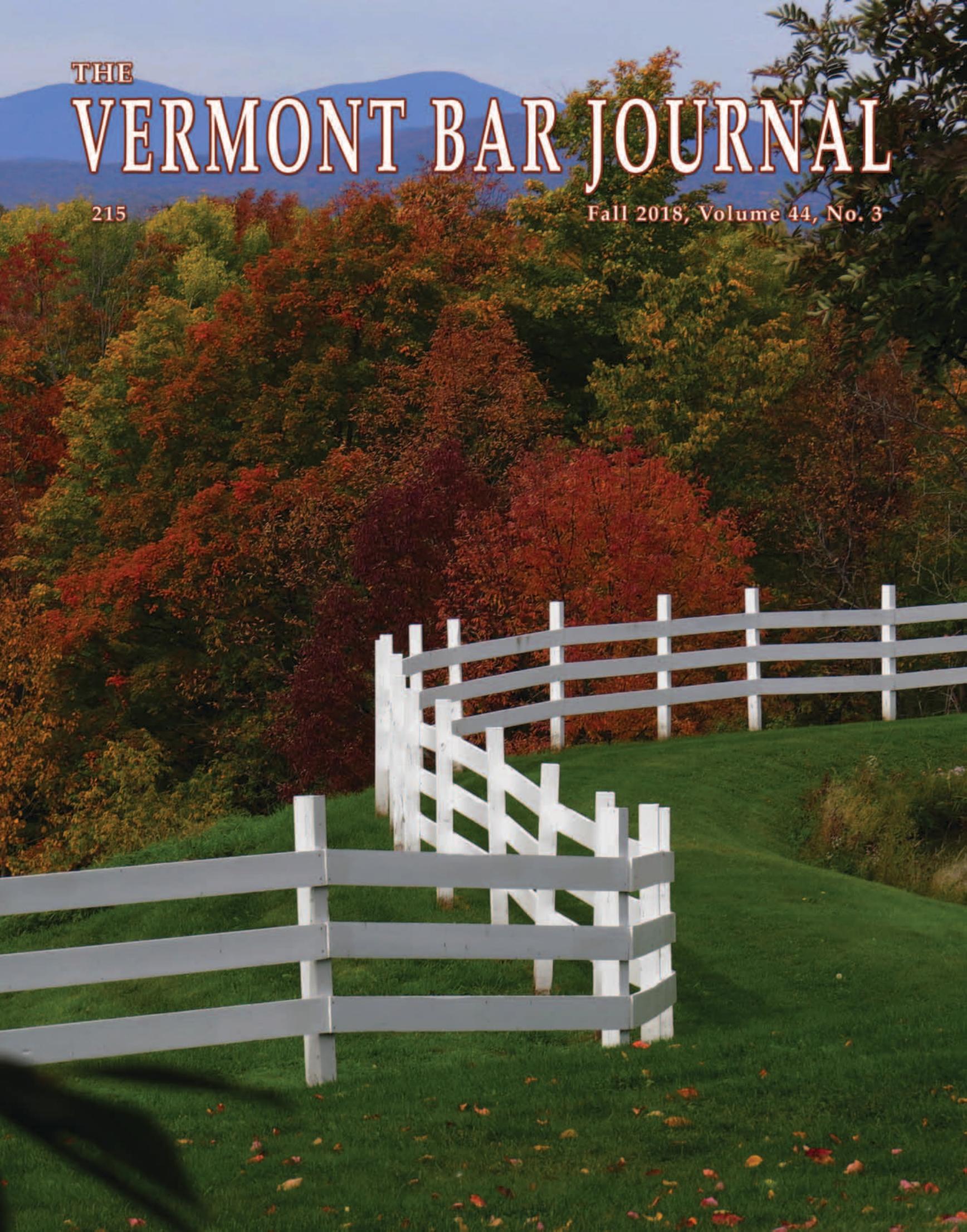


THE

# VERMONT BAR JOURNAL

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Fall 2018, Volume 44, No. 3





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# VERMONT BAR JOURNAL

## DEPARTMENTS

- 5 PRESIDENT'S COLUMN  
— *An Interview with Gary Franklin*
- 8 PURSUITS OF HAPPINESS  
— *Duplicate Bridge - An Interview with Mark Oettinger*
- 14 RUMINATIONS  
— *The Veto, The Override, and the Constitution*
- 24 WHAT'S NEW  
— *VBA Annual Report 2017-2018*
- 26 WHAT'S NEW  
— *2017-2018 Sections and Divisions Annual Report*
- 30 WRITE ON  
— *Assessing the Legal Writing Style of Brett Kavanaugh*
- 44 BOOK REVIEWS
- 46 IN MEMORIAM
- 46 CLASSIFIEDS

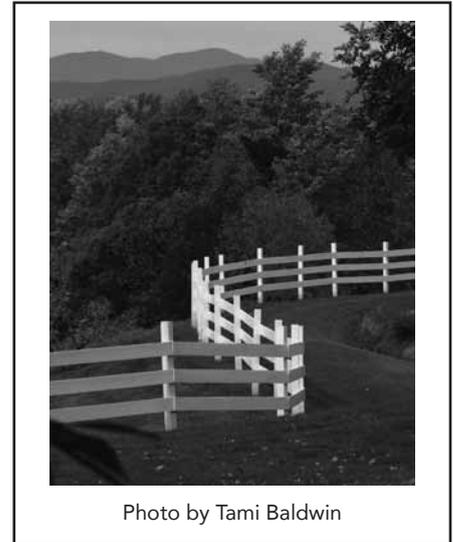


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## FEATURES

- 34 The Promise of Restorative Justice  
*Jan Peter Dembinski, Esq.*
- 40 Spotlight on Grantee: Women's Freedom Center  
*Sarah E. Wilson, Esq.*
- 42 The Importance of Learning to Say No  
*Mark Bassingthwaighe, Esq.*

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## ADVERTISERS INDEX

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ALPS .....	12
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Berman & Simmons.....	33
Biggam Fox & Skinner.....	4
Caffry Law, PLLC.....	31
Cleary Shahi & Aicher, P.C.....	17
CUBA 2018.....	23
Dinse .....	9
Economic & Policy Resources .....	27
First American Title Insurance Company .....	31
James A. Johnson, Jr.....	10
Jarrett & Luitjens .....	13
Law Pay .....	21
Lawyers Assistance Program .....	35
Marks Powers LLP .....	11
Northeast Delta Dental .....	10
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Vermont Attorneys Title Corporation .....	7
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# PRESIDENT'S COLUMN

## Interview with Gary Franklin

**Teri Corsones:** Today is September 5, 2018, and I'm speaking with Vermont Bar Association Board President, Gary Franklin. Gary, on behalf of *Vermont Bar Journal* readers everywhere, thank you for taking the time to visit with me today.

**Gary Franklin:** It's my pleasure.

**TC:** First, can you tell us a bit about your background, where you grew up, and where you went to school.

**GF:** Sure. I grew up on the mean streets of New York City. My parents were pioneers of the Upper West Side in the early 1960's, and they purchased a brownstone on a block that had a number of vacant lots and uninhabited buildings. I went to a private high school on the Upper East Side, where some of my friends weren't allowed to come over to my house because the neighborhood was too dangerous. Ironically, many of those friends now live on the Upper West Side. Eventually I went to college in Boston and law school in San Francisco, where I lived for six years.

**TC:** Your parents were quite the visionaries! What led you to consider law school as a path?

**GF:** Basically, as a child, I argued with my mother a lot at the dinner table, so it was kind of a natural progression.

**TC:** That's probably the start of most legal careers. After living and working in San Francisco, how did you end up in Vermont?

**GF:** So, that was sort of a longer path. My wife, whom I met out in California, was from upstate New York and we decided to return East so she could attend business school at NYU. However, after having lived in California for a number of years, I'd broken the mold of being a NYC kid. After 5 years in New York we decided to downsize. We picked Vermont as the place to raise a family.

**TC:** Had you had any prior connections with Vermont?

**GF:** Only as the backyard playground for the Northeast.

**TC:** So, you'd been here skiing or hiking or things like that?

**GF:** Yes, we vacationed here a number of times, and at some point, determined that it would be far better to live here and visit the city rather than the other way around.

**TC:** I think a lot of our members reached

the same conclusion! Where did you first work when you came to Vermont to live?

**GF:** When I first came to Vermont, I worked at a small firm of about 10 attorneys in Burlington, called Miller, Eggleston & Cramer. That firm then became Eggleston & Cramer, when Marty Miller left to become the CEO of Velco. Then Eggleston & Cramer merged with Primmer Piper, when we doubled in size. Primmer Piper Eggleston & Cramer has continued to grow to the point where it's doubled in size again, and has become a regional firm. It's been a good ride.

**TC:** What year did you start working in Vermont?

**GF:** 1999.

**TC:** Did you have the benefit of a mentor when you were first starting out?

**GF:** I did. Marty Miller, who hired me, was a terrific mentor for the couple/few years that we crossed paths before he left. Marty had been in the Burlington community for a long time and was well connected. He was also a real innovative thinker. Scot Kline, who is now Judge Scot Kline, was my direct superior at Eggleston & Cramer. He was also a tremendous mentor, and a very thoughtful, thorough and measured attorney. It's no surprise to me that he became a judge - he would regularly strike any adjectives from my writing to tone it down. I'll have to remember that when I eventually appear before him.

**TC:** We all will! Did you have a specific area of law that you focused on from the beginning?

**GF:** Civil litigation has always been my focus and more specifically in the commercial and business world. That can cover a fairly broad segment of cases from land use and development, through real estate, employment and intellectual property types. It involves a lot of contract law. I've never practiced in the areas of personal injury or family law or criminal law, so in some ways it's easier to describe what I don't do. Over time, the cases have sort of increased in size and complexity and value, so there's been an evolution in the work, but the general focus has always been commercial and business litigation.

**TC:** What do you find most interesting about your work?

**GF:** Well, the people I work with. There have been a lot of very bright, energetic



clients, who've been terrific partners in my cases. I learn a tremendous amount from them, and I enjoy just expanding the network of people I've gotten to know. The cases range from one industry to another, and becoming well-versed in something that I really didn't know much about before keeps me engaged. The cases are definitely not run of the mill and are rarely repetitive, so I'm constantly learning and having my clients teach me new and interesting things.

**TC:** So that might be the answer to my next question. I was going to ask what you find most challenging about your work.

**GF:** Yes, the challenge is always having to come up to speed on areas of law or different industries that are new to me. I like to think that I have an expertise in the process, in how to navigate through a very serious dispute. The subject matter of the disputes is often something that I really need to learn a lot about. Every case is different.

**TC:** So, after having done so many different types of cases where you learned about so many different subjects, you must be great at trivia?

**GF:** (Laughing) I don't know, my mind, seems to constantly override it, so I don't know how much old information I retain.

**TC:** I know that you also regularly preside in small claims court. First thank you for providing such a tremendous service to the courts and to the small claims court

litigants. Second, how would you describe your experience presiding in small claims court?

**GF:** It's great. You know, it's always good to give back and I've enjoyed the opportunity to play "Judge Judy" in real life. You sit there and listen to some stories that can be pretty hard to believe and very difficult to decide, but justice has to be meted out. I find that most of the folks that appear before me, if they don't like the result, they're at least satisfied that they've had their day in court and they were treated fairly. Hopefully, it ends the dispute and ultimately that is what the court is all about. It's dispute resolution; one way or another, your dispute is going to get resolved. If you can't do it on your own it's going to be done by a judge or a jury. But it is going to get resolved. It feels good to help people put some finality to a problem they've often been living with for some time. It's also been very educational for me, to have the perspective of wearing the robe and sitting in the front of the courtroom and listening to the litigants present their cases. I see what's effective and what's really not effective, and I try to take advantage of that perspective while honing my own presentations.

**TC:** It is a great way for veteran practitioners to give back, and it's a tremendous benefit to the courts. Switching gears to your new role at the VBA, I wanted to ask a little bit about when you first became interested in serving on the VBA Board.

**GF:** As you know, my partner, Jon Eggleston is a past president of the VBA. He really encouraged me to get involved in the bar, and basically volunteered me to, initially, serve on the Chittenden County Bar Association Board. Once you serve on that board, you move forward to become president of the Chittenden County Bar. From there, he again, basically volunteered me to put my hat in the ring for a seat at large on the Board of Managers for the VBA. It kind of went from there, and I'm really glad he encouraged me to get involved.

**TC:** I think that's a definite pattern—people are encouraged to run for a seat and then go from there. I'm grateful to Jon Eggleston for encouraging you! What did you think serving on the VBA Board was going to be like?

**GF:** You know, I didn't really go in with any preconceived notions, I just knew that volunteering was important to me and I always strive to find avenues where I can give back. Having an opportunity to give back to the legal profession and to help improve the practice of law in Vermont seemed like a great opportunity to me. That has proven to be the case, where working with the Vermont Bar Association does indeed pro-

vide that opportunity. I also have a new appreciation for all the work that the bar does towards Access to Justice and helping people at the lower end of the economic spectrum. Also, working with the courts and educating the legislators, those are areas that I didn't really know much about and it's just terrific to see all of the work that the bar does.

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

**GF:** For me, having the opportunity to meet so many lawyers in the state that I never would have had the opportunity to meet otherwise, because we just don't practice in the same areas. Also, simply traveling around Vermont and getting to know it much better. Serving on the bar is a great way to network, meet all the judges and get to know all the different people who are involved in the practice of law. It gets me out of my office and out of my own practice area. And, as I said, it's a terrific volunteer opportunity to hopefully help improve my profession.

**TC:** Great to hear! Sometimes VBA Board presidents have a theme for their year in office. Do you have a particular theme in mind for your year as president?

**GF:** We recently had a retreat to work on our strategic plan for the next year or two, and one of the two areas that we settled on is really important to me. To work on the image of lawyers, and to get the general public and frankly, even people from the other branches of government, to really understand what lawyers do and what goes on in the court system. I don't think the general public recognizes how important the role of the bench and the bar is to democratic processes and to our civil society. I think it's particularly important for funding for the court system, and support for all of the terrific public service work that lawyers in the legal system perform.

**TC:** Well said. Gary, what is your favorite pastime when you're not working?

**GF:** I like to try to create some balance in life, which is sometimes hard to do, obviously. I love being a parent; I have two wonderful daughters who are in college now. I have a wonderful wife and we share a lot of interests. I also really like to get out and run around and Vermont is obviously a terrific place to do that. I love to ski. My parents got me started at about the same time I learned to walk. I love to bike. I have done some triathlons, so I guess I do some running too, although, I'm particularly bad at that part of the race. My perfect day is probably windsurfing on Lake Champlain with 20 mph winds and just flying across

the water, that's true freedom for my mind and my body. A day on the water is always a good day.

**TC:** Well, it sounds like your decision way back when to come to Vermont worked out well for that balance that you're striving for.

**GF:** I try.

**TC:** Gary, what advice would you give to a young person who's thinking about law as a profession today?

**GF:** To get involved. I think the answer is really in the question, which is referring to the law as a profession. It's not just a job, and I think, unfortunately, too many people may want to treat it like a job, like it's a place to punch in, bill some time and check off the projects provided by your boss. What I try to impart to younger lawyers is to get out of that comfort zone a little bit, and try getting involved with different organizations. It doesn't even have to necessarily be law-related, but get out in the community and enrich your life. As a profession, being a lawyer can be extremely gratifying, and it's a lot more than simply going to work.

**TC:** Last question, what would you like to be remembered for as the 139<sup>th</sup> president of the Vermont Bar Association?

**GF:** Well, that's pretty tough! I guess I would like to have success in improving the image of lawyers, but also maybe just being remembered at all would be pretty awesome. It's only a one-year stint, and if I can be remembered for my time, it means I have had an impact.

**TC:** Well, in my view you've already had a very positive impact. We're all thrilled to have you at the helm.

**GF:** Thanks, Teri, I'm grateful for the opportunity.



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# PURSUIITS OF HAPPINESS

## *Duplicate Bridge*

**Jennifer Emens-Butler:** I am here in the office of Montrroll, Backus & Oettinger in a beautiful lake view conference room and I am here to interview Mark Oettinger for our Pursuits of Happiness column which you have been following since its inception, right?

**Mark Oettinger:** Yes, I have been following the Pursuits of Happiness and I have been reading the *Bar Journal* since 1980 and have written many articles.

**JEB:** Yes, yes you have, and thank you!

**MO:** Thank you for publishing them.

**JEB:** So this column doesn't talk about your legal pursuits - we try to find people who have interests and passions that are outside of the practice of law that keep them sane, busy, at peace or entertained. I was not aware that you have a very strong passion for a certain card game.

**MO:** Yes.

**JEB:** Well it's called a card game, but it's so much more than that, right?

**MO:** Well, it's probably THE greatest card game! Bridge has been around, in its current form, since the 1920s. And I play a form that is typically played at the competitive level that is called "Duplicate Bridge."

**JEB:** So basic bridge, generally, is also called contract bridge, right? Because you are making a contract?

**MO:** Correct, in bidding you are making a contract, which you either successfully perform, or you breach, by making, or failing to make, the contracted number of tricks. If you make your contract, you are awarded points, and if you breach it, then "damages" (points against you) are awarded to the other pair.

**JEB:** Ah ha! It's legal in nature, that's why you like it! Do you find there are a number of lawyers who play?

**MO:** Yes, there are many, like Justice Ernest Gibson, Justice John Dooley (a reluctant bridge player, but a very accomplished Oh, Hell! player), Mike Furlong, Emily Bergquist, Rob Backus, Gene Kazlow, Jane Friedenson, Dena Monahan, Mary Cox, the late David Pendleton, and the late Alan Coulman.

**JEB:** Wow, do they all play in your club or you just know they play?

**MO:** I've played socially with some of them, and duplicate bridge with others. It's



a small group that play duplicate bridge as opposed to just straight contract bridge. In the 1950s, there were bridge programs on TV, and it was very popular, so bridge generally is still very popular among baby boomers.

**JEB:** So what makes duplicate bridge so different than regular bridge?

**MO:** You play with a partner, against another pair, at a given table, while there are many other tables in play at the same time. There are 24-28 computer-dealt hands, which everyone plays during the course of the roughly 3.5 hour session. The hands are generated by the American Contract Bridge League (ACBL), an organization of about 160,000 members, who play duplicate bridge. The downloaded hands are fed into a card dealing machine which takes about 8 seconds to deal each hand. The dealing machine inserts the four hands into a "board." The players play the "board" without mixing up the cards, and at the end of the hand, reinsert their hands into the appropriate pockets of the board. Depending upon the configuration of the particular tournament, you play 2, 3 or 4 hands against the same opponents, and then the opponents, and the boards, move to the next table (in different directions). At the end of the session, every player has played every hand.

**JEB:** There are preset hands the whole evening.

**MO:** Yes, so this way you are compared not in terms of how lucky you are in terms of being dealt good cards, but instead, how you did compared to other people who were dealt the exact same hands. You get a point for every pair you beat, and you get half a point for every pair you tie. At the end of the night, you get a hand record that reflects all of the hands that you played. All of the results are uploaded to the ACBL website, where you can study every detail of the tournament within 10 minutes of finishing.

**JEB:** Sounds very technical.

**MO:** Yes, bridge is becoming more online driven. As the live games get smaller live, bridge is becoming much bigger online.

**JEB:** So, the word "duplicate" just means you are competing with someone with the exact duplicate hand and you take all the chance and luck out of it? You see how everyone deals with the same bad hands as well as good hands.

**MO:** Most of it, yes. If I only have 5 high card points, but take one trick, I have done better than others who took no tricks with the same bad hand. Since each hand, no matter what it contains, is worth roughly 4% of the score. If I do better than 50% over

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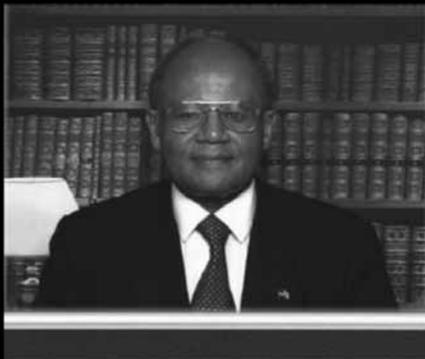
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the course of the session, I am doing better than average. In a way, it's like baseball: if you have a 60% season, you will probably win your division. If you have a 70% season, you might win the World Series.

**JEB:** Back to the computer, I'm just curious. Do the records include every card down to each card in that hand?

**MO:** Yes. And when one plays online, not only is every hand recorded and available for review, but every sequence of plays, and the complete auction, are permanently recorded! At any given time, there may be 10,000 people worldwide playing. I can play with my favorite partner, who may be in Singapore, or I can play against robots, so the online component has really grown.

**JEB:** Is it just the ACBL group that has 160,000 or worldwide?

**MO:** Yes, 160,000 in the ACBL. Other countries like China, India and many Scandinavian countries are really into bridge, so those numbers are higher.

**JEB:** Now here it is known as a baby boomer game. Is that still true, or is there an uptick in younger players getting involved because of the online component?

**MO:** The average age is still high. Many of us baby boomers learned to play in college. In my case, I helped develop the Woodstock (Vermont) Duplicate Bridge Club in college. After graduating, and before law school, I directed and managed that club. I played inter-collegiately for a time but then after I got married and we had our son, I pretty much gave it up for about 35 years, but I came back to it about 10 years ago.

**JEB:** Oh wow, you stopped playing for 35 years?

**MO:** Yes, and that's a pretty typical profile of a bridge player today. And this caused a resurgence. For instance, the Burlington bridge program has a substantial program and has lots of resources for new players who can play in "protected" games, where if you have a low number of "masterpoints," you won't be forced to play against the sharks.

**JEB:** So when you ran the program in college, did people pay, in or was it a volunteer passion to match players?

**MO:** The Woodstock Duplicate Bridge Club back then, which I ran from 1975-77, met on Wednesday nights with maybe 5-10 tables, so 20-40 people. These days the entry fee is \$6 for a session. In a tournament you'd pay more. There is no prize money involved, just masterpoints.

**JEB:** Wait, you pay, but you don't get anything if you win?

**MO:** Correct, there is some bridge played for money, but duplicate bridge is all about masterpoints and rankings. The director could get paid a modest sum of money and the space needs to be rented. And they may have coffee or snacks at the event. But it's certainly a bargain for an evening's entertainment. and costs less than seeing a movie!

**JEB:** Yes \$6, for 3.5 hours, a bargain! So that's an average length of time?

**MO:** Yes, but in a big tournament, like the one I just played in Florida, you can play 2-3 sessions a day. There, we started at 10:00 am, played to 1:30 pm, had lunch, played again at 3:00 pm until 6:30 pm and if you really are a glutton for punishment, they have one more session from 7:30 until 11:00 pm.

**JEB:** And you did all that? Was this a weekend regional tournament?

**MO:** I played 10 sessions over the five days at a "regional" tournament in West Palm Beach at the PGA golf resort, a gorgeous place.

**JEB:** Gorgeous, but you MIGHT want to get outside at some point?!

**MO:** Well at 100 degrees and 100% humidity, not so much. It was well-air conditioned, a very nice place, and top competition, so we played 7 hours a day. There were 15 Grand Masters competing, which is amazing. Like in chess, that is the highest designation. Many are full time professional players.

**JEB:** Wait, how do you play for money if you said there is no money involved?

**MO:** Even though we don't compete for money *per se*, the really good players are often hired by "clients" in order to try and achieve higher outcomes.

**JEB:** Oh, they are hired like a hitting partner in tennis, hired to help them improve? There is definitely money in that!

**MO:** Exactly! Some get \$2,000 a day to do that.

**JEB:** Have you ever been hired? Should you be?

**MO:** No, never. But I could perhaps, if I ever give up my day job. I'm not a Grand Master.

**JEB:** What is your rank?

**MO:** I'm a Life Master, and there are ranks within those, like degrees of black belts in martial arts. I'm currently a Silver Life Master.

**JEB:** So that sounds pretty good, but not Platinum though?

**MO:** Yes, there is a rank of Platinum Life Master, and if I hadn't given up the game for 30+ years I'd probably be ranked higher. These master points are a lifetime accumulation. But there is another ranking, more like the chess system, where it's not just a function of lifetime accumulation of points, but also more how you've done recently. In other words, how much success you've had against what quality players. So, if you go to a big tournament and do well against master players, you will increase your rating significantly in this alternative ranking structure, which is better measure of true quality.

**JEB:** Especially for someone who has taken a 35-year break. So, are you on an uptick?

**MO:** We did really well in Florida. We won one event and came in 5<sup>th</sup> in another with hundreds of top quality worldwide players.

**JEB:** "We," so did you have a set partner?

**MO:** Yes, I went with one of my favorite partners from Iceland, who played around the world as a teenager - they have a bigger support system there, and he had a team of coaches as a youth. He's a world class player. He's now a professor at UVM.

**JEB:** Do you ever get a random partner, or do you usually play with him?

**MO:** You can go to a tournament and sign up at the partnership desk for a random partner. Better players usually have someone they want to play with. Some never switch partners. You can also play as a team of 4.

**JEB:** Do you do the team of 4 play?

**MO:** In Florida, we anticipated just playing in pair games the whole time, but for the last day, we partnered with another pair from Florida for team play, and we won our bracket. We were in the second highest bracket based upon our master points, and we won that!

**JEB:** Excellent! But you say most play with set partners?

**MO:** Yes, for example, Bill Gates and Warren Buffett are regular partners who play together. Warren lives in Omaha, and if you go to the regional tournament there in Omaha, you may end up playing against Warren Buffett and Bill Gates!

**JEB:** They always play together?

**MO:** Not always, but often. They are friends, and they are quite good, and there is a debate about who is better.

**JEB:** I'd guess Bill Gates!

**MO:** No, actually more people who have

played them believe it is Warren Buffett. He is noted as saying he'd be fine going to jail for the rest of his life so long as he could have three other good bridge players to go with him.

**JEB:** I did also see that you write quite a bit about this game, and in your writings you go into hands in great detail, like what would you do if you were dealt a particular hand. Is that a popular forum, or how people share on line?

**MO:** Yes, my Icelandic partner and I are co-editors of a quarterly publication called *Table Talk*. It has been published in Vermont, by the Vermont Bridge Unit of the ACBL since 1986. My partner and I took it over about 1 year ago. Duplicate bridge has three components: the bidding, the play of the hand, and defense. The articles in *Table Talk* variously address each of these components...

**JEB:** ... Like how to handle unusual hands?

**MO:** Exactly. As an adjunct to the quarterly publication, my co-Editor and I have created a website... [www.bridgequarterly.org](http://www.bridgequarterly.org)...where we post our issues of *Table Talk*, and where we are gradually putting up old issues dating back to 1986.

**JEB:** So, to our Pursuits of Happiness theme, this sounds a lot like work. There are legal aspects in the contractual bidding, there are mathematical calculations, you are sitting down and inside the whole time, there are detailed articles you write and it all sounds very mentally taxing. But I recall you said you play to relax. *What do you find the most enjoyable or relaxing about playing a game that requires so much intellect?*

**MO:** Well it is a very cerebral and mathematical game. Percentages, maximizing tricks, etc. But it's a very different form of intellectual stimulation than practicing law, and in a way much more refreshing. That said, after 5 days in Florida playing 7 hours a day, I'm drained.

**JEB:** So, your brain was fried?

**MO:** My brain got a good workout. Like distance running, if you are conditioned to it, its invigorating and endorphin building. Socializing is great, and winning is obviously a rush. Live bridge, even more so than online bridge is a partnership sport, and the ability to collaborate successfully with someone else is a challenge. It's particularly rewarding when you communicate well.

**JEB:** I was wondering about being able to wink or signal what you have...I mean that sounds like cheating.

**MO:** That would be. No behind the scenes signals are allowed. There can be

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no secrets, and everything has to be disclosed.

**JEB:** So, if I slap a mosquito on my leg during bidding and shout, will I get thrown out?

**MO:** Yes, if it's signaling. No signaling is allowed.

**JEB:** But what if a mosquito actually bit me?

**MO:** Extraneous discussion is discouraged, especially since bridge is a timed event. It's intense.

**JEB:** Ok, no extraneous chatter, so I'm out (laughs)! But in less competitive Burlington, are they silent, or do they sit and talk about other things? Is the bid process always super sacred?

**MO:** It's pretty much sacred. Getting through 27 hands in 3.5 hours is a challenge, so the timed event aspect is respected. If you are waiting for a round to finish, you socialize or get a snack or when you rotate, but during the hand, it's pretty down to business. You cannot signal

through inflection or foot tapping or anything like that. At the world championships, there are even screens between the partners.

**JEB:** But when you rotate tables, you don't have time to talk either? So, no time to socialize.

**MO:** There's definitely time for socializing. True, in duplicate bridge, the endorphin rush and mental challenge probably outweigh the social aspect, but you do have time, when easier hands allow you to finish a round earlier, to get up and socialize with others who are also finished. It's very satisfying to go to a tournament and come back with good results. When people asked me, "How was your trip?" I can't stop thinking about how remarkably good the world class players are, and how incredibly nice people they are. I don't see it as so serious and cut throat, because I've met so many nice people among the top-flight people I played with. And they all enjoy it. That's what I really have enjoyed about returning to competitive bridge... spending time with very friendly and intel-

ligent people who are different than I am in so many ways.

**JEB:** And you play often online without your live partner?

**MO:** I've been playing for 50 years, and there is an endless learning curve.

**JEB:** You find you still learn things?

**MO:** Yes. Playing at the level I got to play at this past weekend in Florida, I learned a tremendous amount. There is so much more to learn about statistics, probability, algorithms, defensive signaling, etc.

**JEB:** So, you've learned which techniques have more success over the years but find there is always room for improvement. So that must be part of the entertainment value then? You know a lot of people that I interview choose something where they can absolutely let their mind go for their pursuit of happiness. Something they can do with their hands or something that is the exact opposite of practicing law. *And yet you've chosen something where you have to use your mind even more as a*

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way to relax.

**MO:** Relax and grow I'd say. As an example, I played in law school with a few people that were strong bridge players in the area. My partner was second in his class, the class ahead of me. The one I played against then was the valedictorian of my class. We would almost invariably play bridge right before exams...

**JEB:** Oh, because the more you exercise your brain, the better it gets...

**MO:** I'm not sure if it is to get the brain running or get it completely thinking along a different track and NOT about exams, but I do think it reorganizes your brain. I'm not much of a musician, but the notion of playing an instrument is the same in that sense that you are requiring great skill and mental concentration in a different way. That is what makes it so refreshing. Even though it is intensely cerebral, it's a huge change and it is refreshing. Although admittedly, I'm a much better player when I'm away from work at a bridge tournament, rather than working all day and then playing.

**JEB:** Right, at some point you are spent. But you find the time to do both?

**MO:** Yes, I have a very busy practice. I also do ski patrol, I do international judicial work on human rights, and I do a monthly pro bono clinic at the First Congregational Church in Burlington with Susan Ellwood and Robert Backus.

**JEB:** Do you ever just watch bad TV or read bad thriller novels? Or do you not find a need to totally shut down your mind or meditate?

**MO:** I exercise and garden. Gardening serves that purpose, since I haven't been able to run anymore. I'm not a big TV person, and my vision doesn't allow me to read recreationally. I do read about bridge, and I collect bridge books [readers, are you listening?]. I have a shelf of bridge books over 12' long! One of my favorites is *Following the Law* (and yes, it's a bridge book!). There are 'laws,' such as: you are generally safe to bid at the level of which you and your partner have combined trumps. If you have 9 Spades between you...

**JEB:** You are safe to bid 3 spades?

**MO:** Yes! You've got it. And if you don't make it, you'll lose fewer points than you would have lost if your opponents had instead won the bid.

**JEB:** Immutable truths of bridge?

**MO:** Yes, this is the actually the second book in the series. The first is *To Bid or Not to Bid*, kind of the bridge equivalent of *Prosser on Torts*.

**JEB:** And you find bridge to be a pursuit that is relaxing and challenging and so different from the practice of law that it brings you happiness? And you aren't fighting for clients' livelihood so it's a different kind of pressure too.

**MO:** A similar endorphin rush, with stakes not as high.

**JEB:** What's your next goal after Silver Life Master?

**MO:** I'm about half way to the next level, and I will probably attain the one after that, but I am limited in that respect by having spent so much time away. But in terms of an elite online ranking, that is more attainable.

**JEB:** So, do you play bridge casually or at tournaments with your wife?

**MO:** She used to play with us sometimes in college, but I can't convince her to really pick it back up again or go to big tournaments. I did get the bridge club to host a fundraiser for my step daughter when she was competing for Miss Vermont and so that's the last bridge tournament she went to but it's just not her thing. And that was the right involvement with bridge because the fundraiser worked and my step daughter became Miss Vermont.

**JEB:** Your step daughter is Miss Vermont?

**MO:** She was in 2011, and she traveled to over 300 venues to help young people register to vote, and worked to empower girls and young women through involvement in politics. She helped shepherd the Vermont constitutional amendment that allows 17-year-olds to vote in the primary if they will be 18 before the general election. She now works at Mitzi Johnson's chief of staff.

**JEB:** That's amazing, you must be so proud!

**MO:** Yes, we are.

**JEB:** Who knew bridge could do and be so many things. And be relaxing!

**MO:** It really is. I'd urge anyone to contact their local bridge club if they have any interest. They are all anxious to welcome new people, and many clubs offer protected games, and provide lessons to get aspiring players and returnees started.

**JEB:** Thanks for sharing your passion for bridge with us, Mark.

**MO:** Thanks for interviewing me.

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# RUMINATIONS

## *The Veto, The Override, and the Constitution*

When a Governor objects to a piece of legislation, the executive has three choices—to sign it into law, to allow it to become law without a signature, or to return it to the chamber that first proposed it. Those are the choices if the bill is presented to the Governor *before* adjournment. A different regime applies after adjournment. As there is no legislature to which to return the bill, it does not become law without the Governor's signature. The bill only becomes a law if the Governor signs it within five days, not counting Sundays, after presentment. The process of returning the bill is called *veto*, Latin for "I forbid."

When a Governor returns legislation to the chamber that originated it, the legislature may enact the law if it passes again by a vote of two-thirds of a quorum in each body. The vote of each member must be announced. This is called an override.

Vermont's veto is described in Section 11 of the Constitution, but "forbid" is too strong a word for its exercise. Vermont's, as that of the United States, is a qualified veto, subject to being overridden. Article I, Section 7 of the federal constitution describes the process at the national level. The two sections are nearly identical in form and process.

Between the time of the first gubernatorial veto in 1839 and the vetoes of Governor Philip Scott in June and July of 2018, Vermont Governors have exercised the power 152 times.<sup>1</sup> The Governor who used the veto power most was Howard Dean with 21. James H. Douglas vetoed 18 bills, Madeleine Kunin and Philip Scott nine, Richard A. Snelling and John A. Mead eight. Twenty-five Vermont Governors never issued a veto.<sup>2</sup> The veto was used less in the first years and has increased in recent decades. Half of all the vetoes have been made since 1965.

Of the 152 vetoes, ten have been overridden, four from the time when the veto was first added to the Vermont Constitution in 1836, when only a majority of each chamber was necessary to override. After the Constitution was amended in 1913 to require a two-thirds vote, there have been six more.

There were 26 vetoes that challenged the constitutionality of proposed legislation. These vetoes represent the executive exercise of constitutional review. The judiciary has judicial review, and its "veto" is absolute, although the legislature can always enact a similar law that avoids the stated constitutional defect. The legislature, for its

part, tries to avoid unconstitutional laws during the committee process and by action of the floor of each chamber. But the executive veto is the tool the Governor has to prevent hasty and improper bills from becoming law, and particularly those that offend the Constitution.

### History of the Veto; Absolute or Qualified Vetoes

Roman tribunes vetoed legislation by the Senate to protect the plebians against the patricians. Kept out of the Senate during its sessions, tribunes would shout through the door of the Senate chamber, "veto" for the proposal to be rejected.<sup>3</sup> The English Constitution gives the crown an absolute veto over the acts of Parliament. Queen Elizabeth I approved 43 bills and vetoed 47 in 1597. Commentator James Kent explained, "In the English constitution, the king has an absolute negative; but it has not been necessary to exercise it since the time of William III."<sup>4</sup> In *Federalist* LXIX, Alexander Hamilton described why. "The disuse of that power for a considerable time past, does not affect the reality of its existence; and is to be ascribed wholly to the crown's having found the means of substituting influence to authority, or the art of gaining a majority in one or the other of the two houses, to the necessity of exerting a prerogative which could seldom be exerted without hazarding some degree of national agitation."<sup>5</sup>

John Locke wrote a constitution for the colony of Carolina in 1669, and included an absolute veto by the Palatine or his Deputy, and three of the Lords or Proprietors.<sup>6</sup> George III vetoed colonial legislation, and that led to American independence.<sup>7</sup> The Articles of Confederation were void of a veto, as there was no executive to interfere with the absolute power of the Continental Congress.<sup>8</sup>

In *Federalist* LI, James Madison explained why an absolute veto was a bad idea. "On ordinary occasions, it might not be exerted with the requisite firmness; and on extraordinary occasions, it might be perfidiously abused."<sup>9</sup> Frederic Maitland explained the difference. "A qualified negative answers all the salutary purposes of an absolute one, for it is not to be presumed that two thirds of both houses of Congress, on reconsideration, with the reasoning of the President in opposition to the bill spread at large upon their journals, will ever concur in any uncon-

stitutional measure."<sup>10</sup>

### The Governor and Council

Vermont had no veto until 1836. From 1777 to 1836, the Governor could not act alone. The executive branch was governed by the Governor and Council, a body consisting of the Governor and twelve Councilors, elected at large at the General Election. The Governor and Council played a role in legislation. Section XIV of the 1777 Constitution provided,

To the end that laws, before they are enacted, may be more maturely considered, and the inconvenience of hasty determination as much as possible prevented, all bills of public nature shall be first laid before the Governor and Council, for their perusal and proposals of amendment, and shall be printed for the consideration of the people, before they are read in General Assembly for the last time of debate and amendment; . . .<sup>11</sup>

Nothing required the legislature to correct a bill before it became law based on the Governor and Council's proposals. The Constitution provided that the bill only had to be delivered to the Governor and Council, and printed, before final passage. There was no requirement that the bill be returned to the House before passage and no need to reenact a bill for any reason.

In 1784, the legislature passed "An act directing the form of passing laws." This act provided that once a bill has passed the Assembly and was approved by the Governor and Council without amendment, the bill would become a law. When a bill was passed and the Governor and Council took no action within three days or before the adjournment or rising of the legislature, it should be returned to the Assembly and recorded as a law. "But if all or a part of the proposed Amendments shall not be concurred in by the Assembly (the reasons for which Amendments shall be given verbally or in writing) the Bill shall be returned to the Council, and the reasons for the non-concurrence be given, either verbally or in writing, that the Council may, if they shall think proper, proceed further thereon. And if the Council shall not, within three days, or before the rising of the Legislature, propose further Amendments which shall be agreed to by

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the Assembly, the said Bill shall be returned to the Assembly, and considered and recorded as a Law."<sup>12</sup>

The law did not address what happened when the Assembly disagreed with the proposals of amendment a second time.

Seven years later, the constitution was revised. As adopted in the 1786 Constitution, all bills

. . . shall be laid before the Governor and Council for their revision and concurrence, or proposals of amendment; who shall return the same to the Assembly, with their proposals of amendment, if any, in writing; and if the same are not agreed to by the Assembly, it shall be in the power of the Governor and Council to suspend the passing of such laws until the next session of the Legislature. Provided, that if the Governor and Council shall neglect or refuse to return any such bill to the Assembly, with written proposals of amendment, within five days, or before the rising of the Legislature, the same shall become law.<sup>13</sup>

This was Section XVI of Chapter II. Printing was no longer required, and the Governor and Council could suspend the effective date of a bill for a year. When bills were not returned within five days or before the next session of the General Assembly, they became law by default.

In 1801, the legislature passed a law revising the 1784 law, attempting to clarify Section XVI. When a bill passed and was sent to the Governor and Council, and returned to the House, with proposals of amendment or a conclusion not to concur, the legislature could pass the bill again. The bill would go back to the Governor and Council, for "their revisal, concurrence or proposals of amendment," but the 1801 act explicitly prohibited the Governor and Council from returning the bill to the House a second time.<sup>14</sup>

A bill entitled, "An act, to repeal a part of an act therein mentioned," was passed by the House in 1825, sent to the Governor and Council, and suspended for a year. It was not returned to the House in 1826, which took up the measure on its own (without the actual bill) and concluded it was a law, without the concurrence of the Governor and Council. The Governor and Council regarded this as an "assumption of power, unprecedented and unwarranted by the constitution."<sup>15</sup> A week later, the House passed its own resolution, concluding that the Constitution gave the House the right to pass suspended bills into law. This led the Governor and Council to direct their secretary to keep suspended bills in his possession, not to be returned without the express direction of the Governor and Council.

The system worked well, or at least with-

out incident, until 1826. The prior year, the Assembly has passed a bill repealing a part of the law relating to the jurisdiction of justices of the peace.<sup>16</sup> A justice could hear and decide trespass claims, but if the defendant answered with a plea of title to the land, jurisdiction would move to the county courts, where the defendant was compelled to "take a trial on such plea of justification." Passed in 1824, repealed in 1825, suspended, not returned, the repeal reenacted in 1826, the act was treated as law by the House and printed with the laws of 1826.

The 1835 Council of Censors agreed with the House. Although it could not "impute any impure motives to either branch," the Council found the fault was with the lack of clarity, believing the dispute arose from "different constructions of the inexplicit and doubtful language of the constitution, touching the powers of the two branches." There was precedent as well. Vermont had 30 years of experience with the suspension clause since the adoption of the 1793 Constitution, and no Governor and Council had previously assumed to have a true veto over legislation. During these years, the framers of the Constitution or their contemporaries, who had served on the Governor and Council, had simply acquiesced to the superior power of the legislature to enact laws after suspension.<sup>17</sup>

To address the problem, what is now Section 11 was adopted in 1836, with a qualified veto, to be exercised at the discretion of the Governor acting alone. The Council of Censors explained, "We have thought it inconsistent with the principles of a free government that the executive should have a negative on the proceedings of the Legislature; nevertheless, as the executive have an opportunity of observing all difficulties which arise in the execution of laws and are the center of information upon that subject, we judge it necessary that the Legislature should be availed of such information. We therefore propose that all acts, before they pass into laws, shall be laid before the executive for revision. They are, however, to make no leading propositions, but simply to state their objections, if any they find, with their reasons, in writing, to the Legislature, who still are to have the sole power of passing laws."<sup>18</sup>

Section 11 of Chapter II of the Vermont Constitution was adopted by the Constitutional Convention of 1836. It provided,

Sec. 11. Every bill, which shall have passed the senate and house of representatives, shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it; if not, he shall return it, with objections in writing, to the house in which it shall have originated; which shall proceed to reconsider it. If, upon such reconsideration, a major-

ity of the house pass the bill, it shall, together with the objections, be sent to the other house, by which it shall likewise be reconsidered, and if approved by a majority of that House, it shall become a law. But, in all such cases, the votes of both Houses shall be taken by yeas and nays, and the names of the persons voting for or against the bill shall be entered on the journal of each House, respectively. If any bill shall not be returned by the Governor, as aforesaid, within five days (Sundays excepted) after it shall have been presented to him, the same shall become a law in like manner as if he had signed it; unless the two houses, by their adjournment, within three days after the presentation of such bill shall prevent its return; in which case it shall not become a law.<sup>19</sup>

With the amendment, the steps necessary to complete the legislative process after a veto were clarified. A majority of each chamber would be necessary to override the veto. Laws would take effect with or without the Governor's signature, depending on the time of arrival at his office. There would no longer be any question of how the process should work.

### The Vetoes of the Nineteenth Century

Of the 35 vetoes from 1839, (when Governor Silas Jennison vetoed the act incorporating the Memphremagog Literary and Theological Seminary, because the bill didn't contain any express provision authorizing a future legislature to alter or amend it), to 1888 (when Governor William P. Dillingham vetoed a bill relating to the powers of the State Board of Health and local boards of health, on the grounds that it purported to give the State Board the power to enact rules with the force and effect of law, raising concerns about delegation of legislative powers, and because it had not been given careful consideration by both branches), there had been only two successful overrides.<sup>20</sup> One was Guy Sampson's claim for compensation for what Governor William Slade had called a defective digested index to Vermont laws, which he vetoed in 1845, and was promptly overridden by the Assembly.<sup>21</sup> The other was Governor Levi Fuller's 1892 veto of the bill incorporating the Ludlow Savings Bank and Trust Company, objecting to the authorization for the directors to issue letters of credit at their discretion. The legislature quickly overrode the veto and reenacted the bill into law.<sup>22</sup>

Of the 33 vetoes that were sustained by the legislature in that century, only nine of them marked the end of the legislation. In the remaining instances, the legislature responded to the Governor's criticism by enacting a law that satisfied his concerns. Gov-

ernor Carlos Coolidge, for example, vetoed an amendment to the charter of the National Life Insurance Company in 1848 for the same reasons Governor Jennison had vetoed the Memphremagog Literary and Theological Seminary bill in 1839, that there was no express reservation of right to alter or amend it in the future. When the legislature returned in 1849, it passed a corrective bill, which the Governor signed into law.<sup>23</sup> The veto, its sustaining, and subsequent repair in a new law that meets the executive's objections, is the reflection of a dialogue between the branches. In recent years, the Governor has issued warnings that bills in their present state will be vetoed, and the corrections have been made rendering a veto unnecessary.

The role of the modern Legislative Council has to be appreciated, in avoiding mistakes and misunderstandings.<sup>24</sup> In 1858, Governor Hiland Hall vetoed an act relating to the Vermont and Canada Railroad Company, explaining, gracefully, that he had just signed another act on the same subject, with a slightly different timetable, and the second bill was a redundancy.<sup>25</sup> Governor John B. Page vetoed the bill incorporating the Green Mountain Quarrying and Manufacturing Company in 1867, as it was the same bill as one he signed the day before.<sup>26</sup> The bill amending the jurisdiction of constables in 1868 was vetoed by Governor Peter T. Washburn because it repealed the wrong chapter of the General Statutes.<sup>27</sup> Poor drafting caused Governor Washburn to reject a law relating to the collection of taxes in 1869.<sup>28</sup>

The legislature enacts bills which can become laws. It also approves resolutions, which usually represent merely opinions, sympathies, and approvals, and are not treated as law. In 1871, a joint resolution of the House and Senate authorized the State Treasurer to pay bonds as they became due in coin, only if the bonds were issued before the enactment of the legal tender act by Congress, legislation which reflected the abandonment of the gold standard and allowed payment in treasury notes (paper money). Loyal C. Kellogg challenged the Treasurer's refusal to pay him in gold coin. On appeal, the Vermont Supreme Court refused him relief, concluding that a joint resolution was unenforceable. The Vermont Constitution provides that "No money shall be drawn out of the treasury unless first appropriated by act of legislation."<sup>29</sup> But this wasn't legislation. The Governor, ruled the Court, "is a co-ordinate branch of the government, and a necessary party to all 'acts of legislation.'"<sup>30</sup>

Governor Samuel Pingree signed the bill to incorporate the National Land & Loan Company in 1884. In an affidavit provided to the court when the corporation's charter was challenged, the Governor explained that after signing it, he noticed that the Speaker of the House and the President of the Senate

had signed on the first page of the bill, but not at the end, where it mattered, so Pingree erased his signature and returned it to the legislature. Later, after the Speaker and President signed the last page and forwarded the bill again to the Governor, "in the hurry of the last hours of the session it was sent to the office of the secretary of state without being clerically completed on my part. I intended to have replaced my signature at the end of the bill before it was sent to the secretary of state; but, after the session was finally adjourned, my attention was called to this bill, and the fact that I had not done so; and some time in March, 1885, while at Montpelier, I replaced my signature in regular form at the end of the bill, and wrote the words, 'Approved November 25, 1884.'" When the act was challenged in 1888, the Supreme Court treated it as a valid act of legislation in 1888, concluding "That which took place afterwards did not annul this enactment. It was not even so intended if the power existed. The governor did not attempt to withdraw his approval. The place of signing was as effectual as though it had been at the end of the bill; the fact appearing that it was intended as a signing and approval of the entire bill."<sup>31</sup>

Governors vetoed bills occasionally during the remainder of the nineteenth century, and in spite of the fact that the bills had been enacted by majorities in the House and Senate, the vetoes were all sustained, with the two exceptions, in 1888 and 1892. These vetoes were not controversial. But then, at the dawn of the twentieth century, Governor William Stickney vetoed a bill relating to the Central Vermont Railroad.<sup>32</sup>

#### The 1913 Constitutional Amendment

Stickney vetoed that bill because he believed it violated the Vermont Constitution when it made the Central Vermont Railroad responsible for claims against the Vermont Central, the corporation that built the line and then was lost to foreclosure. He believed it was a taking, in violation of Article 2<sup>nd</sup> of the Vermont Constitution. The Governor did not name the article in his address, but his intent was clear.

The legislature reconsidered the bill and reenacted it.<sup>33</sup> This infuriated one newspaper editor. The *St. Albans Messenger* charged the Assembly with assuming "a practical dictatorship that destroys the balance of power," reducing the Governor's role to that of a "rubber stamp."<sup>34</sup> The *Messenger* continued to berate the treatment of the veto as an "act of defiance of the general assembly and the rejected legislation is invariably passed over with derisive laughter." What was "designed as a check upon fraudulent or ill-considered legislation that experience shows can frequently be railroaded through a legislative body," was not respected.<sup>35</sup> "A



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lobby fanned the popular prejudice against railroads and the bill was passed. The governor, sitting outside the heat and turmoil of the two busy houses, with an opportunity to survey the bills that came to him without the bias of a partisan and in the coolness and even-temper of a position far removed from the influences of either chamber, with plenty of time for reflection and opportunity to consult the best judges of the law—vetoed the bill. And straightway it was passed over his veto amid the shouts and jeers of a throng of men who for the most part did not know what they were doing any more than if they had been little boys.”<sup>36</sup>

The newspaper led the charge to amend the constitution. The target was the majority override. The paper urged a change in the override percentage to two-thirds of each chamber. “Educate the public to the idea that an honest, fair-minded governor can do the state as much good by his veto as the lawmaker can with his bill, and frequently more. Rebuke on every occasion the tendency of the general assembly to treat a gubernatorial veto with contempt. Seat in the governor’s chair men with the courage of their convictions and let us have some vetoing. We need it.”<sup>37</sup>

Another veto was overridden in 1904. The act relating to witness fees was judged by Governor Charles Bell to increase litigation.<sup>38</sup> The large fees mandated by the bill would soon “render it profitable to be a witness” and raise “an army of professional witnesses.” The *St. Albans Messenger* heard the derisive laughter again.<sup>39</sup> Other editors and other Vermonters began to agree that something must change.<sup>40</sup>

In 1910, the legislature appointed a committee to recommend constitutional amendments. Among the proposals was the change from a majority to a two-thirds override vote. Its report to the legislature explained its reasoning.

Our constitution contemplates that the governor shall have a voice in legislation by means of a veto power. The veto power given him by the 11<sup>th</sup> article of the amendments is not substantial and practically of little effect. The same majority which originally passed a bill can pass it over his objection. The result is that vetoes by governors have sometimes received but scant consideration and governors have often refrained from risking a veto which had so little effect.

...

The constitution of the United States and of thirty-two of the states require a two-thirds vote to pass a bill over a veto, some two-thirds of all the members and some only two-thirds of those present. If the governor is to have a constitutional part in law making, and

we believe such is the desire of the people and that it is a wise provision, then more than a majority should be required to pass a bill over his objection.<sup>41</sup>

In 1910, Governor John A. Mead vetoed six bills, and the following year two more, all of the bills sustained by the legislature. In 1913, Governor Allen Fletcher vetoed four more bills, also all sustained. One of these vetoes drew strong supportive reaction from the press. The *Montpelier Morning Journal* of February 13, 1913 stated, “That monstrous piece of fad legislation, the sterilization bill, is dead. A timely and courageous veto by Gov. Fletcher saved the State of Vermont from the shame and disgrace of having in its statutes a law so inhuman so unjust to its unfortunate wards and so repugnant to the sentiments of all right thinking men.” The override vote in the Senate was 13 to 10, and the Lieutenant Governor mistakenly ruled it effective in reversing the veto. Sixteen votes were needed to make a majority.

The proposal to amend the constitution to change the majority override to a two-thirds vote passed each chamber in 1910 by a near unanimous vote. The people approved the change at the annual town meeting of 1913 by a vote of 11,047 to 8,078.<sup>42</sup>

Article of Amendment 11 became Section 11 of Chapter II after the Supreme Court re-drafted the Constitution to merge the various amendments into the body of the document. Section 11 then read (and reads so today) as follows.

Every bill which shall have passed the Senate and House of Representatives shall, before it becomes a law, be presented to the Governor; if the Governor approve, the Governor shall sign it; if not, the Governor shall return it, with objections in writing, to the House in which it shall have originated; which shall proceed to reconsider it. If, upon such reconsideration, two-thirds of the members present of that House shall pass the bill, it shall, together with the objections, be sent to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present of that House, it shall become a law.

But, in all such cases, the votes of both Houses shall be taken by yeas and nays, and the names of the persons voting for or against the bill shall be entered on the journal of each House, respectively. If any bill shall not be returned by the Governor, as aforesaid, within five days (Sundays excepted) after it shall have been presented to the Governor, the same shall become a law in like manner as if the Governor had signed it; unless the two Houses by their adjournment, within three days

after the presentation of such bill shall prevent its return; in which case it shall not become a law.

Unlike the prior version of Section 11, the 1913 amendment required two-thirds of the members present and voting to override, where the 1836 amendment required a majority of the members of the House and the same of the Senate to reverse the veto.

### The Vetoes of the Twentieth Century

Of the 94 vetoes of the twentieth century, six were overridden. These included, in addition to Governor Stickney’s veto of the Central Vermont Railroad charter in 1900 and Governor Bell’s 1904 veto of the law on witness fees, both discussed above, the 1921 veto of the Homestead Act by Governor James Hartness, who believed the legislation was premature and that women ought to become used to their newly-awarded suffrage rights before having to deal with laws that equalized the property rights and obligations of both men and women;<sup>43</sup> the 1925 veto by Governor Franklin Billings of the Intangibles act, on grounds that it shifted the burden of the taxes from the bank to its shareholders;<sup>44</sup> Governor Snelling’s 1981 veto of an amendment to the sales and use tax, exempting film rentals, on grounds of lost revenue and bad policy;<sup>45</sup> and the 1990 veto by Governor Madeleine Kunin of the budget act, denied because it proposed new spending without additional revenues in a tight fiscal time for Vermont.<sup>46</sup>

The journals of the House and Senate include the veto message, and details of a vote to override or sustain the veto, but never an explanation of why the legislature won’t accept the reasoning of the chief executive. Floor debates are not a matter of record.

In 1921, Secretary of State Harry Black decided that 80 bills passed by the General Assembly and signed by the Governor after adjournment were not valid, and refused to publish them in the *Acts and Resolves* for that year. Black read Section 11 not to give the Governor the power to approve them and that they had been the subject of a pocket veto, as more than five days had passed since adjournment. The Supreme Court’s decision, written by Justice William H. Taylor, granted a mandamus to Hartness, ordering the printing of the acts. Taylor concluded “that there is no provision of the Constitution restricting the power of the Governor to approve bills after the adjournment of the Legislature, except that he is limited as to time to the period of five days (Sundays excepted) after the bill has been presented to him. No such provision is needed to make the plan of executive revision complete. To hold as the petitionee contends would make it necessary to read into the Constitution a provision restricting its plain and express

terms, wholly unnecessary to reasonable interpretation."<sup>47</sup>

The House or Senate Clerk does not deliver the bills to the Governor on the day final action by the legislature is taken, once adjournment has occurred. There is a necessary delay in paperwork, and over the last 50 years there has been a practice of keeping the bills until the Governor's office requests them, so that the five days for pocket vetoes would not run until that time. In some years, delivery has been delayed until the Governor can find an occasion for a signing ceremony. In June of 1994, House Clerk Donald Milne concluded that Governor Howard Dean had abused the privilege of holding legislation until the Governor wanted to sign it, and delivered 18 bills to the Governor's office all at once, rather than waiting for an invitation.<sup>48</sup> That dramatic event, later mitigated by agreement, underscored the practical machinery of Section 11, and the collision of branches in the legislative process.

The increasing use of the pocket veto led to a change in the time of adjournment. Rather than ending the session, the legislature regularly recesses for a few weeks after finishing its session to be able to respond to vetoes, without the need for a special ses-

sion. This is another indication of the tension that separates the branches, and the way the balance can shift.

### The Vetoes of the Twenty-First Century

Since the century began, Governors Dean, Douglas, Shumlin, and Scott have vetoed a total of 33 bills. Two were overridden, including the 2009 veto of the civil marriage bill by Governor Douglas, based on conscience and redundancy with the civil union law,<sup>49</sup> and his veto of the state budget in the same year, predicting a deficit in revenues that could not support the proposed appropriations.<sup>50</sup>

The vetoes are commonly issued to highlight differences in state policy between the executive and the legislature. This will cost too much, or require higher taxes. This one will kill jobs or hurt small business. Compared to other states, this one would make Vermont look too indulgent or too restraining, a spendthrift or a miser.

Vetoes don't often reflect political differences, and Governors who enjoy majorities in both chambers of their party are not necessarily less likely to veto legislation than those whose political affiliations are in the minority of the House and Senate.

The 2018 session of the legislature ended with a pair of vetoes of the state budget by Governor Scott, requiring a recessed session and tense negotiation before a budget was finally adopted and not vetoed by the Governor. This is the first time in Vermont's history that a bill has been vetoed twice. With nine vetoes in his first term alone, Scott shows promise of becoming the leading contender for the prize of Vermont's greatest vetoer.

### A Rich Source of Constitutional Precedent

Since the veto's inception, twenty-six bills were vetoed because the Governor concluded they violated the U.S. or Vermont Constitutions. The most common objection was citing a violation of the separation of powers clause, Section 5 of Chapter II. Governor Stickney labeled the 1900 bill to incorporate the Central Vermont Railroad as "unconstitutional" because it was "an endeavor to settle by legislation conflicting claims which are purely judicial questions and properly determinable in the courts where the interests of all the parties can be equitably conserved and protected. His was the only veto of the 26 constitutionally-based vetoes to be over-

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ridden.<sup>51</sup>

Section 5 of Vermont's Constitution was invoked as justifying a veto by Governor John Mead in 1910 of a bill to grant the State Board of Health the power to issue fines for corporations violating its own rules on heating and ventilating of mills and factories, as that is a judicial function;<sup>52</sup> Governor Mead's veto of the sterilization bill in 1913, not because it was too severe, as the newspapers believed, but because it did not provide for an appeal to the Supreme Court and because it applied only to disabled persons residing in state institutions and not to the public at large, invoking Article 7 (common benefits) as well;<sup>53</sup> Government Percival Clement's 1919 veto of a law granting the Public Service Commission the power to initiate proceedings to replace railroad grade crossings with bridges, when the PSC was also the institution to consider the outcome of the claim, which it could not do if it were to maintain a fair and impartial process;<sup>54</sup> the 1927 veto of a bill to relieve one company of the burden of a fine for violating the law on outdoor advertising by Governor John E. Weeks, because this is a matter for the judiciary to resolve in a pending suit;<sup>55</sup> the 1957 veto by Governor Joseph B. Johnson of a bill to create an office of state comptroller because it encroached on the Governor's authority;<sup>56</sup> Governor Snelling's 1980 veto of the amendment to the administrative procedure act that allowed for a legislative veto of administrative rules;<sup>57</sup> Snelling's 1991 veto of a bill relating to import and export of domestic animals, on the same grounds;<sup>58</sup> Governor Dean's veto in 1996 of a proposal to change the offenses that would disqualify a person from a waste management position as it was an attempt to change the law for one person, convicted of a crime, having the effect of a pardon;<sup>59</sup> and Governor Douglas's 2005 veto of a universal health care bill that gave legislators duties that properly belonged to the executive.<sup>60</sup>

Article 2, on the taking of private property for public purposes, was given as the reason for the 1869 veto by Governor Peter Washburn of a bill authorizing the digging of ditches and watercourses across private lands without compensation and without consent;<sup>61</sup> Samuel Pingree's 1884 veto of a bill to protect Springfield Village highways because it prohibited landowners along a two-mile long length of a brook from improving their real estate and gave the selectboard the authority to order removal of fences, without providing compensation;<sup>62</sup> and John A. Mead's 1910 veto of a proposal giving railroad corporations the power of eminent domain with no provision for damages.<sup>63</sup>

Governor Percival Clement vetoed a bill in 1919 authorizing bonds for county tuberculous hospitals because the bill began life in the Senate, in violation of Section 6 of the

Constitution, which requires revenue bills to originate from the House of Representatives.<sup>64</sup> Section 6 was also invoked when Charles W. Gates vetoed a measure in 1915 to extend the time to complete railroad construction, which attempted to delegate legislative powers to the Public Service Commission, and in 1888 when William P. Dillingham vetoed a bill giving the State Board of Health the authority to make rules which would be "legal enactments," intruding on the exclusive domain of the legislature.<sup>65</sup>

Other vetoes invoke Articles 4, 10, and 13, and Sections 15, 65, and 72. In several cases, Governors vetoed bills because they offended federal law or the fourteenth amendment to the U.S. Constitution, on due process grounds.

Skeptics might say that Governors have no special expertise in constitutional law, and that their vetoes that recite violations of the fundamental law should have no weight in court, but they are wrong to think that way. The fact that a Governor vetoed a law on constitutional grounds, has meaning. As cases emerge that challenge government action and define the meaning of the Constitution's rights and obligations, this body of constitutional law shouldn't be neglected.

### The Future of the Veto

The pace is accelerating: Governors and their staffs are becoming more vigilant in exercising the post-enactment review process. Legislatures are becoming more aggressive and Governors more defensive on issues of public policy and finance. Just as the pace of judicial review appears to be increasing, the veto and override engines are heating up, as is the Constitution itself.

There were years when the Constitution was dormant, and rarely used, but an era where every branch remains sensitive to the fundamental law appears to be emerging. The constitution is a tool for all three branches, a corrective, a shield, a border, a prescription for legislation that respects the rights of the people and the limits of governmental power. It is also, of course, our constitution, and we are its primary constituents, not a court, not the General Assembly, not a Governor. But then, we don't have a veto.

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<sup>1</sup> There have been 2,574 vetoes by U.S. Presidents since the adoption of the Constitution, and 111 of them have been overridden. <https://www.senate.gov/reference/Legislation/Vetoes/vetoCounts.htm>. (visited 7/22/18 10:45 a.m.). The

veto messages of Vermont Governors are found in the journals of the House or Senate, and have been compiled by the State Archives. <http://vermont-archives.org/governance/Vetoes/vetoes.html>.

<sup>2</sup> This would be a good place to say how many Governors Vermont has had, but that presents a numerical problem. Philip Scott is listed on his official webpage as Vermont's 82th Governor. [governor.vermont.gov/](http://governor.vermont.gov/). He is the 76th person to be elected Governor, the 79th to serve as Governor, counting Paul Brigham, George Hendee, and Harold Arthur, who as Lieutenant-Governors took over the duties of the chief executive. As this process goes, in keeping with the number given to Presidents, when a Governor is elected for non-sequential terms, the official enjoys a second count, which is the case with Thomas Chittenden, Isaac Tichenor, Jonas Galusha, Erastus Fairbanks, and Richard A. Snelling. That would make the number 84 (counting the successor Lieutenant-Governors, but the way these counts are made only Governors of States are included, so Thomas Chittenden, Moses Robinson, and Paul Brigham don't qualify as Vermont wasn't a State until 1791. That adds three to make the number 81. How we get to 82 is unclear.

<sup>3</sup> George Willis Botsford, *A History of the Ancient World I* (New York: The MacMillan Company, 1916), 345.

<sup>4</sup> James Kent, *Commentaries on American Law I*, O.W. Holmes, Jr., ed. (Boston: Little, Brown, 1873), 239-241.

<sup>5</sup> Alexander Hamilton, *The Federalist LXIX*, in *The Debate on the Constitution II* (New York: Literary Classics of the United States, Inc., 1993), 338-339.

<sup>6</sup> John Locke, *Carolina Constitution*, Sec. LXXVI, in *A Collection of Several Pieces of Mr. John Locke* (London: R. Franklin, 1739), 11. "No Act or Order of Parliament shall be of any force, unless it be ratified in open Parliament during the same session, by the Palatine or his Deputy, and three more the Lords, Proprietors, or their Deputies; and then not to continue longer in force but until the next biennial Parliament, unless in the mean time it be ratified under the Hands and Seals of the Palatine himself, and three more of the Lords Proprietors themselves, and by their order publish'd at the next biennial Parliament."

<sup>7</sup> Robert J. Sptizer, *The Presidential Veto* (Albany, N.Y.: State University of New York Press, 1988), 4-6.

<sup>8</sup> *Id.*, 10.

<sup>9</sup> James Madison, *The Federalist LI*, *The Debate on the Constitution II* (New York: Literary Classics of the United States, Inc., 1993), 165.

<sup>10</sup> F.W. Maitland, *The Constitutional History of England* (Cambridge: University Press, 1919), 195.

<sup>11</sup> Paul S. Gillies and D. Gregory Sanford, eds., *The Records of the Council of Censors of the State of Vermont* (Montpelier, Vt.: Secretary of State, 1991), 11.

<sup>12</sup> "An act directing the form of passing laws," John A. Williams, ed., *Laws of Vermont 1781-1784* (Montpelier, Vt.: Secretary of State, 1965), 31-32.

<sup>13</sup> *Council of Censors*, 51.

<sup>14</sup> "An act in addition to the act entitled, 'An act directing the mode of passing laws,' Acts and Laws passed by the Legislature of the State of Vermont, at their session at Newbury, in October, 1801 (Windsor, Vt.: Alden Spooner, 1801), 6-7.

<sup>15</sup> E.P. Walton, ed., *Records of the Governor and Council of the State of Vermont VII* (Montpelier, Vt.: J. & J.M. Poland Steam Press, 1879), 225.

<sup>16</sup> "An act repealing part of an act therein mention," October 21, 1826, Acts and Resolves passed by the General Assembly of the State of Vermont 1825-1827 (Windsor, Vt.: Simeon Ide, 1828), 28-29; "An act, in addition to the several acts, defining the powers of justices of the peace within this state," November 19, 1824, Acts and



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Resolves passed by the General Assembly of the State of Vermont 1823-1825 (Bennington, Vt.: Clark & Doolittle, 1825), 24-25.

<sup>17</sup> Council of Censors, 394.

<sup>18</sup> *Id.*, 113-114.

<sup>19</sup> Article of Amendment 11, *Constitution of Vermont*, in Charles L. Williams, comp., *The Compiled Statutes of the State of Vermont* (Montpelier, Vt.: E.P. Walton & Son, 1851), 45.

<sup>20</sup> Silas Jennison, Veto Message, *The Journal of the House of Representatives of the State of Vermont October Session 1839* (Montpelier, Vt.: E.P. Walton & Sons, 1839), 128-131; William P. Dillingham, Veto Message, *Journal of the Senate of the State of Vermont Biennial Session 1888* (Montpelier, Vt.: Argus and Patriot Job Printing Office, 1889), 326-327.

<sup>21</sup> William Slade, Veto Message, *The Journal of the Senate of the State of Vermont October Session 1845* (Windsor, Vt.: Bishop & Tracy, 1846), 138-143.

<sup>22</sup> Levi K. Fuller, Veto Statement, *The Journal of the House of Representatives of the State of Vermont Biennial Session 1892* (Montpelier, Vt.: Argus and Patriot Job Printing House, 1893), 347-348.

<sup>23</sup> Carlos Coolidge, Veto Message, *The Journal of the House of Representatives of the State of Vermont Annual Session 1848* (Burlington, Vt.: Chauncey Goodrich, 1848), 222-223; "No. 78.--An act to amend the charter of the National Life Insurance Company," October 5, 1849, in *Acts and Resolves Passed by the Legislature of the State of Vermont at the October Session, 1849* (Montpelier, Vt.: E.P. Walton & Son, 1849), 113-114.

<sup>24</sup> The Legislative Reference Bureau was created in 1902. "No. 14.--An act relating to a legislative reference bureau," *Acts and Resolves Passed by the General Assembly of the State of Vermont at the Twenty-second Biennial Session 1912* (Montpelier, Vt.: Capital City Press, 1913), 14-16. Under this act, "revisers of bills" were employed by the legislative reference librarian to work with legislators on draft legislation.

<sup>25</sup> Hiland Hall, Veto Message, *The Journal of the House of Representatives of the State of Vermont October Session 1858* (Ludlow, Vt.: Warner's Book & Job Printing Establishment, 1858), 213-215.

<sup>26</sup> John B. Page, Veto Message, *Journal of the Senate of the State of Vermont Annual Session 1867* (Montpelier, Vt.: Freeman Steam Printing Establishment, 1868), 226-227.

<sup>27</sup> Peter T. Washburn, Veto Message, *The Journal of the House of Representatives of the State of Vermont Annual Session 1869* (Montpelier, Vt.: Polands' Steam Printing Establishment, 1870), 139-140.

<sup>28</sup> Peter T. Washburn, Veto Message, *id.*, 178-179, 253.

<sup>29</sup> Vermont Constitution, Chapter II, Section 27.

<sup>30</sup> *Kellogg v. Page*, 44 Vt. 356, 361-362 (1871). Loyal C. Kellogg was elected to the Vermont Supreme Court in 1859 and served eight years on the Court. In 1870, he was elected to the House, representing the Town of Benson. Frank Fish, "Loyal C. Kellogg," in Walter H. Crockett, *Vermont the Green Mountain State V* (New York: Century History Company, Inc, 1926), 125-126.

Governor Snelling once signed a resolution, indicating his support for the proposition. Whether that converted a resolution into a legislative act is as yet undecided, but doubtful.

<sup>31</sup> *National Land & Loan Co. v. Mead*, 60 Vt. 257, 259 (1888).

<sup>32</sup> William P. Stickney, Veto Message, *The Journal of the House of Representatives of the State of Vermont Biennial Session 1898* (St. Albans, Vt.: The St. Albans Messenger Co. Press, 1899), 501-502.

<sup>33</sup> "No. 159.--An act to incorporate the Central Vermont Railway Company," *Acts and Resolves Passed by the General Assembly of the State of Vermont at the Fifteenth Biennial Session, 1898*

(Burlington, Vt.: Free Press Association, 1898), 125-128.

<sup>34</sup> "The Passing of the Veto in Vermont," *St. Albans Daily Messenger*, March 29, 1901, 4.

<sup>35</sup> "The Veto Power in Vermont," *St. Albans Daily Messenger*, April 19, 1901, 4.

<sup>36</sup> "The Governor's Veto," *St. Albans Daily Messenger*, April 4, 1902, 4. The Messenger revealed that the heart of the debate was who would bear the cost of replacing a grain elevator in Ogdensburg.

<sup>37</sup> "The Governor's Veto," *St. Albans Daily Messenger*, April 10, 1902, 1.

<sup>38</sup> Charles Bell, Veto Message, *Journal of the Senate of the State of Vermont Biennial Session 1904* (St. Albans, Vt.: St. Albans Messenger Company Print, 1905), 242; Override, *Journal of the House of Representatives of the State of Vermont 1904* (St. Albans, Vt.: St. Albans Messenger Company Print, 1905), 312-313.

<sup>39</sup> "Vermont Governor's Veto Power," *St. Albans Daily Messenger*, December 1, 1904, 5.

<sup>40</sup> "How the Matter Stands," *Brattleboro Reformer*, June 10, 1904, 2 (quoting from the *Burlington News*).

<sup>41</sup> "State of Vermont Proposals of Amendment to Constitution, Report of Commission" (St. Albans, Vt.: St. Albans Messenger Co., 1910).

<sup>42</sup> Walter Hill Crockett, *Vermont The Green Mountain State IV* (New York: The Century History Company, 1921), 446.

<sup>43</sup> James Hartness, Veto Message, *Journal of the Senate of the State of Vermont of the Thirty-sixth Biennial Session 1915* (Montpelier, Vt.: Capital City Press, 1921), 404, 529; "An Act to amend the General Laws relating to a homestead," *Acts and Resolves of the General Assembly of the State of Vermont at the Twenty-third Biennial Session 1915* (Montpelier, Vt.: Capital City Press, 1921), 67-71.

<sup>44</sup> Franklin S. Billings, Veto Message, *Journal of the Senate of the State of Vermont Biennial Session 1925* (547-553; "No. 21.--An act relating to the taxation of certain personal estate known as intangibles," *Acts and Resolves of the General Assembly of the State of Vermont at the Twenty-eighth Biennial Session 1925* (Montpelier, Vt.: Montpelier, Vt.: Secretary of State), 32-36.

<sup>45</sup> Richard A. Snelling, Veto Message, *Journal of the House of Representatives of the State of Vermont Biennial Session 1981* (Essex, Vt.: Offset House, 1981), 311-312, 335; "An act to add 32 V.S.A. § 9741(28) relating to the sales and use tax," *Acts and Resolves of the State of Vermont Biennial Session 1981* (Essex, Vt.: Offset House, 1981), 68.

<sup>46</sup> Madeleine Kunin, Veto Message, *Journal of the House of Representatives of the State of Vermont Biennial Session 1990* (Burlington, Vt.: Queen City Printers, 1990), 1030-1031, 1235-1236; "No. 85.--An act providing adjustments in the amounts appropriated for state government," *Acts and Resolves of the General Assembly Biennial Session 1990* (Burlington, Vt.: Queen City Printers, 1990), 74-91.

<sup>47</sup> *Hartness v. Black*, 95 Vt. 190 (1921). In 1929, the United States Supreme Court ruled that a bill passed during one session of Congress, presented to the President less than ten days before adjournment, not signed or returned to the house where it originated, does not become a law as if he had signed it, construing Article 1, Sec. 4 of the U.S. Constitution. *Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville, and Lake Indian Tribes or Bands of State of Washington, D.C. v. U.S.*, 279 U.S. 655 (1929).

<sup>48</sup> "House Clerk won't wait on Governor," *Burlington Free Press*, June 17, 1994, 6.

<sup>49</sup> James H. Douglas, Veto Message, *Journal of the House of Representatives of the State of Vermont 2009* (605, *Journal of the Senate of the State of Vermont Biennial Session 2009* (Middlesex, Vt.: Buildings and General Services, 2009), 907; "No.

3.--An act relating to civil marriage," *Acts and Resolves of the General Assembly of the State of Vermont* (Middlesex, Vt.: Buildings and General Services, 2009), 33-37.

<sup>50</sup> James H. Douglas, Veto Message, *Journal of the House of Representatives Biennial Session 2009* (Middlesex, Vt.: Buildings and General Services, 2009), 2396; "An act making appropriations for the support of government," *Acts and Resolves of the General Assembly of the State of Vermont Biennial Session 2009* (Middlesex, Vt.: Buildings and General Services, 2009), 38-74.

<sup>51</sup> See footnote 32.

<sup>52</sup> John A. Mead, Veto Message, *Journal of the House of Representatives of the State of Vermont Biennial Session 1910* (Montpelier, Vt.: Capital City Press, 1911), 211-213.

<sup>53</sup> Allen Fletcher, Veto Message, *Journal of the Senate of the State of Vermont Biennial Session 1913* (Montpelier, Vt.: Capital City Press, 1914), 618-621.

<sup>54</sup> Percival W. Clement, Veto Message, *Journal of the Senate of the State of Vermont Biennial Session 1919* (Montpelier, Vt.: Capital City Press, 1920), 608-609.

<sup>55</sup> John E. Weeks, Veto Message, *Journal of the House of Representatives of the State of Vermont Biennial Session 1927* (Montpelier, Vt.: Capital City Press, 1927), 402-403.

<sup>56</sup> Joseph B. Johnson, Veto Message, *Journal of the Senate of the State of Vermont Biennial Session 1957* (Burlington, Vt.: Queen City Printers, 1957), 804-805.

<sup>57</sup> Richard A. Snelling, Veto Message, *Journal of the Senate of the State of Vermont 1980* (Burlington, Vt.: Queen City Printers, 1980), 797-800.

<sup>58</sup> Richard A. Snelling, Veto Message, *Journal of the Senate of the State of Vermont Biennial Session 1991* (Essex, Vt.: Offset House, 1991), 840-841, *Journal of the Senate of the State of Vermont Biennial Session 1992* (Essex, Vt.: Offset House, 1992), 14-16.

<sup>59</sup> Howard Dean, Veto Message, *Journal of the Senate of the State of Vermont Biennial Session 1996* (Essex, Vt.: Offset House, 1996), 1833-1834.

<sup>60</sup> James H. Douglas, Veto Message, *Journal of House of Representatives of the State of Vermont Biennial Session 2005* (Middlesex, Vt.: Buildings and General Services, 2005). This message is the longest of the veto addresses.

<sup>61</sup> Peter T. Washburn, Veto Message, *Journal of the House of Representatives of the State of Vermont Biennial Session 1869* (Montpelier, Vt.: Polands' Steam Printing Establishment, 1870), 250-252.

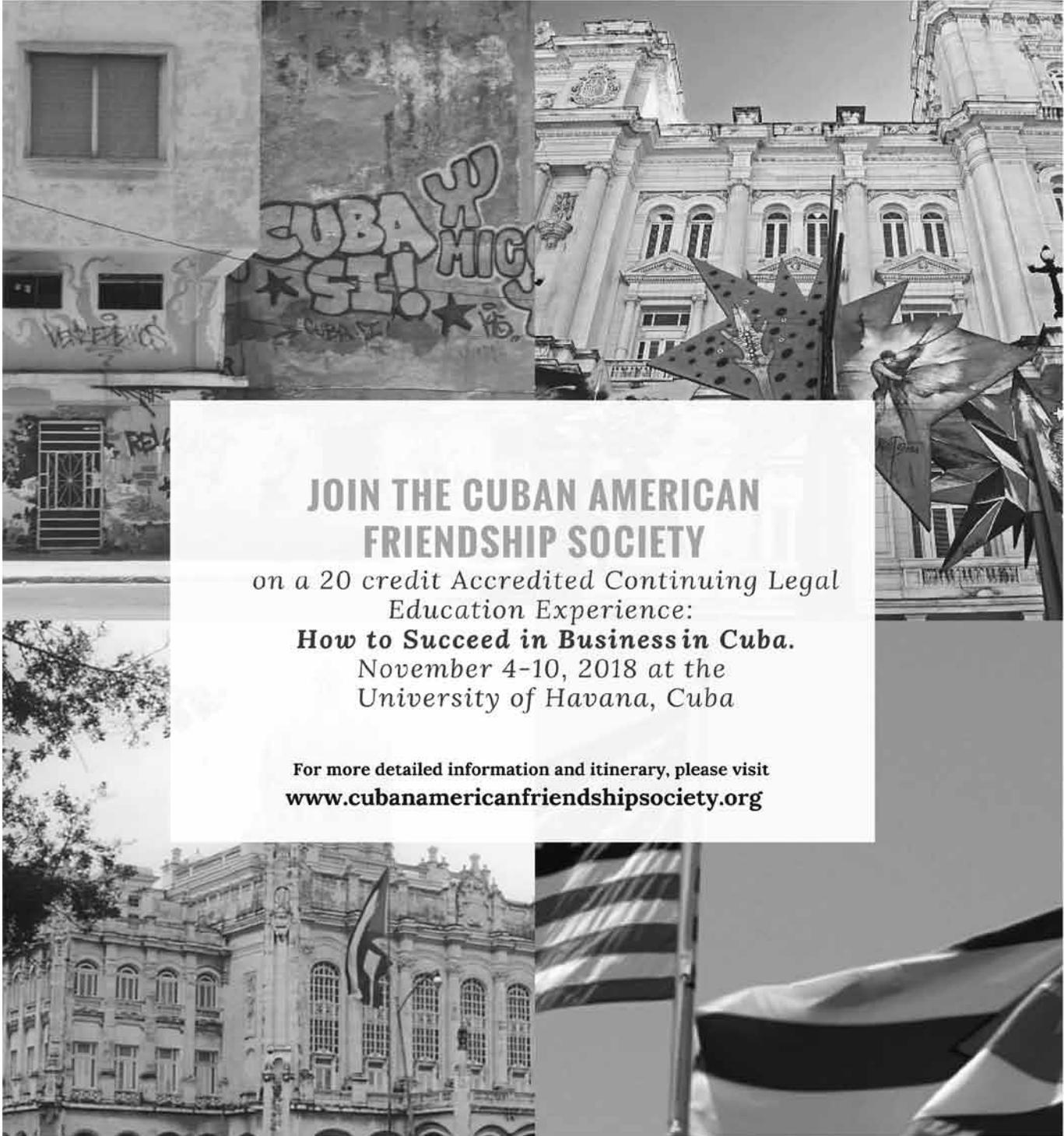
<sup>62</sup> Samuel E. Pingree, Veto Message, *Journal of the House of Representatives of the State of Vermont Biennial Session 1884* (Montpelier, Vt.: Watchman and Journal Press, 1885), 403-404.

<sup>63</sup> John A. Mead, Veto Message, *Journal of the House of Representatives of the State of Vermont Biennial Session 1910* (Montpelier, Vt.: Capital City Press, 1910), 314-315.

<sup>64</sup> Percival Clement, Veto Message, *Journal of the Senate of the State of Vermont Biennial Session 1919* (Montpelier, Vt.: Capital City Press, 1919), 454-455.

<sup>65</sup> Charles W. Gates, Veto Message, *Journal of the Senate of the State of Vermont Biennial Session 1915* (Montpelier, Vt.: Capital City press, 1915), 544-545; William P. Dillingham, Veto Message, *Journal of the Senate of the State of Vermont Biennial Session 1888* (St. Albans, Vt.: St. Albans Messenger Company Press, 1888), 326-327.





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# WHAT'S NEW?

## VBA Annual Report 2017-2018

It's a pleasure to report to you about VBA activities during 2017-2018.

Thanks to the generosity of so many lawyers and judges who are willing to share their expertise, the VBA was able to offer a full smorgasbord of **CLE Programs** covering the gamut of legal topics. Over 2,500 of you attended 248 live programs and watched 559 digital programs this past year. Many thanks to the amazing VBA section chairs who organized at least one CLE during the year at the Annual Meeting in September, at the Mid-Winter Thaw in January, at the Mid-Year Meeting in March, at the VBA Tech Conference in May, or during the numerous stand-alone programs held throughout the state. Please don't hesitate to let us know what CLE offerings you'd like to see offered, or if you'd like to present!

We're honored to work closely with all three branches of the Vermont Government, to ensure that your and your clients' interests are well-represented. The VBA also serves as a resource when needed. Towards that end, we were pleased to co-host "**Legislators' Days**" with the Judiciary in each of the fourteen counties throughout the Fall. County legislative delegations were invited to their local state courthouses to observe court hearings, and to meet with judicial officers and lawyer "ambassadors" from each division. Those events were followed by a VBA Legislators' Reception in January and a VBA Legislators' Breakfast in March that we hosted at the statehouse. The 2018 VBA Legislative Overview gives a summary of relevant legislation that was passed during the last legislative session, and is available on the VBA website. We're grateful that VBA Government Relations Coordinator Bob Paolini will continue in that role in 2019. Many thanks also to the ambassadors, to the section chairs, and to many other members who offered invaluable testimony during the legislative session, when needed.

A continuing focus in the arena of public education was to encourage lawyer presentations in conjunction with **Constitution Day** in September. The VBA has now provided over 3,500 copies of "Pocket Constitutions" for lawyers and judges to distribute at presentations they give to school and civic groups throughout the state. We were pleased to organize a third annual Constitution Day Panel Presentation, with an esteemed panel of five justices, judges and a Vermont Law School Constitution Law Professor, moderated by VBA President Gary Franklin. The panel presented a one-hour basic overview of the Constitution, with a focus on Separation of Powers, at Vermont Law School in September. Links to the videos of each Constitution Day presentation are on the VBA website. The VBA is happy to provide this and other resources to whomever would like to make a presentation in their community this year.

The Young Lawyers Division and the VBA Diversity Section organized a **Martin Luther King, Jr. Poster-Essay Contest** for Vermont middle-school students in the Fall. Governor Phil Scott presented awards to the winners at the statehouse in January; the students and their families also toured the statehouse and the Vermont Supreme Court Building, where their winning posters and essays were on public display for the month of January. Materials for the 2019 MLK, Jr. Poster-Essay Contest are going out soon!

The VBA and the Vermont Judiciary co-hosted a **Centennial Celebration** of the 100<sup>th</sup> Anniversary of the Vermont Supreme Court Building in May. Entitled "Celebrating the Role of the Bench and the Bar in Preserving the Rule of Law", the event included a well-attended outdoor ceremony with remarks by Governor Phil Scott, Chief Justice Paul Reiber, and State Representative Maxine Grad, Chair of the House Judiciary Committee. The presiding judges

and county bar presidents from each county presented historical accounts from their respective counties, and each received an historical marble plaque commemorating the occasion, hewn from marble from the Court's original construction. Lawyer/historian Paul Gilles wrote the historical accounts, as well as a fascinating essay about the building's history. The event culminated with a re-enactment of an oral argument from the Court's first term in the then-new building.

VBA Members have automatic access to **Casemaker**, a leading legal research services provider with intuitive search capabilities. Many enhancements have been added in the past year to Casemaker features. The website includes detailed information about the latest enhancements, and benefits of Casemaker for your research.

VBA membership includes unlimited access to section activity through our online communication platform "**VBA Connect**." Developed in response to members' requests for the ability to archive and to search the invaluable information that's shared among section members, VBA Connect allows section members to control the frequency of received posts, and to easily search and retrieve whatever information has been shared in all communities to date. If you haven't yet experienced the benefits of VBA Connect, please call or e-mail the VBA office at any time for personal training.

We were pleased to offer the **Second Annual Trial Academy** at the Vermont Law School in July. This day-long intensive trial practice program featured ten Vermont Supreme Court Justices and Vermont Superior Court Trial Judges, who ran ten different "courtrooms" throughout the day. They, and participating Vermont Fellows of the American College of Trial Lawyers, offered individual critiques of the 70 participants' opening statements, direct and cross ex-

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aminations, and closing statements. Members of the VBA Young Lawyers Division served as volunteer witnesses, and VLS students served as timekeepers. Stay tuned for the Third Annual Trial Academy in the Summer of 2019!

Our Vermont **Lawyer Referral Service** continues to work well for clients in need of Vermont counsel, and for the 157 LRS panel members who earned more than \$1,200,000.00 in LRS revenue this past year. The VBA fielded 7,182 LRS calls, averaging 598 calls per month. We printed and distributed VBA business cards with the LRS 800 number, the VT Free Legal Answers website, and the "Modest Means" website to all of the Vermont state courthouses, numerous public libraries, and many veteran centers throughout Vermont. If you're not already an LRS member, consider joining for the low cost of \$70.00 per year. Your next big case could be an LRS referral!

Regarding **Access to Justice** initiatives, the VBA is grateful to the Vermont Bar Foundation for funding the seven different County Bar Legal Assistance Projects covering nine counties, which provided legal representation to over 130 low income Ver-

monsters who would have otherwise been without legal assistance in their civil, probate and family cases. Participating lawyers also contributed a total of 200 pro bono hours to the cases. With our share of a US Department of Justice Victims of Crime Act grant, the VBA provided low bono payments to lawyers who represent crime victims in legal matters arising from their victimization. In the VOCA project last fiscal year, we placed 54 cases with low bono attorneys, and the attorneys collectively donated 42.2 pro bono hours over and above the hours they billed. Effective January 1, 2018, the Vermont Supreme Court awarded two grants to the VBA to continue and expand statewide low bono legal representation in two categories of cases. With one grant, the VBA pays low bono lawyers to represent respondents in adult involuntary guardianship cases. With the other grant, private attorneys are paid a low bono stipend to assist foster/adopting parents as they negotiate and enter into post adoption contact agreements with relinquishing parents. If you would like to be added to the rosters of participating attorneys, please contact VBA Legal Access Coordinator Mary Ashcroft at [mashcroft@vtbar.org](mailto:mashcroft@vtbar.org).

As always, we strive to bring you the latest membership products and services, as evidenced by the numerous sponsors and exhibitors at our major meetings, and as detailed in the "**Affinity Partners**" section on the website. Be sure to take advantage of the substantial discounts available for consulting, credit card processing, practice management, health insurance, personal insurances, retirement program, marketing software, professional liability insurance, rental cars, and shipping services. Our newest partners include Red Cave Consulting, TurboLaw, HealthiestYou, and Sugarbush Ski Area.

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

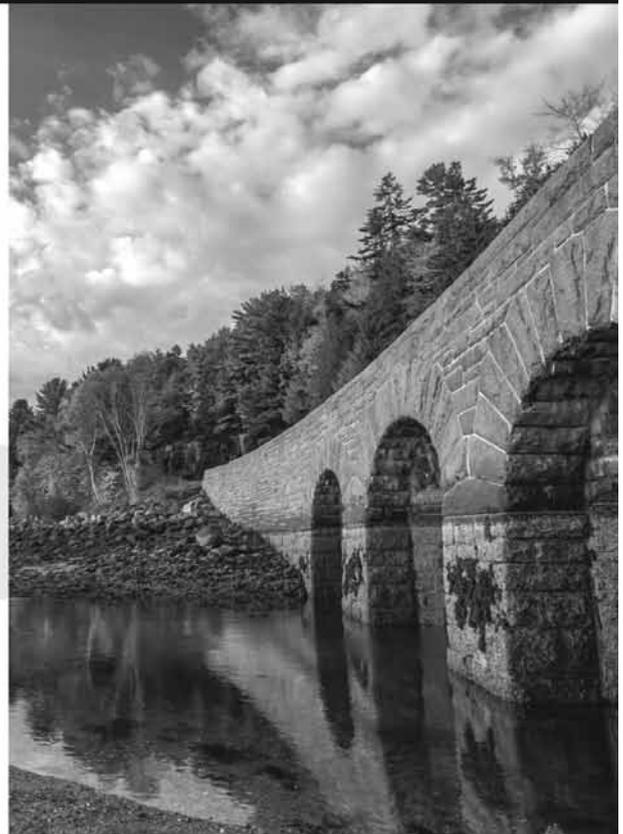


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# WHAT'S NEW?

## 2017-2018 Sections and Divisions Annual Report

### APPELLATE LAW SECTION

Chairs: Benjamin Battles and Bridget Asay, Esqs.

The Appellate Section is planning a CLE program for early next year on State Constitutional Law. In the meantime, a quick update on the appellate rules: the "day is a day" rule changes took effect on January 1, 2018, and changed many familiar deadlines. Practitioners should also know that the Court changed the automatic appeal rule for defendants sentenced to life imprisonment and adopted a prison mailbox rule. See VRAP 3(b)(2), 10(b)(3), and 4(f). Was the key piece of evidence in your trial a blown-up photo, oversize map, or 300-page appraisal? Under the now-permanent Rule 11(b)(3), the superior court clerk will not automatically send unusually bulky documents or physical evidence to the Supreme Court. Make sure to ask if it's important to your appeal -- and you may need to help transport it.

### BANKRUPTCY LAW SECTION

Chair: Heather Cooper, Esq.

The Bankruptcy Law Section fulfills its mission of promoting professional education and service to the bar and community through various initiatives. The Annual VBA Bankruptcy Holiday CLE and Luncheon was held on December 1, 2017 and was well attended, as usual. The Bankruptcy Section considered bankruptcy specific issues relating to revised local rules and the transition to the National Chapter 13 Plan which is being used in Vermont. In addition, those in attendance discussed succession planning issues that relate to practitioners' ethical responsibilities in a more general context. The section heard from members who are both in the process of transitioning and some who have transitioned out of practice entirely. We greatly appreciated those who emerged from retirement to participate.

Various members of the Bankruptcy Section contributed to a variety of continuing legal education events locally and nationally including the American Bankruptcy Institute's Northeast Conference which was held in Stowe in July. Vermont's standing Trustees continue to be active in national organizations and one of our members, Chapter 7 standing Trustee and former Bankruptcy Section Chair, Raymond Obuchowski, was recently named as President of the National Association of Bankruptcy Trustees.

In addition, in concert with the United States Bankruptcy Court for the District of Vermont, the Bankruptcy Section holds nearly monthly Bench-Bar Brown Bag Lunch Meetings over the noon hour in either Rutland or Burlington with access by phone to ensure statewide availability for all practitioners.

The Bankruptcy Section welcomes new incoming co-chairs for the 2018-2019 season: Nancy Geise and Don Hayes. We are currently developing the topics for the upcoming Bankruptcy Holiday CLE and Luncheon which will take place on December 7, 2018 at the Trader Duke's Hotel in S. Burlington, Vermont.

### BUSINESS ASSOCIATION LAW SECTION

Chair: Tom Moody, Esq.

Members of the Business Association Section were active in drafting and providing testimony on a few pieces of business legislation, the most notable of which was S.269, an act relating to blockchain based limited liability companies and personal identity trusts. The group engaged at length with the Office of the Vermont Secretary of State, the Department of Financial Regulation, the House Committee on Economic Development and the Senate Finance Committee. Our Section was involved from start to finish, working to shape the legislation to be helpful to the business community and the State of Vermont. That same group was involved in changes to the public document and notary public statutes. Also, the Business Association Section presented at the 2017 VBA Annual Meeting on "Advanced Issues in Private Sale Transactions." The group made only light use of VBA Connect, and one of our goals for the coming year is to get more members of the group engaged in using VBA Connect.

### COLLABORATIVE LAW SECTION

Chair: Nanci Smith, Esq.

The Collaborative Law Section would love to invite members from the larger membership who are interested in Collaborative Practice to reach out and create your own local practice group or join an existing practice group. This past year the Central Vermont Practice Group merged with the Chittenden County Practice Group and is now called CPVT (Collaborative Practice Vermont). The group held a strategic planning meeting in

May, are working on rolling out a new public education campaign about Divorce Options which has been successfully used in California. We continue to meet monthly with our interdisciplinary partners in mental health and financial planning. Three attorney members and a mental health professional from the group engaged in additional mediation training this year through a 3-day training at Champlain College. Two attorney members attended the IACP (International Academy of Collaborative Professionals) Forum in Philadelphia where we continued to network and expand our skills. We started to incorporate zoom as our meeting platform as our membership expands, and attorney members who are interested in joining the CPVT practice group are encouraged to contact Nanci at [nanci@nancismithlaw.com](mailto:nanci@nancismithlaw.com). As always, members are encouraged to engage in discussion about collaborative law on VBA Connect and share their collective wisdom.

### CONSUMER LAW SECTION

Chair: Jean Murray

Though the Consumer Law Section has taken no position, members of the consumer law section were involved during the legislative session reviewing and commenting on proposals regarding debt collection process in Vermont. With stakeholder agreement, a bill passed the House, but was not addressed in the Senate. It included steps for obtaining or defending an order for Trustee Process against bank accounts that would add timeliness and certainty.

### CRIMINAL LAW SECTION

Chair: Dan Maguire, Esq.

This coming year the Criminal Law Section plans to actively engage its diverse membership by soliciting its members as to what changes, additions or deletions to the Vermont Rules of Criminal Procedure would best benefit the effective administration of justice. Section Chair Dan Maguire will forward proposals to the Supreme Court's Criminal Rules Advisory Committee for consideration and adoption. In the past year the Criminal Rules Advisory Committee, made up of Judges, prosecutors, defense attorneys and court staff, have debated numerous proposed changes and amendments to the criminal rules. Members are encouraged to engage in this process and comments are welcome and can be directed to Dan Maguire at [Dan@maguirelawvt.com](mailto:Dan@maguirelawvt.com)

## DISPUTE RESOLUTION SECTION

Chairs: Neil Groberg and Richard Hecht, Esqs.

With over 135 members strong, the members of the Dispute Resolution Section continue to strive to make mediation, arbitration and facilitation more utilized, accepted and publicized in Vermont's legal community. Internally, renewed efforts have been made by Co-Chairs Rick Hecht and Neil Groberg to keep the members informed and communicate with each other. Given the geography of the state and the busy practices of our members, this has been accomplished primarily through VBA Connect.

VBA Connect postings regarding about available commission positions; possible assignments; legislation and topical issues have dominated. Examples included postings on the open neutral positions to the Vermont Labor Relations Committee and the change in the law related to those appointments. Another example of the proactive nature of the use of VBA Connect was an engaging discussion about #Metoo and the value of mediation in that context. In this regard, we are excited about the forthcoming workshop at the VBA Annual Meeting entitled "Arbitration in Vermont" featuring a panel of distinguished arbitrators.

The Section anticipates becoming even more vibrant in the coming year and welcome suggestions from all Bar members regardless of Section on opportunities for Dispute Resolution and interaction with the DR Section.

## ELDER LAW SECTION

Chair: Glenn Jarrett, Esq.

The Elder Law Section co-sponsored Vermont NAELA's annual Summit. The 2018 Summit is focusing on three timely topics: Planning for Camps and Second Homes; Financial Exploitation of Elders and Digital Assets.

In addition, Section members reviewed proposed legislation on financial exploitation of elders and gave informal advice about the legislation to Attorney General's Office members. A segment of VBA's Probate Law Day in June also focused on financial exploitation of vulnerable adults.

## ENVIRONMENTAL LAW SECTION

Chair: Gerald Tarrant, Esq.

At this past June's annual VBA CLE we continued our review and discussion of how the courts accord deference to the Agency of Natural Resource's statutory authority and expertise. *In re Korrow Real Estate, LLC*,

2018 VT 39 (No. 2017-133).

Perhaps the single most important issue encountered in 2018 has been the celebration and scrutiny of Act 250. With its Fiftieth Anniversary in clear sight, the 2017 Legislature passed Act 47 creating the Commission on Act 250 to review the purpose and goals of Act 250, listen to the views of Vermonters on how best to maintain the environment, and potentially recommend improvements to the State's comprehensive land use law. This law could well influence more than the ten criteria of Act 250 and its process, but also ANR permitting, municipal review and oversight, renewable energy review and perhaps insert new criteria dealing with climate change and other issues. By statute, the Chair of the Environmental Section of the VBA is one of several advisors to the Commission.

Non-profits, state agencies, planners, the development community and members of the public including the legal community have provided comments and/or proposals for changes relative to the Natural Resources Board, the district commissions, and the Environmental Division of Superior Court. The Agency of Natural Resources, other state agencies, the Vermont Planning Association and municipalities have generally argued for more oversight by ANR and a larger say by ANR in the process, with lesser oversight and control by the District Commissions. Some groups and citizens have argued for a return of the old Environmental Board, while others maintain the Environmental Division of Superior Court offers the fairest review process and should be maintained. There is no shortage of positions and recommendations, including the idea of placing renewable energy projects under Act 250 review.

The Commission is Chaired by Sen. Amy Sheldon, Middlebury. The Commission includes Sen. Dick McCormack, Windsor, Sen. Christopher Person, Burlington, Sen. Brian Campion, Bennington, Rep. David Deen, Westminster, and Rep. Paul Lefebvre, Newark. At the end of this year, the Commission will deliver a report to the 2019 Legislature that analyzes how Act 250 has performed and may offer recommendations for possible improvements. Members from the Environmental Section have participated in the Commission's numerous meetings and hearings around the State and have provided input both at the Section's most recent CLE and through the VBA. Please utilize VBA connect to share any thoughts you have about Act 250 and any recommended changes to the present law.

## FAMILY LAW SECTION

Chair: Patricia Benelli

The Family Law Section has been focusing

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on statutory changes in both state and federal law this year. In state law, Susan Murray and Kurt Hughes were largely responsible for--and are to be commended for--a monumental rewrite of Vermont's outdated parentage statute. Several members of the section testified on this bill in the legislature, and it was passed into law in the spring. There has also been much activity--but as yet no results--concerning a rewrite of the alimony and child support guidelines as a result of the recent dramatic changes in federal tax law. The Section will be sponsoring a CLE at the VBA annual meeting with updates on family law rules, statutes and case law. It has a busy agenda for the upcoming year, and the schedule for regular meetings has been announced.

## GOVERNMENT AND NON-PROFIT SECTION

Chair: James Porter, Esq.

The Government and Non-Profit Section saw its membership grow with the addition of members of the Department of State's Attorneys & Sheriffs and the Office of the Attorney General. In addition, the section was given a seat on the VBA Board and Joshua Diamond, Deputy Attorney General, was

elected to serve in that seat. This year we are actively seeking recommendations from members as to possible subjects for an upcoming CLE.

## HEALTH LAW SECTION

Chairs: Drew Kervick and Elizabeth Wohl, Esqs.

In connection with the VBA's recent attention on attorney wellness, the health law section organized a CLE at the 2018 VBA Mid-Year meeting focusing on mental health. Titled "Keeping it All Together: Navigating Mental Health Challenges in the Legal Profession", the seminar featured a facilitated panel of expert discussion leaders, including Michael Kennedy (Vermont Bar Counsel), Elizabeth Wohl (Brattleboro Retreat), AJ Ruben, (Disability Rights Vermont), and Wilda White (Vermont Psychiatric Survivors), and focused on the challenges of accessing mental health treatment, the problems that stigma creates, and the particular barriers that attorneys may (or may not) face when interacting with mental health providers, among other topics. The health law section looks forward to continued attention on the important issue of attorney wellness in 2019!

## IMMIGRATION LAW SECTION

Chair: Sidney Collier, Esq.

This past year has been another very active one in the field of immigration law. We have seen many policy changes that discourage even legal immigration to the U.S. and some that will likely result in more individuals facing deportation proceedings. In April, we saw families entering the U.S. at the southern border targeted with detention and separation, and many families remain separated despite a court order requiring reunification. The Section expects continued elevated activity in the coming year with more far-reaching changes anticipated.

In March 2018, Sidney Collier and Adeline Simenon presented on employment- and family-based immigration law at the VBA mid-year meeting. We look forward to an exciting humanitarian-based immigration presentation by attorneys with the Vermont ACLU and Vermont Law School at the VBA's Annual Meeting on September 28<sup>th</sup>. The Immigration Law Section encourages everyone to use VBA Connect to share what you are seeing in the field and ask questions.

## INTELLECTUAL PROPERTY LAW SECTION

Chair: Andrew Manitsky, Esq.

At the VBA Annual Meeting, the Intellectual Property Section participated in a joint

presentation with the Employment Law Section on "Workplace Investigations, Intellectual Property Law and Employment Law." In addition, Section Chair Andrew Manitsky gave a presentation on copyright law at the Governor's Institute on Information Technology & Digital Media on IP Across Digital Media and Technology. The IP Section will be presenting at the upcoming Mid-Year Meeting.

## INTERNATIONAL LAW & PRACTICE SECTION

Chair: Mark Oettinger, Esq.

The VBA's International Law & Practice Section has approximately 50 members. We engage in informal member-to-member resource sharing and cross-referral. During the past year, the Section co-hosted a presentation on Cross-Border US-Canada litigation. Chair Mark Oettinger joined Toronto attorneys Scott Fairley (Harvard LLM and SJD in Public International Law and International Human Rights) and Ruzbeh Hosseini, both of Cambridge LLP, a firm specializing in US-Canada (and other) cross-border litigation. The topics of the presentation included recent developments in Canadian case law regarding recognition (or not) of foreign-nation judgments under principles of comity.

Section members continue to collaborate on the design, dissemination and implementation of a proposed World Court of Human Rights (WCHR), a supra-national court that would, if implemented, unify the jurisprudence and procedure of the growing body of public international human rights law. For further details on this project, please see an article entitled, *The Design and Implementation of a World Court of Human Rights*, published in the Winter 2016-2017 issue of the *Vermont Bar Journal*. More information can be found at [www.worldcourtofhumanrights.net](http://www.worldcourtofhumanrights.net).

Mark Oettinger is scheduled to give the keynote address on the WCHR at the October 31, 2018 meeting of the Canadian Society of International Law (CSIL). During the past year, ILP Section members have also actively engaged with the Vermont International Trade Alliance, and the Vermont Council on World Affairs. Members are encouraged to post comments, questions or international legal developments of note through VBA Connect.

## JUVENILE LAW SECTION

Chair: Pamela Marsh, Esq.

The Juvenile Law Section sponsored a workshop at the Mid-Winter Meeting on Post-Adoption Contact Agreements. This was a lively session, and the video is available for folks are be willing to advise pro-

spective adoption parents on PACAs. Low bono funding (3 hours @\$60/hr) is available for this representation statewide.

Major changes in juvenile delinquency and Youthful Offender law have gone into effect as of January 1 and July 1, respectively. In summary: the prosecutor, except in very unusual circumstances, must charge youths who are under 18 at the time of the offense, in juvenile court for everything except the "big 12" offenses. Youthful Offender status may be requested for youths up to age 21 without entering a conditional plea in criminal court. The case is then immediately transferred to juvenile court for an "amenability hearing," at which time it is determined whether the case stays in juvenile court or is returned to the criminal division. Return to the criminal division remains possible if the youth violates probation.

Unfortunately, the Section has remained fairly inactive. Those with interest in Juvenile Law are encouraged to share discussions on VBA Connect. Next year the Section will be led by Linda Reis, Esq., and Sarah Star, Esq. who will hopefully breathe more life into Section activities.

## LABOR AND EMPLOYMENT SECTION

Chair: Stephen Ellis, Esq.

At last year's VBA Annual Meeting, the Labor and Employment and the Intellectual Property Sections combined to present a 2-part CLE on Workplace Investigations which was very well received. This year, the Labor and Employment Law Section is collaborating with the Vermont Department of Labor to present a seminar at the VBA Annual Meeting addressing legal and economic developments and trends within the general framework of workforce development. This not-to-be-missed program will provide a unique opportunity to engage directly with the Department of Labor's Commissioner, General Counsel and Chief Economist and will provide an overview of recent developments in the law from a policy perspective. Following the annual meeting, the Section will draw upon its membership continue to work with the DOL to make this presentation available in a series of public forums throughout the state. Please share any thoughts on public forum or program topics with Jennifer Emens-Butler or with the Section on VBA Connect.

## MUNICIPAL LAW SECTION

Chair: Brian Monaghan, Esq.

The Section was fairly inactive this year without having our annual Municipal Law Day. We are in the planning stages for having Municipal Law Day next year. The activ-

ity on VBA Connect was moderate-- members are always willing to help each other out with questions and odd scenarios. There was limited assistance with the leaslands legislation and discussion on VBA Connect about its implications.

## PARALEGAL SECTION

Chair: Carie Tarte, RP®, AIC

The Paralegal Section submitted an article that was published in the spring 2018 *Vermont Bar Journal* on "certified" vs. "certificated" paralegals, which outlined the difference between attending an educational program to obtain a certificate of completion in paralegal studies versus taking an examination to obtain a registered or certified paralegal designation. We are working toward co-sponsoring a dinner or luncheon event with the VBA this fall that will encompass both a social aspect and be eligible for CLE credit.

## PRACTICE AND PROCEDURE SECTION

Chair: Gregory A. Weimer, Esq.

Over the past year the committee chair acted as liaison between the Practice and Procedure Committee and the Vermont Civil Rules Committee concerning proposed amendments to V.R.C.P. 26(b)(4) to address changes in the case law concerning the disclosure of "Event Expert Witnesses". The Chair helped coordinate the publication of a Bar Journal article co-authored by James Dumont and Allan Keyes mapping out the proposed amendments as well as an open forum seminar at the upcoming annual VBA meeting to foster discussion and understanding of the proposed changes.

## PROBATE AND TRUST SECTION

Chairs: Bob Pratt and Mark Langan, Esqs.

The Probate and Trust Section co-chairs divided and conquered this past year with Bob Pratt handling the legislative matters and Mark Langan handling the section chairship otherwise. The section put on a very successful full-day Probate Law Day in June, reviewing the mass changes to probate laws and discussing elder abuse. As for the legislation, 2018 saw the conclusion of the project that started in 2010 for modernizing decedent's probate law, with Act 195 passed and signed by the Governor, effective July 1, 2018, including for Wills offered for admission or executed on or after that date. We will be going back for another change, to the small estates procedure, in the next session. It included authorization of self-proving Wills, property settlement agreements

made during marriage, expedited administration by waiver of an accounting, and an unsupervised administration if there is only one beneficiary who is also the sole fiduciary. The changes in the law will be highlighted again to Vermont's NAELA chapter in early October. There was also a change in the law allowing probate judges to approve trusts for minors that go beyond their attainment of the age of majority; this was part of Act 195 but was interjected by other interested parties; see 14 VSA 2659(e). The section remains one of the more active discussion sections on VBA Connect.

## REAL ESTATE SECTION

Chairs: Jim Knapp and Benjamin Depman, Esqs.

This was a busy year for the Property Law Section. Members of the section provided CLE programs at the September meeting and a well-attended and very informative day of CLE programs at Real Estate Law Day in November. There will be another presentation at the VBA Annual Meeting in September. Co-Chair Jim Knapp also presented the real estate segment at the Basic Skills program in September and March for attorneys pursuing admission to the Bar. The VBA Connect Online community remains very active, with hundreds of distinct discussion threads posted over the last year or so.

The regular session of the 2018 Legislature took up bills relating to several topics of interest to Section members: (a) addressing the issues with tax sales (statutes of limitation for challenging tax sales and for claims related to potential fraudulent conveyances); (b) providing for the transfer of the municipality's interest in municipal leaslands to the holders of the perpetual leases in 2020; (c) the complete revision of the regulation of the statutes related to notary publics; and (d) topics involving blockchain technology. Members Jim Knapp and Andy Mikell provided extensive testimony on the bills in numerous committee meetings.

The Title Standards subcommittee of the Real Estate Section will release new title standards in September along with updates and revisions of the current Standards.

## WORKERS' COMP

Chair: Keith Kasper, Esq.

The year-in-review for WC, Torts and Insurance presentation at the 2017 VBA Annual meeting had very positive feedback. Thanks to Heidi Groff, Jennifer McDonald and Paul Perkins for their presentation.

On May 4th, the VBA WC Section held its annual Bench Bar luncheon meeting with the VT Department of Labor personnel. The fo-

cus of this year's meeting was discussing the proposed major re-write of Vermont's Rules governing Vocational Rehabilitation Services in the WC system. Public comment on the proposed rules closed on July 20. Rules go to the Legislature for approval later this summer.

On July 20th, the VBA WC Bar celebrated the retirement of Phyllis Phillips, long time Administrative Law Judge, from the Vermont Department of Labor, with a roast and a fundraiser for Kids Chance of Vermont. Judge Phillips is opening a mediation practice. A luncheon will be held in conjunction with the annual Adjuster's Conference on October 26<sup>th</sup> to meet the new ALJ Stephen Brown.

## YOUNG LAWYERS DIVISION

Chair: Charles Romeo, Esq.

This has been another busy year for the Young Lawyers Division. The YLD has continued to host regional mixers throughout the state for division members as well as other members of the bar. Most recently, this included Montpelier and Brattleboro, both organized by our Secretary, James Valente. This past January, we held another successful annual Mid-Winter Thaw in Montreal which was packed with exceptional panelists of both the bench and bar and a keynote address by Vermont Public Radio's Mitch Wertlieb, which was a highlight of the event. This was also a year of transition for the Thaw. After nearly a decade or more, in 2019, the Thaw will be leaving the Le Centre Sheraton and returning to the recently-renovated Omni-Mont Royal, where the Thaw had been held in years past prior to the Sheraton.

For the second year in a row, members of the YLD served as witnesses for the VBA's Trial Academy. Lastly, the YLD launched a new program called "Dinner With a Judge" with a pilot event held in Rutland with Chief Justice Paul Reiber and U.S. Second Circuit Court of Appeals Judge Peter Hall. "Dinner with a Judge" is designed to provide an opportunity for members of the division to have informal, small-group discussions with members of the judiciary on general topics relating to the profession, including those affecting young lawyers. The Rutland event was a success and we look forward to hosting other such events throughout the state in the coming year.



# WRITE ON

## Assessing the Legal Writing Style of Brett Kavanaugh

Last fall, I wrote a column critiquing the legal writing style of Neil Gorsuch, President Trump's first appointee to the United States Supreme Court. This fall, I will critique the writing style of Brett Kavanaugh, President Trump's second appointee to the Court. Kavanaugh has been a judge on the D.C. Circuit Court of Appeals for twelve years. In that time, he has authored 307 opinions (including concurrences and dissents).<sup>1</sup> From this vast body of evidence, I have selected about thirty opinions that Judge Kavanaugh (in his statement to the Senate) and others have identified as some of the more noteworthy opinions in his time on the D.C. Circuit. I give Judge Kavanaugh's legal writing style high marks. He follows many of the key principles of plain English and persuasive writing. His opinions often begin with powerful, attention-getting introductions. He writes short sentences in the active voice. He uses transitions effectively. His sentences display strong parallel structure. His paragraphs abide by the "unity" principle of good paragraphing by sticking to one subject, and they are rarely too long.

Judge Kavanaugh writes his opinions in a matter-of-fact, no-nonsense way. I prefer Judge Kavanaugh's writing style to that of Justice Gorsuch. Those who read my column last fall know that I criticized Justice Gorsuch for some bad writing habits (excessive alliterations, relentless contractions, conjunctions at the start of sentences, use of the second person, sentence fragments, etc.). Judge Kavanaugh avoids many (though not all) of these problems. In the best legal writing, the reader only sees the writer's argument, not the writer. Too often, Justice Gorsuch's showy writing draws attention to him, not his argument. Not so for Judge Kavanaugh—his writing persuades by being logical, concise, and temperate. This column will explain why I think Judge Kavanaugh is an excellent legal writer.

### I. Effective Writing Habits

#### A. Powerful Openings

Judge Kavanaugh writes powerful openings that capture the reader's attention and succinctly describe the issue in the case. The opening paragraph or two of a brief (or, in Judge Kavanaugh's case, a judicial opinion) is valuable real estate. The introduction to your brief should "orient readers and frame the dispute."<sup>2</sup> A judge reading your brief should know "within thirty seconds" what the dis-

pute is about and why your client should prevail.<sup>3</sup> Bryan Garner, a leading expert on legal writing, recommends always starting with a preliminary statement "even if the rules don't call for it. Just put it there—as far up front as you can."<sup>4</sup> Judge Kavanaugh embraces this advice. Here are a few openings from his opinions and dissents. As you read them, notice how he is able to summarize even complex cases in just a few sentences. Notice also how Judge Kavanaugh establishes good flow from one sentence to the next.

#### *Kahl v. Bureau of National Affairs*

The First Amendment guarantees freedom of speech and freedom of the press. Costly and time-consuming defamation litigation can threaten those essential freedoms. To preserve First Amendment freedoms and give reporters, commentators, bloggers, and tweeters (among others) the breathing room they need to pursue the truth, the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits. In this case, we follow that Supreme Court directive.<sup>5</sup>

Judge Kavanaugh develops flow and clear logical persuasion in this opening paragraph by using "substantive" transitions effectively. We frequently use explicit transition words (however, because, subsequently, conversely, although, etc.) to link sentences, but using the actual words of one sentence (or their paraphrase) in the next can help bind the sentences together. Grammarians call this type of transition a "substantive" transition. Here, Judge Kavanaugh binds the first and second sentences together with the phrase First Amendment freedoms. The subtle shift from, "The First Amendment guarantees freedom of speech and freedom of the press" to "To preserve First Amendment freedoms" makes the transition lively and not plodding. The same is true for the substantive link between the second and third sentences ("directed" to "directive").

Substantive transitions are also called "dovetail" transitions. The metaphor is apt. Professor Megan McAlpin, author of *Beyond the First Draft: Editing Strategies for Powerful Legal Writing*, explains dovetail transitions this way: "Carpenters use dovetail joints to fasten wood without using nails or screws. They simply cut the two parts in a way that allows them to fit securely and seamlessly together. So, if the transition words are the

nails that you see, then substantive transitions are the seamless fasteners that hold your writing together invisibly."<sup>6</sup> To me, the artful use of substantive transitions is persuasive writing at its finest. Paragraphs are held together without the need for explicit transition words. Substantive transitions improve reader comprehension because the reader sees an "old" thought in the new sentence; thus the move to the "new" thought is less abrupt and is linked to something the reader has seen before. When done well, substantive transitions may be nearly invisible, but if you look for them in Judge Kavanaugh's writing, you will see he uses them all the time.

#### *El-Shifa Pharmaceutical Industries Company v. United States*

In August 1998, President Clinton ordered the U.S. military to bomb both the El-Shifa factory in Sudan and al Qaeda training camps in Afghanistan. The goals were to kill leaders of al Qaeda and to destroy al Qaeda infrastructure. President Clinton explained to Congress and the American people that he ordered the bombings in furtherance of the Nation's "inherent right of self-defense" in the wake of al Qaeda attacks on U.S. property and personnel in Kenya and Tanzania. As authority for the bombings, President Clinton cited his Commander-in-Chief power under Article II of the Constitution.

Plaintiffs El-Shifa Pharmaceutical Industries Company and its owner, Salah Idris, allege that their factory in Sudan was wrongly destroyed in the bombings and that they were reputationally harmed by later Executive Branch statements linking them to Osama bin Laden. As relevant here, they have brought a federal defamation claim and an Alien tort Statute claim against the United States.<sup>7</sup>

This excerpt is the opening of Judge Kavanaugh's concurrence. The majority opinion starts this way: "The owners of a Sudanese pharmaceutical plant sued the United States for unjustifiably destroying the plant, failing to compensate them for its destruction, and defaming them by asserting they had ties to Osama bin Laden."<sup>8</sup> I like this opening too, and I wrote many openings like it as a law clerk and lawyer. Yet Judge Kavanaugh's opening has the visceral power of dramatic storytelling. It brings us back in time to

real events. By putting the focus squarely on President Clinton, Judge Kavanaugh's opening reminds us that the strategy of dropping a few bombs after each terrorist attack was not going to stop bin Laden. That was my reaction, but even if you did not see this in Judge Kavanaugh's opening, I trust you agree it is a compelling narrative start to an opinion.

*United States v. Papagno*

Victor Papagno had a goal: to collect two of every kind of computer or, as he phrased it, to build the "Noah's Ark of Computer land." Unable to buy such a collection, he decided to steal it. Over 10 years, he pilfered 19,709 pieces of computer equipment from his employer, the Naval Research Laboratory. After he was caught, Papagno pled guilty and was sentenced to 18 months in prison.<sup>9</sup>

The genius of combing through the record to find the defendant's boast about the "Noah's Ark of Computer land" makes this opening memorable and appropriately humorous. Noah Messing says that introductions should be "short and pithy."<sup>10</sup> This opening is just that.

*Hall v. Sebelius*

This is not your typical lawsuit against the Government. Plaintiffs here have sued because they *don't* want government benefits. They seek to disclaim their legal entitlement to Medicare Part A benefits for hospitalization costs. Plaintiffs want to disclaim their legal entitlement to Medicare Part A benefits because their private insurers limit coverage for patients who are entitled to receive coverage from their private insurers rather than from the Government.

Plaintiffs' lawsuit faces an insurmountable problem: Citizens who receive Social Security benefits and are 65 or older are automatically entitled under federal law to Medicare Part A benefits. . . . There is no statutory avenue for those who are 65 or older and receiving Social Security benefits to disclaim their legal entitlement to Medicare Part A benefits.<sup>11</sup>

Judge Kavanaugh's use of substantive transitions is evident in this opening and in the one that follows. He uses this coherence technique so often that some might think it slows down the forward momentum of his argument. I disagree. Law is complex. Layering the same words throughout a paragraph and even over several paragraphs creates cohesion and reinforces the central point you want to make. The estimable H.W. Fowler favored the repetition of key words, and had

this caustic comment for those who needlessly vary word usage: "It is the second-rate writers, those intent rather on expressing themselves prettily than on conveying their meaning clearly . . . that are chiefly open to the allurements of elegant variation."<sup>12</sup>

*Coalition for Mercury-Free Drugs  
v. Sebelius*

The Coalition for Mercury-Free Drugs opposes the use of vaccines that contain thimerosal, a mercury-based preservative. The Coalition believes that vaccines containing mercury harm young children and pregnant women. The Coalition and several of its members sued to suspend the Food and Drug Administration's approval of thimerosal-preserved vaccines. The District Court dismissed plaintiffs' suit for lack of standing.

We recognize plaintiffs' genuine concern about thimerosal-preserved vaccines. But plaintiffs are not required to receive thimerosal-preserved vaccines; they can readily obtain thimerosal-free vaccines. They do not have standing to challenge FDA's decision to allow *other people* to receive thimerosal-preserved vaccines.<sup>13</sup>

This opening is a paradigm of effective legal writing style. Every sentence in this opening is in the active voice. Every sentence puts the subject and verb close together at or near the start of the sentence. The average sentence length is 13.8 words per sentence, well below my recommended average of 17-20 words per sentence. Finally, the plaintiffs' claim and the court's resolution of it are understandable on a first read, something rare in legal writing. Plus, we understand the claim and resolution in 97 words—even rarer!

*Lorenzo v. Securities and  
Exchange Commission*

Suppose you work for a securities firm. Your boss drafts an email message and tells you to send the email on his behalf to two clients. You promptly send the emails to the two clients without thinking too much about the contents of the emails. You note in the emails that you are sending the message "at the request" of your boss. It turns out, however, that the message from your boss to the clients is false and defrauds the clients out of a total of \$15,000. Your boss is then sanctioned by the Securities and Exchange Commission (as is appropriate) for the improper conduct.

What about you? For sending along those emails at the direct behest of your boss, are you too on the hook for the securities law violation of *willfully* mak-

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ing a false statement or *willfully* engaging in a scheme to defraud?

According to the SEC, the answer is yes.<sup>14</sup>

Judge Kavanaugh describes a realistic work-a-day situation in which the reader becomes the unwitting accomplice of the boss's misdeeds. When I take Judge Kavanaugh's suggestion, and imagine that I am working for such a boss, the implications are chilling. That's the effect Judge Kavanaugh desires. He primes the reader for his legal argument about why the SEC is wrong by first making the reader experience the defendant's predicament personally.

This opening also scores high on all key Plain English criteria mentioned above: Every sentence is in the active voice; the average sentence length is eighteen words; substantive transitions and explicit word transitions ("however," "then," "too") create excellent flow and logical progression. The "Flesch-Kincaid Grade Level Readability Formula" measures the "readability" of a chosen text by assessing factors like active voice, sentence length, etc., and then placing the text on a grade level.<sup>15</sup> This opening by Judge Kavanaugh scores an 8.5, which means that it is written in "Plain English" and can be "[e]asily understood by 13- to 15-year-old students."<sup>16</sup> You can use the Formula on your writing. What is the grade level of your writing?

Judge Kavanaugh's openings are a model of good legal writing: He starts with an attention-getting story rather than dry procedural history. He focuses on flow. He writes short sentences (17-20 words on average). He uses the active voice. Techniques like this can make even complex cases understandable.

### B. Strong Topic Sentences

The topic sentence is the most important sentence of any paragraph. The topic sentence expresses the main idea—the point you want to prove—for every paragraph. A good topic sentence "ensures that each paragraph has its own cohesive content."<sup>17</sup> Yale Law Professor Noah Messing, author of *The Art of Advocacy*, puts it this way: "Think of each topic sentence as a jurisdictional statement for that paragraph. It tells you what the rest of the paragraph will discuss."<sup>18</sup> Messing offers this challenge to legal writers: "Perfect topic sentences make it possible to read only the first sentence of each paragraph and still follow the argument."<sup>19</sup> Professor McAlpin also encourages legal writers to apply this strategy to their writing. She suggests creating a "Topic Sentence Outline."<sup>20</sup> Pull every topic sentence from the paragraphs of the Argument section of your brief. Put them in outline form. Is your argument understandable by reading just the outline of your topic

sentences?

Judge Kavanaugh can answer yes. Here are consecutive topic sentences from Judge Kavanaugh's dissent in a case in which Indonesian citizens sued Exxon under the Alien Tort Statute (ATS) for atrocities allegedly committed by Indonesian soldiers protecting Exxon property in Indonesia (quotation marks and citations omitted):

I would dismiss the ATS claims because the torts alleged here occurred in Indonesia and the ATS does not extend to conduct that occurred in foreign lands.

It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.

The presumption against extraterritoriality serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.

The presumption against extraterritoriality is focused on the site of the conduct, not the identity of the defendant.

This canon of construction is deeply rooted.

The canon remains to this day an essential part of the Supreme Court's jurisprudence.

In applying the presumption against extraterritoriality, we look to see whether language in the relevant Act gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or some measure of legislative control.

Here, the spare text of the ATS does not support application of the law to conduct in foreign lands.

The ATS's historical context likewise provides no basis for rebutting the presumption against extraterritoriality.

Under the Articles of Confederation, which were in effect from 1781 until the U.S. Constitution was ratified in 1788, the U.S. Government lacked authority to remedy or prevent violations of the law of nations.

After ratification of the Constitution in 1788, the First Congress addressed this problem in 1789 by enacting the Alien Tort Statute, which was part of Section 9 of the Judiciary Act of 1789.

The purpose and background of the ATS—avoiding conflict with foreign nations—thus reinforce the presumption against extraterritoriality.<sup>21</sup>

Each of these topic sentences is followed by a paragraph of varying length full of authority supporting the proposition. The argument spans four pages of the Federal Report-

er, yet the busy reader can understand Judge Kavanaugh's argument by quickly reading just the topic sentences. Space does not allow me to show you other examples that illustrate this point, but my reading of dozens of Judge Kavanaugh's opinions reveals that he consistently passes the "Topic Sentence Outline" test.

### C. Effective Use of Lists

Numbering your arguments helps you organize your thoughts and also allows the reader to focus on your main points. Ross Guberman, author of several legal writing guidebooks, encourages writers to number their points in lists: "The top advocates love lists . . . Nothing helps a brief hold together better than a list of legal, factual, or common-sense reasons that you should prevail."<sup>22</sup> Judge Kavanaugh frequently lists his main points by number. Here is one example from a case in which a group of atheists, secularists, and humanists sued to remove religion from the presidential inauguration ceremony, including opening prayers and the phrase "So help me God" in the presidential oath. In his concurrence, Judge Kavanaugh summarized his position on the Establishment Clause claim. Each of these points begins a paragraph, but, as I noted above, you can understand his argument from the topic sentences alone:

In analyzing the Establishment Clause issues in this case, I begin with several background principles.

First is the obvious point [that] . . . all citizens are equally American, no matter what God they worship or if they worship no god at all.

Second, in deciding this case, we cannot gloss over or wish away the religious significance of the challenged Inaugural prayers.

Third, and relatedly, we cannot resolve this case by discounting the sense of anguish and outrage plaintiffs and some other Americans feel at listening to a government-sponsored religious prayer.

Fourth, at the same time, we likewise cannot dismiss the desire of others in America to publicly ask for God's blessing on certain government activities and to publicly seek God's guidance for certain government officials.<sup>23</sup>

This list effectively captures the key premises of Judge Kavanaugh's argument in an orderly and succinct way. (Judge Kavanaugh ultimately relied on the Supreme Court case of *Marsh v. Chambers* to conclude that prayer at government events is "part of the fabric of our society.") Simply numbering your arguments, especially in the introduction to your brief, can focus the reader's attention on the

discrete reasons you should win.

## II. Judge Kavanaugh's "Exemplary Legal Writing Award"

In 2013, *The Green Bag Almanac and Reader* honored Judge Kavanaugh with an "Exemplary Legal Writing Award" for his opinion in *Vann v. U.S. Dep't of the Interior*.<sup>24</sup> I commend the opinion to you as a summation of the key principles of effective legal writing I have discussed in this column. Here are the first two paragraphs of the opinion:

Before the Civil War, members of the Cherokee Nation had slaves. Those slaves were freed in 1866 pursuant to a treaty negotiated between the United States and the Cherokee Nation. The Treaty guaranteed the former Cherokee slaves and their descendants—known as Freedmen—"all the rights of native Cherokees" in perpetuity. See Treaty with the Cherokee, art. 9, July 19, 1866, 14 Stat. 799. Those rights included the right to tribal membership and the right to vote in tribal elections.

At some point, the Cherokee Nation decided that the Freedmen were no longer members of the tribe and could no longer vote in tribal elections. A group of Freeman eventually sued in the U.S. District Court for the District of Columbia, claiming that the Cherokee Nation had violated the 1866 Treaty.<sup>25</sup>

The issue in the case was whether the Cherokee Nation was entitled to sovereign immunity. Judge Kavanaugh held that, because the plaintiffs sued the tribe's Principle Chief in addition to the tribe itself, the Supreme Court's *Ex Parte Young* doctrine allowed the plaintiffs to pursue declaratory and injunctive relief. But I want to focus on Judge Kavanaugh's masterful use of legal writing techniques. To begin, that first sentence, at a mere eleven words, packs a wallop. Then, notice how he uses substantive transitions and the repetition of words to bind the two paragraphs together, like glue. The sentences range in length from 11 words to 26 words. This pattern continues throughout the opinion for an overall sentence length averaging 23.5 words.

We understand the factual setting and the plaintiffs' complaint in just 131 words. I dare say many of us would have needed many more words to describe the same factual setting and complaint—it takes work to be brief! The entire opinion is twelve paragraphs long. Those twelve paragraphs contain 42 sentences. Those 42 sentences contain 933 words (omitting citations). What a joy lawyering would be if more judicial opinions were only 933 words long! The opinion scores a 13.7 on the Flesch-Kincaid Grade Level Readability Formula. This means that a first-year col-

lege student could understand it. Brevity is the soul of clarity.

## III. Conclusion

I prefer Judge Kavanaugh's straightforward writing style to Neil Gorsuch's more provocative writing style, yet Justice Gorsuch's writing style has garnered much more attention. My column last year referenced numerous articles praising Justice Gorsuch's writing. The tables may be turning. Critics now complain about his "cutesy idioms, pointless metaphors, and garbled diction."<sup>26</sup> All seem to agree that he overuses alliterations. The title of a *New York Times* article about Justice Gorsuch's writing styles captures this well: "#GorsuchStyle Garners a Gusher of Groans. But is His Writing Really That Bad?"<sup>27</sup>

Conversely, in researching this column, I found very little commentary on Judge Kavanaugh's writing style.<sup>28</sup> Yet the thesis of this column is that Judge Kavanaugh is an excellent writer whose style we should emulate. The praise heaped on Justice Gorsuch's writing may have been premature as we grow weary of his grammatical gymnastics. At the same time, I suspect more critics will come to regard Judge Kavanaugh as an outstanding legal writer.

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<sup>1</sup> Brett Kavanaugh, Response to United States Senate Committee on the Judiciary, Questionnaire for Nominee to the Supreme Court 63 (July 11, 2018), available at [https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20SJO%20\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20SJO%20(PUBLIC).pdf)

<sup>2</sup> Noah A. Messing, *The Art of Advocacy* 193 (2013).

<sup>3</sup> *Id.*

<sup>4</sup> Bryan A. Garner, *Legal Writing in Plain English* 69 (2d ed. 2013).

<sup>5</sup> *Kahl v. Bureau of Nat'l Affairs*, 856 F.3d 106, 109-11 (D.C. Cir. 2017).

<sup>6</sup> Megan McAlpin, *Beyond the First Draft* 26 (2014).

<sup>7</sup> *El-Shifa Pham. Indus. Co. v. United States*, 607 F.3d 836, 852 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

<sup>8</sup> *Id.* at 837.

<sup>9</sup> *United States v. Papagno*, 639 F.3d 1093, 1094 (D.C. Cir. 2011).

<sup>10</sup> Messing, *supra* note 2, at 194.

<sup>11</sup> *Hall v. Sebelius*, 667 F.3d 1293, 1294 (D.C. Cir. 2012).

<sup>12</sup> H.W. Fowler, *A Dictionary of Modern English Usage* 148 (2d. ed. 1965) quoted in Antonio Gidi & Henry Weihofen, *Legal Writing Style* 20 (3rd. ed. 2018).

<sup>13</sup> *Coal. For Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1276-77 (D.C. Cir. 2012).

<sup>14</sup> *Lorenzo v. Sec. and Exchange Comm'n*, 872 F.3d 578, 596-97 (D.C. Cir. 2017).

<sup>15</sup> For a description of the Flesch-Kincaid scale, see <http://www.readabilityformulas.com/flesch-grade-level-readability-formula.php>

<sup>16</sup> [https://en.wikipedia.org/wiki/Flesch%E2%80%93Kincaid\\_readability\\_tests](https://en.wikipedia.org/wiki/Flesch%E2%80%93Kincaid_readability_tests) (explaining the meaning of each grade level).

<sup>17</sup> Garner, *supra* note 4, at 81.

<sup>18</sup> Messing, *supra* note 1, at 253.

<sup>19</sup> *Id.*

<sup>20</sup> McAlpin, *supra* note 6, at 16 ("[Y]our reader should be able to understand your argument or explanation by reading *only* your topic sentences.").

<sup>21</sup> *Doe v. Exxon/Mobil Corp.*, 654 F.3d 11, 74-78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

<sup>22</sup> Ross Guberman, *Point Made* 9 (2011).

<sup>23</sup> *Newdow v. Roberts*, 603 F.3d 1002, 1016 (D.C. Cir. 2010) (Kavanaugh, J., concurring). In another opinion, Judge Kavanaugh starts the Discussion section with, "In our view, at least six considerations foreclose the IRS's interpretation of the statute." *Loving v. Internal Revenue Serv.* 742 F.3d 1013, 1016 (D.C. Cir. 2014). He then proceeds to march through the considerations with each of them numbered. No list is too long for Judge Kavanaugh!

<sup>24</sup> See <http://prawfsblawg.blogs.com/prawfsblawg/2013/12/green-bag-exemplary-legal-writing-2013-honorees.html>

<sup>25</sup> *Vann v. U.S. Dep't of the Interior*, 701 F.3d 927, 928 (D.C. Cir. 2012).

<sup>26</sup> Mark Stern, *Neil Gorsuch is a Terrible Writer* available at <https://slate.com/news-and-politics/2018/01/neil-gorsuch-is-a-terrible-writer.html>

<sup>27</sup> Adam Liptak, *#GorsuchStyle Garners a Gusher of Groans. But Is His Writing Really That Bad?* NY Times (April 30, 2018).

<sup>28</sup> I did find one piece of high praise. Laurence Tribe gave Judge Kavanaugh's writing this glowing review: "Kavanaugh could be one of the Court's more colorful writers, a group that's now down to Kagan and—well just Kagan." See Zach Helfand, *Big, Strong, Psyched*, *The New Yorker* 27 (August 27, 2018).



# The Promise of Restorative Justice

## Introduction

*Restorative Justice can be defined as an approach toward achieving justice that, to the best extent possible, involves all the stakeholders involved in a crime to address the harms, needs, and obligations arising from the crime, by putting right the wrongs and enabling healing to the greatest extent possible. The 3 pillars of RJ are harms, needs, and obligations. At its core, RJ is about "putting right wrongs and harms" grounded in "respect for all," which stems from an acknowledgment of interconnectedness but also diversity; this is done by focusing on harms and needs, addressing obligations, involving all stakeholders, and by using collaborative, inclusive processes. RJ is not a specific program, but through relying on the guiding questions and signposts of RJ, we shift the question from "What does the offender deserve?" to "What are the harms, needs, and obligations of a crime? Who needs to be involved? How do we address these and the underlying causes?"*<sup>1</sup>

Can restorative justice be merged with criminal justice? Moreover, can the traditional, adversarial process of criminal justice be merged with the voluntary, non-adversarial processes of restorative justice into a seamless, effective system of justice within our state? Optimistically, I believe it can be done if the judges, prosecutors, and defense attorneys—those in charge of our criminal justice system—recognize that justice accepted and submitted to voluntarily is always truer justice than justice which is imposed through fine or force, justice which is resented and resisted. The promise of restorative justice is essentially the former. But our current criminal justice depends on the latter. The first form of justice, restorative justice, sustains and nurtures law-abiding and just citizens—and all who are willing to become such. The second form of justice, through fine or force, if bereft of the option of restorative justice resolutions, sustains and nurtures a sense of criminality and leads to a resentful class of citizens as surely as it designates anyone a "criminal."

As contrary as these forms of justice appear to be, I am optimistic they can be merged—or forged—into a coherent system of justice because, in a sense, they already exist in the ideal of justice, justice with a capital "J."<sup>2</sup> What remains is to iron out the wrinkles within our systems of justice to allow those citizens who have run afoul of the laws of the state, those who

have committed recognizable societal harms, to work out with those they have harmed how and when they are to make amends—to work out, in short, how they are to do justice. But the work of ironing out of the folds to allow the errant to make amends without the state imposing a predetermined punishment or range of punishments will inevitably be perpetual. As every resolution is, in essence, only a "resolution," every justice decision will create the need for another justice solution, and every tweak of the justice "system" will inevitably require later tweaks as society evolves and changes. What is important for the criminal justice system's well-being, is for its officials to recognize the ideal and to attempt to align justice decisions with the ideal. In other words, to do as one college motto urges: "Climb high. Climb far. Your goal, the sky. Your aim, the star."<sup>3</sup>

What then is the justice ideal our criminal justice officials will "aim" for, the justice that beckons to be spelled with a capital "J"? It is the justice of balance. Pure justice is pure balance. We see it reflected in the scales of justice that the iconic Goddess of Justice keeps raised above her head. We see it in scientific laws that articulate perfect balance. In this article I will lay out my reasons for my faith and hope in a system of criminal justice with restorative justice as both its foundation and as its highest aspiration—as the means of achieving the truest balance among parties in conflict. While this article will not lay out a concrete plan for the integration of our current criminal justice system with restorative justice, it will attempt to lay down the cornerstone for such a system.

## Restorative Justice as the Cornerstone

In the simplest terms, this cornerstone is the recognition that restorative justice is true justice. Although the adversarial criminal justice system, and restorative justice processes both depend upon a recognition of balance and balancing as the goal and means of resolution, the former tries to achieve balance between the evidence and the prescribed applicable law, whereas the latter attempts to allow the parties in conflict themselves to arrive at justice resolutions. Given these fundamental differences, the cornerstone recognition is that restorative justice is justice more fundamentally aligned with human freedom and dignity in so far as it requires a *voluntary* search for justice among the parties most directly impacted by the harm or the "crime" at the

root of their conflict.<sup>4</sup> Such a search is taken from the parties when third party professionals adopt the parties' conflict as their own "work" and then dictate outcomes to the parties.<sup>5</sup> But how can a voluntary search for justice be such a cornerstone for a justice system?

## Justice as Balance

To answer that question let us consider justice as balance. If justice is balance, we can infer balance as being absolute. But can such a thing as absolute balance ever be recognized, let alone inferred? And can there ever be true justice, let alone absolute justice? To the extent man has perceived absolute balance in scientific laws, we can infer that absolute balance exists—and exists for every man, woman, and child, no matter what distinctions exist between them.

An unending, infinite vision of absolute balance exists within the Pythagorean Theorem (the square of each side of a right triangle added together equals the square of the hypotenuse,  $A^2 + B^2 = C^2$ ). No matter how many variations of right triangles one cares to imagine, the Theorem holds true for each one. A vision of absolute or perfect balance exists, as well, in scientific laws that articulate universal truths, such as  $E=MC^2$  and, with respect to physical activity, "for every action there is an equal and opposite reaction." The latter is true for *all* actions—every sort, size, and shape. The equal sign (=) denotes perfect balance. All our mathematics depend upon the equal sign and upon the conception of the existence of perfect balance. So, too, if we infer absolute balance exists then we can infer absolute justice exists for each and every one. But can we ever know, without any doubt, what it is?

## Justice as Balancing

For any person who exists in time and space in which change is constant, it is absurd to think we can know absolute or perfect balance other than its shadow in an abstraction, such as the Pythagorean Theorem, and then infer its existence. So, while justice may be balance and we can infer the existence of absolute balance and, thus, infer the existence of absolute justice, justice manifests in our lives as the effort of *balancing* in light of our conception(s) of balance. Justice is the balancing of oneself with whatever one feels one needs to become or do to be in balance. If one has au-

thority over others, whether as parent, employer, doctor, state official, etc., justice can also be seen as the effort to balance others in relation to themselves and to society, its laws and mores and traditions. The great majority of us allow ourselves to be placed in this state of balance as we recognize and accept such authority.

But not always. As mature, self-respecting individuals, we give ourselves the freedom to judge for ourselves. In youth, we generally obey our parents. We stop doing so when we want to judge and understand things for ourselves—to have our own experiences that bring us wisdom, that allow us to think independently and beneficially for ourselves and others. Most of us generally obey the doctor's orders, the police officer's, the court official's, the state official's, the priest's or minister's or imam's (or the official of whatever religion with which we identify, if any), or try to follow their advice, but we rarely, if ever, once mature (once we realize mistakes can be made) do so blindly. We are always *balancing* the evidence of another's authority with our own calculation as to the scope of such authority and the wisdom of obeying the other's exercise of that authority. Sometimes, perhaps, fully informed; almost always, not. It may take only a millisecond of conscious or subconscious awareness (e.g., yes, the person in that car behind me with the blinking

blue lights and the siren must be the police, and I better pull over to see what they want or to let them go by—even though there is a very small chance it is not the police) because we have seen the pattern of the authority exercised before and have learned it is best to obey.

So as the goal of balancing is balance, the term "justice" also includes the act of balancing. And if a peace is resolved or determined among parties at conflict by themselves or with the help of others, there is a balance. There is justice. Some measure of it, at least. We cannot conceive of a more fundamental goal of justice than peace—wherein all those who have been at odds are at peace. The parties are free to leave one another and are free to pursue their personal interests.

How else can we know this to be true? That there is balance in our lives? That there is justice? Regardless of the changing nature of our laws (when one day possession of pot for sale is a crime and the next a laudable source of taxable income), regardless of the perpetual conflict in the world, we can see such balance in *ourselves*. We can see that we exist in the image of balance and, therefore, in the image of justice. We exist physically in the image of balance with two eyes, two arms, two legs, the two lobes of the brain, and more, all fashioned and formed, all grown, in sym-

metry—in balance. We walk in balance and try to remain in balance.

So, too, we try to be in mental and spiritual in balance. With our minds, we are constantly weighing the words of others and our own with what we perceive through our senses—hearing, seeing (reading), etc. We try to remain in spiritual balance amid all the hubbub and harmony within our lives by never getting angry or frustrated—at least, in an "unjustified" way—and by keeping control of our feelings and passions. So, therefore, we think in terms of justice and try to remain in justice by being just—by sharing and taking what is fair given the circumstances and the factors that are relevant in our eyes and in the eyes of others. Justice is at the basis of all our arguments—even among those our justice system has labeled "criminals."<sup>6</sup> Justice is the polestar of our existence—we leave it only to yearn to return to it.

#### Justice is Universal

Justice as balance and as acts of balancing, is universal. It is something every man and woman deals with on a daily basis in deciding how much to give, how much to take, how much to receive, or how much to share—be it with work, with family, with friends or with or for others, whether in words or deeds. No matter how wild or bi-

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zarre our imagination, it is not possible to conceive of any activity without balance being, ultimately, *the* critical factor. All of our good deeds we believe will reap good results, all of our bad deeds bad ones, all of our rash deeds rash results, and on and on. The Virginian, in the classic novel of the American West that carries the same name, underlines this truth when he speaks to the ranch hand named Shorty, a man the Virginian recognizes as having goodness within him as he has “a kindness for animals in his heart” but who has taken to associating with a horse thief. The Virginian talks with Shorty about what constitutes *just* compensation for one’s labors:

“After a while,” he continued, “I noticed a right strange fact. The money I made easy that I WASN’T worth, it went like it came. I strained myself none gettin’ or spendin’ it. But the money I made hard that I WAS worth, why I began to feel right careful about that. And now I have got savings stowed away.”<sup>7</sup>

While we all can choose to be steeped in the delusive sensations of passing pleasures that, in the poet Keats’ terms, leave “a heart high sorrowful and cloyed,” and lose track of our up and down, our right and wrong—our balance—everyone is able to perceive what is “just,” be it as compensation, reward or thanks, given the circumstances.<sup>8</sup> A famous TED talk and video reveals that chimpanzees are, in fact, acutely aware of what is just compensation. I do believe we—all of us—are greater than chimpanzees in this regard.<sup>9</sup>

The principle of balance that undergirds restorative justice, as well as all of “justice” is this: justice as balance and justice as the acts of bringing oneself, first and foremost, into balance and then, if it is one’s duty, to help bring others into balance. The word “restorative” itself means “serving to restore.” Restorative justice serves to restore a lost balance in the lives of those affected by conflict or harm. Given how justice mirrors that which is universal for all of us, the bedrock principle of restorative justice is that people, given the opportunity to do so voluntarily *and* in what they perceive as a safe environment will willingly try to come to terms with others. They will be willing to work the conflict out with good will and good intentions, will seek to be at peace with their neighbors. An attendee at this summer’s restorative justice conference organized and supported by Vermont Law School, “Global Unity and Healing: Building Communities with a Restorative Approach,” recently articulated this belief in his blog about the conference: “Ultimately, restorative justice systems are based on the belief that *all* humans are instinc-

tively creative, relational, communicative, self-reflective, and responsible for their actions.”<sup>10</sup>

### Justice of the Sages

These concepts are merely dusting off what we all instinctively know, perhaps. Plato depicted Socrates disputing with Meno about the latter’s division of men into categories of good and bad, and Socrates demonstrated how untenable such a division is, even according to Meno’s reasoning—how, in fact, all men desire what is good and pursue what is good as they see and understand it to be so.<sup>11</sup> Hence, it has been clear since antiquity that rationality beckons us to acknowledge that all men, even those that our state has classified as “criminals,” seek what they perceive or think of as good—even though others, even society at large, may hold their “good” to be “bad” or “evil” or “wrong.” Therefore, we are all in reality seeking a balance in all our engagements that will bring us greater happiness or peace of mind, whether it be with physical goods or with more refined goods, whether with a new car or with learning how to play a musical instrument, whether it be with fruit or folly ... *ad infinitum*.

Some great thinkers and sages of the past, along with Plato, confirm the proposition that justice is balance and that man exists in its image and lives within his conception of it. In doing so, we will encounter notions of the “state” and its relation to justice, which will bring us back to the relation of restorative justice and criminal justice in our own state:

While there are no stirrings of pleasure, anger, sorrow, or joy, the mind may be said to be in the state of Equilibrium. When those feelings have been stirred, and they act in their due degree, there ensues what may be called the state of Harmony. This Equilibrium is the great root from which grow all the human acting in the world, and this Harmony is the universal path which they all should pursue.<sup>12</sup> *Confucius*.

[Justice] is complete virtue in its fullest sense, because it is the actual exercise of complete virtue. It is complete because he who possesses it can exercise his virtue not only in himself but towards his neighbour also; for many men can exercise virtue in their own affairs, but not in their relations to their neighbour.<sup>13</sup> *Aristotle*.

This, then, is what the just is—the proportional; the unjust is what violates the proportion.<sup>14</sup> *Aristotle*.

[J]ustice is that virtue which gives every one his due.<sup>15</sup> *Augustine*.

Justice, then, is our birthright. As we exist in its image, in the symmetry of our physical forms, it is also our duty and calling:

Be just and fair to all.<sup>16</sup> *Isaiah*.

He has told you, O man, what is good; and what does the LORD require of you but to do justice, and to love kindness, and to walk humbly with your God?<sup>17</sup> *Micah*.

The felicity of a man does not consist either in body or in riches, but in upright conduct and justice.<sup>18</sup> *Democrates*.

[T]he best man is not he who exercises his virtue towards himself but he who exercises it towards another; for this is a difficult task. Justice in this sense, then, is not part of virtue but virtue entire, nor is the contrary injustice a part of vice but vice entire.<sup>19</sup> *Aristotle*.

Is it not disgraceful, and a great sign of want of good-breeding, that a man should have to go abroad for his law and physic because he has none of his own at home, and must therefore surrender himself into the hands of other men whom he makes lords and judges over him?<sup>20</sup> *Plato*.

Since a man’s integrity and dignity cannot be severed from his just acts and justice deliberations, whenever possible the state, the government in which a man abides, should be perpetually striving *not* to abrogate to itself what a man is fit to handle on his own. To do so is to encroach upon his liberty, his freedom, and his right to act virtuously and nobly to resolve his conflicts for himself in a peaceable manner. To do so is to abrogate to itself the individual’s highest calling. To do so is to abrogate to itself the individual’s own dignity. As our states and governments are enterprises of just men and women who, by virtue of the attractiveness of their union, govern other men and women within their political domain, within the reach of its state powers, the state itself depends upon the existence of just men and women within it. Hence, it should allow whenever possible, its citizens to act justly.

Three iterations of this truth are made by Augustine:

Justice being taken away, then, what are kingdoms but great [gangs of robbers]?<sup>21</sup>

[W]ithout justice a republic can neither be governed, nor even continue to exist.<sup>22</sup>

[J]ustice is known in one way in the unchangeable truth, in another in the spirit of a just man.<sup>23</sup>

### Justice and the Constitution of the United States

As art is the product of an artist, so a just state is the product of just citizens. Here in the United States, jurists and politicians often claim that the Constitution is “the supreme law of the land,” relying on those very words found in the Constitution itself:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.<sup>24</sup>

Yet because the authors of the Constitution existed before that document existed and obviously saw themselves as men who had the authority to try to establish a just government under a just set of laws, there had to be a higher law that existed before the Constitution—the law that enabled them to strive to fashion a just system of government. What is this higher law? It is justice. It is living so as to be, fundamentally, in balance with others, with nature, and with whatever one envisions to be one’s highest calling. America in its vast potential beckoned its educated sons and daughters to cast off the yoke of English monarchy. The potential and the tradition were out of balance. And did they not recognize, in their calling to be political leaders of a new and independent people, a need to strive to be in perpetual balance with each other in civil discourse and government?<sup>25</sup>

Our brief Constitution must be interpreted. Our interpretations must allow the citizens of our country to continue to strive to be just, to abide by the law that is inherent in everyone, the law by which we all live, the law of balance and balancing—the law of justice. Our tripartite system of government itself gives homage to this perpetual striving for balance. The operation of our government continually depends on the balance of power consciously exercised between the three branches of government. The continual balancing of these powers exercised for the common good of the people is the appropriate work of our government—of the men and women who

constitute our government, our state.

### Restorative Justice as Constitutional Justice

Restorative justice is constitutional justice because the men and women who participate in restorative justice processes are seeking justice *from themselves for themselves*—as did our founding fathers. Because it is devoid of coercion, restorative justice is the justice of a truly “free” people. Restorative justice is an invitation to strive to be in balance with another who one thinks one has harmed him or whom one thinks he or she has been harmed by. No one has to participate in a restorative justice process if he or she does not want to or no longer cares to *for any reason*. A person charged with a crime in a criminal justice system that allows for restorative justice resolutions can choose, if given the option, to allow himself or herself to be handled by justice officials according to the rules and laws of the state’s criminal, adversarial justice system in which resolution and punishment is imposed.

There are, cogent reasons not to allow a defendant to partake of a restorative justice process, for example, lack of remorse, a continuing interest in criminal enterprise and affiliations, incompetence and insanity. But the restorative justice option should be the first choice of the state—plan A, so to speak. Besides helping to foster virtue among its citizens (for virtue requires justice and justice, virtue), it will, at the very least, undergird the fundamental lynchpin of justice that keeps our society from devolving into a police state: innocent until proven guilty. Even if technically guilty of a crime, do not just men and women accept responsibility, not try to distance themselves from their own deeds, and seek to make amends?

For those who can participate, a restorative justice process allows the men and women, the victims, offenders, and their respective families, friends, and concerned community members to come together in a voluntary manner and with respectful attitudes to explore how all the parties have been affected by an offense, a harm or harms.<sup>26</sup> It allows them, moreover, to fashion a justice agreement that addresses more particularly and more suitably the individual needs and capabilities of the parties. Unlike the probation system that levy fines that defendants are unable to pay and, thus, whom it may render perpetual victims of the state, restorative justice parties can work out for themselves, often with help from their families and friends and concerned community members, what justice solutions will actually work. The legislatively derived, cookie-cutter approach to justice wastes a lot of the parties’ dough,

so to speak. The restorative justice approach does not—it is the parties’ choice, after all, as to how they spend, utilize, and account for their resources in a restorative justice agreement. Their agreements are, ultimately, their responsibility.

If a respectful attitude is not shared among the parties, then doubtless the restorative justice process, the exploration of the harm done or the attempt to come to peace with a justice agreement, will not continue successfully. Then, whoever is deemed to have violated the law will be subject to the criminal justice system—plan B, so to speak. If a hateful, vengeful, manipulative, or an overly fearful attitude exists (versus an apprehensive one, which will surely be present among all the parties), then there will be recourse, again, to plan B. Certainly, the difficulty in maintaining respectful attitudes among parties at conflict will itself assure the continual existence of our current coercive, criminal justice system. And, of course, it is the constitutional right of every defendant to a jury trial. But this is not to say there will always be such difficulty or that certain crimes will achieve resolution when a restorative justice process option is made available to those involved and affected by a crime.<sup>27</sup>

### Restorative Justice: The Hope of the Future

Our criminal justice system should do what it was designed to do: hold trials. It should not sweep conflicts out of sight with plea “deals,” which can be often leveraged on the impoverished and ignorant. “[C]riminal justice today is for the most part a system of pleas, not a system of trials.”<sup>28</sup> Delineated standards of unacceptable behavior and subsequent consequences for such behavior are, of course, necessary for a state to define itself as a state. A criminal system based on such standards must exist *but* not to the exclusion of peaceable and voluntary means of resolving conflicts. The criminal justice system, as is, will also be necessary for those who desire to plead innocent to whatever charges the state brings against them. Such standards and consequences as perpetuated by the criminal justice system will also help motivate affected parties to resolve their conflicts on their own and to avoid getting into them. The deterrence effect of state-imposed punishments is not denied here in any way.

The problems with our current criminal justice system are legion.<sup>29</sup> It is not the purpose of this article to describe them or to direct the reader’s attention to them. A promotional flyer for the Center for Justice Reform at Vermont Law School declares the problems with unabashed forthrightness:

The current criminal justice system is financially and ethically untenable. Plagued by the unsustainable cost of incarceration, high recidivism rates, the devastating impact on children of incarcerated parents, the burden and collateral consequences of criminal conviction, a “school to prison” pipeline borne of excessively harsh academic disciplinary measures, and racial, economic, and geographic inequalities, our communities need alternatives to traditional punitive models.<sup>30</sup>

The purpose of this article has been to plead, based on the cornerstone of justice as balance and balancing, for the current, coercive, adversarial criminal justice system officials—its judges, prosecutors, and defense attorneys—to make room for restorative justice processes. So often these processes result in reconciliation and peaceful outcomes. So often they are deeply appreciated by those who participate in them.

### Conclusion

There is no reason for any attorney or judge in our state to feel restorative justice processes will undermine our current criminal justice system. These processes can be the healing agent of our tottering justice system.

Because our state depends upon just men and women within it to keep it a just state, the state should allow restorative justice processes to supersede adversarial criminal justice processes *whenever possible*. In this way, the effects of the negative consequences that flow from criminal acts will be arrested and laid to rest by those who are the only ones can truly do so—by the parties most affected by the acts themselves. But this laying to rest will not be true for those unwilling to accept and face the truth of their actions. For them and for society at large, our current criminal and correctional justice system will serve effectively, if, ultimately, without plea “deals.” If the parties most directly affected by a crime can resolve the conflict and harm created by the criminal act on their own, yet with the guidance and under the supervision of a trained, state-approved, restorative justice facilitator, they will be helping themselves to live in more peaceful and self-consciously considerate relationships. Although outcomes for various categories of crimes may differ widely with restorative justice resolutions, so, too, do the circumstances and ripple effects of these crimes—but they will be effects and circumstances most intimately known by the parties involved in the forging of the restorative agreements, not by professionally-motivated third-party attorneys and advocates as-

signed by the state.

It is time to let restorative justice processes lead and be at the forefront of our criminal justice system. The promise of restorative justice is simple: restorative justice is justice.

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<sup>1</sup> Zehr, Howard, *The Little Book of Restorative Justice*. Notes by Neekan Oshidary. <http://neekaan.com/TheLittleBookofRestorativeJustice.pdf>

<sup>2</sup> For an explanation of the various restorative justice processes, there are innumerable websites and organizations now devoted to promoting and explaining them. Go to, for example, <http://restorativejustice.org>, or <https://www.iirp.edu>.

<sup>3</sup> A motto of Williams College, engraved on a gateway to the West College dormitory.

<sup>4</sup> See Zehr, Howard, *Changing Lenses*, Herald Press; 3rd edition, 2005. This groundbreaking book in the field of restorative justice recognized and promoted the awareness of crime as harm to individuals in contrast to crime as a violation against the state.

<sup>5</sup> The fundamental shortcomings of such a system in respect to human nature were first examined by Christie, Nils, “Conflicts As Property,” *The British Journal of Criminology*, Volume 17, Issue 1, 1 January 1977, Pages 1–15. Christie’s article is one of the foundational essays on justice in regards to restorative justice.

<sup>6</sup> I assure the reader of this on the basis of my 18 years of experience in teaching law classes to inmates under contract with the Vermont Department of Corrections.

<sup>7</sup> Wister, Owen, *The Virginian: A Horseman of the Plain*, 100<sup>th</sup> Anniversary Edition, Buffalo Bill Memorial Association, Buffalo Bill Historical Center, Cody, Wyoming, 2002, p.166.

from Chapter XXIII, “Various Points,” p. 139.

<sup>8</sup> Keats, John, *Ode on a Grecian Urn*.

<sup>9</sup> If the reader has any doubt of the truth of that statement, I strongly urge him or her to watch the TED talk video on YouTube, “Moral Behavior in Animals,” by Frans de Waal in which two chimpanzees are paid unequally for doing the same amount of work ([https://www.ted.com/talks/frans\\_de\\_waal\\_do\\_animals\\_have\\_morals](https://www.ted.com/talks/frans_de_waal_do_animals_have_morals)). We are more than chimpanzees.

<sup>10</sup> Payne, George Cassidy, <http://www.krwg.org/post/global-unity-and-healing-building-communities-restorative-approach>. July 5, 2018.

<sup>11</sup> Here is the pertinent section of the *Meno*: Soc. ...[N]ow, in your turn, you are to fulfill your promise, and tell me what virtue is in the universal; and do not make a singular into a plural, as the facetious say of those who break a thing, but deliver virtue to me whole and sound, and not broken into a number of pieces: I have given you the pattern.

Men. Well then, Socrates, virtue, as I take it, is when he, who desires the honourable, is able to provide it for himself; so the poet says, and I say too—Virtue is the desire of things honourable and the power of attaining them.

Soc. And does he who desires the honourable also desire the good?

Men. Certainly.

Soc. Then are there some who desire the evil and others who desire the good? Do not all men, my dear sir, desire good?

Men. I think not.

Soc. There are some who desire evil?

Men. Yes.

Soc. Do you mean that they think the evils which they desire, to be good; or do they know that they are evil and yet desire them?

Men. Both, I think.

Soc. And do you really imagine, Meno, that a man knows evils to be evils and desires them notwithstanding?

Men. Certainly I do.

Soc. And desire is of possession?

Men. Yes, of possession.

Soc. And does he think that the evils will do good to him who possesses them, or does he know that they will do him harm?

Men. There are some who think that the evils will do them good, and others who know that they will do them harm.

Soc. And, in your opinion, do those who think that they will do them good know that they are evils?

Men. Certainly not.

Soc. Is it not obvious that those who are ignorant of their nature do not desire them; but they desire what they suppose to be goods although they are really evils; and if they are mistaken and suppose the evils to be good they really desire goods?

Men. Yes, in that case.

Soc. Well, and do those who, as you say, desire evils, and think that evils are hurtful to the possessor of them, know that they will be hurt by them?

Men. They must know it.

Soc. And must they not suppose that those who are hurt are miserable in proportion to the hurt which is inflicted upon them?

Men. How can it be otherwise?

Soc. But are not the miserable ill-fated?

Men. Yes, indeed.

Soc. And does any one desire to be miserable and ill-fated?

Men. I should say not, Socrates.

Soc. But if there is no one who desires to be miserable, there is no one, Meno, who desires evil; for what is misery but the desire and possession of evil?

Men. That appears to be the truth, Socrates, and I admit that nobody desires evil. Soc. And yet, were you not saying just now that virtue is the desire and power of attaining good?

Men. Yes, I did say so.

Soc. But if this be affirmed, then the desire of good is common to all, and one man is no better than another in that respect?

Men. True.

Soc. And if one man is not better than another in desiring good, he must be better in the power of attaining it?

Men. Exactly.

Soc. Then, according to your definition, virtue would appear to be the power of attaining good?

Men. I entirely approve, Socrates, of the manner in which you now view this matter.

Plato: *The Complete Works (31 Books)* (Kindle Locations 8537–8565). Titan Read Classics. Kindle Edition.

<sup>12</sup> Confucius. *The Doctrine of the Mean*. Complete Works of Confucius (Kindle Locations 2157–2160). Minerva Classics. Kindle Edition.

<sup>13</sup> Aristotle. *Nicomachean Ethics* (Kindle Lo-

cations 1432-1435). . Kindle Edition. Book V, Chap. 1

<sup>14</sup> Aristotle. *Nicomachean Ethics* (Kindle Locations 1500-1501). . Kindle Edition. Book V, Chap. 3

<sup>15</sup> Augustine. *The City of God*, Book XIX, Chap. 21.

<sup>16</sup> Isaiah. 56:1. Holy Bible, New Living Translation.

<sup>17</sup> Micah. 6:8. Holy Bible, English Standard Version.

<sup>18</sup> Democrates. *The Golden Verses of Pythagoras: And Other Pythagorean Fragments*. "The Golden Sentences of Democrates," No. 6.

<sup>19</sup> Aristotle. *Nicomachean Ethics* (Kindle Locations 1438-1440). Kindle Edition. Book V, Chap. 1.

<sup>20</sup> Plato. *Plato: The Complete Works* (31 Books)

(Kindle Locations 16143-16145). Titan Read Classics. Kindle Edition. *The Republic*, Book II.

<sup>21</sup> Augustine. *The City of God*. Book IV, Chap. 4. Note: "gangs of robbers" is substituted for "great robberies."

<sup>22</sup> Augustine. *The City of God*. Book II, Chap. 21.

<sup>23</sup> Augustine. *The City of God*. Book XI, Chap. 29.

<sup>24</sup> The Constitution of the United State, Article IV. *Emphasis added*.

<sup>25</sup> I do not assert that the founding fathers were entirely enlightened and selfless servants of the common good—especially in light of today's standards of what serves the common good.

<sup>26</sup> See above, endnote 1.

<sup>27</sup> The most up to date research and accounting with regards to restorative justice processes and

victim satisfaction that I could find on the internet is from New Zealand: *Restorative Justice Victim Satisfaction Survey; Research Report*, Research and Evaluation, Ministry of Justice September 2016; available at <https://www.justice.govt.nz/assets/Documents/Publications/20170303-RJ-Victim-Report.pdf>

<sup>28</sup> *Lafler v. Cooper*, 511 U.S. 11 (2012)

<sup>29</sup> I have made reference to some of these engrained problems in a previous article on restorative justice: Dembinski, Jan Peter, *Restorative Justice: Time to Take It Seriously?* 39 Vt. B.J. 20 (2013-2014).

<sup>30</sup> Center for Justice Reform at Vermont Law School Handout, "Developing New Ways to Address Harm and Conflict." 2017.



## UPCOMING VBA CLE'S NOT TO BE MISSED!

### September 27-28, 2018: VBA Annual Meeting

@ The Equinox Resort, Manchester

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

### AND SAVE THESE DATES:

#### September 27, 2018: Basic Skills in VT practice & procedure

@ The Equinox Resort, Manchester

#### October 18, 2018: Pro Bono Conference

@ The Statehouse, Montpelier

#### November 7, 2018: Real Estate Law Day

@ The DoubleTree (fka the Sheraton), S. Burlington

#### November 9, 2018: Family Law Day

@ The Capitol Plaza, Montpelier

#### December 7, 2018: Annual Bankruptcy Holiday CLE

@ Trader Duke's Hotel (fka Doubletree), S. Burlington

#### January 18-19, 2019: YLD Mid-Winter Thaw

@ The Hotel Omni Mont-Royal, Montréal, CA

#### March 21-22, 2019: Mid-Year Meeting

@ Lake Morey Resort, Fairlee

**...And stay tuned for our winter webinar law practice management series!**

# Spotlight on Grantee: Women's Freedom Center

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

The Women's Freedom Center (the Center) has been advocating for Vermont women and men experiencing domestic abuse for over 40 years. The past year's IOLTA grant funds received by the Center provided 57 hours of legal services to 13 women across Windham County. In the past grant cycle, the Center used funds to assist in what are critical and safety-related areas of legal representation, including divorce, custody, immigration and relief from abuse. Examples include a case where a survivor of domestic violence was assisted by counsel to obtain a relief from abuse order against a former partner who had been stalking her and breaking into her car while she sat at red lights. In another case, the Center used the funds to provide legal representation to a survivor who had been strangled by her partner several times and felt unsafe reporting the crime to law enforcement. The funds helped the client develop a safety plan and obtain an emergency relief from abuse order with the assistance of counsel.

I had a chance to speak with two advocates from the Center, Donna and Sherry. It was important for them both, first and foremost, to express their profound gratitude for the Vermont legal community's work with those facing domestic abuse and violence. They especially wanted to thank the attorneys who have generously shared and continue to share their legal expertise through low-bono and pro-bono representation. Like most non-profit organizations, the Center stretches the grants and donations it receives, to maximize its impact on Vermont communities. The Center uses these funds to serve the Brattleboro, Bellows Falls, and surrounding communities with a wide range of innovative and notable programs.

## Crisis Hotline and Advocacy

The most impactful service that the Center provides is their 24-hour hotline reachable in Windham (802) 254-6954, Southern Windsor (802) 885-2050 & Toll Free (800) 773-0689. These hotlines are confidential and provide

direct access to an advocate who can assist with resources and give direction to callers in crisis. Advocates also personally meet with victims at hospitals, accompany them to court hearings, review and explain Relief from Abuse orders, provide housing and economic services, and connect them with community and state programs.

## Youth Education

The Center also focuses on Vermont teens with their youth outreach, where they work with schools in Windham and Southern Windsor counties to address issues such as dating violence, sexual assault, healthy relationships, and the impact of social media. The Center currently has two full-time community outreach coordinators working in Vermont school systems. Sherry shared that many of the issues facing Vermont teens revolve around digital stalking and sexual harassment by way of intimate photographs being used to shame, humiliate and control victims. Donna suggests that educating youth early about bystander empowerment, consent, and personal rights, is an important component in promoting healthy relationships and avoiding future violence. She further stressed that advocates at the Center are not mandated reporters. Donna believes that because of this, the Center finds their advocates are able to have frank and meaningful discussions with student victims, who are not likely to ask for help from educators who are required to notify authorities.

## Women's Film Festival

Outreach to the community is an important role for the Center. They reach out to the community each year by providing women from Vermont, and throughout the world, a platform for discussing important matters, such as women's rights, diversity, rape, human exploitation, and domestic violence. One example is the Women's Film Festival, which was held this year in Brattleboro at the New England Youth Theater located on Flatt Street. This event, in its 27<sup>th</sup> year, intro-



duces Vermonters to unknown women filmmakers, featuring a variety of relevant topics. The Center uses this three-weekend festival as their major fundraiser. This is an extremely exciting event where over 50 movies and shorts are screened for Vermont audiences each year. The film festival is kicked off with an opening champagne gala. This year's gala featured a revolutionary theme, with participants dressing as their favorite revolutionary character. For more information go to [www.womensfestival.org](http://www.womensfestival.org).

As Donna and Sherry summarized, the Center has really expanded their focus and message from one of primarily addressing crisis, to that of education and awareness for the rural population of Vermont. While the Center still assists those facing domestic abuse and those in crisis, they also put their energies and resources toward informing and educating Vermonters on the issues of relationship violence and culture. Community outreach and education has been a large part of the Center's work over the past few years. The Center is available to facilitate a variety of educational workshops and presentations for school systems and is interested in doing the same for the various county bar associations around the state. As Sherry explained, relationship violence, sexual assault and harassment cross all socio and economic boundaries, and the Center can provide attorneys with resources and tools that would be beneficial in advocating for all clients. Donna and Sherry encourage interested attorneys to contact them for more information on the Women's Freedom Center and to visit them at <http://womensfreedomcenter.net/>.

*Sarah E. Wilson, Esq. practices in Bennington and serves on the Vermont Bar Foundation Board and its Promotions Committee.*



# Now More Than Ever, Where You Bank Matters

The Vermont Bar Foundation uses interest from IOLTA accounts to fund legal services for low-income Vermonters.

If every lawyer's IOLTA account was in a Prime Partner institution, it would mean \$500 thousand more in revenue — allowing us to fund more of the valuable programs that work to protect the most vulnerable among us.



If you don't see your IOLTA institution listed below, ask us how you can help get them there. Contact our office by emailing [dbailey@vtbarfoundation.org](mailto:dbailey@vtbarfoundation.org) or calling 802-223-1400.

## Prime Partners

### GOLD LEVEL Leadership Institutions

Annual net yield of 2.0% or higher and tie to a recognized market indicator.

- *Brattleboro Savings & Loan Association*
  - *Mascoma Savings Bank*
- *New England Federal Credit Union*
  - *Passumpsic Savings Bank*

### SILVER LEVEL Leadership Institutions

These institutions offer an annual net yield of 1.5% or higher.

- *North Country Federal Credit Union*
  - *People's United Bank*

# The Importance of Learning to Say No

Some people seem to view having to say no as requiring them to be confrontational; and for these folks, confrontations are difficult things to get through. Others view saying no as being rude. Now, certainly how a “no” is delivered can be rude; but the act of saying no in and of itself isn’t. Regardless of the reason or situation in which one might struggle with saying no, it’s a valuable skill to learn. In fact, in the context of a law practice, the ability to say no can be a real life-saver because we’re talking about quality of life issues here.

When visiting law firms around the country, I often ask a few questions about firm culture in an attempt to understand the environment in which everyone is working. For example, is the setting conducive to allowing staff and attorneys to maintain a healthy balance between their personal and professional lives? If yes, that’s great! If no, I become concerned. The risk of a malpractice claim is now higher than it otherwise would have been if for no other reason than that missteps can happen more readily when we’re not at our emotional best or if our batteries are running low.

Upon further questioning in those settings where things are out of balance, it is common to find that work hours for some are beyond reasonable. I am not trying to suggest that working long hours is a direct cause of malpractice claims. It is not. In fact, I have met a number of attorneys and staff who work incredibly long hours and remain quite happy and content. However, these individuals also often play hard when they are not working. Most importantly, they have found ways to stay refreshed and sharp during the time they devote to their personal lives.

My focus is really directed toward those individuals who feel that their own work circumstances are burdensome. When pressed, I will often hear from these individuals comments along the lines of “I really don’t know how to turn down clients so I have taken on more than I had planned,” or “This client has been a client of mine for many years and I can’t risk saying no to the additional work even though the work isn’t something I am comfortable handling.” Others have shared “While I knew I shouldn’t have taken this client’s matter on, I didn’t know when the next prospective client might come through the door and I do have bills to pay.” I have even heard “Making these kinds of personal sacrifices is one of the costs that come with being an attorney.”

The inability or refusal of an attorney to say no to taking on more clients than she should, to willingly take on additional work that is beyond her comfort zone, or to agreeing to work with a recognized problem client requesting her services can readily evolve into a serious problem. While the occasional sacrifice is often fine, for the attorney who habitually struggles with saying no, the work environment can quickly be experienced as a huge burden resulting in feelings of being overwhelmed and/or out of control. This isn’t good, both from a quality of life and risk management perspective. If left unattended for any length of time burnout and or depression is often what follows.

This is why it’s important to learn to say no. It can be done creatively, respectfully, and non-confrontationally. A statement along the lines of “At present, due to the number of pending cases here at our firm, we are not able to represent you in this case. Please understand that it is our firm policy to decline representation on any matter where we do not feel confident that we can invest all of the time and energy necessary to do the best possible job for our client” is a very respectful way to say no. “While I greatly appreciate your continued loyalty, my legal judgment tells me that you are best served by my assisting you in finding an attorney with the level of experience this particular matter calls for” is another positive way to say no. If your practice is going to be truly full for a time, consider instructing staff to inform all potential clients that you currently are not accepting any new clients for X number of months and that they are free to check back at that time. All of these approaches are examples of ways to say no in a non-confrontational and respectful way.

Allow me to share one final thought with the intent of further driving a point home. Time has always interested me and I am particularly fascinated by how others manage time. A number of years ago I knew a physician who regularly allowed his patient schedule to get overbooked and he could never keep up. Yet every afternoon, without telling anyone and in spite of patients waiting, he would simply walk off site and go grab a cup of coffee for ten to fifteen minutes. Although this drove his staff crazy, he always came back refreshed and ready to take on the rest of the day. While I wouldn’t recommend this as a way to manage time or clients, there is something of value to be learned here. As

I see it, this doctor was on to something. This was his way of reminding himself who was in control of his professional life. He was. So, go ahead, take control, say no when necessary. It really is ok.

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

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## *Every day is Constitution Day!*

The VBA has pocket constitutions and other materials available for volunteers who wish to go to schools or civic groups and speak about the importance of the US Constitution and the Bill of Rights.

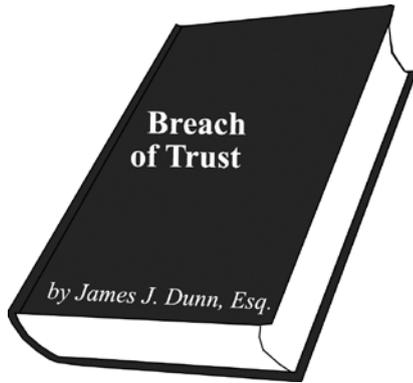
Contact Jennifer at [jeb@vtbar.org](mailto:jeb@vtbar.org) if you would like to volunteer in your community or if you would like materials from the VBA.

Annual Constitution Day panel presentation videos are available on our website under For the Public, Constitution Day.

*Many thanks to our gracious and knowledgeable  
2018 Constitution Day presenters,  
L to R: Judge Cohen, Judge Waples, Professor Teachout,  
Justice Eaton, Justice Robinson and VBA President Franklin.*



# BOOK REVIEWS



## Breach of Trust

By James J. Dunn, Esq.

Reviewed by Mary C. Ashcroft, Esq.

It was the cast of characters in the front of the book that caught my attention—eighty-nine in all. These were Vermont's legal and political "names" during the 1980's when I was a young lawyer just starting my practice: Fred Allen, Bill Hill, Ernest Gibson, Jeff Amestoy, John Dooley, John Easton, Madeleine Kunin, Tom Salmon, among others. They were all listed because their paths had crossed, for better or for worse, with that of Jane Wheel.

This book is about the rise and fall of Chittenden County Assistant Judge Jane Wheel, who was elected to that position in 1974 and held power until her ouster by voters in 1986. Mr. Dunn's meticulous research sheds light into dim corners of Wheel's courthouse intrigues and careful cultivation of friend-

ships useful to her. Her connections with Justices Thomas Hayes, Ernest Gibson and especially William Hill led to Hill's resignation, a cloud on Hayes's name at his death, and eventual vindication of Gibson. It shook the foundations of our Supreme Court and of our state's legal system.

Don't skip the introduction -- Dunn opens the slim volume with his view into Wheel's world through the lens of his legal attempts to prevent the demolition of the Chittenden County Courthouse. Wheel was on the other side. Wheel won. But how she won frames the story of her abuse of power and the breach of trust exhibited by Supreme Court Justices, judges and others who could not or would not stand up to her perversions of justice.

Don't skip the appendices either—they are a rare look into letters, affidavits, memos and a legal ruling central to the process of justice. And most have the typographical errors and authentic signatures of Vermont's pre-computerized legal world.

Attorney James Dunn packs the pages in between with a brisk, detailed narrative describing Wheel's power-brokering. He tells of the side judge sitting on cases in which she had conflicts, building her empire of side judges, using court funds for a judicial party, changing docket entries on court files, and punishing those who disagreed with her or tried to stop her. And the pervasive theme—using her friendship with judges and justices to get her way.

This is the story of how the Vermont le-

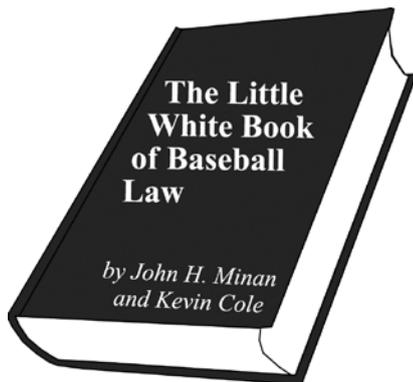
gal system first failed its citizens, and then corrected itself to bring justice to those who abused power.

Dunn delves into the courtroom drama of Wheel's perjury trial and the Judicial Conduct Board's review of inappropriate conduct of Justice William Hill. The author takes the time to explain the history of assistant judges and to define interlocutory appeals, temporary injunctions, a "rump" Supreme Court and much more. He highlights the determination of young lawyers like David Suntag and Susan Harritt, and the wily lawyering of veteran Leonard Wing.

This book is a good read. It's a treat for the Vermont historian and for those of a certain age who remember the personalities of the 1980's. It will appeal to lawyers who appreciate good lawyering and deft legal tactics. The curious layperson will enjoy the book too, as legal strategy and arcane rules of court are described in understandable, uncondescending terms. And for all Vermonters who value honest government, there are heroes and villains--and the heroes win.

A good read and a keeper -- I'm putting this book on my bookshelf next to publications about the Irasburg affair and the Paul Lawrence scandal. If you don't know what I mean by either, read about them. We can always learn from past mistakes.

Mary Ashcroft, Esq. is the Legal Access Coordinator for the Vermont Bar Association.



## The Little White Book of Baseball Law

By John H. Minan and Kevin Cole

Reviewed by Kevin J. Doyle Esq.

As this review goes to publication, regular season baseball is in its waning days. The Red Sox lead the American League East by a comfortable 9 1/2 games over second place New York, and the Yankee fans among us are hoping we will get to see the Bronx Bombers

secure a wild card spot in post-season play. Fall baseball, especially when your team is in contention, conjures nostalgic thoughts of playoff runs and World Series past.

Baseball inspires like no other sport. From the classic black-and-white photos capturing baseball's greatest moments, to the countless poetic descriptions of the triumphs and heartbreaks of the game, baseball has long captured the American imagination and become a central feature of the cultural landscape. Who can read John Updike's paean to the great Ted Williams, *Hub Fans Bid Kid Adieu*, and not admire its grasp of the *feel* of baseball, not to mention the craftsmanship of Williams ("He radiated, from afar, the hard blue glow of high purpose") and the complexity of his relationship with his fans and the larger world ("The affair between Boston and Ted Williams has been no mere summer romance; it has been a marriage, composed of spats, mutual disappointments, and, toward the end, a mellowing hoard of shared memories")? What is it that pierces the soul about Lou Gehrig's 1939 farewell speech at

Yankee Stadium when, dying of a ravaging disease that would take him less than two years later at age 37, Gehrig called himself "the luckiest man on the face of this earth," in no small part because of his association with the game of baseball?

Even the terminology of the game — "three strikes," "in the ballpark," "bush league," "curveball," "left field"— are part of the lexicon of even the least sports-minded among us. In his classic study of baseball, George Will observed: "Baseball—its beauty, its craftsmanship, its exactingness—is an activity to be loved, as much as ballet or fishing or politics, and loving it is a form of participation."<sup>1</sup> Will is on to something. A love for America's Pastime gives the student of the game a certain intimacy with all that baseball is and all that it represents in the national imagination.

Even amidst occasional reports that the fan base for the game is dwindling compared to other supposedly more exciting sports like football and basketball, Americans' love of baseball abides—the beautiful-

ly-turned double play, the perfectly-placed bunt down the third base line, the no-hitter, the lawsuits. Maybe not the lawsuits. But as law professors John Minan and Kevin Cole explain in *The Little White Book of Baseball Law*, baseball broadly defined has been the subject of court disputes for over a hundred years. The book is an entertaining and light read on the intersection of legal principles and baseball-related facts.

Minan and Cole recount the remarkably diverse array of legal disputes over the years that have centered around baseball. The book samples reported cases in which courts have considered baseball under every conceivable legal theory, from a nineteenth century patent law challenge involving an early catcher's mask design, to liability for negligent medical assistance to an injured spectator, and everything in between. The book opens with a 2000 federal case in the District of Massachusetts arising out of an apparent "ticket-scalping" incident at Fenway Park before a Red Sox-Yankees game. The Boston Police Department (BPD) arrested plaintiff Gary Lainer for selling a ticket for face-value to another fan outside the stadium. Lainer sued the BPD, alleging a violation of his constitutional rights and seeking injunctive relief against BPD's ticket-scalping enforcement policies. The crux of the legal issue was that while Massachusetts law prohibited the "business of reselling any ticket . . . without being licensed," the BPD had a policy of arresting anyone reselling game tickets, for any amount, in a public area. The federal court granted the preliminary injunction, which enjoined the police from arresting or prosecuting any person for selling a ticket at Fenway at or below face-value, unless the police had probable cause to believe that the person was in the business of reselling tickets and did not have a license to do so.

In another chapter, the authors explain the legal origins of baseball's century-long exemption from the federal antitrust laws, specifically the Sherman Antitrust Act. This protected status (a privilege the Supreme Court has not extended to basketball, boxing, or football) dates to the formative years of organized professional baseball. Ten years after the 1903 creation of the American and National Leagues, a group of well-heeled businessmen created a competitor league known as the "Federal League." The three leagues eventually reached an understanding in 1915 that called for the termination of the Federal League, and also permitted some, but not all, of the Federal League members to buy franchises in the American or National League. For some unexplained reason, Baltimore was excluded from this potentially lucrative opportunity. Baltimore brought suit against the Leagues and others, claiming an unlawful conspiracy to monopolize the business of baseball in violation of

the Sherman Act. According to Baltimore, the defendant Leagues' teams travel across state lines to play each other was sufficient to establish business practices in restraint of interstate commerce for purposes of the Sherman Act.

In a 1922 opinion written by Justice Oliver Wendell Holmes, the Supreme Court held that the "business" of baseball were the games themselves, and that the travel to the games was merely incidental. In other words, Holmes held that "baseball was purely a state affair"<sup>2</sup> and therefore beyond the reach of the federal antitrust laws. The authors note that the decision is out of step with the current big-business reality of professional baseball, but suggest that baseball in 1922 was not nearly as commercialized as it is today. Nevertheless, the Supreme Court revisited the baseball antitrust exemption on different facts in 1972 and declined to disturb its 1922 precedent.<sup>3</sup> As Minan and Cole describe the decision, the Court recognized that its 1922 precedent was an aberration, but it was reluctant to overturn a fifty-year old precedent on *stare decisis* grounds. The Court deferred to the legislature on the issue. Congress passed the Curt Flood Act in 1998 extending antitrust protections to the realm of baseball, but the law limited coverage only to Major League Baseball labor issues. The antitrust exemption for baseball remains in place today.

Baseball fans who enter the fray for a ball hit into the stands might want to review *Alex Popov v. Patrick Hayashi*, a 2002 decision of the California Superior Court. Applying a combination of law and equity, the court settled competing claims to legal possession of Barry Bonds' 73<sup>rd</sup> home run ball. As a general rule, the home team supplying the baseballs for the game generally abandons its claim to a ball once it leaves the playing field. That means principles of property law govern in the stands to settle spectator disputes over loose balls. In this case, Popov caught Bonds' home run in the top part of the glove's webbing (a "snow-cone" catch). During the ensuing jostling by other fans attempting to catch the ball, the ball fell from Popov's glove and was picked up by Hayashi. Hayashi had the ball in his possession when the scramble was over and claimed entitlement to it. Popov sued Hayashi for conversion and "trespass to chattel." But in order to prove those theories, Popov had to show that he had actual possession of the ball before the alleged conversion or trespass. In the end, the court found merit in both sides' arguments and held that both men had equal claims to the ball. According to the court, the only fair thing to do was to sell it and divide the proceeds equally. The authors remind us that the proceeds of such a sale are likely taxable.

The book also takes up the issue of tort liability for intentional conduct during play that

causes physical injury. The classic example is when a pitcher deliberately throws a pitch at the batter. In the case of *Avila v. Citrus Community College District* (2006), college baseball player Jose Avila sued an opposing team's collegiate district, after the opposing team's pitcher allegedly struck him in the head intentionally with a pitch. Avila sought damages under theories of battery and negligence. The case ultimately made its way to the California Supreme Court. Rejecting the defense claim that the district was entitled to statutory public entity immunity, the court addressed whether assumption of the risk doctrine precluded liability. Under that doctrine, liability will not be found for "injuries arising from those risks inherent to the sport."<sup>4</sup> Notwithstanding the intentional nature of the pitch thrown at Avila, the California Supreme Court held that "being intentionally thrown at is a fundamental part and inherent risk of the sport of baseball."<sup>5</sup> The court explained its concern that applying tort liability in this context might change the very nature of the game of baseball. As the authors summed it up, "[t]he beanball appears to be an inherent risk of the game and, therefore, outside the law of negligence as well as intentional torts."<sup>6</sup>

These are just four representative examples of the eighteen included in the book. Each chapter presents a concise and entertaining exposition of how the law applies in factual scenarios common to baseball. And while lawsuits about baseball will never join Gehrig's farewell speech or Updike's essay on Ted Williams in the canon of baseball's cultural essentials, they do add another interesting perspective on the game. If nothing else, the next time another fan in the stands contests your right to keep a foul ball that slipped through his hands, hopefully he will back off when you explain to him that a protected property right requires not only intent to possess, but also a certain amount of actual control of the ball.

Kevin J. Doyle, Esq. is First Assistant U.S. Attorney at the U.S. Attorney's Office in Burlington. The opinions expressed in this review are the author's alone and do not reflect the views of the United States Attorney's Office or the U.S. Department of Justice.

<sup>1</sup> George Will, *Men at Work: The Craft of Baseball*, Macmillan 1990, at p. 4.

<sup>2</sup> *The Little White Book of Baseball Law*, p. 44.

<sup>3</sup> *Flood v. Kuhn et al.*, 407 U.S. 258 (1972).

<sup>4</sup> *The Little White Book of Baseball Law*, p. 177.

<sup>5</sup> *Id.* (quoting *Avila*).

<sup>6</sup> *Id.* at 179.



# IN MEMORIAM

## Melvin Bauer ("MB") Neisner, Jr.

Melvin Bauer ("MB") Neisner, Jr., left this world on August 12, 2018, surrounded by his family. Born on June 7, 1956 in Rochester, NY, he was an Eagle Scout as a child, one of his proudest accomplishments. He moved to Killington in 1978 running a ski lift and managing a newspaper. Neisner received his JD from the Washington University School of Law. He married his wife, Peggy, in 1989 and they raised 2 children in Killington. Neisner was a justice of the peace, town health officer, Town Meeting moderator and member of the Board of

Civil Authority. He received the Paul Harris Fellow recognition from the International Rotary Organization for his work with the Killington-Pico club. They welcomed many Rotary exchange students in their home. He is survived by his mother, his wife and their two children.

## John G. Hutton, Jr.

John G. Hutton, Jr., 85, passed away on August 24, 2018 at Wake Robin in Shelburne. A 1951 graduate of Bennington High School, John attended Swarthmore College, graduating in 1955, and then ac-

quired his law degree from Columbia Law School in 1958. John first practiced law in Manchester, VT then moved to Montpelier where he was chief legislative craftsman and counsel to the Vermont General Assembly for several years. He moved to the Mad River Valley and practiced there. John was the town agent and moderator in Warren working on land use controls. In 2003, his struggles with cancer mounted and in 2007 he moved to Wake Robin. John was an avid reader of non-fiction and history books. He enjoyed concert-going with his wife, Dorothy whom he married in 1989 and who survives him.



## WANTED: LEGAL FICTION

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***Our next deadline is December 1, 2018.***

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I handle all initial contacts with the plan or third party administrator and provide all

necessary processing directions when the order is ready for filing.

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CFO  
Vermont Bar Association



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Managed IT Services



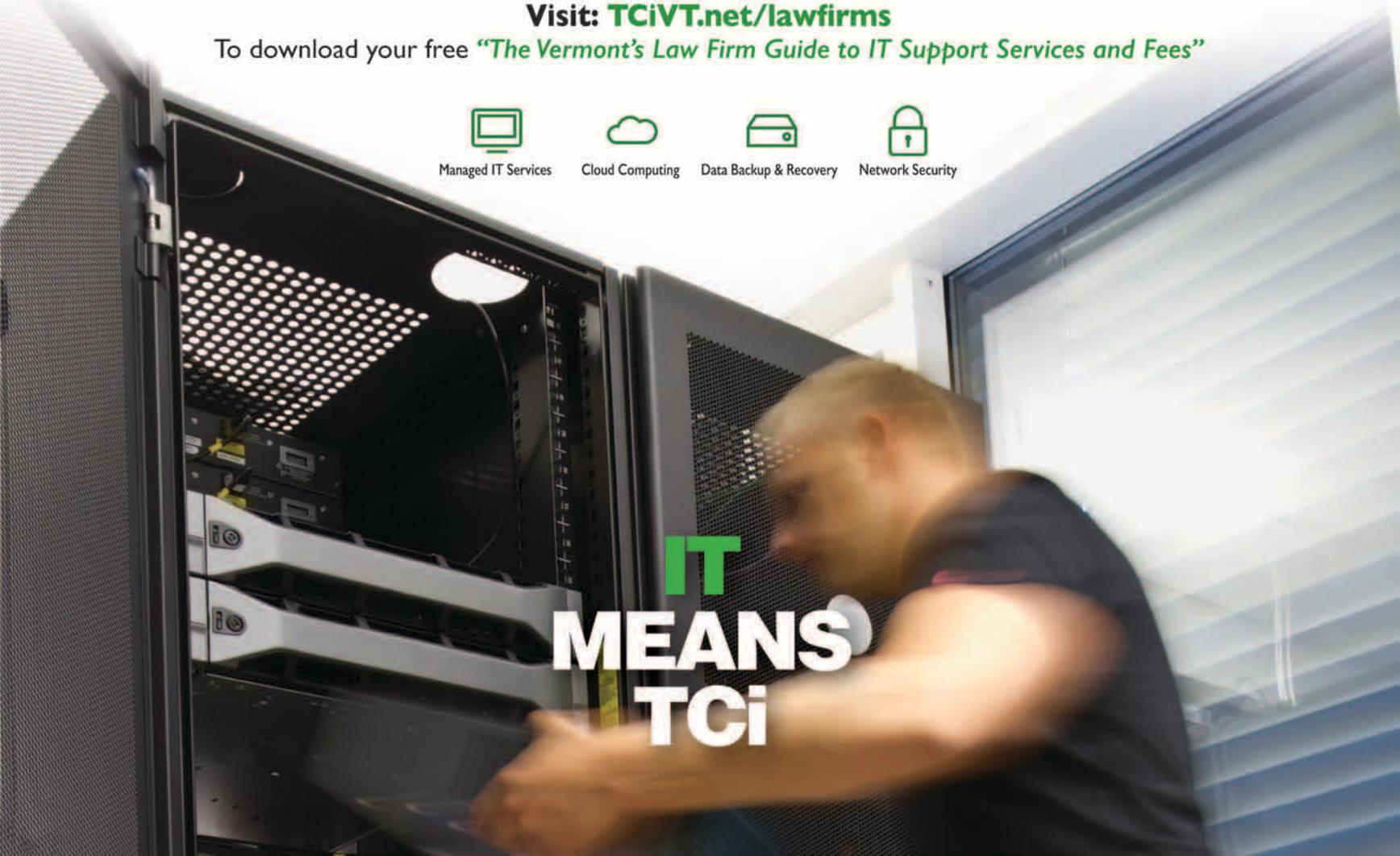
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Data Backup & Recovery



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