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# VERMONT BAR JOURNAL

216

Winter 2018, Volume 44, No. 4



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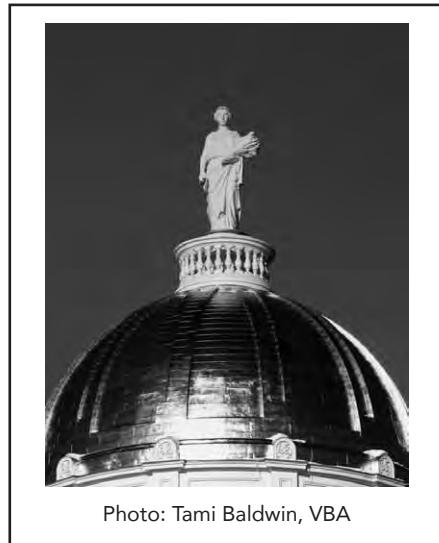


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# PRESIDENT'S COLUMN

## *It Matters*

So, recently I was preparing a client for a deposition. In covering his background, he shared with me his military experience while serving in Vietnam. As an infantry soldier he saw substantial combat. What really struck me though was his experience of walking through villages as part of a heavily armed platoon where, in that moment, he and his comrades shared absolute power. The rule of law did not exist. In contrast, he told me that a deposition, while part of an unfamiliar and cumbersome legal process, "shouldn't be a problem."

Churchill's famous remark about a democracy being the worst form of government except all others that have been tried, immediately came to mind. While we gripe about increasingly ineffective government and protracted litigation, often with good reason, we have to keep it in perspective. Living in a society that subscribes to the rule of law with due process and an independent judiciary, as imperfect as it is, is indispensable to our way of life. Even more fundamental to the preservation of our constitutional rights is the right to a trial by jury which provides protection against arbitrary action from a corrupt prosecutor or biased judge. Compare our forms of dispute resolution with earlier and more primitive forms such as trial by battle --exactly as it sounds -- or trial by ordeal where, for example, a defendant would be adjudged innocent only if they sank when immersed in water. Yes, you risked drowning to prove your innocence. So, while our more modern form of litigation deserves its fair share of complaints, we need to judge it on the scale of human experience.

Unfortunately, we are facing significant challenges to the rule of law. More and more, our population has become siloed with factions living in their own echo chamber suppressing the healthy exchange of ideas. People are conditioned to reject speech that they disagree with. It's no coincidence that public trust in government is declining, voter participation is low, and few Americans can even name all three branches of government. This toxic combination has led to increased political polarization where major domestic achievements – think Obamacare and Trump's tax cuts – are passed without a single vote from the minority party. Gridlock is replaced by executive order and the left and the right play almost entirely to their base. A healthy democracy, however, cannot be

the child of ignorance but should be the product of enlightened choices.

As lawyers, we play an important role in guarding the rule of law. To become licensed, we are required to literally swear to uphold the Constitution. Shakespeare understood this well when his character Dick the Butcher in a scene from Henry VI proclaimed "first, kill the lawyers" in order to eliminate law and order so his rebel leader Jack Cade could ascend to the throne.

Combating ignorance of the rule of law is the best way to preserve it. That is why we are doubling down on our educational efforts at the Vermont Bar Association. Each year we hold Legislators' Days with the judiciary in each county. Local legislators are invited to meet with judicial officers and witness proceedings in their county courts. These have proven to be a highly valuable tool in educating the legislature about the importance of the judiciary and what is required to ensure that it remains a robust functioning branch of government serving their constituents. Additionally, the VBA promotes Constitution Day on an annual basis where lawyers and judges distribute pocket constitutions and present at schools and civic groups throughout the state regarding aspects of the Constitution. This year we also organized the third annual Constitution Day Panel hosted at the Vermont Law School. The VBA also co-hosted the Centennial Celebration of the Vermont Supreme Court Building celebrating the role of lawyers and judges in preserving the rule of law.

Currently, Chief Justice Paul Reiber and I are engaged in a listening tour, visiting each county within the State to gain a better understanding of perspectives on the



legal system from the local bar, local legislators, other stakeholders in the judicial system and any members of the general public who participate. The Chief and I agree that it's very important for people to be heard and to feel vested in our democratic institutions.

An educated citizenry, whether liberal or conservative, that understands civics and the importance of a strong and independent judiciary, is far more likely to trust our courts and democratic institutions. Through robust civic engagement we can promote the "commerce of ideas" and stem the tide of ideological warfare. As lawyers, we are uniquely suited to this task. Yes, what we do really matters.



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# PURSUITS OF HAPPINESS

## Renaissance Rebecca: An Interview with Rebecca Rice

**Jennifer Emens-Butler:** I am at the office of Cohen & Rice in Rutland to interview Rebecca Rice for our Pursuits of Happiness column. So Rebecca, as you know, I have a regular column where I interview lawyers with interests and passions outside of the practice of law. I have had interviews with people who have musical talents, excel at competitive sports, have passion for the outdoors or passion for volunteer work. And for you, it's all of the above, correct?!

**Rebecca Rice:** Correct!

**JEB:** Yet, you have a very busy practice as well, so we want to get to a little bit of information about your busy life and as many of your pursuits that I can cover, ok?

**RR:** Yes, ok.

**JEB:** So, what is the nature of your practice, just so our readers know a little bit about you.

**RR:** Right now, it is solely bankruptcy.

**JEB:** Solely bankruptcy. You used to do other things?

**RR:** I used to evict tenants.

**JEB:** You wore the black hat [laughs]?

**RR:** [laughs] Yes, I used to wear a black hat. I used to do foreclosures even, and now I only do white hat work.

**JEB:** White hat...it's mostly Chapter 13's for debtors, right?

**RR:** A good chunk of my bankruptcy practice is Chapter 13.

**JEB:** And the 13's are the ones that can last a long time, 3 to 5 years or longer?

**RR:** Or longer.

**JEB:** Or longer, right! Do you have an estimate of how many open cases you have at any given time? I know when I was practicing I used to tell people numbers close to 100 and they thought that was ridiculous, but it is probably true, right?

**RR:** Yes, it's true. I have at least 200 open cases right now.

**JEB:** 200! Wow. And you have a staff to help you with all these cases?

**RR:** Yes.

**JEB:** So your practice is definitely full time. Do you work weekends?

**RR:** I try not to, but I frequently end up working on the weekends, sometimes from home.



**JEB:** Ok.

**RR:** But on the cold days or the nasty days, I will come into the office.

**JEB:** It's warmer here?

**RR:** It's warmer here.

**JEB:** I was wondering how you find hours in the day for your pursuits of happiness when you have over 200 cases, but you do find the time?

**RR:** Yes, on the weekends, I do not check email, and my cell phone is usually turned off.

**JEB:** That is incredible. People have a hard time doing that, even though it is recommended for mental health reasons. But yet you have a couple hundred balls in the air at once. Do you set that expectation ahead of time? You just tell them you don't answer on the weekends...

**RR:** Right, my clients know that I don't check my emails on the weekend, and a lot of my clients don't do much by email.

**JEB:** They walk in, they still do everything on paper, old school?

**RR:** Yes, and do their credit counseling

by phone, because they don't have a computer.

**JEB:** It is good that you don't find that it adds any stress--not being able to be in contact--because while there are urgencies, perhaps there aren't emergencies. As Judge Conrad said, there are no real emergencies in bankruptcy, because it's only money, with the only exception being cows.

**RR:** Yes!

**JEB:** Your cows needing to be milked is the only emergency there is.

**RR:** Don't talk to me about cows...my problem with cows right now is basically, that I am the only one doing chapter 12 [farm cases].

**JEB:** So, you have all the cows.

**RR:** I have all the cows and right now, with the milk prices where they are now, I am getting calls out the wazoo.

**JEB:** Right. And those are true emergencies, if somebody walks and the cows don't get milked, they will die.

**RR:** Fortunately, most of these are com-

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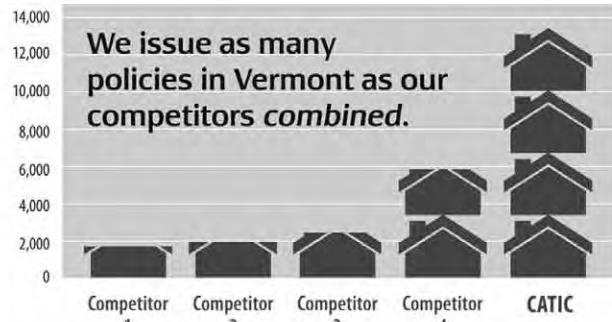


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**JEB:** Oh, so how did you fall in love with horses if they weren't at home?

**RR:** When I was 5 my parents went to Europe and shipped me and my sister down to North Carolina for the summer and my Aunt down there had horses.

**JEB:** Oh.

**RR:** My grandmother hired a mother's helper who was a rider and rented a pony for us for the summer, so if they couldn't find me, they knew I was in the barn. Holy Hanna and I were very good friends. She was my Aunt's mare, and my pony was Micky. Micky and I bonded very well.

**JEB:** So, when did you get your first horse?

**RR:** I got my first horse when I was 13. I got 2. I got a mom, who was not a very rideable horse and the deal was they were selling the horses because the family was getting divorced and they were selling the mare for \$200 and the filly for \$100 but if you bought them together it was \$250 for the 2 of them.

**JEB:** What a deal! Never mind the feeding and the care and all of that.

**RR:** Right!

**JEB:** Was this in Vermont or where are you from?

**RR:** Well I was born in North Carolina and my family has had the farm there since 1958, and the farm that I am on in Vermont they've had since 1965. My father taught at boarding schools, so I spent the school year living in a boy's dorm and the summers in Shrewsbury.

**JEB:** So, you have 7 horses and how many of them have bankruptcy names, because I remember when you got your Irish pony.

**RR:** None of them right now, but I did have Fresh Start, Absolute Priority and New Value.

**JEB:** Those are all good horse names that have bankruptcy relevance, right? I remember, was it Fresh Start you got from Ireland?

**RR:** Yes, he was my divorce present to myself.

**JEB:** And he has since passed?

**RR:** Yes, he passed almost 2 years ago from colic. He was 24.

**JEB:** I'm sorry. Well I think that Fresh Start will have to be our journal picture. So the others?

**RR:** I have Steeplebush Beaumarais, who is my 28-year-old Morgan, I have got 2 rescue horses, purebred off the track race horses, Well Vicar and Found My Guard.

Vicar is 16 and Sophie, Found My Guard is 17. I have got a 17-year-old half Connemara pony that I bred and watched being born and is still with us.

**JEB:** Of Irish descent?

**RR:** Yes. I have got a Kerry, who is the main mare that I ride, who I bought when she was not quite 2 and she is now 16 and one of the reasons I bought her is because her mother's full brother went to the Olympics on the eventing team in 2004. He was a Canadian Sport horse named Carrick and her mother's name was Carrie. So, my mare's name is Kerry, after my sisters' best friend when we were growing up.

**JEB:** That's funny.

**RR:** And Cinnamon, the pony, is Cinnamon Bear because when she was born, my sister thought I should name her Sarah Bear after my best friend when we were growing up, Kerry's sister. But my nephew thought Cinnamon because that was the name of his guinea pig.

**JEB:** His guinea pig and she is brown I am assuming?

**RR:** Yes.

**JEB:** Very cute. And they are family, obviously, the way you talk about them. Do you still compete?

**RR:** Some. I haven't been doing as much because my 10-year old neighbor has started competing.

**JEB:** I was going to ask if your 10-year old neighbor was your protégé in training.

**RR:** Yes, and she started competing this year and it wasn't fair for me to be focusing on me competing and her competing at the same time.

**JEB:** So, this was a trade for her helping you on the farm?

**RR:** Yes. She gets lessons and some of the dressage shows she has done, she has earned her classes, because Central Vermont Dressage Association does exchange for her volunteering, for every half day you volunteer, you get a free class.

**JEB:** Great.

**RR:** So, she has already earned at least 6 classes.

**JEB:** Now does she do anything with the goats – is there any 4-H going on with the goats? Or are they strictly pets?

**RR:** They are strictly pets. They are not milking, they are just my TV.

**JEB:** You don't watch TV?

**RR:** Well, I have one that hasn't been turned on in probably 15 years. The goats are hysterical to watch.

**JEB:** I was figuring that probably with all these interests and passions that you probably wouldn't have much time left for television including your day job. We should probably move on from the farm and find out about these other things.

**RR:** Well I haven't finished with the horses yet.

**JEB:** Oh, tell me more.

**RR:** The more special thing was last fall I found out that my mare Kerry's mom, Carrie, was with foal with my farrier's stallion and my mare is just such a wonderful horse, so when I found out that Momma was in foal, I told my farrier to tell the breeder that I was going to buy that foal. The foal was born on June 28<sup>th</sup> and we brought her home 2 1/2 weeks later. We picked up the mare and the foal, so that we could start dealing with her and handling her right away.

**JEB:** Oh, wow, congratulations!

**RR:** Her mom has now since gone home, but I have got the filly and the filly is now a little over 5 months.

**JEB:** So sweet. So that's better than TV too!

**RR:** Oh, and she is just so wonderful.

**JEB:** So do you know all your 'kids' birthdays?

**RR:** I think I know all the goats, or at least all the ones that I have bred. 7 of the goats were either bred or the initial one, Nutmeg was born in early January and she and her 6 kids and grandkids I now have.

**JEB:** Now, back to the horses, do you train anybody else, any other protégés in jumping or just the 10-year old?

**RR:** I have a student from UVM who hadn't realized that you could essentially earn riding lessons in exchange for work, and she was a volunteer at a therapeutic riding program in town this summer and was interested in learning to ride, so she contacted me, so and started this past summer.

**JEB:** So those are your two students?

**RR:** But I also teach at CCV.

**JEB:** Oh wow, you teach non-riding as well!!

**RR:** Business Law, one semester a year.

**JEB:** That is still a lot of work! Well speaking of giving your time, you won the VBA award 2 or 3 times, for pro bono services, correct?

**RR:** Three, I think.

**JEB:** Ok three, and you get recognized every year by Judge Brown for bankruptcy

volunteer work?

**RR:** Yup.

**JEB:** And then last year you were recognized nationally, when the Legal Services Corporation came to Burlington. And that was for the volunteer work you do in bankruptcy?

**RR:** Yup.

**JEB:** Well that's an incredible honor to be recognized by the LSC! Do you know, and not cases that end up being voluntary, but do you keep track of how many pro bono cases that you do?

**RR:** Not really. There are some that aren't necessarily sent to me by Vermont Volunteer Lawyer's Project, where someone comes in and they just don't have any ability to pay anything, and I will send them to VVLP and say, tell them that I will do this on a pro bono basis when you send it back.

**JEB:** I used to do that too. I would have them do the screening and some of the beginning work and then send it back to me. It is funny, people used to ask all the time, doesn't everybody who files for bankruptcy have no money? And the answer is yes and no, but it's hard to pick the cases that are truly pro bono sometimes, right?

**RR:** Right. I do a lot of low bono type stuff too. You know folks who are on social security that really don't have a whole lot of extra money, I will charge, maybe \$300 for my fee.

**JEB:** And do the whole case?

**RR:** Right, and do the whole case, and they will pay the filing fee, and on those, I will even put them on a payment plan at least for my fees, because, they are more than happy to pay \$50 a month.

**JEB:** And that doesn't even get recognition, right, because they count only the pro bono cases, but you say you do a lot of low bono cases.

**RR:** I do A LOT of low bono cases.

**JEB:** But you have been recognized for your volume of pro bono work, which is commendable. In the Pursuits of Happiness column, we interview people about their interests outside of the law, but sometimes it is law related. Pro bono work, according to many wellness studies, is one of the things that makes people well—volunteering feels good. You feel good about the outcome and you feel good that you have done it.

**RR:** Yes, that's so true. Not only do I do the volunteering with the legal work, but I also do a ton of volunteering with the horse stuff, because I volunteer for Central Vermont Dressage Association and Green Mountain Horse Association.



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**JEB:** Teaching or cleaning or...

**RR:** No, for events. For Green Mountain I scribe for their Dressage Shows, generally, or steward if they have enough scribes, and I am usually the start or finish timer for the events at Green Mountain and then for CVDA I do all the scoring, so that takes up the weekends.

**JEB:** So, you teach students at home, you do tons of pro bono work here and you volunteer at the two large events in the area for their programs. So how do you find time for say, any musical talents?

**RR:** Well...

**JEB:** I heard a rumor.

**RR:** I was a violin major in college.

**JEB:** Oh, I didn't know, I didn't know you majored in violin. Did you go to a conservatory?

**RR:** Well, I started out at New England Conservatory in Music. I spent two years there and then switched to University of New Hampshire.

**JEB:** Ok, but then you majored in violin at the University of New Hampshire?

**RR:** Yup, I've got a BS in music. In performance violin.

**JEB:** Wow, now did you compete in that or I recall you had done some travels with your violin.

**RR:** When my hips were bad, and I couldn't ride much, I got back into the music and went to fiddle camps.

**JEB:** Fiddle camps!

**RR:** And I tried to declassify myself, so I was studying.

**JEB:** Transforming from classical music to fiddling you mean?

**RR:** Yes, so I would take classes in an Irish, Celtic, Mexican, swing, blue grass and Cajun. One of my best teachers ever was Michael Doucet who plays in BeauSoileil and he is just a sweetheart and worlds best teacher!

**JEB:** And that was when you went down south to fiddle camp with him?

**RR:** Yes, for several years I did. There's a fiddler/violinist named Mark O'Connor who had a fiddle camp the first 2 years I went, which was outside of Nashville and then the 2<sup>nd</sup> two years I went it had moved to Eastern Tennessee College in Johnson City, so I did, I think 4 years at Mark's camp, and then Mark stopped the southern one and just did the camp in Berklee School of Music in Boston. After having gone to school in Boston for 2 years, I stopped as Boston, to me, does not seem conducive for fiddling, or rather for fiddle camp.



**JEB:** You would rather not be in a Northeastern city of any kind?

**RR:** Right, and in the meantime, there was one year when there was Mark's fiddle camp in Johnson City and 2 weeks later was the fiddle section of the Swannanoa gathering at Warren Wilson College, which was another fiddle camp, so I took a week at Mark O'Connor's, I did a bankruptcy boot camp in the middle and went to Swannanoa which was great. I've done a fiddle week and Celtic week there.

**JEB:** You were saying you are classically trained so fiddling is way different?

**RR:** Yes, and improvising is a whole new thing for me.

**JEB:** So aside from the camps did you find any other outlet, or you just play at home sometimes, just to relax?

**RR:** Well, I haven't played recently but my mother was a harpsichordist and my father plays the cello and the harmonica,

so we have the Steeplebush Family Band which periodically gets together and will do weddings or play at a bakery or other gatherings.

**JEB:** I had no idea, I haven't seen the Steeplebush Family Band in public. That's the name of the farm?

**RR:** Steeplebush farm is my farm. In the Steeplebush Family Band, my mother would play her small harpsichord, or she also has an electric piano, and my father would play generally harmonica and I the fiddle. We do a lot of Celtic music--we started out as doing contra dance tunes and now we are doing Irish and Scottish as well.

**JEB:** So you don't have anybody else that you play with or any solo events?

**RR:** There are some local folks who I play with periodically, but I haven't recently.

**JEB:** Well you have 2 students on the farm, students at CCV and you have your goats and horses...

**RR:** Yes, because I have been focusing on the ponies as opposed to the fiddle. It's interesting because we had an old mandolin and my mother had it fixed up and it's sitting in my house waiting for me to learn to figure out how to play that. My next challenge.

**JEB:** Your next challenge, because you know, why watch TV, because you have plenty of other things that you can do with your time! It's funny because for most of the people I interview, they focus on the one thing that really helps them relax, rather than so many. What would you say is the most relaxing of all these things that you like to do?

**RR:** I think just being with the critters.

**JEB:** Being with the critters. It's very soothing, I mean they say that having a pet adds to someone's life span, and helps in terms of your heartrate et cetera.

**RR:** Yes, and they all love attention. Even just when I throw hay out in the barn, I open the back door, the big sliding door in the back and just look out at the mountains, even if I am just throwing the bale of hay out, and I will just sit and relax. You know the view is just so beautiful. And just chill.

**JEB:** Just chill. That is very relaxing. It's got to be a lot of work though, I mean you have horses that require a lot of care, but it's still relaxing to you?

**RR:** Yeah, and fortunately, my setup, all the horses are on run in, so no one stays in at night, so that lessens the....

**JEB:** Oh, right, so if you don't get there at 5 in the morning, it's not the end of the world.

**RR:** Right, and it lessens the shoveling of manure!

**JEB:** So here's a silly question, maybe, have you ever played the violin for your animals?

**RR:** Actually, yes! Well, I don't know if it was just for the animals, but sometimes I have been known to fiddle while horses are being shod or having their feet trimmed.

**JEB:** Oh, it soothes them. So that is fair, and you are not ashamed to admit that because that is good for everyone, right? You get to practice, and the horses are calm, right?

**RR:** And the farriers love it.

**JEB:** And the farriers too, that's right, so everyone loves it. That's awesome. You

can mix all the passions together at the same time.

**RR:** Well, and years ago, when I was in high school, I have been known to play, and ride my pony in the school marching band, playing the trumpet.

**JEB:** You never mentioned that you played the trumpet.

**RR:** Well I don't really. But the trumpet only requires one hand.

**JEB:** So back to the happiness, basically, when you feed the horses and you just look at the mountains, you are there?

**RR:** Right.

**JEB:** So, trying to think of a way to wrap this up, it seems like you have so many interests and talents, but it also sounds like you have struck a real balance, where you don't feel too overly stressed out on most days?

**RR:** Well, don't talk to me the day before a Chapter 13 day!

**JEB:** Right. But you do find that balance where you are able to go home and take care of the farm and enjoy the scenery?

**RR:** Yes, absolutely. I love my farm and music, and I like saving houses and cars for people. It's very rewarding.

**JEB:** Right, there is something about bankruptcy where people say it is depressing, but you have a magic wand and you get to fix things.

**RR:** Well it's amazing what can get fixed. When I can loan modifications that work, and I have gotten some sweet loan modifications, it really feels great.

**JEB:** Right, it puts people on the right track.

**RR:** And they can keep their house.

**JEB:** That's the other thing that people don't realize about bankruptcy is it stimulates the economy and you help them keep going in a positive direction.

On theme, thank you for doing the good work, and for enjoying what life has to offer at the same time.

**RR:** Thank you.

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



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# RUMINATIONS

## We Pledge Allegiance to the Vermont Constitution

At the "Clio in the Courtroom" conference in 1986, Professor Patrick H. Hutton began his talk by describing his reaction to the requirement that he sign a loyalty oath before he could begin teaching at UVM. A statute requires all superintendents, principals, teachers, professors, instructors at any publicly-supported institution of learning or headmasters and teachers at independent schools to swear to "support the U.S. Constitution, the Vermont Constitution, and all State and federal laws."<sup>1</sup> Hutton explained that he had not read the Vermont Constitution before, and signed the pledge in blind faith, committing himself to support whatever it said.

Professor Hutton later read the Vermont Constitution closely and wrote a compelling essay on what he found (and had pledged his devotion to) in that document.<sup>2</sup>

The educator's oath was first required of educators and school administrators in 1931, essentially in the form of the law as it appears today. It was driven by a national movement, attempting to prevent the spread of communism in American life. A 1935 amendment enlarged the idea, providing a teacher "shall not indulge in, give or permit, either directly or indirectly, any instruction, propaganda or activity in connection with such school, university, college or normal school, contrary to or subversive of the constitution and laws of the United States or of the state of Vermont, but shall so organize, administer and conduct such school as most effectively will promote the ethical character, good citizenship and patriotic loyalty to the United States and to its constitution and laws."<sup>3</sup>

In 1964, the U.S. Supreme Court struck down the Washington State loyalty oath, which prohibited "subversive persons" from serving in government or in the schools. These oaths were offensive to the federal constitution, according to the opinion drafted by Justice Byron White, on the grounds of vagueness, uncertainty, broadness, and due process. The Washington oath regarded a person as subversive who abets or advises another to commit an act which assists "a fourth person in the overthrow or alteration of constitutional government." Justice White wrote that the court didn't question proper methods to "safeguard the public service from disloyal conduct," but "measures which purport to define disloyalty must allow public servants to know what is and is not disloyal."<sup>4</sup>

In Vermont, Attorney General James Oakes later concluded the 1935 amendment was unconstitutional, and in 1968 the legislature repealed it, leaving the original language from 1931. Lyman Hunt was a member of the House in 1931 when the act was first passed, and, still a member in 1968, told how the men who fought in World War I had opposed the law, feeling that they did not need to prove their loyalty to the Union with an oath.<sup>5</sup>

### Section 56 (Oath of Allegiance)

Every person of good character, who comes to settle in this State, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold and transfer land or other real estate; . . .<sup>6</sup>

When nonresidents purchase property in Vermont, intending to relocate here, they should take the oath of allegiance first, if we read the constitution strictly. The oath is found in Section 56:

You \_\_\_\_\_ do solemnly swear (or affirm) that you will be true and faithful to the State of Vermont, and that you will not, directly or indirectly, do any act or thing injurious to the Constitution or Government thereof. (If an oath) So help you God. (If an affirmation) Under the pains and penalties of perjury.<sup>7</sup>

This isn't done, of course. Dozens of closings occur every week without a thought of giving the purchasers the oath. This is one of several provisions of the Vermont Constitution that aren't respected. Perhaps it's worthwhile to consider how we can justify the avoidance of constitutional prescriptions. This is the constitution, after all, not some mere statute.

As Justice Marilyn Skoglund wrote in her opinion in *In re Town Highway No. 20* (2012), the "Vermont Constitution is the fundamental charter of our state and is preeminent in our governmental scheme. It is the expression of the will of the sovereign people of the state and confers upon the government limited powers while simultaneously protecting the basic freedoms of the governed. As such, the constitution stands above legislative and judge-made

law, and the rights contained therein speak 'for the entire people as their supreme law.'"<sup>8</sup>

Having pledged allegiance to the constitution, how then can we overlook what it requires?

Chief Justice Isaac Redfield addressed this conundrum in 1853. He wrote, "it seems to me that the right to interfere with aliens holding real estate in this country, strictly and appropriately belongs to the national, and not to the State sovereignty. It goes upon the basis of some defect in allegiance; and allegiance is a matter pertaining altogether to the national sovereignty. They have the exclusive control of all relations between this country and foreign nations, or their citizens. And the States are expressly prohibited, in the United States Constitution, from attempting any stipulations, treaties or compacts, upon the subject."<sup>9</sup> Respect for the Vermont Constitution is overridden by respect to the federal constitution.

Why an oath? We are all bound to respect the constitution and laws, and we don't need to commit to that respect by taking an oath.

The Vermont Voter's Oath, taken by every resident as a prerequisite to voting in all elections, does not go so far as to prohibit anything that would injure the constitution, as the oath of allegiance does. The voter's oath provides, "You solemnly swear (or affirm) that whenever you give your vote or suffrage, touching any matter that concerns the State of Vermont, you will do it so as in your conscience you shall judge will most conduce to the good of the same, as established by the Constitution, without fear or favor of any person."<sup>10</sup> The voter is wedded to the constitution's definition of what constitutes "the good" of the State of Vermont, as filtered through conscience, and must act fearlessly, impartially, and responsibly, in voting.

### The Conundrum

Which parts of the Vermont Constitution no longer apply, or may safely be ignored, and who decides that? Who will parse out what's enforceable and what isn't and on what grounds? We should have an annotated Constitution giving fair warning to those who would too assiduously attempt to adhere to the letter of the language of the constitution that not all that appears

there is true or enforceable. Must we await litigation to learn what we must respect?

#### Counting Ballots

Section 47 describes how ballots for statewide offices should be counted:

The voters of each town shall, on the day of election for choosing Representatives to attend the General Assembly, bring in their votes for Governor, with the name fairly written, to the Constable, who shall seal them up, and write on them, Votes for Governor, and deliver them to the Representatives chosen to attend the General Assembly; and at the opening of the General Assembly, there shall be a committee appointed out of the Senate and House of Representatives, who, after being duly sworn to the faithful discharge of their trust, shall proceed to receive, sort, and count the votes for Governor, and declare the person who has the major part of the votes, to be Governor for the two years ensuing. The Lieutenant-Governor and the Treasurer shall be chosen in the manner above directed.<sup>11</sup>

The votes for Governor, Lieutenant-Governor, and Treasurer, of the State, shall be sorted and counted, and the result declared, by a committee appointed by the Senate and House of Representatives.

Vermont election law no longer gives the Constable any role in elections. Election officials don't count ballots; ballot-counting machines do it. The results are tallied and reported to the Secretary of State, who calls a committee together of the major parties and independent candidates, who then certify the result of the election to the legislators. The committee does not sort or count or tally; it certifies.<sup>12</sup>

This isn't so important that it needs to be listed among the great failures of the legislature to respect the constitution. But here the statutes have drifted away from what the fundamental law requires, and it bespeaks a lack of care in the amendment process or in statutory design.

#### Slavery and Antislavery

Vermont's was the first American constitution to abolish slavery. Article 1<sup>st</sup> addresses that, saying:

That all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting prop-

erty, and pursuing and obtaining happiness and safety; therefore no person born in this country, or brought from over sea, ought to be helden by law, to serve any person as a servant, slave or apprentice, after arriving to the age of twenty-one years, unless bound by the person's own consent, after arriving to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.

Supreme Court Judge Stephen Jacob had a slave, Dinah, purchased by him before he moved to Vermont, and he avoided having to pay for her support when she became disabled by using Article 1 as a defense.<sup>13</sup> David Avery, Bennington's Congregational pastor, brought a slave to town when he was chosen pastor, and excommunicated a parishioner who criticized him for owning another person in a state that abolished slavery.<sup>14</sup> Slavery wasn't entirely abolished in Vermont after the constitution was adopted, although in time the state became strongly abolitionist.<sup>15</sup>

We should not be too hard on history. It is imperfect. A constitution, while it can be self-executing, has no army to enforce its orders. A constitution guides society, but it cannot guarantee its principles will always be respected. Change takes time.

#### Imprisonment for Debt

Section 40 provides that "No person shall be imprisoned for debt." The 1777 Vermont Constitution treated the subject this way: "The person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison after delivering up bona fide, all his estate, real and personal, in possession, reversion or remainder, for the use of his creditors, in such manner as shall be hereafter regulated by law."<sup>16</sup>

Notwithstanding the constitution, imprisonment for debt was the law of Vermont until 1838.<sup>17</sup> There were improvements over those 60 years in the law of poor debtors, but it took several generations of lawmakers to bring the practice to an end. This delay was not done in ignorance. As early as 1803, Governor Isaac Tichenor raised the problem of how to deal with insolvent debtors in his inaugural. He believed the current law was not sufficiently "explicit and guarded to secure the rights of Creditors, and afford the remedy intended for Debtors."<sup>18</sup> In 1824, Governor Cornelius Van Ness believed that at least the law should exempt females from the harsh penalties of imprisonment for debt. "The spectacle of an honest and unfortunate female confined in a common jail, with persons of all descriptions, or even at all restrained of her liberty, because she may

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be unable to fulfill a contract, must create the most painful sensation in the mind of every feeling and honorable man; while on the other hand, the confinement of one of the opposite character, under like circumstances, cannot be otherwise than disgusting in its aspect, and demoralizing in its tendency, and is therefore equally to be avoided."<sup>19</sup> Finally, during the governorship of Silas Jenison, the legislature abolished imprisonment for debt in 1838.<sup>20</sup> It took 66 years to make Vermont laws consistent with the Vermont Constitution.

### **Corporal Punishment**

To deter more effectually from the commission of crimes, by continued visible punishment of long duration, and to make sanguinary punishment less necessary, means ought to be provided for punishing by hard labor, those who shall be convicted of crimes not capital, whereby the criminal shall be employed for the benefit of the public, or for the reparations of injuries done to private persons: and all persons at proper times ought to be permitted to see them at their labor.

Section 64 of Chapter II defines "hard labor" as the punishment for crime. This was essentially the wording of the 1777 Constitution. Corporal punishment—branding on the forehead, cutting off an ear, whipping on the naked back—these were the predominant punishments from the creation of Vermont until 1808, when the law was changed after the construction of the Windsor State Prison. Thirty-five years of mutilations came to an end, as the legislature finally respected the constitutional mandate of hard labor.

### **Reapportionment**

Nothing more perfectly captures the sense of constitutional trauma more than the reaction of the state to reapportionment. The shock of reducing 246 members to 150 in the House of Representatives was strike one; that the requirement came from the federal courts, strike two; but the final blow was the fact that after reapportionment, the Vermont Constitution still mandated the one-town one-vote system. There were calls for a constitutional convention. The ten-year time lock on amending the constitution meant that ten years might pass before the Plan of Government could be conformed to its reformed constituency.

Late in 1964, Governor Philip Hoff asked the Attorney General for his opinion on whether the Vermont Constitution allowed the legislature to call a constitutional convention to amend the constitution to pro-

vide for proportional representation. Attorney General Charles Gibson, Jr. concluded the constitution did not forbid the legislature from calling a convention, but explained that the amendments would have to be put to a vote by popular ratification.<sup>21</sup> He based his decision in part on Article 7<sup>th</sup>, which gives the community the inalienable right to "reform or alter government." Gibson cited cases from other states that had faced similar challenges, and how their courts had respected the actions of the legislature. He quoted Daniel Webster for the proposition that only one of the original 13 state constitutions actually provided for an amendment process, but how each of them had gone ahead in spite of the lack of explicit authority to amend the constitutions frequently.

Two years later, Assistant Attorney General Frank Mahady added his opinion on the subject, responding to State Senator James Jeffords' inquiry about an alternative procedure, similar to the existing constitutional amendment process laid out in Section 72 of the constitution, without having to call a constitutional convention and waiting for seven more years. Mahady reiterated the opinion of Attorney General Gibson that the only alternative to the constitutional amendment process was a convention, but added that the legislature could not properly limit the authority of the convention by subject. He also concluded that the legislature could not form itself into a convention, but that delegates to such a convention would need to be elected directly by the people. He did not speculate on how the convention would be apportioned.<sup>22</sup>

In 1969, the legislature passed an act calling for a constitutional convention to convene at the State House on October 6, 1969, if voters approved any of seven subjects for amendment at a special referendum vote to be held on June 3, 1969.<sup>23</sup> None of the proposals passed, and the state waited until 1974 to fit the constitution to reality.

### **Biennial Sessions of the Legislature.**

The General Assembly shall meet biennially on the first Wednesday next after the first Monday of January, beginning in A.D. 1915.

This is Section 7 of Chapter 2. Formerly the legislature met in annual sessions, and elections were held for statewide, legislative, and county officers every year. In 1870, the constitution adopted the biennial system. The Council of Censors was persuaded that the legislature could work just as well meeting once every two years. It believed "we have had too much legislation," and too frequent changes that in-

creased litigation. Taking the time to give ideas mature deliberation would bring better laws, the Council explained, and if an occasional adjourned session was necessary, when the public good required it, the legislature could always come back in the second year.<sup>24</sup>

The legislature did not need an adjourned session from 1870 to 1960, a full 90 years. In the years when there was no election, the State House remained a museum. From 1968 to the present, there has always been an adjourned session.<sup>25</sup> During those years, there have been special sessions, as emergencies arose, but those were focused on the issue that justified the legislature reconvening.

Of course government is more complicated today than earlier years, and few would argue we should have no adjourned sessions, but there it is again, the inconsistency between what we pledge allegiance to and what we actually do.

### **The Blue Laws**

The Sunday blue laws remained a feature of Vermont law until 1982. That year the Supreme Court threw out the last of the restrictions on what you could do on the seventh day of the week, in *State v. Ludlow Supermarkets, Inc.* (1982). This was the first Vermont decision subjecting legislation to judicial review through construction of Article 7 (common benefit clause). Chief Justice Albert Barney wrote the decision for the Court, who was the author of several prior decisions upholding the blue laws. In *Ludlow Supermarkets*, he wrote:

The State makes the statement that there is no constitutional right to shop on Sunday. This stands constitutional law on its head. Our constitutions are restraints on governmental powers. The rights of citizens are not conditioned on grants given by constitutional fiat, but exist without the aid of expressed governmental permission, subject only to properly authorized circumscription where the public welfare requires. Since the citizens have long since chosen to be governed through a limited grant of authority to each branch of government, it is their right, and this Court's duty, to see that any legislative action prohibiting as a crime otherwise lawful activity is bottomed on the proper exercise of a constitutional power assigned to the legislative branch.<sup>26</sup>

The constitution hadn't changed in the 205 years prior to 1982, but our understanding of it had evolved. This glacial fluidity can be unnerving to a strict constructionist view of the constitution. If the con-

stitution meant this for so many years, the recognition more than two centuries later that it hadn't is discomfiting to those who treasure its words as gospel.

### Perfectability

In 1904, former President Grover Cleveland in his *Presidential Problems* told "of a legislator who, endeavoring to persuade a friend and colleague to aid him in the passage of a certain measure in which he was personally interested, met the remark that his bill was unconstitutional with the exclamation, 'What does the Constitution amount to among friends?'"<sup>27</sup> The wink that accompanies this remark does not distract from the heresy it displays.

Even among friends, the constitution needs to be respected. Where practice is different from the words of an article or section, we can regard it as an historical anomaly or an imperfection that eventually was or will be overcome. When we read about how many years it took for the legislature to fulfill the mandate of the constitution, as in the treatment of poor debtors or laws that were punished by mutilation, or when we see the courts waking up to constitutional violations in the exercise of judicial review, we need not condemn them for the delay. Law takes longer to mature in some

instances. Government isn't as perfect as a constitution would expect it to be, but it is perfectable. We should respect that too.

### Allegiance

At town meeting, we pledge allegiance to the flag, unconcerned that it might be a "graven image," and the nation for which it stands, which saves us from blasphemy. We pledge allegiance to the constitution as our civil gospel. Sometimes you need to squint at it, take it on blind faith, grateful for its protection of our rights. Details are important, but not all details are of equal moment.

Alabama's national committeewoman turned to President Harry Truman, and said, "I want to take a message back to the South. Can I tell them you're not ramming miscegenation down our throats? . . . That you're not for tearing up our social structure—that you're for all the people, not just the North?" Truman pulled a copy of the Bill of Rights from his pocket and read it all aloud to her.<sup>28</sup>

Have you ever heard the Vermont Constitution read aloud or done it yourself? When was the last time you read it, even silently, stem to stern? It's time. It's online at [vermontlegislature.gov](http://vermontlegislature.gov). The Secretary of State gives free copies of the Vermont

Constitution to any who ask. It's a small 4" x 6" booklet, handy and easy to read. Pull it out of your pocket from time to time. It will inspire and surprise you.<sup>29</sup>

### The Surprise of Spirit

In *Baker v. Carr* (1999), Chief Justice Jeffrey Amestoy rejected plaintiffs' arguments that a case from 1993 that construed a 1945 statute on adoption, where the court recognized the right of a "woman who was co-parenting the two children of her same-sex partner" to adopt the children "without terminating the natural mother's parental rights" was useful to their claims. The rejection cleared the way for the court to reach its conclusion that Article 7 guaranteed the right to civil unions for same-sex couples. Predicting that this ruling on the statutory claim might interfere with this judgment, the Chief Justice remarked that "[a]lthough the Legislature had undoubtedly not even considered same-sex unions when the law was enacted in 1945, our interpretation was consistent with its 'general intent and spirit.'"<sup>30</sup>

The majority opinion began its constitutional analysis by focusing "on the words of the Constitution themselves, for, as Chief Justice Marshall observed, 'although the spirit of an instrument, especially of a con-

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stitution, is to be respected no less than its letter, yet the spirit is to be collected chiefly from its words.<sup>19</sup><sup>31</sup> What is this spirit? While we've been reviewing the chasms that sometimes separate what government does and what statutes say from what the literal words of the constitution seem to require, we have been too literal. We haven't planned for another layer of constitutional authority that isn't explicit in its language, but that emerges like a mist over a waterfall to rule the words.

If it is fair at all for us to expect to know to what we are pledging allegiance, where does spirit come into our understanding? No one can read the constitution today and predict how it will be read in another generation, what spirit will arise to color traditional understandings and upend long-established cultural and legal principles. Blind faith to a constitution is not overcome if we insist on reading the text before taking an oath of allegiance to it. We commit to what it says, and what it will be construed to mean in the future.

The oath asks a lot of us. It asks us to commit to 8,000 words originally adopted in 1777, largely based on what Pennsylvania had adopted the previous year and on principles William Penn had written in 1682

in its colonial charter. It asks us to trust the means the legislature will adopt to implement it. And it asks us to respect the way the courts will interpret it. It's like the traditional Anglican marriage vow, "not to be entered into unadvisedly or lightly; but reverently, discreetly, advisedly, soberly, and in the fear of God."<sup>32</sup> It's serious.

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<sup>1</sup> 16 V.S.A. § 12. The oath is not required of any teacher who is a citizen of a foreign country.

<sup>2</sup> The "Clio in the Courtroom" lectures were published in 56:3 *Vermont History* (Summer 1988), and include essays by Justice Thomas Hayes, and Professors Hutton and Gary J. Aichele. Professor Hutton's "The Print Revolution of the Eighteenth Century and the Drafting of Written Constitutions" dismissed the idea that interpreting the constitution should include trying to "encapsulate the 'original intent' of the framers." "We must interpret their designs in terms of the world in which we live," treating precedent not as an established rule but rather as "a point of departure in the construction of something new." Patrick H. Hutton, "The Print Revolution of the Eighteenth Century and the Drafting of Written Constitutions, 56:3 *Vermont History* 161.

<sup>3</sup> V.S. § 4301.

<sup>4</sup> *Baggett v. Bullitt*, 377 U.S. 360, 379-380 (1964).

<sup>5</sup> "House advances teach oath constitutionality bill," *Burlington Free Press*, 27 January 1968, 11.

<sup>6</sup> Vermont Constitution Chapter II, Section 66.

<sup>7</sup> *Id.*, Section 56.

<sup>8</sup> *In re Town Highway No. 20*, 191 Vt. 231, 248 (2012), ¶ 26.

<sup>9</sup> *State v. Boston, C. & M.R. Co.*, 25 Vt. 433, 440 (1853).

<sup>10</sup> Vermont Constitution, Ch.II, Sec.

<sup>11</sup> *Id.*, Section 47.

<sup>12</sup> 17 V.S.A. § 2607.

<sup>13</sup> *Selectmen of Windsor v. Jacob*, 2 Tyl. 192 (1802).

<sup>14</sup> John L.T. Phillips, "Sketches of the Early Ministers of Windsor," in *Berkshire Historical and Scientific Society I* (Pittsfield, Ma.: Sun Printing Company, 1886), 55-56; Isaac Jennings, *Memorials of a Century: The Early History of Bennington, Vt. and Its First Church* (Boston: Gould and Lincoln, 1869), 61-63.

<sup>15</sup> Harvey Amani Whitfield, *The Problem of Slavery in Early Vermont, 1777-1810* (Barre, Vt.: Vermont Historical Society, 2014); Michelle Aronosky Shelburne, *Abolition & the Underground Railroad in Vermont* (Charleston, S.C.: The History Press, 2013).

<sup>16</sup> Allen Soule, *Laws of Vermont 1778-1781, 12 State Papers of Vermont* (Montpelier, Vt.: Secretary of State, 1964), 17.

<sup>17</sup> "An Act, to abolish imprisonment for debt," *Acts and Resolves passed by the Legislature of the State of Vermont at their October Session, 1838* (Montpelier, Vt.: E.P. Walton and Sons, 1839), 8.

<sup>18</sup> Isaac Tichenor, *Inaugural Address, E.P. Walton, IV Records of the Governor and Council of the State of Vermont V* (Montpelier, Vt.: Steam Press of J. and J.M. Poland, 1877), 531.

<sup>19</sup> Isaac Tichenor, *Inaugural Address, E.P. Walton, VII Records of the Governor and Council of the State of Vermont V* (Montpelier, Vt.: Steam Press of J. and J.M. Poland, 1879), 445.

<sup>20</sup> "An Act, to abolish imprisonment for debt," *Acts and Resolves passed by the Legislature of the State of Vermont at their October Session, 1838* (Montpelier, Vt.: E.P. Walton and Sons, 1839), 8. In his 1838 inaugural, Jenison said, "Jail should be for punishment; the debtor should not be confused with a criminal; and the last person who should be able to control the freedom of a debtor is the creditor. The debtor should be able to disable the creditor upon taking the oath, and avoid imprisonment. At least a debtor should be able to demand an immediate trial, rather than leaving it to the discretion of the 'vindictive creditor.'"

<sup>21</sup> 1964-66 Opinions of the Attorney General 93-103.

<sup>22</sup> 1966-68 Opinions of the Attorney General 122-128.

<sup>23</sup> 1969, No. 74.

<sup>24</sup> *Records of the Council of Censors of the State of Vermont 644-648*. The Council added that less frequent elections, would be a secondary benefit. Elections, "accompanied as they are by local contests, the intrigues of cliques, and the struggle of hungry aspirants, have in them much that is demoralizing. Not to mention the corrupt appliances which unscrupulous men bring to bear more or less in every close contest, there are influences which cannot be stigmatized as immoral which have yet an unhealthy tendency. Our frequent elections bring about an eagerness for place and a consequent courting of popularity that works evil in our society. Our leading men in such conditions, instead of being manly and outspoken in their convictions, become timid in rebuking evil and cautious in sustaining the right. Instead of being public teachers, advocating wise counsels and combating prejudices and striving to turn public thought into higher and better courses, our public leaders flatter the vanity and stimulate the prejudices of the multitude, and follow wherever the passions or interests of the many may lead them. Instead of big statesmen they become demagogues."

<sup>25</sup> *The General Assembly: A Potpourri* (Montpelier, Vt.: Secretary of State, 1994), 35-36.

<sup>26</sup> *State v. Ludlow Supermarkets, Inc.*, 141 Vt. 261, 264 (1982).

<sup>27</sup> Grover Cleveland, *Presidential Problems* (London: G.P. Putnam's Sons, New York: The Century Co., 1904), 29. The story has also been attributed to Andrew Jackson. Edward V. Schneier, *Crafting Constitutional Democracies: The Politics of Institutional Design* (Lanham, Md.: Rowman & Littlefield Publishers, Inc.), 12.

<sup>28</sup> William E. Leuchtenburg, "The Conversion of Harry Truman," 42:7 *American Heritage* (November 1991). <https://www.americanheritage.com/content/conversion-harry-truman>

<sup>29</sup> Aside from what appears in the present constitution, there were parts of this fundamental law since amended out that will interest you. For instance, the Vermont Constitution once required candidates for the House of Representatives to be "persons more noted for wisdom and virtue." *Vermont Constitution* (1793), Ch.II, Sec.8. This prerequisite was eliminated in the amendments of 1974. Paul S. Gillies, *Revising the Vermont Constitution: 1785-1786, and Beyond*, 17:5 *Vermont Bar Journal* 6 (October 1991).

<sup>30</sup> *Baker v. State*, 170 Vt. 194, 200 (1999).

<sup>31</sup> *Id.*, 170 Vt. at 207.

<sup>32</sup> 1789 U.S. Book of Common Prayer,



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## WHAT'S NEW?

# Vermont Commission on the Well-Being of the Legal Profession Update

The Vermont Commission on the Well-Being of the Legal Profession was the subject of a plenary session at the March 23, 2018 VBA Mid-Year Meeting. At that session, Chief Justice Paul Reiber described the background for the creation of the Commission, introduced the Commission members, and welcomed keynote speaker Terri Harrington, then-newly installed Executive Director of the New Hampshire Lawyers Assistance Program (NHLAP). Ms. Harrington spoke eloquently about the need for both proactive and reactive resources for members of the legal profession. Following is a synopsis of the information shared during the plenary session, an update about the Commission's work since then, and a foretaste of next steps.

In December 2016, the American Bar Association Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation published a study of practicing lawyers that revealed alarming statistics. It found that between 21 and 36 percent of lawyers qualify as problem drinkers, approximately 28 percent struggle with some level of depression, 19 percent suffer from severe anxiety and 23 percent live with elevated stress.<sup>1</sup>

A similar survey of law students, also published in 2016, showed that 25 percent of students were at risk for alcoholism, 17 percent experienced some level of depression, 14 percent suffered from severe anxiety, 23 percent exhibited mild or moderate anxiety, and 6 percent had serious suicidal thoughts in the past year.<sup>2</sup>

Although like studies have not been undertaken in Vermont, Vermont Bar Counsel Michael Kennedy extrapolated the data from the studies in a March 3, 2016 *Ethical Grounds* blog post entitled "Lawyers Helping Lawyers." In the post, he suggested that approximately

- 500 active Vermont attorneys are problem drinkers
- 500 active Vermont attorneys exhibit signs of problem anxiety
- 720 active Vermont attorneys struggle with some level of depression<sup>3</sup>

In response to the studies, a National Task Force on Lawyer Well-Being was convened and issued "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change" in August 2017.<sup>4</sup> The Report included 44 recommendations for judges, regulators, legal employers, law schools, bar associations, lawyer assistance programs, and

lawyer professional liability carriers.

The Vermont Supreme Court established the Vermont Commission on the Well-Being of the Legal Profession on January 2, 2018. In the corresponding Charge and Designation, the Court noted:

- Supporting lawyer, judge and law student well-being contributes to success in the delivery of legal and judicial services, and enhances lawyer and judicial ethics.
- The Vermont Supreme Court fully supports the concept of lawyer, judge and law student well-being as a critical component of lawyer and judicial competence and reinforces the critical role of the Supreme Court in overseeing the profession.
- The Vermont Supreme Court recognizes its desire to take an active role in the development of effective mechanisms through convening the relevant stakeholders in Vermont to improve the well-being of the profession and the bench.

The Vermont Commission on the Well-Being of the Legal Profession was established for the purpose of creating a state-wide action plan with specific proposals for the Vermont Supreme Court and its relevant committees to consider regarding the following three areas:

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

The Charge and Designation identified nine Commissioners associated with various stakeholder groups, including Chief Justice Reiber as Commission Chair, Judge Bill Cohen as Chair of the Judges Committee, Teri Corsones as Chair of the Bar Association Committee, Mike Kennedy as Chair of the Regulators Committee, Dean Thomas McHenry as Chair of the Law School Committee, Joshua Simonds as Chair of the Lawyers Assistance Program Committee, Ian

Carleton and Laura Wilson as Co-Chairs of the Legal Employers Committee, and Chris Newbold (ALPS Executive V.P.), as Chair of the Lawyer Professional Liability Carriers Committee. Each Commissioner enlisted multiple Committee members.<sup>5</sup>

Since March, the various stakeholder committees have met regularly to review and evaluate the recommendations of the National Task Force on Lawyer Well-Being specific to each group. For example, the Bar Association Committee met monthly by phone from March through August to review recommendations pertaining to: CLE programming on well-being related topics; educational materials to support "best practices" for legal organizations; empirical research on lawyer well-being as part of member surveys; creation of a lawyer well-being committee;<sup>6</sup> and planning for lawyer well-being activities and events at bar association events. The Committees were tasked with preparing Committee Reports detailing the results of the various reviews, and the Commission is in the process of creating a state action plan to submit to the Vermont Supreme Court by year's end.

One of the most critical aspects of the state action plan will be to address the second area identified in the Commission's Charge and Designation: a plan to support and sustain a Lawyers Assistance Program to assist lawyers, judges and law students with mental health, well-being and /or substance abuse resources. By way of brief background, Vermont's "Lawyers Concerned for Lawyers" began under Rutland Attorney John Webber's volunteer guidance in the early 1990's. Incorporated in 2006 as Lawyers Concerned for Lawyers, Inc., the organization operates today on a voluntary basis as the Vermont Lawyers Assistance Program (VTLAP). Its website explains that it "provides confidential, meaningful assistance to lawyers, judges, law students and their families in coping with alcoholism and other addictions, depression, and other personal or professional crises."

It is anticipated that the Commission's state action plan will include a proposal for a funded Vermont Lawyers Assistance Program, likely through lawyer licensing fees. Lawyer license fees are typically the primary funding mechanism for LAP programs nationwide. For example, the Committee on Lawyer Well-Being of the Supreme Court of Virginia recently completed its state action report. Acknowledging that its report recommends additional costs to the legal pro-

fession taken from lawyer license fees, the Committee noted: "Our collective judgment is that the immediate benefit to individual members of the profession and the prophylactic benefit to the profession and the public of education, training, and prevention, including intervention for impaired legal professionals, substantially outweigh the slight cost associated with the establishment and funding of the following proposals. We believe that they are fundamental to competent and professional legal services, and will be accepted as core responsibilities attendant to the privilege of practicing law."<sup>7</sup>

The Vermont Commission's state action plan is due December 31, 2018. Anticipating that the Vermont Supreme Court will act upon the recommendations in the state action plan soon in the new year, the VBA plans to report on the Court's response to the state action plan at the VBA Mid-Year Meeting scheduled for March 21-22, 2019 at Lake Morey Resort in Fairlee. As Mike Kennedy noted in his *Keep it on the Front Burner* post a little over a year ago, "Whatever we do to address this problem, we need to make sure it includes spreading the word that it is

no longer sufficient to wait to refer someone to help until he's hospitalized or her practice has cratered. Refer early. Not to save clients from harm, but to help a fellow human being get into recovery or treatment...We cannot let the topic fade into the background. The numbers prove that lawyers need help now. We must provide it."<sup>8</sup>

Many thanks to the Commission and Committee members who have worked hard over the past year to formulate a plan for the Court's review and response. Please stay tuned for that response.

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

<sup>1</sup> "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys", *The Journal of Addiction Medicine*, Jan/Feb 2016, Vol. 10, Issue 1. [https://journals.lww.com/journaladdictionmedicine/fulltext/2016/02000/The\\_Prevalence\\_of\\_Substance\\_Use\\_and\\_Other\\_Mental.8.aspx](https://journals.lww.com/journaladdictionmedicine/fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx)

<sup>2</sup> "Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns," *Journal of Legal Education*, Vol. 66, Number 1 (Autumn 2016). <https://jle.aals.org/>

[org/home/vol66/iss1/13/](http://org/home/vol66/iss1/13/)

<sup>3</sup> Ethical Grounds, *The Unofficial Blog of Vermont's Bar Counsel, Lawyers Helping Lawyers* 3/10/2016. <https://vtbarcounsel.wordpress.com/2016/03/03/lawyers-helping-lawyers/>

<sup>4</sup> See ABA's National Task Force on Lawyer Well-Being: *Creating a Movement to Improve Well-Being in the Legal Profession*, August 14, 2017. <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf>

<sup>5</sup> A list of the members of each committee is on our website [www.vtbar.org](http://www.vtbar.org) under "For Attorneys/Commission on the Well-Being of the Legal Profession." <https://www.vtbar.org/FOR%20ATTORNEYS/Vermont%20Commission%20on%20the%20Well-Being%20of%20the%20Legal%20Profession.aspx>

<sup>6</sup> On September 27, 2018 the VBA Board of Bar Managers voted to approve a new Lawyer Well-Being Committee, with Samara Anderson and Michaela Tucker serving as co-chairs.

<sup>7</sup> Found at the Virginia State Bar site, [www.vsb.org](http://www.vsb.org). *A Profession at Risk: Report of the Committee on Lawyer Well-Being of the Supreme Court of Virginia*. [http://www.vsb.org/docs/A\\_Profession\\_At\\_Risk\\_Report.pdf](http://www.vsb.org/docs/A_Profession_At_Risk_Report.pdf)

<sup>8</sup> Ethical Grounds, *The Unofficial Blog of Vermont's Bar Counsel, Keep it on the Front Burner*, 7/18/2017. <https://vtbarcounsel.wordpress.com/2017/07/18/lawyers-helping-lawyers-keep-it-on-the-front-burner/>



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# WRITE ON

## A Good Rebuttal Is Like Obscenity: You Know It When You See It

### Introduction

It is Appellate Advocacy season at Vermont Law School; that time of year when our second year law students research, brief, and deliver an oral argument on a pending Supreme Court case. Each year, many members of the Vermont Bar graciously donate their time reading briefs, judging oral arguments, and then giving feedback to our students. One thing I have noticed in listening to feedback during my years of teaching Appellate Advocacy and coaching Moot Court is that everyone has an opinion on the rebuttal part of the oral argument. Sometimes a single panel of judges can produce multiple views on whether a student should or should not have used the rebuttal, how much time should have been reserved, and whether the rebuttal was effective or not. Given this panoply of different views on rebuttal, I often struggle when asked by students what makes a good rebuttal, often left answering: a good rebuttal is like obscenity, you know it when you see it.<sup>1</sup>

As a result of this long-standing rebuttal controversy, I began researching articles from the experts on rebuttals. However, I was able to find few articles devoted to rebuttals; most mentioned them in passing in articles centered on oral arguments. However, from the available research, I have collected five tips for delivering a stand out rebuttal. I then tested these tips by reviewing several recent Vermont Supreme Court Oral Arguments to see if the advocates adhered to them.

### Rebuttal Basics

In most appellate courts, after the Petitioner/Appellant has delivered their argument, the Respondent/Appellee delivers their response. Ideally the Respondent or Appellee responds to the arguments the Petitioner/Appellant made. The rebuttal is the Petitioner/Appellant's chance to address Respondent/Appellees' argument. In other words, the rebuttal is a chance for the Petitioner/Appellant to have the last word before the judges make their decision. However, ineffective or improper use of rebuttal can backfire and leave the panel with a negative impression of the Petitioner/Appellant, or their argument.

Depending on court rules and local custom, there are generally two ways for Petitioner/Appellant to take a rebuttal. Peti-

tioner/Appellant must reserve time for rebuttal at the beginning of the argument, or stop their argument early, reserving the rest of the time for rebuttal. In the latter scenario, Petitioner/Appellant only succeeds in receiving rebuttal time by "stemming the tide of the justices' questions before his or her allotted time has elapsed," which, depending on the panel, can be impossible.<sup>2</sup> As most readers already know, the Vermont Supreme Court adopts this second approach.

When making a rebuttal, a short roadmap with signposting words is usually helpful, so the Judges know what is coming. For example, you might begin like this: "Your honors, I have two points on rebuttal. First, counsel for Respondent stated . . . This is irrelevant because . . . Second, counsel cited . . . That case does not apply here because . . ."<sup>3</sup> Once you have made your points, sit down. Sometimes the simple close: "Thank you" can do the job perfectly.<sup>4</sup>

Keep in mind that judges will often ask questions during rebuttal (just as they would during the main argument), and therefore, your plan can easily be derailed. As noted, a rebuttal roadmap may help with this, as the judges may be eager to hear what points you have identified as crucial. But like in all aspects of oral argument, the best laid plans often go awry. To make the most of the rebuttal, consider the following 5 tips.

### Tip # 1: Sometimes the Best Use of Rebuttal is Not to Use It

Judge Frank H. Easterbrook, a long time judge on the United States Court of Appeals for the Seventh Circuit offered this advice: "The very best use of rebuttal time is not to use it. The judges are ever so happy when you say, 'I have nothing further, Your Honor.'"<sup>5</sup> Judge Easterbrook reports that of his approximately 15 cases before the Supreme Court as a Petitioner, he gave a rebuttal in only one of those cases.<sup>6</sup> Judge Easterbrook believes that lawyers do not waive rebuttals nearly enough.<sup>7</sup> (Incidentally, he says the same thing about the use of reply briefs, referring to them as "repeat briefs."). According to Judge Easterbrook, "if you've done your job well, you anticipate all of the arguments the other side is going to make. And you address them, not in the form of counterpunching . . . but in your affirmative case."<sup>8</sup>

This advice is apropos for appellate argument rebuttals because in the case of the oral argument, you've had your brief and the other side's brief, so "you know perfectly well what the other side is going to say."<sup>9</sup> In short, Judge Easterbrook suggests crafting your argument in a way that makes rebuttal unnecessary.<sup>10</sup> He suggests reserving a small amount of time in the rare case that the other side takes the opportunity to raise an entirely new argument or to make a significant unsupported factual assertion.<sup>11</sup> But do not be afraid to waive that time if either of those rare occasions does not happen. If you do decide to waive your reserved time for rebuttal, stand up and state, "Petitioner/Appellant waives the remaining time" or words to that effect.

### Tip # 2: Reserve Only a Minute or Two for Rebuttal

As noted above, the best advice is sometimes not to use the rebuttal. However, how much time to reserve for rebuttal is filled with controversy. Most articles on rebuttals suggest reserving no more than two or three minutes.<sup>12</sup> Some feel quite strongly that one-minute is the perfect time for rebuttal, while others prefer two to three minutes in case an argument you have not anticipated comes up. The most commonly recommended time is two minutes.

### Tip # 3: Remember, Oral Argument is Linear: Avoid Acronyms and Other Complexities

This tip applies well to all parts of oral and written advocacy, but applies with special force in rebuttals. One of the most important differences between brief writing and oral argument is that oral argument is linear.<sup>13</sup> "No one can go back and rewind the tape."<sup>14</sup> That means, that advocates should avoid complexity whenever possible. One example of needless complexity that commonly appears in oral argument and especially rebuttals (where time is by nature even more limited) is the use of acronyms.

As Legal Writing scholar Bryan Garner warns: "specialists often glory in concocting an alphabet soup that no one else finds digestible."<sup>15</sup> (Incidentally, environmental lawyers, as many of our graduates become, are "the grossest offenders."<sup>16</sup>) Garner gives an example in his book *Legal Writing*

## *in Plain English:*

Rather, MCC's involvement in the facts giving rise to the action was limited to the following: MCC agrees to defend and indemnify (1) the RCWD under the insurance policy against Grosse's civil claims, and (2) VII against RCWD's cross-complaint.<sup>17</sup>

Incomprehensible. The lack of clarity is even more potent in an oral argument, where the audience does not have the benefit of rereading or going back to where these words were defined. To keep your justices with you during the grand finale of your oral argument, avoid acronyms or other needless complexities.

### **Tip # 4: Don't Sweat the Small Stuff**

Advocates are sometimes tempted to harp on misstatements of fact or law in their opponent's argument, even if those misstatements are not material. Do not use rebuttal to point out small mistakes that your opponent made. For example, do not use rebuttal time to point out citation errors, unimportant errors in dates, or minor factual inaccuracies. Instead, focus only on those inaccuracies or statements that have legal significance to your case. Failing to heed this advice may make you look needlessly fussy or, worse yet, disrespectful of the Court's time.

### **Tip # 5: Actually Rebut**

Nearly everyone agrees on this: use the rebuttal to actually rebut. That is, use the rebuttal to refute or respond to the arguments your opponent made.<sup>18</sup> United States Supreme Court Rule 28.5 makes clear that "counsel making the opening argument shall present the case fairly and completely and not reserve points of substance for rebuttal."<sup>19</sup> Some judges will interrupt advocates who fail to heed this advice, stating something like, "Counselor, do you have any rebuttal to offer?"<sup>20</sup> In other words, do not use the rebuttal to:

- Repeat arguments you made in your initial argument;
- Raise arguments that you did not get into in your initial argument;
- Attempt to respond to every argument or point made by your opponent in his or her argument;
- Respond to your opponent's arguments that the panel seemed uninterested in; or
- (As noted in Tip # 4) Harp on non-material mistakes your opponent made.

In my experience, this advice is the easiest to understand but the hardest to apply. One guiding principle I once heard that resonated was: "Raise the issues on

rebuttal that had you wanting to jump out of your seat" during your opponent's argument. Maybe you wanted to jump out of your seat because what your opponent said was so materially incorrect; and you can easily correct it. Or perhaps you wanted to jump out of your seat because your opponent pointed out a weakness in your argument that seemed to catch the panel's attention, and you've got a solution that you know will ease the panel's mind. All of these scenarios are ripe areas for rebuttal.

Of course, to follow this advice, you must really listen during your opponent's oral argument. Eschew preplanned or prewritten rebuttals. Instead, listen to the judges' questions and your opponent's arguments and plan to rebut on the issues that seemed most important to the judges during your opponent's argument. That means decisions about rebuttal must be made on the spot. You may also "jot down a word or phrase from your opponent's presentation to make your point more effective, e.g., "Your honors, counsel for Respondent stated that Ms. Miller's attempts to establish a relationship with her father were 'too little too late.' This time limit on family relationships is precisely what is wrong with Section 1409(a)."<sup>21</sup>

Judge Easterbrook also warns of a few more rebuttal "Don'ts." He warns specifically against attempting to sandbag the other side by raising a new argument in rebuttal. He warns that when he was a judge, and this occurred, he would say, "Counsel, this is time to be used in rebuttal. What, particularly, are you rebutting?"<sup>22</sup> Judge Easterbrook also reports seeing some lawyers who represent the Petitioner/Appellant attempt to waive their argument, and then when the Respondent/Appellee gives their argument, try to give the main argument as a rebuttal. The strategy apparently is to have the last word on all issues. He also tells of an attorney beginning the argument by stating, "I reserve all of my time for rebuttal."<sup>23</sup> In such scenarios, Judge Easterbrook reports that his response would be "In that event, there won't be any time for rebuttal. That's not the way the court is set up, and with good reason."<sup>24</sup> In summary, either waive your rebuttal time or use it to actually rebut.

### **Tips Tested**

I took this collected advice and tested it in several recent oral arguments before the Vermont Supreme Court. (Recall, however, that the Vermont Supreme Court does not allow advocates to reserve rebuttal time ahead of time.) The Vermont Supreme Court heard the case *State v. Melissa Rotibille* (No. 17403) on December 5, 2018. The Appellant's attorney followed tip # 1 and waived her rebuttal (although she

only had 15 seconds left due to the judges' many questions during her affirmative argument).<sup>25</sup> Indeed, in her oral argument, you can hear her following Judge Easterbrook's advice addressing the Appellee's likely arguments.

In the case *Lawson v. Halpern-Reiss, et al.* (No.18-157), argued on December 5, the Appellant's attorney left six minutes for rebuttal, but stated he would use only "45 seconds of it."<sup>26</sup> Close to his word, the Appellant's attorney used only about a minute of his rebuttal, and focused only on one issue that was central to the Appellee's argument and seemingly of interest to the judges. The Appellant did not escape a few follow up questions from the judges, however, which is always a risk when taking rebuttal.

On December 4, 2018, the Vermont Supreme Court heard the case *State v. Parkway Cleaners, et al.* The Appellant had 1 minute and 45 seconds left for rebuttal.<sup>27</sup> While the Appellant's attorney did not give a substantive roadmap, he did say he had only a few points to make. He made two points directly addressing the Appellee's argument – focusing on arguments Appellee made that he did not believe were relevant. This advocate did not escape a question from Justice Robinson, however, and used the entire time.

Despite my small sample size, I drew several conclusions about rebuttals in the Vermont Supreme Court. The Appellants must wrap up their affirmative arguments to save time for rebuttal, many advocates were not successful in saving time for rebuttal. In most cases, those that were often had less than a minute left, but some were able to use that time effectively to address one key point. Be warned, however, most advocates before the Vermont Supreme Court were not able to deliver a rebuttal without interruption with follow up questions! That is a risk to take when trying to end on a strong note. As I mentioned, the best-laid plans often go awry.

### **Conclusion**

I hope this advice is useful in helping you make stand out rebuttals in 2019 and beyond. From all of us at Vermont Law School, best wishes for a Happy New Year.

*Beth McCormack* is the Vice Dean for Students and a Professor of Law at Vermont Law School, where she teaches Legal Writing and Appellate Advocacy. Prior to joining the faculty at VLS, she practiced in the litigation department of the Boston law firm Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

<sup>1</sup> See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart J., concurring) ("I shall not

today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of pornography], and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”<sup>9</sup>

<sup>2</sup> Mary-Beth Beazley, *A Practical Guide to Appellate Advocacy*, 271 (3d. ed. 2010).

<sup>3</sup> See supra note 2 at 271-272.

<sup>4</sup> *Id.* at 271.

<sup>5</sup> Judge Frank H. Easterbrook, *Interviews with United States Court of Appeals Judges*, 15 Scribes J. Legal Writing 8 (2013).

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

<sup>7</sup> *Id.* at 9-10.

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

<sup>9</sup> *Id.*

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

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., James D. Dimitri, *Stepping up to the Podium with Confidence: A Primer for Law Students on Preparing and Delivering an Appellate Oral Argument*, 38 Stetson L. Rev. 76, 101 (2008) (recommending no more than two of three minutes be reserved for rebuttal ).

<sup>13</sup> *Supra* note 5 at 25.

<sup>14</sup> *Id.*

<sup>15</sup> Bryan A. Garner, *Legal Writing in Plain English*, 60 (2d. ed. 2001).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 61.

<sup>18</sup> See *id.* at 101.

<sup>19</sup> Supreme Court Rule 28.5, cited in Mary-Beth Beazley, *A Practical Guide to Appellate Advocacy*, 270 (3d ed. 210).

<sup>20</sup> *Supra* note 2.

<sup>21</sup> *Id.*

<sup>22</sup> *Supra* note 5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 11.

<sup>25</sup> <https://www.vermontjudiciary.org/supreme-court/audio-recordings-oral-arguments> (last visited December 14, 2018) (*State v. Melissa Robitille*).

<sup>26</sup> *Id.* (*Lawson v. Halpern-Reiss, et al.*).

<sup>27</sup> *Id.* (*State v. Parkway Cleaners*).



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

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

@ The Hotel Omni Mont-Royal, Montréal, CA

Ethics Bowl, Mediation, Going Public, Getting Paid, Estate Litigation and Appeals.

Keynote Speaker Madeline Kunin, cocktail receptions, yoga and more in the festive city of Montréal.

Get your passports ready and enjoy the thaw!

### AND SAVE THESE DATES:

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

@ Lake Morey Resort, Fairlee

Implicit Bias, Sexual Violence, Intellectual Property,

Contract boilerplate, Vt Basics 101 track, State Constitutions, Food and Beverage Law and more!

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### April 25, 2019: Basic Skills in Vermont Practice and Procedure

@ Trader Duke's Hotel, South Burlington

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### May 23-24, 2019: Solo and Small Firm Conference

@ Basin Harbor Club, Vergennes

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**And don't forget our winter webinar series!** Law Office Technology was held 12/12@12 and it was a success! Our next webinar will be in mid-January on Law Office Marketing: Networking, social media, website and more. February's webinar will be on Law Office Financial Management: Time & billing, Accounting, Electronic payments, trust accounting and more. We will also have a second February webinar on client intake technologies. March will be all about setting business goals, so stay tuned to our website, monthly e-newsletters and social media!

## Women in the Judiciary Event

With the stage set by the December 12, 2018 cover story in Seven Days<sup>1</sup>, the VBA Women's Division hosted its panel discussion on the evening of December 12<sup>th</sup> featuring Judge Christina Reiss, Justices Marilyn Skoglund and Beth Robinson and Judge Helen Toor. With the theme being the importance of having women in positions of authority, the Women's Division capped off 2018, the Year of the Woman, with this enlightening and engaging event. Like the Seven Days article, much of the focus was delving into the paths that each of these successful women took to end up where they are today. Approximately 100 attendees enjoyed the panel presentation by the judges and justices, moderated by Assistant Attorney General Alison Stone, with time for some Q&A at the tail end of the program.

Perhaps not surprisingly, none of the judges had life plans that involved becoming a judge. Judge Reiss, when asked how she went from being a French major to becoming the first female Article III Judge in Vermont, noted that she got through every challenge by just saying, "why not me?" Justice Skoglund, who majored in sculpture, credits her success to just working hard. When the opportunity to become a judge came to her, she initially declined, saying that she just couldn't do that to her kids, but when she approached her kids with the news, they all encouraged her to do so, saying, yes you can! She noted that having Denise Johnson on the Court already was inspiring, especially seeing working female lawyers and judges with kids. She noted that one of her biggest inspirations was Janis Joplin, just because she was courageous and didn't care what other people thought.

Judge Toor worked at a Ben & Jerry's scoop shop between college and law school. Environmental law inspired her, as well as her desire to leave New York and come back to Vermont. Surrounded by male judges in federal court in New York, it was when a 44-year old woman was appointed to the federal bench that she suddenly was able to picture herself in that role. When Justice Robinson was appointed to the Vermont Supreme Court, without prior judicial experience, she recalls a friend reminding her that she had plenty of experience being on the bench in Indiana, for high school basketball! She always thought she wanted to be a teacher, but it was during her senior year in college that she decided to go to law school. Justice Robinson loved the intellectual challenge and loved the work she ultimately did at Langrock, Sperry & Wool.



On the path to judgeship, Justice Robinson counsels folks to realize that there is a huge element of a "crap shoot." Because your planned path may not happen, she advises that you take steps for their own sake--to pursue what you are most passionate about and do it well. Justice Robinson's involvement in the Baker (civil union) case was never considered a step or path to judgeship, just something she was passionate about and was compelled to do well.

All of the judges remarked some about the joys and challenges of being a judge. Judge Toor noted how shocked she has been by the scope of poverty and drug abuse in the state. But she said she also enjoys learning about so many fascinating facets of life, like really learning about milking machines or bridge supports from people who live and love those things. Most of the judges remarked that being a judge is fairly isolating, at times, but noted that their families and non-lawyer friends keep them from being too lonely. While they all have judicial colleagues to bounce ideas off of, most remarked that they were surprised how little that happens compared to the time spent researching and drafting alone.

When asked what advice they would give to younger attorneys, Judge Toor realized how much being a judge necessitates that you stop worrying what other people think of you. Her advice would be to start now and not worry about what others think. Judge Reiss wants young female lawyers to realize their high value to their firms, in marketing, in quality work, in diversity, and

to be confident enough to not stress over having to leave early to pick up kids or request an alternate schedule. She also reminded the attendees that court advocacy is communicating, finding the best advocates to be conversational and comfortable rather than confrontational. Justice Skoglund counseled to always work hard and be prepared for cases. Justice Robinson and Judge Toor, garnering nods from all the judges, stressed that being courteous to your opponent, both in court and in writing, is one of the most important factors in good advocacy.

When questions arose about sexism in the judiciary or in the legal profession, generally, most of the judges noted that they have not experienced much on the bench. When reacting to a quoted study that showed that women judges are interrupted more and have their names mixed up more than their male counterparts, Justice Skoglund did laugh, noting that she is called Justice Johnson all the time! Judge Toor noted that she's had pro se litigants inappropriately say she was beautiful during hearings, but that the attorneys have all treated her with respect on the bench.

Regarding sexism, the judges were optimistic that most of the egregious behavior they've experienced is in the past, perhaps by virtue of being on the bench or perhaps because times have changed. Not wanting to dredge up too many old memories, Justice Skoglund just gave one example of when a male attorney, rather than complimenting her on her excellent advocacy at a hearing, asked her why she wasn't wearing heels (she was 8 months pregnant!). Judge

Toor recalled being asked to get coffee many times. And Justice Robinson recounted a story where she was second chair on a big case, with multiple depositions, and when showing up for another deposition, on time, with her large bag, she sat waiting for quite a while before the other lawyer remarked that he guessed the other lawyer wasn't going to show up. He assumed she was the court reporter. Justice Robinson did note that she owes much of being in her position at the Court, being granted equal respect, and even being allowed to wear pants, to the trailblazers who came before her.

The audience did ask about implicit bias training, and the judges remarked about how they've taken some of the tests and received some training. Just having the conversation raises awareness, as does having diversity around you, as Justice Robinson noted. Overall, the presentation was extremely optimistic and inspiring. While we often speak of the aging bar in Vermont, and nationally, the room was full of youth and energy, as so many young attorneys soaked in the real and down-to-earth perspectives of these truly inspirational women in powerful positions.

Before closing and heading into the cocktail reception, VBA President-Elect, Beth Novotny, made a pitch for the next installment of our implicit bias CLE series, to be a plenary session at our Mid-Year meeting at Lake Morey Resort in March. The general implicit bias overview at our Annual Meeting received our highest remarks and compliments. Not only do we intend to continue the implicit bias training at our meetings, the Women's Division was inspired by this event to host more panel discussions in the future. Also, in the Spring, please watch your inboxes for an important gender survey from the VBA, similar to what is being done in other states. And, as always, we welcome article submissions for the VBA Journal. We want to keep the conversation (and the comradery) going!

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

<sup>1</sup> Seven Days, *Lady Justices: Four Vermont Judges Talk Law, Fairness and Being Female*, by Mark Davis, Chelsea Edgar and Ken Picard, December 12, 2018. <https://www.sevendaysvt.com/vermont/lady-justices-four-vermont-judges-talk-law-fairness-and-being-female/Content?oid=24114749>



## Vermont Bar Foundation Grantee Spotlight: Association of Africans Living in Vermont, Inc.

This is another in a series of articles highlighting organizations that receive grants from the Vermont Bar Foundation. In this series we shine the spotlight on grant recipients that make a difference in our state, that further the goal of the VBF to make the ideal of equal access to justice a reality. As readers may know, the interest from our IOLTA accounts is channeled through the VBF in the form of grant awards to organizations and groups that assist Vermonters who otherwise would lack the means to participate meaningfully in our legal system. In this issue we illuminate the work of a unique organization whose mission is particularly timely.

Imagine you are newly arrived in a strange land with a language, customs and climate that are all alien to you. Imagine further that you came to this place to escape hunger, violence and oppression, with little more than the clothes on your back. To whom would you turn for help in navigating this new life? How would you even begin to overcome the many cultural, economic and legal barriers that await you? Thankfully, there are resources available here in our state, both governmental and non-governmental. Foremost among the latter is an organization whose impact has been felt widely within our immigrant community, the Association of Africans Living in Vermont, Inc. ("AALV").

The AALV occupies the third floor of a former Catholic school at 20 Allen Street in Burlington, Vermont. Originally, AALV was organized to assist ethnic Bantus that had fled war-torn Somalia. Burlington had been selected as one of several resettlement destinations after the Bantu refugees had been classified as a priority by the U.S. Department of State. Many had fled to the neighboring country of Kenya, but conditions there were little better than what they had left. Given the wide cultural and economic gulf between their homeland and their new homes here in America, these people needed help, and organizations like AALV were created to fill that need.

Now, the name of the organization can be misleading, because their mission has since expanded to provide similar assistance to refugees beyond Africa and from all around the globe. Most recently, they have seen a dramatic increase in the number of Bhutanese immigrants from Nepal. In fact, Bhutanese have now surpassed Vietnamese as one of the largest resettle-



ment populations in Vermont. Besides the entire continent of Africa, the countries of origin of AALV clients now span Asia, Eastern Europe, South and Central America and the Middle East.

The Executive Director of AALV is Yacouba Jacob Bogre, himself an immigrant, whose passion for this work is immediately evident. In a former classroom that now serves as a conference area, he explained the myriad of services that the organization provides. Many, but not all, of their clients are refugees, whose needs are most acute. Mr. Bogre's primary goal is to help these new Americans achieve independence by providing services such as case management to integrate the many resources that are available to them; workforce development to replace skills that may not be transferrable to the U.S. labor market; behavioral health services to help cope with their new surroundings; and interpreter services. His staff is, by necessity, both multicultural and multilingual.

There are other financial resources available to AALV, such as a grant from Homeland Security to provide assistance with citizenship status and instruction. Another is a grant from the Department of Labor to provide employment training. That program has been particularly successful, and has enjoyed a 100% job placement rate.

The Department of Justice provides funding to assist women who have been victims of sexual abuse in their home countries as well as here in the U.S. A grant from the Vermont Department of Children and Families is targeted towards keeping young men out of the criminal justice system by providing training and mentoring programs. The overall objective of the organization is to help people become fully functioning members of society. This requires a multi-disciplinary approach that encompasses a range of programs to provide support and counselling to help them achieve that goal.

While the need for the full panoply of AALV services is painfully obvious in the current political climate, our attention at the VBF is focused on legal services. During the 2017-18 grant year, AALV provided legal assistance to 758 individuals from 59 countries. Michele Jenness is the Legal Services Coordinator for AALV. Her caseload is entirely humanitarian; meaning she concentrates on services for those seeking asylum, immigrants who are in the criminal justice system, women dealing with domestic violence, family reunification for refugees and other similar issues. They are not involved with business or student visas. Ms. Jenness is fully accredited by the U.S. Department of Justice to represent clients be-

fore the Immigration Court and the Board of Immigration Appeals. She is assisted in her work by Rita Neopaney, who is partially accredited, and is able to represent clients in their cases before United States Citizenship and Immigration Services.

Most of Ms. Jenness's clients come from Chittenden County, which, as one might expect, is the most racially and ethnically diverse area in Vermont. On occasion, she works with people from other counties such as Bennington, Washington and Windsor. She often works closely with the South Royalton Legal Clinic, and they refer cases to each other. One crucial aspect of her work is helping those seeking asylum. As was stated in the AALV's most recent grant report: "under the Trump administration, all forms of immigration are being deliberately restricted or eliminated and subjected to unprecedented scrutiny and intentional bias. In a time when immigrant rights are constantly besieged, it is critical to provide knowledgeable and supportive legal services." Once one is granted asylum, the need shifts to working on bringing his or her family into the country. Along this line, the report disclosed that "[l]egal representation was provided to 104 individuals. These were cases of family reunification which are complicated and lengthy, and adjustment and naturalization cases where there were criminal issues." Aside from the South Royalton Legal Clinic, there are no other pro-bono legal services available to provide such assistance. This is a need to which our Bar could easily respond. Ms. Jenness advises that training can be provided in this area if attorneys are interested.

Criminal convictions can have severe immigration consequences, and may lead to deportation, exclusion from admission to the U.S. or denial of naturalization. AALV

consults with immigrants and their attorneys to mitigate those consequences. That work can include accompanying clients to their hearings and attorney conferences and work on post-conviction relief with the Prisoners' Rights' Office. Ms. Jenness points out that such collaborative efforts are critical because what might have been a 'safe' plea, for purposes of immigration may now put the individual in jeopardy.

Advocacy work is another one of Ms. Jenness's responsibilities. AALV has formed a coalition with Vermont Legal Aid, federal public defenders, the ACLU and the South Royalton Legal Clinic to address issues such as public benefit eligibility, education through public forums and guardianships for the children of undocumented residents. AALV also focuses on mental health issues, which can lead to interactions with the criminal justice system. The organization works with the Psychiatry Department of the UVM Medical Center and Howard Mental Health Services to assist people dealing with the kinds of trauma that refugees frequently encounter.

An example of the work undertaken by the AALV is a client to whom we shall refer as "NA" (*the following is an excerpt from an AALV grant report*).

NA originally entered the U.S. as a Somali refugee in August of 2013. He filed an I-730 Refugee/Asylee Relative application on behalf of his wife and daughter which was approved in April, 2015. Then the mother and child awaited consular processing in Kenya. Suffering from their absence, NA returned to Dadaab Refugee Camp to visit his family. While there, a son was conceived and then born in May of 2017. Because NA was not yet a U.S. citizen, which would have conferred the same status to his child, he had to petition for his baby.

Soon after NA returned to the U.S., AALV staff filed an I-130 Petition for Alien Relative for his son. However, the waiting period for a minor child of a permanent resident is at least two years and was too long for the family to endure. Meanwhile, NA's wife and child had finally been approved to come to the U.S. and there were no other relatives to care for the youngest child if left behind.

AALV staff then filed for advanced parole for the child based on urgent humanitarian reasons and requested that it be done in an expedited manner. Working with Senator Leahy's office, NA's son was granted parole into the U.S. one month later, lightning speed for USCIS. This meant that NA's family arrived together in Vermont. The child's parole is for a period of two years in which time the visa will become current and the child can apply for permanent residence in his own right.

You can discover more about the AALV by visiting their website at: <https://www.aalv-vt.org>. We invite you to also visit the VBF website at: <https://vtbarfoundation.org>, where you can learn about other grant recipients. While you are there, please consider a making a donation. The VBF is YOU, and we need your support.

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*Jesse D. Bugbee, Esq. is a shareholder with the firm of Kissane Associates in St. Albans, and is a past president of the Vermont Bar Foundation.*



# VBA CONNECT

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

## Share Collective Wisdom Today!

# 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.

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

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  - *New England Federal Credit Union*
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### 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*

# Jill Rudge 2018-2020 Poverty Law Fellow

Selected from a pool of over 60 young lawyers, we are proud to welcome Jill Rudge as our 2018 Poverty Law Fellow. Vermont Legal Aid will host Jill's two-year fellowship, with a focus on housing-related problems experienced by low income clients with mental health issues, ranging from eviction and access to subsidized housing, to the lack of supportive services that allow people to remain successfully housed.

Jill has just completed an Immigrant Justice Corps Fellowship at Sanctuary for Families in New York, where she represented survivors of domestic and gender violence facing serious immigration-related legal problems.

Jill is a 2016 cum laude graduate of Brooklyn Law School, where she worked with a wide range of public interest organizations including the Resilience Advocacy Project, Children's Rights, The Legal Aid Society, Atlas: Developing Immigrant Youth, Brooklyn Defender Services, the Immigrant Defense Project, and the Safe Harbor Project Clinic. She received the Sparer, BLSPI, and Squire Patton Boggs Fellowships in recognition of her commitment to public interest lawyering. She was also the Notes and Comments Editor of the Brooklyn Journal of International Law.



Prior to law school, Jill lived and worked in Costa Rica, Australia, the Philippines, and Timor-Leste. She has focused on indigenous policy reform, sustainable economic development, and election-monitoring efforts with both government and non-government organizations. She received her

B.A. summa cum laude in Anthropology from George Washington University. Jill's family is Cuban-American from South Florida and Brooklyn, and she speaks Spanish.



We hope you will add the Access to Justice Campaign to your charitable giving.

The Campaign provides a singular opportunity to do the right thing by supporting a system of justice that is available to all.

To make your donation online please visit: <https://vtbarfoundation.org> or mail a check to:  
Vermont Bar Foundation, PO Box 1170, Montpelier VT 05601-1170.

## WANTED: LEGAL FICTION

Fancy yourself a fiction writer? The next Grisham? The *Vermont Bar Journal* is not just for scholarly legal dissertations! Call it a fiction contest or an active solicitation for your works of fiction, either way, if we love it, we may print it!

Submit your brief works of legal fiction (6,000 words or less) to [jeb@vtbar.org](mailto:jeb@vtbar.org).  
**Our next deadline is March 1, 2019.**

# Vermont Lawyers Assistance Program

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

COUNSELING, PEER SUPPORT, AND PROFESSIONAL ASSISTANCE

## CALL FOR HELP

Help Line:

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(the Boston LAP  
can help refer you  
to a Vermont LAP  
Volunteer)

ALL  
COMMUNICATIONS  
ARE CONFIDENTIAL  
UNDER RULE 8.3(C)

Vermont LAP:  
1-800-355-4352  
[www.lapvt.com](http://www.lapvt.com)

# Casemaker4: New and Improved, Yet Reassuringly Familiar

(Editor's Note: At the time this article was written, Casemaker4 was still in beta testing. As a result, it is possible that features described or shown may have been modified slightly in the final version of the new platform's release.)

In January, Vermont Bar Association members will be introduced to Casemaker4, the next generation legal research platform from Casemaker.

In creating Casemaker4, to which VBA members will have free access, the Casemaker development team was presented with two overarching imperatives:

- On the one hand, improve search speed, modernize the interface to enable more intuitive site navigation, and upgrade design responsiveness to better accommodate mobile devices;
- On the other hand, retain features and design elements that loyal Casemaker users value and trust, and minimize changes with the potential to disorient.

Put another way: *Make it new. Make it better. But avoid change for change's sake.*

"The history of platform re-designs across various industries is littered with examples of solutions in search of problems," said Dan McCade, Casemaker's Chief Information Officer. "We were very conscious throughout the development process of only adding features that would matter to our users, and of not throwing out the baby with the bath water, so to speak."

Guided by several years of user feedback and incorporating refinements suggested through an extensive beta testing process, the team managed to achieve the desired balance, producing a new and improved platform that remains, nonetheless, reassuringly familiar.

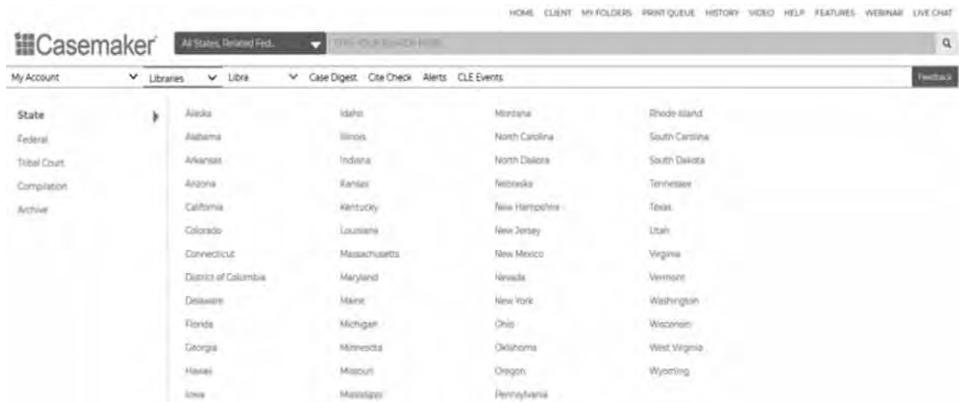
Casemaker4 features a clean and uncluttered layout, with all of the features VBA members previously enjoyed, along with faster search speeds, better search filter tools, and new functionality such as type ahead searching. It is both W3C and ADA compliant and includes a much more responsive design for enhanced display on smaller devices.

Not every change to the new platform is visible to users. As McCade explained, Casemaker invested in significant "back end" enhancements.

"We have upgraded our load balanc-

ing and database clustering technologies," McCade said. "And then, along with hardware improvements, we've invested in our server operating system, and database and search engine software. The result is faster response time and greater platform stability."

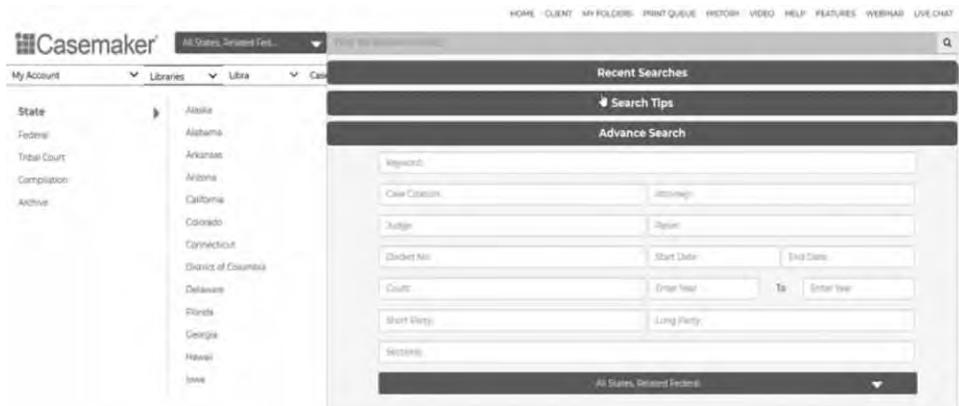
In designing the new platform's user interface, much thought was put into making the user experience not only more intuitive, but also more efficient. To that end, notable enhancements include:



- Moving the main navigation to the header area so there is no longer a need to return to the home page.
- Enabling a search of anything from anywhere by including the jurisdiction selection menu on every page. In concert, the system automatically updates the search jurisdiction as the site

is navigated, so that searching on just the content you are browsing remains the default.

- Adding time-saving options to the Search Input box, including "Recent Searches," "Search Tips," "Advanced Search," and predictive "Type Ahead" functionality. (see below)



- Adding Casemaker Digest (daily summaries of leading cases), Casemaker Libra (eBooks), CiteCheck and CLE Events to the main navigation for easier access, as well as the inclusion of links to Libra citing references where applicable.
- A new Alerts feature that allows us-

ers to be notified of any new developments pertinent to a predefined topic based on a saved search or list of primary sources.

- Incorporating intelligent algorithms to suggest related primary and secondary materials not previously displayed.
- And much more!

What's not changing? The expert care and handling of legal content by editorial staff that has long distinguished Casemaker among low cost legal research providers, who tend to rely more heavily on algorithmic approaches to capturing and organizing legal content, with comparatively little to no human intervention.

In a study circulated at last summer's Annual Meeting of the American Association of Law Libraries, entitled "Database Evaluation: Drawing the Silken Thread," three highly respected Connecticut law librarians set out to objectively evaluate seven legal research services by researching six topics.<sup>1</sup> They performed identical searches on each service, and then assessed each result set against five pre-determined criteria.

The study showed that Casemaker consistently returned more relevant results than other low-cost services, that its content was more current, and that its citator, CaseCheck+®, was more precise and less cumbersome to use than other providers' citation checking tools. In fact, Casemaker performed on par with (and in some cases even surpassed) the leading high-cost services across multiple points of comparison.

As Casemaker Chief Operating Officer Sarah Gorman said at the time, "These results are truly gratifying. Our editors take great pride in their work and here we can see that the human touch really does make a difference."

Soon, as a VBA member, you can have the best of both worlds: a much-improved platform with state-of-the-art functionality, and content you can continue to rely on with confidence.

*Norman Woolworth joined Casemaker as Director of Marketing in the Spring of 2018. He is a seasoned veteran of the online legal research industry, having served in a variety of marketing leadership and general management roles during a nearly 20-year career at LexisNexis, most recently as the head of the company's Federal Government market segment.*

<sup>1</sup> The full study may be found at <http://casemakerlegal.com/pdf/public/database-comparison.pdf>.



by Mark Bassingthwaigte, Esq.

## Yes, Sometimes a Referral Can Come Back to Haunt You

Lawyers make referrals. It's something that comes with the territory. For some, making a referral is almost a daily occurrence. They are often made after work is declined. Staff may make them in response to a cold call or give one to a client who needs a service that the firm doesn't provide. Referrals are sometimes made during dinner conversations, at social events, or after a presentation given to the general public. Names may be passed along to family members, friends, a colleague, and to good clients. After all, we do want to make sure our good clients are well taken care of! Too often however, referrals seem to be made without any thought of the potential malpractice exposure. Is such casualness justifiable? Unfortunately, the answer is sometimes no.

Nationwide, malpractice coverage statistics vary geographically and over time due to any number of reasons. Some lawyers do not feel that malpractice coverage is necessary. They prefer to protect their assets in other ways. Others simply can't afford the coverage, particularly during economic hard times. I have even had a few lawyers tell me that they believe having malpractice coverage simply invites claims. As they see it, if they have no insurance no one will bother suing them. Regardless, this is a roundabout way of sharing that contrary to popular belief not all lawyers are insured for malpractice. In fact, in a few states the percentage of uncovered lawyers has been estimated to be as high as 50%. This reality begs the question of what would happen if a lawyer made a referral to another lawyer who was uninsured and that lawyer eventually made a mistake? Might the referring lawyer be exposed? You bet. There are ways that liability can be found. It's a hunt for a deep pocket and it will be framed as negligent referral. The good news is that avoiding this type of claim is relatively easy.

The most dangerous type of referral is one that results in a referral fee and it doesn't matter if the fee was expected or simply offered as a gift. Acceptance of the fee can and will bring to the referring attorney liability for the other attorney's work. If a fee is offered, the best advice is to decline it or suggest that the referral fee be refunded to the client because referral fees are too easily viewed by the client as payment for legal advice to have them work with the other attorney.

If your practice is to accept referral fees, proceed fully aware of the risk involved and

be up front with the client about the arrangement. Remember, when you share fees you share liability. Rule 1.5 of the Model Rules of Professional Conduct states that a division of a fee can only occur if the division is in proportion to the services performed and the client agrees in writing. In addition, the fee must be reasonable and each lawyer will assume joint responsibility for the representation. This rule clearly requires that a referring attorney who will be accepting a referral fee inform the client of the presence of the referral fee and obtain written consent to the fee division. Given all this, it would seem to be prudent to stay in contact with the other attorney in order to monitor critical dates and see that work is completed on time because there is no free lunch here.

Two side notes are in order. First, prior to ever making a referral where a referral fee is expected, consider making certain that the attorney you are referring to has malpractice insurance in place and that the limits are adequate for the size of the matter being referred. Do not accept verbal verification of coverage. There are attorneys who will say they are insured in order to obtain the business. Ask the other attorney for a copy of the declaration page to the malpractice policy prior to ever making this kind of referral. Second, occasionally an attorney who has recently been disbarred will seek to refer clients and request a referral fee. If the referral happened to be made while this attorney was in good standing with the bar, payment of the referral fee would be acceptable. If this attorney is seeking to make the referral and asking for a fee after being disbarred, the payment of a referral fee would be prohibited under Model Rule 5.4(a) which prohibits the sharing of fees with a non-attorney.

That said, acceptance of a referral fee is not the only method of creating a liability from a referral. Referrals to specific lawyers or a referral made with a promise such as "Attorney X is the finest personal injury plaintiff attorney in the area and always gets great results" can also create liability. To avoid exposure for a negligent referral claim, the rules are simple. When referring anyone to another lawyer always provide a minimum of three names and make no promises. Of course, suggesting the individual contact your state bar referral service would be another very safe practice.

Sometimes, however, we do wish to make a specific referral if for no other reason than

to see that a good client is properly taken care of. If negligent referral claims are a concern for you, consider documenting adequate malpractice coverage by asking the other lawyer for a copy of the declarations page to her malpractice policy prior to making a specific referral. Why? It's because one shouldn't run with assumptions. Negligent referral claims are about coverage, not competency. Competent lawyers can and sometimes do make a mistake or miss a deadline and again, not all lawyers are insured.

One other type of attorney referral that can potentially create a serious problem is the referral made to an officemate in an office-sharing situation. By their very nature office sharing arrangements create added vicarious liability for every lawyer in the space. A simple referral to an officemate just increases the difficulty of avoiding this liability should a claim ever arise. In this situation it is particularly important to give a minimum of three names. It is fine to include an officemate in this list. Just be certain to disclose that one of the names provided is an attorney in the suite, make no promises about the suitemate, and be certain that the client understands that this attorney is completely independent. It would also be advisable to document how this referral was made in some fashion. Finally, never make a referral to an officemate who is uninsured or underinsured. This risk simply isn't worth it.

Now here is the interesting twist to the issue of negligent referral. Many referrals are made for non-clients. A lawyer's duties to non-clients are minimal and thus negligent referral claims arising out of such referrals are few and far between. The real concern is when an attorney refers a client to another attorney or, perhaps more frequently, to another professional. Making matters worse, words of assurance are also often shared with the client in this situation perhaps as a way to make sure the client follows through. To underscore this concern, consider an estate planner who regularly refers clients to the same CPA and is surprised to learn, after the CPA has made an error, the CPA has no errors and omissions coverage. The client, now harmed, may very well look to the estate planning lawyer for a recovery based upon her legal advice to work with that particular CPA. Here, following the above advice becomes even more important. The same rules should apply whenever making a referral to an existing client. Always provide a minimum of three names, make no promises, and verify that an errors and omissions policy is in place if a specific referral is preferred.

Remember that these rules not only apply to referrals made after work is declined. They also apply to referrals made at a dinner party, in an e-mail to a friend, in response to an e-mail from someone contacting you as a result of a visit to your firm's website, in a ca-

sual conversation following a public presentation, on a chat site, or in response to an inquiry over the phone.

The next issue concerns staff. Occasionally a firm will have a sound referral policy in place that all attorneys understand and follow yet a staff member may be completely unaware of the reason the policy is in place and thus not follow the rules in every instance. There is no ill will here, just an honest desire to try and see that clients get the best help possible. Their motivation is to provide good service. This staff person will make a specific referral to an attorney or other professional whom they know and think highly of blissfully unaware of the associated risks. For clients who are upset, staff may even try to reassure them by making certain "harmless" promises about the receiving attorney. "Attorney X is a very good attorney and well respected by our firm." If attorney X misses a statute date and is uninsured or underinsured, the client may not agree with the statement that attorney X is a good lawyer and they may want to hold the firm liable for their loss.

Make certain that all staff understand your firm's policy and procedure for referrals and also the reasons why such a policy is in place. Develop a referral list with three names for the various types of matters the firm will refer out and make it available to everyone in the office. If this list doesn't cover a referral request, have the staff pass the matter on to one of the attorneys, politely decline by stating the firm does not make referrals, or have staff refer to the state or local bar referral line.

Last but not least, an often overlooked source of potential liability for negligent referral claims may come from links on your firm's website. If there are links to other sites, an appropriate external links disclaimer should be prominently displayed near these links. The disclaimer should simply state that the firm has provided these links for the convenience of users of the site and that these links do not constitute an endorsement of the linked websites, or of the information, products, or services contained therein.

In reality, negligent referral claims are not a significant problem for malpractice carriers. Yet when they arise, and they do, these

claims can be costly. Given that the actions that can be taken to avoid this type of claim are highly effective and quite minimal, there really is no reason not to take the prudent course of action and follow the advice shared here.

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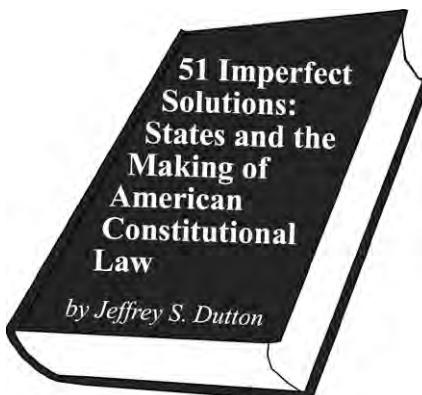
*ALPS Risk Manager Mark Bassingthwaighe, Esq. has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Check out Mark's recent seminars to assist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

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# BOOK REVIEW



## 51 Imperfect Solutions: States and the Making of American Constitutional Law

By Jeffrey S. Sutton  
(Oxford Univ. Press 2018)

Reviewed by Benjamin D. Battles, Esq.

Jeffrey Sutton's book *51 Imperfect Solutions* is an excellent case study of an underappreciated part of American federalism—state constitutions. Sutton is a judge on the U.S. Court of Appeals for the Sixth Circuit and a former state solicitor of Ohio. In just over 200 pages, he draws on these experiences and his own research to persuasively demonstrate the critical role of state constitutions in defining and protecting individual rights.

Sutton's main thesis is that lawyers overlook state constitutional claims at their own peril. As he puts it, a lawyer preparing a constitutional claim or defense against a state or local government is like a basketball player at the free throw line in a tie game when the clock has run out. Like the player, the lawyer has two shots to win—one under the federal constitution and one under the state constitution. Why not take the second shot? In Sutton's view, failing to do so borders on malpractice. The client wants to win and won't care which sovereign's law provides the victory. And what's more (putting aside the basketball analogy), a state court interpreting its own constitution may be able to provide the client more complete and durable relief than would be available under the federal constitution.

Sutton makes his case by examining four legal topics: school funding, search and seizure, eugenics, and freedom of expression. He draws different lessons from each.

With respect to school funding, Sutton explains how state constitutions were used to create a right to equal funding that had been rejected as a matter of federal law. In *San Antonio Independent School District*

v. *Rodriguez*, the U.S. Supreme Court rejected a federal Equal Protection Clause challenge to Texas's system for financing public education, which resulted in dramatic disparities between rich and poor districts.<sup>1</sup> Following the defeat in *Rodriguez*, however, advocates in Texas and elsewhere began challenging school funding systems based on state constitutional guarantees. These provisions—unlike the federal constitution—specifically addressed education. In many instances, including in Vermont, these lawsuits were successful.<sup>2</sup>

In the search and seizure context, the story is more complicated. Sutton describes how state constitutional decisions anticipated *Mapp v. Ohio*, which required state criminal courts to exclude evidence obtained in violation of the Fourth Amendment to the U.S. Constitution.<sup>3</sup> But imposing a one-size-fits-all solution on all 50 states under the federal constitution prompted a significant backlash, which arguably led the U.S. Supreme Court to later create exceptions to the exclusionary rule.<sup>4</sup> Although many states declined to adopt these exceptions as a matter of state constitutional law,<sup>5</sup> the federal exclusionary rule was nonetheless weakened. With the benefit of this history, Sutton asks whether criminal defendants would have greater protections today if *Mapp* had not been decided and the law had continued to develop incrementally.

Sutton's chapter on eugenics demonstrates the danger of state courts blindly following federal precedents to interpret their own constitutions. In the early 20th century, many states passed laws allowing for the compelled sterilization of individuals perceived to have undesirable hereditary traits such as "feeble-mindedness." In well-reasoned opinions, several state courts blocked the enforcement of these laws on due process, equal protection, and cruel and unusual punishment grounds. In Vermont, Governor Fletcher Allen vetoed a compulsory sterilization law based on the state attorney general's opinion that the law violated the state constitution.<sup>6</sup> In 1927, however, the U.S. Supreme Court upheld a Virginia law against a federal constitutional challenge and blithely declared—per Justice Oliver Wendell Holmes—that "three generations of imbeciles are enough."<sup>7</sup> Holmes's decision in *Buck v. Bell* breathed new life into the eugenics movement. More states passed sterilization laws. Vermont's law was finally enacted in 1931.<sup>8</sup> And state courts followed *Buck's* reasoning even when interpreting their own constitutions. In the end, it wasn't until public opinion turned against

the eugenics movement after World War II and the horrors of the Holocaust that compelled sterilization statutes fell into disuse and were eventually repealed or abrogated by new anti-discrimination laws.

And finally, in the area of freedom of speech and religion, Sutton explains how state constitutional decisions can directly lead to reconsideration of a federal constitutional question. In *Minersville School District v. Gobitis*, the U.S. Supreme Court rejected the First Amendment challenge of two Jehovah's Witness children to being required, at the penalty of expulsion, to salute the flag during the daily pledge of allegiance at their public school.<sup>9</sup> Following *Gobitis*, and in the wake of a national wave of violence against Witnesses prompted by the decision, numerous state courts sustained challenges to compelled salutes under their state constitutions. Then, less than four years after *Gobitis*, the U.S. Supreme Court reversed itself in *West Virginia State Board of Education v. Barnette* and found a First Amendment right not to salute the flag.<sup>10</sup> Drawing heavily (without attribution) on the themes of the intervening state court cases, the Court per Justice Robert Jackson declared that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>11</sup>

The story Sutton tells in this book fascinating and well worth reading if you are a lawyer or judge who handles cases involving the government. And although Sutton is generally thought of as a conservative judge—he clerked for Justice Scalia and was appointed to the bench by President George W. Bush—his book is scholarly and non-partisan.<sup>12</sup> Focusing on the meaning of state constitutions may help liberals in some cases and conservatives in others. At the end of the day, however, all citizens benefit when the checks and balances of our federalist system are operating as intended. State constitutions are a fundamental part of the system, and *51 Imperfect Solutions* is an important and timely reminder of that.

*Ben Battles is the Solicitor General at the Vermont Attorney General's Office.*

<sup>1</sup> 411 U.S. 1 (1973).

<sup>2</sup> See, e.g., *Brigham v. State*, 166 Vt. 246, 692 A.2d 384 (1997).

<sup>3</sup> 367 U.S. 643 (1961).

<sup>4</sup> See, e.g., *United States v. Leon*, 468 U.S. 897 (1984) (refusing to exclude evi-

dence obtained in reasonable reliance on a search warrant subsequently found to be invalid). The Vermont Supreme Court has declined to incorporate Leon's "good faith" exception.

<sup>5</sup> See, e.g., *State v. Oakes*, 157 Vt. 171, 183, 598 A.2d 119, 126-27 (1991) ("We will not impose such a significant limitation upon our state exclusionary rule on the basis of the Court's cost-benefit analysis in *Leon*.").

<sup>6</sup> See Governor Allen M. Fletcher, Veto Message (S.79) (Jan. 31, 1913), available at <https://www.sec.state.vt.us/>

media/60110/1913FletcherS79.pdf.

<sup>7</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927).

<sup>8</sup> 1931 Acts & Resolves No. 174.

<sup>9</sup> 310 U.S. 586 (1940).

<sup>10</sup> 319 U.S. 624 (1943).

<sup>11</sup> *Id.* at 642.

<sup>12</sup> In any event, Judge Sutton's judicial record is not easily categorized with a partisan label, as illustrated by his two most well-known decisions. In 2011, he wrote a concurring opinion explaining his vote to uphold the Affordable Care Act against a constitutional challenge. *Thomas More Law Center v. Obama*, 651 F.3d 529, 549-

66 (6th Cir. 2012) (Sutton, J., concurring). And in 2014, he wrote a majority opinion upholding the gay marriage bans of Michigan, Kentucky, Ohio, and Tennessee against constitutional challenges, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), creating a circuit split that paved the way for the U.S. Supreme Court's review and decision in *Obergefell v. Hodges*, 134 S. Ct. 2584 (2015).



## IN MEMORIAM

### Colin William Robinson

Colin William Robinson, 62, passed away in his home of 27 years in Lyme on October 12, 2018 with his wife at his side. Born in Greenwich, CT on November 19, 1955, Colin graduated in 1978 from UNH with a BS in Environmental Conservation. He received his JD from Franklin Pierce Law Center in 1991, marrying his wife, Mary Lou that same year. Colin opened his own successful law practice in 1995 and spent time volunteering in the community, including teaching 5<sup>th</sup> graders about the law and coaching mock trial competitions, and splitting and delivering firewood to citizens in need with "Those Guys Firewood Crew" of Lyme. Colin used his time and legal expertise to help the UNH women's club hockey team gain recognition from the University. He helped his mother manage Camp Wulamat, providing a summer camp community for generations to enjoy. Colin is survived by his wife and two children, who continue to enjoy the outdoors and hockey.

### Francis Bernard McCaffrey, Jr.

Francis Bernard McCaffrey, Jr., died on October 27, 2018 at the age of 82 after a courageous three-year struggle with cancer. Rita, his wife of 60 years, was by his side. Born in Queens, NY, Frank graduated from Chaminade High School in 1954 where he was an All NYC basketball player. He attended Saint Michael's College, playing basketball on the famous team that made it to the Final Four in Indiana. Frank's lifelong passion for basketball and his endless hours of hoops with his children and neighborhood, earned him an induction into the Vermont and the NE Basketball Hall of Fame. Graduating from Fordham Law School in 1961, he practiced in NYC, NH and Rutland, Vermont, until 1981 when he was sworn in as a Vermont State Court Judge. He retired in 2004 as Administrative Judge, finding passion, using his empathy, wisdom and compassion, in presiding in the Rutland Drug Treatment Court. Frank had a strong commitment to his family and his community and was a founding member of Serenity House, a training teacher at the Thresholds Decisions Program and a guiding force at the four Dismas of Vermont homes. He is survived by his wife, his 2 daughters, 2 sons and 6 grandchildren.

### Scott Skinner

Scott Skinner, 76, passed away on December 15, 2018 from complications from lung disease. He was born in Pennsylvania on May 31, 1942, and was an active Boy Scout, reaching the rank of Eagle Scout at 13, the youngest Eagle Scout in PA at the time. Scott attended boarding school in New Jersey where he played football and basketball, and was the captain of the chess team, the editor-in-chief of the school's magazine and obtained top honors. He received his BA from Dartmouth College in just 3 years, majoring in history with high honors. After 2 years in Nepal with the Peace Corps, he obtained his JD from Columbia Law School in 1969. Scott married Mary Just in 1970 and they moved to Montpelier in 1972 where he became the first ED of VPIRG. He was later the ED of the ACLU during the Island Pond raid case, and then joined Pat Biggam and Ron Fox in Montpelier until he retired. Scott was rumored to be the guiding force behind the "Hunger Mountain Climb" in February, and was also known, along with his wife, of nearly 50 years, for their animals and exceptional garlic from their old farmhouse in Middlesex. Scott and Mary climbed 68 New England peaks over 4,000 feet together and hiked and traveled with their two sons, including to Nepal and Peru. He is survived by Mary, their two sons and 2 grandchildren.



# Scenes from the Annual Meeting



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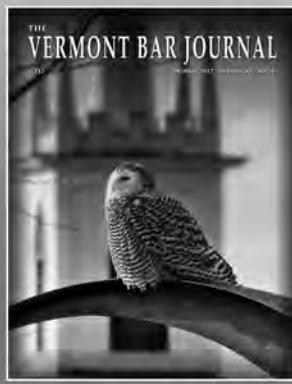
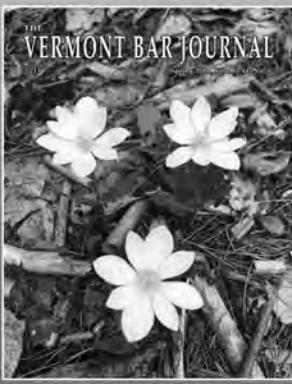
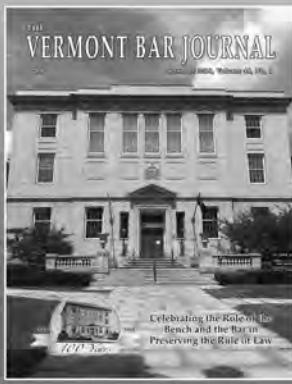
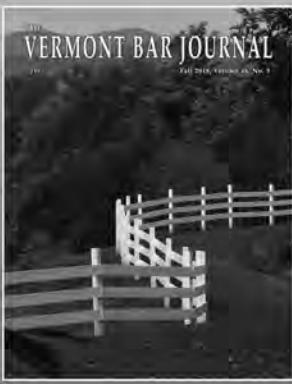
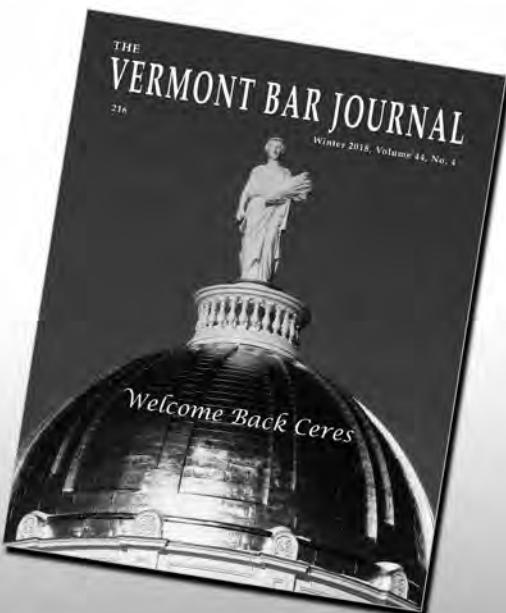
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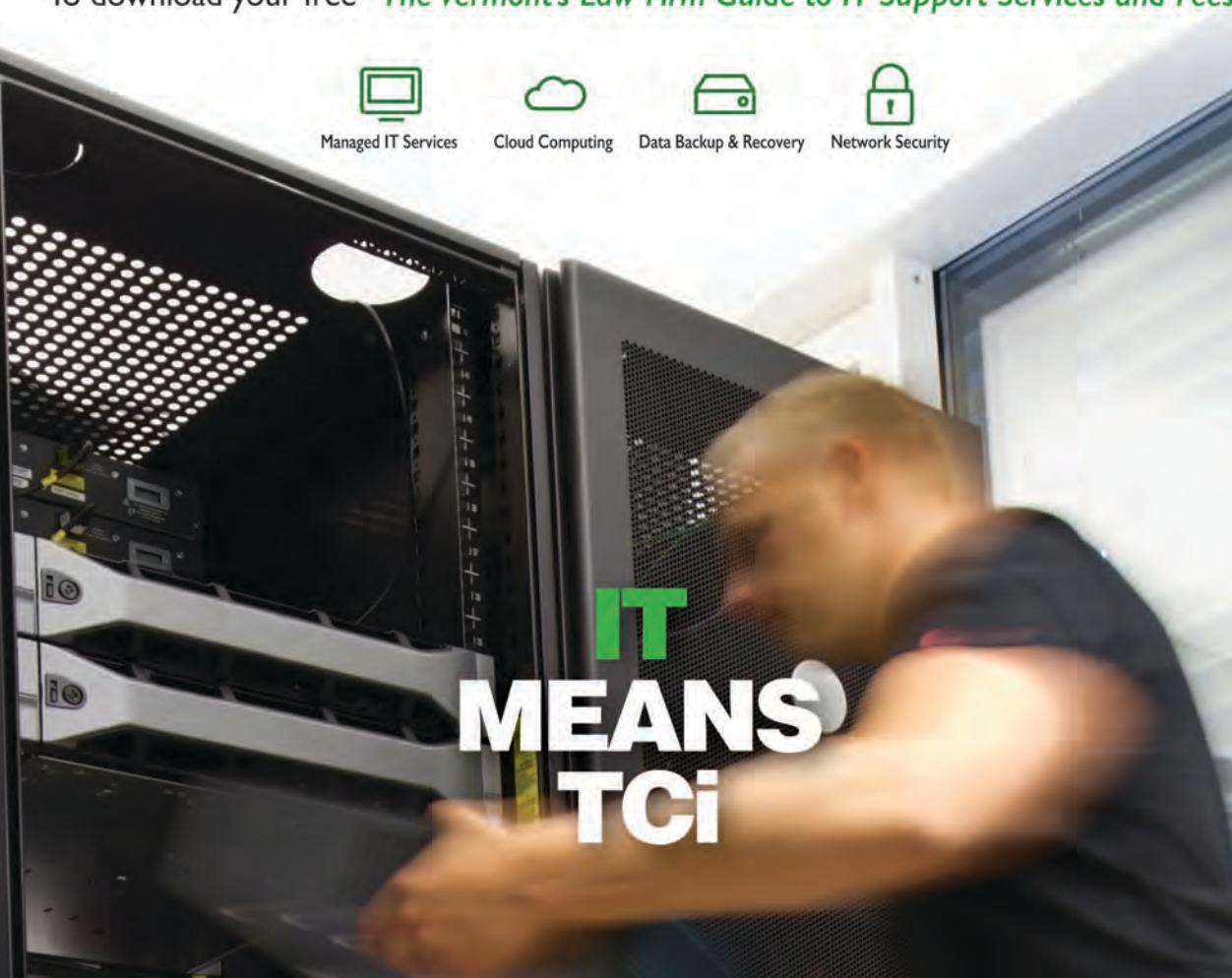
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A blurred photograph of a person wearing a dark t-shirt, working on a large server rack in a data center. The server rack is filled with various components and cables. The background shows more server racks and a window with horizontal blinds.

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