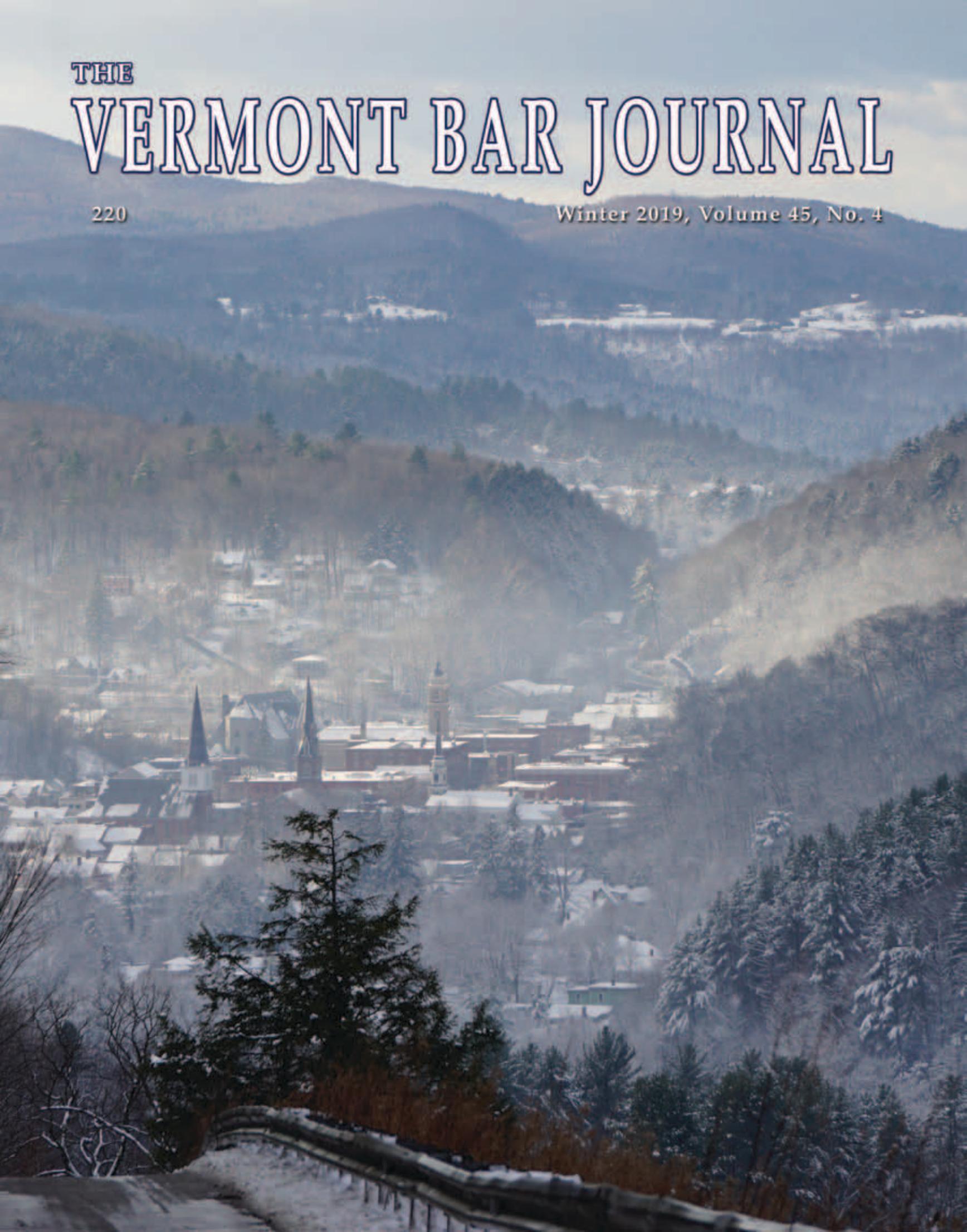


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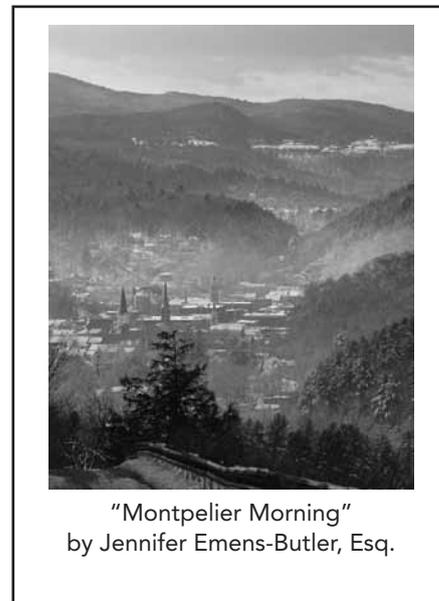
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PRESIDENT'S COLUMN

In my remarks at the VBA annual meeting in September, I committed to elevating our profession, connecting the VBA to our broader community and celebrating Vermont attorneys for their dedication to Vermonters and the cause of justice. I'd like to use this column to share our progress since that meeting.

- In 2020, the VBA will sponsor 4-5 regional public forums to discuss proposed amendments to the Vermont Constitution. I will have the privilege of facilitating a panel of legislators, constitutional legal experts, and perhaps historians as they talk about the process and history of amending the Vermont constitution and their interpretation of the scope and effect of the amendments. We plan on recording this event where we will invite audience participation. The video will be posted on the VBA website for any member or member of public who is unable to attend.
- In order to promote civics in our schools, I have asked the VBA Board to create an annual VBA Civics award and name the award in honor of a person whose work or deeds exemplify civic duty. This gives the VBA an opportunity to elevate values inherent in civic duty while honoring the deserving recipient of the award.
- In an effort to strengthen our connection to the youth in our communities, the VBA will collaborate on an education/civics program that will help connect Vermont lawyers with students in our Vermont classrooms. VBA Executive Director, Teri Corsones, is reaching out to Vermont social studies teachers regarding legal and civics topics of interest. The VBA will provide the topic materials to VBA members interested in talking to a class. Our goal is to make it easy for interested lawyers to spend an hour in a Vermont classroom and, by doing so, promote our profession and generate an interest in civics.
- As part of our commitment to partner with non-legal community organizations, the VBA joined an alliance of Vermont organizations developing and

planning the 100 year anniversary of the 19th Amendment.

- The VBA contacted presidents of the county bar associations seeking recommendations and input on what social or business groups I should meet with to discuss the virtue of our profession and Vermont lawyers. Please contact me if you have an organization in your community that you would like me to address.
- To highlight your good deeds and valuable contributions to the Vermont community, I plan to submit an article to the media about Vermont lawyers and their value.
- In order to establish the VBA membership as the resource for providing background on current events, and at the same time showcase our membership's legal acumen, the VBA will maintain a "go to" list of members the media can contact for legal background on articles and stories. The VBA will also offer a CLE on how to deal with media inquiries. Please contact Communication Director Jennifer Emens-Butler if you are interested.

I hope you are satisfied with the VBA efforts to date and thank you for the opportunity to serve your interests. None of our efforts to date could be achieved without the talented and hard-working VBA staff. So, thank you Teri, Lisa, Jennifer, Michelle, Mary and Laura.

And as a final thought on this snowy December afternoon, during this upcoming year, as often as possible, please take



a moment to consider something you did that you are proud of or that made you feel good about yourself personally or professionally. Taking the time to reflect on a moment where you were your best self or performed some act of kindness or service to others is an easy wellness exercise to practice, yet one you likely practice the least. Do it just once and I guarantee you will feel better as a result.

With deep gratitude,

Beth



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PURSUIITS OF HAPPINESS

Adventures in Cycling: An Interview with Ben Marks

JEB: I'm here speaking with Ben Marks who has been nominated by Paula McCann to be interviewed for our Pursuits of Happiness column. Ben, as you may know, I interview people for the journal who have passions and talents outside of the practice of law. Before we get to the meat of your adventure last summer, let me find out where your interest in cycling started.

BM: Well, I started bicycle touring at a young age. Instead of going to summer camps or other expensive adventures out of state, I embarked on a New England adventure with a couple of friends when I was 15. You know, it's funny what we did unsupervised when we were younger. I think of my kids at 14 or 15 and I can't imagine them doing these things.

JEB: Yes, I always think about how I went to an 8-week summer camp at age 9 and I don't think my son would have made one week at that age let alone 8!

BM: [laughs] True. So I organized this trip from Keene, NH to Martha's Vineyard, MA with two friends, one of whom I'm still friends with to this day.

JEB: Wait, you went on that long of a journey without any parental supervision?

BM: That's right. About 1/3 of the journey we camped, about 1/3 of the journey we stayed in hostels and for about 1/3 we stayed with friends or relatives, but we did the whole thing on our own.

JEB: That's amazing! So you are from Keene, NH?

BM: No, I'm from NYC, but we didn't want to have to navigate out of the city on bikes loaded up for camping. So we took a bus out of the city for the trip's start.

JEB: Wow. Have you had a passion for bicycle touring ever since?

BM: Absolutely, I've been on many trips since then. When I was 19, I went on another long trip, with one of my buddies from that first trip. We started in San Francisco and ended in New York City. We headed north to Spokane, WA and made a big right turn to head towards the East Coast. Just 3 of us. And back then, we didn't have the convenience of Google Maps or other aids so we just had to find places to stay and bike routes along the way. I think we used the old AAA maps – funny, we discovered that they weren't so good for figuring out a road's grade/inclination. Then again, they never ran out of batteries, if you know what I mean.



JEB: That is incredible. I didn't think about maps needing to show the hills! How long did that trip take you?

BM: About 2 months. It has been the only time in my life, especially now with work and kids, that I could have taken two whole months off to unplug for that type of adventure.

JEB: Being in college, were you able to stay in hotels or did you camp the whole time and carry all that gear?

BM: We did camp some and carried gear, but every pound you carry definitely affects your ability to survive the long haul. We often found places to stay, either church basements when it was raining, or folks along the way you'd meet at a store or somewhere who would let us stay in their homes or on their lawns, which I've done on my own since then as well.

JEB: Wait a minute... You look quite trustworthy, but I'm pretty sure if you came up to me at a store and asked for a place to say I'd be skeptical!

BM: It's not exactly like that! Usually someone would strike up a conversation in a store or somewhere, seeing me in all my bike gear, and ask where I was going or where I came from, and after a while, you might ask if they knew of a campground or place to stay. It never ceases to amaze me the kindness of strangers that still exists all across the United States. Perhaps it's not as frightening being a man traveling alone often as it would be for a woman, but I've never felt afraid on the road and have always found great company along the way.

JEB: Funny, I can see that happening. Whenever I'm somewhere with my husband and he sees a couple of cyclists with all their gear, he is somehow compelled to ask them where they are going or about their adventure. It must happen to you a lot.

BM: Yes it does. One of my favorite parts of doing these trips is getting a different look at the countryside and towns along the way from a perspective you just can't get from a car or certainly from a plane, and how often I meet people without that barrier. I get more insight about the country and the people as I travel.

For instance, I was riding through Flint, MI right past the picket lines in the middle of the summer's General Motors strike. It is one thing to see a 40-second story about a strike like this on the news. It is another entirely to be able to talk to the strikers yourself. I didn't plan the trip that way, but that's what happened. Similarly, I went into a small grocery store in a little town off a rail spur in Michigan. Every item on the store shelves was a Mexican product – guava candies, cidre (an apple cider soda), dulce de leche, etc. I had known, intellectually, that Mexican farm workers were central to the Michigan farming community. But I hadn't really thought through that those communities would have local stores in a rural location. It was kind of like stumbling into Chinatown, or Little Italy, or the Lower East Side in New York City, if you didn't know the history of the place. Eye opening. And by the way, you'd never see this stuff if you were going between Minnesota and Vermont by car – the most efficient way to travel between cities by car is on an Interstate Highway.

JEB: That's definitely true. It's the little experiences that make the trips special for sure. Back to present trip and why you were nominated. Tell me a bit about the trip you took last year.

BM: Well, my daughter was given a hand-me-down car by her grandmother to use at college. For her first year of school, the car sat in our driveway. After a year of insuring it and watching it sit there, we decided that it belonged in Minnesota with my daughter. She wasn't too versed in highway driving, so my wife and I thought why not drive her out there and then I could cycle back! My wife knows how much I enjoy long cycling trips and encouraged me to do so.

JEB: So you cycled back from Minnesota?!



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BM: My daughter and I had a great road trip out, much more in the lap of luxury in that we stayed at hotels, took our time to see the sights, took the Michigan-Wisconsin ferry, ate out and then when we got to college, I unhooked the bike and set off back home. For what it's worth, my daughter's college friends thought I was nuts. So there was that.

JEB: Then you must be doing something right! I think I'd much prefer the trip out. How much planning would be involved in such an adventure?

BM: Surprisingly it's not too complicated now that Google Maps can give you bike routes and can display most of the motels and campgrounds in the radius of a day's ride. In fact, there are rail-to-trail projects sponsored by many states that have converted disused rail beds into recreational paths. They are graded almost flat and are set apart from traffic. This makes them much safer than sharing the road shoulder with morning commuters still on their first cup of coffee and checking their e-mail while driving! In Minnesota, I just told Google Maps to get me home and hit the "bike" icon. Google's map function then linked each state's rail-to-trail paths, and choose secondary roads to get me safely between gaps in the states' systems. That

part is much easier than it was when I did the long trip in 1987.

JEB: Did you have to do a lot of physical conditioning?

BM: Well given that it was the end of the summer, I had been cycling, and I did cycle from Vermont to Long Island earlier in the summer to meet family as a sort of proof-of-concept for the longer ride. After a long winter, you can't just get up and bike 60 miles on a fully loaded touring bike, or at least I can't. And I did some experimenting with how much gear I could carry, what bike seat would be best, how many miles I could do back to back. Since the distance you can cover is dictated by, among other things, the grade of the roads, the strength and direction of the wind, and the weather generally, in addition to your own physical capabilities, planning many days out can be difficult.

JEB: So many things to think about. I can't sit on a bike seat for 1 hour let alone days on end. Did you find the right seat?

BM: Funny, I did end up switching seats after the Long Island trial run. Despite the promises of larger padded seats, I found those did not give lasting comfort the same way as a smaller seat that only supports your "sit" bones. I ride a pretty beefy

steel touring bike – no carbon fiber here! The bike is made by a company called Rivendell, based out in California. They make old school bikes with plenty of wheel clearance for wide tires, fenders and racks. The machine has to carry me, plus around 30 pounds of gear, so it has to be sturdy. I like steel bikes because if you ding a part, like a front fork, out in the boonies, you can bend things back into shape enough to get you back to civilization. I also have a front wheel with a small generator in it that runs my lights. Never run out of batteries again! And I did visit two bike shops along the way to deal with mechanical issues that arose (a loose pedal that was "clicking" on each rotation in one case and a loose headset in another).

JEB: I was curious about the type of bike you used. How many days did the Long Island trial run take? I drove to Long Island last weekend and it took me 6 hours!

BM: You figure an average of 9 miles an hour and maybe between 50 and 70 miles in a day depending upon the weather, topography, or just how you are feeling. I cheated a bit on the first day -- my wife agreed to drive me and my bike to Ludlow, which was just about the highest point of elevation on my trip. So I started a bit closer to Brattleboro to avoid the larger moun-

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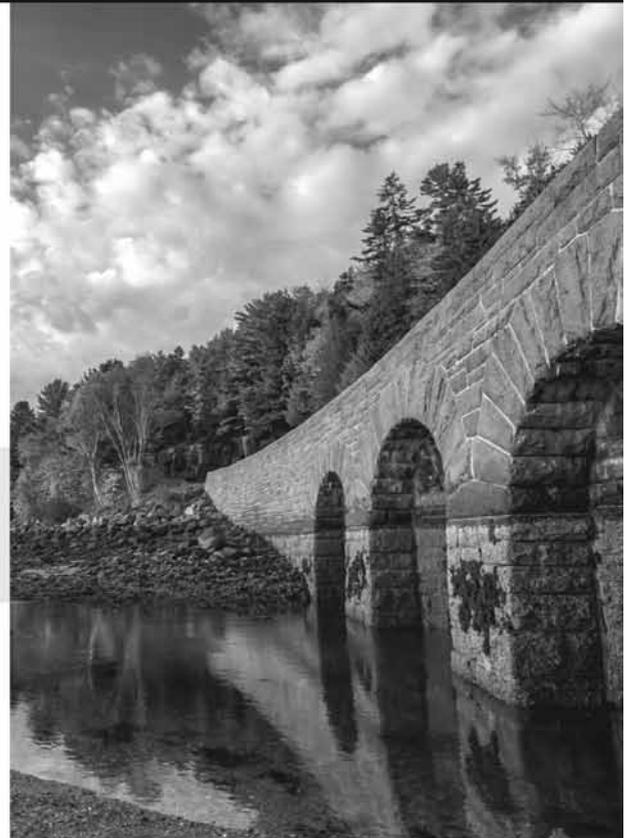


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tains and did it in about 4 days. The last day I powered through 75 miles just to make it there.

JEB: My trip to Long Island was mostly 4 lane highways. I assume you took much quieter routes?

BM: Like I said, I found all my trips to be extremely safe as far as people are concerned, the biggest risk is people texting while driving! You also have to be comfortable claiming a lane when you need it. I do run front and rear lights on my bike, regardless of time of day, and I wear a Day-Glo jersey. But the rail-to-trail paths take a lot of automobile traffic out of the equation. You can get from Amherst, MA to New Haven, CT almost entirely on bike trails these days.

JEB: That sounds much more relaxing!

BM: Yes, but there's a trade-off. The funny part about those converted rail beds and paths is that you lose much of the variety and sightseeing. A bike path in Connecticut looks pretty much the same as a bike path in Michigan. You have to leave the path to go to towns to find food, but other than that there are long, I dare say relatively boring stretches. There is something to be said of the variety and the local nature of the old "blue highways."

JEB: Oh yes you can definitely say boring if it's anything like I-90 across New York. Talk about a long stretch of sameness!

After your trip to Long Island, did you feel prepared for the trip from Minnesota? Did you have any trepidations?

BM: Well the weather forecast called for some seasonably cold evenings in Wisconsin and Michigan. Once the temps are below 50*, it gets pretty tough on your hands and feet, if you are not prepared. As luck would have it, it was unseasonably warm in the upper Mid-West this year and I didn't need the warm gear I packed.

JEB: But of course, if you didn't bring it, it would be cold.

BM: Yes, it always seems to be that way. It was good to have it but I could have gone without the extra weight.

JEB: Did you camp mostly when you were on your own this summer?

BM: No, as it turns out, I mostly stayed in motels. My wife was a big proponent of doing the trip right and making sure it was a pleasant experience. She thought, if I'm going to take all this time off and do it, I should do it comfortably and successfully. I had wanted the flexibility that camping gives you. But in Madison, WI, I realized that I hadn't spent a single night sleeping on the ground, cried "uncle" and mailed home all my extra camping gear. Also, I

had taken a small laptop with me to check in on work, so I wanted to make sure I had places to check email, file motions if needed and recharge (literally).

JEB: I was going to ask about work! How long did the trip take?

BM: I'd sound superhuman if I just said two weeks without explaining that I had to stop around Rochester, NY as it was apparent I would miss some important commitments if I kept going. So it took me two weeks to cycle from Minnesota to NY, averaging about 60-70 miles per day. You have to stay flexible in your planning. I had stopped in Flint, MI, planning on taking a ferry into Ontario and crossing into Canada that way. Turns out that the ferry has been out of commission for a year, and no one told Google! The approaches to the US-Canada border are all federal highways – no bikes allowed. Rather than take an extra day and navigate Detroit, I just rented a car in Flint and drove my bike to Buffalo. That's an option I never had when I was 19!

JEB: I hadn't even thought about the border issue. That still sounds superhuman to me. I wouldn't make it one week. I do prefer the sound of staying in motels over camping though. I think I'm done with camping at this point.

BM: There were some interesting old motels along the way I have to say. You also aren't sure from Google Maps just how safe the area you choose is until you get there! There are also these online apartments, like a motel/Airbnb combo where you book online, get a code for the door and just get into a furnished apartment with a kitchen, etc. Those were quite handy. I found a couple along the way. What I haven't tried, which also exist, are cycling groups who provide hot showers or beds for people on long cycle trips.

JEB: Oh like those couch-surfing sites?

BM: Yes but for cyclers. I think one of them is actually called hot showers or something. Again, I have just found so many decent people along the way in my cycling travels; it's definitely one of my favorite parts of the adventure.

JEB: And I'm sure it's a good respite from your daily work and stresses of work?

BM: You find yourself with immediate minor worries, like how much water do I have left, how many calories do I have and need before the next stop, where should I stop, but you aren't worried about work or daily stressors. It's quite freeing.

JEB: Your clients were ok with the two-week hiatus or did you keep in touch?

BM: For one, I picked two weeks that I knew were less likely to be busy. I also

think it's more of a mind-set that we lawyers get in where we think we simply cannot take the time, but if we prioritize, we can. While I know people say that our technology keeps us tethered 24/7 to our work, that same technology enabled me to check and answer emails, and keep an eye on cases. Between my phone and my little laptop, I could take care of most stuff. If a client matter had blown up while I was on the trip, though, I might have had to change my plans. But that's true no matter where you are. At least with the technology, you are neither helpless, nor out of the loop.

JEB: Yes and it's about setting client expectations at the onset. Does it help or make it worse that you are a solo practitioner?

BM: I was a partner at Sheehey until about ten years ago and I loved the people there and the work. But the work-life balance wasn't there for me. Or at least I couldn't make it happen. So 10 years ago, when my kids were 7 and 12, I made the decision to step back and spend more time with them. I reasoned that the dad they were going to get for the next 5 or so years would be the one they took with them into their own grown up lives. We refer to this as the "less money/more fun" business model around our house.

JEB: Ah, the Vermont state motto!

BM: [laughs] Yes! But it was a critical and healthy decision for me that I will never regret. I was able to spend more time with them, and pursue other activities that have been deeply meaningful. I chair the Cornwall Select Board, serve on my town's volunteer fire department, and joined a local community chorus. These activities really balance my time out more.

JEB: It sounds like you are doing even more work, although we've heard time and again that volunteering your time as a lawyer actually helps your wellness and work-life balance.

BM: It really does. And given the divisive times we are living in, where the recited wisdom is that Americans can't bridge the current divide of 'us vs. them', these activities serve as an effective antidote. My town's Select Board consists of five people who are united by their desire to solve local problems. We don't talk political parties, or presidential elections; instead, we find solutions. In that way the Select Board is like the antidote to the current political malaise. Similarly, the fire department has an informal 'no politics' rule. I mean, your neighbor's house is on fire, or someone needs urgent medical attention, none of that stuff really seems to matter. In both cases, we have a group of people, all committed to solving specific problems to im-

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prove their town no matter their political leanings. It's such a refreshing example of how small government can and should work.

JEB: That's so true. And I'm sure your legal talents are needed for those roles.

BM: Absolutely, we have a great town attorney, Jim Carroll, who we can call upon when litigation is the direction, but mostly, people are willing and able to solve problems together and do appreciate my suggestions in terms of what the laws say or what I think might work in an ordinance. It's extremely rewarding.

JEB: The sense of giving back is so rewarding.

BM: I don't keep track of my volunteer hours, but I would not be surprised if I didn't give away about 1/2 of my time these days. But I feel an obligation to do so and it really does help with my wellness and balance. I remember when you were in practice, you were always generous with your bankruptcy advice to those of us who

called scratching our heads about issue that had popped for our own clients. I try to do the same, when I can.

JEB: Oh yes, thank you. We were always helping other attorneys but of course we never charged for it. It just seems like what we all should be doing. The work also helps with the intellectual stimulation, right? Many of my interviewees combine a freeing physical or artistic passion with some sort of intellectual passion which both aid in wellness.

BM: Yes, it also can't be understated that cycling does wonders for physical wellness as well as mental clarity.

JEB: Do you bike in the winter or indoors?

BM: No, I really enjoy cycling for the long hauls, to see parts of the country from another perspective and to immerse in local communities throughout. I also just don't enjoy cycling in the cold. I've had some injuries, so other than cycling, I'd say yoga or swimming in the winter gets me through to

the next cycling adventure.

JEB: Do you have plans for any upcoming adventures?

BM: My wife enjoys biking some, and we keep talking about taking an adventure when the kids are out of the house. We have thought about a tandem bike too, perhaps down the coast. The joke about tandems is that "wherever your relationship is going, you're going to get there faster riding a tandem bike."

JEB: Too funny. Well, that sounds incredibly beautiful and peaceful, I can't wait to hear about it!

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

Justice Robert Larrow and His Legacy

It was the beginning of March 1974, the last time the legislature would elect a Justice of the Supreme Court. The 1974 amendments to the Vermont Constitution would soon require judges and justices to be chosen by the Governor, after nomination by the new Judicial Nominating Board. But for one more time, the legislature would elect a Justice of the Supreme Court.

As Chief Superior Judge, the most senior of the civil judges, William Hill expected he would be elevated to the high court. With the exception of 1914-1915, that had been the rule for many years.¹ As vacancies occurred on the high court, they would be filled by the longest-serving trial judge, not because the constitution or the law dictated it, but because that was the order of things. Vermont used to be ruled by many unwritten orders.

The legislature had elected Hill to the Superior bench in 1959. He had seven years of seniority over Judge Robert Larrow, who had been appointed a Superior Judge in 1966 by Governor Philip Hoff, and then elected to consecutive two-year terms by the legislature. Franklin Billings, Jr. was the third most senior Superior Court Judge, appointed by Hoff to the civil trial bench in December of 1966.

Tradition did not hold in March of 1974. Judge Robert Larrow won the race in the legislature. The vote was Larrow 89 to Hill 82. The *Burlington Free Press* explained that Larrow had the solid support of the Democrats, joined by a "loose coalition of conservative Republicans, led by Speaker [Walter] Kennedy."²

The Court in 1974 consisted of Chief Justice Albert Barney, Milford K. Smith. F. Ray Keyser, Sr., Rudolph J. Daley, and newly-elected Robert Larrow. Justice Keyser retired on June 1, 1975, and Franklin S. Billings, Jr. was appointed by Governor Thomas Salmon to fill the vacancy, another breach of tradition. Justice Smith retired on April 30, 1976 and at last William Hill was appointed a Supreme Court Justice, a second Salmon appointment.

The court remained intact for more than four years until October 31, 1980, when Justice Daley retired, and Governor Richard Snelling appointed Wynn Underwood to replace him on the high court. The next year, effective August 31, 1981, Justice Larrow retired. Governor Snelling appointed Louis P. Peck in his stead. Justice Hill re-



tired April 1, 1987.³

Justice Larrow served a total of 15 years and three months as a judge or justice, including seven years and six months on the high court. Justices Larrow and Hill's tenures overlapped for five and a half years.

Inquiry

In the summer 2019 issue of the *Vermont Bar Journal*, an essay entitled "Politics and the Court" attempted to define what constitutes a conservative judge, and to investigate whether the Chief Justice Sherman Moulton's Republican politics showed through in his published opinions. This month, we look at the same question from the left, using the works of Justice Robert Larrow. Could we lift the veil and see the political heart of this judge?

Politics

Robert Larrow was not a Republican. He was a determined Democrat, with a long history of involvement in statewide political campaigns both as a candidate and as a spokesman for the party. He had run for Governor at the unripe age of 37 in 1952 against Republican Lee Emerson and won nearly forty percent of the votes, more than any Democrat in Vermont history had ever earned. He had run for other offices after that, never prevailing, but always making the races competitive. His campaigns helped inspire his minority party to turn it-

self into a majority party, solidified by the elections of William Meyer in 1958 as U.S. Representative and Philip Hoff's gubernatorial victory in 1962.⁴

Larrow was the second Democrat to be elected or appointed to the high court. The first was Isaac Fletcher Redfield, who served on the court from 1835 to 1860, the last twelve years as Chief Judge.⁵ Larrow was a Roman Catholic of French descent. His political affiliation and his religion were important components of his character.

Robert Larrow was born in Vergennes, on April 27, 1915, attended local schools, later earned a B.A. from Holy Cross College (1936) and an LL.B. from Harvard Law (1939). His first political race was for Burlington City Attorney, won in 1944, beating Theodore F. Hopkins, a Republican who had held the post for 23 years.⁶ Larrow remained City Attorney until 1963. He represented Burlington in the House (1949-1951) (as a Democrat) and was chair of the State Liquor Board (1964-1966). Elective office otherwise eluded him, but did not silence him.

Larrow had a sharp wit. In his race against Emerson in 1952, he criticized the Republican leadership for its allegiance to the Proctor Marble Company. "When the dog barks in Proctor," he said, "the tail wags in Montpelier."⁷ He ran an ad that year in the *Free Press*: "Why you should support the candidacy of Robert W. Larrow for Governor of Vermont: He is young, progressive, capable of providing the real leadership Vermont needs." He lost that race, as well as the 1962 contest for Attorney General, and for Mayor of Burlington the following year. He came close to winning the race for Attorney General in 1962.

In 1954, he publicly defended his party, while giving an elbow to the Republicans. He charged Republicans with "100 years" of "drifting and dreaming." He agreed with the criticism that Democrats were a "party of malcontents." He said, "Of course we are not content. We are discontented with decade after decade of state government without leadership."

Republicans, he said, were keeping Vermont "at least one, and probably two, decades behind the progress of its sister states." He predicted the end of Republican rule. "The people of Vermont are Republicans not by prejudice or bias, but by habit. That habit can be broken. Perhaps not overnight, but it can be broken and we

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will break it."⁸

In 1962, he said, "One-party rule leads to nothing but stagnation." He argued that 106 years of "heel dragging and a reluctance to institute needed measures of reform" was enough.⁹ Of the office he sought he said, "The [Attorney General's] office was created to represent the state and its people and not simply to serve as the agent and rubber stamp of the governor's office. The office is perverted when impelled by executive pressure."¹⁰

After he was appointed to the bench in 1966, Robert Larrow was not active in the Democratic Party. Becoming a judge meant being shorn of party politics, at least publicly. Upon his retirement, in the summer of 1981, *The Brattleboro Reformer* reported Larrow was "noted for his intellectual contributions to the high court." Chief Justice Barney praised "his matchless intellectual contribution to the content of law, both in his own opinions and in his comments on those of the rest of us." The reporter wrote how some "have viewed Larrow as one of the most liberal members on the bench, but [the Chief Justice] said there is little difference in political philosophy among the jurists." Governor Snelling praised him, saying, "He has compiled an impressive record as a jurist both on the Superior and Supreme court benches. All the people of Vermont are indebted to him."¹¹ Phil Hoff said there may have been better lawyers, trial judges and Supreme Court justices, "but I have not happened to meet them."¹²

At the time of his retirement, Justice Larrow gave an interview with Professor Samuel Hand. He was asked why he ran for an office in 1952, taking "the nomination in the sense that you would not be merely a token candidate but someone who would campaign actively and apparently make a genuine effort to win, although I suspect you knew you weren't going to win?" Larrow answered, "Well, I guess one reason would be personal. That's the way I do things generally. I get into them; I really get in."¹³

In that interview, Justice Larrow defined what it meant to be a liberal, describing Harland Howe, a Democrat candidate for Governor in 1912 and later a Superior judge. Howe was a liberal, he said, "in the sense that he was completely devoted to the cause of the little man, both on the bench and off it."¹⁴

Would that label apply to Justice Larrow? Let's look at what he wrote.

Justice Larrow wrote more than 250 decisions in his seven years on the Court. In retirement, he returned (specially assigned) to sit on approximately a hundred more cases, the last of them in 1986, and wrote another half dozen opinions. There is no question about who wrote a Larrow decision. His voice is present in every opinion.

Dissenting and Concurring

A justice speaks personally through a dissenting or concurring opinion. There the first person singular is an accepted pronoun.¹⁵ Justice Larrow dissented six times during his years on the high court. Just six months in his seat, Larrow filed his first dissent in an appeal of a complicated income tax issue. He didn't dissent from the decision itself, but felt strongly enough to express his disappointment that the majority had relied on an earlier decision that Larrow felt was plainly confusing and should be overturned. He also found fault with imperfection in the calculation of the money at stake. "The findings and conclusions below set forth the formula used by the Commissioner in making the computations required by the previous opinion. I do not agree to its accuracy, nor do I understand the majority opinion to expressly endorse it. But its accuracy was not put in issue, either below or in this court, and is therefore not for determination."¹⁶

A little sarcasm entered his next dissent, in *Simpson v. State Mut. Life Assur. Co. of America* (1977). He wrote, "I do not think that the phrase 'dental care or treatment' became unclear or ambiguous until the opinion was written." An insurer had denied coverage for dental services, expressly excluded from the policy, on grounds they weren't medical treatments, a judgment the majority reversed. Larrow was unpersuaded. "Without the understandable promptings of sympathy, the bill in question here falls clearly within the quoted exclusion. The services in question were rendered by a dentist, within the carefully spelled out field of his statutory license. They were rendered after the patient was referred to him, for that purpose, by a doctor of medicine. The treatment was selected in preference to three other options clearly within the medical field. The plaintiff's present arguments that the policy was ambiguous seem to me completely untenable, particularly where it does not appear that she sought any clarification prior to incurring the expense."¹⁷

That income tax question that irritated Larrow in his first dissent returned the following year, and he felt compelled to repeat his concerns, in *In re Goodyear Tire & Rubber Co., Corporate Income Tax 1966, 1967, 1968* (1975). "Albeit vainly, I must reiterate that an item never actually or constructively received is not income, even though it may 'confer an economic benefit.' Income must confer a benefit, but all benefits are not income. The interest received by a bank from its mortgages confers 'an economic benefit' on bank depositors, in that it permits payment of interest on their deposits. So do dividends received by a bank on its owned securities. But no

court, so far as I know, has ever held these items to be income to the depositor.... Recognizing, as the Legislature appears to have done that even a large corporation may be the recipient of an injustice, I dissent."¹⁸

The majority opinion in *Orleans Village v. Union. Mut. Fire Ins. Co.* (1975) caused another Larrow dissent. He did not believe that *res judicata* should prevent the court from deciding whether the village had waived sovereign immunity by purchasing insurance, when the same issue had been addressed in a prior action brought by the village against the insurer. "My analysis of the course of this litigation would indicate that the interests of the insured and the insurer, at the first trial, were not identical, as held, but diverse.

"I cannot conceive that substantially the same Court which held *res adjudicata* to be inapplicable in *Hill v. Grandey* (1974), with all essential facts found and all essential parties joined in the first action, can hold in the situation here presented that the issue of coverage was truly 'litigated', when both parties to the original action were basically interested in establishing it, and no one presented the contrary view."¹⁹ Larrow had filed a concurring opinion in *Grandey*, in which the majority concluded that the issue of whether an insurer must represent the insured was settled in favor of the company and did not preclude a subsequent suit against the insurer for breach of contract.²⁰

Larrow's dissent in *Vermont State Employees Association, Inc. v. State of Vermont* (1976), joined by Justice William Billings, faulted the majority for disrespecting the union's rights after the State unilaterally reduced the workweek and wages of state employees once the contract had expired. While he agreed reluctantly that the State had this power, he refused to accept that this action was anything other than an unfair labor practice. "It is, in effect, a refusal to bargain collectively, and it cannot be justified under the statute as a matter of right, because the statutory procedure is not followed."²¹

While specially assigned to sit in on the appeal of *In re E.T.C.* (1982), after his retirement, Justice Larrow filed a concurring opinion, generally agreeing with the majority on all points except "the implication that a person in the status of the director here could ever be held to possess the independence and impartiality which the majority holding requires." That was the director of a group home, who had participated in a juvenile's decision to waive his rights to remain silent or have counsel present. The majority found his presence in the interrogation harmless, although it had ordered the juvenile's inculpatory statements suppressed. Larrow wrote, "No 'director' or 'houseparent' employed by or under con-

tract with the state can, in my view, be considered either impartial or independent. He differs only in slight degree from the prison warden, and very few of them are, from my observation, consulted by the prison inmate working on his habeas corpus.

"It should be made clear that the status of the 'director,' in itself, precludes any finding by the trial court that minimum protection standards have been met. Foxes should not be subject to individual evaluation; as a class they should be disqualified as poultry custodians."²²

Five years after he retired, Justice Larrow, specially assigned to hear the appeal in *State v. Paquette* (1985), dissented without comment to a majority decision written by Justice William Hill.²³

Leading Cases

A justice's majority opinions are not the product of one mind. They reflect what other justices have concluded about how an appeal should be addressed. Larrow's opinions are not, however, as stark and bland as many more recent decisions. It may have been the coincidence of rotation of writing assignments, but Larrow wrote many cases involving workmen's compensation, municipal law, including zoning, and unemployment compensation. It is tempting to conclude that the court arranged to have Larrow write on these subjects, given his background.

At the time of his retirement, the justice was asked about his leading decisions, and he named the *Sunday* case and a probate fee appeal that awarded large sums to the prevailing party, a law was declared unconstitutional.²⁴ In *Sunday v. Stratton Corp.* (1978), the court upheld a judgment of \$1,500,000 for a skier who became entangled in brush and hit a tree trunk, concealed by loose snow, while skiing on the resort's novice trail, and who suffered permanent quadriplegia as a result of the accident. Larrow wrote, "While skiers fall, as a matter of common knowledge, that does not make every fall a danger inherent in the sport. If the fall is due to no breach of duty on the part of the defendant, its risk is assumed in the primary sense, and there can be no recovery. But where the evidence indicates existence or assumption of duty and its breach, that risk is not one 'assumed' by the plaintiff. What he then 'assumes' is not the risk of injury, but the use of reasonable care on the part of the defendant."²⁵

The probate case Larrow referred to was *In re Eddy's Estate* (1977), which found the graduated probate "distribution fee" tax violative of the proportional contribution clause of Article 9 of the Vermont Constitution. The "fee" was arbitrary and unreasonable, according to Larrow's decision,

because it was based on trust assets, on a scale equal to that for decree of distribution, varying between one, two, or no percentage of the estate.²⁶ The following year, Larrow authored the majority opinion in *In re Webb's Estate* (1978), where the ruling of *Eddy's Estate* was clarified to require recovery of the funds paid for the unconstitutional tax.²⁷

Justice Larrow authorized three other decisions applying the Vermont Constitution to issues on appeal, one involving a challenge to jury selection. The law gave broad discretion to the trial court respecting the place of trial, and did not require jurors to be drawn from all counties in the unit.²⁸ In *State v. Christman* (1977), he dismissed a claim that a criminal information was defective, finding no violation of Article 10 and allowing an amendment to cure any lack of specificity. The claim, he wrote, was "an attempt to reverse on an insubstantial technicality rather than the presentation of a substantial constitutional question. The general principles enunciated in *V.R.Cr.P. 2*, of just determination, simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay, are not served thereby. Like their Federal counterparts, our Criminal Rules are designed to eliminate technicalities in criminal pleading and are to be construed to secure simplicity in procedure."²⁹

Larrow's decisions include several that have had lasting impact on local government. Given his experience as Burlington's City Attorney, these decisions wed experience and the state of the law in memorable ways. *Smith v. Winhall Planning Commission* (1981) established the minority rule as the law of Vermont, granting vested rights to applicants to the zoning bylaws in effect at the time the plans were filed, and prohibiting the municipality from changing the rules in the midst of a review. "The minority rule is, we feel, the more practical one to administer. It serves to avoid a great deal, at least, of extended litigation. It makes for greater certainty in the law and its administration. It avoids much of the protracted maneuvering which too often characterizes zoning controversies in our communities. It is, we feel, the more equitable rule in long run application, especially where no amendment is pending at the time of the application, as here."³⁰

Sorg v. North Hero Zoning Board of Adjustment (1977) set the bar for the review of zoning variances, requiring true hardship, not just personal inconvenience or mere profitable use, underscoring the principle that a variance can only be granted when the applicant cannot build in strict conformity with the bylaws. Larrow wrote, "the Inn has been operated as such for some 87 years; the present owners were familiar with the operation, as guests, long



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before they bought it. The development is present, and the use must be a reasonable one, because enlargement of it is what is sought. This statutory criterion is also unmet."³¹

An applicant for a funeral home zoning permit was not forthcoming about his plans to offer crematory services, which was a nonconforming use. The decision in *Town of Bennington v. Hanson-Walbridge Funeral Home, Inc.* (1981) altered the general rule that any permit is unassailable once the appeal period has passed by recognizing the town's right to close it down.³²

Larrow's decision in *Hinesburg Sand & Gravel Co. v. Town of Hinesburg* (1977) found the town had operated the town gravel pit as a private business, at a competitive advantage over a local gravel business, and awarded the company lost profits as a consequence. The claim that only "surplus" materials were sold was denied, as the pit provided a nearly inexhaustible source of gravel and sand.³³

Justice Larrow wrote the decision in *In re State Aid Highway No. 1, Peru* (1974), setting a high standard for recusal when decision-makers have conflicts. The Chair and one member of the Environmental Board were members of the Vermont Natural Resources Council, and the chair had donated funds to the organization. Neither stepped aside from hearing a case where VNRC was a party, and the high court ruled the participation of both members was improper and a justification for reversal. He wrote, "We are in a field of almost complete first impression. We are in a time situation where a right of removal became effective as to an appeal during the very interval in which a right of appeal existed. And we are confronted with other gross irregularities, hereinafter treated, which would, in sum, make such 'egregious error' that we could not in conscience allow the ruling below to stand. On the whole case, there is certainly much more than 'a reasonable basis' for fear that an injustice has been done.

"Environmental laws affect very substantial rights, and it is vital that the procedures under which they are enforced be scrupulously observed and impartially administered. Any failure in this respect can quickly rise to constitutional dimensions. The 'rush to judgment' which characterized the proceedings below, even though in part unobjected to, in our view is totally incompatible with the standards we have long sought to enforce."³⁴

In *Punderson v. Town of Chittenden* (1978), Justice Larrow ruled that a board of civil authority need only state its reasons in its appeal decisions, but was not required to make findings, overruling *Harris v. Town of Waltham*, which had held BCAs to the same standard of decision-making as it routinely requires of courts.³⁵

The Cause of the Little Man

Larrow's definition of a liberal judge was one who favored the individual over the government, the corporation, and the employer.³⁶ In practice, the law narrows the opportunities for any court to lean in favor of the "little man," but where there is an opening, some courts and some judges will revert to that philosophy.

In *Palucci v. Department of Employment Security* (1977), Larrow refused to accept the argument of the State that no claimant may refuse a referral within a labor market area because of a lack of transportation. Plaintiff was thrown out of the unemployment compensation system for refusing to take a job outside of Rutland City. Larrow wrote, "It cannot reasonably be said that one drawing \$27.00 per week unemployment benefits must move, buy a car, or hire a cab to reach a job outside the area, seven miles distant, paying \$1.50 per hour plus tips for work as a breakfast waitress."³⁷

When UVM objected to a trial court's finding of a continuing and disabling pain in a workmen's compensation case, based only on the testimony of the claimant, rather than requiring expert testimony to justify it, Larrow disagreed. "The continuing existence of that pain," he wrote, is "a subjective matter peculiarly within the knowledge of the claimant."³⁸

Larrow ruled that Montpelier could not oppose the organization of two unions within the fire department. There was no showing of overfragmentation or any adverse effect on the operation of the city, the city's principal defense.³⁹

He concluded that arguments with supervisors, reprimands on the job, and justified criticism of performance do not alone amount to good cause to quit a job and obtain unemployment compensation, but when an employer reaches outside the job, bringing the "criticism to [the employee's] wife and to her conduct, involving at the same time the wife's mother," the resignation is justifiable.⁴⁰

Justice Larrow also filed a concurring opinion in *In re J.* (1976), involving a case terminating parental rights. He wrote, "The underlying philosophy of the trial court seems to have been that even though the natural mother was making valiant and fruitful efforts to regain her capacity to care for her children, their overall good would be promoted by adoption. I do not view the statute as trying to create the best possible world. I do not think it intends to set up a mechanism for transferring parental rights from those in temporary difficulty to those more affluent and adjudged by the social worker as more capable of educating and rearing the progeny, if not of procreating them. The result below does not accord with our social policy of bolstering

the family unit, preserving it, where necessary, by financial and other support. There may well be a point where hope that the 'biological parent' may resume her place with her family disappears, and severance of the last remaining ties is required. But it does not appear to be reached on the facts here found."⁴¹

In an appeal of a suit against the Central Vermont Hospital, Larrow's opinion focused on what constituted reasonable care. "We perceive nothing technical or beyond the common knowledge of a lay person," he wrote, "in the essential function of supplying a bedpan with reasonable expedition to a bed patient in a hospital. Ministering to the fundamental needs of such a patient is, as plaintiff argues, essentially routine care, ministerial and not technical. It is well within the applicable rule requiring 'such reasonable care as the patient's known (or should be known) condition may require or demand.' Here the evidence showed a patient relatively immobile, previously supplied with a bedpan, and under sedative medication. No special skill is required to supply a bedpan when needed; no special expertise is required to foresee the possibility of a fall resulting from the patient's attempt to supply the deficiency in care."

The hospital complained that it was "a 'target defendant' because 'the plaintiff is an aged lady and the defendant is a hospital, an institution that, according to the popular media, is growing more impersonal all the time.' The argument is unique, but insofar as it calls for a special set of rules governing the relationship of a hospital to its patients, an immunity total or partial from the ordinary rules of responsibility for negligence, it should be addressed to the legislative body. The accusation of impersonality, founded or unfounded, should have no bearing on our decision; we cannot take for granted that it influenced the jury."⁴²

In *In re Southwestern Vermont Ed. Ass'n.* (1978), the justice concluded that a school board had committed an unfair labor practice in firing its custodial staff and hiring independent contractors to perform janitorial services, at a time when the workers had submitted a petition to form a union. The school board's actions were found to be "inherently destructive" of union employee rights.⁴³

Larrow and Hill

Based on the record of decisions, the competition between Larrow and Hill continued after the 1974 legislative election. In *Bolkum v. Staab* (1975), Larrow wrote, "We are somewhat at a loss to understand what the trial court meant by 'real control', a phrase it did not explain. We take it to be

equated to actual control, as exercised by master over servant, rather than the general control exercised by an owner over an independent contractor. Whatever may have been intended, it was a not unusual situation presented by the findings.

"Plaintiffs' claims of error with respect to the amounts of damage awarded, however, have more substance. They claim that the court erred in its mathematical calculations, on its own findings, and that it excluded without cause any compensation to plaintiffs for the reasonable cost of expert inspection and advice, completely aside from expert testimony and trial preparation. Both claims appear to have merit."⁴⁴ Judge Hill had heard and decided *Bolkum*.

Judge Hill's decision in *In re Lampman* (1977) was reversed by the high court. Larrow's decision explained, "Relief was denied the appellant by the superior court, without citation, on the ground that 'he would be in jail anyway and should not be permitted to credit (sic) for the same time spent in jail.' We do not concur in this oversimplified conclusion, and reverse." Larrow's critique described Hill's decision as based on "reasons which must have appealed to the trial court though far from apparent here."⁴⁵

In *Bassett v. Vermont Tax Department* (1977), Larrow's opinion faulted Hill's decision for "misconstruing the action as a probate appeal," where the Supreme Court ruled that settlement funds from a wrongful death case were "not part of decedent's estate or of the 'residue' therein for purposes of computing statutory decree fee" and the dispute belonged within the jurisdiction of the Superior Court.⁴⁶

Larrow's opinion in *Green Mountain Power Corp. v. Commissioner of Labor and Industry* (1978) reversed Hill's decision to relieve the utility of liability for a VOSHA violation, concluding that "[u]nder the particular facts of this case, we hold that GMP did not discharge its statutory obligation by simply issuing adequate safety instructions and holding safety meetings. Delegating the responsibility of implementing the company's safety policies to rank and file employees, while under the immediate supervision of managerial personnel, does not comport with either the letter or the spirit of VOSHA. To hold otherwise would mean that once an employer provides its employees with safety equipment and issues orders or instructions regarding the safe use of that equipment, the employer is free to disregard the employee's actual compliance with those instructions. To say the company invokes disciplinary measures for noncompliance with its safety rules is not enough. Although such after-the-fact measures are within the intentment of the Act, actual supervision during the performance of a job, where feasible, also is in-

tended."⁴⁷

In *Appeal of Farrell & Desautels, Inc.* (1978), Larrow criticized Hill severely. "Although several issues were presented to the trial court, and are briefed here, the paucity of the findings below makes adjudication of all of them in this Court impossible. The findings and judgment order of the superior court purporting to 'affirm' the action of the zoning board were addressed only to a single issue. And, were not the parties in agreement with respect to the zoning ordinance provisions relating to this issue, even this point would escape our adjudication, because none of the applicable provisions of the ordinance, or of the municipal plan, were found by the trial court. No facts were found and no conclusions of law were stated with respect to the claims of the Town that the proposed unit development (a) would not promote the most appropriate use of the land, (b) would impair the natural and scenic qualities of open lands, (c) would conflict with the town plan, and (d) would exceed the density requirements established by the zoning ordinance."

Larrow also stated, "Extensive review of the evidence below is not required to dispose of the single issue which may fairly be said to be before us, because most of it never found its way into considered findings."⁴⁸

Larrow's opinion in *University of Vermont v. Town of Colchester* (1978) continued his attack on Hill's findings. Larrow wrote, "proper performance of the judicial function requires impartial patience and adequate reflection, not demonstrated where findings are copied verbatim from the requests of the parties. Here 29 findings were made and filed, 17 taken word for word from the requests of the plaintiff and 12 from the requests of the defendant. The deficiency strikes even deeper upon analysis, because two of the findings, on what the parties have treated as a key factual issue, are directly contradictory of each other. Finding No. 27 states that living in close proximity with other married students is important, because interaction with others in the same social situation is important for academic as well as personal goals, while Finding No. 22 states that although this interaction may be desirable and may enhance the learning process, the benefit is remote and incidental. These findings are diametrically opposite, as may be expected when culled from different sets of requests to find.

"Another defect apparent from the record below is the casual manner in which the matter was tried, with respect to the presence or absence of a fully constituted court. The trial extended over a two day period, and on the first day the presiding judge and one of the assistant judges sat.

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On the second day, for unexplained reasons, the assistant judge was absent, and the presiding judge sat alone, commenting that 'it's like a jury, if you miss one word you're out.' Notwithstanding this, the findings were signed by both, as was a supplemental finding. Later amended findings were signed by the presiding judge alone. Conclusions of law were signed and filed by all three judges, and the ultimate judgment order was signed by the presiding judge and the original assistant judge. Whatever the rationale behind this unpatented procedure, it cannot stand."⁴⁹

Larrow affirmed Hill's trial court decision in *Peoples Trust Co. of St. Albans v. Trahan* (1976).⁵⁰ But that is the only time a Hill trial decision was affirmed in a Larrow appeal decision.

Once Judge Hill joined the court, the two justices appear to have continued their differences in dissenting and concurring opinions.

Hill's concurring opinion to Larrow's majority opinion in *State v. Cady* (1978), agreeing to the result but not the court's reasoning, is one example. Hill wrote, "Even if it were necessary to a decision of this case for the Court to give content to the phrase 'right to operate,' the meaning which the majority implicitly assigns the phrase permitted by law to drive on the highways would not be a proper one. Such a meaning, although suggested by the words standing alone, is unacceptable because it is contrary to the statutory scheme. The anomalous state in which this decision leaves the Motor Vehicles law could have been avoided had the majority paid heed to this elemental rule of statutory construction:

"The true rule for the construction of statutes is to look to the whole and every part of the statute, and the apparent intention derived from the whole, to the subject matter, to the effects and consequences, and to the reason and spirit of the law, and thus ascertain the true meaning of the legislature, though the meaning so ascertained conflicts with the literal sense of the words."⁵¹

Larrow joined Justice William Billings in a concurring opinion in *State v. Howe* (1978), objecting in part to Justice Hill's majority opinion, believing that Miranda warnings should have been given the defendant, where "coercive elements are compellingly present." But Billings went on to state, "I would affirm the conviction, however, on the ground that the constitutional error is harmless beyond a reasonable doubt because of the 'overwhelming evidence of guilt' presented by the State."⁵²

Hill and Billings dissented in part and concurred in part in *Capron v. Rogers* (1979), to the majority opinion by Larrow that refused to apply a statutory amend-

ment providing that a cause of action accrues upon discovery, not at the time of injury. The dissenters agreed to the outcome, but believed that the court did not go far enough, by failing to overrule an earlier decision that established the date of injury as the date of accrual. "If the discovery rule were applied to this case, as it should be, the action would be allowed, since it was commenced within three years from the discovery of the injury. I am unable to hide behind the majority's view that legislative inertia before the 1976 amendment to the statute of limitations bars this Court from overruling its outdated, inequitable, and unrealistic rule."⁵³

Hill and Billings also dissented to Larrow's opinion in *Preston v. Chabot* (1980), which imposed a constructive trust on an undivided one-half interest in certain property, after the defendant had murdered his wife. In dissent, Billings stated, "The slayer and his successor in interest should be deemed to have obtained legal title to the entirety, but be held a constructive trustee for the entire estate, subject to the slayer's right to the value of the rents, profits and income of one-half the estate for the slayer's lifetime."⁵⁴

There were far more decisions of the court once Hill was appointed, where Larrow and Hill agreed to the outcome than cases where they disagreed, but it is a fair conclusion that the two justices never stopped treating each other as opponents, stemming from their first encounter back in 1974.

There may have been other reasons as well. Justice Hill was a liberal Republican; Justice Larrow was a progressive Democrat. Just why the legislature elected Larrow over Hill in 1974 is impossible to answer, but if politics played a role, the fact that conservative Republicans favored Larrow seems counterintuitive. It may have been personal.

"Knockout" Larrow

Robert Larrow was a tough justice to face on oral argument. Known for his exhaustive work habits, he was said to have practiced a "hot court," where judges and attorneys were expected to read all legal briefs and memoranda on a case before hearings were conducted.⁵⁵ Those who appeared before the court were tested.

In one oral argument, after Larrow grilled a young lawyer about a point of law, the attorney passed out, ashen and unconscious, and fell forward on the lectern, both cascading to the floor. The Court quickly left the courtroom, and Richard Cassidy, Larrow's clerk, helped the lawyer to his feet. It was the flu, the lawyer explained, that caused the faint, and he agreed he could continue the argument.

When Cassidy entered the chambers of

the court and informed the justices the lawyer was willing to continue, the court said no, they had heard enough. Justice Billings then baptized Justice Larrow as "Knockout" Larrow. Some mornings Billings would greet his colleague with, "Here comes 'Knockout.'"

How Justice Larrow felt about this new sobriquet is unknown, but it would not be too presumptuous to conclude he took it in good humor.

Crispness and Diligence

In one of his first decisions, Justice Larrow faulted the lawyers for both parties for failing to articulate the questions in the appeal, claiming they had "not crisply presented" them in their briefs or oral argument. But Larrow's opinion did. He wrote, "The State flatly asserts in its brief that Vermont's procedure is the orthodox rule. It cites no cases for this conclusion, and we know of none which support it."⁵⁶

In *Woodmansee v. Stoneman* (1975), Larrow's opinion explained why the court was reversing the decision from below. "This Court has long adhered to the view that where evidence of guilt is entirely circumstantial the circumstances proved must exclude every reasonable hypothesis except the one that the defendant is guilty. And this conclusion cannot be reached by basing one inference from established facts upon another inference. Under these tests the evidence was indeed sparse, and cannot support the verdict."

Later in the opinion, he wrote, "The State argues to us, at length, that no error appears because 'the court should understand that psychiatry is wizardry and not science, and should not be permitted in the future.' It also argues that presenting psychiatric testimony to a jury is 'an amateur's voyage on the fog-enshrouded sea of psychiatry.' It makes this argument despite the fact that it admittedly did not attack the qualifications of Dr. Woodruff. We cannot concur, and judicially notice that psychiatry is a recognized profession, with its qualified practitioners entitled to recognition as expert witnesses on the question of competency. The profession itself does not, as we understand it, make any claim that it is an exact science."⁵⁷

Larrow was hard on attorneys. In *Herbert v. Boardman* (1975), "Defendants' final claim of error attacks the conclusion of liability of the individual defendants. That liability, they claim, can attach only to the corporation because that is the only promisor referred to in the agreement. Without citation of authority, they assert that the law does not make them individually liable.

"Neither party cites us to authorities bearing on this issue. Both could, however, discover authorities tending to support

their respective claims. Cf. 18 Am.Jur.2d Corporations s 127; Annot., 21 A.L.R.2d 483 et seq. (1952)."⁵⁸

In *Gilbert v. Town of Brookfield* (1976), Larrow faulted the selectman for discriminatory standards of highway classification. He wrote, "We cannot construe the pertinent statutes as giving the selectmen arbitrary authority to grant and to withhold Class 3 classification. To do so would render the enactments unconstitutional. The record strongly suggests that personal elements may well have influenced a decision which should be one of policy, with a quoted statement by one selectman that they wanted no more teachers living in far corners of the town. One of the petitioners is a college teacher."⁵⁹

Larrow often faulted parties and trial courts for missing important issues. In *State v. Powers* (1978), he wrote, "Unnoticed by counsel and, apparently, by the court itself, is a defect in the record fatal to the judgment below. The complaint alleged the taking of a wild deer by artificial light, in violation of 10 V.S.A. § 4747. Trial was by court, with many stipulations in lieu of direct evidence, and findings of fact were made, with a conclusionary finding that the appellant 'took a wild deer in closed season within the meaning of 10 V.S.A. § 4747.' The judgment order, when eventually entered, followed the form of the complaint. Even though this error was not raised by the respondent, we deem it grounds for reversal under the rule of 'plain' or 'egregious' error."⁶⁰

"It's Personal"

One Larrow story has been repeated from time to time, in various versions. Rich Cassidy has the best claim to an accurate rendering, as he heard it from both parties involved. In his words, it goes this way:

"Hoff appointed Larrow to be Chair of the State Liquor Control Board. Snelling was a brash young man and he ran against Hoff in 1966. Hoff was reelected. Shortly thereafter, the Liquor Board voted not to renew its lease for a liquor store on a property owned by Snelling.

"Larrow was half-time Burlington City Attorney and as he crossed Church Street on his way to City Hall, Snelling saw him and accosted him about the decision. The thrust of his remarks was that he had thought that Larrow was a man of integrity and he was shocked and disappointed that Larrow would hold politics against him in making a business decision on behalf of the State.

"According to Snelling, Larrow got a big 'shit-eating grin' (in my mind's eye, I can see what he was describing as it was characteristic mischievous Larrow) and said 'Dick, I want you to know that politics had

nothing to do with that decision. It was entirely personal!' Snelling stomped off in disgust.

"In the long run, Snelling took no lasting offense. I was his seat mate at an industry dinner when he was in his second incarnation as Governor. I told him that I had clerked for Larrow, and he was effusive in his praise for him. Then he told me his version of the story, which except for describing the grin, did not differ from the Larrow version."

What to Think

Perhaps the proper conclusion of a study of Justice Robert Larrow is that his opinions were more personal than political, just as he himself described his liquor board decision. This is reflected in his interview with Virginia Downs, prepared for the Bar for the celebration of the bicentennial of Vermont in 1977 and published in 2004. He is quoted there as saying:

"The law as I have observed it over the years is getting bigger, more complicated and too impersonal. I think that the personal touch between lawyer and client is tending to disappear for several reasons." With bigger firms with many lawyers, clients did not choose a lawyer, but are assigned to one. Lawyers "really have no direct relation with the client." He said, "A lot of the personal element is gone.... Clients are becoming cases rather than people."⁶¹

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

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¹ The 1914 constitutional amendments, failing to account for a lapse in terms when the legislative session moved from October to January, caused the Supreme Court to resign, and allowed the Governor to appoint his own choices for two positions on the court, irrespective of custom. William C. Hill, "Vermont's Judicial Crisis of 1914-1915," *Vermont History* 38 (1970): 124-138.

² *Burlington Free Press*, 7 March 1974, 1.

³ For a full description of the crisis that arose from allegations of judicial misconduct of three justices, and Justice Hill's retirement, see James Dunn, *Breach of Trust* (Burlington, Vt.: Onion River Press, 2018).

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⁴ Samuel B. Hand, *The Star That Set: The Vermont Republican Party 1854-1974* (Lanham, Md.: Lexington Books, 2002), 201-202, 225-227, 260.

⁵ Paul S. Gillies, "Moralizing Justice: Isaac Fletcher Redfield and the Weight of Responsibility," 39 *Vermont Bar Journal* 9 (Summer 2004).

⁶ *Burlington Free Press*, June 6, 1944.

⁷ *Rutland Daily Herald*, 9 August 1981, 16.

⁸ *Burlington Free Press*, 20 October 1954, 13.

⁹ *Rutland Daily Herald*, 25 October 1962, 4.

¹⁰ *Burlington Free Press*, 19 July 1962, 1.

¹¹ *Brattleboro Reformer*, 10 July 1981, 2.

¹² *Burlington Free Press*, 3 August 1991, 5.

¹³ Justice Robert Larrow, "Interview," May 19, 1981, UVM Archives of Folklore and Oral History.

¹⁴ *Ibid.*

¹⁵ While "I" is rare in majority decisions of the Vermont Supreme Court since the late nineteenth century, there are 20 three-judge panel decisions that end with either "I affirm" or "I reverse," as early as 1991 and as recently as 2014, signed by various justices including John Doolley, Denise Johnson, Marilyn Skoglund, and Chief Justice Paul Reiber.

¹⁶ *F.W. Woolworth Co. v. Commissioner of Taxes*, 133 Vt. 93, 100, 328 A.2d 402, 407 (1974).

¹⁷ *Simpson v. State Mut. Life Assur. Co. of America*, 135 Vt. 554, 560, 382 A.2d 198, 201 (1977).

¹⁸ *In re Goodyear Tire & Rubber Co., Corporate Income Tax 1966, 1967, 1968*, 133 Vt. 132, 139, 335 A.2d 310, 314 (1975).

¹⁹ *Orleans Village v. Union Mut. Fire Ins. Co.*, 133 Vt. 217, 222-223, 335 A.2d 315, 319-321 (1975).

²⁰ *Hill v. Grandey*, 132 Vt. 460, 470-471, 321 A.2d 28, 34-35 (1974).

²¹ *Vermont State Employees Association, Inc. v. State of Vermont*, 134 Vt. 195, 200, 357 A.2d 125, 129 (1976).

²² *In re E.T.C.*, 141 Vt. 375, 380-381, 449 A.2d 937, 940 (1982).

²³ *State v. Paquette*, 146 Vt. 1, 6, 497 A.2d 358, 362 (1985).

²⁴ *Brattleboro Reformer*, 10 July 1981, 2.

²⁵ *Sunday v. Stratton Corp.*, 136 Vt. 293, 302, 390 A.2d 398, 403 (1978). The legislative reaction to the decision led to the enactment of 12 V.S.A. § 513, setting a one year statute of limitations after the cause of action accrues.

²⁶ *In re Eddy's Estate*, 135 Vt. 468, 380 A.2d 530 (1977).

²⁷ *In re Webb's Estate*, 136 Vt. 582, 397 A.2d 81 (1978).

²⁸ *State v. Murphy*, 134 Vt. 106, 353 A.2d 346 (1976).

²⁹ *State v. Christman*, 135 Vt. 59, 370 A.2d 624 (1977).

³⁰ *Smith v. Winhall Planning Commission*, 140 Vt. 178, 436 A.2d 760 (1981).

³¹ *Sorg v. North Hero Zoning Board of Adjustment*, 135 Vt. 423, 378 A.2d 96 (1977).

³² *Town of Bennington v. Hanson-Walbridge Funeral Home, Inc.*, 139 Vt. 288, 427 A.2d 365 (1981).

³³ *Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, 135 Vt. 484, 380 A.2d 64 (1977).

³⁴ *In re State Aid Highway No. 1, Peru*, 133 Vt. 4, 10, 328 A.2d 667, 671 (1974).

³⁵ *Punderson v. Town of Chittenden*, 136 Vt. 221, 388 A.2d 373 (1978), overruling *Harris v. Town of Waltham*, 158 Vt. 477, 613 A.2d 696 (1992). N.B., superseded by *Guntlow v. Board of Abatement, Town of Pownal*, 198 Vt. 174, 112 A.3d 118 (2014), which recognized the lighter standard for tax appeals had not been extended to abatement decisions.

³⁶ Justice Robert Larrow, "Interview," May 19, 1981.

³⁷ *Palucci v. Department of Employment Security*, 135 Vt. 156, 376 A.2d 14 (1977).

³⁸ *Merrill v. University of Vermont*, 133 Vt. 101, 106, 329 A.2d 635, 638 (1974).

³⁹ *International Ass'n of Firefighters Local No. 2287, Montpelier v. City of Montpelier*, 133 Vt. 175, 332 A.2d 795 (1975).

⁴⁰ *Schneider v. Vermont Employment Sec. Bd.*, 133 Vt. 187, 333 A.2d 104 (1975).

⁴¹ *In re J.*, 134 Vt. 480, 485-486, 365 A.2d 521, 525 (1976).

⁴² *Newhall v. Vermont Central Hospital, Inc.*, 133 Vt. 572, 573-574, 349 A.2d 890, 891 (1975).

⁴³ *In re Southwestern Vermont Ed. Ass'n*, 136 Vt. 490, 396 A.2d 123 (1978).

⁴⁴ *Bolkum v. Staab*, 133 Vt. 467, 346 A.2d 210 (1975).

⁴⁵ *In re Lampman*, 135 Vt. 226, 228, 373 A.2d 547, 548 (1977).

⁴⁶ *Bassett v. Vermont Tax Department*, 135 Vt. 257, 376 A.2d 731 (1977).

⁴⁷ *Green Mountain Power Corp. v. Commissioner of Labor and Industry*, 136 Vt. 15, 383 A.2d 1046 (1978).

⁴⁸ *Appeal of Farrell & Desautels, Inc.*, 135 Vt. 614, 614-615, 383 A.2d 619, 620 (1978).

⁴⁹ *University of Vermont v. Town of Colchester*, 136 Vt. 403, 404-405, 392 A.2d 413, 414-415 (1978).

⁵⁰ *Peoples Trust Co. of St. Albans v. Trahan*, 134 Vt. 136, 353 A.2d 357 (1976).

⁵¹ *State v. Cady*, 136 Vt. 29, 31-32, 383 A.2d 607, 608-609 (1978).

⁵² *State v. Howe*, 136 Vt. 53, 68-69, 386 A.2d 1125, 1134 (1978).

⁵³ *Capron v. Romeyn*, 137 Vt. 553, 556, 409 A.2d 565, 566-567 (1979).

⁵⁴ *Preston v. Chabot*, 138 Vt. 170, 185, 412 A.2d 930, 938 (1980).

⁵⁵ *Burlington Free Press*, 3 August 1991, 5.

⁵⁶ *State v. Harbaugh*, 132 Vt. 569, 573, 326 A.2d 821, 823 (1974).

⁵⁷ *Woodmansee v. Stoneman*, 133 Vt. 449, 455, 458-459, 344 A.2d 26, 29, 31 (1975).

⁵⁸ *Herbert v. Boardman*, 134 Vt. 78, 85, 349 A.2d 710, 714 (1975).

⁵⁹ *Gilbert v. Town of Brookfield*, 134 Vt. 251, 253, 356 A.2d 524, 526 (1976).

⁶⁰ *In re Fuller*, 135 Vt. 575, 381 A.2d 1056 (1977).

⁶¹ Virginia Downs, "Robert Larrow: Vermont's Last Elected Supreme Court Justice," *Vermont Bar Journal* 30 (Spring 2004): 17-21.



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WRITE ON

Justice Beth Robinson: A Paragon of Good Legal Writing

In my last two columns for Write On, I analyzed the legal writing styles of Neil Gorsuch and Brett Kavanaugh. For this column, I thought I would bring it closer to home by analyzing the legal writing style of Vermont Supreme Court Justice Beth Robinson. Beth Robinson graduated from Dartmouth College in 1986 and the University of Chicago Law School in 1989. She came to fame in Vermont as the lead attorney in *Baker v. State*, Vermont's same-sex marriage case, and as the long-time chair of the Vermont Freedom to Marry Task Force. Governor Peter Shumlin appointed her to the Vermont Supreme Court in October 2011. The Vermont Senate confirmed the appointment by a unanimous vote in February 2012.

Since 2012, Justice Robinson has published over 180 opinions and dozens of concurrences and dissents. For this column, I read 25 of Justice Robinson's opinions, 10 concurrences, and 15 dissents. Immersing myself in Justice Robinson's jurisprudence has been a delight. She nails every important rule of good legal writing. This column will explain why Justice Robinson is a paragon of good legal writing. It will first focus on Justice Robinson's practice of opening with a succinct and clear statement of the issue in each opinion. Next, the column will list the key principles of good legal writing as described in *Plain English for Lawyers*, a leading legal writing text for decades. I will then apply these principles to Justice Robinson's writing. The column will conclude by highlighting the somewhat more dramatic writing style in Justice Robinson's concurrences and dissents. All of this should convince you that every lawyer can benefit from emulating the writing style of the esteemed Justice Beth Robinson.

I. Clear Issue Statements

Justice Robinson excels at opening her opinions with clear and succinct statements of the issue in the case. In my last column, I praised Justice Kavanaugh for opening his opinions with attention-grabbing images or stories that draw the reader in immediately. Justice Robinson chooses a different approach, equally commendable. She opts for a more straightforward style, explaining the claims at issue with a remarkable brevity of words. This practice follows the advice of many legal writing experts. Yale Law School Professor Noah Messing, for example, says that the opening of a brief

(or, in this case, a judicial opinion), should "orient readers and frame the dispute."¹ The reader should know "within thirty seconds" what the dispute is about.² Justice Robinson's opinions pass this exacting test time and time again. Space will only allow me to quote the openings of five of Justice Robinson's opinions, but these are merely representative of Justice Robinson's style throughout her jurisprudence.

Defendant appeals from his conviction of involuntary manslaughter following a jury trial. Defendant set up a dangerous shooting range on his property and invited others to join him in firing weapons at the site. An errant bullet struck and killed a neighbor in his nearby home. Defendant argues that: (1) a jury view of the scene presented misleading and prejudicial evidence and was not conducted with necessary procedural and evidentiary safeguards; (2) the trial judge impermissibly assumed the roles of an advocate and witness in reviewing the jury view; (3) the court erred by failing to excuse one of the jurors; and (4) his conviction is not supported by the evidence. We affirm.³

Justice Robinson's writing style is nonsense, in contrast to the showier styles of judges like Neil Gorsuch or Richard Posner. This next opening issue statement is another typical example of that style:

Defendant David Tracy was convicted of disorderly conduct by "abusive . . . language," 13 V.S.A. § 1026(a)(3), following a heated exchange with his daughter's basketball coach. The trial court, following a bench trial, concluded that the defendant's language was not protected by the First Amendment to the United States Constitution because it constituted "fighting words." On appeal, defendant argues that the "abusive language" prong of Vermont's disorderly-conduct statute is overbroad and impermissibly chills speech without serving a compelling interest. He further argues that, even if the statute is constitutional on its face, the speech for which he was convicted in this case is constitutionally protected. We agree that the speech for which defendant was convicted is beyond the reach of the abusive-lan-

guage prong of the disorderly-conduct statute, and reverse his conviction.⁴

In legal writing, brevity is the soul of clarity, to wit:

This case raises a facial challenge to Vermont's statute banning disclosure of nonconsensual pornography. 13 V.S.A. § 2606. We conclude that the statute is constitutional on its face and grant the State's petition for extraordinary relief.⁵

Justice Robinson's introductions serve as a kind of executive summary for the busy reader, capturing the entire case in a paragraph:

Neighbors of a proposed solar electric-generation facility appeal a decision of the Public Utility Commission (PUC) approving the issuance of a certificate of public good for the project. At the heart of their appeal is a challenge to the PUC's conclusions that this project—called the Apple Hill project—would not unduly interfere with the orderly development of the region and would not have an undue adverse effect on aesthetics. Both of these conclusions rest in substantial part on the PUC's conclusions that the selectboard of the Town of Bennington took the position that the Apple Hill project complied with the applicable Town Plan, and that the 2010 Town Plan did not establish a clear, written standard. Because the evidence and the PUC's findings to not support these conclusions, we reverse and remand.⁶

My final example of Justice Robinson's introductions comes from a case in which the Court held that emotional distress damages are not available in legal malpractice claims:

This case involves a jury award of emotional distress and economic damages in a legal malpractice action. Defendant challenges the damages award on the grounds that emotional distress damages are not available in a legal malpractice case and that the award of economic damages equal to the amount plaintiff paid to settle the underlying case was improper because

plaintiff failed to establish that the underlying settlement was reasonable. We reverse as to the award of emotional distress damages and affirm as to the economic damages award.⁷

Justice Robinson consistently opens her opinions with a concise issue statement. After reading just a few sentences, the reader has been briefed on the dispute and ready to tackle the legal issues in greater detail.

II. Key Principles of Good Legal Writing

In her introductions and in the body of her opinions, Justice Robinson follows all the key principles of good legal writing. Though there are many competing legal writing guides on the market, they all focus on best practices for creating dynamic legal writing by using vivid verbs in the active voice and streamlined sentences with little to no wordiness. I use *Plain English for Lawyers* by Richard Wydick and Amy Sloan in my Legal Writing I class because it explains these key principles in a concise text (just 162 pages) with helpful examples, practice exercises, and a sprinkling of humor to keep the reader engaged. Here are the main lessons of the book:

- Omit Surplus Words
- Avoid Nominalizations

- Write in the Active Voice
- Use Short Sentences
- Avoid Wide Gaps Between the Subject, the Verb, and the Object
- Use Strong Nouns and Verbs to Persuade⁸

I will next show how Justice Robinson consistently follows these principles.

Omit Surplus Words. Every text cautions against verbosity, but Wydick and Sloan offer a number of constructive ways to omit surplus words. First, they distinguish between “working words” and “glue words” and suggest the balance should be weighted in favor of working words. Working words carry the meaning of the sentence, while glue words hold the sentence together. Glue words are necessary, Wydick and Sloan are quick to point out, for proper grammar, but a preponderance of prepositions, conjunctions, and other glue words “add unnecessary bulk and bog down your writing.”⁹ Here is one of their examples, with the working words underlined: “The ruling by the trial judge was prejudicial error for the reason that it cut off cross-examination with respect to issues that were vital.” And this is their rewrite: “The trial judge’s ruling was prejudicial error because it cut off cross-examination on vital is-

sues.”¹⁰ Simply by eliminating glue words, they turned a 24-word sentence into a 15-word sentence. The rewritten sentence is clearer and livelier. Shortening and enlivening one sentence in isolation may not seem that impressive, but cutting and entire document down by 30% or 40% will unquestionably improve clarity and make your writing more dynamic.

Let’s try this with Justice Robinson. Here is the start of her statement of facts in a DUI case where the defendant sought to suppress statements she made to police officers at her home after an accident.

On a cold January night, a Department of Corrections (DOC) officer was traveling in his vehicle down Christian Street in the Town of Hartford when he encountered defendant walking up the road about 100 feet from a motor vehicle stuck in a snow bank. The back half of the vehicle was encroaching on the traveled roadway, and both the rear reverse lights and dash lights were on. The DOC officer offered defendant a ride home. During the brief trip, defendant identified herself and told the DOC officer that she had driven off the road because she was upset by a fight with her boyfriend. The DOC officer dropped her off at an apartment

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less than a mile away and reported the vehicle to the Hartford Police Department. Officer Muldoon responded, arriving at the vehicle within six to ten minutes. He found documents in the vehicle listing defendant's name and address. The DOC officer, who had returned to the scene, told Officer Muldoon that he had driven the defendant home. Officer Muldoon drove to defendant's apartment and knocked on the door. Defendant's grandmother answered. After Office Muldoon asked to speak with defendant, grandmother invited him in and called for defendant to come out of her room.¹¹

By my count, here is the proportion of working words to glue words in these eleven sentences:

30/13
12/10
6/2
24/5
15/8
9/3
8/3
17/7
7/4
3/0 (Nirvana!)
14/8

Working words predominate in every sentence. Notice how Justice Robinson establishes "flow" by using the "dovetailing" technique I have spoken of in this column. Each sentence is linked to the last by some brief reference ("The DOC officer offered defendant a ride home. During the brief trip . . ."). Remember that this technique of coupling the sentences does not have to appear at the start of the sentence. You can achieve coherence and variety by moving the substantive transition around (as Justice Robinson does with the link, "who had returned to the scene," in the ninth sentence).

Avoid Nominalizations. The verb is the most important word in any sentence of legal writing. Verbs express action. The law is all about action. Cars collide. Plaintiffs sue. Jurors deliberate. Yet lawyers like to bury the action of a sentence in the noun, missing the opportunity for clarity that a vivid verb offers. Lawyers tend to write "The Defendant was in violation of the law," instead of "The Defendant violated the law." Turning a verb into a noun is called a nominalization. Noted grammarian and New York Times contributor Helen Sword calls nominalizations "zombie nouns." She uses this metaphor for nominalizations "because they cannibalize active verbs."¹² The nominalization example I just used is easy to spot, but subtler ones can sneak into our writing, stumbling ashen through our texts, gobbling up descriptive verbs, and drain-

ing sentences of life. One advantage of *Plain English for Lawyers* is that it offers common word endings for nominalizations. You might not know you are using a nominalization, but if you look for these word endings you might find a lively verb hidden inside. So, look for words ending with -al, -ance, -ancy, -ant, -ence, -ency, -ent, -ion, -ity, -ment.¹³

Let's see how Justice Robinson does with nominalizations v. vivid verbs. Here's a sampler. In the first, the Court addressed defendant's claim that the weapon he used to slash a victim's face at the Tunbridge World's Fair was not a prohibited "brass knuckles."

We conclude that § 4001 applies to the weapon here. The statute does not define "brass knuckles," and the legislative history of its enactment is scant. Our conclusion is, however, supported by common understandings of the term "brass knuckles." Defendant points to, and the trial court cited, numerous dictionary definitions of "brass knuckles" to determine its "plain, ordinary meaning." These definitions illustrate, although not exhaustively, the core elements of brass knuckles: a device designed to be gripped in a clenched fist, that fits over the knuckles, and that is designed to increase the damage caused from a strike of the fist.¹⁴

Each of these sentences uses descriptive verbs to explain the Court's holding and none of them contains a bulky nominalization. The same is true for this second example, where the Court reversed a defendant's conviction for disorderly conduct.

A person commits the offense of disorderly conduct by "engag[ing] in fighting or in violent, tumultuous, or threatening behavior" with an "intent to cause public inconvenience or annoyance, or recklessly creat[ing] a risk thereof." 13 V.S.A. § 1026(a)(1). While attempting to collide with a police officer could in some circumstances constitute disorderly conduct, the evidence here is insufficient to fairly and reasonably tend to show beyond a reasonable doubt that, by walking toward Officer Hodges, defendant engaged in fighting or violent, tumultuous, or threatening behavior.¹⁵

The paragraph comes alive through descriptive verbs that drive the story forward without any nominalizations. Now, Justice Robinson commits a bad split infinitive,¹⁶ but otherwise the reader can glean the meaning of the entire case from one para-

graph, and this is due in part to the vivid verbs. This principle is closely related to the next one, so let's move on to the all-important advice to avoid the passive voice.

Write in the Active Voice. Verbs have five "characteristics": Number (singular, plural); Person (first, second, third); Voice (active, passive); Mood (indicative, imperative, subjunctive); and Tense (past, present, future, etc.).¹⁷ I make this rather fine grammatical point for one reason—to stress that the passive voice has nothing to do with verb tense. Legal writers often confuse the two, and that can lead to trouble. *Plain English for Lawyers* makes this point clearly: "No matter what the verb tense—past, present, future, or something more complicated—the key difference between the active and passive voice remains the same: in the active voice, the subject of the sentence does the acting, but in the passive voice, the subject of the sentence is being acted upon."¹⁸ The book keeps its example simple to emphasize this central lesson of active/passive voice. "Active: John kicked the ball. Passive: The ball was kicked by John."¹⁹ My advice to students distills this lesson into an even simpler rule: Keep the subject of the sentence on the left side of the verb and you will be writing in the active voice. Another approach is to ask with each sentence, "Who is doing what to whom?" If you write your sentences in this order, you will be writing in the active voice.

Justice Robinson excels at writing in the active voice. Here is an example:

Some courts have held that personal jurisdiction is a necessary prerequisite to issuing an abuse-prevention order against a nonresident, and have concluded that they did not have personal jurisdiction over the defendants. For example, a Florida appeals court vacated a final injunction against domestic violence issued against an estranged husband in Maryland after the wife fled from Maryland to Florida following husband's violent acts and threats. *Becker v. Johnson*, 937 So.2d 1128, 1132 (Fla. Dist. Ct. App.2006). Explaining that "[t]he constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State," the court concluded that the husband's calls and text messages to the wife's cell phone, when her phone number was a Maryland number and he had no knowledge that she was in Florida at the time, were insufficient to confer jurisdiction on Florida's courts. *Id.* at 1131 (quotations omitted). The court noted that its decision did not leave the wife without an enforceable remedy in Florida; if she got an order

in Maryland that was compliant with the federal Violence Against Women Act, 18 U.S.C. § 2265 (2005), that order would be enforceable in Florida.²⁰

100% active voice. So too here:

On May 26, 2009, a group of teenagers gathered at a vacation house owned by the Flanagans and located near the Okemo Mountain Resort in Ludlow. . . . The gathering began around 7:00 p.m. Defendants Kevin Spear and Nicholas Sweet went to the property to smoke marijuana. Sometime after arriving, Sweet called other teenagers and invited them to join him and Spear at the property. At some point, defendant Nathan Gritman heard about the gathering and called [Dylan] Stinson. Stinson got a ride there from Jessica Francis, who was accompanied by defendants Elizabeth Plude and Austin Lawson. They picked Stinson up sometime after 7:40 p.m. and arrived at the property around 8:00 p.m. Gritman arrived around dusk, having walked to the property by himself. Shortly after dropping off Stinson, Francis left the property. After Francis left, the teens milled around in the driveway, drinking beer and chatting. Stinson was among the individuals who drank beer. As the night progressed, it became chilly. Having spotted an outdoor fireplace, or chiminea, on the Flanagans' deck, the teens decided to build a fire.²¹

You can guess what happened next. The house burned to the ground. But back to my point—every sentence is in the active voice. This paragraph succeeds as an example of good legal writing for a number of other reasons as well, including flow and, as a bridge to the next topic, effective use of short sentences. Here are the number of words in each sentence: 26, 29, 6, 13, 18, 13, 18, 16, 11, 9, 14, 8, 7, and 18. *Plain English for Lawyers* recommends an average sentence length of 25 words (I tell my students to average between 17-20).²² This excerpt easily meets this test. More, I am a big fan of the short sentence for dramatic impact. This excerpt has several short sentences that move the story along descriptively and concisely. "As the night progressed, it became chilly." What a nice, tight set-up for what happened next!

Use Short Sentences. Writing shorter sentences is an essential aspect of good legal writing. Legal writing guru Bryan Garner places it at the top of the list: "As much as any other quality, sentence length will determine the readability of your writing."²³ Professor Messing agrees: "The simple act of shortening your sentences hones your

prose, clarifies your points, keeps readers interested, and makes it easier for you to spot problems in your legal analysis."²⁴ On short sentences, I offer my students this aspirational aphorism from Antoine de Saint-Exupery: "Perfection is finally attained not when there is no longer anything to add, but when there is no longer anything to take away."²⁵

Some of Justice Robinson's sentences are on the long side in her analysis sections, but she consistently keeps her sentences short in the fact sections, to great dramatic effect. Listen to this creepy story:

Complainant and defendant met and began a romantic relationship in December 2006. In May or June 2007, after a heated argument, complainant considered their courtship over. Shortly thereafter, complainant encountered defendant in a store. Upon seeing her, defendant called out that "she is a difficult one." Complainant ignored defendant, paid for her food, and left. Defendant was waiting outside of the store. Complainant explained to him that she wanted their relationship to be finished, and she then turned to walk up the street to her home. Defendant followed complainant, and the two got into a loud exchange, with complainant eventually going inside her home. Subsequently, in June 2007, defendant emailed complainant and invited her to be his guest at a wedding that was to occur that September. Complainant declined. In August 2007, defendant emailed complainant and "berat[ed]" her. On the night of the wedding, defendant called complainant "sound[ing] intoxicated" and invited her to a friend's party, and again complainant declined. Later that same night, complainant was driving in Winoski when she received an incoming call from defendant's phone, which she did not answer. Complainant looked in the rearview mirror and saw defendant on the phone driving "directly behind" her. Defendant followed complainant to her home in Burlington.²⁶

It gets worse, but this excerpt of the disturbing fact pattern illustrates my point. This paragraph summarizes every point I have made so far about good legal writing. Justice Robinson draws the reader right in to this unsettling story by weighting every sentence heavily toward working words. She uses vivid verbs instead of nominalizations. She writes in the active voice (passive voice: 0%). And she writes short sentences (average sentence length: 13.9 words). "Complainant declined." That powerful sentence summarizes the case in two words!

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Avoid Wide Gaps Between the Subject, Verb, and Object. A better way to describe this principle is to phrase it in the affirmative. I tell my students the single most important rule in legal writing is this: Keep the subject, verb, and object close together at or near the start of the sentence. Long gaps between the S-V-O can cause confusion as the reader waits to see, to use the phrase again, who has done what to whom. Other problems can occur as well. For example, the longer the gap between the subject and verb, the greater the risk of errors with subject/verb agreement. Problems with parallel structure can also arise with wide gaps. Yet lawyers create wide gaps between the S-V-O all the time. *Plain English for Lawyers* uses this typical example: "A claim, which in the case of negligent misconduct shall not exceed \$500, and in the case of intentional misconduct shall not exceed \$1,000, may be filed with the Office of the Administrator by any injured party."²⁷ I hope you caught the passive voice. The irony with this poorly constructed sentence is that it ends where it should begin. "Any injured party may file a claim with the Office of the Administrator. The injured party's claim may not exceed \$500 for negligent misconduct or \$1,000 for intentional misconduct."

Most every block quote I have used from Justice Robinson's opinions follows this final rule (check back and see for yourself). I will only add one more as representative of Justice Robinson's practice of keeping the S-V-O close together. This is a case in which plaintiffs challenged a Town's use of federal funds to repair an aging church.

Applying these standards, we first conclude that the trial court overstated the extent to which plaintiffs established a likelihood of success on the merits. Our analysis is framed by the Compelled Support Clause of Chapter I, Article Three of the Vermont Constitution and our caselaw thereunder, limitations arising from the Free Exercise Clause of the First Amendment to the U.S. Constitution, and the record in this case. In light of these considerations, plaintiffs' path to success on the merits is narrow. Plaintiffs face strong headwinds in arguing that the Compelled Support Clause embodies a categorical prohibition against any public funding for physical repairs to a place of worship, and plaintiffs have not yet presented sufficient evidence to demonstrate a high likelihood of success on a narrower claim.²⁸

Some short transitional phrases to help with flow, but otherwise S-V-O close together near the start of every sentence. Nice parallel structure in the second sen-

tence as well. Plus a clever use of metaphor with headwinds—the image captures the plaintiffs challenge well.

III. Justice Robinson's Concurrences and Dissents

Justice Robinson's opinions for the Court are a model of judicial temperance. Justice Robinson's goal is to explain a dispute and the Court's resolution of it with objective, even-handed language, with no showiness or grandstanding. I often say that, in the best legal writing, the writer disappears. The reader focuses on the argument, not the author. This is certainly true of Justice Robinson's opinions. As with most jurists, though, Justice Robinson can be a bit more searing and dramatic in her concurrences and dissents. A few examples of this more acerbic language will be a fitting end to this column.

Here's an example from a 2016 case in which the plaintiff alleged Senators Ted Cruz and Marco Rubio were not constitutionally qualified to run for President. The Court dismissed the claim as moot because Cruz and Rubio had dropped out of the race by the time the Court heard the appeal. Justice Robinson disagreed with this conclusion:

The majority holds that the "capable of repetition" prong of an exception to the mootness doctrine is not satisfied in this case because the prospect of Senator Marco Rubio or Senator Ted Cruz running for United States President in 2020 is a mere theoretical possibility unsupported by any statements or legal filings by either indicating an intent to run in 2020. This holding distorts the applicable legal standard and defies common experience.²⁹

Here is an excerpt from Justice Robinson's stinging dissent in a case where the Court reversed the disorderly conduct charges against a defendant who distributed Ku Klux Klan recruitment flyers at the homes of a Mexican American woman and an African American woman.

[T]he majority's approach—focusing on the presence or absence of physical movement—hones in on the wrong factor. The public harm from threatening behavior does not arise from a defendant's gesticulating while engaging in a threatening tirade; it flows from the threatening tirade itself. Excluding from the statute's reach those public threats that are communicated in words without the accompanying gesticulations would frustrate the purpose of the statute.³⁰

I have time for one more. Here is an excerpt from Justice Robinson's damning dissent in a case where the Court held a motorist had no negligence claim against a property owner when the motorist hit a horse that had broken free from land owned by the defendant but leased to a tenant.

I spill so much ink on this analysis because of the troubling implications of the majority's suggestion that *only* the owner of a farm animal can be liable in tort to a driver injured on a public highway when the animal escapes. In so holding, the majority does far more than merely shield landlords from liability for inadequate fencing of livestock by their tenants. Wholly apart from the landowner-tenant context, the majority's apparent holding would shield property owners who do not own the animals on their property from any duty to maintain adequate enclosures—or any enclosures at all—when they permit the pasturing of animals on their land, even if they retain exclusive possession and control of that land. This position would leave Vermont's common law relating to such cases far outside of the national mainstream. And, it could severely limit the remedies available to individuals who suffer grievous injuries as a result of the negligence of landowners or other possessors of land who fail to take reasonable care in managing the pasturing of animals on their land.³¹

I have one quibble with Justice Robinson's concurrences and dissents. She consistently refers to the Court's opinions by referencing "the majority." We see this all the time, of course, in concurrences and dissents, so Justice Robinson is certainly not alone in this practice. The phrase carries some subtle suggestion that the Court's holding is undermined because not every justice agrees with it. Yet it is this very challenge to the institutional authority of the Court that troubles me. In this, I was deeply influenced by the late, great Justice Allen Compton of the Alaska Supreme Court. I clerked for him in 1995-96. He wrote a number of dissents that year, and he was adamant that they refer to "the Court" and not "the majority." He felt this was an important point. Chief Justice Compton said no case is bigger than the Court's reputation. Any justice in dissent seeking to gain some rhetorical points by referring the "the majority" in the hope of undermining the holding actually undermines the court they serve on.

Struck by Chief Justice Compton's position, I have paid attention to the terms used by dissenters for the past 25 years. The results might surprise you. Justice An-

tonin Scalia, for example, was famous for his take-no-prisoners dissents, yet he consistently referred to “the Court,” not “the majority.”³² Go back to the block quotes above from Justice Robinson’s concurrences and dissents. Wherever you read “the majority,” substitute “the Court.” I think you will see what I mean—Justice Robinson’s arguments are just as strong, but the Court’s power to create precedent and issue mandates as *one unified Court* is reaffirmed.

Conclusion

I have more praise for Justice Robinson’s legal writing on the macro-level, something harder to show in a single block quote. Justice Robinson helps readers navigate lengthy opinions by saying where she will go in an opening roadmap paragraph, and then sticking to the that roadmap with headings or topic sentences that mirror the language of the roadmap. Justice Robinson has a healthy habit of surveying thoroughly the jurisprudence from other states—especially other states in New England—when the Court is facing an issue of first impression. She is a master at the “topic sentence outline” approach to legal writing (something I discussed in my column on Brett Kavanaugh’s legal writing style). For many of Justice Robinson’s opinions, you can pull the topic sentences out of lengthy text, put them in an outline, and understand Justice Robinson’s argument without reference to anything else.

Justice Robinson’s 7+ years of jurisprudence is an impressive achievement in legal writing. Her writing style is approachable and even humble,³³ yet erudite. She applies all the key principles of good legal writing and therefore serves as a role model of everyone desiring to improve their legal writing. I encourage all of you to take your own journey through Justice Robinson’s jurisprudence. You will find that legal writing treasures abound!

Greg Johnson is Professor of Law and Director of the Legal Writing Program at Vermont Law School.

¹ Noah Messing, *The Art of Advocacy* 193 (2013).

² *Id.*

³ *State v. McCarthy*, 2012 VT 34, ¶ 1, 191 Vt. 498, 501, 48 A.3d 616, 620.

⁴ *State v. Tracy*, 2015 VT 111, ¶ 1, 200 Vt. 216, 219020, 130 A.3d 196197.

⁵ *State v. VanBuren*, 2018 VT 95, ¶ 1, 214 A.3d 791, 794.

⁶ *In Re Petition of Apple Hill Solar LLC*, 2019 VT 64, ¶ 1.

⁷ *Vincent v. Devries*, 2013 VT 34, ¶ 1, 193 Vt. 574, 575, 72 A.3d 886, 888.

⁸ Richard C. Wydick and Amy E. Sloan, *Plain English for Lawyers* (6th ed. 2019). The book contains more rules than these that I highlight, but I will focus on these to meet the constraints of this column.

⁹ *Id.* at 8.

¹⁰ *Id.* at 9.

¹¹ *State v. Sullivan*, 2013 VT 71, ¶¶ 2-5, 194 Vt. 361, 364-65, 80 A.3d 67, 70-71.

¹² Helen Sword, *Zombie Nouns*, *New York Times*, July 23, 2012, available at <https://opinionator.blogs.nytimes.com/2012/07/23/zombie-nouns/>.

¹³ Wydick and Sloan, *supra* note 8, at 24.

¹⁴ *State v. Brunner*, 2014 VT 62, ¶ 12, 196 Vt. 571, 576, 99 A.3d 1019, 1023.

¹⁵ *State v. McEachin*, 2019 VT 37, ¶ 14, 213 A.3d 1094, 1098.

¹⁶ See Greg Johnson, *Sweat the Small Stuff*, 40 Vermont Bar J. 37 (2014).

¹⁷ See, e.g., <http://ilmmii.com/verb-functions-verb-characteristics-verbs-kinds-verbs-examples-exercises/>

¹⁸ Wydick and Sloan, *supra* note 8, at 28.

¹⁹ *Id.* at 27.

²⁰ *Fox v. Fox*, 2014 VT 100, ¶ 11, 197 Vt. 466, 472, 106 A.3d 919, 923.

²¹ *Concord Gen. Mut. Ins. v. Gritman*, 2016 VT 45, ¶¶ 3-5 (footnote omitted), 202 Vt. 155, 158-59, 146 A.3d 882, 885.

²² Wydick and Sloan, *supra* note 8, at 36.

²³ Bryan Garner, *Legal Writing in Plain English* 27 (2d ed. 2013).

²⁴ Messing, *supra* note 1, at 247.

²⁵ See https://www.brainyquote.com/quotes/antoine_de_saintexupery_401881

²⁶ *State v. Noll*, 2018 VT 106, ¶¶ 2-4, 199 A.3d 1054, 1056-57.

²⁷ Wydick and Sloan, *supra* note 8, at 40.

²⁸ *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 21, 205 Vt. 586, 596-97, 178 A.3d 313, 320.

²⁹ *Paige v. State*, 2017 VT 54, ¶ 18 (Robinson, J., concurring in the mandate only), 205 Vt. 287, 295-96, 171 A.3d 1011, 1017.

³⁰ *State v. Schenk*, 2018 VT 45, ¶ 49 (Robinson, J., dissenting), 207 Vt. 423, 450, 190 A.3d 820, 839.

³¹ *Deveneau v. Wielt*, 2016 VT 21, ¶ 55 (Robinson, J., dissenting), 210 Vt. 396, 424, 144 A.3d 324, 343.

³² See, for e.g., *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (Scalia, J., dissenting).

³³ See Greg Johnson, *Credibility in Advocacy: Humility as the First Step*, 39 Vermont Bar J. 22 (2013).



WELCOME VBA President BETH NOVOTNY



WHAT'S NEW

An Interview with Carl Lisman, President of the ULC

TERI CORSONES: Today I'm interviewing Attorney Carl Lisman at Lisman Leckerling PC in Burlington. Carl, thank you very much for taking the time to visit with me today. First, congratulations on being elected President of the Uniform Law Commission!

CARL LISMAN: Thank you.

TC: That is quite an honor, and I imagine quite an obligation. Before we talk in more detail about your presidency, I wondered if you could tell us a bit about where you grew up, where you went to school, and how you decided on law for a career.

CL: I grew up in Burlington and went to Burlington public schools. I went to UVM, and then law school at Harvard. I knew from a very early age that I wanted to be a lawyer because my dad and my uncle were lawyers.

TC: Did you go right to work in Burlington after law school?

CL: No, I had the privilege of clerking for Sterry Waterman at the U.S. Court of Appeals for the Second Circuit in New York. Then I spent time working for a large law firm in Manhattan and was there until the time came to move back to Vermont with a young child and spouse in tow.

TC: You wanted to raise your family in Vermont?

CL: Yes, well it was pretty clear to me that I was making too much money to be poor and too little money to be rich. It was not a good time to raise a child in New York City.

TC: Well, your family in Vermont must have been thrilled that you relocated back home.

CL: I think so. But I was out-negotiated by my dad and my uncle; they came to me and said, 'if you don't think you're going to come back to Vermont to take over the firm, we're going to shut it down...We're both ready to retire.' They won me over, and of course they each continued their practice for many years after that!

TC: It's my understanding that you first became a Uniform Law Commissioner more than 40 years ago. How did that come about?

CL: Tom Salmon was the governor who first appointed me. Judge Waterman had been a Uniform Law Commissioner and had expressed that he really enjoyed his time



working with the ULC. So when Governor Salmon asked me if there was a position in state government that I might be interested in, it was the first one that I thought of.

TC: What year were you first appointed?

CL: 1976.

TC: Does the governor in each state typically appoint the commissioners?

CL: Yes, typically it's a gubernatorial appointment in every state. In a few states, though, the president of the Senate, the speaker of the house or the chief justice might have an appointment. And the appointments are commonly for fixed terms.

TC: What is the usual term?

CL: Five years.

TC: How many commissioners are there in Vermont?

CL: There are six. Peter Langrock from Middlebury is officially a life member. Rich Cassidy from Burlington, Ted Kramer from Brattleboro and Stephanie Willbanks from South Royalton are Commissioners. And Luke Martland from the Legislative Counsel is also a member.

TC: It's nice that there's such a geographic and practice area variety to the commissioners.

CL: Yes. Our governors have looked at geography as well as other factors when they make their appointments. We've also been quite lucky in Vermont that it hasn't become politicized.

TC: Does that happen?

CL: It does. From time to time we'll see that a new governor will come into office

and all of the appointees from the state will be purged across the board and new appointees from the governor's political party will be substituted. It's unfortunate when that happens because the ULC is non-political and non-partisan.

TC: Well, I'm glad that it's worked out well in Vermont to have experienced practitioners filling the role of commissioner. I think most lawyers were probably introduced to the Uniform Law Commission in law school studying the Uniform Commercial Code. Is the UCC the most well-known product of the Uniform Law Commission?

CL: Probably but there are others. The Uniform Anatomical Gift Act is a close second. And then perhaps the Uniform Probate Code, much of which is the law in Vermont, and the Uniform Trust Code substantially all of which is the law in Vermont. The Common Interest Ownership Act, which we have in Vermont, is probably not quite as well known as the UCC, but is up there with the UCC. And then there are many others that are widely adopted that aren't as well known.

TC: Do you know how many uniform law commission laws have been adopted in Vermont?

CL: The ULC credits us with 93 enactments.

TC: Wow. Is that fairly typical for a state to have that many?

CL: Some states have more than we do, and some states have fewer; it depends on the state and the willingness of legislatures to rely on the ULC's expertise and product quality.

TC: I'm going to assume it's a very exacting and time-consuming process, but from start to finish how is a uniform law developed?

CL: Good question. We start with suggestions that come from current and former commissioners, law professors, lawyers in public and private practice, the judiciary, the general public. We have had suggestions from outside the country. In each instance someone is saying that perhaps there ought to be a law on a topic.

TC: Is it as simple as somebody going to the ULC website and posting a suggestion, or is there a formal process?

CL: There is no formal process. So some-

times we'll get an email from somebody who says, 'don't you think there ought to be a uniform law on this subject?' And that's all they give us. At the other extreme we might get a 300-page law review article or a white paper on a particular issue.

TC: Interesting. What happens next?

CL: Our standing Committee on Scope and Program vets suggestions and may recommend to our Executive Committee that we undertake a drafting project on that subject, or it may refer it to a study committee of commissioners or to one of our affiliated joint editorial boards further vet the subject and bring it back to the Scope and Program Committee for it to make a recommendation.

TC: I saw from looking at the ULC website that you served as chair of the Committee on Scope and Program in the past. How many suggestions does that committee get each year?

CL: It will vary. The committee meets in person in January of every year and then again at our annual meeting in July of every year. At these meetings, typically we'll have anywhere from 20 to 60 suggestions, some of which we can deal with quickly and some of which take a fair amount of time.

TC: So that must be a big job in and of itself, just reviewing the suggestions.

CL: It is. And, as people become more savvy, by gathering information from the internet, the supporting materials that we get grows exponentially.

TC: How many commissioners are there nation-wide?

CL: There are approximately 400 uniform law commissioners, including life members.

TC: So, that's a good number of people to help with the work load.

CL: Right. Once the executive committee decides that we should go forward with drafting a uniform law, the president appoints a committee of commissioners to undertake that process. The committee invites stakeholders--individuals and organizations who have an interest in the subject matter of the proposed law--to participate at the table with us in the writing and revising of the law. We hire a reporter who will actually do the writing of the act and the official comments. We'll meet typically at least four times over a two-year period in person, and much more often by video conference or teleconference to finish the drafting. We have a requirement that an act be considered at two or more annual meetings; that review is undertaken by all of the commissioners.

TC: So the drafting is a two-year process?

CL: Correct. It's unusual for us to start and complete a uniform law in less than two years.

TC: Well, I know from having worked somewhat on the notary public law that we relied heavily on the drafters' comments, and I remember being very surprised at how detailed the comments were. It's obvious that a lot of work goes into the drafting and the comments.

CL: Commissioners serve without compensation. Our reporters are paid a very nominal amount to do the heavy lifting, and our advisers and observers fund their own participation. People don't generally do what we do unless it's a labor of love. And that's how you get people to spend the time creating these laws and then writing the official commentary to help explain why the provision that you're looking at says what it says, and what thoughts were evaluated and discarded or accepted.

TC: What incredible dedication the commissioners must all have.

CL: Indeed. Of course, if you take a step back and think for instance, about the commercial code, around five trillion dollars are transferred by wire every day. If the law isn't precise or accurate you have a potential disaster on your hands. Making sure that our laws are well-written and well-thought-out is really important.

TC: I read where the Uniform Law Commission was first established in 1892. Has the process worked the same from the beginning?

CL: The first commissioners knew that they wanted to promote uniformity in the law, but struggled about which subjects to start with. They made the decision to start with what we now have the General Partnership Act and the Negotiable Instruments Law, both of which were enacted here. These were done in the early part of the 20th century. In the late 40s and into the 50s, the ULC committed itself to the commercial code and devoted meeting after meeting to it, working through the various articles. Since then we've been less focused on specific areas of the law and are willing to take on subjects that cover a broad scope of categories.

TC: Once the Uniform Law Commission approves a uniform law, how would it typically become law in Vermont?

CL: That happens one of two ways. One way is for commissioners to come back to their states and say, 'here's a really good law that would be beneficial here in our state.' The other is for someone who has an interest in that subject matter, whether it's

a business person or consumer, to take the lead. Either way, you need to find somebody in the legislature who shares an interest in the bill.

TC: And do you publicize what laws are approved?

CL: We send a letter every year to the governor and the chairs of various House and Senate committees. We should add the VBA to the list.

TC: Thank you! I think it would be of great interest to the membership. I know certainly the probate section worked very long and hard on the uniform probate code. Now that I have a whole new understanding of the process, what is your schedule as president?

CL: It's busy. We have drafting committee meetings in the fall and the spring. They typically are weekend meetings where the committee meets Friday, Saturday and sometimes Sunday morning. So, I've attended, since the middle of September, nine of those weekends. In addition, I attend the ABA House of Delegates meetings, I meet with people in Washington to ensure the relationship between the states and the federal government. I have weekly telephone conferences with our Chicago staff and others in our leadership. We have executive committee meetings monthly by video conference. And sometimes I will have to deal with budget issues or personnel issues in the Chicago office and go there. Plus, we have our week-long meeting in the summer every year.

TC: That's an incredible schedule! I remember that when Rich Cassidy was president, he had one of the meetings in Vermont. Do you have plans along those lines during your tenure?

CL: Not another annual meeting. This summer's meeting will be in Madison, Wisconsin and the following summer we'll be in New York City. But we'll hoping to schedule drafting meetings in Vermont next year. One of the privileges of being the president is that you get to figure out where these meetings happen.

TC: Is another privilege that you get to have a focus or a goal for your term?

CL: Yes. My primary goal for these two years is to see if we can come up with a law on the collection, distribution and use of personally identifiable data in electronic transactions.

TC: Interesting and very timely!

CL: Exactly. It doesn't look like Congress is in any position to act on this subject. California and a couple of other states have tried to write comprehensive laws on that subject. California's law will go into effect

soon and they're struggling to revise it already as it is not really workable. So, we're going to be working on that.

TC: Did you read the VT Digger article about the DMV's sale of information?

CL: Absolutely. I also heard on VPR this morning about a television viewing service that makes more money selling advertising than it does on customer subscriptions, which means that it is selling information about what its customers are watching. The internet has grown so fast that it matured as an industry before government could see whether it should be regulated and if so, how and who should do the regulation.

TC: Seems like that's what Congress is grappling with right now.

CL: It's trying. It wasn't so long ago, that our biggest concern was government intrusion into our privacy. But now we will be looking at privacy protections from industry.

TC: It sounds like you've selected an incredibly useful topic to focus on. What would you say has been the ULC's most important contribution during its now nearly 130-year history?

CL: I would say that promoting laws for the states to adopt that are uniform in areas generally where Congress doesn't legislate, such as family law, real estate law, criminal law, trust and probate, business entity law matters. It was all quite a hodgepodge until the ULC came along and we've made it easier for people to function in business and in their private lives. When you go from state to state, there's no good reason in general why the laws should be different.

TC: What has been the most satisfying part about your work with the Uniform Law Commission?

CL: I would say that it has been working with intellectual giants whether they be commissioners, observers, advisers, or reporters. Over the years I've met and have had the privilege to get to know some of the greatest legal minds in this country. And it's been fascinating.

TC: The last question: are there ways for Vermont lawyers, including young lawyers, to get involved in the work of the Uniform Law Commission?

CL: For sure. Certainly, anybody can make a recommendation that we draft a

law and if we go in that direction, they can be an active participant at the national level in drafting the law. They can also work with the Vermont commissioners when we go to the Legislature.

If they want to be a commissioner, then they need to get the ear of the governor and when a vacancy arises, apply for the opening. I became a commissioner when I was six years out of law school. In some ways the Uniform Law Commission shaped my practice.

TC: Well, that's another advantage to working on the ULC! Carl, we're so honored that you're the President of the Uniform Law Commission. Your dedication to the profession is awe-inspiring, especially considering the thousands of hours that you've devoted to helping ensure that laws are fair and uniform.

Thank you for sharing your insights into the very interesting and important work of the Uniform Law Commission.

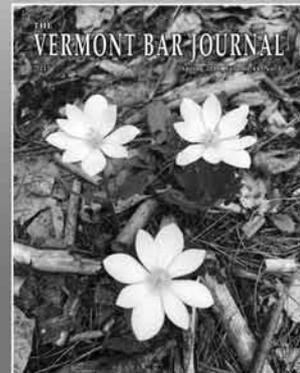
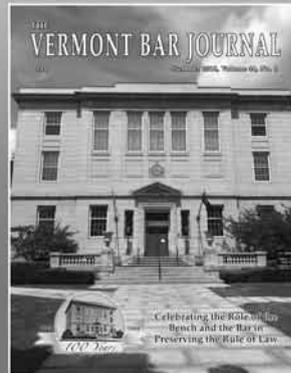
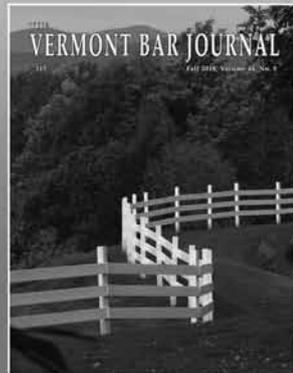
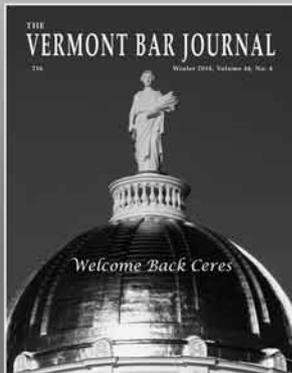
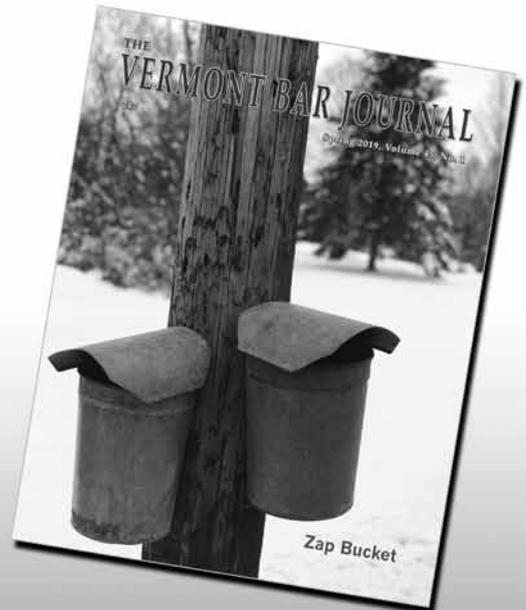
CL: Thank you, Teri; it's been a pleasure.

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



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WHAT'S NEW

The Vermont Legal Food Hub: Supporting Vermont's Agricultural Economy with Pro Bono Legal Assistance

In January, Vermont Law School's Center for Agriculture and Food Systems is launching Vermont's first Legal Food Hub. This new pro bono legal assistance program will offer key support to our state's farmers and food producers, while also opening new doors for legal professionals.

Why Vermont Needs a Legal Food Hub

Vermont prides itself on a vibrant local food culture and strong farm economy, and with good reason. Over 20 percent, or approximately 1.2 million acres, of Vermont's landmass is in agriculture.¹ Home to 6,808 farms, Vermont leads the nation in maple syrup production² and ranks among the top 10 states for certified organic farms (in terms of both acreage and number of farms)³ and for local food sales.⁴ According to U.S. Department of Agriculture (USDA) data, sales from Vermont producers directly to consumers, retailers, institutions, and local distributors like food hubs totaled \$250 million in 2016 alone.⁵

These trends are not accidental. In 2010, the Vermont legislature authorized the establishment of the Vermont Farm to Plate Investment Program and directed it to create a statewide food system strategic plan.⁶ The plan aimed for 10% of all food purchases in the state to be local by 2020. A 2018 report found that Vermont had already exceeded that goal, with local food purchases totaling 12.9% (or \$289 million) of total food purchases in 2017.⁷ The same report found that, since 2010, Vermont's food sector has seen the addition of 6,559 new jobs and the creation of 742 new businesses.⁸

These successes are worthy of recognition and celebration. However, agriculture is an economically risky industry, and Vermont's food and farm community faces significant challenges. Farmers make substantial financial investments in their operations, yet returns are dependent on factors outside of their control, such as weather, natural disasters, and fluctuating local and global markets. This inherent vulnerability can have direct and often adverse effects on the income of many farmers. Moreover, farmers and food entrepreneurs face a variety of laws, regulations, and business challenges in establishing and maintaining viable businesses. At the same time, many beginning and small-scale farmers and food

entrepreneurs often have trouble affording legal services.⁹ The cost of legal services and the thin profit margins associated with farming compounds this problem. As a result, many farmers with businesses of the size and scale commonly found in Vermont may be reluctant or unable to obtain legal services.

Farms in Vermont are predominantly small, family farms.¹⁰ The average Vermont farm is 175 acres, a two percent increase from the 2012 Census,¹¹ but still significantly smaller than the national average of 441 acres.¹² In Vermont, approximately 90 percent of farms meet the USDA definition of small (less than \$250,000 in gross annual sales), and the vast majority of these are family farms.¹³ In fact, of Vermont's 6,808 farms, 72 percent bring in less than \$25,000 in average annual sales; only 16 percent have \$100,000 or more in sales.¹⁴ While the average net cash farm income in Vermont increased modestly from \$20,772 in 2012 to \$26,215 in 2017, it remains well below the national average of \$43,053.¹⁵

Although farm and food clients share much in common with other clients seeking business and legal advice, their distinctive characteristics present the legal community with new challenges and opportunities. Similarly, many small-scale farmers and food entrepreneurs may be unfamiliar with attorneys and the practice of law. Even when transactional legal counseling could significantly benefit farmers and their businesses, they often do not seek out such services. Farmers may not believe that attorneys understand their unique legal issues enough to be of service to them, or to be worth the investment.¹⁶

Through the Vermont Legal Food Hub, we hope to address some of these barriers and help bridge the gap between the agricultural and legal sectors. As we see it, success is not only good for these farmers, food entrepreneurs, and their families, but also for the health and wellbeing of communities across our state.

What is the Legal Food Hub?

The Legal Food Hub is a regional program created by Conservation Law Foundation (CLF) designed to help grow a vibrant regional food system by connecting farmers, food entrepreneurs, and related organizations with pro bono legal services.¹⁷ Jennifer Rushlow, who now serves as Director of the Environmental Law Center at Vermont Law School (VLS), established the first Hub in Massachusetts in 2014 when she was Director of CLF's Food & Farm Program. Since then, the Legal Food Hub has expanded to Maine, Rhode Island, and Connecticut, and has assisted more than 450 farmers, food entrepreneurs, and organizations with a range of transactional and business law matters, leveraging over \$2.5 million in pro bono legal services.¹⁸ Some examples of this assistance include:

- Helping a beginning farmer and butcher form an LLC for their farm, designate ownership of the LLC's property, and create waivers necessary to host workshops;
- Assisting a dairy farmer in entering into a lease-to-own agreement with a farmland investor who planned to purchase a currently operating dairy farm and then lease it to the new farmer;

Legal Food Hub Eligibility Criteria

To be eligible for pro bono legal services through the Legal Food Hub, a farmer or food entrepreneur must meet all of the following income criteria:

- ✓ the farm or food enterprise's net annual sales must not exceed \$30,000; and
- ✓ the farmer or food entrepreneur's annual household income must not exceed 400 percent of federal poverty guidelines; and
- ✓ the farm or food enterprise must have had an annual revenue of at least \$5,000 in the prior tax year or have started operating within the last three years.

Nonprofits and community groups in Vermont whose primary purpose is either to support farmers and food entrepreneurs or to address social justice issues related to the food system are also eligible.

- Working with a diversified, certified-organic farm to review and negotiate the terms of a new operating agreement when the land they leased was sold to new owners;
- Addressing the intellectual property needs of an artisanal cheesemaker seeking to protect her brand and products as she expanded into wholesale markets; and
- Filing for 501(c)(3) nonprofit status for a farmers market federation.¹⁹

Expanding the Legal Food Hub to Vermont

VLS is delighted to partner with CLF to establish a Hub in Vermont. Starting in January 2020, the Vermont Hub will officially begin matching eligible applicants with skilled attorneys willing to provide their legal services pro bono on discrete, transactional business matters. Unlike the Hubs in other states, which CLF administers, VLS' Center for Agriculture and Food Systems (CAFS) serves as the primary administrator of the Vermont Hub and conducts client intake (screening for both income and issue eligibility), placement, and monitoring. Some matters that come in through the Legal Food Hub may be placed with CAFS' Food and Agriculture Clinic. However, we hope to place most matters with participating attorneys throughout the state. There is no obligation to take a particular number of pro bono matters; however, our hope is that participating attorneys will accept at least one each year.

In Vermont, we expect many of the matters to mirror those placed through other Hubs in New England, including:

- Drafting and reviewing contracts, such as an animal purchase agreement or a membership agreement for a food cooperative;
- Drafting and filing articles of incorporation for corporations and cooperatives;
- Filing applications to obtain 501(c)(3) status with the Internal Revenue Ser-

- vice;
- Advising on employee status, including independent contractors versus employees, interns and volunteers, and immigration;
- Establishing a trademark for a small food business's name and logo along with handling with other intellectual property matters;
- Carrying out successful real estate transactions to purchase or lease land;
- Negotiating commercial real estate leases; and
- Ensuring compliance with local land use regulations, state and federal food safety requirements, product labeling, and other regulatory matters.

Farmland Transfer: A Major Area of Need

Attorneys are needed in Vermont to help transition farmland from retiring to incoming farmers. A 2010 report projected that 70% of agricultural land nationwide would change hands over the next 20 years.²⁰ A 2016 report found that 28 percent of Vermont farmers were over the age of 65 and collectively owned 300,000 acres of land.²¹ As of 2017, the average age of Vermont farmers was just shy of 56, and the number of farmers over 65 increased to 30 percent, further supporting the need for farmland transfer assistance as these farmers consider retirement.²²

Importantly, Vermont is also seeing an increasing trend among younger generations looking to become farmers. To qualify as a "beginning farmer" according to the USDA, the farmer must have operated a farm for 10 consecutive years or fewer.²³ In 2017, 30 percent of Vermont producers identified as new and beginning farmers,²⁴ and nearly the same percentage of Vermont farms identified a beginning farmer as the principal producer.²⁵ Notably, these new farmers are increasingly coming from outside of farm families or with non-farming backgrounds.²⁶ In 2010, for example, only half of farmland transfers across the Unit-

ed States were intra-family.²⁷ These data indicate that, while there will be significant farmland turnover in the coming years, a new generation of farmers is poised to step in. However, the data also point to a growing need for specialists in this area, including attorneys, to help exiting and entering farmers maintain the strength and vibrancy of Vermont's agricultural economy.

Attorney Benefits

The Legal Food Hub provides a unique opportunity for the legal community to help farmers, food entrepreneurs, and food system organizations build strong businesses and healthy communities. Providing legal assistance on transactional matters to these food and farm clients also contributes real value to our economy. Indeed, according to the most recent USDA Local Foods Marketing Survey, the local food sector has climbed to an \$8.7 billion industry nationwide.²⁸ Working with individuals in the local food sector to help them become viable also provides the opportunity for law firms and solo practitioners to get more involved in this growing practice area.

Indeed, a recent survey of attorneys participating in the Legal Food Hub in other states affirms this notion, finding that:

- 80% of attorney respondents reported that they are likely to work with pro bono food systems clients in the future;
- 46% of attorneys reported a continued relationship with the client, as paying clients as the farm or food business grows, or on a pro bono basis; and
- 64% of attorneys believe that their time spent with the Legal Food Hub made a positive impact on the local food system.

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

Elizabeth Boepple is an attorney licensed in Vermont, New Hampshire and Maine who has assisted food and farm clients through the Maine Hub. Beth shared the following about her experience:

When CLF first launched the Legal Food Hub in 2014 in Maine, I was already exploring ways to assist farmers and food producers in my law practice. Being a recent transplant from Vermont where, prior to becoming a lawyer, I co-owned a restaurant where we sourced local before it was common, assisting farm and food clients was a natural fit. So, volunteering and help-



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ing spread the word about the Legal Food Hub was an easy extension for me. What better way to give back to the community with my pro bono service than by helping farmers and food producers in need? To know you are providing needed legal services to a community that nourishes us all is reason alone to get involved and sign up as a volunteer lawyer. And if you don't think you know the first thing about how to serve a farmer's legal needs, sign up for one of the Legal Food Hub's CLE seminars. I look forward to seeing you there!

Looking Ahead

There are currently more than 160 firms participating in the Legal Food Hub across

the region. As we officially launch the Vermont Hub, we are seeking additional attorneys to join our growing network of participating Vermont firms. We are also developing educational resources for both attorneys and food and farm stakeholders on a variety of food and agriculture law topics, including Agriculture Law Day at VLS on May 28, 2020, co-hosted with VBA. We hope you will join us.

Sophia Kruszewski is an Assistant Professor of Law and directs the Food and Agriculture Clinic at Vermont Law School. For more information about the Vermont Legal Food Hub, please contact us at LegalHub@vermontlaw.edu, or contact the author directly at SKruszewski@vermontlaw.edu.

¹ Approximately half of that acreage is woodland and half is cropland. U.S. DEP'T OF AGRIC., NAT'L AGRIC. STATISTICS SERV., 2017 CENSUS OF AGRICULTURE, VERMONT STATE DATA, TABLE 1. HISTORICAL HIGHLIGHTS: 2017 AND EARLIER CENSUS YEARS [Hereinafter "VERMONT AG CENSUS DATA"].

² *Id.*; U.S. DEP'T OF AGRIC., NAT'L AGRIC. STATISTICS SERV., NEWS RELEASE: MAPLE SYRUP PRODUCTION UP 7 PERCENT IN VERMONT (June 12, 2019) (Vermont produced nearly half of the country's syrup and exceeded two million gallons in production in 2019).

³ U.S. DEP'T OF AGRIC., NAT'L AGRIC. STATISTICS SERV., NASS HIGHLIGHTS NO. 2017-6, 2016 CERTIFIED ORGANIC SURVEY, SALES UP 23 PERCENT (October 2017).

⁴ U.S. DEP'T OF AGRIC., NAT'L AGRIC. STATISTICS SERV., DIRECT FARM SALES OF FOOD: RESULTS FROM THE 2015 LOCAL FOOD MARKETING PRACTICES SURVEY (December 2016).

⁵ *Id.*

⁶ VT. STAT. ANN. tit. 10 § 330(c)(1) (directing the Vermont Farm-to-Plate Investment Program to "create a strategic plan for agricultural and food system development").

⁷ VERMONT FARM TO PLATE, 2018 ANNUAL REPORT 2, https://www.vtfarmtoplate.com/assets/resource/files/VTFarmtoPlate_AnnualReport_2018_FINAL.pdf.

⁸ *Id.* at 1.

⁹ See Rachel Armstrong, Business as Unusual: Building the New Food Movement with Business Law, YALE CTR. FOR ENVTL. LAW & POL'Y (Nov. 20, 2013), available at <http://vimeo.com/80411482>.

¹⁰ USDA defines a family farm as "any farm organized as a sole proprietorship, partnership, or family corporation" and excludes from the definition farms "organized as nonfamily corporations or cooperatives, as well as farms with hired managers." U.S. DEP'T OF AGRIC., NAT'L INST. OF FOOD & AGRIC., *Family Farms*, <https://nifa.usda.gov/family-farms> (last visited Dec. 7, 2019).

¹¹ VERMONT AG CENSUS DATA, *supra* note 1, at 1.

¹² U.S. DEP'T OF AGRIC., NAT'L AGRIC. STATISTICS SERV., 2017 CENSUS OF AGRICULTURE, NATIONAL LEVEL DATA, TABLE 1. HISTORICAL HIGHLIGHTS: 2017 AND EARLIER CENSUS YEARS 1.

¹³ VERMONT AG CENSUS DATA, *supra* note 1, at 1.

¹⁴ *Id.*

¹⁵ U.S. DEP'T OF AGRIC., NAT'L AGRIC. STATISTICS SERV., 2017 CENSUS OF AGRICULTURE, NATIONAL LEVEL DATA, TABLE 5. NET CASH FARM INCOME OF THE OPERATORS AND PRODUCERS: 2017 AND 2012.

¹⁶ See Rachel Armstrong, *supra* note 9.

¹⁷ LEGAL FOOD HUB, <https://www.legalfoodhub.org/> (last visited Dec. 7, 2019).

¹⁸ LEGAL FOOD HUB, YEAR IN REVIEW: 2018, <https://annualreport.legalfoodhub.org/> (last visited Dec. 7, 2019).

¹⁹ *Id.*

²⁰ THE FARMLASTS PROJECT: FARM LAND ACCESS, SUCCESSION, TENURE, AND STEWARDSHIP, EXECUTIVE SUMMARY AND RECOMMENDATIONS FROM THE FARMLASTS PROJECT RESEARCH REPORT i (2010), <http://www.uvm.edu/farmlasts/projectexecutivesummary.pdf>.

²¹ AM. FARMLAND TRUST & LAND FOR GOOD, KEEPING FARMERS ON THE LAND: NEW RESEARCH UNDERSCORES NEED TO ADDRESS FARM TRANSITION IN VERMONT 2 (January 2016), <http://landforgood.org/wp-content/uploads/Vermont-Gaining-Insights-AFT-LFG.pdf>.

²² VERMONT AG CENSUS DATA, *supra* note 1, at 1.

²³ NATURAL RES. CONSERVATION SERV., *Historically Underserved Farmers and Ranchers*, <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/people/outreach/slbfir/> (last visited Dec. 7, 2019).

²⁴ U.S. DEP'T OF AGRIC., NAT'L AGRIC. STATISTICS SERV., 2017 CENSUS OF AGRICULTURE STATE PROFILE: VERMONT 2, https://www.nass.usda.gov/Publications/Ag-Census/2017/Online_Resources/County_Profiles/Vermont/cp99050.pdf.

²⁵ VERMONT AG CENSUS DATA, *supra* note 1, at Table 69. New and Beginning Producers – Selected Farm Characteristics: 2017.

²⁶ NAT'L YOUNG FARMERS COAL., BUILDING A FUTURE WITH FARMERS II: RESULTS AND RECOMMENDATIONS FROM THE NATIONAL YOUNG FARMER SURVEY 23 (November 2017), https://www.youngfarmers.org/wp-content/uploads/2019/03/NYFC-Report-2017_LoRes_Revised.pdf.

²⁷ THE FARMLASTS PROJECT, *supra* note 20, at 1.

²⁸ LOCAL FOOD MARKETING SURVEY, *supra* note 4.



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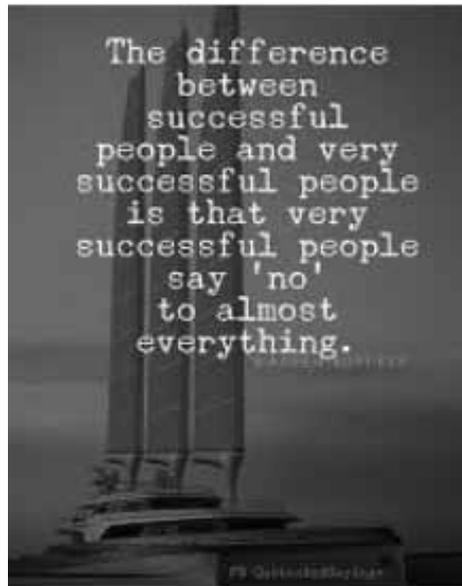
Is it Possible to Do Less to Achieve More?

Prioritizing Doing and Getting Things Done

As a perfectionist and Type-A over-achiever, I find it extremely challenging to just “be.” To carve time out of my life to do what appears to be nothing, just doesn’t make any rational sense. I still recall the first yoga class I ever attended in 2003 just after graduating from law school and starting my legal career while training to run the New York City marathon as my first attempt at 26.2 miles running non-stop. As the yoga teacher told all of us to “find our breath” once we found a comfortable position, I could hear this rather loud voice inside my head saying “What, I am supposed to just sit here and find my breath? This is ridiculous. I have so many things to do right now. Sitting here just focusing on my breath seems like a massive waste of my time. And time is money.” I left the class as soon as the last Om vibration ended and vowed never to waste my time doing “nothing” again!

It was early in my litigation career and I was just starting to integrate the mentality that there may never be any “free” time in my life. One of my partners had pulled me aside when I started and gave me some words of advice: “Now Samara, the biggest mistake new lawyers do is not adequately capturing their billable time. For example, if you are in the shower and you are thinking about your legal analysis or a client’s legal issue, you need to capture that time. If you are out running and outlining your legal memorandum, you need to capture that time. This will be the best way for you to achieve the 2700-hour billable time requirement.” I took these words of advice to heart in a very intense way, which led to billing 3,000 hours/year for a few years in a row, until I started to feel the effects of BURN OUT.

I truly believe everyone handles their



perception of stress differently and individual manifestation of stress can also vary widely. My coping mechanisms were to try to squeeze more and more out of every minute, so I could achieve more so I could make more money and thus, be more successful. The only way I could do that was to numb the stress with alcohol after intense days of triathlon training and litigation tasks. I actually became a triathlete as a “break” from working so hard at the law firm. So, outwardly I appeared healthy and happy, but inside the long-term effects of chronic stress were wreaking havoc with my health. Every 6-8 weeks I would suffer a horrible health setback from walking pneumonia, tonsillitis, mononucleosis and bronchitis. These illnesses were severe and literally stopped me in my tracks...despite my resistance to do so. I still recall having a 103-degree fever and making an error in judgment by contacting a former work colleague, which led to some negative supervisor feedback and made me feel that being sick was also a waste of time that I just

didn’t have time for!

Clearly, my path of obsessive doing was not sustainable and only changed when I realized that I needed to change my current professional path. I desperately wanted to leave the stress. Do something else, anything where I wouldn’t be so stressed and feel so out of control.

Prioritizing Saying “No” and Embody “Being”

It was a drastic shift to consider leaving my current schedule, which started at 4:30 am to fit 10-mile runs in before being the first person working in the law office and then working until I was the last person to leave around 9:00 pm, averaging about 6 hours of sleep every night. It was 2007 and I was still a stressed litigator, but now was also an injured triathlete and after trying all modalities of healing, including: primary care physician, physical therapist, acupuncture, chiropractor and a massage therapist, someone said, “Have you tried yoga?” This question immediately triggered me back to that first yoga class that I didn’t have time for and wasn’t flexible enough to do comfortably. I responded: “I haven’t wanted to do yoga in a group class because I think it is a waste of my time, but I would be open to 1:1 therapeutic sessions.” And my path towards physical healing began with 1:1 therapeutic yoga sessions, where we still focused on our breath, but now I was moving in ways that brought both awareness and healing to my physical body. But then I started to realize something even stranger, I felt happier and less stressed. I was less reactive and just a better human. Kinder and more compassionate to myself and others. This was a MAJOR shift for me!

When I told my counseling therapist this news, she excitedly asked me if I had ever heard of Eckhart Tolle’s book, “A New Earth. I responded I had not, but purchased

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it and upon listening to it on my daily commute my mindfulness awareness exploded. I started to see my existence in the world in an exciting and multi-dimensional way and I wanted to share that with everyone around me. Also, I started to see the value of just making space in my life to "Be" because that is where you can realize all of the magic that is around you. In every moment. I started to yearn for a less stressful life. One where I could spend more time in nature as well as teaching, which has always been something I am passionate about. So, in 2009 I left the litigation job and dove into aligning with my passions around practicing yoga and embodying a more mindful path. I made space for the people I cared about and activities that brought me joy. I spent more time in nature. I moved to Vermont to teach at the law school and started my path towards becoming a yoga teacher.

One of the largest aspects of my yoga teacher training was implementing a disciplined practice of yoga, breath control or pranayama and meditation on a daily basis. I was forced to carve out time to just "be" in these activities as there is no goal to attain or end product to create. It was really hard in the beginning. I would be lying if I didn't still have pangs of tension when I tried to do less instead of attending to my long To Do list. When would I get these items done? Where would I find

the time? But, after I have completed my activities of doing nothing, I feel so much more spacious and open. I look at my tasks and just complete them in a timely manner without any anxiety or stress. *It is as though time extends and expands to allow me to complete my tasks with more efficiency and clarity than if I hadn't taken the time to do less.* It has been my experience that the work product is of a higher quality as a result of my mindfulness practice. So it is truly a win-win: accomplish all tasks in a timely manner with less anxiety and higher quality results! When I am under stress the converse seems to occur – I NEVER have enough time to do what I need to accomplish and feel horrible during the entire task or activity!

With regard to my athletic endeavors, the power of doing less or nothing has had a profound impact on my ability to stay in better shape while doing less. I was initially resistant to attend yoga classes titled "gentle," "yin," or "restorative" because the descriptions didn't involve enough vigorous action. They were actually described as slow and easy with an emphasis on either doing less or nothing at all. I observed my initial cardio-obsessed reaction of "what a waste of time" but then forced myself to grab a bolster, an excessive number of blankets and other props and do as little as possible for up to 2 hours. It wasn't easy

to get both the body and the mind to slow down, but then I started seeing the results in my training outcomes. My body was able to recover from harder workouts faster. I wasn't injured as much or at all. I was more flexible. I was able to sleep through the night without my calves and arches cramping. And I found I had more fun and was more relaxed when I did my workouts and races. Another win-win!

With my journey in mind, my advice is to start small. Take 5 minutes each day to just "be" with no agenda or plan. Find time to take a conscious breath. One where you pay attention to the inhale and the exhale. Just once. Even though it sounds silly. Try it. Find a yoga class that isn't described as vigorous and try to do less than you normally do. Take time to stretch after a workout or a race. Slow down. Notice what arises when you shift your focus from "doing." Just observe your reactions as I did and still do. Without judgment. Just awareness. That is the first step in cultivating your self-awareness, which is so critical in moving away from a stressed out human to one that is relaxed, happy and focused.

And now, I am really pushing my own personal "Being" envelope as I close this decade of mindfulness evolution with a 9-day silent retreat (from December 26 – January 5) at the Vipassana Retreat Center in Shelburne, MA where I cannot speak, read, write or make eye contact. Then, I will be staying at the Kripalu Center in Lenox, Massachusetts for 4-days to re-enter life through a Reflect and Renew Retreat, full of yoga, meditation, nourishing food, journaling and integrating such an intense "Being" experience into "Doing" as I plan my next year and decade! I truly believe that I could lose my mind during this intense period, which may be the point of spending that much time alone with your mind? I look forward to sharing my experience with stressed professionals and athletes in January 2020, so stay tuned! Contact me to be included in my monthly newsletter to learn more (anderson_samara@yahoo.com).

Samara Anderson is a Legal and Policy Advisor for the State of Vermont, Agency of Human Services, a Registered Yoga Medicine™ Yoga Teacher and a social entrepreneur teaching mindfulness to stressed professionals and creating a non-profit community farm in Vermont to use farm animals, nature and mindfulness to heal people. She co-chairs the VBA Lawyer Well-Being Section.



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Economic Impacts of Civil Legal Assistance Programs in Vermont

A Study Commissioned by the Vermont Bar Foundation and Funded by a Grant from the Vermont Supreme Court

Fall 2019

Presented by the Access to Justice Coalition Members:

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Executive Summary

Civil legal aid organization in Vermont are, like many other services in the state, organized along a variety of lines. The primary low-income legal service providers are Vermont Legal Aid, Legal Services Vermont, the South Royalton Legal Clinic at the Vermont Law School, and the Vermont Bar Association's low and pro bono project. Together with the Vermont Bar Foundation, which provides funding to these and other organizations, these groups represent the best of the public service bar and contribute hundreds of hours at low, reduced, or free rates to ensure that the civil legal needs of Vermonters are met.

These organizations along with the Vermont Supreme Court comprise the Access to Justice Coalition, which coordinates efforts among the members and seeks to find new ways to expand access to justice.

The report accompanying this summary represent the coordinated efforts of several individuals and groups. It began in the spring of 2018 when the Vermont Bar Foundation sought a grant from the Vermont Supreme Court to study the impacts of low-income legal services on the greater Vermont economy. Following receipt of this grant, the Foundation convened a work group comprised of representatives from the Foundation and the four primary legal service providers, together with Dr. Ken Smith and the *Resource for Great*

Programs.¹ From October of 2018 through June of 2019, the working group met to compile the most recent data of each group's caseload, outcomes, and judgments. From this information, Dr. Smith and his team were able to identify, analyze, and quantify the value of this work.

In brief, the Study found that:

- The results of this study show that these legal service groups provide two important benefits:
 - They provide direct benefits to their clients through greater access to the legal system to defend their rights and to make meritorious claims.
 - They provide indirect benefits to all Vermonters in the form of a substantial economic return to the larger economy.
- For every \$1 invested in Vermont Low-Income Legal Services, the State and Vermonters see a rate of return of \$11, or a social impact return on investment of 1106%.
- In 2017, Vermont's Low-Income Legal Services had a \$66.4 Million impact on the Vermont economy at a cost of \$6 Million.
- These impacts include:
 - \$32.7 Million in new income for low-income households
 - \$2.6 Million in cost savings (Preventing evictions, foreclosures, and domestic violence)
 - \$31.1 Million impact on local spending.
- This analysis reveals that Vermont civil legal aid organizations are providing essential services that help low-income residents of Vermont each year address critical legal issues directly affecting their families, homes, incomes, jobs, and access to vital services. The gap between the need for these services and the capacity of these organizations to address them is profound.²

Major Findings

1. *Low-income Legal Services Provide an Important Economic Resource at a Low Cost*

The income generated by civil legal aid providers goes directly to low-income Vermonters. This is money in the pockets of individuals and families to purchase the essentials of life. It is food for groceries, rent,

medicine, clothing for school, and reliable transportation. These results are achieved with a relatively low investment in civil legal aid services. This \$11 benefit for every \$1 invested is one of the best in the nation.³ As compared to other states, Vermont low-income legal services provide effective and efficient representation.

2. *The \$66.4 Million impact that low-income legal service providers had in 2017 consisted of three major components:*

- a. *\$32.7 Million in direct dollar benefits.* These payments received directly by low-income clients and other entities as a result of successful legal assistance by legal aid organizations in 2017 included the following:
 - \$10.7 Million in SSI, SSDI, and other Social Security benefits received by low-income individuals and their families.
 - \$17.4 Million in Medicaid- and Medicare-funded reimbursements received by Vermont health care providers.
 - \$4.2 Million in child and spousal support payments to low-income clients of legal aid organizations.
 - \$0.4 Million in Veteran's benefits to veterans and their families.
 - \$0.5 Million in increased wages to immigrants due to attainment of legal permanent resident (LPR) status or becoming U.S. citizens with legal assistance from Vermont legal aid organizations.
- b. *\$2.6 Million in cost savings.* In addition to the direct dollar benefits outlined above, Vermont civil legal aid organizations achieved the following cost savings for clients and other stakeholders as a result of services provided in 2017:
 - \$0.8 Million in preventing domestic violence thereby reducing emergency medical treatment and law enforcement costs.
 - \$1.1 Million in foreclosure avoidance representing costs that were not incurred and were avoided by low-income homeowners, lenders, neighbors, and local governments through the legal assistance provided by the organizations in this study.
 - \$0.7 Million in preventing evictions thereby avoiding costs of emergency shelters and associate social

costs of homelessness.

c. \$31.1 Million from the economic multiplier effect of revenue brought into Vermont from outside the state. A large portion of the dollars received by legal aid clients from such external sources as federal SSI/SSDI benefits and the federal share of Medicaid reimbursements are spent within the state, thereby increasing revenue for local businesses and creating jobs for working Vermonters. This boost to the Vermont economy would not have occurred without the successful legal assistance that eliminates legal barriers to low-income Vermonters' receiving benefits for which they are eligible under the law.

3. Low-Income Legal Services Bring Stability to Vermonters.

Through access to services, income, prevention of homelessness, and protection of basic rights, low-income legal services protect those who are most vulnerable. As these numbers show, these services help individuals and communities recover and obtain economic benefits. More importantly, these needs prevent individuals and families from slipping further into poverty and its accompanying issues. Helping a family fight an eviction keeps them from involuntary homelessness, loss of employment, and potential issues like drug use, and crime. Investing in this type of preventative program is both less expensive and more effective than dealing with these issues as they emerge.

Civil legal aid organizations ease the burden on the Vermont court system. Legal aid advocates enable Vermont courts to operate more efficiently and effectively by helping self-represented litigants prepare to navigate the courts and by hosting community legal education events to inform residents how the legal process works.

4. Access to Justice is more than numbers.

It is about meaningful access to the legal system to resolve disputes, obtain benefits or services owed, or defend rights and processes. Yet this mission also produces economic impacts that ripple outward to benefit many other segments of society. Making local government officials, business people, bar leaders, funders, and other stakeholders aware of the scope and impact of these outcomes is an important opportunity that this report seeks to address.

The substance of this report reflects the significant efforts of Vermont private lawyers to support civil legal aid efforts and to narrow the justice gap. The Vermont Bar Association and local county bar asso-

ciations collaborate with legal aid organizations across the state to identify needs and to promote pro bono service to low-income Vermont residents.

Methodology Used in the Study

The impacts reported above were estimated using a methodology developed by The Resource for Great Programs over the past two decades and applied in 12 states—including New York, Virginia, Pennsylvania, Georgia, and New Hampshire—encompassing more than 80 civil legal aid organizations. This methodology first quantified the number of legal aid cases for which specific outcomes for clients were achieved during the study period, such as avoidance of domestic violence or prevention of eviction. These figures were derived from case statistics and outcomes data collected by the legal aid organizations through their recordkeeping systems.

The outcome figures were then multiplied by estimates of the dollar benefits or cost savings per successful outcome to derive estimates of the total impact. For example, each successful SSDI/SSI case produces an average income stream of \$715 per month for the client that lasts for an average of 11 years. These dollar multipliers were derived from a variety of external data and evaluation results such as government databases and analyses, research papers and reports, and various models and surveys such as the Regional Input Output Multiplier System (RIMS II) maintained by the U.S. Bureau of Economic Analysis.

Details regarding the data sources, computations, and assumptions used for deriving the estimates produced by this study are provided in appendices to this report, available from the Vermont Bar Foundation at www.vtbarfoundation.org.

Conclusion

This study has revealed that the civil legal aid organizations funded in part by The

Vermont Bar Foundation are providing essential services that help thousands of low-income residents of Vermont each year to address critical legal issues directly affecting their families, homes, incomes, jobs, and access to vital services. The gap between the need for these services and the capacity of these organizations to address them is profound.

The "justice gap" represents both a challenge to the justice system and an unrealized opportunity for the Vermont civil justice community and its supporters to produce even more profound economic and societal benefits for low-income Vermont residents and the entire community. Every additional \$100,000 of funding enables legal aid organizations to generate an additional \$1.1 Million in economic benefits. The findings of this study have demonstrated that additional investments aimed at bridging the "justice gap" not only will help many more people, but also will have dramatic economic impacts that benefit all Vermonters.

¹ The Resource for Great Programs is a national research firm dedicated to providing strategic support to civil justice organizations that seek to expand access to justice for low income people. Details about The Resource may be obtained at www.GreatPrograms.org.

² The Vermont Committee on Equal Access to Legal Services published a report on Vermont's low-income legal needs in 2001. https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/ls_VT_clns_2001.pdf. A subsequent study focusing on older Vermonters was published in 2010 by Vermont Legal Aid. https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/ls_VT_Elderclns_2010.pdf.

³ For a broad comparison, see the American Bar Association's Collection of State Needs Assessments and Impact Studies, available at https://www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/atj-commissions/atj-commission_self-assessment_materials1/studies/.



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The Ins and Outs of Tail Coverage

To this day I still get the occasional call from an attorney wanting to know how to go about purchasing a tail policy and my response is always the same. I need to make sure that the caller understands there really is no such thing as a tail "policy." Clarification on this point is important because confusion over what a tail is and isn't can have serious repercussions down the road. To make sure you don't end up running with any similar misperceptions, here's what you need to know.

An attorney leaving the practice of law can't purchase a malpractice insurance policy because he or she will no longer be actively practicing law. There simply is no practice to insure. This is why an attorney can't buy a tail "policy." What you are actually purchasing when you buy a tail is an extended reporting endorsement (ERE). This endorsement attaches to the final policy that is in force at the time of your departure from the practice of law. In short, purchasing an ERE, which is commonly referred to as tail coverage, provides an attorney the right to report claims to the insurer after the final policy has expired or been cancelled.

Again, under most ERE provisions, the purchase of this endorsement is not one of additional coverage or of a separate and distinct policy. The significance of this is that under an ERE there would be no coverage available for any act, error, or omission that occurs during the time the ERE is in effect. So for example, if a claim were to arise several years post retirement out of work done in retirement as a favor for a friend, there would be no coverage for that claim under the ERE. This is why you hear risk managers say things like never write a will for someone while in retirement. I know it can be tempting, but don't practice a little law on the side in retirement because your tail coverage will not cover any of that work.

Another often misunderstood aspect of tail coverage arises when an attorney semi-retires and makes a decision to purchase a policy with reduced limits in order to save a little money during the last few years of practice. The problem with this decision is that insurance companies will not allow attorneys to bump up policy limits on the eve of a full retirement, again, because no new policy will be issued. For many attorneys, this means the premium savings that came with the reduced limits on the final policy or two will turn out not to have been worth it and here's why. All claims reported under the ERE will be subject to the available re-

maining limits of the final policy that was in force at retirement and this may not be enough coverage.

By way of example, if you were to reduce your coverage limits from one million per occurrence/three million aggregate to five hundred thousand per occurrence/five hundred thousand aggregate during the last year or two of active practice in order to save a little money, you will only have coverage of five hundred thousand per occurrence/five hundred thousand aggregate available to you for all of your retirement years assuming there was no loss payout under that final policy. In terms of peace of mind, for many that would be an insufficient amount of coverage. Therefore, if you anticipate wanting those higher limits of one million/three million during your retirement years, keep those limits in place heading into retirement.

Unfortunately, while many attorneys hope to obtain an ERE at the end of their career, the availability of tail coverage isn't necessarily a given. For example, most insurers prohibit any insured from purchasing tail coverage when an existing policy is canceled for nonpayment of premium or if the insured failed to reimburse the insurance company for deductible amounts paid on prior claims. An attorney's failure to comply with the terms and conditions of the policy; the suspension, revocation, or surrender of an insured's license to practice law; and an insured's decision to cancel the policy or allow coverage to lapse may also create an availability problem.

An attorney's practice setting is also relevant. Particularly for retiring solo practitioners, insurers frequently provide tail coverage at no additional cost to the insured if the attorney has been continuously insured with the same insurer for a stated number of years. Given that tail coverage can be quite expensive, shopping around for the cheapest insurance rates in the later years of one's practice isn't a good idea as the opportunity to obtain a free tail could be lost. Review policy provisions or talk with your carrier well in advance of contemplating retirement in order not to unintentionally lose this valuable benefit.

The situation for an attorney who has been in practice at a multi-member firm is a bit different. Here, when an attorney wishes to retire, leave the profession, or is considering a lateral move and worried about the stability of the about-to-be-departed firm, some insurance companies will not offer an opportunity to purchase an ERE due to policy provisions. The reason is the firm's

existing policy will continue to be in force post attorney departure. This isn't as much of a problem at it might seem in that the departing attorney will be able to rely on former attorney language under the definition of insured. However, because the definition of insured varies among insurers, you should discuss this issue with your firm's malpractice insurance representative so options can be identified and reviewed well in advance of any planned departure. That said, I can share that under two ALPS policies and as long as certain conditions are met, we provide some of the most comprehensive tail coverage options in the industry, to include free individual EREs in event of retirement, death, disability or a call to active military service.

Be aware that the period in which one can obtain an ERE can be quite limited. Most policies provide a 30-day or shorter window that will start to run on the effective date of the expiration or cancellation of the final policy. There are even a few very restrictive policies in the market that require the insured to exercise the option to purchase an ERE on the date of cancellation or expiration. Given this, you should review relevant policy language well in advance of contemplating departing the profession as the opportunity to purchase an ERE is one you can't afford to miss.

The duration of tail coverage or more accurately the length of time under which a claim may be reported under an ERE varies depending upon what is purchased. Coverage is generally available with a fixed or renewable one, two, three, four, or five-year reporting periods or with an unlimited reporting period. If available to you, the unlimited reporting period would be the most desirable, particularly for practitioners who have written wills during their later years of practice.

The premium charge for an ERE is usually specified in the policy. Often the cost is a fixed percentage of the final policy's premium and can range from 100% to 300% depending on the duration of the purchased ERE.

Given all of the above, if the ERE provisions outlined in your policy language have never been reviewed, now's the time. One final thought, be aware that if the unexpected ever happens such as the sudden and untimely death of an attorney still in practice, know that tail coverage can be obtained in the name of the deceased attorney's estate if timely pursued in accordance with policy provisions. This is why

even attorneys who are not nearing retirement should still have some basic awareness of ERE policy provisions because one just never knows.

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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Civil Case Mediation: A Practical Guide

In this brief article, I hope to convey some practical advice that may prove useful to you whether you represent the plaintiff or a defendant in a civil case. My intention, at least, is to discuss what, in my view, works best for your clients in preparing for and participating in a civil case mediation.¹ By continuing to practice law - by remaining an active trial lawyer - I have been fortunate to remain familiar with the "dance" from the litigator's perspective and, as we all know, it can be a roller-coaster of anticipation and anxiety as we negotiate toward a resolution. If we lawyers feel some anxiety, and we do, imagine what our clients are going through. A mediation is a difficult experience for the lay person, particularly in a case involving serious injury or loss such as a wrongful death case.

Across several thousand cases, I've gained a sense of what methods in mediation work or don't work; what approaches aid your client's cause or may prove counter-productive. Much of what follows is simple common sense (the trial lawyer's most important tool) although several observations may surprise you or seem counter-intuitive.

I always begin a mediation by observing, among other things, that I take very seriously my obligation to be strictly neutral; neither for nor against any party. That principle applies with equal force here. My comments apply to "both sides" except where context dictates otherwise.

I. When To Mediate?

In a recent year, the United States District Court's annual report for the ENE program (in Vermont) revealed that only about one-third of civil cases resulted in full settlement at the ENE session. Anecdotally, we all have a sense that a comfortable majority (or better) of civil cases settle at mediation as a general rule. So, why the low success rate?

Candidly, there are likely multiple factors involved and I don't have an answer. That said, one can ask: are federal (ENE) cases mediating "too early"? Perhaps, but even pre-suit civil disputes often result in settlement without the benefit of any discovery at all. I think the answer may, in part, depend upon whether all parties are both prepared to negotiate and truly motivated to actually settle when they sit down across the table from one another.

Sometimes, both parties (it must be both) are appropriately prepared and motivated even before suit is filed. Sometimes, however, one or several parties - on the eve

of trial - are either unprepared or not motivated or both. Whether the mediation (or ENE) comes "early" or "late", you should resist mediating your case until you are satisfied that you, your client and the opposition team are prepared and willing and able to meaningfully discuss resolving the case.

II. Preparing For The Mediation

A lawyer who is properly prepared for mediation has, at a minimum:

- ensured the right people will be present at mediation in person;
- come to fully understand the existence of, limits of and any controversy concerning insurance coverage for every defendant;
- **KEY:** managed her client's expectations;
- done all that can be done before mediation with respect to any actual or anticipated third party claimants/claims (WC, any lienholder claim, CMS or MSA requirements, etc.);
- anticipated and prepared to meet the opponent's arguments;
- prepared written and oral presentations that are brief and tailored to the specific case (including a decision whether or not [and how] to have the client speak in general session);
- counseled her client to listen, keep an open mind and be prepared to compromise if and when appropriate, and;
- given her client a short course in how a mediation proceeds from widely divergent
- figures to a narrower range to ultimate resolution (or not).

This list applies to all the lawyers — for both plaintiffs and defendants alike. Beyond such generalities though are some key considerations specific to (1) the plaintiff's preparation and (2) the defendant's approach.

A. Plaintiff's Counsel

Experience teaches that a fully-informed defendant (read: insurance company typically) may, right or wrong, choose not to offer enough to settle a case but...a poorly-informed carrier will never pay you a proper amount. You cannot control how hard-working, experienced or skillful the defense representatives you draw in your case may be but you can ensure that you are not the reason for any failure to make a reasonable offer. In other words, in the run-up to mediation, while being careful not to "show weakness" or sacrifice principal, be

helpful in providing relevant information to the people you are trying to get positioned to pay your client. With rare exceptions (and growing ever more rare), the person offering money to you must answer to others either (1) immediately (often to obtain more authority) or (2) later at intra-company audit. This often layered oversight is an unfortunate reality today and cannot be ignored.

Carriers (and some, typically larger, self-insureds) often make decisions at what might be termed institutional speed and/or by committee. Presenting new information, documents or numbers, however accurate, in support of a claim will not lead to an increased offer if the carrier gets this information at or just before the mediation.

There really is no excuse for going into mediation without knowing the existence (and limits) of any potentially available insurance and whether or not there are any coverage issues or whether or not a reservation of rights agreement is in place. Similarly, you need to know the precise amounts of all subrogation, med-pay, worker compensation and any other claims or liens. More than that, you have hopefully either come to an agreement with all such claimants or have made arrangements to conduct contemporaneous negotiations with such lien-holders during the mediation. In some cases, you should insist that a representative of the third party claimant be present at mediation.² Finally, it is no longer acceptable to mediate a case without knowing your Medicare-related obligations (existing and future). Do you have the CMS letter and have you discussed any possible reductions? Is an MSA required? What does this specific insurance company defending this defendant require in terms of protecting the government's interest?

I think the most important aspect of preparing your case for mediation (and beyond) is managing your client's expectations.

Litigation savvy corporate representatives, attorneys and insurance representatives don't need a short course on how a mediation proceeds but the lay person (defendant and plaintiff alike) is entitled to a preview of just what is about to happen. It is important to discuss the process:

- opening session (or not...is there a reason to skip the opening exchange?);
- attendance (who will be present and who will not be present and why);
- confidentiality and private caucus;
- the mediator's role and methods;
- opening demand(s) and offer(s); what to expect and how not to be "put off"

- by numbers;
- the three components to settlement (lien, fee and net...and what, if anything, may be taxable);
- the problem of "friends and family" and the pitfall of "personal needs analysis."

By "personal needs analysis," I simply mean that sometimes a plaintiff will approach his case by focusing upon what he "needs" to take home. Rather than focusing upon what a jury will likely do (after being instructed by the judge about the elements of damages), some plaintiffs will be unable to let go of their firmly entrenched sense of what he or she "needs" to come away with in settlement. In effect, such plaintiffs have added a fourth component to where the settlement dollars will go. It is not just lien, fee and net but (1) lien; (2) fee; (3) what I need to pay off loans from family and friends; to get out of debt; etc. and (4) a net take-home after I'm out of debt. On occasion, such needs or expenses may be a legitimate part of the damages presentation to the fact-finder. At other times, such debts or financial needs, though very real, are not part of the case; are not evidence and won't be heard by or awarded by the jury. Nevertheless, I have mediated quite a few cases where a plaintiff has rejected a reasonable figure because it fell short of meeting his needs to get out of debt, for example, or to make a down payment on a home. I stress the need to be sure your client knows what a jury can and cannot do; what evidence will and will not be admitted on such points. It may seem an obvious point to the experienced litigator but I have seen too many instances of counsel and client at odds in private caucus on the issue of what a jury has the power to hear and award.

As to "family and friends," we all know the risk of a client being told by brothers and sisters and uncles and aunts what his lawsuit is worth.

B. Defense Counsel

In your jurisdiction, do most trial judges permit plaintiff to prove the "retail" value of medical expenses in a personal injury case? Defendants will argue that plaintiffs should be restricted to proving only the amount of medical expenses actually paid rather than the face amount of the medical bills. In Vermont, the weight of authority favors the plaintiff being permitted to prove up the "retail" value of those bills, without regard to the fact that nobody was charged that full amount of those bills. It is important to know how the issue is handled in your jurisdiction.

As mentioned above, whoever is making decisions for the defendant(s) must be both well-informed and timely informed.

Carriers really don't like optimistic defense counsel to turn pessimistic at or just before mediation (or at or before trial for that matter). Reserves must be set and are sometimes set, in part, based upon outside counsel's advice. At a mediation, it is a problem for everyone involved in the process, including the carrier representative, in terms of getting the case settled if, prior to the mediation, a too rosy analysis led to the setting of a too low reserve on this file. In such cases, the mediator's hands can be tied because the carrier representative's hands are tied. Do not expect mediator persuasion to move a defendant from \$X to \$2X at or during mediation. It is one thing to move a defending party from "top dollar" to 10% or 20% above "top dollar" but it is another thing entirely to attempt to persuade a defending party to increase a so-called "top dollar" figure by 50% or more. Increasingly, I am seeing defendants with a very firm sense of what they will and will not pay at mediation when they walk in the door.

In other words, in the run-up to mediation, defense counsel, of course, needs to offer a detailed, thorough and, above all, accurate and realistic assessment of risk so that the carrier understands the insured's risks in the event of a verdict as well as its own risks. I should add that during the mediation itself, in private caucus, it is fine to reiterate your side's strengths but, in my view, private caucus is the time and place to ensure that your client (whichever side you are on) really understands the negative aspects of her case so that her decision making is truly well informed. I too often see counsel in private caucus continue to advocate as if a jury were sitting in the room when it would be more productive to discuss risk. Once your client knows you are prepared to try the case and fully able to do so and after you have insured that your client is well aware of the strengths of her case, be sure to make sure she understands every risk she faces, from the economic costs of trial (overt and covert) to the emotional cost to the merits.

One of the most active debates in the field of mediation is the subject of participation: who must attend the mediation session? We need to maintain a lively debate on the topic because, candidly, it does not admit of any easy answers. As defense counsel, one must be aware of the state and federal rules on point. Must the named individual defendant be present where the matter is fully covered by available insurance and the insured is not at any financial risk? Some feel the defendant's presence at mediation is required. That said, in practice, the named defendant is usually absent and that normally is no obstacle to meaningful and successful negotiations. In practice, I believe counsel should and do con-

fer and agree that the defendant not be required to attend. Absent such agreement, counsel should ask the court for permission to excuse the defendant as the rule, by its express language, requires.

The ENE rule in federal court permits the defendant to remain at home in those cases where the exclusive settlement authority is possessed by the insurance company. However, "settlement authority" is defined to mean the individual attending the session for the carrier has "...control of the full financial settlement resources involved in the case, including insurance proceeds." In practice, what does this mean?

If the defendant is a municipal corporation, it is not practicable to require the presence of a person or persons having such full authority sine the Board of Trustees or a quorum thereof would have to attend (assuming the public notice requirements could somehow be met before discussion and decision are made in any case which is improbable).

If the defendant is a corporation or insurance company, how does one send to mediation a person having such comprehensive authority to settle? If the carrier acts by committee (as, for example, is often or perhaps always the case with medical malpractice insurers), who must attend the mediation?

Is it enough to send:

- a local third party administrator whom some would accuse of serving merely as a "warm body"?
- an employee representative of the involved insurer who has a certain level of authority but must consult others at the local, regional or home office of his employer before exceeding such authority?
- the regional claims manager?
- the national claims manager?

I do not have an answer. The rules typically require a person to attend who has "settlement authority". The federal rule requires the attendance of a person who controls the "full financial settlement resources involved in the case..." In practice, how does this play out and what should you do to increase the chances of having a meaningful mediation?

I think, in practice, it is best to pay attention to this important concern before every mediation. If you represent the plaintiff, you want to know who is attending and roughly what rung on the ladder they stand on; you will want some assurances that this person has authority and access to someone with higher authority should that become necessary. Insisting upon the presence of a VP of claims for a slip and fall case involving \$15,000 in medical bills and a good post-surgical recovery is not likely necessary and may be counter-productive to getting the result you seek for your cli-

ent. That said, you have the right to insist upon someone possessing real authority to be present per the rule. Bring up the issue beforehand rather than wait to find that no one with authority will be coming.

If you represent the defendant, it is best to get an agreement that your client need not be present at mediation in the appropriate case because plaintiff's counsel agrees it is unnecessary or might prove counter-productive or inflammatory. If there is disagreement concerning participation and you cannot reach consensus, seek the court's advice or request that your client be excused or that a particular representative be permitted to attend (perhaps with someone higher up on the ladder available or required to also participate by phone). Communicate on this point with opposing counsel. If you don't, you run the risk of motion practice (and the Court's ire) seeking to have you pay the considerable expenses your opponent incurred before and at mediation for what turned out to be a non-event.³

Finally, please note that, in Vermont federal court, the parties cannot simply agree that a person with settlement authority participate remotely. A motion is required.

III. Presentation at the Mediation

I am glad to have this opportunity to encourage everyone to make only a brief presentation at opening session of most mediations. Making a long presentation (and using video) should be reserved for the rare case indeed. Even high value cases are best handled, in my view, by making a relatively brief presentation. Again, plaintiffs should share mediation (written) statements early on to give the carrier/defendant an opportunity to process that information. Once that has been accomplished, there is no reason to go over the same information again at opening session.

I think it is best to make a brief statement:

- to highlight the strengths of your case;
- to enhance your credibility by acknowledging any obvious strength of the opponent's case ("We realize we have an issue with comparative negligence but...");
- to demonstrate readiness and conviction (while remaining cordial at all times);
- and to definitely give the plaintiff an opportunity to speak (by narrative or in answer to specific questions you put to her) particularly in those cases where the decision-maker (the insurance representative) has never met the plaintiff. (I have witnessed a number of occasions where the plaintiff makes a very good impression on the payor – meeting plaintiff for the first time or

personally observing a wound or injured limb – and the value has gone up considerably as a result).

I think it is best to avoid:

- an over-long presentation;
- video unless it is brief, "clean," helpful and presented without technical delay or flaw;
- emotion unless it is a genuinely emotional case, objectively speaking;
- apology, unless it is appropriate and entirely genuine (if so, an apology can be the most important part of a mediation);
- the "in your face" presentation. If you are in the driver's seat on any issue, point it out but only point it out. Doing more than that (saber-rattling) will invariably be counter-productive. Be firm and be courteous; they go hand in hand;
- confusing your mediation presentation with your opening statement or closing argument. The audiences are entirely different. Your presentations should be entirely different. An opening statement, in length and content, is designed for a lay audience. If you represent a plaintiff, please remember that the insurance person across the table is nothing like a juror.
- insulting your opponent. For your client's sake, never insult, by word or facial expression, your opposing counsel or party or party representative.

Briefly, in conclusion, a word about offers and demands. Unless the defendant is pursuing a counter-claim, the defense always starts from the same number- zero. The plaintiff is at liberty to start wherever the plaintiff chooses to start. With this freedom comes responsibility though. It is an art to determine a starting demand that is not too high yet not too low; a demand that indicates this is a case having a substantial value yet we recognize this is a negotiation process and we'll have to come down. Starting "too high" presents several problems:

1. It will be viewed as stratospheric and a "non-starter;"
2. It will require the mediator to talk the defendant into "ignoring" that number and putting something on the table to get things going (because plaintiff will rightly not give a lower figure without hearing an offer: "We will not bid against ourselves");
3. It will delay arriving at that point in the mediation where both parties will get realistic and start presenting some actual risk to the opponent so that the work can finally begin;
4. It may require bigger moves down-

ward to get into or near to the "ball-park;"

5. It may cause your plaintiff to cry foul: "I've come down \$400,000 and they've only gone up \$40,000 in the last two hours; this is an insult."

Starting too low is a problem too. You run the risk of leaving yourself and your client little or no room to move. It rarely helps to present an opening figure accompanied by a speech that there is little room to move since few will believe that statement however true it may be.

Often, clients (on both sides) will ask: "Why can't I just tell them the most I'll [pay] [take]?!!" Well, one could do that but it is not going to be believed. Rather, the opponent will nearly always believe that if the party will pay/take that amount, that party will pay a little more or take a little less. In other words, as frustrating as it can be to be the lay person, it pays to "dance" and let the process unfold as it will. Oftentimes, mediations are successful yet sometimes they are not. Sometimes, the first session is a prelude to a second session. On occasion, the process teaches us what else has to happen before the conversation can again be taken up at a future session. Be prepared and be patient. Good luck with your case.

James Spink is a trial lawyer with a busy mediation practice. He is a Fellow of the American College of Trial Lawyers. He is a member of the National Association of Distinguished Neutrals.

¹ My experience is limited to civil cases for the most part.

² For example, you should have present at mediation a decision-maker for the worker compensation carrier (which may be at risk for ongoing or future payment of benefits to the claimant) in any significant third-party tort case where the compensation carrier, in effect, is a co-plaintiff and may be looking to close its file.

³ In one case I failed to resolve as mediator, post-mediation motion practice led to an angry admonition from the bench concerning the failure of a particular insurance professional to attend an ENE after being told to attend (with a hefty price tag to reimburse opposing counsel for their time and expenses).



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Pro Bono Award Winner Anne Day, Esq.

Attorney Anne W. Day received the VBA's Pro Bono Award in 2019 for her work with the Low-Income Taxpayer Clinic. Vermont Legal Aid's Sandra Paritz nominated Day, noting that in 2018 alone, Attorney Day had donated 254 pro bono hours. Paritz wrote: "Anne's expertise, hard work, and commitment to providing pro bono assistance to low income taxpayers in Vermont has improved the lives of many low-income Vermonters facing complicated tax disputes with the IRS."

There is a continent of difference between water rights law in the western states and pro bono tax clinics in the Connecticut River Valley. Pro Bono Emeritus attorney Anne Day didn't have a problem bridging those differences.

Mixing interests and careers is not new to Day, who enjoys art, political activism, community service and the law. She earned her undergraduate degree in studio art and English at Williams College, then spent the next 6 years working on political campaigns—including the Dukakis and Bill Clinton presidential campaigns—before attending Boston University School of Law. She worked as an environmental regulations lawyer in Sacramento, then as attorney with the City of Houston, where her practice continued in regulatory work and water law—wastewater, water production, brown fields. Given the geographic area, Day ruefully observed that there was a lot of brownfield work. When her husband was hired at Dartmouth College, she headed east with him.

After a brief stint with a Vermont law firm, Anne Day discovered that litigation was not a good fit for her and she left law practice to concentrate her efforts on community service.

Anne Day volunteered at her son's school and she served for 5 years on four local school boards in the Norwich area, chairing three of them. She was also a member of her local library board. Her legal training was helpful in all of these service activities. "You can spot issues, frame questions, and suggest 'I think we need a lawyer for this,'" Day said. She found real similarities between two jobs half a continent apart. When she was with the City of Houston, Attorney Day handled a \$2.1 billion capital water project, dealing with contractors, construction contracts and engineers. When she ended up on the library's building and grounds committee, the work was similar, albeit with a smaller price tag.

"There is something unique that lawyers can bring through our training and other ex-

periences," she said. Serving on a board is good for lawyers, too. Day remembers reading an article about the law being the loneliest profession—and she agrees. "We work so much alone, at our desks, writing, researching, drafting—anything that can get us out into the community and meeting with others can help ground us."

Day started looking around for projects that needed volunteers and could use her legal skills. "When you're licensed as a lawyer, the one thing you can give that others can't is volunteer legal service." Her search led her to VITA--Vermont Income Tax Assistance--a program established to assist lower income Vermonters and the elderly with tax preparation. Free training for volunteers is provided by the IRS and the Vermont Department of Taxes, and Day signed up. "I did our family tax returns, so this was a logical move," she noted. After the training and passing a test, Day signed up for a 3-5 hour shift one day a week preparing tax returns for low income Vermonters.

It wasn't long before VITA folks noticed that Anne Day was a skilled attorney, and urged her to be in touch with lawyer Christine Speidel with Vermont Legal Aid's Low-Income Taxpayer Clinic. Day's legal services were urgently needed.

The Low-Income Taxpayer Clinic is funded with a grant from the IRS to provide legal assistance to clients in a dispute with the IRS about an audit, tax debt or lien. Although it seems counterintuitive, this IRS sponsorship makes good sense both for the IRS and the taxpayers it serves. Lawyers like Anne Day make sure taxpayers receive the credits to which they are entitled, that errors are corrected and liens released. The end result—the IRS spends less of its time going after taxpayers who have made a simple mistake.

Anne found that taxpayer clients often fell into two categories. One group were individuals who lacked the skills to complete tax returns or manage retirement assets. She remembered one individual who cashed in his IRA but didn't have any tax withheld to cover the tax hit. The amount owed to the IRS was compounded when the taxpayer received an inheritance and then fell victim to financial exploitation. Anne helped untangle the resulting tax snarl, and kept the taxpayer's assets from being seized by the IRS.

A second group of taxpayers often seen by Anne and others at the Tax clinic are people with significant mental health issues. Anne struggled with how to represent them when they had difficulty processing the information she gave them and even more difficulty adhering to the advice she provid-

ed. "You have to learn how to deliver bad news to someone who is emotionally fragile. You have to say, 'you can't do X, but we can get to you Y, which is pretty close,'" she explained. While this was client work that Anne had not done, she got a lot of support from the non-tax lawyers within Legal Aid.

Even with these challenges, or maybe because of them, Attorney Anne Day does not hesitate to recommend pro bono work for younger lawyers. "The work is immediately rewarding. Even if you are working on a small issue, you get immediate positive feedback," she said. "You can get fabulous experience—doing depositions, appearing in court or in front of an agency, meeting and working with client—all things that you might not get for a couple of years in a large firm," she noted. "You will also say to yourself 'now I remember why I wanted to be a lawyer.'"

Anne Day's work with the Low-Income Tax Clinic and VITA ended in August of 2019 when she turned her attention to assisting an elderly relative. Attorney Anne Day will maintain her pro bono emeritus licensing status so that she may continue her pro bono work. This licensing category is not limited to older or retired attorneys—it is available to any attorney who is taking a break from practicing law for remuneration. Day sees emeritus licensing status as especially useful for younger lawyers. "This is something a new attorney can do," she said, noting that a lawyer can get mentoring and in-house teaching while doing useful work for clients of a legal services organization. And the work can make a profound difference in the life of a low-income person.

To illustrate her point, Day told the story of a woman she helped at the tax clinic. The client was homeless, couch-surfing and eating at food banks. She had no money, and was devastated when the IRS got her tax assessment completely wrong, claiming she owed \$75. Anne filed a 12-page analysis and defeated the claim. The client was enormously relieved and grateful. "\$75 was a big deal to her," Day remembered. "These people are invisible," Attorney Day recalled. "You can make a huge impact in their lives with a relatively small amount of tax money saved or refunded to them." While Attorney Day's work at the clinic has ended, she remains open to new pro bono opportunities. Maybe it's even time to work on another presidential campaign, she mused.

Mary Ashcroft, Esq. is the legal access coordinator for the VBA.



Pro Bono Award Winner Ian Carleton, Esq.

Burlington Attorney Ian Carleton weaves a variety of pro bono and low bono into his law practice. He credits his own personal interest and his supportive law firm for the rich legal tapestry that results.

A Boston native, Ian Carleton moved as a child with his family into the changing Vermont landscape of the 1970s. He attended Columbia College to obtain a degree in comparative literature, then earned his JD at Yale. Carleton started to pursue a PhD in literature at Yale, but changed his mind. Two motivators drove this decision: he wanted to return to Vermont “no matter what,” and, although he loved language, he wanted to “use it to help others rather than to think deep thoughts” in an academic setting.

Opportunities opened up for the bright young attorney. Attorney Carleton clerked for federal judge William Sessions from 1999 to 2000, then worked as an associate for Hoff Curtis in Burlington. Carleton joined Sheehy Furlong and Behm in 2003 where he is now a partner.

Carleton is a litigator. He handles complex litigation in federal and state civil and criminal courts, with a concentration on medical and legal malpractice and on intellectual property disputes. But perhaps his most compelling case involved his work to exonerate John Grega.

Grega was convicted in 1995 of killing his wife while they were vacationing with their young son in Dover, Vermont. Grega was convicted entirely on circumstantial evidence—no witnesses and no physical evidences were produced at trial. He received a life sentence without possibility of parole.

Carleton was first contacted about this case in 2004 by the US District Court in Vermont. Would he agree to be appointed to assist a pro se litigant, John Grega, on a recently filed habeas corpus petition? Carleton’s answer was yes. Within a few days, Carleton received a call “out of the blue” from Grega’s mother. “My son is innocent,” she told the young attorney. “I’ll send you the trial transcript, and when you read it you will agree.”

Carleton read the transcript, and he did agree. In his quest for the *habeas corpus* writ, the case ping-ponged from US District Court in Vermont to the Second Circuit Court of Appeals twice, and to and from the Supreme Court in a failed attempt to win cert. This effectively ended the *habeas* pursuit in 2008.

In 2009, Attorney Carleton filed a petition for DNA testing of previously untested biological samples from the scene of Gre-

ga’s wife’s murder. The testing excluded Grega as the source of the most significant DNA sample. Grega was released from prison on August 22, 2012. With Carleton still by his side, Grega readied for re-trial. On August 21, 2013, a day short of a year from his release from prison, the state dismissed all charges.

By then, Vermont had adopted the Innocence Protection Act to provide compensation for those incarcerated after being wrongfully convicted of a crime. (13 VSA §5574). On behalf of Grega, Carleton filed a lawsuit to win compensation for the years Grega had spent in prison. Tragically, his client was killed in a car accident while this civil action was pending. Ultimately, the state of Vermont paid \$1.55 million to settle Grega’s claims against the state. His attorney regrets that Grega did not live to experience the sense of justice. Carleton had strong praise for his client. “Over the 17 years 8 months he was imprisoned for a crime he did not commit, John helped literally hundreds of inmates organize their thoughts, conduct legal research, and write coherent pro se pleadings. He was a smart man and a good writer,” said Carleton, who added “To this day I don’t know how he channeled his energy in that direction rather than becoming bitter given his personal situation.”

Carleton’s work for Grega encompassed 10 years and four different proceedings: the federal *habeas corpus* matter, the petition for DNA testing, the failed re-prosecution case and the post-exoneration civil action. His compensation was a combination of CJA reduced fee payments--“I burned through the CJA cap pretty quickly,”--payments from Grega’s family who took out a mortgage on their home, and hundreds of hours of pro bono time. He ended up with some compensation on a contingent fee basis from the wrongful incarceration, but donated a portion of his fee to New England Innocence Project; he had partnered with a pro bono team from Goodwin Proctor under the NEIP umbrella.

Judge Nancy Waples nominated Carleton for the VBA’s Pro Bono Award. She had known him since their paths overlapped when she was a US Attorney, and again when they were at Hoff Curtis. Judge Waples recognized Carleton’s work as a Criminal Justice Act (CJA) Panel attorney since 2000. “Ian is one of those rare attorneys who continued pro bono representation of his clients in a variety of legal matters long after his CJA assignment was completed,” she wrote. She highlighted not only Carleton’s work in the Grega case, but also as guardian ad litem for children in Vermont Family Division, noting that Car-

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LinkedIn is your professional networking site and resume resource. Join our Vermont Bar Association group and read stories and posts from our members on LinkedIn. Import your LinkedIn profile with ease to our online communities at vbaconnect.vtbar.org and the VBA connect membership directory will display your photo and LinkedIn info.

leton has taken on some of the most difficult cases often on short notice.

Ian Carleton still serves as GAL for young Vermonters, conceding that those cases take more time than expected to do the job correctly. "I meet with the child, with caretaker and teachers," he said. "I do GAL work because I've seen too many criminal cases where the kids were collateral damage." Being a GAL poses different challenges for an attorney. "You do everything you think you need to do, but don't overstep your bounds. Your role is to advise the court, although the temptation is to go beyond that role," Carleton observed. "You don't usurp others involved in the kids' lives."

Carleton also serves as acting judge in Chittenden, Franklin and Orleans counties, hearing cases in criminal and small claims divisions. This work takes the pressure off sitting judges, and has given Carleton a view of justice from a different perspective. "It's not about getting the best out-

come for one side, but crafting a result with facts and the law." Carleton acknowledges that sitting as acting judge has significantly impacted how he practices law: "It reminds me that some arguments are just not worth making, and that judges appreciate lawyers who are selective with their arguments, not wasting time of the court on arguments made just because they can."

As acting judge, Carleton has seen the enormous number of pro se litigants in small claims division. He feels personal reward from explaining the process in a way that makes sense to a non-lawyer, and acknowledges the importance of allowing people to tell their stories. Carleton cited a study done by Judge Helen Toor on what litigants want from small claims court. For them, the most important part of the process is having their story heard. Carleton took Judge Toor's training for acting judges, and still has the original power point presentation. "I refer to it still," he acknowledges, "to recall what happens when

the Plaintiff does not show up, and what to do when the debt collection agency has assignments of debt but does not track those assignments."

Carleton also serves as special counsel to the judicial conduct board. His work is two-fold—he first investigates complaints against state judges, gathers facts, reviews the judicial canons and advises the Board. Then, if the Board decides to bring charges, Attorney Carleton becomes the prosecutor and litigates the case before the board.

Attorney Carleton has dipped his toe in political waters, serving five years on the Burlington City Council, two as chair. He also represented high-profile candidates in election recounts, and served as State Democratic Party Chair when Barak Obama was elected President. But that was several years ago, and there's been little political activity since. "At a certain point I realized that politics is a nighttime occupation. Voter contact happens at night because voters have jobs."

Carleton was missing out on a slice of life during that time. "My kids are not going to be at home very long. And I missed my nights at home." So Carleton now spends time mountain biking with his children, ages 17, 14 and 9. He admits he is not feeling a burning need to engage in political activity. "This is a dark and cynical time in politics," he observed. "I am happier and more useful if I do my part through legal work."

Attorney Carleton didn't ponder long the question of how to get younger lawyers involved in doing pro bono work. "It's incumbent on every law firm of reasonable size to support and push younger lawyers in pro bono work."

"This firm [Sheehy, Furlong and Behm] was incredible in the Grega case." Carleton knew he was significantly underperforming as a partner, but his firm never second guessed his commitment to the case—even though it was to their financial detriment. Ian Carleton feels law firms need to install a belief that the practice of law is about helping people solve problems. "It's important to stay connected to doing the right thing without any expectation of being rewarded—there's an elegance to that," he remarked.

When asked about the importance of pro bono, Carleton didn't hesitate. Pro bono work is hugely important, not just because you are serving a group that needs help, "but because it centers you in what lawyers do for society and why we help our community."

Mary Ashcroft, Esq. is the legal access coordinator for the VBA.



NOMINATE A WORTHY COLLEAGUE FOR PRO BONO SERVICE AWARD

We all know attorneys who have donated many pro bono hours to help disadvantaged Vermonters. Now is the time to recognize those generous colleagues for their good work.

Nominations are now being accepted for the VBA's annual Pro Bono Service Award. The award is given each year to one or more attorneys who have devoted themselves in an outstanding and meritorious way to provide pro bono legal services to the poor and disadvantaged.

Standards for the award reflect Rule 6.1 of the Vermont Rules of Professional Conduct which exhorts lawyers to provide at least 50 hours of pro bono publico legal services per year. The majority of this time should be given without fee or expectation of fee to persons of limited means or to the organizations which serve them.

Nominations for the pro bono award may be made by attorneys, judges, clients or law office staff. The VBA Pro Bono Committee reviews the nominations and selects one or more for recommendation to the full VBA Board.

The deadline to nominate an attorney for the pro bono award is Friday, February 14 by noon. The nomination should include a brief description of the attorney's pro bono legal activities, and should be addressed to VBA's Executive Director Teri Corsones at tcorsones@vtbar.org, with a copy to Mike Kennedy, chair of the VBA's Pro Bono Committee at Michael.Kennedy@vermont.gov.

The VBA Pro Bono Service Award will be presented at the VBA's Mid-Year meeting luncheon on Friday, March 27 at the Hilton in Burlington.

Paralegal Licensure is a Solution

The Vermont Joint Commission on the Future of Legal Services, at the urging of Vermont Supreme Court Justice Reiber, provided its Final Report and Recommendations to the Vermont Bar in September of 2015 on how to increase access to justice for Vermonters.

Within the Joint Commission's Report was the Legal Education Committee's strong recommendation that Vermont adopt a paralegal licensing program. Unfortunately, this recommendation has since languished, but the problems with access to justice in Vermont remain.

Members of the VBA Paralegal Section, Carie Tarte, Corinne Deering, Lucia White and Lynn Wdowiak, in conjunction with Dan Richardson, then-President of the VBA when the Joint Commission Report was issued, now examine whether or not Vermont is ready for paralegal licensure and whether or not paralegal licensure is an appropriate solution to Vermonters' lack of access to justice.

This is the first in a two part series that explores why Vermont is ready for some form of voluntary paralegal licensure and how paralegal licensure can increase Vermonters' access to justice. The second part, written by Attorney Dan Richardson and Paralegal Lynn Wdowiak, will run in the *Vermont Bar Journal's* Spring edition, and will review why paralegal licensure may not be an appropriate answer for Vermont.

Statistics Tell Us Vermont Is Ready

As stated in The Vermont Joint Commission on the Future of Legal Services report, almost three quarters (72%) of Vermont's civil docket is comprised of small claims, collections, landlord-tenant disputes, divorce, and parentage cases. What's more, according to the Vermont Access to Justice Coalition, eighty percent (80%) of all cases in Vermont's docket today have one or more self-represented litigants.

Access to justice at its core involves basic fundamental rights for Vermonters and the stakes are high: losing housing in foreclosure or evictions, losing custody of a child, losing assets in a divorce, or losing money in a collections action. In 80% of these cases, where fundamental rights are on the line and the stakes high, Vermonters are representing themselves.

The main solution thus far in Vermont has been to make the necessary forms and information available on-line. While this increases access to the forms and statutory language, it does little by way of increasing

access to "justice." It is the equivalent of offering to increase transportation options for someone by providing him or her with a free, but completely disassembled car. The Vermont Paralegal Organization ("VPO") has received many requests from pro se litigants over the years asking for assistance on how to complete these on-line forms and guidance as to how and in what court the forms should be filed. Such requests for assistance to the VPO must go unfulfilled, as they would put paralegals in a position of providing legal advice, and hence, engaging in the unauthorized practice of law ("UPL").

The number of questions about forms and the litigation process that the VPO has received pales in comparison with the number of questions our State court clerks field from pro se litigants on a daily basis. Not only are court clerks inundated with legal questions (placing court clerks in the position of potentially dispensing legal advice), once pro se litigants get before judges in merit hearings, they often have no idea how to submit their documents into evidence, nor do they always have the "evidence" or documents helpful or necessary to their case. In fact, they may not even realize that a merits hearing is dispositive on their matter. This creates backlog for the court docket as judges are spending their time talking litigants through the evidentiary rules and process and ultimately postponing hearings until the appropriate evidence can be obtained.

Now imagine a Vermont judicial system in which there is a pool of non-lawyers available (paralegals in particular) who have met certain educational and work experience criteria in a particular area of law, who have been specifically trained in Vermont law for divorce, child support, collections, and landlord-tenant disputes, who have passed an examination on those specific areas of law and have been licensed by the Vermont Supreme Court to assist litigants in those limited legal specialties.

These fictitious licensed paralegals would be capped at what they could charge for services to assist pro se litigants, and while they would not have to work under the direct supervision of an attorney in their designated specialized legal field of license, they have available a Vermont licensed attorney to consult with through a "collaborative agreement," similar to those used between a physician and physician's assistant. Such a system could work to substantially increase access to justice for those Vermonters with no intention of hiring an at-

torney to assist them because they are both too "rich" to qualify for legal assistance through grants and other funding, and too "poor" to be able to afford the services of a lawyer.

The Resources Exist in Vermont--To an Extent

Utilizing a pool of licensed paralegals taps into an already existing resource in Vermont. According to the Economic and Labor Market of the Vermont Department of Labor, as of 2018, there are approximately 670 paralegals in Vermont. While not all of the State's paralegals would opt to undergo voluntary licensure, a larger majority may if the process is straight forward and not cost-prohibitive.

Even if only ten percent (10%) of Vermont's paralegal population were to become licensed, it would mean the availability of more than 60 licensed paralegals to assist the pro se divorce litigants in accurately and timely completion their 813 Financial Affidavits, or to assist pro se tenants in appropriately compiling the necessary documentation for their merits hearing in their dispute with their landlord.

In addition to helping pro se litigants identify and prepare forms, a Vermont licensed paralegal could help increase judicial efficiency by explaining to litigants rules like service of documents on all parties and what evidence may or may not be relevant to their case. He or she could also help litigants organize and outline their case. Litigants who appear in court prepared with this type of information would allow judges to focus on the contested issues without spending as much time on the process.

While Vermont does have the paralegal resources and overwhelming need to increase access to justice, it does not have the staffing or infrastructure to establish an elaborate, lengthy and financially impractical process for paralegals to obtain licensure. One of the major criticisms and likely detractors to the full success of the Limited License Legal Technician (LLLT) program in Washington State is the prohibitive educational and work requirements.¹ Because of the extensive requirements just to sit for the examinations, very few paralegals in Washington have opted to obtain LLLT status. As a result, the costs to implement the LLLT program far exceed the income from participating paralegals.

Utah, the second state to develop a paralegal licensure program, has requirements similar to Washington's LLLT program, but much less daunting. Utah has approved Licensed Paralegal Practitioners ("LPP") to

obtain licensure in specific family matters, small claims, and forcible entry and detainer. Utah's program was enacted in November 2018, so there is little information on its current impact. Like the LLLT, applicants in Utah are required to have at least an associate degree. However, the course requirements are far fewer - an ethics course plus a subject matter course for each area in which they plan to practice - and the pre-application work requirements are half that of the Washington model.

Any paralegal licensure in Vermont would need to be straight forward, attainable, and essentially self-funding. Paralegals would pay for their course requirements and would pay similar licensing and renewal fees as attorneys (application fee, examination fee, character and fitness/background check fee). They would also be required to obtain their own malpractice insurance, as well as meet continuing legal education requirements on a biennial basis. As Vermont's Bar Counsel, Michael Kennedy, noted in his December 9, 2017 blog about paralegal licenses, "we shouldn't make perfect the enemy of good." In other words, "the goal shouldn't be to provide people who can't afford lawyers with access to something that walks, talks and looks like a lawyer. It should be to provide them with something that is better than they have now-which is nothing."

Vermont licensed paralegals would obviously have rates considerably lower than those charged by a lawyer. It is likely that most Vermont paralegals would remain employees of law firms or corporations, in addition to offering limited legal assistance to the public under a licensing program. Having a licensed paralegal offer limited services can benefit the law firm by providing independent revenue, as well as freeing up the attorney's time for more complex matters. Paralegals with the requisite education, experience and specialty training to become licensed paralegals would not have to carry the heavy debt from law school in order to become a licensed paralegal. At most, they would be paying course fees, licensing fees, examination fees, continuing education fees and malpractice insurance fees. As long as these fees remained reasonable and attainable, paralegals desiring to become licensed in specialty fields to assist with access to justice would be able to charge lower, more reasonable rates to the public who cannot afford to hire a lawyer.

Through paralegal licensing, albeit in a limited fashion, the public is thereby protected from the unauthorized practice of law. In many cases, unrepresented litigants are forced to seek information and assistance from the internet, legal software packages, and in the worst case, independent, unlicensed, "non-lawyers" offering services without any oversight from an at-

torney. By allowing licensed paralegals to practice in specialty areas, these trained professionals would be available to assist those people who might otherwise be forced to seek alternative cheaper, less reliable methods of obtaining help. Ensuring that paralegals meet the requirements of holding a limited license to practice in specialty fields would go a long way to reducing the unauthorized practice of law.

Many other states are looking at forms of licensure, regulation, or certification of paralegals to increase access to justice. The Empire State Alliance of Paralegal Associations, Inc. ("ESAPA") recently announced that the majority of paralegals in New York State support voluntary certification. As a result, ESAPA unanimously voted to proceed with creating a state-wide voluntary certification program. ESAPA anticipates implementing the full program in January of 2021. While other states immediately surrounding Vermont may not be actively pursuing a licensure, regulation or certification program for paralegals, states in other parts of the country are establishing these programs or further investigating forms of regulation, certification or licensure.

Certification of paralegals could be a stepping stone to licensure or regulation, also furthering access to justice, as long as the requirement of full attorney supervision is modified. A model in which paralegals are not required to remain under the supervision of attorneys in limited areas is preferable to one which continues to require attorney supervision. Paralegals can already seek voluntary certifications from nationally available programs where all of their work currently requires attorney supervision. Adding another option for certification does not seem like it would address the current abundance of *pro se* litigants because it does not represent a substantial change in our current system. If attorneys are not currently accepting the types of matters that have an abundance of *pro se* litigants, it is doubtful that having a certified paralegal on staff would change that dynamic, since ultimately, attorneys would be required to supervise (and charge for the supervision of) the paralegal's work.

Some states may establish a state certification, with a modified supervision requirement, in order for trained paralegals to actually "practice" in a specified limited capacity, thereby allowing further access to justice. As long as full attorney supervision is still a requirement, however, the system is simply operating under the existing parameters, thereby denying lower income litigants access to justice. Moreover, it is unlikely that paralegals would go through the time and expense to become specially trained, to invest in malpractice insurance, and to take an exam, only to be in the same situation in which they are currently func-

tioning under direct supervision of an attorney.

Seeking a standard of education, experience, and qualifications to be a licensed member of the paralegal profession only protects employers and the public, and at the same time can increase access to justice with the assistance of qualified professionals. It is the wave of the future across the United States and soon more and more states will be following suit, in one way or another, to develop solutions to the gap in justice for lower income litigants and to establish standardized criteria for a professional that is in a position to help fill the gap. All of this is not to say that licensed paralegals are the only answer, but it is to say that licensed paralegals can and should be an answer.

Carie Tarte, RP, AIC, is the VBA Paralegal Section Chair and a Senior Paralegal with the firm of Maley and Maley, PLLC in Burlington, where she assists with personal injury matters. In 2013, Carie obtained both her Registered Paralegal (RP) designation by passing the Paralegal Advanced Competency Exam (PACE) and her Associate in Claims designation by passing four examinations through the Insurance Institute of America.

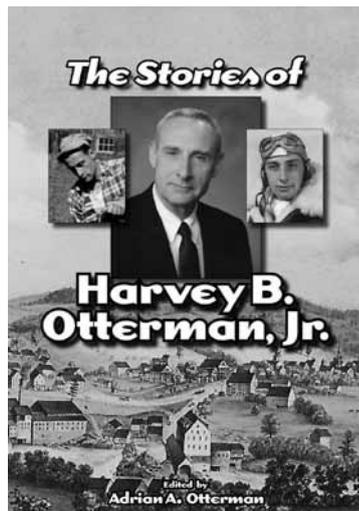
Corinne Deering, RP, is a Senior Paralegal with the firm of Paul Frank + Collins, P.C. in Burlington, where she assists with insurance defense litigation, workers' compensation and personal injury matters. In 2000, Corinne obtained her Registered Paralegal (RP) designation by passing the National Federation of Paralegal Associations' (NFPA) Paralegal Advanced Competency Exam (PACE). Corinne has also served in many capacities on the Board of Directors of the Vermont Paralegal Organization (VPO) and has been a member since shortly after its inception in 1990.

Lucia White, CP, is the Practice Manager and an Intellectual Property Paralegal with Dunkiel Saunders Elliott Raubvogel & Hand, PLLC in Burlington. Lucia has worked extensively in child welfare and currently volunteers at the legal clinic at Steps to End Domestic Violence. She has been president of the Vermont Paralegal Organization since 2017.

¹ Prior to sitting for the licensing examination, paralegals in Washington State interested in becoming LLLT must first complete a minimum associate level degree with 45 of the credits completed in an ABA-approved paralegal program in courses defined in the LLLT regulations plus an additional 15 credits through the University of Washington School of Law in the specific areas of law they wish to become licensed in, and work a minimum of 3,000 hours under the supervision of a licensed lawyer.



BOOK REVIEWS



Stories of Harvey B. Otterman, Jr.
edited by Adrian A. Otterman
(2019)
Reviewed by Daniel Richardson, Esq.

Perpetuation of Memory

This Association shall be called "Vermont Bar Association." Its purposes are . . . to cherish a collegial spirit among its members, and to perpetuate their memory.

Article I of the Constitution of the Vermont Bar Association

There are some legal careers that are formed by a single case. No matter what Ken Starr does with his life, he will always be defined, for better or worse, by his role as special counsel. Johnnie Cochran will forever be linked to OJ and the glove. *To Kill a Mockingbird* makes much out of Atticus Finch's defense of Tom Robinson but leaves us little else of his legal career.

But such fame and singular fortune is the exception to the rule. For the rest of us, our legal careers are composed of a series of trials and trenches, hard fought battles, momentary victories, and sudden reversals. The peaks and valleys of our careers often appear, in retrospect, as less sharp than we imagine. Instead of a range, we glance backward to see that we have only traversed rolling hills.

As noble or as powerful as we like to see ourselves, the truth is that the practice of law is an on-going task that demands our day-to-day attention.¹

Nevertheless, even in our work-a-day careers, we accumulate substance. We do score victories that move the dial on the law, or we become so invested in our case that when we lose we become guardians of what could have been. This explains a lot of who we are. Victories are revisited

like Vikings around a campfire raising the stakes of the tale until we are Beowulf and the opposition, a clever opponent of Grendel-like strength and cunning.

These stories are often the only hallmarks that survive as public attention turns away. If we are lucky and if we practice long enough, we live to see the tide return and revisit these losses or defend our victories. A few years before his death, Bob Gensburg testified on school funding before the legislature. Press coverage noted that the testimony served to warn the legislature of the *Brigham* case and its constitutional limits. But it was also defense of the underlying reasoning of *Brigham*, which had changed the landscape of school funding 18 years prior, and which remained Gensburg's crowning achievement.²

Over the last ten years, we have been fortunate in Vermont to witness the fruition of a generation of legal scholarship. With the twin volumes of Vermont legal history from Paul Gillies, they deep research of Judge Mello dedicated to reviving Moses Robinson's central role in early Vermont jurisprudence, Judge Martin's book deconstructing the Orville Gibson murder trial, and James Dunn's comprehensive analysis of the Jane Wheel saga, we have not wanted for critical analysis and historic records of Vermont legal history and work. At the same time, this boon in scholarship has been missing another critical tradition, the preservation of good stories about the daily practice of law, what I will call the attorney anecdote memoir. The two greatest examples of this genre in Vermont are Peter Langrock's two volumes of *Addison County Justice* and *Beyond the Courthouse* and Deane Davis' two volumes of *Justice in the Mountains* and *Nothin' But the Truth*.

Each of these examples captures a slice of Vermont practice and the personality of the author. Davis' homespun anecdotes capture the practice of the law emerging from the 19th century. It is filled with tales of municipal courts and Justices of the Peace hearing misdemeanor charges. In the books, Davis plays the sly, native fox, always prevailing, but in an "aw-shucks, country lawyer" fashion. Davis is smart, but he is warm and welcoming.

Langrock's tales are more modern. Beginning in the era when rules of procedure and uniform laws came to dominate the practice, they reflect a Vermont that has captured the national attention and the personality of its larger-than-life figure. There is often an animating passion behind the story, a wrong to be righted or an arc of history that needs bending. Langrock is

also smart. He knows he is among the best of his generation, and his stories reflect an awareness of this self-recognized swagger and purpose. Both sets of books are critical reads for anyone practicing law in Vermont. They offer insights into the personalities and styles that have largely defined the practice of law. They are not weighty tales, but they offer a sensibility that what we do and what we practice from day-to-day has some accumulated meaning.

To these examples, a welcome addition has emerged. *The Stories of Harvey B. Otterman, Jr.* (Adrian A. Otterman, ed.) was published privately late last year and is available from Otterman & Allen, the law firm that Harvey Otterman founded in the 1950s. The book is a loving tribute to Bud Otterman a former Orange County State's Attorney, private practitioner, town moderator, legislator, and President of the Vermont Bar Association (1980-81). It is also a window into the life of a small-town lawyer in mid-century Vermont where the old ways that Davis celebrated did not recede quickly or easily into the new frontiers of Langrock's modernizing Vermont.

As with most examples of the attorney anecdote-memoir, *Stories* paints a picture of Bud Otterman, the man. Otterman grew up in Washington, D.C. as part of the greatest generation. He spent his summers in Vermont, but when World War II began, Otterman enlisted and became a diver bomber pilot at the tender age of 19. Saved from combat by the atomic bombs and the ensuing quick end to the war, Otterman took advantage of the GI Bill, went to law school, and moved to his beloved Bradford, Vermont where he took up the practice of law for the rest of his life among the hills of Orange County.

From here, Otterman's story expands to encompass the larger community. By the time, he started practicing in Bradford, the Town had long passed its peak days as a timber center and important stopover on the Connecticut River for the railroad. Otterman takes up the flag and mantle of old tradition in Vermont when he describes the various bank holidays and panics that Bradford experienced in the 1930s. For a young lawyer arriving 20 years later, the scars of these bank scares must have run deep, and the ensuing federal actions that effectively froze the local economy, must have made a significant impact on the young lawyer who was beginning to take stock of the people and community he would be serving for the next fifty years.

Otterman, like Langrock, was tapped by the voters early in his career to serve as State's Attorney for the county. This part-

time position well-suited many young, ambitious law school graduates who could parlay a term or two of public service into community connections and a reputation that would serve their careers well. It does not appear to have been difficult work, but it was steady and gave the young Otterman a lot of trial work. From his stories, Otterman does not seem to have had a passion for this type of criminal work—particularly when compared to his passion for explaining agricultural, commercial, or railroad issues.³ But it was at the end of Otterman's tenure that he found himself at the center of the most unusual case of Orville Gibson's murder.

The Gibson case was a real-life Peyton Place that rocked the tiny town of Newbury, the larger community, and eventually that garnered national attention. Orville Gibson was a prosperous dairy farmer who walked into his barn one December morning in 1957 and was not seen again for another three months when his body was dredged from the Connecticut River. A long list of potential suspects developed, and theories ranging from suicide to vigilante justice circulated in and around the small community. While secrets and speculation abounded, there was little hard evidence to prove what happened or who did it. Two primary suspects emerged, Ozzie Welch, a local janitor, and Frank Carpenter, a down ne'er-do-well, but the silence of the town ensured that what little connected them to the murder would not be enough.

Otterman tried the first of two cases against Ozzie Welch. This trial, which was not the more well-known one defended by Attorney Dick Davis, ended in a directed

verdict for the defense and largely marked the end of Otterman's law enforcement career. Perhaps not so surprisingly knowing the personality of the man, Otterman writes about the case with no bitterness or personal antipathy. For him, the outcome was what the facts and the law required. He did his job to the best of his ability, and there is no shame in losing if you play well. At the end of his version of the Gibson murder trial, he notes that the "defendants and their families had every right to consider themselves exonerated."

This is the irony of Otterman's *Stories*. He is perfectly comfortable letting go of the Gibson case because it was what the community rendered for a verdict. This stands in high contrast to the last third of the book, which is derived, in part, from speeches or notes that Otterman drafted on various issues of the day ranging from assistant judges to Act 250 to protecting the American flag. For the most part, Otterman's opinions, many given on the floor of the General Assembly, do not reflect the current political tide. They are prickly and cranky. They are the statements of someone who knows history is turning away from him but stubbornly holds his ground. In this respect, Otterman's book is a pure distillation of what older Vermonters must have seen as the wave of hippies, yuppies, and back-to-the-landers who came sweeping up into the quiet hollows and gores. In each of these pieces, Otterman stands as a conservative rail against the forces that were washing across the state. In each speech, he articulates a position usually grounded on the traditional Vermont values of thrift, self-reliance, and

community. Here we see Otterman fighting against the forces that were liberalizing his beloved rural corner of Vermont and fighting for the values that he saw fading with this change. The Otterman who could shrug off the trial court loss in Gibson cannot abide by the loss of place.

The great joy of reading attorney anecdote-memoirs is of course to be found in the stories. Otterman does not disappoint here, and he reveals himself to be a thoughtful, low-key, and self-deprecating Vermonter. Otterman playfully recounts his first title search that required him to help the town clerk hay a field in exchange for opening up the land records. He also tells of learning as a prosecutor not to put a preacher on a jury as some take the Christian charge of 'turn the other cheek' to mean acquittal at all costs.

In this respect, Otterman's *Stories* read like the man. In comparing *Stories* to either *Addison County Justice* or *Green Mountain Justice*, it is hard not to notice the contrasts. Both Langrock and Davis write about themselves and their triumphs. But Otterman is willing to admit defeat and looking a little sheepish in the aftermath of a trial.

The tag-line to the 1989 Blake Edwards film, *Sunset*, purported that the film was "All true . . . give or take a lie or two." This often true with the attorney anecdote-memoir, and one can almost see Davis and Langrock glossing over the rough patches emphasizing the storytelling over point-by-point veracity. Otterman, however, is a quieter storyteller. He emphasizes the truth even when it leaves him out of the story.

For Otterman, the lesson time and time



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again comes back to place and to community. Not only is all politics local, but in Otterman's writing, it is the *sui generis* of common sense and decency. Otterman's stories put you into the mind of his time and his territory. We come to understand his rock-ribbed conservatism because we come to understand this place and this time. Otterman occupied one of the most conservative corners in what was at the time one of the most conservative states. Otterman's *Stories* reflect these traditions and the lessons that spawned them.

Otterman, like Langrock and Davis, also revels in the beauty of the simple well-tried case. Otterman describes winning a speeding ticket prosecution despite the elaborate reconstruction and presentation of the defense based on a single miscalculation. The defense argues that the defendant's alleged speed was impossible given the distances involved and lays out then-complicated measurements and math. Otterman stands up and notes that the defense's elaborate theories can be ignored since a mile is made up of 5,280 feet and not 5,820 feet as the defense had written. As trial attorneys, we live for such days, and Otterman's keen eye captures a number of these wonderful moments.

In all, *Stories* is filled with smart, gentle tales of Orange County law. Otterman was a successful lawyer who saw the law as a tool of common sense, but he was at heart a man of his community and writes of a Vermont that is neither folksy nor secretly progressive. These are rural folk who work hard, who abide by a moral code, and who prize these values in themselves and others. There are no shocking revelations or unexpected opinions in the *Stories*. The tales and commentaries flow like the hills into a series of ups and downs, trials, trenches, and travails. Common sense, much more than cunning and wit, is likely to carry the day. Reading *Stories* is a chance to spend a little time with Otterman, which in and of itself is a pleasure. Like his fellow attorney anecdote-memoirist, he gives you the gift of place told in his own voice. You cannot help but enjoy your time with him. It is this preservation, the perpetuation of memory, that is Otterman's real gift. Upon finishing this slim volume, you come away with a fuller sense of Otterman and his community, which is really a larger glimpse into those practitioners who came before and the connection to that past, which informs our present.

Stories ends like Otterman on a perfect note of grace. Otterman, at age 86, walked out of his house shortly after New Year's Day 2012 to work on a brush pile. Chainsaw and loppers in hand, he stopped for a picture in full duck coveralls and gave a gentlemanly tip of the hat to his wife. He then trudged up the hill for the morning

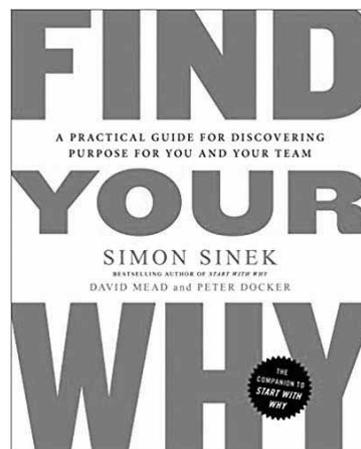
chores where he suffered a fatal heart attack and was found later that day. As his grandson and editor writes, "like any good Vermonter, he left behind two years' worth of firewood cut, split, and stacked."

Dan Richardson, Esq. is a past-president of the VBA and VBF and has a civil litigation practice at Tarrant, Gillies & Richardson in Montpelier.

¹ How many of us have failed to follow the general advice to take the day off following a win in court and have instead returned to the office to start plugging away at the next deposition, motion, operating agreement, bond opinion, or title search?

² Amy Ash Nixon, *Lawmakers Reminded of Findings in Brigham Case*, VTDigger.org (Feb. 15, 2015), at <https://vtdigger.org/2015/02/12/lawmakers-reminded-findings-brigham-case/>; see also Mark Johnson, *Lawyer Who Argued Landmark Case Leading to Act 60 Dies*, VTDigger.org (Nov. 14, 2017), at <https://vtdigger.org/2017/11/14/lawyer-argued-landmark-case-leading-act-60-dies/>.

³ See Chapters entitled, the Railroad Era, The Curious Case of the Shrinking Haybales, the Sniper, and The Milk Co-op.



Find Your Why: A Practical Guide for Discovering Purpose for You and Your Team

By Simon Sinek et al.
(2017)

Reviewed by Anna Vaserstein, Eq.

What if someone said you are good? That you can be happy? That you have a purpose? And promised to help you find it? Wouldn't you want to believe? (and buy the book?). In his book, *Find Your Why: A Practical Guide for Discovering Purpose for You and Your Team* (2017), Sinek creates a tidy model of human behavior, called the "Golden Circle," that he claims, follows the biological structure of our brains. Imagine three concentric circles. The outer circle is entitled "What." The "What" circle encompasses a person's actions, wherever they find themselves (i.e. at work, at home, etc.). The middle circle is entitled "How." It describes how a person behaves. The in-

ner circle is entitled "Why." While the other two circles are linked in the human brain to reason and language, the "Why" circle, Sinek says, is part of the language-less limbic brain. The "Why" circle is the person's motivation or purpose. Once the "Why" is identified, Sinek claims that one can achieve success and fulfillment in acting in a way that furthers one's purpose.

Sinek claims that everyone has a single "Why" or purpose which is always positive. Take for example Sinek's own stated purpose: To inspire people to do the things that inspire them so that together, we can change the world. *Id.* at 36. Here are a few more examples of "whys": to propel positive change so that people can live a more fulfilled life (*id.* at 80), to propel people forward so that they can make their mark on the world (*id.* at 81).

While Sinek's model of human behavior may be clothed in the trappings of science, my guess is that most biologists would argue that the "why" purpose of any living organism, humans included, is survival and passing on of genetic material, rather than "inspiring others." I think Sinek's empty and lofty purposes merely obscure the "why" behind the "why."

Sinek's concept of a single circle and a single purpose per person, while easy to conceptualize, is Pollyannaish and glib. The popularity of *Find Your Why* stems from Sinek's ability to tell people what they want to hear, which is not surprising given Sinek's background in advertising.

That said, this book encourages introspection and soul-searching which is always a good thing. As Pythagoras is credited in saying: 'Man know thyself, then thou shalt know the Universe and God.' It is always a worthy goal to examine one's actions and motivations. In *Find Your Why*, Sinek offers a method for finding the "why" both for individuals and organizations. The process works through identifying key events in your life/or the organization's and finding the common threads that run through them. The part of the book written for organizations, maps out activities for finding the organization's purpose, and is certainly an activity worthwhile for its team-building potential.

Final words: *Find Your Why: A Practical Guide for Discovering Purpose for You and Your Team* (2017) is a feel-good book with an empowering message that is more show than substance. For the individual reader who seeks better self-understanding, this is not a useful book. However, if you're looking for a fun activity to do on your firm's next retreat, buying this book for \$20 (cover price) is cheaper than hiring a motivational speaker.

Anna Vaserstein has a small general practice in Jericho.



IN MEMORIAM

Greg Lowell McCurdy

Greg Lowell McCurdy passed away on March 3, 2019 at the age of 73. He was born on November 14, 1945 and practiced in Randolph, Vermont. He was buried in the Vermont Veterans Memorial Cemetery in Randolph Center.

Theodore Ross Barnett

Theodore Ross Barnett, 99, died on September 26, 2019 at The Manor in Morrisville. Born in Newton, MA, Ted attended Harvard College and the Columbia School of Engineering and served in the Pacific during World War II as an engineering officer in the Air Force. At the end of the War, he joined his father's wool business and traveled extensively in the Middle East, learning French, Arabic and Farsi. He was proud of his cross-border work, but as the wool business declined, he began invest-

ing in real estate in Lamoille County, having fallen in love with Stowe during a ski trip in the 40's. He then went to Columbia Law School, passing the Vermont bar in 1966 and becoming State's Attorney for Lamoille County where he practiced for 10 years. He continued in his passion for land development after that, having owned, brokered, or managed an estimated 13,000 acres in Vermont over 50 years. Ted was a life-long learner, loving travel and trying new things like ski racing and open-water swimming. He is survived by five children, seven grandchildren and three ex-wives.

Thomas M. Dowling

Thomas M. Dowling passed away on October 26, 2019 at the age of 74. Born in Las Vegas, he graduated from Dowling High School in Iowa, St. Ambrose College with a BA and received his law degree from the University of Notre Dame in 1969. He

then became a CPA in Illinois in 1972 and in Vermont in 1975. While working at Ernst & Young in Chicago, he met and married Maureen O'Brien in Burlington, Vermont in 1970. They moved to Vermont in 1975, where he began practicing law at Ryan Smith & Carbine. Tom practiced law there in the fields of general civil practice, real estate, banking, probate, health care law and charitable giving, among others, and was a partner at Ryan Smith & Carbine at the time of his death. He is survived by his wife of 49 years, Maureen, three daughters and a son, and four grandchildren.



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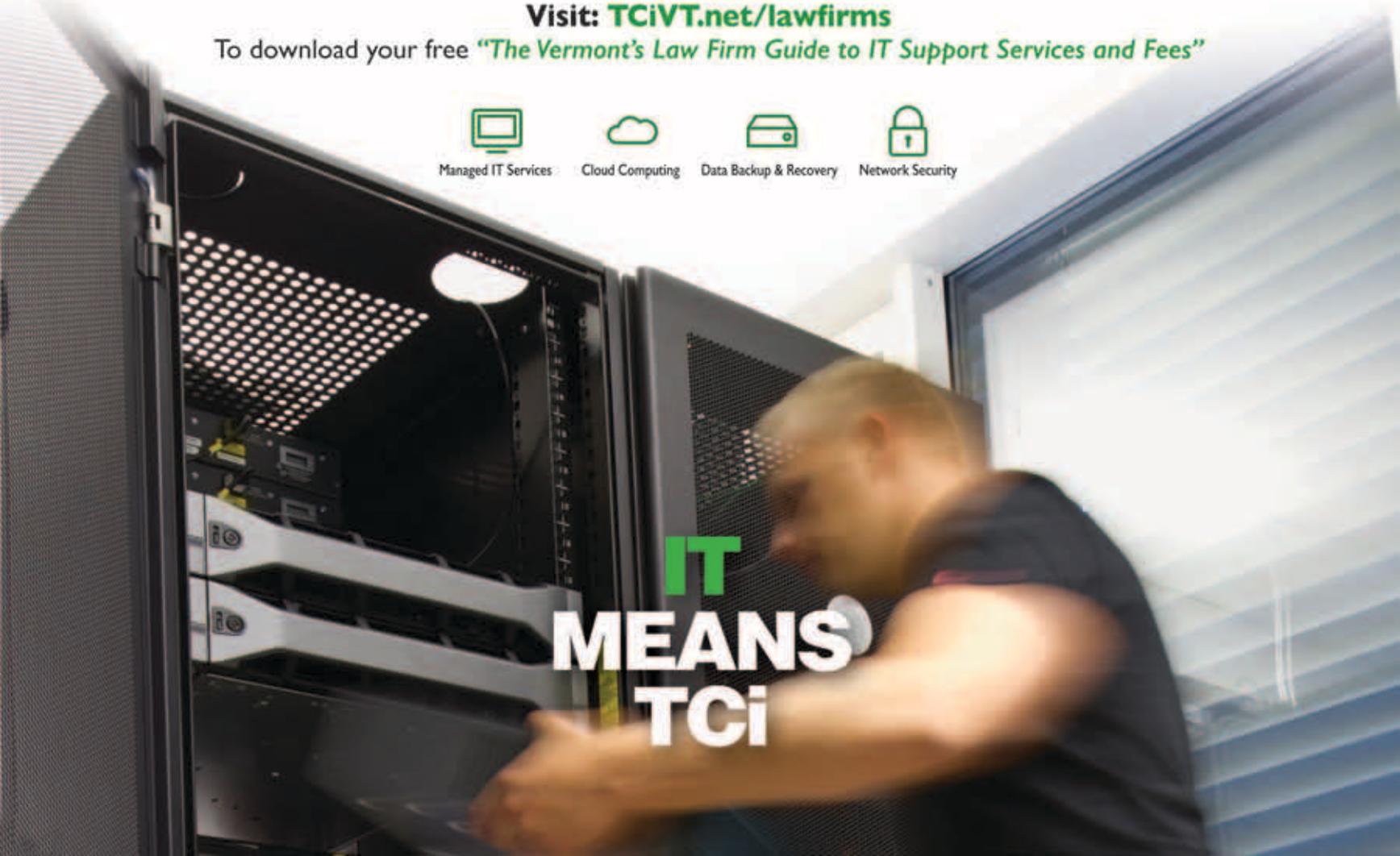
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