistent healthy

interaction with a trusted adult. That healthy interaction--called a responsive relationship--is undergirded by a type of caring and thoughtful communication called "serve and return." It turns out that both childhood and tennis are no fun without a responsive partner. In the infant's or toddler's case, well-being requires a trusted adult partner who is sensitive and responsive to a young child's sounds, gestures and needs.

The five parts of "serve and return" communication are:

1. Notice the serve and share the focus of attention
2. Return the serve by supporting and encouraging
3. Give it a name! Identify words and concepts
4. Take turns...and wait
5. Practice endings and beginnings.

The research shows, "responsive relationships are both expected and essential, their absence is a serious threat to a child's development and well-being." What's so interesting about this finding is that not only is the interaction needed but the absence of the interaction causes additional stress and harm. The stress hormones are activated and flood the brain, harming its ability to develop new skills, reducing its current capabilities as well as potentially setting up future health effects.

On the other hand, a strong responsive relationship puts children on the road to developing executive function, which includes the development of working memory, mental flexibility and self-control, all in coordination with each other. Working memory permits us to be efficient, draw on experience and access our mental store of learned facts and concepts. Mental flexibility goes beyond directing how we shift or maintain attention, allowing us to take

on changing roles and perspectives when needed. Self-control enables us to maintain calm in highly emotional and contentious situations. It also keeps us focused. All of these intertwining functions are critical for self-regulation and further learning including how to be able to make healthy and reasonable choices. With a safe and secure environment and healthy social interaction, executive function develops and enables all the learning children need. However, without the presence of a protective responsive adult, children face unrelieved activation of the body's stress management system and they are set up for the worst of long-term consequences for learning, behavior and both physical and mental health.

So what does this have to do with lawyers?

In listening to the speaker from Harvard describe toxic stress, I scanned my life and legal experience, recalling clients and families dealing with exactly the types of adverse experiences she described. But then I found myself also thinking somehow about my own experience, not as a child, but as a young attorney. I was a young, single mom trying to manage adulthood and legal practice (and attorney colleagues) at the same time. Yet much of my time was spent in a solo office figuring out things on my own. It felt insane. Each day I would try to stuff new concepts into my head and it seemed they had all fallen back out.

What was going wrong? I had graduated at the top of my class, but why was I behaving like a stupid lawyer? I was stressed, not from adverse experiences, but perhaps from a lack of "serve and return." It wasn't until I happened into a mentor that I could learn again. Then I made huge strides, had my first trial and appeal, and began to suc-

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ceed. When I heard about this research, telling me that the inability to build executive function through responsive relationships creates toxic stress in children, I began to wonder, could it have the same effect on the developing lawyer's stress in the early career years.

What could responsive relationships do to promote well-being in the VBA?

This brilliant research is all in the context of early childhood development—or early brain development. A completely separate area of human neuropsychology, to be sure, than adult neurology. And, the first years of practice in even the most stressful and isolating law offices do not really approximate the horror of many adverse childhood experiences that stunt child development. However, there are undoubtedly lessons we can take away from the discoveries at Harvard. It is probable that if the human brain needs continued outside stimulation with other humans to develop neurological connections and sense of well-being in the early years, that need continues into adulthood. Indeed, this need for interaction is being studied at the other end of life as a way to help stave off dementia—that is the gradual loss of executive function—so why not the entire lifespan?

We also know that the mind is most vulnerable during times of great development. Only recently have we begun to understand these periods of development continue into the 30's and possibly 40's. Studies show that growth of executive function capacity continues at least to age 30 when most lawyers have entered or are entering practice. And now, scientists are proposing that the elasticity of the brain

and the neuronal growth never stops.

Furthermore, there is nothing more critical for success as a lawyer than razor sharp executive function. We must have developed at a pretty high level to have achieved admission to law school, but entering practice requires more development of these skills, and expansion of working memory and mental flexibility. It is a potentially vulnerable (as well as exhilarating) time requiring more resilience and resistance to stress.

I propose that as a profession where learning is required for success, we adopt the growing evidence in science that care of the mind requires active and intentional work, not merely of our own but in connection to others. I further suggest that we who serve as mentors and supervisors of new attorneys must surely bear some responsibility for enabling or at least not threatening the potential for the necessary development in our colleagues. To that end, I hope you will join me in an experiment, trying out some brain tennis with your early career colleagues (and perhaps later career ones, too). I'd love to hear whether it makes a difference.

Let's take a second look at the five parts of serve and return communication—with new lawyers in mind:

1. Notice the serve and share the focus of attention. By noticing serves, you'll learn a lot about their abilities, interests, and needs. You'll encourage them to explore and you'll strengthen the bond between you. You can't spend all your time doing this, so look for small opportunities throughout the day to show you notice and share in the experience.
2. Return the serve by supporting and encouraging their interests and cu-

riosity. When you return a serve, you acknowledge their thoughts and contributions are heard and understood. Never getting a return is stressful and causes efforts to communicate to be associated with stress.

3. Give it a name! This helps identify important concepts. It allows them to know that you see what they are focused on, and by providing the name or phrase, you help them understand the world around them and know what words to use.
4. Take turns...and wait. Keep the interaction going back and forth. Notice who's turn it is and understand that waiting is crucial. People learning new things need time to think. Turn-taking gives them practice with developing self-control in new situations and helps them learn how to get along with others in difficult ones. Practice with a trusted partner builds confidence and independence.
5. Practice endings and beginnings - Notice when they are "done" and help, either with keeping them on task, wrapping up, moving on or mooting. This builds self-control and mental flexibility under duress. It also builds trust that they can seek your help when they run into a challenge or make a mistake.

Feel free to contact me with any questions! Good luck!

Micaela Tucker, Esq. is Co-Chair of the VBA Lawyer Well-Being Committee along with Samara D. Anderson, Esq.



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Vermont Bar Foundation Grantee Spotlight

New Story Center

Continuing the tradition of highlighting a different Vermont Bar Foundation grantee in each Vermont Bar Journal edition, this edition will feature the NewStory Center in Rutland, Vermont. NewStory “is a non-profit human services agency that works to end the cycle of violence through support, education, prevention, and collaboration with all the people and communities of Rutland County.”

Celebrating its 40th anniversary this October, NewStory began its story in Rutland in 1979, when a small group of local women were determined to provide a safe haven for women fleeing domestic violence. NewStory Executive Director Avaloy Lanning and Development Director Jennifer Yakunovich explained that the 70’s were an era when domestic violence issues first emerged from the shadows. Before then, society tended to look the other way, or to consider domestic abuse as a private matter. The dedicated group of women in Rutland opened the “Rutland County Battered Women’s Shelter” on Center Street, just down the street from the Rutland County Courthouse, in a small space that originally served as the municipal jail.

From those humble beginnings, the organization grew significantly when the Sisters of St. Joseph, a Roman Catholic order of nuns who educated thousands of Rutland schoolchildren over the years, gifted a large house on Grove Street to the group. Large enough to include 24 beds, the new home for the organization later became known as “HerStory House.” As societal attitudes changed and new laws were enacted to address domestic violence, the re-named “Rutland County Women’s Network & Shelter” services grew to include a 24-hour crisis hotline, support groups, medical advocacy, referrals to area resources, trainings and technical assistance in addition to emergency housing.

Another major change in the organization’s evolution took place in 2017, when extensive strategic planning resulted in the drafting of a new mission, vision and goals, including a decision to re-name the organization to better reflect its purpose. Avaloy Lanning introduced the new name by explaining its significance: “So as we move forward, to our next chapter as an organization, we recognize that for too many people and for too long a time, someone else has been writing their story, controlling their narrative. Not any longer. It’s time



Several of the Rutland area attorneys who have provided legal assistance to NewStory Center survivors include (L to R) Kevin Volz, Pamela Gatos, Michelle Kenny and Matthew Getty.

for us, for our community, for survivors, to take control of their narrative and write a new story.” Another significance of the new name was to show that services are available to all members of the community, and that domestic abuse survivors include not just women but all members of society.

A goal of the strategic planning process was to learn from survivors what specific services would be most helpful. That inquiry led to an initial application to the Vermont Bar Foundation for funding for direct legal services for survivors. In its application, Jennifer Yakunovich wrote: “NewStory Center strives to meet the ever-evolving needs of our client population. In 2016, after many years of noting qualitative feedback from clients who informed us that their legal service needs were not being met, NewStory Center took the proactive step to address this significant service gap.” The grant application sought to secure funding to hire local lawyers on a reduced fee basis, so they could counsel victims of domestic and sexual violence as they attempted to navigate legal issues such as child custody, divorce or parentage. Explaining that the victims whom NewStory Center serves often-



times lack the financial resources to consult an attorney, the application also spelled out a process to maximize the legal services: NewStory staff will first evaluate a victim’s need and decide if a referral to an attorney is an appropriate action.

Referrals are decided based on the individual needs of the victim. The biggest factor in deciding whether to make a referral is the type of case. Divorce and child custody are the cases most likely to be referred for an attorney consultation. If a referral is

appropriate, an attorney will be identified, and the NewStory Center Systems Advocate will inquire about availability. NewStory Center keeps an up-to-date list of attorneys who have agreed to accept clients at the low bono fee of \$60 per hour. NewStory assists with setting up an appointment with the selected attorney. If it is found that a victim is in need of more than one hour of consultation, she/he will need to submit a request in writing and NewStory Center will reach out to the attorney to confirm that this is the most appropriate action, while respecting privilege and confidentiality. Whereas the usual limit for hours per case has been 2 – 3 hours, the limit can be increased to 6 hours in certain cases.

Victims who were able to utilize the legal services were so grateful and found the legal services to be so beneficial that applications were made for additional funding in 2017, 2018 and 2019. Assisted victims include a male victim who was one of the first people to take advantage of the VBF-funded assistance. After an initial meeting with the participating attorney, the attorney agreed to handle the victim's divorce and child custody case on a pro bono basis and a successful resolution was reached. Another recent success story was that of a female survivor who was referred to a participating attorney who offered the full six hours of consultation. The attorney then offered to further represent her at a reduced rate, and with the help of a family member's financial contribution, the client "was able to walk in to the court room for her hearing with

her attorney feeling confidently prepared against the defendant's witnesses and evidence. She also left the courtroom smiling, knowing that even if the outcome did not go as she may have hoped, the scales were more balanced in her favor, and she was in control as best she could be in this stressful situation," according to NewStory.

To date, 40 survivors have been able to receive legal assistance from local lawyers thanks to the Vermont Bar Foundation grant. Avaloy notes: "All of the clients have found the consultations to be helpful and felt that they received the knowledge they needed to make informed decisions. Most importantly, these clients have taken back some of the power that they lost while in their abusive relationships."

Avaloy and the NewStory staff are deeply grateful to the Vermont Bar Foundation, and to the Rutland lawyers who time and time again have provided legal assistance to the victims in need. They also suggest that the lawyers may not fully realize the incredible impact that the representation has on the survivors. "One of the most important goals of this project is to provide a sense of confidence and empowerment to victims of domestic and sexual violence. Victims have been told by their abusers over and over again that they do not matter, that no one will believe their story of abuse, and that they will never succeed outside of the relationship. The ability to have someone who truly listens and is working exclusively for them can have profound impact on a survivor. To walk into a courtroom with an attorney

by their side or simply say, 'my attorney says' takes the power away from the abuser and begins to place it back into the hands of the victim."

One of the attorneys who has provided legal assistance to survivors through the NewStory Center grant is Michelle Kenny, from the firm Kenny & Gatos, LLP in Rutland. Attorney Kenny considers it a privilege to offer her legal skills and expertise to assist those in need: "As attorneys we have a special privilege of providing a supportive ear and a knowledgeable ally in a client's determination to break the cycle of domestic abuse. The legal process itself can be daunting and complex, and without proper assistance, many of those who desire change are less likely to reach a positive outcome. Partnering with NewStory to provide legal assistance to clients who may not otherwise have reasonable access to justice, is truly the least we can do. It is our obligation as attorneys, as community members and quite frankly, as humans. Thank you NewStory for the work you do and continue to do."

Many thanks also to all of the Vermont lawyers whose interest earned in their IOLTA accounts help fund the Vermont Bar Foundation grants, including the grant awarded to NewStory Center of Rutland, Vermont.

Teri Corsones, Esq. is executive director of the VBA and serves on the promotions committee of the VBF.



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The Decision to Hire Contract Attorneys Should Never Be Just About the Money

Firms hire contract attorneys for a variety of reasons, not the least of which is an attempt to control expenses. While reducing expenses is a good thing, the financial savings shouldn't be the only issue in play as unintended consequences could follow if no thought is ever given to a few other concerns. The issues that come to mind most readily for me are conflicts of interest, accountability for work product, disclosure, and insurance coverage were an allegation of negligence ever to arise.

Addressing these issues is problematic however, because the term "contract attorney" means different things to different people. IRS definitions and regulations aside, contract attorneys can run the gamut from fulltime "employees" who are held out as members or associates of a firm to temporary part-time attorneys who never step foot within the walls of the firm. For the purposes of this article, I am going to focus on contract attorneys who will never be held out publicly as being associated with the firm at which they are working.

Let's look at the insurance coverage concern first. Don't assume that coverage for contract attorneys under your existing policy is a given. While some insurance companies make no distinction between "contract attorneys" and "employed" attorneys, others do. This means that some insurance carriers will automatically add contract attorneys to your policy, once notice has been given and the appropriate amount of premium paid, and others will not. Why won't they? One reason is that contract attorneys are often temporary and/or part-time and some firms hire quite a few. Do these part-timers have their own clients, to include other firms that they work for under contract? Is there frequent turnover of contract attorneys at the firm? In short, contract attorneys represent an unknown risk to a malpractice insurance carrier. If your insurance carrier will not extend coverage under your existing policy, the contract at-

torney may need to purchase his or her own coverage if they feel coverage is necessary. I would suggest that coverage should be mandatory if the contract attorney will be doing things like appearing in court or taking depositions. It may not be necessary if there will never be any client contact and the hiring firm will be reviewing and accepting accountability for the contract attorney's entire work product. Regardless, always confer with your insurance carrier when thinking about hiring a contract attorney (or attorneys) so that the situation can be fully understood, documented, and appropriately underwritten by the carrier if they are willing.

The decision as to whether to use contract attorneys is not something that should lie exclusively with the firm. Clients may or may not be comfortable with contract attorneys and thus clients should be included in the decision-making process. Certainly our ethical rules require disclosure; but ethical rules aside, whose matter is it? It's the clients. I would argue that clients fundamentally deserve to know who will be working on their matters due to confidentiality, competency, and financial concerns at a minimum. Explain to your clients why the use of contract attorneys is necessary. Let them know who they are and what skill set they bring to the table. Then detail what the savings will be and share the steps that will be taken to ensure that confidences will be maintained. In the end, it's all about respecting the attorney/client relationship.

The accountability piece is an interesting issue. Under agency principles, the firm is going to be liable for what the contract attorneys do within the scope of their employment. Sometimes firms will try to do an end run around this concern and treat the contract attorneys as independent contractors. This may be partially effective if the contract attorneys are fully independent (think in accordance with the IRS definition) and the client has not only been made aware of

the situation but consented to it in writing. I say partially effective because there will always be the possibility of a negligent hire claim should any of the independent contract attorneys commit malpractice. Given this, appropriate risk management practices are called for whenever utilizing the services of contract attorneys. Adequate supervision and work product review are a given. Have the contract attorneys sign a confidentiality agreement and instruct staff to never discuss unrelated firm matters in front of them. You would also be well advised to inquire into the background, education, and experience of every potential contract attorney hire as well as ask about past claims or disciplinary matters prior to making any hiring decision.

Perhaps the most significant issue with contract attorneys is the imputed conflict problem. Here the specifics of the working relationship will matter. There is going to be a real difference in how the conflict problem plays between contract attorneys who will never step foot inside your firm's physical space, have no access to firm files, and will only work on one project for your firm versus contract attorneys who will work internally, will be employed there for an extended period of time, will be working on multiple projects, and have access to the firm's client files. The issue can be further compounded if any of the contract attorneys will also be working at one or two other firms at the same time. To minimize the risk of unintended conflict problems arising, limit the contract attorneys' access to client files to the greatest degree possible. An isolated or off site work space coupled with no access to the firm's computer network or the area where client files are maintained can be an effective way to manage the problem. In contrast, the greater the degree to which any contract attorney becomes integrated within a firm the greater the likelihood that all the conflicts this attorney carries will be imputed to the firm.

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Understand that this isn't about how contract attorneys are paid. It's about length of time in your employ, scope of the relationship with the firm, degree of client contact, access to client files, the clients' understanding of the relationship, and the list goes on.

The decision to use contract attorneys can be an appropriate decision that brings real value to your firm and the clients you serve. Just don't rush into this for the expense savings alone because there can be unintended consequences that in the end could prove more costly than if you had never hired the contract attorneys in the first place.

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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Bankruptcy Annual Holiday Luncheon and CLE

December 6th at Killington Grand Resort

YLD Mid-Winter Thaw

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VBA Tech Show

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Elder Law Day

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And don't forget Procrastinators' Day will be in June as always!

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Vermont Poverty Law Fellowship Update: Mental Health and Housing

"I appreciate you saying sorry [about my situation]. I just wish 'sorry' could make a difference."

An aging client who was newly experiencing homelessness said this during a routine phone call one rainy Friday evening. She and I have been working together for several months on eviction, rental assistance, emergency housing, disability benefits, and discrimination cases. She is separately litigating family and criminal court matters. This is a client who does not want or appear to be eligible for transitional, residential, or hospital setting treatment. However, for her, living and accessing health care in the community setting means navigating a complex web of social services, a nearly impossible rental market, and their intersections with her psychiatric disabilities—often with legal conflict and now from a position of homelessness. I assured her that I was here for her and that we could keep fighting. She wished me a good weekend, which she would spend outside in the rain.

Hers are just some examples of the realities faced by low-income Vermonters with intersecting mental health and housing challenges. As I complete my first year as the sixth Poverty Law Fellow, the reasons why mental health and related housing issues were identified as *the* access to justice issue for 2018-2020 are more apparent than ever.

Building on the experience of the previous fellows, I began my fellowship by speaking with a wide range of organizations and individuals involved at the intersection of mental health and housing, hearing their concerns and recommendations for change, and seeking suggestions for others I should contact. I also began representing individuals statewide with diverse legal problems, narrowing in on a few practice areas which might become the focus of my second year. With every new client I represent, and every stakeholder I consult, I observe wide gaps between the available legal solutions and my clients' urgent housing and mental healthcare needs.

My housed clients often experience difficult relationships with landlords and neighbors, as they struggle to keep up with unaffordable rent, maintain their apartments, and monitor and tolerate disability-related behaviors in old, dense, and sometimes segregated settings. Clients with fair housing and ADA rights to reasonable accom-

modations of their disabilities, which would make their tenancies more viable, often do not invoke those rights until they are already facing adverse action. Clients with subsidized housing often forgo colorable counterclaims to stop their program termination or eviction and instead move out with hopes of preserving their rental history and rental assistance. For all clients, every move lowers the chances that they can secure their next apartment.

If clients experience homelessness, their resulting compromised health makes their housing search all the more difficult to manage. This tracks national *Housing First* evidence that stable housing is the gateway to physical and mental health (in contrast to our previous approach that required physical and mental health before a chronically homeless person was deemed 'ready' to be housed). Homelessness and health decompensation increase clients' risk of hospitalization or incarceration. These institutional settings are overburdened and are our most financially and socially expensive (and harmful) shelter/care settings—costs borne by individuals and communities as well as the state. The ADA requires states to provide mental health services to people with disabilities in the most integrated settings appropriate to their needs. However, clients' lack of housing is often a barrier to exiting Vermont's institutional settings, as are the limited resources constraining Vermont's delivery of community-based mental health services.

Clients who have access to community mental health care and associated housing supports are working with case managers who juggle heavy caseloads, tight schedules, low wages, and high turnover. One-to-one case management in the community setting is often only available to those who have already experienced significant periods of institutional care. This means that many low-income Vermonters experiencing mental illness have not yet been institutionalized 'enough,' are not yet homeless 'enough,' or have not decompensated 'enough' to become eligible for the community mental health care and housing supports that they need to become and remain stably housed.

By the time a mental health-housing case comes to me (or my awe-inspiring colleagues at Vermont Legal Aid and Legal Services Vermont), I am often advocating for a reasonable accommodation of the client's disabilities in the form of a "second



chance," or more time to increase community mental health and housing supports that are reasonably likely to remediate tenancy issues. If the client has access to case management, my strategy focuses on close collaboration with the client and the designated mental health agency staff to augment the client's care plan. If the client does not have access to case management, my strategy involves investigating the client's private health information for evidence and arguments that they meet eligibility criteria.

In either scenario, the available avenues do not do enough to help clients with serious psychiatric disabilities reach their identified goals of being healthy and housed. When a client presents with a goal of getting a 'second chance' to stay housed, the bulk of the work to make that accommodation "reasonable" rests with the client and the case manager. Service enrollment, relationship building, motivational interviewing, case planning, and treatment implementation is nuanced and time-consuming work, and it takes longer to meaningfully remediate problematic disability-related behaviors than landlord/tenant, fair housing, and anti-discrimination laws provide.

Thanks to your support, the fellowship is allowing me to grapple with these urgent and difficult-to-resolve issues faced by so many low income Vermonters, and to collaborate on creative solutions to individual cases and on a systemic level in my second year. So far, my fellowship has helped prevent evictions, preserve subsidies, unlock access to services and benefits, and secure criminal records expungements for clients in at least seven counties statewide. I have established working relationships with and/or delivered trainings to at least six desig-

nated mental health agencies, as well as hospitals, statewide. I have also participated in trainings, conferences, and stakeholder meetings with partners dedicated to making our housing and mental health systems work better for individuals and com-

munities. For my second year, my goal is to identify an impact project that will help close these gaps between Vermont's mental health care system, our affordable housing system, and landlord/tenant, fair housing, and anti-discrimination laws.

I am so grateful for this opportunity to be part of improving access to justice for low income Vermonters with mental health and housing challenges. I hope for your continued support as I begin my second year. Thank you!



Access to Justice Campaign

The Vermont Bar Foundation's Access to Justice Campaign has completed its 2018-2019 fundraising. Since 2008 the VBF has funded a Poverty Law Fellow, each for a two-year term. Thanks to all of you who support this important work by contributing during this campaign. You can find a list of the five prior Poverty Law Fellows, and the current Fellow, and a description of each of their projects on the VBF's website.¹

The VBF is proud that Jill Rudge is the current Poverty Law Fellow. Jill, who is beginning the second year of her fellowship, has spent the past year working on housing-related problems for low-income clients with mental health concerns. Jill has worked on cases that involve (a) the need for more housing-focused mental health support, (b) disability discrimination in long-term care facilities, and (c) access reasonable modifications of rules and procedure in the mental health/housing social services and legal systems. She has co-delivered training at the Howard Center on these issues and is planning trainings for Northwest Counseling and Support Services in Franklin County. In the coming year she is working to schedule trainings with the UVM Medical Center and Washington County Mental Health Services.

Jill, like the Poverty Law Fellows before her, has made the most of her opportunity and has been doing important work for people who need access to justice.

The access to justice for those who need it provided by the Fellows is important both on a case by case level, but also in bringing needed attention to these underserved communities and the difficult legal issues that confront them.

The Fellowship has also benefited the Vermont legal community by successfully attracting excellent young lawyers to Vermont who make it their home and continue to work in public service. All five prior fellows have made lives here in Vermont and all are continuing to make valuable contributions to their communities.

We thank Deborah Bailey for her dedication and all her hard work on the Campaign. We thank Campaign Co-Chairs Fritz Langrock and Erin Gilmore and all of the attorneys on the Campaign committee for their tireless work on the Campaign.

We also thank the Addison, Rutland, and

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

We would also like to thank Halvorson's in Burlington for hosting the Chittenden County Justice Fest event.

Fritz Langrock and Bonnie Badgewick will be co-chairing the 2019-2020 Campaign. If you are interested in volunteering please contact Deborah, Fritz or Bonnie.

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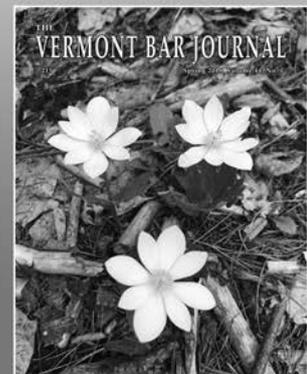
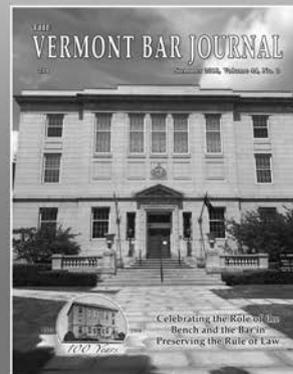
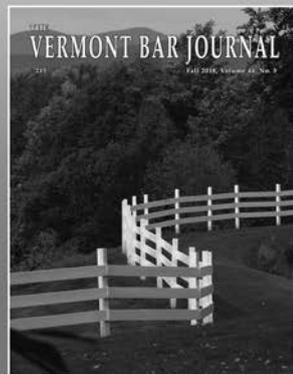
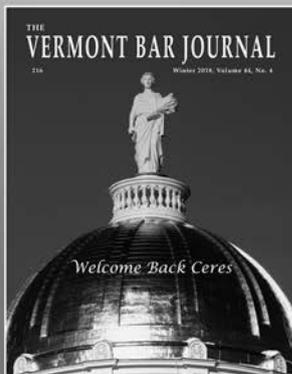
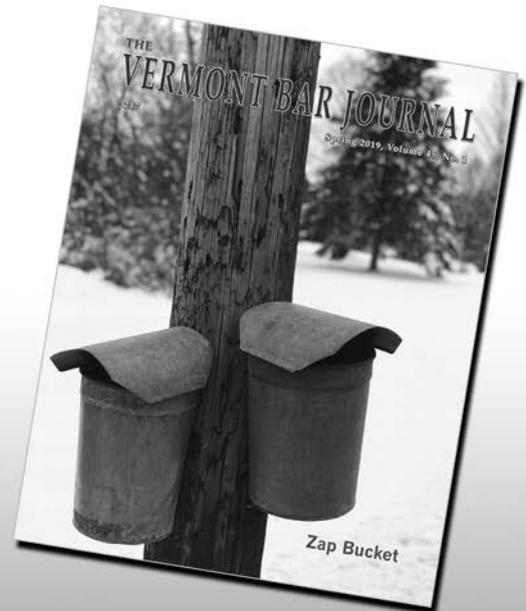
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Mediation - Evolving Methods

Exploring the Three Basic Types of Mediation

There are “types of” mediation? I hear this all the time when first discussing a proposed mediation with counsel or the parties in an unrepresented session. When discussing the potential mediation of an existing conflict we must first learn the underlying relationships and goals of the parties. Only then can an appropriate method of assistance be employed by the mediator.

Most people seeking mediation services for the first time are doing so in search of less contentious, more cost-effective solutions to conflict. The threshold factors in assessing whether a particular situation is ripe for mediation are the readiness, willingness, and ability of all parties directly involved in the conflict to be open and listen to divergent points of view, and to actively participate in arriving at a negotiated resolution to conflict.

So what are these three types of media-

tion and how do they differ?

The active participation of parties in crafting an optimal solution to conflict is the primary distinguishing characteristic of mediation versus formal litigation in the courts or private arbitration. In litigation, the parties direct all communications to a judge, jury, or arbitrator who then unilaterally decide how a case will resolve. In mediation, the parties assume a far more active role in crafting the solution to their conflict.

Though all types of mediation share this fundamental distinction from adversarial litigation, three main types of mediation have emerged as dominant (1) Facilitative Mediation, (2) Evaluative Mediation, and (3) Transformative Mediation. Each of these mediation types differ as to the needs of the parties, the role of the mediator, and the overriding goal of mediation.

Three Types of Mediation

Type of Mediation	Party Goals	Mediator Role	Desired Outcome
FACILITATIVE	Parties need an intermediary to foster constructive communication and exchange.	Direct constructive reasoned exchange between the parties with focus on disputed and agreed issues and likely outcomes.	Mutual understanding and agreement
EVALUATIVE	Evaluation of relative positions on disputed issues of a complex nature, legal, scientific, etc.	Extract detailed basis for positions and provide neutral evaluation of likely outcome and basis while providing alternative strategies for resolution or further evaluation	Increased understanding of complex issues by the parties leading to resolution or framework for further action toward resolution.
TRANSFORMATIVE	Resolution of conflict while maintaining on-going relationships between the parties.	Neutral evaluation of conflict between the parties with understanding of their ongoing and future relationship needs and desires. Explore the parties' relationship and needs/wants of all to assist in crafting plan to resolve current conflict and means for addressing future interaction.	Positive long term relationship between parties presently in conflict, resolution of current conflict, and creation of agreed plan for future issues in relationship.

Facilitative Mediation

In facilitative mediation, the mediator will often not make recommendations or give advice. Instead, the mediator typically holds sessions with the parties asking questions and engaging in a conversation to understand their point of view and interests. The mediator's goal is to help direct the parties to a resolution based on information and understanding.

At a basic level, interpersonal conflict arises when people or entities have different interpretations of a factual scenario and the responsibilities which flow from that event or events. Some conflicts (e.g., an auto accident) involve a single event, while others (e.g., a marital relationship) have unfolded over a significant period of time. These situations become a conflict to the parties when they are interpreted in a way that violates notions of how the other party or parties “should have” conducted themselves during the past event or series of events.

In many cases, these ideas of what “should have” happened in the past violate deeply held notions that have become an integral part of one's perceived “self”. To the extent this is the case, a party will manifest a strong interest in protecting that sense of self and will react defensively, and often aggressively, when other parties involved in the conflict attempt to justify, or merely explain, their past actions.

These dynamics involving self-protection manifesting in defensive reactions may demand a neutral intermediary who can effectively diffuse this tension to a point at which direct, constructive exchange between the parties becomes possible. In this case, the mediator assumes a *facilitative* role in fostering constructive communication between the parties. This role is at the heart of facilitative mediation.

Evaluative Mediation

Evaluative Mediation is similar to discussions during a settlement conference before the parties go to trial. The mediator will generally take a more directed approach, advising the parties about the strengths and weaknesses of their case and making recommendations. The mediator will meet with the parties separately and may also meet with their attorneys separately while directing discussions toward resolution based upon likely outcomes.

In this category of mediation, the challenges standing in the way of a negotiated resolution have less to do with interpersonal dynamics between the parties, and are more related to a lack of clarity in likely future outcomes of the relative positions held by each party. In evaluative mediation, the role of the mediator draws on their professional expertise in being able to provide parties with a more clear understanding of the merits of their respective positions and why a litigated outcome is likely to result in a particular end result.

Evaluative mediation is more commonly invoked in situations involving complex factual scenarios. In such cases, the parties lack a clear, mutual, understanding of what arguments are likely to succeed under currently prevailing case and statutory law in a particular venue. With clarity provided by the evaluative mediator, the parties are assisted in reaching a level of clarity as to likely outcomes that will position them to negotiate a resolution of their dispute while avoiding more costly and contentious litigation.

Transformative Mediation

Transformative mediation goes beyond facilitative. The goal is to empower the parties to come to their own resolution. The mediator helps them recognize each other's needs, interests, values and points of view. The parties control both the process and the outcome and the mediator follows their lead.

The transformative approach to mediation does not seek resolution of the immediate problem, but rather, seeks the empowerment and mutual recognition of the parties involved. In this context, Empowerment means enabling the parties to define their own issues and to seek solutions on their own and Recognition means enabling the parties to see and come to understand the other party's point of view -- to understand how "the other side" define the problem and why they seek the solution they do. (Seeing and understanding, it should be noted, do not necessarily constitute agreement with those views.) Often, empowerment and recognition pave the way for a mutually agreeable resolution of the parties' current conflict, but that is often only a secondary effect.

The primary goal of transformative mediation is to foster the parties' empowerment and recognition, enabling them to approach their current problem, as well as later problems, with a stronger, more open view. It should be noted that achieving empowerment and recognition is assessed independently of any particular outcome of the mediation. This approach avoids the problem of mediator directed resolution (often seen as coercion by the parties),

which so often occurs in problem-solving mediation. Transformative mediation instead puts responsibility for all outcomes squarely on the parties in the dispute by directing them to take ownership of the issues and work to create a mutual resolution or plan for addressing conflict.

Transformative Mediation is best suited to parties who are interested in seizing the potential inherent in a current conflict, and using that potential as a springboard for relationship growth. Parties explore these higher ideals in transformative mediation *in addition* to resolving the practical and legal aspects of their underlying dispute so they more effectively continue an ongoing or anticipated relationship.

As alluded to earlier, factual scenarios tend to rise to the level of "conflict" when they are interpreted in a way that violates one or more party's notion of "right and wrong," or "good and bad" and other dualistic notions that may contribute to one's core sense of self, commonly referred to as "ego." The transformative potential inherent in conflict begins with an understanding that these dualistic notions are the result of learned conditioning that in most cases long precedes the present factual scenario giving rise to the current conflict between the parties.

In this way, conflict manifests a unique opportunity for parties to challenge and transcend many core beliefs they may come to view as having significantly limited their past experiences, as well as adversely tainted past interpersonal relationships.

The transformative mediator works to create a mediation environment in which all parties feel safe and comfortable enough to feel, articulate, and explore the antecedents of, and reactions to conflict on a deeper level. In so doing, parties will often come to realize the way, and/or degree to which, they reacted to the other parties may be the result of habitual reactions acquired in response to situations that occurred much earlier with little or no temporal relationship to the current parties or conflict.

A transformative mediator works with parties to heighten their understanding and awareness of learned conditioning and habitual reactions. In so doing, the goal is for parties walk away with a heightened realization that their current decisions and future actions need not be dictated by long-held learned conditioning. In these ways, parties leave mediation with significantly heightened self-understanding, as well as an experienced sense of freedom resulting from the loosened grip of formerly long-held, entrenched beliefs, and a plan for addressing their current and future "conflicts."

Real Life Examples – When Do We Use A Particular Mediation Type?

Facilitative - The Parts Supplier and The Manufacturer

When entering into mediation where we anticipate a Facilitative approach it is often helpful for counsel to address certain areas with their client prior to mediation and for the mediator to delve into these issues further as part of assisting the parties toward an agreed resolution of their dispute.

- How did the dispute start?
- Why did it accelerate or fester?
- Was it through neglect or is there some antagonist?
- Who do you view as the victim and why?
- What might have been done to avoid the initial dispute and its deepening?
- What are the benefits and downsides of settling?
- Whose interests are served by continuing the fight and why?
- What is needed in a settlement to satisfy your interests?

These types of questions may not have much use or relevance to how issues may be presented at trial, but they are central to the Facilitative mediation process. By asking your client to answer these questions thoughtfully from both their, and the opponent's, perspective, empathy is actively cultivated and common ground often comes to the surface. These areas are the building blocks for a productive Facilitative mediation.

One of my favorite examples of a successful Facilitative mediation involved a small family-owned supplier of automotive components to a multinational auto manufacturer (Small Co) and a multinational manufacturer of consumer goods (Big Co), who was interested in attempting to leverage its product expertise in the U.S. auto market. Small Co. and Big Co. entered into an agreement where Small Co would assist Big Co with entry into the auto industry market through marketing and consultation. In the second year of the relationship, Big Co terminated the contract and Small Co immediately sued for breach. The divisive forces of litigation took hold, positions hardened, and the chances for constructive dialogue between the parties diminished.

Within the first hour of mediation, Small Co's young, second generation CEO voiced his belief that Big Co, who approached Small Co in the first place must have done so with ill intent and a 'plan from the start' to use them as a shell to find a better opportunity rather than as a trusted partner. This was the first anyone in the room, including Big Co's CFO and its counsel, had heard about these suspicions.

Big Co's CEO sincerely apologized for

any misunderstanding and explained that after the first year, its project team knew the automotive market was outside of their core competency and it was a mistake for them to maintain efforts attempting to develop. Big Co simply wanted to sever the relationship with whole industry – not Small Co, in particular – and thought they did so in a manner designed to avoid too much disruption to Small Co’s supply chain. Small Co’s CEO requested a one-on-one meeting with Big Co’s CEO (without lawyers) and the case settled before lunch.

As the mediator, I learned from this example the value of facilitative sessions where the parties, rather than their counsel, are actively engaged. The example also illustrates the value of alternative settings for negotiation in addition to the plenary and caucus sessions. The clients in this case were well prepared by their counsel to understand how separate discussions between the clients, with or without counsel or the mediator, can break through barriers and facilitate progress.

Evaluative – The Government Bid and The Contractors

Evaluative mediation is the most common form of mediation for civil and business litigation practitioners. During mediation the mediator gives at least one of the parties opinions on the merits of a legal claim or defense, possible settlement, the likely outcome or value of a case if it adjudicated, or some other area where the mediator makes a conscious step from facilitation to evaluation.

An example of Evaluative mediation we recently concluded involved the protest of a multi-million dollar contract award on a security equipment contract for a governmental entity. The protest, among other things, challenged the product team’s cost/technical tradeoff. Acting as the mediator at the parties’ mutual request, I conducted a series of discussions with the parties and their counsel, both jointly and individually. During those sessions I provided neutral evaluation regarding the likelihood of success of the protest on the merits as well as of the potential remedies that might be ordered in an adjudication. During extended discussions with the protester and intervenor we identified risks that might result in the event of an ordered re-bidding or re-evaluation, and suggested they consider settling the protest by means of a negotiated subcontract between the two firms. This suggestion was adopted, and under the negotiated subcontract, the protester was to perform those portions of the work for which its proposal was rated highest technically. The Government thus realized the dual benefit of having its work performed by the best team technically and paying a reasonable, competitive price. On this ba-

sis, the protest was withdrawn.

Transformative – The Cows and The City Folk

Transformative mediation is best suited to a dispute where the parties will continue in a relationship of some sort after and despite of the dispute presently before them. This is true most marital cases and disputes between businesses over a specific issue but where their relationship will continue in the future. It also has a place in an increasing area of conflict here in Vermont – family farms and “city folk” moving to the area.

A dairy farmer and her new neighbor were in a dispute over manure storage and spreading. The neighbor said when she bought her house in January everything was fine but come summer she was upset about the odor emanating from the farm next door. The farmer was beyond angry at “the city folk” for complaining to other neighbors, the police, and several town and state officials instead of just walking over and talking to her.

They came to mediation without counsel after a referral from their town clerk. We first spent time finding areas where we all agreed. The farm was beautiful and well maintained and was, in fact, one of the reasons the new neighbor purchased their property. They both admitted neither had ever gone next door to meet the other. The farmer admitted that she saw the new neighbors and decided they weren’t ‘her type’ of people the day she drove in – based on their car alone.

We were then able to find areas of agreement and understanding unrelated to their position as neighbors before moving on to their mutual love of the area and desire to maintain its rural character. After a four hour mediation, the farmer agreed to give all her neighbors, not just the new one, notice and change the timing of her manure spreading and some other farm practices. The neighbor gained an understanding of farm work and necessary practices, financial pressures, and the farmer’s contributions to their community. As a result of mediation, both were able to come to an agreement that ended their battle over manure. They also made a plan for handling any future complaints, which started with talking (face to face).

A few months after the mediation, I was driving by the farm and stopped in to see how things were going. The farmer was on her porch and came down to meet me. I asked how things were on the farm and how things were with the ‘city folk’? She looked at me and laughed – she said since the mediation they now share dinner with each other, alternating Saturday nights each week and those ‘city folk’ now help her out with fence mending and a few other chores while she plows their driveway.

In fact, shortly after mediation a small dam broke on a pond on the farm and flooded part of the neighbor’s yard. This time they not only talked about it – they worked together to fix the dam and the flooded area near the neighbor’s home. Their relationship was transformed from distrusting strangers to neighbors and they both anticipate a long congenial relationship.

Conclusion

A good mediation is not about ‘splitting the baby’ – King Solomon has no place at the mediation table. A meaningful mediation is the use of a neutral third party who employs an appropriate approach to aid parties in a dispute to reach a reasonable conclusion. The next time you are faced with a dispute, yes – consider mediation, but do so only after evaluating your client, your dispute, and goal for resolution. Rarely is a dispute truly one sided. The story behind the dispute is always greater than we see at first blush. By engaging in a meaningful preparation and mediation we can actively assist in resolving conflicts faster, more fairly, and more economically.

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The NBAification of Biglaw and Can Lawyers Learn Anything from Warren Buffet and Leonardo da Vinci?

While the doings at elite law firms (“Biglaw”) in New York, Chicago and elsewhere may be a bit distant to Vermont lawyers, a recent article in the *Wall Street Journal* contains some rather unsurprising news that may be relevant to lawyer life in the Green Mountain State. (“Being a Law Firm Partner Was Once a Job for Life. That Culture IS All But Dead.” August 9, 2019.) To summarize briefly:

- Back in the day, if a good lawyer made partner in Biglaw, compensation among partners tended to be lockstep, job security was high and marketing was almost a second thought.
- A once emerging trend is becoming the norm: two-tier partnerships reserve the big bucks for top performers, who share in the firm’s outsized profits, and other partners are salarymen (“partners in name only” or PINOs). PINOs work hard and have job insecurity issues.
- Law firm governance, once operated on something like a partnership basis, now is operated on a corporate basis: a small group of head honchos control.
- At the top of the equity partner pyramid, the view is good and the pay is better (\$10 million +, some ranging to \$25 million annually). Competition rages for top performers (i.e., skilled lawyers with a major book of business). PINOs work really hard trying to make equity partner, and they get paid well, but orders of magnitude less than equity partners. In some firms, PINOs aren’t even invited to annual partner meetings (reserved for equity partners).
- This reflects a movement in Biglaw to what might be called an investment bank model: big players make big money, everyone else does reasonably well and tends to be unhappy. One might call this the NBA model: LeBron James makes something like an annual salary of \$38.2 million and the last guy on the bench (which, for the Lakers, seems to be a guy named Talen Horton-Tucker) makes about \$898,000. (He’s no doubt an amazing athlete and that isn’t bad money, but LeBron makes about 42.6 times as much). Thus, the NBAification of Biglaw.

Some number of Biglaw players are concerned about this. Head honchos decry the monetization of the profession, while

announcing record profits per equity partner. Others drop out; even those who can ride out the long process to equity partner sometimes have that sinking feeling of having been admitted to the really prestigious club only to find that you can no longer hack the pain and suffering of being a member.

This may not mean all that much to Vermont lawyers. After all, few of us toil in Biglaw, and I’m assuming no Vermont lawyer makes \$25 million per year. (If I’m wrong as to the latter, apologies for the error and congrats!) But the ennui inspired by the WSJ article might lead us to search for more creative ways to think about what we do and how to have a more satisfying career as practicing lawyers. As our good friend Aristotle put it a few millennia ago, “Excellence is never an accident. It is always the result of high intention, sincere effort, and intelligent execution; it represents the wise choice of many alternatives - choice, not chance, determines your destiny.”

A recent edition of the *Financial Times* (April 27, 2019) contains two excellent articles, an extended profile of Warren Buffett (“I Have More Fun Than Any 88 Year Old in the World”) and an extensive discussion of Leonardo da Vinci’s genius and how it might be relevant to the current “age of disruption” (“The Da Vinci Code”).¹ In their own ways, Buffett and da Vinci are two of the most exceptional people to have lived: Buffett is one of the richest men living, with unparalleled long-term success as an investor, and da Vinci was a polymath with marvelous talent and amazing creativity.

What lessons, if any, can the careers of these two geniuses impart to lunch-bucket (ok, briefcase) toting lawyers trying to generate billables in a law firm or get ahead in in-house or other legal gigs? Most likely, the immediate reaction is: not much; if I were a genius like those guys, I wouldn’t be here working on the Smith divorce or the Bigco merger, worrying about paying my mortgage or student loans. And I certainly wouldn’t be listening to my odious colleague, Johnson, go on about how he got out of the sand trap on hole 17, or about his favorite IPA. But that answer would be wrong, or at least would make for an unacceptably short article. I propose that even ordinary lawyers can learn from geniuses, and learn useful items that can be applied in our mundane, day to day lives. Buffett and da Vinci are perhaps two extremes on

the “continuum” of genius, one a rumpled seemingly “regular guy” (Buffett) and the other a visionary of perhaps unprecedented depth and breadth (da Vinci).

Warren Buffett’s career is fascinating, for reasons not least of which include his net worth (roughly \$86 billion) and that his company’s (Berkshire Hathaway) annual return since he took over in 1965 is 20.5% compared to the S&P’s 9.7% annual return for the same period. Based on that success, one might expect Buffett to present as a super genius rocket scientist, spouting differential equations and living large to match his unparalleled success. As you probably know, nothing could be further from the Warren Buffett reality. He famously lives in the same old house he’s always lived in back in Omaha, eats at McDonald’s, downplays his genius and has what might charitably be described as pedestrian offices. He is said to drive a 2014 Cadillac XTS, after auctioning off for charity his 2001 Ford Town Car. He has pledged most of his assets to charity at his death.

What does this have to do with me, you might be asking. Perhaps consistent with his “aw, shucks” persona, Buffett’s profile in the *Financial Times* provides some solid advice:

- *Be Humble/Don’t Take Yourself So Seriously:* As Warren puts it about his looks, “I buy expensive suits--- they just look cheap on me.” (Your reporter feels ya, man.) More seriously, Berkshire Hathaway has performed about in line (or even underperformed) the S&P 500 in recent years and the “Oracle of Omaha’s” response seems to be that that sort of performance may be about what one can expect from a fund the size of Berkshire Hathaway, and even recommends S&P 500 index funds to most people. So, even if you are the mighty managing partner of the Biglaw Behemoth, over \$2 billion in revenue, and praised as a visionary genius of the highest order, remember, person, that thou art dust and into dust thou shalt return, sooner perhaps than you think. (And by the way, don’t try to bribe your kid’s way into Stanford.)
- *Have Fun:* Why in the world would a guy whose net worth in billions of dollars (86) is virtually equal to his age in years (88) go to work every day, or work at all? Because he has “fun”-- more

fun, he claims, than any 88 year-old in the world. What? How can my job as drone lawyer (in either sense) be “fun”? There’s our challenge! To put it in more high-toned terms, this is our “search for meaning”: finding something to do with our lives that pays the bills and also gives us a real reason to get dressed in the morning (if that’s when you get dressed).

- *Love Your Colleagues:* Buffett cites his love for his co-workers as one of the principal reasons he keeps going: “It’s because I love what I do and I love the people I do it with.” The *Financial Times* profile makes this sound like a Norman Rockwell scene: each desk is covered with family photos, greeting cards and tchotchkes. As Buffett puts it, “We go to baseball games together. They try to make my life good, and I try to make their lives good.” There’s even a charming picture of him in a Royals’ jacket. Does this mean you must love the odious Johnson of the sand trap and humble brag IPA? No, of course not, but if you really don’t care for or admire any of your colleagues, that should tell you something.
- *Keep It Simple:* Buffett is remarkably direct about what it takes to be successful in business, or at least in his business: He describes his business as “interesting” but “simple enough.” His advice: “I always tell people: if they’ve got more than 130 points of IQ, sell the rest because you’re not going to need it in this business.” He goes a step further: “It may hurt you.” This is consistent with reports from legal consultants that B students rule the Biglaw world; A students may be too impractical, or tied up in their metaphorical shorts, to succeed in the world of billable hours and accounts receivable. (See, for example, the work of Professor William Henderson at Indiana Law School.) Buffett is also well known for staying away from deals that are too complex or challenging to be worth the investment of time and money required to get the deal done. This is his famous “too hard” tray on his desk--- perhaps interesting opportunities that just aren’t worth the risk and effort.
- *Don’t Overpromise:* Buffett is adamant about this point. He tells people now that he expects that Berkshire Hathaway can “modestly” outperform the S&P 500 over the next decade. In comments relevant to all of us in the services business, Buffett emphasized that “the one thing that would ruin my life is people expecting more than I deliver.” Read that again---- the world famous possessor of an \$86 billion net worth says that sort of over promising would

ruin his life. We should take him at his word on this and try to apply this advice to our professional lives.

If Buffett is perhaps the Tony Gwynn or maybe even Ted Williams of investing (yes, my wife criticizes me for over use of sports analogies, especially involving old school baseball players), da Vinci is a different kind of fellow altogether, being sometimes compared to Newton or Shakespeare in terms of scope. The *Financial Times* article on da Vinci vividly describes him as having a “polymathic intellect” and a genius for painting, and further describes him as “the embodiment of the ideals of the Renaissance.” As an artist, he is compared to Raphael or Michelangelo, which is surely rarified company, but the distinguishing characteristic is his work as an engineer, architect and speculative thinker.

There, the comparison to great artists such as Raphael or Michelangelo begins to become less useful. According to experts, there are less than a dozen extant paintings unequivocally attributed to him, including of course the “Mona Lisa” in the Louvre. The art world seemed shocked when the painting “Salvator Mundi” was auctioned by Christie’s in 2017 for \$450 million even though it is viewed as only “generally accepted” as da Vinci’s work and subject to scholarly dissent as being the work of an assistant. In contrast, there are over 7,000 pages of notebooks, as the *Financial Times* puts it, “showing a mind unfettered by disciplinary boundaries.” The scope of da Vinci’s creativity was recently explored, somewhat breathlessly, by Walter Isaacson in his book *Leonardo da Vinci*. For example, da Vinci seems to have anticipated two of Newton’s laws of motion two hundred years before Newton, and appears to have discovered how the aortic valve works 450 years before official medical practitioners did.

Again, I suspect you are wondering what this has to do with you, regular person lawyer trying to make a living in a tough world. And, as with the discussion of Warren Buffett above, on first glance the similarities between today’s corporate lawyer advising startup companies and da Vinci seem so attenuated as to be unhelpful. But let’s give it a chance by considering the following, gleaned from the *Financial Times*. Perhaps it will facilitate discussion to substitute the term “creativity” (something we all think is within our reach to some extent) for the term “genius” used in the *Financial Times* piece (which may seem well beyond our reach):

- *Creativity Does Not Simply Arise, It Needs to be Nurtured:* The article emphasizes that da Vinci was supported and encouraged by the Medicis, who were broadly interested in the arts and philosophy. The cultural and economic

scene in Florence at the time was tolerant of diversity and immigrants, and its leaders were willing to invest in projects that were not likely to generate immediate economic returns. How willing are we to invest in the future through arts and ideas? We seem focused on closing liberal arts programs and trying to force students to get “good jobs.” There’s nothing wrong with good jobs but how do we foster creativity when we are focused so highly on financial goals and indicia? Who would support a da Vinci today?

- *Creativity Transcends Disciplinary Boundaries:* da Vinci worked in any number of intellectual areas, including visual arts, engineering, architecture, futurism, design of aircraft, weaponry, musical instruments, reading glasses and much, much more. But we are not in the era of “natural philosophy” where thinkers could profitably work in multiple areas; instead, we are in an age of specialization where we have not just business lawyers, not just tax lawyers, not just corporate tax lawyers, but lawyers who focus on specific types of corporate tax (such as forward triangular mergers). How can we imagine that we can do anything useful in broad areas, when the world is now so complex and people spend their whole lives in their relatively small (but deep) quadrant? This is a challenge to our imagination and requires a generous spirit to fund more speculative enterprises.
- *When Things Change More Quickly, People Get Left Behind More Quickly:* The *Financial Times* article concludes on a somewhat startling note by stating that the Renaissance ended when the forces of global commerce and information revolution collided with populists who objected to the uneven distribution of the economic gains of those economic and cultural developments. Thus, we cannot take progress for granted, and need to focus on the risk of people being left behind and take steps to end the offending process.

What can you do? Get out of your bunker and do something that expands your universe a bit. It’s ok to keep doing what you’re doing, but perhaps expand the scope of your enterprise to think more broadly and interact with different kinds of people. Take an asylum case or, if that’s not consistent with your views, defend the Second Amendment against incursions. Serve on your town school board. Teach a high school class on the Constitution. Take on a pro bono case in an area that comes with training, such as adult involuntary guardianships or guardians ad litem.

A more radical proposal could be ad-

dressed to the masters of the Biglaw universe. There seems to be an amazing lack of legal focus on the upcoming consequences of climate change. This lack of focus may ultimately not be surprising: many of us find the climate change disasters too disturbing to think about (a bit like thinking about one's own death only magnified millions of times over), and the science behind it seems hard to understand and evaluate. But let's do a thought experiment: suppose the UN report is more or less correct, just for sake of argument, what are the principal legal issues that will follow from its effects? The issues are staggering in their breadth and complexity: property law, insurance law, asylum and immigration, torts and contracts, property tax, admiralty, and on and on. You could think of this as expansive business development for your firm's practice in a hotter, wetter, even crazier world.

Why don't we do this: let's have a number of law firms send one lawyer to a nationwide task force on climate change to work exclusively on that issue for 1 year under the supervision of a governing board of partners from leading firms and academics working in the area. Then have the group determine the likely outcomes from the UN report and map those into an assessment of the principal legal issues raised and how the legal system will be stressed by the presumed events. There would be no need to assess how likely the climate change events are to occur; we can let the UN report set those assumptions. Then turn loose the group's creativity to think about what we can do to address those issues, and the timeline for doing so.

This sort of project might be something that combines the skillsets of Warren Buffett and Leonardo da Vinci. Maybe the work product won't be "genius" but it could be useful, solid stuff that could perhaps be the basis of progress. And that would be pretty good.²

Joseph Ronan, Esq. is a solo practitioner in Norwich, Vermont, and works primarily in the areas of taxation, executive compensation and business law. He was previously a partner at Morgan Lewis and held positions with Bell Atlantic and Blank Rome. He is an adjunct professor of law at Villanova Law School and is a member of the Selectboard in Sharon, Vermont.

¹ www.ft.com. Paid subscription required.

² Like the D-League player who makes it big in the NBA (e.g., Hassan Whiteside, who, after toiling in the D League, is making \$25 million a year now, just like the Biglaw big hitter but Whiteside can dunk).



BOOK REVIEWS



An Adventure in Lawyer's Poker: Thinking in Bets: Making Smarter Decisions When You Don't Have All the Facts

By Annie Duke

(Portfolio/Penguin: New York 2018)

Reviewed by Richard T. Cassidy, Esq.

For lawyers who strive to give clients objective advice, *Thinking in Bets* is a refreshing challenge.

I am fortunate that my own practice experience has been diverse. Although my focus is on representing plaintiffs, I carry with me some of the thought processes I learned when I represented insureds, insurance companies, and employers. But that experience is dated, and the lessons of those days have receded.

So, Annie Duke's book, *Thinking in Bets*, gave me an important opportunity to reevaluate my decision-making processes.

Annie Duke left a promising career in academia as an experimental psychologist and became a successful professional poker player for 18 years. She won the 2004 World Series of Poker.

Her book is not about practicing law, but it is very relevant to the work of lawyers. Duke points out that being a trial lawyer is more like playing poker than it is like playing chess. Chess players see all the relevant information right on the board. Luck plays little if any role in the outcome. But in poker, and in the law, critical information may be hidden and luck often plays an important role in determining outcomes.

In law practice, as in most businesses, you can't control the outcome of the ventures you undertake. But you can learn to make better decisions, which, over time, will give you better results.

Duke points out the pervasive, persistent influence of confirmation bias in all our lives. We tend to seek out and accredit evidence that confirms our existing views and to avoid and discredit evidence that is inconsistent with those views. And this bias is not reduced by intelligence. In fact, it's often just the reverse. The smarter we are, the easier it

is to find and believe evidence that supports our views and avoid and discredit that which does not. We also tend to believe that the good things that happen are to our credit, but the bad things that happen aren't our fault.

Duke explains an idea she calls, "resulting." She describes it as the tendency to judge a decision by its outcome, instead of by the quality of the decision itself. As a notable example, Duke points to Pete Carroll's decision to call a pass play in the last 26 seconds of 2014 Seahawks/Patriots Superbowl game. It was an objectively good decision that led to a bad result. The Seahawks were four points behind and on the one-yard line. Everyone expected them to hand off the ball to Marshawn "Beast Mode" Lynch to bull his way into the endzone. The Seahawks had only one time out left, so a running play would likely give them only two chances to score. But a pass play had real advantages. An end-zone completion would have won the game. An incompletion would likely take very little time, leaving the Seahawks two more shots at the end zone. Only an interception would cost the Seahawks the game. That's, of course, exactly what happened. Carroll looked like a goat and Patriot's coach Bill Belichick looked like wizard. But the results don't make Carroll's decision a bad one, only an unsuccessful one. Duke points out that the statistics showed the probability of an interception was only 2.5%. And there was a risk, nearly 1%, of a possession-changing fumble on a running play.

So, Duke argues that Carroll's choice was a good one. It had the advantage of surprise and was likely to give the Seahawks an extra opportunity to win the game.

In fact, the correlation between our decision-making processes and the results of those process is very loose. We may very well make some poor decisions that lead on to success and vice-versa. I think this is particularly true of strong lawyers who may sometimes make things work, that – viewed objectively – simply should not. It's great to pull off a long shot, unless it gives you a false sense of invincibility that leads on to multiple failures. I know it happens. I can recall an early trial success that led me to take several contingency cases I lived to regret.

Duke has great suggestions about how we can improve our decisions. A leading idea she explains looks back to the name of the book, *Thinking in Bets*. She suggests that we try to explicitly lay out the ways that things can work out and then take a stab at estimating the probabilities of each one before deciding. Having laid out the factors that may affect the results and assigned even rough probabilities helps us to compare re-

sults with expectations. If done seriously, it makes us information hungry. Even partial success in gathering and looking at relevant information informs our decisions and improves our process. And acknowledging that there is some uncertainty as to the outcome tends to soften the psychological attachment to our decisions and increase our ability to learn the right lessons.

Duke also suggests the benefits of including diverse views in our decision making. She points out that many group decision-making processes are “confirmatory” rather than “exploratory. Confirmatory groups are committed to being right, that is, to affirming that the group’s view is the right one. Being surrounded by people who tell you what you want to hear hurts rather than helps. But an exploratory group values and rewards serious dissent. It carries a commitment to being “accurate” rather than “right.” An exploratory process helps a group decide based on a clearer view of the relevant facts.

There is much more to be had from Duke’s book. As lawyers, we sell good advice and good decision making. Reading this review is a step in the right direction. Reading Duke’s book is bigger step. And taking Duke’s thinking seriously and implementing at least some of her suggestions, is bigger still.

Of course, it is better to be intuitive and right than it is to be objective and wrong. But unless you believe in magical thinking, the path to good intuition is well-informed decision-making followed by careful evaluation.

Richard Cassidy is a co-founder of Rich Cassidy Law in South Burlington, Vermont. He focuses on plaintiff’s personal injury cases, employee side employment law, and professional licensing matters.



The Not Good Enough Mother

By Sharon Lamb

(Beacon Press Boston, 2019)

Reviewed by Cristina Mansfield, Esq.

Attorneys and judges practicing in the juvenile docket have met the characters in Sharon Lamb’s latest publication, *The Not Good Enough Mother*: the addicted mom wistfully loving her children but “mightily

loving the high;” the father who committed violence but is doing everything right to get his kid back; the toddler attached to an abusive parent; the 12-year old girl who bravely testifies to sexual abuse by a male relative.

Author Sharon Lamb is a psychologist specializing in early and adolescent development. She counsels children, adolescents and adults, and conducts forensic evaluations in DCF cases. Her publications include *Cambridge Handbook of Sexual Development: Childhood and Adolescence* (co-authored with Jen Gilbert) and *Sex Therapy for Kids*. She lives and sees patients in Shelburne, Vermont, and teaches in Boston.

Through the characters she presents, Lamb offers a glimpse into the world of forensic evaluation, where the stakes are high. Her recommendation will impact whether a child is taken away from a biological parent or from a foster parent, who may have cared for the child since birth. In all but one case, Lamb asserts, the judge has followed her recommendation. What does Lamb look for in her observations? For almost a hundred years, psychologists have viewed the development of the child through Heinz Kohut’s lens of “mirroring and idealization,” i.e., whether a parent can mirror back what the child is feeling in order to develop the child’s sense of self, and later a “grandiose self in the best sense of the world.” As evaluator, Lamb is looking for whether a parent can understand what is in the child’s mind (‘mind-mindedness’) and respond appropriately. Yet according to the theory of pediatrician and psychoanalyst D.W. Winnicott, a mother need only be “good enough,” getting it right most of the time. “She needn’t be perfect.”

That is where the challenge comes in for the forensic evaluator. When a mother’s right to remain a parent is questioned, what is ‘good enough’? How does one weigh the imperfections of the parent against the best interests of the child? While the standard for evaluating parent-child relations is attachment, Lamb makes the argument that the impact of the loss of the parent to the child should also be taken into consideration. Loss of a parent is worse to a child than negligence and that loss should never be minimized.

Who is Lamb to decide that a parent is not good enough? “Most of all, I sit in judgment. [...] But sometimes I sit in judgment of myself.” Without giving anything away, the reader is gripped with the realization that the entire premise of the book is overlaid with Lamb’s doubts as to whether she has been a good enough mother herself.

A number of themes are woven though the book. Lamb introduces us to the role played by ‘other mothers,’ the team of women (and men) made up of therapist, attorney, DCF worker, school counselor and

GAL – the network of support that wraps itself around a child who has been neglected or abused. The other mothers may be a fixture in a child’s life or play a short-term role, but they are critical to supporting a child in this village-less society. I challenge the reader to get through those sections without remembering their own other mothers.

Another important theme in the book is the devastation in our communities that is the addiction crisis. Lamb notes that since 2014, most of the 33% increase in children placed in custody had to do with parents who were addicted to opiates. She points out how the current waitlist system for legal Suboxone sends addicts searching for illegal ways to get clean. The high point for me was the hysterical national-wide search for a private drug rehabilitation center in the chapter entitled “Rehab Shopping.” Evelyn Waugh would be proud.

Readers in the legal community may take offense at Lamb’s portrayal of attorneys and judges as seeing a nuanced world in black and white. Indeed, the ultimate decision in a DCF court custody case is placement of the child and the role of the attorney is to protect the interest of their client. However, juvenile defense attorneys represent children as often as they do parents and they have experience dealing with every side of a case. The Office of the Defender General, which provides juvenile defenders to parents in nearly all cases, has a network of family support workers to help when no one appears on the side of the recovering parent. An attorney may accompany a parent through the ups and downs of a case bound for termination of parental rights (TPR) for as long as three years. Juvenile and DCF case workers work hard to develop trust between the bio parent and the foster parent so that contact may continue after TPR regardless of whether there is a post adoption contact agreement. All of that work is anything but black and white and, although heart-wrenching, seems completely worthwhile when, as happened to me last month, a bio mother whose rights were terminated rushed up to tell me, “I took my daughter out for her birthday.” The child is safe with a foster mother but has not lost her not good enough mother forever. In that respect, Lamb is spot on: there is a community in Vermont trying to get it right.

The Not Good Enough Mother is an essential read for juvenile law practitioners and will stay with you long after you have turned the last page.

Cristina Mansfield is a solo practitioner in Manchester, Vermont, and has a juvenile conflict contract in Bennington County.

IN MEMORIAM

John M. Lorentz

John M. Lorentz, 73, died on July 12, 2019 with family at his side, after a year-long battle with cancer. Born in NJ, John was a high school valedictorian and graduated summa cum laude from Dickinson College. He received his JD from Rutgers Law School and a PhD from Rutgers University. John taught political science and law as an adjunct and practiced law for 44 years, most of them in Killington. In his youth, John played saxophone and sang in a band performing in clubs and bars in NJ. John served on the Title Standards Committee of the VBA and many boards and

community activities. John and family enjoyed cross-country skiing and tennis. He is survived by his wife of over 50 years and three sons.

Arthur E. Crowley, Jr.

Arthur E. Crowley, Jr. passed away on August 18, 2019 at the age of 90. Born in Vermont, Art attended Norwich University and Boston University before serving in the US Army as an Airborne Ranger as 1st Lieutenant during the Korean War. He was a member of the VBA for nearly 60 years, having served as a deputy attorney gen-

eral and the Rutland County state's attorney before becoming a founding member of Keyser Crowley, PC. Art was very active in the local community, serving on the local school board, board of aldermen and helping form the Castleton University Nursing Program and the Rutland City Police Commission. He was active in the republican party, serving as the chairman of the Executive Committee of the Vermont Republican Party. Art loved to travel and fish and enjoyed large family gatherings. He is survived by his wife of 32 years, five children and many grandchildren.



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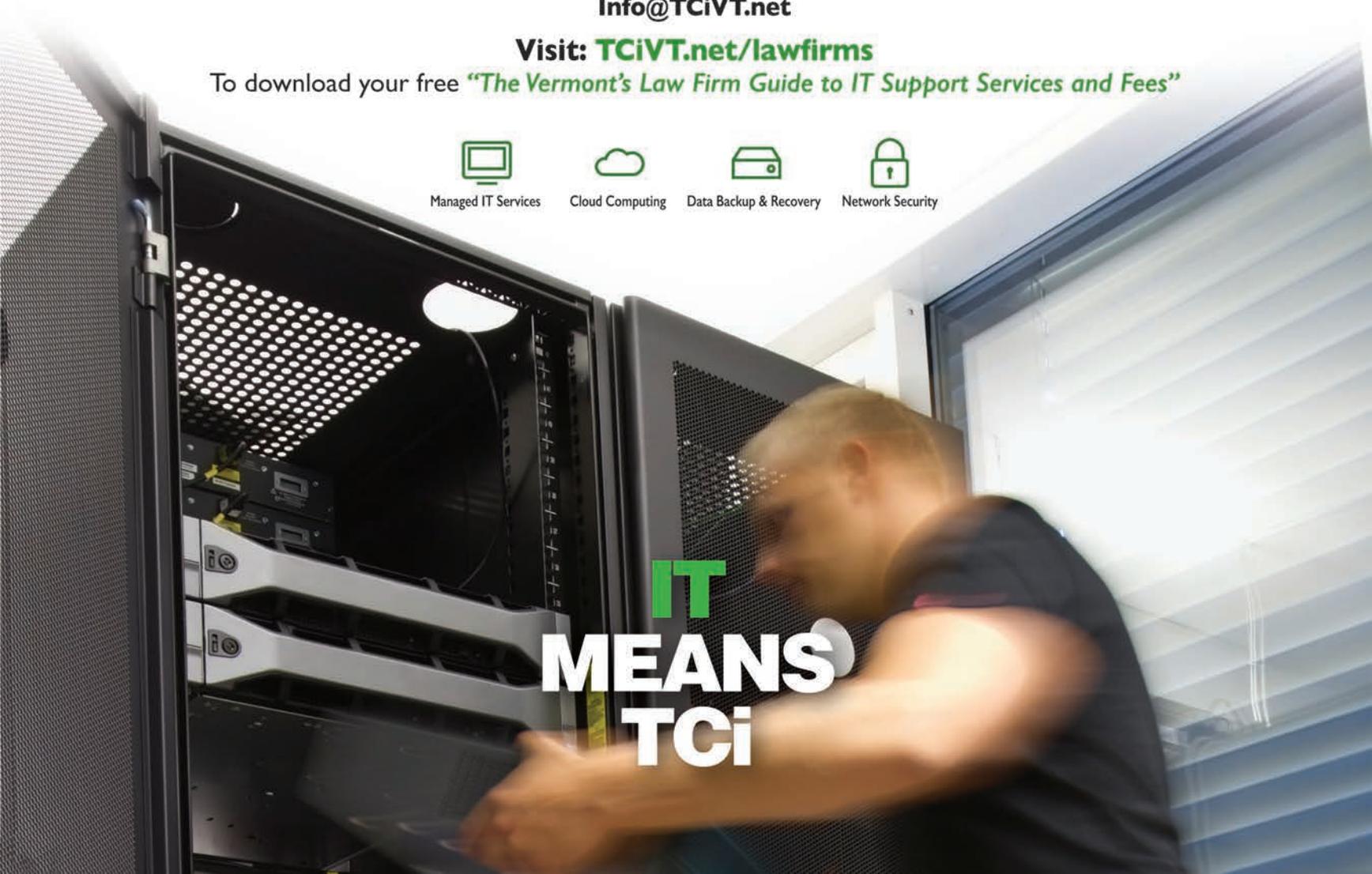
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