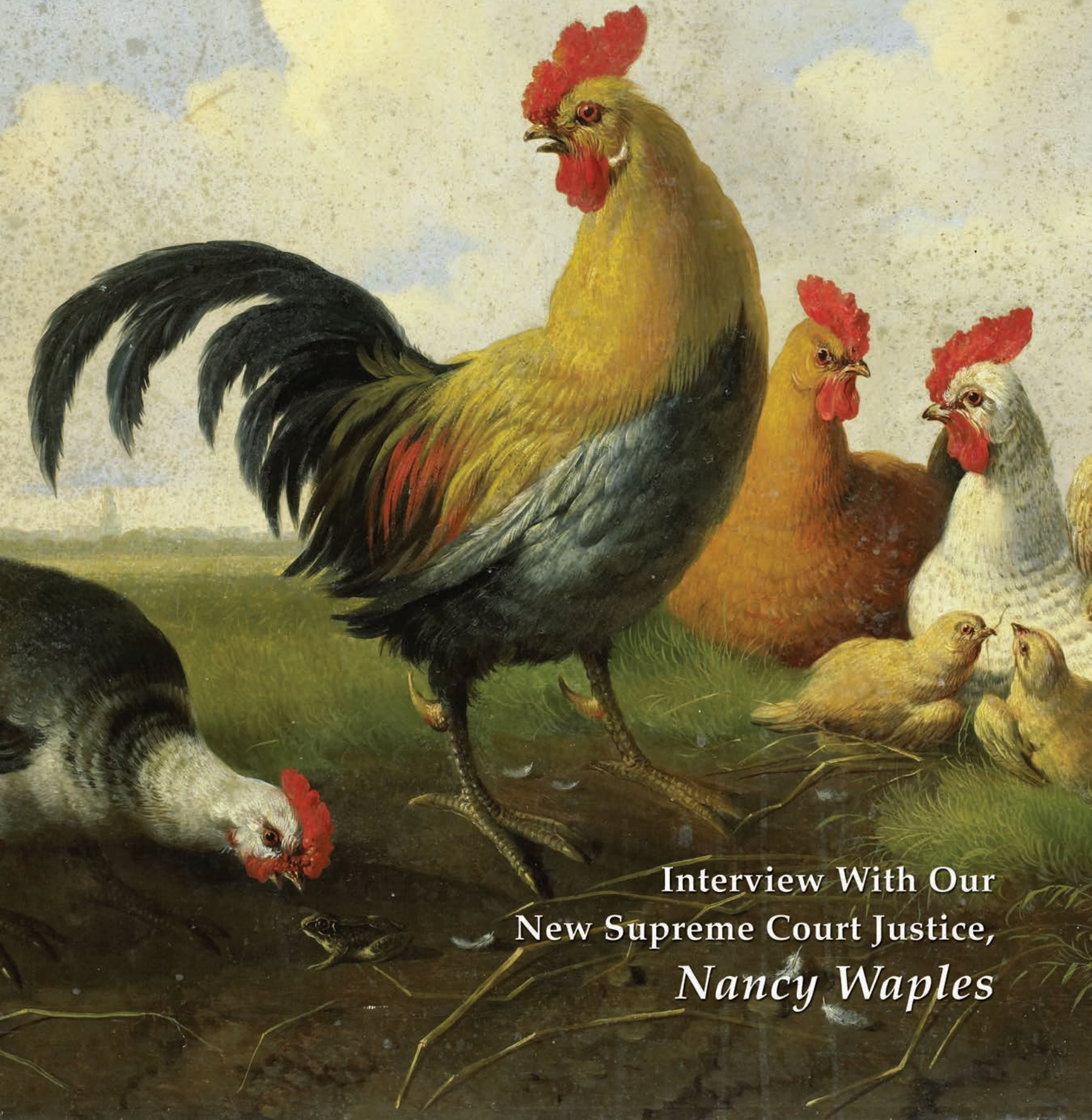


# THE VERMONT BAR JOURNAL

229

Spring 2022, Volume 48, No. 1



Interview With Our  
New Supreme Court Justice,  
*Nancy Waples*





## Complex Legal Challenges require legal teamwork

### **Legal Complexity Requires Legal Teamwork**

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"A Rooster with Hens and Chicks,"  
Albertus Vrhoesen. Image courtesy  
of the Rijksmuseum, Amsterdam.

Try out the  
Crossword Puzzle  
by Kevin Lumpkin, Esq.  
on page 33!

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# PRESIDENT'S COLUMN

## Relax Your Shoulders...

First, many thanks to those who attended the VBA Mid-Year Meeting. It was nice to see friends and colleagues in person, to have a healthy discussion about our Client Security Fund, and to recognize pro-bono "superstars" and others who make the VBA "tick." And many thanks to those who contributed to our event including Chief Justice Reiber, Judge Hoar, Professor Watanabe, our sponsors, and the excellent VBA staff!

It's good for us to get together, to laugh, debate, discuss, kibbutz and connect. We don't do it often enough. Our lives are complicated and stressful. We are dealing with our own burdens and challenges, and with those of our clients. "Advances" in technology enable us to be in contact with our offices and our clients 24 hours a day. We check our emails and messages before we say good morning to the family, or even the family pet. In the words of bar counsel -- "Is That Wrong?"

I think it is. I think our ambition, our competitiveness, our service orientation, and our egos force us to be "on" every minute. But as productive and important as we tell ourselves (our families and our partners) we are, this is not healthy or sustainable.<sup>1</sup>

An informal poll of judges in 2020 indicated that 88% of the respondents felt increased stress, 79% increased anxiety, and 47% a higher feeling of depression and hopelessness. This poll was taken early in the pandemic, so these statistics reflect uncertainty of how that would unfold. I expect a simultaneous poll of lawyers would have yielded similar results.

We must find our way to a more balanced life. One where we set reasonable client expectations about access and response time, where our colleague's or co-worker's "emergency" is not transferred to us. We need to sit together in a room (please no more "remote" meetings) and talk to each other without judgment or re-priming. Talk about things other than deadlines or deals. Talk about the stresses we experience and the angst we feel. Talk about non-work things. Connect as people.

We need to put our phones, laptops and smart watches in the garage with the snow tires; read a book or watch a movie; go fishing; meditate; dance; sing; gaze at the stars; travel; call someone; hug someone. Do what needs to be done to off-load stress and regain some balance. We function better if we are "well." We are better people, better co-workers, and better lawyers. When we are not well, we make mis-

takes or worse, possibly hurting ourselves or others, physically, emotionally, or financially.

The VBA's webpage entitled "Attorney Well Being" has general resources as well as material for specific audiences.<sup>2</sup> This page reflects the work of the Commission on the Well-Being of the Legal Profession and its current Action Plan. The third Annual Report of the Commission will be published in July. Among the action plan recommendations are these:

1. Discourage work addiction (i.e., working consistently beyond 8 hours per day except in emergencies and through lunch);
2. Discourage checking work email during no-working hours and set reasonable boundaries on responding to emails.
3. Move toward increased vacation and flex time, without guilt. Time off should be expected, if not mandatory.

Clients and co-workers appreciate having ready access to us, and our commitment to their needs. They rarely suggest that you take a day or a weekend off. Put "you" at the top of your "to do" list. You may be the only one who will.

In mid-March I attended a presentation on Bar "messaging." The speaker commended as memorable and powerful a president's column that read:

"Gone fishing, you should too!"

Don't feel guilty if you occasionally heed that advice.

<sup>1</sup> "To be a good lawyer, one has to be a healthy lawyer. Sadly, our profession is falling short when




Bob Fletcher, Esq.

it comes to well-being. The two studies referenced above reveal that too many lawyers and law students experience chronic stress and high rates of depression and substance use. These findings are incompatible with a sustainable legal profession, and they raise troubling implications for many lawyers' basic competence. This research suggests that the current state of lawyers' health cannot support a profession dedicated to client service and dependent on the public trust." ABA National Task Force on Lawyer Well-Being The Path to Lawyer Well-Being: Practical Recommendations for Positive Change (Aug. 2017). A link to the report is provided here. [https://www.americanbar.org/groups/lawyer\\_assistance/task\\_force\\_report/](https://www.americanbar.org/groups/lawyer_assistance/task_force_report/)

<sup>2</sup> <https://www.vtbar.org/attorney-well-being/>




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# PURSUIITS OF HAPPINESS

## Judge Howard Kalfus Turns the Beat Around

**KSV:** Greetings Judge Kalfus! As you know, for this column we interview people with interests and passions outside of the practice of law which keep them balanced. I, as you also know, am the new Director of Education and Communication here at the VBA. My predecessor, the very helpful Jennifer Emens-Butler, left a list of attorneys who had been suggested as subjects for this column and that list included your name. The notes tell me that your "far-from-the-law" activities include that you are a "pit musician for local theater groups" and that you are a member of Vermont's "only Jewish rock band." Do I have that right?

**HK:** (laughing) That's right. I like to think of it as Vermont's *premier* Jewish rock band...

**KSV:** Thanks for clarifying because the lawyer in me wanted to know how you know it's the *only* one.

**HK:** I don't know for sure. And if it is not the only one, I very much doubt that it is the premier Jewish rock band.

**KSV:** It might be good if there were others because then you could have a festival, right?

**HK:** Correct. Like a Woodstock.

**KSV:** Maybe somebody else will start one after they read this and then you guys can get together. So what instruments do you play?

**HK:** Percussion.

**KSV:** And percussion means "drums," right?

**HK:** It means anything you hit. It includes all kinds of drums, including timpani (kettle drums). It includes hand percussion and things you hit with mallets. It also includes pitched percussion instruments, like xylophones and marimba, things like that.

**KSV:** Do you have all these things in your house?

**HK:** I have a marimba in my home. Most of my other equipment is other places. Like my drum set lives at my Temple. My timpani live at the Lyric Theater warehouse and I've got a storage unit that has all my other keyboard and percussion instruments. It's a lot.

**KSV:** Is there one among them that's your favorite?



**HK:** I love timpani and I love marimba.

**KSV:** We're going to go into some detail about all of that but let's first go back to your beginnings. Where were you born?

**HK:** Newark, New Jersey

**KSV:** And where'd you grow up?

**HK:** Livingston, New Jersey.

**KSV:** Is that near Newark?

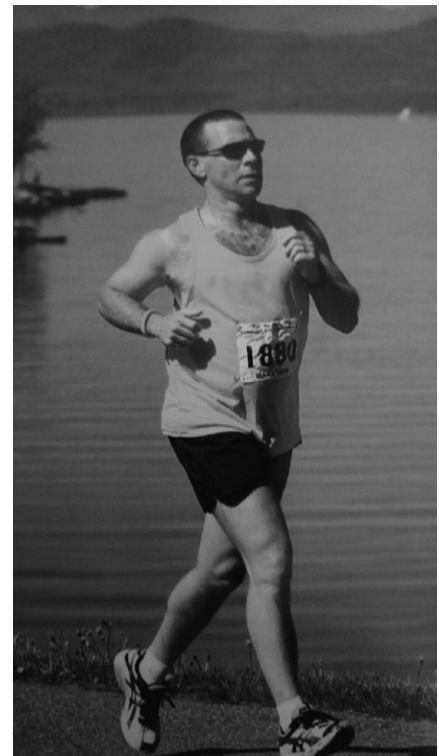
**HK:** Very near. Same county.

**KSV:** So tell me how you wound up in Vermont.

**HK:** Sure. I did my undergrad at the University of Massachusetts at Amherst where I studied music. And then I spent a year in between undergrad and law school living in Burlington making bagels at Bruegger's and lifeguarding at the Y. Then I went back down to Newark for law school at Seton Hall. But even when I went back to New Jersey, I kept my Vermont driver's license and my Vermont license plate. I knew I was coming back to Vermont. Vermont was the only place I wanted to be. In fact, I had my car packed and when I finished my last law school exam, my third year, I immediately got in the car and drove to Vermont and had to return to New Jersey for the graduation. I was that eager to get back here.

**KSV:** And you've been here ever since?

**HK:** Ever since. Yep.



**KSV:** Tell me a little about your legal career. Where did you start?

**HK:** I had done my six-month clerkship, splitting my time between the Chittenden County Public Defender's office and the Juvenile Defender's office. When I got admitted to the bar, the Defender General gave me a juvenile contract in Franklin County. So I opened up my own small office right in downtown St. Albans. I was only there

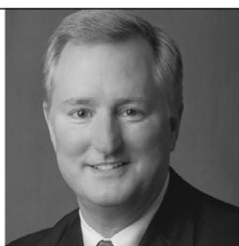
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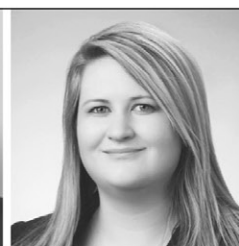
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for about six months when I got a call from the Chittenden Public Defender's office that they had a temporary full-time opening and they wanted to know if I would fill it. And I said, "absolutely." And then three months later it became a permanent position. I closed up shop in St Albans and became a staff attorney at the Public Defender's Office. I stayed for about six and a half

years doing criminal and juvenile cases.

**KSV:** What next?

**HK:** Then I went to the Attorney General's office representing DCF. I did that for about two and a half years. From there, I went to Downs Rachlin Martin where I was for a little less than a year.

**KSV:** And that's where we met each other. Full disclosure we overlapped there briefly. What next?

**HK:** I went from there to the Department of Public Safety as staff attorney. And I was there for not quite six years, couple months shy of six years.

**KSV:** And it was at that point then that you started another career, when you left there?

**HK:** Yes. That's when I got appointed by Judge Davenport to be Vermont's fifth ever hearing officer. I was appointed in 2011. I did that for almost 10 years before I was appointed by Governor Scott to the Superior Court.

**KSV:** And that was last year?

**HK:** Yes. I was sworn in on June 23rd of last year.

**KSV:** Congratulations. And you like being a judge? I mean you "love it," right? I don't want to put words in your mouth ...

**HK:** I absolutely do. As stressful as the job can be, and I'm working, you know, ridiculously long hours, I still wake up every day, just anxious to get back into work.

**KSV:** OK let's get back to the music and how that has fit in on this journey that you just described. When did you get started?

**HK:** It's hard for me to remember any life without music. We always had a piano in our house. My mom played a very little bit. I took lessons. I started piano lessons when I was about six years old. And I think I stopped a year later just because I didn't like taking lessons, but I continued to play. And then when I got into school, I joined any kind of musical ensemble that I could. I think we could join the chorus in fourth grade. I did that. And then orchestra in fifth grade and band in sixth grade. And I just kept trying different instruments and was always involved including musical theater which I started as soon as I was eligible for that in junior high. I decided to go to UMass because of their marching band.

**KSV:** We've got talk about that.

**HK:** I played in what's called the front ensemble or the pit, which is all the stationary percussion instruments. And so we actually didn't march, we were on the sidelines...

**KSV:** Playing a sports events and things like that?

**HK:** Oh yeah. We played for all the home football games for UMass. Some of the away games too. We played every year for the New England Patriots. We played once or twice for the Giants, we would play festivals and parades, things like that.



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**KSV:** That must have been a lot of fun.

**HK:** It was a blast. I continued playing through law school and while I was in law school, I was teaching my old high school marching band's drum line. And I also started playing, which I did for two years in senior drum and bugle corps.

**KSV:** You sort of skipped a step. You were a music major at UMass and next thing you're in law school. How did we make the break from music major to lawyer?

**HK:** Fair enough. So I was a music theory and composition major. And I wanted to write music for the rest of my life. No clue that I was even considering law school at that point. And then it occurred to me a couple years in that maybe I didn't want to have to rely on writing music to put food on the table, and I maybe ought to think about doing that as an avocation. And so I thought about law school for the primary purpose of getting into entertainment law. I took all of the intellectual property courses that Seton Hall had to offer and while I found it to be very interesting, I eventually realized that I'd have to live in New York or LA if I wanted to get into the business. I certainly didn't want to live there, so I shifted my focus to family law which had also interested me from the start.

**KSV:** How did music fit into your life when you were at the early stage in your career in Vermont?

**HK:** When I'd been in Burlington for that year in between undergrad and law school, I played with the University of Vermont concert band and orchestra. And so when I got back up here after law school, I reached out to the percussion professor at UVM (coincidentally, he'd gone to UMass 10 years before I did) and we became friendly and I started playing with some ensembles there. And it was that way that I met my wife.

**KSV:** Oh – there's that too. A family life. You're married and you have two children, correct?

**HK:** That's correct.

**KSV:** Tell me how you met your wife.

**HK:** I got up here in '95 after law school. I was playing in the area mostly through connections at UVM. And then in the summer of 1996, Phish was doing a three-day festival at the old Air Force base in Plattsburgh. They decided to put together an orchestra to open for them before their last set on the last day. The core of the orchestra was the Plattsburgh Community Orchestra. They also pulled in members of the Montreal symphony and the Vermont Symphony Orchestra to supplement. And the percussion professor at UVM, who is still to

this day the principal percussionist with the Vermont Symphony Orchestra, called me and the two of us were the percussionists for this orchestra. And my wife, who was playing at the time with the Plattsburgh Community Orchestra, was one of the bassoonists.

**KSV:** And the rest is history.

**HK:** The rest is history...

**KSV:** So meeting your wife through music would be one of the highlights of your music career, tell me about some of the others.

**HK:** I've done a lot of musical theater work. The majority of it has been for Lyric Theater, but I've also done other community organizations like the Stowe Theater Guild and the Essex Community Players. But I've done most of my work with Lyric at the Flynn. And that's a blast playing for a 1500-seat house. I've done some really great shows there.

**KSV:** How often do those come around?

**HK:** They do two main stage shows per year. I did my first show with Lyric in 1999 and in the 20-going-on-23 years since then, I've done, I think around 32 who shows in Lyric pits.

**KSV:** Wow. And when they put on a show, what's your time commitment?

**HK:** The cast and the crew are working on a show for at least four months. For the musicians, we tend to get the music probably about a month and a half before the show. And then we're expected to have learned it before our first rehearsal. So we tend to have only four or five rehearsals that includes the dress rehearsals with the cast. But there's a lot of work that needs to be done in advance to make sure that we're ready to go since our purpose is to support the cast.

**KSV:** And then how many performances do you do?

**HK:** Typically it's five or six. We open on a Thursday, play a show Thursday night, Friday night, two shows Saturday, and then either one or two shows on Sunday. There have been a few shows that I've done over the years where we did two weekends.

**KSV:** Have you been dashing off from court to rehearsals and shows?

**HK:** Yeah. There have been times when I've literally played opening night, gone to the opening night party, had a slice of cake, and then I would get in the car and drive down to Bennington where I'd check in the hotel to be ready for court the next morning.



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**KSV:** And yet you love it.

**HK:** Love it. It's, it's very different from law. I'm using different parts of my brain, I'm using different muscles. Yeah. And it it's a blast. It's creative, it's collaborative. It's joyful.

**KSV:** Now I need you to tell me a little more about Vermont's only, or maybe more accurately, Vermont's premier Jewish Rock band.

**HK:** The history behind that is that back about 10, 12 years ago, I was the president of my Temple, Temple Sinai in South Burlington. And I had been at a conference for small synagogues, and we were just kind of brainstorming ideas for how to get people enthusiastic about coming to Temple for services. And I thought it would be funny to hold a rock service with kind of a garage-band style group of us that would just play obnoxious music and ha ha it'd be funny, but we get people in the door at least.

**KSV:** And were people receptive to that?

**HK:** They were. I reached out to a guy that I'm very friendly with in my Temple who plays electric bass. And I also knew there were some guitarists that played for our folk services. And I reached out to them and they were interested. I reached out to the Temple keyboardist but she said she didn't have the time. But I knew another keyboardist from Lyric who was also a member of our Temple. I asked her if she would be interested. She was and she asked if there was any chance that her husband could play too, though he's not a Temple member, but he plays guitar and sings. That's significant because turns out he could really play guitar and sing.

**KSV:** How'd it go?

**HK:** We were probably getting, on a regular Friday night, 12 to 15 people coming to services. Well, we advertised this "Rock Shabbat" service and we had about a hundred people that show up that night. And I learned that night really that we could play and that we had a sound that people actually liked. And the thing that drove it home for me was there was a woman who was a member of our congregation probably about 83 years old at the time. And I thought, you know, we're gonna be loud. And I said, we better have the AED ready for her. When we were done, she came up to us and she said, that was fantastic! You gotta do that again. So that's great.

**KSV:** Where did it go from there?

**HK:** We did one or two more Rock Shabbat service and then there was a meeting of an organization called Jewish Communities of Vermont down in Killington for Vermont congregations, and we did a little workshop on our Rock Shabbat. By the

end of the weekend, we had invitations to come do rock Shabbats at four or five different congregations all around the state.

**KSV:** You were touring. Did you get guys you get t-shirts made?

**HK:** Definitely should have done that - lost opportunity. Yeah.

**KSV:** And the name of your band is what?

**HK:** "Dahg," which is Hebrew for fish.

**KSV:** Excellent. I get it. Tell me about the repertoire. What does a Dahg audience get to hear?

**HK:** Boy, what *won't* they hear? We're doing a service in April and attendees for that service will hear, Three Dog Night. They'll hear some Bob Marley. They will hear the Clash. They'll hear Green Day. They will hear couple of original songs.

**KSV:** Did you write the original songs?

**HK:** I wrote one and the husband of one of our singers wrote one.

**KSV:** That's great. So that's April, do you have stuff lined up after that?

**HK:** Yes, we do. Let me think. In July we are doing an outdoor performance at an event called Shabbat Unbound for the Rutland Jewish Center which we've done every year since the workshop in Killington. They do an outdoor Shabbat service at Lake Bomoseen with a barbecue following it. We're going to do that, and then we were asked back up to St. Johnsbury for something at the end of August. And, actually, the one that we're doing at the end of April, it's going to be a joint service. We're streaming it for the congregation that my aunt belongs to in Leominster, Massachusetts.

**KSV:** How many people are in the band?

**HK:** There are nine in the band plus our sound engineer.

**KSV:** So when you travel somewhere is it like a multi van situation?

**HK:** Oh yeah.

**KSV:** That's, impressive. And again, this is in addition to the stuff you've been doing for Lyric Theater ...

**HK:** Yes. Also, I play with other groups. When it doesn't conflict with Lyric, I play with the Vermont Wind Ensemble through the University of Vermont. I've played with the Vermont Mozart Festival. I've played with the Green Mountain Mahler Festival and the Hinesburg Artist Series. I've done some stuff with the Vermont Symphony Orchestra's percussion section.

**KSV:** How do you fit all this in?

**HK:** A lot of the things are limited time commitments. For example, I recently



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played a benefit concert for Ukraine medical relief. And it was a one-day thing where we show up, we rehearse during the afternoon and we play a concert that night. I'm doing another thing in May where we will rehearse for a few hours on Saturday, do a concert on Sunday. Things like that are easy to do on weekends... The weeknight stuff really doesn't work for me, although I have managed to do some of that. I spent probably nine months prior to the pandemic covering juvenile and RFA cases in the Northeast Kingdom. While I was there, I discovered that St Johnsbury has the oldest continuously running town band in the United States. And I happened to be there throughout the summer when they were rehearsing. I did one or two rehearsals and concerts with them, so I get opportunities that I just stumble upon.

**KSV:** It sounds like you don't waste any of your time. I know your kids are pretty well grown up now, but how do you have a family and on top of all this?

**HK:** (laughing) I've always found that if you're willing to neglect your family and your job, the sky's limit in terms of extracurricular activities.

**KSV:** Your wife is a musician as well so that probably helps.

**HK:** Yes. And so are my kids. They're all very understanding. I've done a bunch of concerts with my wife over the years. My daughter and I have also played together ...

**KSV:** What instrument does she play?

**HK:** She plays percussion. She's at UVM and in a number of ensembles including the Vermont Wind Ensemble, concert band and orchestra.

**KSV:** And your son?

**HK:** He was also a bassoonist. He's in grad school now and hasn't touched his bassoon in a few years, but he still plays piano quite often and plays very well.

**KSV:** Do you all play together sometimes at home, like at Thanksgiving?

**HK:** There's nothing better than a bassoon and percussion quartet. I'm actually in the process of writing a three-movement duet for bassoon and mallet percussion.

**KSV:** The Partridge family had nothing on you guys.

**HK:** No, nothing at all.

**KSV:** What else should we know about your life in music?

**HK:** Let me think for a moment. I've done concerts with easily, oh, a dozen or more lawyers and judges in Vermont.

**KSV:** Oh, really? Interesting.

**HK:** Easily. In fact, there is a Vermont Supreme Court decision that said that it was not a conflict for me to hear a termination of parental rights case that was being prosecuted by Jody Racht [of the Attorney General's Office], who plays viola in a lot of Lyric productions.

**KSV:** So some litigant raised that?

**HK:** Yes. And the Supreme Court said it's not a problem. It's a small state. You can't avoid those kinds of things.

**KSV:** Are there new things that you still would like to do musically?

**HK:** For a few years I've wanted to conduct a show for Lyric. This past December, Lyric performed a show called "Burlington Does Broadway" in collaboration with the Vermont Symphony Orchestra and the Flynn Theater. They'd done it in 2018 and 2019 and I was the music director for it this past December. I collaborated with the director and choreographer to put together the songs. And I rehearsed the chorus worked with the conductor for the symphony and then was fortunate to be able to sit in the audience and watch it on New Year's Eve. But I would like to take it one step further with a main stage production, in addition to rehearsing the cast to be able to conduct the pit orchestra for a show. I hope to do that.

**KSV:** It sounds like you're getting there.

**HK:** I'm working towards it. I've got to be thinking about it because they tend to program at least 18 months out. Right now, they're programming for the 2023 and 2024 season, so I've got to be thinking about that, but I'm also trying to settle into this job because it has only been nine months...

**KSV:** Right, that demanding job you have. I did want to ask you about your running. I remember you were a big runner back during our time at DRM.

**HK:** I am not running quite as much as I was back then, but I still do marathons whenever I can. I've been trying to extract myself from certain things. For instance, for almost 10 years now, I've overseen training all the volunteers for the sports and fitness expo that precedes the Vermont City Marathon. So I spend two full days training volunteers and, you know, coordinating that whole effort. I also a co-race-director with Tom Nuovo, an attorney in Colchester. He and I are co-directors for our local running club's annual Turkey Trot.

**KSV:** So you're not just running yourself to blow off steam. You're involved with like organized running?

**HK:** Yes, racing, but as I say, I'm kind of



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extracting myself from some of that. I've got my replacements lined up for each of those things. This is my last year doing those projects just because with this job I've I just can't do all the different things that I've been doing.

**KSV:** It sounds exhausting. You still like to run, though?

**HK:** I love to run. In addition to being so critical for physical health, it's a great release. And I actually do some of my best decision-making when I'm running. About a mile and a half into a run, what seemed like an impossible problem to solve becomes as clear as day. And I've had discussions with lawyers and judges over the years that run and they all experience the same thing.

**KSV:** Well, you're almost inspiring me, although a mile and a half would be about as far as I would hope to go. I tip my hat

to you.

**HK:** Thank you. Thank you.

**KSV:** Thanks for sharing your pursuits of happiness with us.

**HK:** My pleasure. The "extra-curricular" activities feature in each issue are so important. Not only do the activities promote physical and mental health, they keep us engaged in our communities and grounded in life outside the courtroom. They act as a constant reminder to everyone in the legal field that we shouldn't and can't think about issues in a vacuum. Thanks to you and the VBA for making that reminder a priority!

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## New at the VBA

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Kim Velk, Esq. ([kvelk@vtbar.org](mailto:kvelk@vtbar.org)) is the new Director of Education and Communication



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# WRITE ON

## Style Analysis: Wooden v. United States

### Style Analysis: Wooden v. United States

This column springs from the uncontroversial notion that reading is one of the best ways to learn to write. The U.S. Supreme Court recently issued its decision in *Wooden v. United States*.<sup>1</sup> This decision includes a majority opinion authored by Justice Kagan and four concurrences, one each from Justice Sotomayor, Justice Kavanaugh, Justice Barrett, and Justice Gorsuch. With five separate authors in this single decision, each with their own style and quirks, *Wooden* is functionally a forty-three-page textbook on writing. This column will break down some of the tips and tricks we can learn from Justice Kagan's majority and Justice Gorsuch's concurrence.

*Wooden* concerns the plight of William Dale Wooden, who some years ago spent one evening at a mini storage facility, where he burglarized ten separate units in succession.<sup>2</sup> A wall separated each unit from the next. Wooden and his "confederates" broke through the walls between the units, accessing each unit from the one before and stealing assorted items.<sup>3</sup> Prosecutors charged Wooden with ten counts of burglary, one for each mini storage unit, in a single indictment. Wooden pleaded guilty and a judge sentenced him to eight years imprisonment for each burglary, with the sentences to be served concurrently. Many years after his release from prison on the burglary convictions, Wooden was arrested for being a felon in possession of a firearm under 18 U.S.C. § 922(g).<sup>4</sup> The standard maximum penalty for this crime is ten years.<sup>5</sup> But under the Armed Career Criminal Act (ACCA), a person convicted under § 922(g) who also has three prior qualifying convictions must be sentenced to a minimum of fifteen years.<sup>6</sup> Five years difference between sentences is a long time, but as the Court explains, for Wooden the ACCA and non-ACCA sentences presented an even more dramatic range. A sentence of twenty-one to twenty-seven *months* was initially recommended for Wooden, before the United States sought an ACCA enhanced sentence in the case.<sup>7</sup>

Wooden's § 922(g) sentencing hearing focused on whether his ten prior burglary convictions counted as offenses committed "on occasions different from one another," as ACCA requires.<sup>8</sup> Wooden argued all ten happened during a single criminal episode, and thus should count as only a single predicate offense for purposes of sentencing. If

the ten burglaries counted as one predicate offense, then Wooden would not have the three necessary offenses to qualify for ACCA enhanced sentencing. The United States, as was to be expected, argued the opposite position: Wooden's ten burglaries were just that, ten criminal offenses committed on ten different occasions. The district court agreed with the government, and the Sixth Circuit agreed with the district court. Both courts believed Wooden's burglaries had discrete beginning and end points, and fixed the break between "occasions" as Wooden's movement from the physical space of one mini storage unit to the physical space of the next mini storage unit.<sup>9</sup>

In light of a circuit split on the meaning of ACCA's "occasions" clause, the Court agreed to take up the issue of whether Wooden's ten burglary convictions were committed on occasions different from one another, or on the same occasion.<sup>10</sup> The Court reversed, though as noted in the beginning of this column, better than half the justices of the Court wrote individually, all but promising more ACCA litigation in the future.<sup>11</sup>

### Justice Kagan's Majority Opinion

Much has been written about Justice Kagan's writing, and she is generally considered among the best writers on the Court.<sup>12</sup> There is much in *Wooden* to support that thesis, starting with the way in which she writes the factual history of the case. That section starts: "Begin in 1997, when Wooden and three confederates unlawfully entered a one-building storage facility at 100 Williams Road in Dalton, Georgia, next door to Wooden's home."<sup>13</sup> A more formal (and more staid) version of the same sentence might read: "In 1997, Wooden and three other persons unlawfully entered a one-building storage facility at 100 Williams Road in Dalton, Georgia, next door to Wooden's house." Use of the word "begins," rather than the shorter "in 1997," gives Justice Kagan's sentence something of the storyteller, a feel which continues in the beginning of the next paragraph.

In that paragraph, after describing Wooden's burglaries, Kagan moves to describing Wooden's more recent crime.

Fast forward now to a cold November morning in 2014, when Wooden responded to a police officer's knock on his door. The officer asked to

speak with Wooden's wife. And noting the chill in the air, the officer asked if he could step inside, to stay warm. Wooden agreed. But his good deed did not go unpunished. Once admitted to the house, the officer spotted several guns. Knowing that Wooden was a felon, the officer placed him under arrest. A jury later convicted him for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g).<sup>14</sup>

The opening of this paragraph echoes the reference to time in the start of the preceding paragraph, creating a content-based echo link between the paragraphs.<sup>15</sup> The mixed number of clauses in the sentences of the paragraph give the paragraph rhythm. The first sentence has two clauses; the second has one; the third sentence has three clauses; and the fourth and fifth sentences have one clause each; the sixth, seventh, and eighth sentences have two clauses each.

Legal writing experts sometimes talk about an ideal number of words for a sentence,<sup>16</sup> but to me the number of clauses in a sentence—more specifically, the change in number of clauses from sentence to sentence—is just as important. Each comma between clauses acts as a pause, with periods (or full stops) acting as longer breaks, or double pauses between sentences.<sup>17</sup> These pauses are an easy trick to give writing a conversational or, in some cases, oratorical flow that sticks in the ear of the listener (or reader). Like all tricks though, this is one that can be overused. Look for balance and avoid too many clauses in one sentence. Writing feels breathless when it goes on too long without a double pause. Consider how Justice Kagan's paragraph opener would read if it lacked single or double clause sentences:

Fast forward now to a cold November morning in 2014, when Wooden responded to a police officer's knock on his door. The officer asked to speak with Wooden's wife, and noting the chill in the air, the officer asked if he could step inside, to stay warm; Wooden agreed, but his good deed did not go unpunished. Once admitted to the house, the officer spotted several guns; knowing that Wooden was a felon, the officer placed him under arrest. A jury later convicted him for being a felon in possession of a firearm, in violation of 18 U.S.C. §



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922(g).

I apologize for asking you to read that, but it was necessary to demonstrate the point. Reducing the number of single and double clause sentences takes away the flow of the description. This makes the pace of the paragraph feel mechanical rather than oratorical, which in turn reduces the narrative quality and makes the paragraph far less memorable. It is remarkable what a difference a few periods and semi-colons can make.

Along with good pacing, Justice Kagan's writing also demonstrates great use of analogy. *Wooden* involves ACCA's occasions clause, and the majority opinion begins its legal analysis by considering how "an ordinary person" would or would not describe *Wooden*'s burglaries.<sup>18</sup> Would the ordinary person consider these as one occasion, or several? To answer that question, Justice Kagan analogizes to a wedding, which "often includes a ceremony, cocktail hour, dinner, and dancing."<sup>19</sup> While those events do not occur at the same precise time, the ordinary person would recognize those events as having a "shared theme" that makes them part of a single event, or single occasion.<sup>20</sup> Justice Kagan compares this configuration of events, all part of the same occasion, to crimes, which likewise may be connected such that they would generally be understood by an ordinary person as part of the same occasion, even if they occur sequentially rather than simultaneously.<sup>21</sup> The opinion's wedding analogy makes the legal reasoning here accessible by comparing sequential criminal acts (which hopefully few readers have firsthand experience with) to an everyday event (which likely many readers have firsthand experience with). Use of analogy like this can make your writing and analysis more understandable too.

Justice Kagan's word choice in *Wooden* also bears mentioning. As she uses commonplace events to illustrate less commonplace experiences, so too does she use colloquial language to cut through legal terminology. In her words, "ACCA kicks in" when a person has three qualifying prior convictions.<sup>22</sup> Likewise, the government's reading of ACCA's occasions clause would leave that clause with "no work to do."<sup>23</sup> And here, "[t]he burglaries were part and parcel of the same scheme, actuated by the same motive, and accomplished by the same means."<sup>24</sup> That sentence uses colloquial language and tricolon<sup>25</sup> to great effect, leaving the reader with a succinct and memorable statement.

That said, like any other writing trick, the use of informal or colloquial word choice can be taken too far. For instance, I quoted the word "confederates" in the beginning of this column. That word appears in the first sentence of Justice Kagan's de-

scription of the *Wooden* facts.<sup>26</sup> While this word is a benign synonym for "accomplice" or "associate" in many contexts, it has a potential different connotation when describing a group of people in the State of Georgia. I have no doubt that Justice Kagan used this word to avoid using a legally charged word such as "accomplice" or "conspirator," but perhaps something like "companion" would have been a less fraught choice. Later in the opinion, after describing a wedding as an occasion with many sequential occurrences, Justice Kagan turns back to a description of sequential crimes. She writes the following: "The same is true (to shift gears from the felicitous to the felonious) when it comes to crime."<sup>27</sup> The alliteration in this sentence (felicitous and felonious) sounds appealing, and is memorable, but like the word "confederates" may not necessarily land well with the audience. What could have been a clever expression sounds a bit, well, contrived. It seems an unnecessary phrase to include, one which leans into the cleverness of wording at the expense of letting the simplicity of the analogy speak for itself. The phrase thus perhaps focuses attention on the author of the opinion, rather than the parties to the case or the analysis at the opinion's heart.

On the other hand, Justice Kagan can perhaps be forgiven for her nod to her own analogy. She juxtaposes legal reasoning and lawyers with common sense and ordinary people to good effect at least twice in *Wooden*. First, she describes the government's argument as "a legally fancied version of the Sixth Circuit's timing test."<sup>28</sup> Given that the opinion comes down on the side of a commonplace understanding of the word "occasions," we can take this reference as something of a dismissal of legal fanciness in favor of ordinary meaning. Second, when the opinion transitions to discussing how an ordinary person would understand "occasions," Justice Kagan writes the following: "Consider first how an ordinary person (a reporter; a police officer; yes, even a lawyer) might describe *Wooden*'s ten burglaries—and how she would not."<sup>29</sup> To my mind, her concession that lawyers are ordinary people rights all wrongs.

### Justice Gorsuch's Concurrence

Like Justice Kagan's, Justice Gorsuch's writing has been much discussed. He is generally praised, though some have called his writing "folksy."<sup>30</sup> One commentator called his work "exhausting to read and impossible to take seriously."<sup>31</sup> That seems a bit strong to me. There is much to like in Justice Gorsuch's writing, including in his *Wooden* concurrence.

Paired sentences, one short and the sec-

ond longer, are a hallmark of Justice Gorsuch's writing. They appear frequently in *Wooden*. For instance, when critiquing the *Wooden* majority's clarity, Justice Gorsuch begins a paragraph with the following: "Consider some examples. Imagine a defendant who sells drugs to the same undercover police officer twice at the same street corner one hour apart."<sup>32</sup> He begins the next paragraph like this: "Next, take the Court's barroom brawl hypothetical. Because it involves 'a continuous stream of closely related criminal acts at one location,' the Court says the crimes necessarily occur on a single 'occasion.'"<sup>33</sup> A later paragraph begins with the same formula: "Now return to Mr. *Wooden*. The Court rightly says that crimes taking place sequentially can sometimes happen on a single occasion."<sup>34</sup> In each of these examples, the short sentence is the paragraph's topic sentence. Each of these topic sentences delivers precisely what a topic sentence should: a statement that tells the reader what the paragraph is about. So, a paragraph considering examples that stretch the majority's interpretation of ACCA's occasions clause follows the first example. A paragraph discussing one example specifically, the barroom brawl, follows the second example. And a paragraph returning to *Wooden*'s case follows the third example.

A critic might point out that these are sentence fragments. Formal legal writing has traditionally stuck by the rules of grammar, including the most obvious rule: write in complete sentences. But Justice Gorsuch's sentence fragments are appealing because they echo the flow of spoken language. They also still have the most important quality of written work: they convey unmistakable meaning. Think about how Justice Gorsuch's paired openings would read if those fragments were reworked into more traditional legal prose. "Consider some examples" becomes "we will now consider some examples." "Next, take the Court's barroom brawl hypothetical" becomes "we will next consider the Court's barroom brawl hypothetical." And "now return to Mr. *Wooden*" becomes "we now return to Mr. *Wooden*." Justice Gorsuch's version means the same thing as the more traditional version, but the traditional version lacks the conversational flavor of the original. I prefer the fragments for both their clarity and their kinship with spoken language.

Justice Gorsuch sometimes varies his short-long sentence pairings with a short question followed by a longer sentence or two answering the question just asked. So, for example, his *Wooden* concurrence at one point asks: "What do we resolve?"<sup>35</sup> Justice Gorsuch recounts the majority's holding in answer to the question: "The

Court rejects the Sixth Circuit's rule that crimes occurring sequentially always occur on different occasions. Sometimes, the Court holds, crimes committed one after another can take place on a single occasion.<sup>36</sup> Like the short-long sentence pairings, these question and answer pairings mimic spoken language. Beginning with a short question is also a deft way to frame an issue or point of logic.

Justice Gorsuch uses questions in two ways in his *Wooden* concurrence. First, he uses questions to raise a point that is then explained. For example, he writes the following: "Imagine, too, an individual who commits a robbery or burglary then later assaults a pursuing police officer: Does the later assault happen on a separate 'occasion' from the initial crime? The times, locations, and crimes differ, but they are related in certain respects too. Unsurprisingly, the courts of appeals have disagreed in cases like these."<sup>37</sup> The question here focuses the reader on the issue Justice Gorsuch identifies. Without the question, the reader would more than likely still understand Justice Gorsuch's point, but the question essentially doubles down on clarity, making Justice Gorsuch's meaning just a little bit easier to catch.

The *Wooden* concurrence also uses questions without answers to identify points where, at least according to the concurrence, the majority's logic loses ground. For example, at the end of a paragraph Justice Gorsuch writes: "Suppose this case involved not adjacent storage units but adjacent townhomes or adjacent stores in a mall. If Mr. *Wooden* had torn through the walls separating them, would we really say his crimes occurred at the same location?"<sup>38</sup> The question hangs in the air at the end of the paragraph, leaving the reader to speculate as to the answer.

Like the elements of style in Justice Kagan's writing, the quirks and features of Justice Gorsuch's writing can be overused. A short-long sentence pairing can be a catchy way to start a paragraph, but will become repetitive when used too often. Likewise, a sentence fragment here and there adds a spoken word feel, but should be balanced (as it is in Justice Gorsuch's *Wooden* concurrence) with more formal and traditional grammar elsewhere. Finally, a well-placed hanging question is sometimes an easy way to create doubt in the mind of the reader, but when this trick is used too often it can feel contrived. Nonetheless, try out some of the tips you pick up from other writers and see how they add to your own writing.

*Catherine Fregosi, Esq. teaches Legal Writing and Appellate Advocacy at Vermont Law School.*

<sup>1</sup> 142 S. Ct. 1063 (2022).

<sup>2</sup> *Id.* at 1067.

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

<sup>4</sup> *Id.* at 1067-68.

<sup>5</sup> *Id.* at 1068; 18 U.S.C. § 924(a)(2).

<sup>6</sup> *Wooden*, 142 S. Ct. at 1068; 18 U.S.C. § 924(e) (1).

<sup>7</sup> *Wooden*, 142 S. Ct. at 1068.

<sup>8</sup> *Id.*; 18 U.S.C. § 924(e)(1).

<sup>9</sup> *Wooden*, 142 S. Ct. at 1068.

<sup>10</sup> *Id.* at 1069.

<sup>11</sup> *Id.* at 1074. *Wooden* was issued on March 7, 2022. As of this writing, there are two pending petitions for certiorari asking the Court to further define ACCA's occasions clause. See generally Petition for Certiorari, *Williams v. United States* (No. 20-7798); Petition for Certiorari, *Brown v. United States* (No. 21-6448).

<sup>12</sup> See, e.g., Mark Joseph Stern, *Elena Kagan is the Best Writer on the Supreme Court*, SLATE (Mar. 1, 2016, 2:07 PM), <https://slate.com/news-and-politics/2016/03/elena-kagans-dissent-in-lockhart-v-united-states-shows-shes-scalias-successor-as-the-best-writer-on-the-supreme-court.html>.

<sup>13</sup> *Wooden*, 142 S. Ct. at 1067.

<sup>14</sup> *Id.* at 1067-68.

<sup>15</sup> An echo link is a way of connecting sentences and paragraphs without needing to rely on explicit connectives such as "moreover" or "furthermore" or pointing words such as "this" or "that." Instead, the echo link picks up a key word or phrase, or an idea, from one sentence or paragraph and uses it in a later sentence or paragraph to draw a connection between the two. Brian Porto, *Six Simple Steps to Improved Writing*, VT. B. J., Summer 2015, at 35.

<sup>16</sup> See, e.g., Greg Johnson, *Assessing the Legal Writing Style of Brett Kavanaugh*, VT. B. J., Fall 2018, at 31 (recommending average sentence length of seventeen to twenty words).

<sup>17</sup> See LYNNE TRUSS, *EATS, SHOOTS & LEAVES* 72 (Avery 2006) ("For a millennium and a half, punctuation's purpose was to guide actors, chanters and readers-aloud through stretches of manuscript, indicating the pauses, accentuating matters of sense and sound, and leaving syntax mostly to look after itself.").

<sup>18</sup> *Wooden*, 142 S. Ct. at 1069.

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

<sup>20</sup> *Id.* at 1069-70.

<sup>21</sup> *Id.* at 1070.

<sup>22</sup> *Id.*

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

<sup>24</sup> *Id.* at 1071.

<sup>25</sup> Brian Porto, *Making It Sing: How Rhetorical Techniques Can Improve Your Writing*, VT. B. J., Summer 2014, at 37 (explaining tricolon is a way "to maximize the persuasive effect of words by presenting items and actions in groups of three").

<sup>26</sup> *Wooden*, 142 S. Ct. at 1067.

<sup>27</sup> *Id.* at 1070.

<sup>28</sup> *Id.* at 1069.

<sup>29</sup> *Id.*

<sup>30</sup> Greg Johnson, *Is Neil Gorsuch a Good Role Model for Legal Writers? Yes and No*, VT. B. J., Fall 2017, at 27.

<sup>31</sup> Mark Joseph Stern, *Neil Gorsuch Is a Terrible Writer*, SLATE (Jan. 23, 2018, 6:06 PM), <https://slate.com/news-and-politics/2018/01/neil-gorsuch-is-a-terrible-writer.html>.

<sup>32</sup> *Wooden*, 142 S. Ct. at 1080 (Gorsuch, J., concurring).

<sup>33</sup> *Id.* (quoting *Wooden*, 142 S. Ct. at 1071).

<sup>34</sup> *Id.* at 1081.

<sup>35</sup> *Id.* at 1079.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 1080.

<sup>38</sup> *Id.* at 1081.

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# WHAT'S NEW

## The Mid-Year Meeting — In Person and Remote. The Shape of Things to Come?

With the pandemic easing, the VBA was able to host the Mid-Year Meeting live and in-person on Friday, March 25. With 132 attendees, it was the largest live event for the Bar since the Before Time. The gathering, at the recently refurbished Lake Champlain Hilton on Burlington's waterfront, featured six CLE's along with the annual business meeting. Also returning was that feature that no digital meeting could offer, the exhibitors hall— where meeting sponsors provided information and take-aways, where the menu included breakfast, and where coffee and conversation flowed all day.

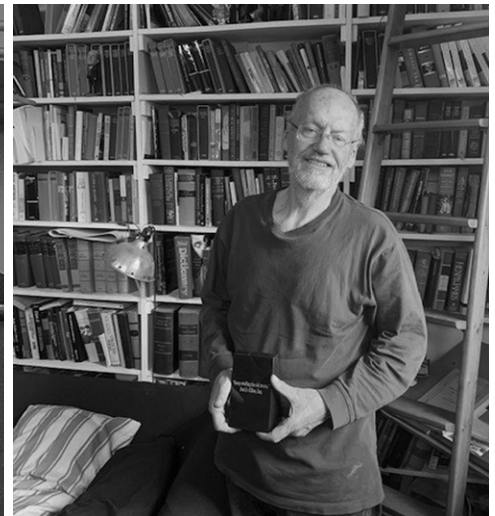
Honors, elections, and some debate were the main features of the business meeting, which was presided over by Board of Managers President Bob Fletcher. Honors went to the Pro Bono Award winners for 2022, Matthew Garcia, Joy Karnes Limoge, Sara North and Laura Savall. Paul Gillies was awarded, in absentia, a VBA President's Award in the form of engraved marble bookends for his 30-year contribution of "Ruminations" columns to the Bar Journal along with numerous other services to the profession. A stealth award (not on the agenda) was presented to Bar Counsel Mike Kennedy on the occasion of his 250<sup>th</sup> "Five for Friday" online open book ethics quiz. Chief Justice Paul Reiber co-presented the award (an engraved Yeti water bottle for the runner and athlete). Mike and the crowd gamely, and accurately, answered some of his historic quiz questions.

The slate of candidates for next year's VBA Board was approved without debate. They are: President-Elect – Judith Dillon; Treasurer – Matthew Valerio; Secretary – Edward J. Tyler; 1<sup>st</sup> Two-Year Seat – James Rodgers; 2<sup>nd</sup> Two-Year Seat – Alfonso Villegas; 3<sup>rd</sup> Two-Year Seat – Kate Lamson. Elizabeth Kruska was also elected as VBA Representative to the ABA House of Delegates.

Members were asked to vote on a proposal to allow the VBA to access some of the funds now in the Client Security Fund (which stands at approximately 1.5 million dollars) for purposes consistent with the VBA Mission. A summary of the question and the background can be found on the VBA website: <https://www.vtbar.org/client-security-fund-mym-vote/> In the end, after spirited debate, the matter was tabled until the Annual Meeting.



*Bob Fletcher, Esq. with Poverty Law Fellow Emily Kenyon, Esq.*



*Paul Gillies, Esq. received his President's Award for his decades of service to the profession at home, after the meeting. Teri Corsones, Esq., VBA Executive Director, presented it personally in his library.*




Josie Leavitt of the Vermont Bar Foundation gave an update on the group's activities for the year. This includes the current (promising) search for a new leader for the VBF. Poverty Law Fellow Emily Kenyon also gave an overview of some of her work over the last year, which included joining with Vermont Legal Aid at the end of 2021 to sue the Vermont Department of Labor over their untimely processing of unemployment benefits appeals.

The afternoon program featured two CLEs along with a break for networking and then - even more food - a lavish char-

cutterie spread in the lobby. This encouraged attendees to linger and provided an opportunity to fortify themselves at day's end. Although the end of the day wasn't the end of the meeting.

Webinars continued online the entire following week. There were 13 webinars offered over the following five weekdays with 15 total CLE hours on offer. With nearly 700 Zoom log ins (688 to be precise) the Webinars also proved very popular.

*Kim Velk, Esq. is the Director of Communication and Education at the VBA.* 

# BE WELL

## The Vagus Nerve: An Operator's Guide to Stimulating your Relaxation Response to DeStress

What is your vagus nerve? It's the longest of the cranial nerves (it comes directly from your brain) and it controls your inner nerve center – the parasympathetic nervous system. It travels down the front of your spinal column and communicates with the diaphragm. Eighty percent of the vagus nerve fibers communicate from the body to the brain and 20 percent communicate from the brain to the body.

The vagus nerve is so-named because it "wanders" like a vagabond, sending out sensory fibers from your brainstem to your visceral organs. It oversees a vast range of crucial functions, communicating motor and sensory impulses to every organ in your body. It sends an anti-inflammatory signal to other parts of the body. It is often overlooked, a kind of missing link, in the treatment of chronic inflammation. Activating your vagus nerve is good for you.

What are the benefits? Stimulating your vagus nerves turns on neurogenesis, helping your brain sprout new brain cells. It rapidly turns off the stress, hyper-arousal, and fight/flight system via the relaxation response. It sharpens your memories. Crucially, it fights inflammatory disease, a major factor in aging and poor health. Other benefits include:

- Improving high blood pressure.
- Blocking the hormone cortisol and other oxidizing agents that age and deteriorate the brain and body.
- Overcoming depression and anxiety.
- Improving sleep.
- Raising levels of human growth hormone.
- Overcoming insulin resistance.
- Turning down the allergic responses.
- Lowering the likelihood chances of stress and tension headaches.
- Benefiting mitochondria – key to maintaining optimal energy levels and not harming our DNA and RNA
- Improving your overall ability to live a longer, healthier and more energetic life.

So how can you unlock these benefits? Read on.

### Vagus Nerve Stimulation Practices

Next time you finish exercising, immerse your face in cold water. This stimulates the vagus nerve, reducing heart rate, motility of the intestines, and activates the immune

system.

Another technique, one you can try without moving from where you are now sitting (or standing), is to increase your salivation. Imagine biting into a juicy lemon. As your mouth fills with saliva, just rest your tongue in this bath – if it doesn't happen, fill mouth with small amount of warm water and rest your tongue in this bath. The practice of simply relaxing will stimulate the secretion of saliva. Now relax further, and feel your hands, feet, hips, back of the neck and head all relaxing. Breathe deeply into this feeling.

It's perhaps not surprising that loud singing or chanting is good for vagus nerve stimulation. The vibration sensation goes throughout the entire body, including the vagus nerve. Try belting out a song. Another method: 7 rounds of "OM – OH/MMM-MMM."

Mindful breathing is also effective for stimulating the vagus nerve. Try deep, slow, belly breathing : (4/6 x 6 rounds = 6 breaths/minute, repeat 3 times) and then breathe more slowly. The goal is 6 breaths per minute. Breathe more deeply, from the belly: think about expanding your abdomen and widening your rib cage as you inhale. Exhale longer than you inhale.

You can also try, "Ujjayi Breath" which involves subtle constriction of the back of the

throat (like fogging up a mirror) for three minutes. "Seated breath awareness," where you pay attention to your breath and determine the difference in your awareness of your breath from the start to the finish of the practice, is another good practice for vagus nerve stimulation.

**"Mindful breathing brings calm and relief to the mind and body."**

*Samara D. Anderson, Esq. is a Technical Regulatory Compliance Advisor for the Department of Children and Families, a Registered 200-hour Yoga Medicine™ Yoga Teacher (completing her 500-hour certification), a Mindfulness Based Stress Reduction (MBSR) Teacher-in-Training, and a social entrepreneur teaching mindfulness to stressed professionals while creating a non-profit community farm in Vermont to use therapeutic animals, nature, and mindfulness to heal people. She also Chairs the VBA Lawyer Well-Being Section. Please contact her if you or your organization want to learn more mindful practices to destress the body and the mind, while increasing overall focus and productivity (anderson\_samara@yahoo.com).*



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# Meet the Hon. Nancy Waples, Vermont's Newest Supreme Court Justice

Governor Phil Scott announced his appointment of Nancy Waples to Vermont's high court on February 25, 2022. On March 25, she was confirmed by a unanimous (27-0) vote of the Vermont Senate. She was sworn into the court on April 15. Waples, 61, was the first woman of color to serve as a Superior Court judge in Vermont and she is making history again with her accension to Vermont's high court. Shortly before her swearing in, she agreed to an interview with Bar Journal editor Kim Velk.

**KSV:** Good morning Judge. Congratulations and thanks for agreeing to talk with me.

**JNW:** It's my pleasure. Thank you for the invitation.

**KSV:** Congratulations on your confirmation, which I saw was by unanimous vote of the Vermont senate.

**JNW:** Thank you. I was honored by the senators' confidence and votes.

**KSV:** Much has been made about the fact that you're going to be the first Vermont Supreme Court Justice who's Chinese American. And, although there's a lot more about you that we want to talk about, what are your feelings about this barrier being broken? Are you happy to be seen as a groundbreaker?

**JNW:** I am proud of the distinction. I think honestly, in my mind and my heart, the real trailblazers are my parents, who had to overcome extraordinary odds to be successful in this country. I'm reaping the benefit of their efforts. And I'm grateful that my contribution to our judiciary will be as the first person of color...I was the first to be appointed on the trial bench, now also to the appellate bench. To me this is a great honor. I hope it will encourage people of color to seek a career in the law. I hope my personal journey and having to overcome obstacles will encourage other minorities to seek judicial appointment.

**KSV:** Given that Vermont is famous, or infamous, for being one of the least diverse states in the country, what's been your experience here? Has it been all positive with you being a standout in that way?

**JNW:** (Laughing) Are you asking me from the perspective of a judicial officer or as an attorney?

**KSV:** Let's say both, if you don't mind.

**JNW:** When I walked into a courtroom on my first day as a practicing attorney in Vermont - I was in Burlington and I was handling a criminal matter - and I walked into the courtroom about 10, 15 minutes before the hearing was to begin to organize myself. One of the court officers approached me and said that I wasn't permitted in the courtroom until the court case was called. I said, 'Oh the courtroom was open and I'm just coming in here to settle down and organize myself.' He said, 'Well, you're the translator, so you'll have to wait until the case is called.' I said, 'No, no, I'm, I'm not the translator.' And then he said, 'Well, then you're the defendant and you have to wait for your attorney to arrive.'

**KSV:** Wow.

**JNW:** Then I told him I was the attorney representing client X on his docket sheet.

**KSV:** How was that information received?

**JNW:** He was surprised, then mortified and apologetic.

**KSV:** I hope you didn't have a lot more experiences like that one...

**JNW:** No. (Laughing) I think he spread the word...

**KSV:** I do have to ask, with Ketanji Brown Jackson's nomination to the US Supreme Court being almost contemporaneous with yours to our supreme court, what are your thoughts on that? Do you see yourself as part of a moment in this country?

**JNW:** My thoughts are that, first off, I will clarify that Governor Scott got his announcement out first (laughing) then President Biden followed a few minutes later with his announcement.

**KSV:** As is so often the case, Vermont leading the way...

**JNW:** It is Vermont leading the way! It's also an unfortunate contrast between our state level and the national level politics. On the national level, things are so polarized. While on our state level even though our representatives are from different parties, they can find common ground and work towards compromise, and they are respectful of each other's views.

**KSV:** So safe to say your, process to confirmation obviously was much less trying than hers was.



**JNW:** Yes. The Senate Judiciary Committee was welcoming and respectful.

**KSV:** Certainly there's been a lot of talk about her being a role model. Are you comfortable with the idea of being a role model?

**JNW:** I'm comfortable with being a role model, as long as I can encourage people, particularly people of color, to pursue a career in the law. If I influence anyone's career choices in a positive way, or if there is anything I can do to forward that interest, or help that person in his or her career, I would be very proud of that. At the end of the day, though, I hope I will be remembered as a good role model for all attorneys who practice in our courts.

**KSV:** With the news of your appointment, you must be hearing from people all over the place. Has there been anything that's surprised you about the response?

**JNW:** Yes, I have heard from some old dear friends, which is always welcome, especially when you get to my age. I mean, you often think of people you've known or had experiences with over the years, and you wonder how they're doing, and then, suddenly, to get a phone call, 'Congratulations! and have a chance catch up. That's lovely, and I've enjoyed that. And of course, the conversation will end with the



old friend saying, 'Well, I know Vermont is really beautiful and I haven't gotten the chance to get there, so I'm so looking forward to visit and we would love to stay with you.' (Laughing)

**KSV:** Are there judges you've worked with who have been role models for you?

**JNW:** One of my greatest role models and mentors is the late Hon. Joseph Sullivan, who was the father of my dear friend, Joan Sullivan Higgins, from law school. Later, Joan and I worked together in the Manhattan District Attorney's Office before I moved to Vermont. Judge Sullivan was one of the most respected appellate jurists in New York. He served for thirty years and has the remarkable distinction of being the longest serving Appellate Justice in New York state's history. He has been a mentor who has helped guide me. He has been a reference (laughing) in every job application, every judicial application, and then was a reference for my sons when they were applying to law school!

**KSV:** Oh, I didn't know your sons are headed that way, we'll follow up on that - but along with Joseph Sullivan is there anybody else you want to recognize?

**JNW:** When I was a practicing attorney, federal judges Bill Sessions and Chris Reiss encouraged me to apply to the bench. Both were so supportive throughout the process. When I was first appointed as a judge, I was very fortunate that Judges Mary Teachout, Jim Crucitti, Helen Toor, Tom Zonay and Tom Devine became early mentors. I found them to be lively, patient, open to frank exchange of opinions and tremendous resources of great intellect for a new judge. Chief Superior Judge Brian Grearson was wonderful as he shepherded me from my transition as a practicing attorney to the bench and was an invaluable resource throughout my career as a trial judge.

**KSV:** Obviously our readership knows that judges and justices are obliged to follow the law, but we also know that you're all human beings with a unique life history. Do you feel that your background and personal experience means that you're going to be bringing something to the court that perhaps it hasn't had in the past?

**JNW:** I am a minority. I grew up biculturally, and I come from a different perspective and life experiences. I spent part of my life living in Chinatown and then public housing in a major city. I grew up in a family business where we earned our living. For me English is a second language and fluency didn't come until later in my primary years, but I enjoy the written and spoken language as an art. As a learned language, it does seem like an art. And it's so differ-



*The Waples family with Gov. Phil Scott in the Vermont Supreme Court on April 15, 2022. From right to left, Lane Waples, Gov. Scott, Nancy Waples, Greg Waples, Graeme Waples.*

ent from the Chinese language in terms of structure and in terms of just how you express certain phrases. So, I'm grateful that I have and can think in two different languages.

**KSV:** I would say all those things are going to make you unique on our court. Certainly, your Chinese language skills are unique. I doubt that anyone in the history of the Vermont judiciary has had those. So maybe at this point sort of back up and go back to your beginnings?

**JNW:** My parents as a young couple in their early twenties fled the communist revolution in China with little more than the clothes on their backs and hoped for immigration to this country. Due to the exclusion laws at that time, they could not enter the U.S. so they made their way to Toronto, Canada. I think many do not realize that the Chinese are the only group of immigrants ever to have been excluded from entry into the US based purely on race. My parents couldn't speak English, they were poor and they left their families behind in China. But they worked hard to provide for me and my three siblings and to be able to send money back to their families in China. My father worked as a waiter or cook in Chinese restaurants and my mother worked as a seamstress. When the exclusion laws were replaced by ethnic quotas, my father saw an opportunity to at least get himself into the U.S. with the hope of later bringing us all here. My mother raised me and my siblings for several years by herself. Eventually, we reunited in this country.

**KSV:** So how old were you when you came to the U.S.?

**JNW:** I was about 10.

**KSV:** Take it from there. Then what hap-

pened?

**JNW:** My parents moved to a suburb outside of New York City and eventually saved up enough money to open their own Chinese restaurant where my siblings and I worked side by side with our parents to earn a living. After school, weekends, school vacations and holidays, my siblings and I worked at our restaurant. After graduating from high school, I attended the College of William and Mary. After graduation from college, I worked for two years for a non-profit and still worked at our restaurant before attending law school at St. John's University in New York City.

**KSV:** So how did law school come into the picture?

**JNW:** When I was in high school, I knew I wanted to be a lawyer. My parents spoke very limited English. When I was in the 10<sup>th</sup> grade my father had hoped to become a US citizen. With his lack of English proficiency, I had to teach him the basics of civics and government. And one thing I did was, I translated the U.S. Constitution for him verbatim. That was where I learned the enduring principles in our Constitution and how it was meant to protect its citizens. For me, what an important concept because of the hardships we faced growing up. I thought what a remarkable, remarkable document and wanted to learn it more and thought the best way to learn it would be a career in the law.

**KSV:** Can you step me through your legal career?

**JNW:** Upon graduation, I was hired as an assistant district attorney in the Manhattan District Attorney's Office by Robert Morgenthau. He gave me my first chance to seek justice in a courtroom. He set the tone in his office that as prosecutors we

were there to do important work without fear or favor. That principle subsequently provided a foundation for me as a judge. I started in the appeals division and then transferred to the trial division. I was quite fortunate that starting as a young ADA in the Appeals Division gave me the opportunity to argue in the New York Court of Appeals and the Second Circuit Court of Appeals.

**KSV:** Interesting. So you were only a, a year or two out of law school at that point?

**JNW:** Yes. I was two years out of law school, and I was arguing in the New York Court of Appeals and the Second Circuit Court of Appeals. The DA's office was an incredible office filled with talented and accomplished lawyers who trained and mentored the legal staff. It was just a tremendous learning ground for a young lawyer.

**KSV:** Did you have a judgeship or something like that in mind when you started your legal career?

**JNW:** No. Never. I didn't think it would ever be in the realm of possibility.

**KSV:** What is it you thought you would be doing?

**JNW:** I actually thought that I would probably be a career prosecutor in Manhattan and stay in Manhattan. I loved the job...

**KSV:** Okay. But here you are in Vermont. You're going to have to tell me how that happened.

**JNW:** So, I met my husband, Greg Waples, who was a prosecutor in the Manhattan DA's office. He was one of the senior trial counsels and had been in the office longer than I had been. He was really, really, ready to leave New York, finding that it was an exhausting place to live. By this time I was in the trial division and truly enjoyed the work but we both realized that raising a family would be difficult in the city. So we were looking for a place that we both loved and we had spent many vacations in Vermont and it checked all the boxes. Greg applied for a job as an Assistant U.S. Attorney and was offered a position. I stayed in New York for a couple years, before I moved up to Vermont.

**KSV:** When did you start working in Vermont?

**JNW:** Year? I think it was 1993 or 1994.

**KSV:** And were you also an Assistant U.S. attorney?

**JNW:** Not initially, I was in a small private firm in Burlington doing criminal defense work. And then I was offered a job as an Assistant U.S. Attorney in 2002.

**KSV:** Where did you go from there?

**JNW:** I joined Hoff Curtis in Burlington. I practiced mostly as a criminal defense attorney for probably 10 years before I was appointed to the bench.

**KSV:** You have two sons and where are they now in their lives?

**JNW:** Lane is a third-year law student at Brooklyn Law School. He will start as an associate attorney at Fried Frank in New York City next fall. Graeme is a second year law student at Brooklyn Law School, as well. This summer he will be a law clerk for the Brooklyn County criminal courts in New York City.

**KSV:** So the law is a real family affair ...

**JNW:** My husband and I never pushed our sons to go into the law. I think it's from their own observations of the satisfaction that we've had from our careers. I hope that inspired them to go to law school because they saw parents who respected the law and valued the law and understood the importance that you, as a lawyer, must use the law to help others.

**KSV:** Let me ask you about your move to the bench. So you were nominated by Governor Shumlin ...

**JNW:** He nominated me in December, 2014. I was sworn in January, 2015.

**KSV:** When did your thoughts turn in the direction of becoming a judge?

**JNW:** Sometimes I'm not quite sure. I think what probably turned me towards the bench was that I had spent my career on both sides of criminal cases in state and federal, courts, and I could often see the strength and weaknesses of my cases. And I think having that perspective, I thought it would be challenging and really fulfilling to be able to sit as a judge and help parties navigate their controversies. One of my closest friends is Elizabeth Evelt, who is the judicial assistant for Judge Sessions. One day she said to me, 'oh, you have to think about the bench,' something casual like that. And I think it probably came from Elizabeth, but, once I expressed an interest, I got invaluable support from judges that I appeared before and attorneys that I respected and admired. So encouragement and perseverance is what kept me going during the process.

**KSV:** You did that for quite a while because here we are in 2022...

**JNW:** I have had the privilege of serving as a superior court judge for seven years and I am proud that in my seven years I've presided on every single docket and I have served in eight of the counties in Vermont.

**KSV:** Amazing, and you have done a lot

of, a lot of driving! When did you find out you'd been nominated for the Supreme Court?

**JNW:** While I was driving. During my last rotation on the Superior Court, I was traveling to three different counties on a weekly basis. I was spending a lot of time in the car again. While driving home one day after sitting in Addison County, the phone rang and, and the person on the phone said, 'Hi Nancy.' And I said, 'Yes?' I didn't recognize the voice. He said, "This is Phil Scott." He told me he wanted to nominate me to be the next associate justice. I couldn't believe it. I asked him if it would be undignified, if I screamed in his ear! He laughed and indeed I screamed. I was on Bluetooth during the call and the Governor suggested I pull over and stop the car so we could discuss details. I was so excited. So that was very sound advice from the Governor.

**KSV:** So, safe to say, you were interested?

**JNW:** Yes. Definitely interested! I definitely said yes in that scream.

**KSV:** What was your family's reaction to your nomination?

**JNW:** I have been blessed with a supportive and inspirational family. My husband and sons were elated and my father and siblings were thrilled. When you grow up in a family that works together to earn a living, I think your individual successes becomes your family's successes. My father, who came here from the humblest of beginnings, told me he never dreamed of this possibility when he was finally able to step foot in this country. My only wish is that my late mother would have been here to see this. She was the most loving person I have ever known. She had the hardest life but she was never bitter. She gave me what it was to persevere, even when you have had everything taken away from you. I carry her in my heart all the time.

**KSV:** What do you think she would have to say to you about this? I'm sure she would be very proud...

**JNW:** She was always my best cheerleader, so I know she would be proud. But, she wouldn't want me to be overly confident. With her immigrant reserve, she would probably rein me a little and remind me of her advice when I was appointed to the Superior Court, 'Don't let it go to your head. You still work for the people. And don't let them down.'

**KSV:** And what about your husband and children? How did they respond?

**JNW:** When my sons were growing up they would go to my husband and ask for something and he would say no, and then they'd look to each other and say, 'Well,

then let's go to the court of appeals,' and then they would come to me to get a final decision.

**KSV:** And now that will have a special meaning...

**JNW:** Yes (laughing)

**KSV:** I wanted to ask you a little about your interests outside of work. I know you're very busy with work, but you must do other things too.

**JNW:** I have found that a healthy lifestyle and a judicial career are not mutually exclusive. I'm very fortunate in that I've maintained close support from a small circle of old friends. I learned early on the basics of stress management so that I could work efficiently. I practice a lot of yoga. I jog on a fairly regular basis. That doesn't mean I go far or go fast. I just try to move. I am often replenished after long walks with my dogs, and I enjoy that very much. I'm a

passionate, but mundane golfer, very mundane. I'm an opera buff who can't carry a tune. I'm an avid gardener but I've learned to garden with an attitude that the garden is 'good enough.' I've learned to dial down perfectionism which has spared me from excessive weeding.

**KSV:** It just sounds like you're very busy, but, I'm wondering with how you grew up, if you've always been that way - sort of straight out all the time?

**JNW:** I usually am, but, at least, at least I am not wrapping wantons, (laughing) or making egg rolls. I could do that in my sleep. I could probably do 300 with my eyes closed.

**KSV:** That's amazing. Do you still do that kind of thing sometimes, or have you had enough?

**JNW:** Yes, when my family asks, I'll make them. I make dumplings for the staff. I enjoy doing that. I'll get you some, I promise.

**KSV:** Okay (Laughing) That's great. The last question I had for you is, having seen lots of lawyers in practice, do you have tips for our members?

**JNW:** Due to remote hearings and since we're not live in a courtroom, attorneys sometimes talk over each other on video. Please don't talk over each other and be respectful of your adversary. Promptness is always appreciated, and most importantly be prepared for your client. I do miss the majesty of the courtroom. I look forward to returning to the courtroom for live proceedings.

**KSV:** Thank you so much for talking with me.

**JNW:** It has been fun and a complete delight. Thank you.



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The Vermont Bar Association's low bono programs pay attorneys a reduced fee to represent disadvantaged clients in a wide variety of legal matters. Hone your skills while helping fellow Vermonters. For more information or to join the referral panel, contact Mary Ashcroft, VBA Legal Access Coordinator at [mashcroft@vtbar.org](mailto:mashcroft@vtbar.org), or by calling 802-775-5189.

### **NEW: Transactional Lawyers Needed**

The VBA and Vermont Law School are partnering with the Small Business Administration to provide low bono legal services to small business owners. We need transactional and business lawyers to work with small business clients on matters including contracts and leases, business entity formation, protection of intellectual property, insurance and employment matters. These are non-litigation, short-term legal assistance cases.

Lawyers will be paid the low bono rate of \$75/ hour for 5-10 hours of work for each small business client.

### **Family Law Attorneys Needed:**

The VBA's VOCA Low Bono Project receives many requests for legal help for domestic violence victims who are struggling with family law issues. We don't have enough private attorneys willing to take on these cases, which range from parentage, divorce, parental rights, property and debt division, visitation, relief from abuse, child support and post judgement enforcement matters.

With a grant from the U.S. DOJ through the Vermont Center for Crime Victim Services, our VOCA Low Bono Project pays \$75/hour for 10-20 hours per case.

We also need family attorneys to advise and negotiate for adoptive/foster parents who agree to enter post adoption contact agreements. These are very short-term matters for which lawyers receive \$75/hour for up to 3 hours per case, paid for with a grant from the Vermont Bar Foundation.

### **Guardianship Practitioners Needed:**

The VBA's Statewide County Low Bono Project seeks private attorneys to represent respondents in adult involuntary guardianship cases in Probate Division throughout the state. This is rewarding, short-term representation of the elderly and disabled young adults in establishment proceedings. The Project pays \$75/hour for 3 hours with our VBA IOLTA grant. As our state's population ages, we have more clients in need of representation, so consider signing up to help out.

### **General Practitioners Needed:**

Our low bono projects are always in need of lawyers who practice in Civil Division and are willing to represent litigants in eviction matters, homeowners defending against foreclosure, and victims of harassment who need no-stalking orders. The low bono rate of \$75/hour will be paid for between 5-20 hours of legal work in the matters.



# A Short Guide to Vermont Appellate Practice

## Introduction

The Vermont Supreme Court has seen significant changes in the past few years. Like other workplaces around the world, the Court has had to grapple with the myriad personal, professional, and logistical disruptions that accompanied the COVID-19 pandemic. At the same time, the Court implemented electronic filing and adopted a comprehensive update to its rules of practice. And on top of all that, three of the Court's five seats have recently turned over—with Karen Carroll succeeding John Dooley in 2017, William Cohen succeeding Marylyn Skoglund in 2019, and Nancy Waples succeeding Beth Robinson earlier this year.

Given all these changes, members of the bar may find it helpful or interesting to review the current state of practice at the Vermont Supreme Court. Every appeal of course has its own idiosyncrasies, and this guide does not purport to address them all. Nor is this guide intended as a primer on electronic filing in the Vermont Supreme Court or elsewhere; those wishing to educate themselves on that topic already have ample resources at their disposal.<sup>1</sup> Instead, this guide aims to introduce the novice practitioner, and refresh the experienced one, on the fundamentals of practice and procedure in Vermont's only appellate court.<sup>2</sup>

## The jurisdiction of the Vermont Supreme Court

The judicial power in Vermont is vested in a unified court system made up of a Supreme Court in Montpelier; a general-jurisdiction Superior Court divided into 14 county-level units and civil, criminal, family, environmental and probate divisions; and a Judicial Bureau, which has jurisdiction over traffic violations and other low-level offenses.<sup>3</sup>

With limited exceptions, the Vermont Supreme Court has "exclusive" appellate jurisdiction to hear appeals from "judgments, rulings, and orders of the Superior Court, administrative agencies, boards, commissions, and officers."<sup>4</sup> Vermont is thus one of only eight states in the country without a general intermediate appellate court.<sup>5</sup>

The Vermont Supreme Court also has "original jurisdiction, concurrent with the Superior Court, of proceedings in certiorari, mandamus, prohibition, and quo warranto"—i.e., the traditional "extraordinary writs"—and supplementary jurisdic-

tion to issue all other writs and orders "necessary or appropriate in aid of its appellate jurisdiction" and "that may be necessary to the furtherance of justice and the regular execution of the law."<sup>6</sup>

The Supreme Court is further responsible for administering the court system, disciplining attorneys and judges, and promulgating rules of practice.<sup>7</sup> The Court has adopted the Vermont Rules of Appellate Procedure to "govern procedure in all appeals to the Supreme Court from the Superior Court or an administrative board or agency and in matters of original jurisdiction."<sup>8</sup>

## Getting to the Vermont Supreme Court

There are four ways to get your case before the Vermont Supreme Court: (1) you can appeal a lower court's final decision as of right; (2) before the lower court has issued a final decision, you can request permission for interlocutory appellate review of an order or legal question; (3) if normal appellate procedures are unavailable, you can file a petition for extraordinary relief as an original action; and (4) if litigating a question of Vermont law in federal court, you can ask the federal court to certify that question to the Vermont Supreme Court.

### 1. Appeal from a final decision

An appeal from a final decision is the preferred and by far the most common way to invoke the Supreme Court's jurisdiction.<sup>9</sup> The process is straightforward. Within 30 days of entry of the lower court's final decision, an aggrieved party must file a notice of appeal with the lower court clerk; provide copies of the notice to the Supreme Court clerk and the other parties; and—unless exempt—pay a filing fee.<sup>10</sup> The 30-day limit is jurisdictional, meaning that if a party misses the deadline, even by a day, the Supreme Court lacks jurisdiction and must dismiss the appeal.<sup>11</sup>

There are, however, several important exceptions to the 30-day limit. *First*, if one party timely files a notice of appeal, any other party may file a cross-appeal within 14 days thereafter, or until the original appeal period expires, whichever is later.<sup>12</sup> *Second*, if any of a number of post-judgment motions are timely filed, the full appeal period does not begin to run until the lower court enters "an order disposing of the last remaining motion."<sup>13</sup> *Third*, in a criminal case, the State generally has only "7 business days" to notice an appeal.<sup>14</sup> And *finally*, the lower court has discretion to briefly extend the appeal period if the party seeking the ex-

tension files a motion within 30 days after the original appeal period expired and can show good cause or excusable neglect.<sup>15</sup>

Typically, an aggrieved party can appeal a lower court's final decision as of right. But the Legislature has declared that in some situations—for example, small claims, Judicial Bureau, and mortgage foreclosure cases—permission must be obtained before a Superior Court's final decision can be appealed to the Supreme Court.<sup>16</sup> In those cases, the party wishing to appeal must seek permission in the Superior Court within 14 days of judgment being entered.<sup>17</sup> If a second request for permission is available, the party has another 14 days to request permission directly from the Supreme Court.<sup>18</sup>

### 2. Interlocutory appeal

A party may also seek to have the Vermont Supreme Court hear its case, or at least part of it, before the lower court has entered final judgment. Although the Supreme Court has long articulated a general policy against "piecemeal" appellate review, there are several acceptable—if narrow—ways to advance a legal question from the lower court to the Supreme Court before final judgment.<sup>19</sup>

If the parties and the lower court agree that a legal question in the case both merits immediate appellate review and is potentially dispositive, the lower court may issue an "order of report" certifying the question to the Supreme Court at any time before entry of final judgment.<sup>20</sup>

Alternatively, an aggrieved party may independently move for permission to appeal an interlocutory lower court order.<sup>21</sup> To obtain permission, the moving party must show that the order sought to be appealed either (1) involves a controlling question of law about which there exists a substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation;<sup>22</sup> or (2) is a "collateral final order" that conclusively determines a disputed question, resolves an important issue completely separate from the merits of the action, and will be unreviewable on appeal from a final judgment.<sup>23</sup> In either case, permission generally must be obtained from the lower court within 14 days after entry of the challenged order, or from the Supreme Court within 14 days of the lower court's denial of permission.<sup>24</sup>

Notwithstanding this general 14-day period, the State in a criminal case must seek permission to appeal within "7 busi-

ness days" after the challenged order is entered.<sup>25</sup> This aligns with the State's time to appeal a final decision in a criminal case.<sup>26</sup> In felony cases, the lower court is required to permit the State to appeal a pretrial ruling that either grants a motion to suppress evidence; grants a motion to have a confession declared inadmissible; or grants or refuses other relief, the effect of which "is to seriously impede (but not completely foreclose) continuation of the prosecution."<sup>27</sup>

Once an interlocutory appeal is accepted by the Supreme Court, it will proceed in the same manner as an appeal from a final decision.

### 3. Petition for Extraordinary Relief

A party may invoke the Vermont Supreme Court's narrow original jurisdiction by filing a petition for extraordinary relief under Vermont Rule of Appellate Procedure 21. The rule abolishes and replaces the traditional "extraordinary writs of certiorari, mandamus, prohibition, and quo warranto" and is now the sole method to obtain from the Supreme Court the substantive relief that those writs formerly provided.<sup>28</sup> A petition for extraordinary relief should be styled as a complaint, including a verified allegation or supporting affidavit concisely explaining that extraordinary relief is warranted because "there is no adequate remedy" under either the normal appellate procedures or through proceedings for extraordinary relief in the Superior Court.<sup>29</sup> Rule 21 provides that original actions for extraordinary relief will be governed by the Rules of Civil Procedure, but in practice, once a petition is accepted, the Court may issue an order that sets a briefing and argument schedule, similar to a normal appeal.<sup>30</sup>

### 4. Certification from a federal court

Although rarely invoked, the Vermont Supreme Court, like many other state high courts, has authority to accept certified questions of Vermont law from a federal court.<sup>31</sup> Any federal court—district, circuit, or the U.S. Supreme Court—may certify a question to the Vermont Supreme Court "if the answer might determine an issue in pending litigation and there is no clear and controlling Vermont precedent."<sup>32</sup> The Court has absolute discretion to decline to answer any question certified to it and need not providing any reasons for its decision.<sup>33</sup> If a certified question is accepted, the parties will brief and argue the question according to normal appellate procedures and the Supreme Court will answer the question in a written opinion.<sup>34</sup>

### Paying the "Entry Fee"

In order for an appeal to move forward in the Vermont Supreme Court, the party seeking review must pay an "entry fee,"

which is the statutory fee required to initiate a cause in the Supreme Court.<sup>35</sup> This entry fee is distinct from, and in addition to, any applicable electronic filing fees.<sup>36</sup> In appeals from a final decision, the entry fee is due when the notice of appeal is filed, or if the appeal is from an administrative agency, within 14 days after the appeal is docketed in the Supreme Court.<sup>37</sup> In all other appeals, no entry fee is due until the appeal is accepted by the Supreme Court.<sup>38</sup> Failure to pay the entry fee can result in dismissal of the appeal.<sup>39</sup> Parties may seek to waive appellate and other court fees based on financial hardship.<sup>40</sup>

### Stays and Injunctions Pending Appeal

In Vermont, the filing of an appeal automatically stays enforcement of the judgment in many cases.<sup>41</sup> In cases where a stay is not automatic, a party ordinarily must first request a stay or injunction pending appeal from the lower court.<sup>42</sup> A stay or injunction pending appeal can be requested from the Supreme Court if a party can show that the lower court already denied the requested relief or that seeking relief from the lower court would be impractical.<sup>43</sup> The Supreme Court may condition relief on a party's filing a bond or other appropriate security in the lower court.<sup>44</sup>

### Completing the Record

Once an appeal has been taken, the next step is to complete the record on appeal, which consists of (1) all "documents, data, and exhibits" filed in the lower court; (2) any transcript or authorized recording of the lower court proceedings; and (3) the record of actions from the lower court.<sup>45</sup>

Following a notice of appeal, the lower court clerk must promptly transmit all documents in the lower court's electronic case file, as well as any documents or audio or video exhibits not in the electronic case file but which are part of the record on appeal.<sup>46</sup> Note, however, that unless directed to do so by a party or the Supreme Court clerk, the lower court will not send "unusually bulky or heavy documents, and physical exhibits."<sup>47</sup>

Now that all Vermont courts have transitioned to electronic filing, the electronic case file is transmitted from the Superior Court to the Supreme Court through the electronic filing system. After the Supreme Court receives an appeal from the Superior Court, and within 14 days of docketing the appeal, the Supreme Court docket clerk must create an electronic "appeal volume" that contains all the PDF documents in the electronic case file.<sup>48</sup> In appeals from administrative agencies, which do not use the electronic filing system, the administrative clerk must still transmit the record doc-

uments to the Supreme Court either electronically or in hard copy. No electronic appeal volume is created in those cases.

The parties are responsible for ordering or otherwise obtaining the necessary transcripts.<sup>49</sup> Failure to order a transcript that is necessary "for informed appellate review" of a party's argument will result in waiver of that argument.<sup>50</sup>

Within 14 days of taking an appeal, the appellant must file and serve a docketing statement on a court-prescribed form.<sup>51</sup> The appellee must do the same within 14 days thereafter.<sup>52</sup> The docketing statement includes basic information about the case and the parties, the issues to be raised, and identifies the transcripts that will be necessary to consider the appeal.<sup>53</sup> The docketing statement also asks whether the appeal is "appropriate for expedited disposition by a three-Justice panel," also known as the "rocket docket."<sup>54</sup> Details of the court's rocket docket procedures are discussed below.

Counsel are well-advised to pay close attention to the steps involved in completing the record to ensure that the lower court provides the Supreme Court with all the relevant documents upon which counsel intends to rely, including exhibits, stipulations, and interlocutory orders which—because of human or technological errors and limitations—may not have not included in the electronic case file. Questions and concerns about the record should be brought promptly to the attention of the Supreme Court docketing clerk.<sup>55</sup>

Once all the documents and transcripts in the record have been received, the Supreme Court will inform the parties that the record is complete.<sup>56</sup> This notice starts the clock running on the parties' briefing deadlines.<sup>57</sup>

### Motions

Motion practice at the Vermont Supreme Court is relatively straightforward. Unless otherwise provided by the Rules of Appellate procedure, any application for an order or other relief from the Supreme Court should be made in writing by motion.<sup>58</sup> The motion "must state with particularity the grounds for the motion and the order or relief sought," and may include any necessary supporting affidavits or other materials.<sup>59</sup> Unless the Court otherwise orders, a non-moving party has 14 days to respond to a motion.<sup>60</sup> Replies in support of motions are neither expressly permitted nor prohibited.

The Court will generally wait to receive a response (but not a reply) before it rules on a motion, although it may rule on procedural motions—including extension requests—at any time even if a response has not been received.<sup>61</sup>

Motion papers should include a caption

stating the Supreme Court docket number and the name of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. Motion papers should otherwise follow the same formatting requirements as briefs, discussed below.<sup>62</sup> In order to ensure that the Supreme Court docketing clerk clearly understands the relief being requested when viewing motions through the electronic-filing portal, motions requesting independent types of relief should be filed as separate documents.<sup>63</sup> Motions requesting emergency or expedited relief should clearly so indicate.

### Briefs and Printed Case

Absent any extensions, the appellant's brief is due at the Vermont Supreme Court within 30 days after the record on appeal is complete, the appellee's brief is due 21 days after the appellant's brief is served, and the appellant's reply brief is due within 14 days after the appellee's brief is served.<sup>64</sup> In a cross-appeal, the cross-appellant's reply is due 14 days after service of the appellant's reply.<sup>65</sup> The brief of an amicus curiae, if allowed, is due at the same time as the main brief of the party the amicus is supporting, unless all parties agree to a different time.<sup>66</sup> Any of these deadlines may be extended by order of the Court.<sup>67</sup>

Except in juvenile cases, the parties may stipulate to extend the briefing schedule—up to double the standard period—once for each brief.<sup>68</sup> A separate stipulation should be filed for each briefing deadline, and should clearly state the period being extended, the date to which the period is extended, and the reason for the extension.<sup>69</sup> Any further extensions should be made by motion and demonstrate good cause.<sup>70</sup>

If an appellant fails to file its brief, the appeal is subject to dismissal; if an appellee fails to file, it will not be heard at oral argument absent the Court's permission.<sup>71</sup>

The formatting requirements for briefs have changed significantly with the advent of electronic filing.<sup>72</sup> These changes—notably a requirement of 13-point font and 1.2 spacing between lines—were made after consideration of best practices from the American Bar Association and reflect that the justices and court staff now primarily read briefs electronically.<sup>73</sup>

In cases where an electronic appeal volume has been created parties no longer need to file an appendix or “printed case” of relevant materials from the record on appeal.<sup>74</sup> A printed case remains mandatory, however, in cases without an appeal volume such as appeals from most administrative agencies.<sup>75</sup> A party may also choose to file a printed case if the appeal volume is incomplete (for example, if not all paper records were scanned in electronic form by the trial

court) or if the appeal volume is very large and a printed case including relevant excerpts from the record would be more useful to the Court and the parties.<sup>76</sup>

### The Rocket Docket

The rocket docket is an innovation that Vermont first implemented in 1991 to deal with a rising appellate caseload, in lieu of creating an intermediate appellate court.<sup>77</sup> As noted above, the rocket docket is a rotating 3-justice panel of the Court that resolves a portion of the Court's docket on an expedited basis. The intent of the rocket docket procedures is to expeditiously resolve those cases that do not necessarily require consideration by the full Court.<sup>78</sup> Under current practice, court staff make the initial decision to assign a case to the rocket docket, but if any justice objects, the case will be heard by the full Court.<sup>79</sup>

An appeal is not appropriate for disposition on the rocket docket if “(1) the Court may be establishing a new rule of law, altering or modifying an existing rule, or applying an established rule to a novel fact situation; (2) the case involves a legal issue of substantial public interest; (3) the Court may be criticizing existing law; or (4) the Court may be resolving conflict or apparent conflict between three-justice panels of the Court.”<sup>80</sup>

It is not uncommon for an appeal to be scheduled for argument or submission on the rocket docket term but ultimately heard by the full Court on short notice, presumably because one of the justices concluded after reviewing the file that full Court disposition was warranted. Rocket docket decisions must be unanimous, and if they are not, they will be reargued before the full Court.<sup>81</sup>

An unpublished decision by a 3-justice panel is not controlling precedent except as to narrow issues involving the same parties and dispute like preclusion and law-of-the-case, but the decision may be cited as persuasive authority in future cases.<sup>82</sup> Decisions by 3-justice panels are generally issued by the Court within several days of the term for which they are scheduled, as compared to several months for decisions by the full Court. Appeals decided on the rocket docket are affirmed at a significantly higher rate than appeals decided by the full Court.<sup>83</sup>

### Argument

Once an appeal is fully briefed, it will be scheduled for consideration at the next available term, either on the rocket docket or by the full Court.<sup>84</sup> Both sit once a month, although the full Court generally does not sit for a regular term in the summer months. Once the appeal is scheduled, the Court

will provide notice to the parties and set a deadline for requesting oral argument. If any party requests argument, both sides will have the opportunity to present argument at the scheduled term. Arguments before the full Court are 15 minutes per side, while arguments on the rocket docket are 5 minutes per side. The Court may grant additional argument time, and it regularly does so in complex cases.<sup>85</sup> If no party requests arguments, the case will be decided on the briefs submitted unless the Court *sua sponte* sets the case for argument.<sup>86</sup>

The Vermont Supreme Court takes a fairly “hands off” approach to how parties handle their argument time. An appellant who requests rebuttal time will only be permitted to actually speak on rebuttal if they have managed to step down from the podium at the end of their primary argument with some of their allotted time remaining. Many unassuming lawyers have walked up to the podium prepared to deliver a carefully prepared rebuttal argument only to be informed by the bailiff that “appellant has no time remaining.” Likewise, in cases involving multiple parties or amici, it is counsel's responsibility to determine how to divide time amongst themselves. The Court generally will not provide a detailed argument schedule that divides time among co-counsel. And although a party may cede some of its time to an amicus curiae who filed a supporting brief, an amicus is not entitled to its own argument time absent permission of the Court, which is rarely granted.<sup>87</sup>

Although remote argument at the Vermont Supreme Court was previously reserved mostly for self-represented parties who were incarcerated in state correctional facilities, the COVID-19 pandemic led to the Court to begin holding oral arguments exclusively via video-conference, with a live-stream for the public available on YouTube.<sup>88</sup> While the Court's exact plans for remote hearings in the future are still being determined, under the current rules, full-Court arguments are expected to be held in-person once the COVID-19 judicial emergency has expired, but any party with a case on the rocket docket may request to present oral argument by video conference no later than 7 days before the scheduled argument date.<sup>89</sup>

### Reargument

A party who loses at the Vermont Supreme Court may file a motion for rearargument within 14 days after entry of judgment, although the Court may extend that deadline.<sup>90</sup> A motion for rearargument “must state with particularity the points of law or fact—presented in the briefs upon the original argument—that the moving party believes the Court has overlooked or misap-



prehended and that would probably affect the result."<sup>91</sup>

Unless the Court requests, no answer to a motion for reargument is permitted, but ordinarily reargument will not be granted in the absence of such a request.<sup>92</sup>

The Court typically disposes of motion for reargument with a short order indicating that the standard for reargument has not been met. The Court, however, may take any number of other actions in response to a reargument motion including amending the opinion, ordering additional briefing, or restoring the case to the calendar for reargument or resubmission.<sup>93</sup>

The Court's mandate will not issue until after either any motions for reargument have been resolved or the reargument period has passed.<sup>94</sup>

## Conclusion

Although some of the personnel and procedures at the Vermont Supreme Court have changed over the past few years, the basics of practice at the Court remain the same: parties obtain appellate review of lower court decisions by filing briefs and presenting oral argument. Hopefully this guide may be of some assistance to counsel engaged in that worthy endeavor.

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<sup>1</sup> See generally Vt. Judiciary, Electronic Filing, <https://www.vermontjudiciary.org/about-vermont-judiciary/electronic-access/electronic-filing> (last visited Mar. 29, 2022).

<sup>2</sup> This guide draws from two recent CLE programs in which the author participated in, as well as guidance contained on the Vermont Supreme Court's website. See Vt. Supreme Ct., Appellate E-Filing Presentation (Aug. 31, 2021); Vt. Bar Ass'n, Appellate Practice Update (Oct. 15, 2021); Vt. Supreme Ct., Appealing to the Vermont Supreme Court, <https://www.vermontjudiciary.org/supreme-court/appealing-supreme-court> (last visited Mar. 29, 2022). Thanks to Vermont Supreme Court Deputy Clerk Emily Wetherell for her input and review on this guide. All opinions and mistakes are entirely the author's own.

<sup>3</sup> 4 V.S.A. §§ 1, 30, 1102; see Vt. Const., ch. II, §§ 4, 30, 31. The Environmental Division of the Superior Court has statewide jurisdiction, but all other divisions are divided into county units. 4 V.S.A. § 30. The Judicial Bureau hears cases in the unit of the Superior Court where the offense occurred. 4 V.S.A. § 1103. Small claims cases are heard in the Civil Division and governed by simplified rules of procedure. See V.R.S.C.P. 1(a).

<sup>4</sup> Vt. Const., ch. II, §§ 30; 4 V.S.A. § 2(a). The Superior Court has several discrete categories of appellate jurisdiction. For example, the Environmental Division can hear appeals from administrative permitting, zoning, and other land-use decisions, 10 V.S.A. § 8504, the Civil Division can hear appeals in small claims cases and from certain decisions of the Probate Division, 12 V.S.A. §§ 2553,

2555, 5538, and the Criminal Division can hear appeals from the Judicial Bureau, 4 V.S.A. § 1107.

<sup>5</sup> Following the creation of the Nevada Court of Appeals in 2014 and the West Virginia Court of Appeals in 2021, only Delaware, Maine, Montana, New Hampshire, Rhode Island, South Dakota, Vermont, and Wyoming lack an intermediate appellate court. See Nat'l Center for State Courts, *The Role of Intermediate Appellate Courts: Principles for Adapting to Change* (Nov. 2012); Hoppy Kercheval, *WV Will Get an Intermediate Appellate Court – Finally*, MetroNews (Apr. 5, 2021), available at <https://www.metronews.com/2021/04/05/wv-will-get-an-intermediate-appellate-court-finally/>; Nevada Judiciary, Ct. of Appeals, [https://nv-courts.gov/Supreme/Court\\_Information/Court\\_of\\_Appeals/](https://nv-courts.gov/Supreme/Court_Information/Court_of_Appeals/) (last visited Mar. 30, 2022).

<sup>6</sup> Vt. Const., ch. II, § 30; 4 V.S.A. § 2(b).

<sup>7</sup> Vt. Const., ch. II, § 30; 4 V.S.A. § 3; 12 V.S.A. § 1.

<sup>8</sup> V.R.A.P. 1. This guide will use the term "lower court" to refer to both the Superior Court and an administrative agency from which an appeal is taken, and the term "clerk" to refer to both the Superior Court clerk and the officer with comparable service and filing responsibilities at an administrative agency.

<sup>9</sup> See generally *In re Pyramid Co. of Burlington*, 141 Vt. 294, 300-01, 449 A.2d 915, 918 (1982); Vt. Supreme Ct., Supreme Ct. Statistics, <https://www.vermontjudiciary.org/supreme-court> (last visited Mar. 30, 2022).

<sup>10</sup> V.R.A.P. 3, 4(a); see 12 V.S.A. § 2383.

<sup>11</sup> See *Moran v. Vermont State Ret. Bd.*, 2015 VT 119, ¶ 14, 200 Vt. 354, 131 A.3d 212, 217 ("Appellate Rules 3 and 4 make clear that the timely filing of the notice of appeal is a jurisdictional requirement.").

<sup>12</sup> V.R.A.P. 4(a)(6).

<sup>13</sup> V.R.A.P. 4(b).

<sup>14</sup> V.R.A.P. 4(a)(2). But if the case involves a sentence of life imprisonment, and the defendant has not waived the right to appeal, the State has the usual 30-day deadline. *Id.* The State's ability to file an appeal in a criminal case is further circumscribed by constitutional and statutory limitations. See U.S. Const. amend. V, cl. 2; 13 V.S.A. § 7403.

<sup>15</sup> V.R.A.P. 4(d). Notably, the Supreme Court cannot extend the appeal deadline itself in the first instance, although it can review a lower court decision granting or denying a motion to extend the deadline. See, e.g., *In re von Turkovich*, 2018 VT 57, ¶¶ 3-4, 207 Vt. 545, 191 A.3d 974.

<sup>16</sup> See 4 V.S.A. § 1107(d) (Judicial Bureau); 12 V.S.A. §§ 4601 (foreclosure actions), 5538 (small claims).

<sup>17</sup> V.R.A.P. 6(a)(1) (for seeking permission from the Superior Court), (b)(1), (2) (for seeking permission from the Supreme Court by filing in the Superior Court).

<sup>18</sup> V.R.A.P. 6(a)(4).

<sup>19</sup> See *In re Trustees of Marjorie T. Palmer Trust*, 2018 VT 134, ¶ 30, 209 Vt. 192, 204 A.3d 623 (cit-

ing *In re J.G.*, 160 Vt. 250, 255, 627 A.2d 362, 365 (1993)).

<sup>20</sup> V.R.A.P. 5(a). See *State v. Misch*, 2021 VT 10, ¶ 4, 256 A.3d 519.

<sup>21</sup> V.R.A.P. 5(b), 5.1.

<sup>22</sup> V.R.A.P. 5(b)(1).

<sup>23</sup> V.R.A.P. 5.1(a)(1).

<sup>24</sup> V.R.A.P. 5(b)(5)(A), (b)(7), 5.1(a)(2), (b)(2). This is distinct from the federal system, in which collateral final orders are treated as final orders that may be appealed as of right. See generally *In re J.G.*, 160 Vt. at 253-54, 627 A.2d at 363-64.

<sup>25</sup> V.R.A.P. 5(b)(5)(A).

<sup>26</sup> See V.R.A.P. 4(a)(2).

<sup>27</sup> V.R.A.P. 5(b)(4)(A). The shortened time period for the State to seek permission to appeal in criminal actions is set forth in Rule 5(b). Rule 5.1, which governs collateral final order appeals, does not distinguish between parties or between civil and criminal actions.

<sup>28</sup> V.R.A.P. 21(b).

<sup>29</sup> V.R.A.P. 21(a)(2), (3).

<sup>30</sup> V.R.A.P. 21(a)(1). But see V.R.A.P. 21(a)(4) ("The Court or a justice may issue any orders necessary or resolve the complaint promptly"); *State v. Van Buren*, 2018 VT 95, ¶ 17 n.6, 210 Vt. 293, 214 A.3d 791; *Turner v. Shumlin*, 2017 VT 2, ¶ 5 n.2, 204 Vt. 78, 163 A.3d 11373.

<sup>31</sup> V.R.A.P. 14; see also, e.g., U.S. Court of Appeals for the Second Circuit, Local R. 27.2.

<sup>32</sup> V.R.A.P. 14(a).

<sup>33</sup> V.R.A.P. 14(a). But the Court of course can provide an explanation. See, e.g., *Valente v. French*, No. 2021-099 (Vt. June 14, 2021) (unpub. entry order) (declining to answer question certified by federal district court about state constitutional limitations on funding religious education because question was "abstract" and "better suited for the legislative or executive branches of government in the first instance, informed by more detailed knowledge of school operations and other factors bearing on the nature and feasibility of specific proposed safeguards").

<sup>34</sup> V.R.A.P. 14(g), (h).

<sup>35</sup> 32 V.S.A. § 1431(a).

<sup>36</sup> See V.R.A.P. 1(c)(5).

<sup>37</sup> V.R.A.P. 3(b)(1).

<sup>38</sup> V.R.A.P. 5(a)(3), 5(b)(6)(B), 5(b)(7)(D), 5.1(c)(2), 6(a)(7), 6(b)(10)(B), 14(g).

<sup>39</sup> V.R.A.P. 4(b)(1)(D), 12(f).

<sup>40</sup> 39 V.S.A. § 1431(h); V.R.A.P. 24; Vt. R. Civ. P. 3.1.

<sup>41</sup> See V.R.C.P. 62(d); V.R.Cr.P. 38; V.R.F.P. 12.

<sup>42</sup> V.R.A.P. 8(a)(1).

<sup>43</sup> V.R.A.P. 8(a)(2).

<sup>44</sup> V.R.A.P. 8(b).

<sup>45</sup> V.R.A.P. 10(a).

<sup>46</sup> V.R.A.P. 11(b)(1).

<sup>47</sup> V.R.A.P. 11(b)(3).

<sup>48</sup> V.R.A.P. 12(a).

<sup>49</sup> V.R.A.P. 10(b), 11(a)(1), (b)(5).

<sup>50</sup> V.R.A.P. 10(b).

<sup>51</sup> V.R.A.P. 3(e).

<sup>52</sup> V.R.A.P. 3(e).

<sup>53</sup> Vt. Supreme Ct, Forms, Docketing Statement, <https://www.vermontjudiciary.org/sites/default/files/documents/800-00006.pdf> (last visited Mar. 29, 2022.)

<sup>54</sup> *Id.*

<sup>55</sup> See V.R.A.P. 10(e).

<sup>56</sup> V.R.A.P. 12(b).

<sup>57</sup> See V.R.A.P. 31(a).

<sup>58</sup> V.R.A.P. 27(a)(1).

<sup>59</sup> V.R.A.P. 27(a)(2).

<sup>60</sup> V.R.A.P. 27(a)(3).

<sup>61</sup> See V.R.A.P. 27(b).

<sup>62</sup> V.R.A.P. 27(d), 32(b).

<sup>63</sup> V.R.A.P. 27(d)(2).

<sup>64</sup> V.R.A.P. 31(a).

<sup>65</sup> V.R.A.P. 31(a)(3).

<sup>66</sup> V.R.A.P. 29. A state agency can file an amicus curiae brief as of right; all other parties must move the Court for permission or obtain the written consent of all parties. V.R.A.P. 29(a).

<sup>67</sup> V.R.A.P. 26(b).

<sup>68</sup> V.R.A.P. 26(d)(1), (2).

<sup>69</sup> V.R.A.P. 26(d)(3).

<sup>70</sup> See V.R.A.P. 26(b).

<sup>71</sup> V.R.A.P. 31(b).

<sup>72</sup> See V.R.A.P. 32(a).

<sup>73</sup> See generally American Bar Ass'n, Council of Appellate Lawyers, *The Leap from E-Filing to E-Briefing: Recommendations and Options for Appellate Courts to Improve the Functionality and Readability of E-Briefs* (2017), [https://www.americanbar.org/content/dam/aba/administrative/appellate\\_lawyers/2017\\_cal\\_ebrief\\_report.auth-checkdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/appellate_lawyers/2017_cal_ebrief_report.auth-checkdam.pdf).

<sup>74</sup> See V.R.A.P. 30(a).

<sup>75</sup> V.R.A.P. 30(a). No printed case, however, is necessary in appeals from the Human Services Board, the Employment Security Board, or in small claims cases. V.R.A.P. 30(a)(1)(A)

<sup>76</sup> See V.R.A.P. 30(c). When submitting an optional printed case, any document therein that also appears in the appeal volume should note the page in the appeal volume where the document appears.

<sup>77</sup> See generally Tracy Bach, *To Expediency and Beyond: Vermont's Rocket Docket*, 4 J. of App. Prac. & Proc. 277, 281 (2002); V.R.A.P. 33.1 Reporter's Notes.

<sup>78</sup> *Id.*

<sup>79</sup> See V.R.A.P. 33.1(a)(1).

<sup>80</sup> V.R.A.P. 33.2(b).

<sup>81</sup> V.R.A.P. 33.1(c).

<sup>82</sup> V.R.A.P. 33.1(d).

<sup>83</sup> See, e.g., Vt. Supreme Ct., Statistics FY 2020, <https://www.vermontjudiciary.org/sites/default/files/documents/2020%20Fiscal%20Year.pdf> (approximately 85% of the appeals heard on the rocket docket in FY 2020 were affirmed in whole, as compared to approximately 44% of the cases heard by the full Court).

<sup>84</sup> See V.R.A.P. 34(a).

<sup>85</sup> See V.R.A.P. 34(b).

<sup>86</sup> V.R.A.P. 34(h).

<sup>87</sup> See V.R.A.P. 34(f).

<sup>88</sup> See generally Vt. Supreme Ct., Administrative Order 49 (amended March 2022).

<sup>89</sup> V.R.A.P. 33.1(b)(2).

<sup>90</sup> V.R.A.P. 40(a).

<sup>91</sup> V.R.A.P. 40(b).

<sup>92</sup> V.R.A.P. 40(c).

<sup>93</sup> V.R.A.P. 40(d). See, e.g., *Sutton v. Vt. Regional Ctr.*, No. 2018-158 (Vt. Jul. 21, 2020) (entry order) (granting reargument, ordering supplemental briefing, and amending opinion); *Kuligoski v. Brattleboro Retreat*, 2016 VT 54A, 203 Vt. 328, 156 A.3d 436 (amending opinion and denying reargument).

<sup>94</sup> V.R.A.P. 41(a).



## STARTING YOUR OWN LAW PRACTICE? APPLY TO JOIN THE VBA/VLS SOLO LAWYER INCUBATOR PROJECT

The Vermont Bar Association and Vermont Law School are accepting applications from new and new-to-Vermont lawyers who want to start their own solo law practices. We will select 2-4 candidates to work with for 18 months as they hone their legal and business skills. The incoming group will overlap for 6 months with our present class of 3 incubator attorneys.

### **Incubator Attorney Benefits:**

- Individual and group mentoring and support to meet first year requirements.
- Reimbursement stipend of \$2,000 to pay for law office start-up costs.
- Weekly "rounds" with your peers and VLS and VBA staff.
- Free membership in the VBA, free admission to VBA's CLE programs and Lawyer Referral Service, free VLS course to audit.
- Guest lectures on law practice management, ethics and trust accounting, tech needs, substantive law topics and much more.
- Client referrals and experience building through our low bono programs.
- Links to attorneys and mentors for advice and future practice opportunities.

### **Incubator Lawyer Commitments:**

- Establish a solo Vermont law practice and become active in your community.
- Set business goals and self-monitor progress toward a self-sustaining law practice.
- Get professional liability insurance, office hardware/software, become licensed in Vermont.
- Take pro bono and low bono cases to comply with VRPC 6.1.
- Not actively seek other legal employment while in the Project.

### **To Apply:**

Send a letter of interest and resume to:  
Mary Ashcroft, Esq., [mashcroft@vtbar.org](mailto:mashcroft@vtbar.org)  
Professor Nicole Killoran, [NAKilloran@vermontlaw.edu](mailto:NAKilloran@vermontlaw.edu)  
Professor Jeannette Eicks, [JEICKS@vermontlaw.edu](mailto:JEICKS@vermontlaw.edu)

*The application period is now open and will close applications when we have chosen 2-4 Incubator Lawyers to begin in May – June of 2022.*

# 2021 Vermont Bar Foundation Highlights

Our Access to Justice campaign raised over \$166,000 this year. Thank you to all 342 of you who donated. We had gifts ranging from \$5 to \$15,000 and all are vital to ensure the continued success of the Vermont Bar Foundation. Now, more than ever, low-income Vermonters need help accessing and receiving legal services. All of you were vital contributors to help us maintain our vision to assist as many Vermonters as possible.

We saw many law firms donate and participate in our Partners in Justice friendly competition. This year, like last year, Vermont Attorneys Title Corporation took the top honors for largest firm gift by donating \$15,000. Massucco & Stern (2<sup>nd</sup> straight win) and Kohn Rath Law shared the honors for firms with the highest percent of staff giving, with each coming in at 100%. And a new category this year, Largest Gift from a Solo-Practitioner was taken by someone who wishes to remain anonymous. Here's a breakdown of all the top firm gifts:

**Platinum donors \$15,000 and over:**  
Vermont Attorneys Title Corporation

**Diamond Donors \$11,000 and over:**  
Primmer Piper Eggleston & Cramer PC  
Langrock Sperry & Wool, LLP  
Downs Rachlin Martin PLLC  
Sheehey Furlong & Behm P.C.  
Gravel & Shea PC

**Gold Donors \$5,000 and over**  
Paul Frank + Collins P.C.  
Anonymous  
Anonymous

The Access to Justice Campaign funds the Poverty Law Fellowship and helps fund our competitive grants program. The VBF had more applicants and grant recipients for The Hon. John A. Dooley Competitive Grants Program than even before. We were able to fund over \$66,000 in grants to twelve organizations throughout the state which provide legal services to low-income Vermonters. Of the twelve organizations the Pride Center of Vermont and Veterans Legal Assistance Project were new applicants to this grant.

Emily Kenyon has been a tremendous Poverty Law Fellow. Her work at Vermont Legal Aid supporting low-wage earners has helped well over 150 people with direct legal services, and hundreds more with advocacy. Emily was part of the VLA team that sued the Department of Labor for not adhering to the mandated hearing times for

unemployment issues. Instead of the mandated 30 days for a hearing, DOL was averaging almost six months to hold hearings and that had profound impacts on those Vermonters with unemployment issues.

Lastly, after 27 dedicated years, Debbie Bailey has retired as Executive Director. Debbie has sought the warmer climate of

Florida and is enjoying spending time with her grandchildren. The Board of Directors is hard at work seeking her replacement.

*Josie Leavitt is the former interim executive director of the VBF.*



## CROSSWORD PUZZLE

by Kevin Lumpkin, Esq.

Kevin is a litigation partner at Sheehey Furlong & Behm in Burlington, and in his spare time he enjoys puzzles and trivia of all kinds, especially crossword puzzles.

*Note: For those readers who regularly solve the New York Times crossword, this puzzle is about a Thursday-level difficulty. See page 34 for the Winter Journal's Crossword Solution.*

### Across

1. MLB official
4. New Haven university
8. Se \_\_\_\_\_ Español
13. It's nothing
14. Adams of NYC politics
15. Purchase at JOANN, maybe
16. More upscale
18. Not competent to stand trial, say
19. Secular
20. Displaced
22. Bad things to give away
26. Mideast lader
27. They're engaged
29. Pistol sound
33. With 44-Across, annual Labor Day occurrence ... or a hint to this puzzle's theme

36. Ed of "Up"
37. Ace's value, sometimes
38. Participates
41. Prefix with cycle or state
42. Former Solicitor General Ken
44. See 33-Across
46. Swiss cheese feature
47. Mobile home?
49. Pepsi, say
51. More svelte
55. Ancient Egyptian leaders
59. Ashen
60. Step aside, as a judge
61. Spice that was the subject of a dangerous viral challenge

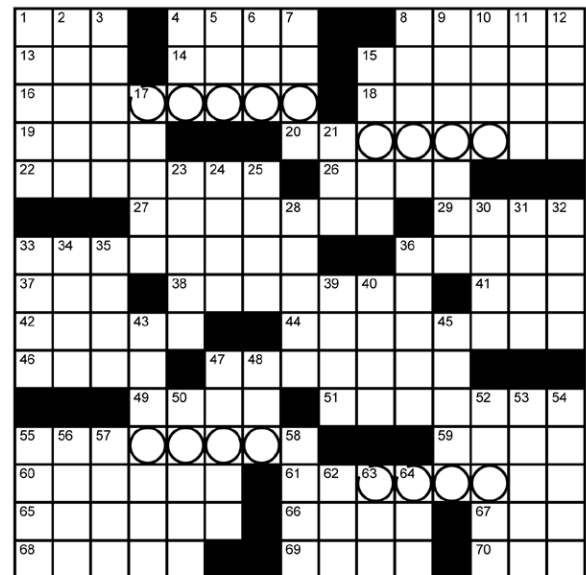
65. Comically, generals keep them in their "sleeves"
66. iPad purchases
67. Mimic
68. Track events
69. Screenwriter Ephron
70. Hem, e.g.

### Down

1. "I give up!"
2. Italian fashion hub
3. Lumberjack style
4. You betcha!
5. Radio host Shapiro heard on 63-Down
6. Fib
7. Light beige
8. Vietnam's capital
9. Soaks in
10. Imp
11. Queue

12. Nailed
15. Associations of attorneys
17. Asimov genre, informally
21. Political leader?
23. More kind
24. Profit
25. Hitch
28. Red Cross founder Barton
30. Not pro
31. Infamous Roman emperor
32. Smile broadly
33. Kid
34. Golden rule world
35. Matter for a transactional attorney, maybe
36. "Same here"
39. Oodles

40. And others: Abbr.
43. Interview on-campus, say
45. City near St. Petersburg
47. Soothing succulents
48. \_\_\_-di-dah
50. Desert refuges
52. Half of a 1960s musical act
53. Secretly unionize?
54. Extend, as a VBA membership
55. Stroller, to a Brit
56. Roll call response
57. Peak
58. Peruse
62. NYSE debut
63. "Morning Edition" ainer
64. Secretive org.





## Laura Savall's Path to A Pro Bono Service Award

The Vermont Bar Association congratulates Attorneys Matthew Garcia, Joy Karnes Limoge, Sarah North and Laura Savall as the 2022 winners of the VBA's Pro Bono Service Award. The Journal plans to profile all the winners and we begin here with Laura Savall.

Laura Savall grew up in Wisconsin and attended Ripon College, a private college north of Madison. Her education has been wide-ranging and eclectic. While at Ripon, Laura majored in Spanish and Psychology and minored in political science. She volunteered as a Spanish tutor and with at-risk children at local schools. Taking advantage of Ripon's study abroad program, she enrolled for a semester at the Universitat d'Alacant in Spain. That was a life-changer for her. "I took a Spanish law class; my Spanish was horrible, so I had to spend hours and hours translating the readings." Other students engaged her in comparisons of U.S. criminal law with Spanish law. The class so intrigued her that Savall began to consider a career in law. "When I got back to the U.S., I thought, OK, if I can manage a Spanish criminal law class in Spain, in Spanish, I can manage law school."

Savall had long held an idyllic view of Vermont—fall colors, mountains, skiing. Vermont Law School had a good reputation and was top listed for environmental law. "I wanted to be Erin Brockovich," Savall confessed. On her visit to VLS, she was sold. "This is a really close community. They really care about you succeeding."

So, the Wisconsinite headed east. "At least I went from one cheese state to another," she laughed.



VBA Pro Bono Service Award winner, Laura Savall

er," she laughed.

At VLS, Savall evaluated future career options by adding externships to her classwork. She served as summer intern with the

Vermont Natural Resources Council studying water quality issues. She spent one spring break working in Puerto Rico helping citizens fight environmental issues relating to a coal ash and natural gas plant. She worked with the Vermont Human Rights Commission. She was staff editor for the Vermont Law Review. She was a Joan Bauer fellow with Vermont Legal Aid, spending 4 months helping victims of domestic violence and creating a Best Practices Manual for courts to address safety issues in relief from abuse cases.

Savall came to realize that environmental law was not for her. "There's not a lot of client interaction in it." But her internship with VLA was different. "I was doing domestic violence work, and realized there is a huge need for lawyers," she said. "I'm really very much a client-centered person."

The stars aligned for Savall. Just as she graduated from VLS, the position of staff attorney came open in the Bennington office of Have Justice-Will Travel. She had heard

### A Judge's Odyssey

Judge Pineles will donate **100% of net profits** from the sale of his book to international and domestic refugee relief organizations. This book can be pre-ordered by going to [www.rootstockpublishing.com](http://www.rootstockpublishing.com) and then clicking on the book under Recent Releases which will take you to the page for placing your order.

***Judge Pineles is most grateful!***

\* See page 38 for a review of *A Judge's Odyssey* \*

about the work being done at HJ-WT by Attorney John Lamson (2012 winner of the VBA Pro Bono Service Award). She met Attorney Wynona Ward and accompanied her to a relief from abuse day at Bennington Family Court. "There were people in court, stressed out, scared, and so relieved to have a familiar face to turn to for advice on how to deal with their problems." Savall realized that this job was for her: it was client-centered and very flexible. She took the position.

Savall now covers the relief abuse docket in Bennington each Thursday and in Rutland every Friday. She likes the pace and the challenge. "You never know what you are going to get. I'm here to help."

On RFA days, Savall works closely with the local domestic violence agency for the county—PAVE in Bennington and NewStory Center in Rutland. The agency reps first advise RFA plaintiffs about available services: the local food shelf or housing, for example. Savall then visits with them individually in a conference room to review their affidavit in support their relief from abuse request. Sometimes her work extends beyond advice, and she will represent the plaintiff in an evidentiary hearing or appear briefly to get them a continuance. "A lot of people show up at court and have no idea that they need witnesses and evidence," she said. Savall reviews the law with them and helps put together evidence such as text messages and pictures.

Sometimes she gets advance notice of clients she may be asked to help, other times, they just show up at court on RFA day. Because RFA hearings have been held virtually during the pandemic, Savall has had fewer short-notice clients and more time to work with the advocacy centers to prepare for hearings.

In addition to her RFA work, Savall takes on other matters in Family Division: custody, visitation, divorce, child support, de facto parentage and more. She didn't take a course in family law at VLS, but her internship with Legal Aid and her hands on training with HJ-WT has made her a competent and confident family practitioner.

She has no regrets about choosing family law. "[Environmental law] is just not as enticing as family law. It is so slow." Relief From Abuse cases have short timelines, quick turn-arounds, and an obvious end result. "Once you do this kind of work, it's really hard to prioritize other things as highly as people fleeing for their safety."

It's also rewarding for her to see people change for the better. She recalls helping a client through a contested divorce, and then working to hold the other parent accountable. Both parties took a parenting class, learned to work together, and four years later their family benefits from two cooperative adults and happy children. "Change is

possible."

Savall also serves on the Board of "Car-ing Dads", a group dedicated to ending the generational cycle of violence. "The key is education, for abusers to understand their own behavior."

Family law, with a heavy emphasis on relief from abuse work, can lead to lawyer burnout, but Savall has avoided that problem. She credits Attorney Wynona Ward and the HJ-WT staff. "What is helpful right now is having a solid support system." Savall can call Ward at any time. She also relies heavily on a full-time paralegal in the Bennington office to ease the workload.

Savall also takes care of herself, keeping weekends work-free. "The first time I worked on a weekend, Wynona called me and scolded me." That lesson learned, Savall keeps work and life issues in balance. She is an avid swimmer—"you can meditate on things in the water"—and joins another local attorney for outings at Emerald Lake.

Laura Savall also takes low bono cases through the VBA's County Low Bono Project. These are separate from her HJ-WT work, and Savall took her inspiration from John Lamson who did the same when he was running the Bennington office for Have Justice. These low bono matters add variety and new challenges. One of her first cases was to represent a respondent in an adult involuntary guardianship matter. "That was a wild ride. I ended up hiking out in the woods with a local constable to find my client."

She also helps foster/adoptive parents negotiate PACAs—post adoptive contact agreements—so that children can stay in touch with their bio parents after the parents' rights are terminated. PACA work has

given Savall a glimpse into juvenile court, which often runs parallel to the RFA and family cases she works with HJ-WT. Guardianship cases and PACA work are both, "short term bursts of commitments" which round out her experience.

While admitting to some sticker shock at the higher cost of living in Vermont, Savall has settled comfortably into Bennington. She enjoys the community—"it's a scrappy little town"—and finds much to do there and in nearby New York and Massachusetts. She loves to cook and to travel and looks forward to more road trips as the pandemic eases. She also wants to get a dog to join her on those excursions.

And Savall is satisfied with her legal career, knowing that her skills are helping people in bad circumstances. She acknowledges that domestic violence victims do not have access to funds because their spouse or partner is controlling the money. They cannot afford to hire a private attorney. Savall is grateful to those donors who support Have Justice-Will Travel so that her legal services are available for DV victims.

Savall urges other lawyers to be involved in pro bono and low bono work. "We have a duty to use the privilege of our education to give back to our community." "It's rewarding and very tangible to help people in need," she said. "You see results immediately and doing good is our obligation."

Savall will be leaving Have Justice Will Travel in early June of this year to take a position with Kenny and Gatos, LLP in Rutland. She plans to continue her work in family law as well as her low bono and pro bono work.

Mary Ashcroft, Esq., is the Legal Access Coordinator at the VBA.



## Here's the Winter Journal's Crossword Solution!

M	C	R	I	B		R	A	C	K		J	O	S	T
A	R	E	N	A		O	R	S	O		O	A	H	U
L	A	U	N	D	R	O	M	A	T		U	S	E	R
T	B	S		D	I	M				B	E	L	I	E
			E	L	A	P	S	E	D		N	E	S	T
			E	Y	E			W	R	I	T	S		
L	I	E	V			A	W	A	R	E		L	A	M
S	P	R	I	N	G	S		G	A	R	D	E	N	S
D	O	E		T	Y	P	O	S			R	I	N	G
			N	E	M	E	A		E	R	A			
A	T	L	A	S		N	F	L	G	A	M	E		
F	R	U	I	T	S			A	O	T		L	L	C
T	A	I	L			P	A	S	S	T	H	E	B	A
E	D	G	E			E	D	I	T		E	V	O	K
R	E	I	D			D	A	M	S		R	E	W	E

# Ten Ways to Have a More Constructive Conversation with Your Clients

In the context of a conversation between an attorney and a client, effective communication occurs when both the attorney and the client feel they have been heard. For example, at the outset of representation, a client is often looking for confirmation that their lawyer understands what the problem and desired outcome is. Similarly, a lawyer is often looking for confirmation that the client has a clear understanding of what the lawyer can realistically do for the client given the circumstances at hand. The challenge here is that an effective communication can only occur by way of a constructive conversation, which requires both participants to enter a mutual conversation. There must be a balance between talking and listening.

This balance thing can be harder than it might seem. Suffice it to say, that while I can be a good listener at times, having a constructive conversation every time I open my mouth remains a challenge and it's all about my being unable to find that proper balance between talking and listening. In fact, in my personal life I have been told more than a few times by my lovely wife that if I would just listen, it would become apparent that she isn't looking to have me solve her problem. Sometimes she just wants to be heard, to get it out, so to speak. Unfortunately, the lawyer problem solver in me just can't shut up. I suspect I'm not the only lawyer who suffers from this conversational shortcoming. I don't know about you, but law school taught me how to problem solve. I never had any law professor pontificate on the virtues of being an effective listener. Quite the opposite in fact, I was taught how to debate and how to put forth a compelling argument.

If any of this is striking a chord with you, following through with even one or two of the following tips will enable you to have a more constructive conversation with your clients. All ten tips come from a Ted Talk by noted author, journalist, and speaker Celeste Headlee. The following are a summary of her points coupled with my trying to put an attorney-client conversation spin on them. If you care to view the entire Ted talk, and I encourage you to do so, you will find it at [https://www.ted.com/talks/celeste\\_headlee\\_10\\_ways\\_to\\_have\\_a\\_better\\_conversation#t-653478](https://www.ted.com/talks/celeste_headlee_10_ways_to_have_a_better_conversation#t-653478). In sum:

1) **Don't Multi-task** - Simply be present and pay attention. No texting,

no thinking about other matters, no working through your email. You are in your client's employ and this is his or her time.

2) **Don't Pontificate** - Enter every conversation with an assumption that YOU have something to learn. Remember, the matter being discussed is the client's matter. The more you learn, the better your advice will be.

3) **Use open ended questions** - Questions like "Will you tell me more about that?" invite your client to think and provide a more informative response. You don't want to make it easy for a client to sit back and just confirm what you think you know or want to hear.

4) **Go with the flow** - Don't get stuck on what you want to say next. To do so requires that you miss half of what your client has just told you because it's quite difficult to concentrate on an important point you want to make and also listen at the same time.

5) **If you don't know something say so** - Honesty instills trust. Faking it fosters doubt. It's as simple as that.

6) **Don't equate the other person's experience with yours** - For example, as a client shares his or her story during intake, don't try and relate by telling your story. Worse yet, don't respond by talking about how many times you've heard this story before. Again, you are in someone else's employ. These conversations are not to be about you.

7) **Try not to repeat yourself** - If you feel you haven't been heard or understood, ask your client to make sure. Continuing to repeat yourself risks your coming across as condescending.

8) **Stay out of the weeds** - Most people really are not that interested in the minutiae or the nitty gritty details. Clients just want to know they're in good hands.

9) **Listen, truly listen** - This does take a lot of effort and energy. According to Steven Covey, most of us don't listen with the intent to understand, most of us listen with the intent to reply. The only way to maximize the relevancy of any reply is to first listen well.

10) **Be Brief** - Share your thoughts and advice in a succinct manner. Demonstrate that the client matters to you as a person by confirming that he or she understands what has been discussed. Invite questions.

Since 1998, Mark Bassingthwaighte, Esq. has been a Risk Manager with ALPS, an attorney's professional liability insurance carrier. In his tenure with the company, Mr. Bassingthwaighte has conducted over 1200 law firm risk management assessment visits, presented over 400 continuing legal education seminars throughout the United States, and written extensively on risk management, ethics, and technology. Mr. Bassingthwaighte is a member of the State Bar of Montana as well as the American Bar Association where he currently sits on the ABA Center for Professional Responsibility's Conference Planning Committee. He received his J.D. from Drake University Law School.







Vermont  
Bar Association

# CONNECT

WITH LEGAL PROFESSIONALS



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Published quarterly - 4 issues a year  
Circulation - 95% of VT licensed attorneys

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The VBA Directory is a comprehensive listing complete with contact information of Vermont licensed attorneys, judges, and law firms, as well as a complete listing of the Vermont Court system and local, state and federal offices associated with the legal profession.

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



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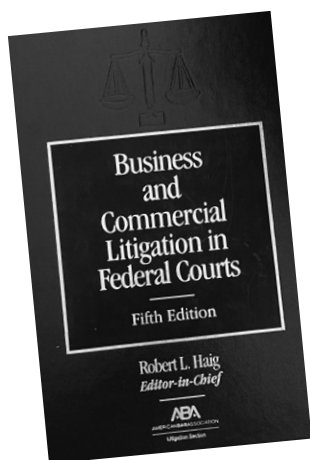
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# BOOK REVIEWS



## **"Business and Commercial Litigation in Federal Courts, 5th Edition"**

*Edited by Robert L. Haig*

*Reviewed by Peter F. Langrock, Esq.*

In 2013 I had the pleasure of reviewing the third edition of *Business and Commercial Litigation in Federal Courts* edited by Robert L. Haig and published by the Litigation section of the American Bar Association. In 2017 I reviewed the fourth edition and now in 2022 I have the pleasure of reviewing the fifth edition.

It is hard not to repeat some of what I said in the previous reviews but those comments still hold true. The difference being that the fifth edition is expanded, updated, improved and even more useful.

The structure of the publication consists of 16 volumes holding 180 chapters. Each chapter deals with an area of federal business or commercial litigation.

Each chapter is authored by a highly-respected practitioner or federal judge. Successive edits to the set build upon the work of the previous author. The fifth edition has several new areas expanding from 153 chapters to 180 chapters.

One of the new chapters is on rescission and is authored by Judge Christina Reiss our own federal judge. If you think she demands high standards of quality writing by the lawyers that appear before her, you only have to peruse this chapter to understand that she imposes an even more stringent and diligent level of work upon herself. A discussion of her chapter gives an insight to the other 179 chapters included in the work. It starts with a general discussion of the rather unique remedy of rescission. It discusses the strategy and objec-

tives of going forward with a claim of rescission. It then details 12 grounds for rescission followed by a short discussion of each one. The text then goes on to lay out defenses for rescission and ends with checklists and finally a form for a rescission complaint. The beauty of this chapter is that it reads like an informative general article on the subject then goes on to explain how it works and whether it should work in a particular factual setting.

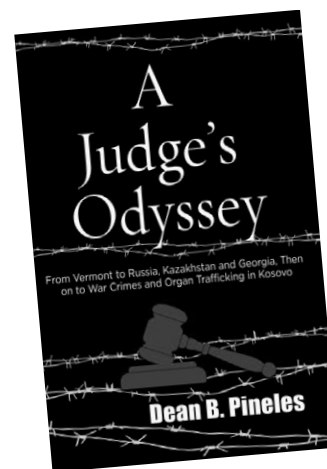
But behind this easy-reading narrative, there is a complex and thorough account of legal research. This narrative is especially useful if the word "rescission" triggers an idea as to one of your cases. If you then decide to go forward, it is invaluable in supplying you not only with a comprehensive study of the subject and the legal research to back it but will provide practical help, even including a form complaint.

Judge Reiss' work is an example of the quality of the other 179 chapters, which include everything from practical aspects of how to deal with requests for admissions to substantive chapters on letters of credit, money laundering, and even animal law. Each chapter is written to give an overview for the curious and then explore the topic in detail. It is all backed by thorough and comprehensive research.

How Robert L. Haig, who is the editor, has been able to gather the quality of writers who deal with these topics and put them forward in such a valuable set is hard to imagine. A table of cases which accompanies the set includes over 2,000 pages of citations. I do not intend them to be intimidating but just to indicate the thoroughness of the research.

The best advice I can give to a lawyer getting involved in federal litigation in a commercial or a business area is to take a relaxed hour away from the computer and stroll through the index and when you find a topic that may be relevant to the case, peruse it casually. Chapters will then speak to you if they can be of service, and I can hardly conceive of any litigation where there will not be some chapters that will be of great use to the practitioner.

*Peter F. Langrock, Esq., is the founding partner of Langrock Sperry & Wool, LLP and has been litigating in Vermont State Courts and the Federal Courts since his admission to the bar in 1960.*



## **"A Judge's Odyssey: From Vermont to Russia, Kazakhstan and Georgia, Then on to War Crimes and Organ Trafficking in Kosovo"**

*by Dean B. Pineles*

*Reviewed by Gary G. Shattuck, Esq.*

Recently, Vermont law enthusiasts have been treated to eclectic accounts of the legal system. They range from the shocking (James J. Dunn, *Breach of Trust: The Ethics Scandal That Challenged the Integrity of the Vermont Judiciary*, 2018), to the experiences of a former attorney general (Kimberly B. Cheney, *A Lawyer's Life to Live*, 2021) and, now, the memoirs of retired judge Dean Pineles, of Stowe. In *A Judge's Odyssey: From Vermont to Russia, Kazakhstan and Georgia, Then on to War Crimes and Organ Trafficking in Kosovo* (Rootstock Publishing, Montpelier, VT, 2022), the first-time author extends the genre considerably, shifting its focus far beyond Vermont's borders. Pineles first describes his legal escapades in the Green Mountains before departing for assignments in distant locales inside and near Russia and then on to the southern edge of Europe in the Balkans. His thoughtful, fast-paced, often raucous romp, covers much ground, is easily consumed and, in the end, leaves the reader wanting more.

It is clear that Judge Pineles has lived a charmed life. Tracing his lineage to early Massachusetts settlers, he grew up in middle class circumstances in the Bay State graduating from Brown University in 1965 and Boston University School of Law in 1968, followed by stints with the U.S. Army JAG and Department of Justice. After leaving Washington in 1973, Pineles and

**Want to review a book for the Vermont Bar Journal?** You can review your own book or one that you think would be of interest in VBJ readers. We look especially for reviews of new titles, or new editions of old titles, that have some connection to Vermont. (A Vermont-based reviewer counts!) Interested? Send inquiries to [info@vtbar.org](mailto:info@vtbar.org).

his wife, Kristina, moved to Vermont where he became an assistant attorney general (hired by Cheney), followed by high-level positions in state government with the departments of health and labor and industry after completion of a master's degree at the Kennedy school at Harvard in 1979. He also served as counsel to Governor Richard Snelling where he became entangled with the infamous Island Pond raid (1984). Surviving close scrutiny, Pineles soon received appointment to the bench chalking up an admirable twenty-one years of further service.

It is in the last years of state employment that Pineles begins exploring other law-related opportunities overseas able to satisfy his insatiable wanderlust. The journey finds him, frequently accompanied by the intrepid Kristina and their protective Lhasa Apso, Piper, traveling to places crying for rule of law reforms. The demands only increase with each new assignment as Pineles becomes further enmeshed, as the book's title conveys, in a wide range of courtroom dramas in Kosovo unlike anything he ever experienced in Vermont. In his lofty new role as an "international judge," he went all in dealing with the mundane as well as war crimes, human organ trafficking, corruption and international drug trafficking. Each

event became increasingly complex because of strong ethnic differences among participants bent on internecine blood revenge, regardless of what Pineles or any other court may rule, that presented dystopian challenges.

Throughout it all, Pineles maintained a steady unapologetic, no-nonsense application of the law articulating and advocating consistent, predictable legal processes to assure the various cultures he encountered received equal treatment. The importance of jury trials where none existed, the independence of the judiciary where corruption prevailed, and the decorum that was necessary for the courts to deliver their unbiased, reasoned decisions, infused his work. In turn, gaining his foreign audiences' respect for the practices of a system differing so greatly from what they witnessed under lingering Soviet-era influences posed yet an additional challenge.

Self-effacing, equipped with a ready sense of humor and ability to adapt to rapidly changing circumstances with creative solutions (whether in the courtroom, on the dance floor or while imbibing the local alcoholic concoction with cohorts) allowed the judge from Vermont to impress all of those he met. Pineles also gained an education of some of the unspoken, darker

sides of international work, crossing swords with others resenting his presence believing it intrusive to their own similar efforts. The pointless turf wars he describes only toughened him to find alternatives to assure furthering the interests of the law.

There is little to fault Pineles' interesting account. It is a heartfelt story, written by a dogged, perceptive man facing down challenges that only a rare few have encountered, accomplished with wit and grace in places in great need of it. The 273-page, thirty-eight chapters, accompanied by several photos of the author in his judicial habitat and various locales awaits the curious reader. For this part of Judge Pineles' life, his self-described "odyssey" is complete and he can revel in the fact that he has made important contributions allowing others to build on.

*Gary G. Shattuck, Esq. is a former Vermont assistant attorney general and assistant U.S. attorney. He also acted as a legal advisor to governments in Kosovo (2000) and Iraq (2003). He is the author of several books about critical periods in Vermont history, most recently, Night-Rider Legacy, Weaponizing Race in the Irasburg Affair of 1968 (White River Press 2022).*



## IN MEMORIAM

### Donald L. Rushford

**Donald Lawrence Rushford**, died on Jan. 7, 2022, at the age of 91. He was born in Burlington, Vermont. He attended Cathedral High School (now Rice Academy) and graduated from Saint Michael's College. After graduation, Don joined the Navy. After two years, he switched from active duty to reserve status and got his law degree from Georgetown University. He married Kathryn Teresa Boyle while in law school. They lived in Fairfax and Alexandria, Virginia, for 16 years. Don worked first at a boutique law firm specializing in aviation law, then as lead attorney for the Federal Power Commission. In 1968, He returned with his family to Vermont where he served as general counsel to the Public Utilities Board and gained a reputation among fellow attorneys, judges and utility executives as a fierce and clever litigator, earning the nickname "Silver Fox." After three years in Montpelier, he moved the family to Rutland, Vermont, to become vice president and general counsel for Central Vermont Public Service Corp., the state's largest utility. While he was known for greatly expand-

ing the legal department at CVPS, finding a way to win any rate case, and for adopting corporate goals that included "having fun at work," Don was also remembered as the guy who "worked" outside the office on days after heavy snowfalls (or whenever else the skiing was particularly good). He continued to contribute during retirement; he was a volunteer mentor for prisoners and he initiated a mediation program in District Courts for which the Vermont Supreme Court gave him an award.

He was predeceased by his first and second wives; stepson Andrew Crowley; and grandson Zachary Stone. He is survived by his children, Beth, Yetta, Peter, Tom, Tim, Martha, Jennifer, Margaret and Matthew; his stepsons, Robert, David and Chris; his adoptive children, Christine Henriksen and Willis Backus; and grandchildren, Matthew, Carly, Courtney, Jackson, Katrina, Kyle, Sam, Nicholas, Emily, Brian, Grace, Timothy, Alex, Connor, John Storm, Benjamin and Finn.

### John D. Hansen

Attorney **John D. Hansen**, 83, died Jan. 21, 2022, at the home of his daughter, Erika Hansen, in North Ferrisburgh.

### Thomas J. Layden

**Thomas J. Layden**, 71, unexpectedly died Jan. 25, 2022, at his home. He was born in Rutland, Aug. 6, 1950, son of Dr. Edward and Agnes (Rubash) Layden. Tom graduated from Castleton College, Class of 1975, and Northrop University, Class of 1979 with his J.D. Tom served as an attorney in Rutland for the majority of his career and was respected by many. He was known for his empathic, ethical and efficient approach. Those who knew Tom personally can attest to his many passions and hobbies outside of his law practice. Tom's "coming of age years" occurred during the 1960s – early-1970s. The significance of the cultural shifts and musical influence during this time period shaped his perceptions on many things and instilled a love for music in his children. Tom was also an avid hunter, a pastime handed down through a very close



relationship with his uncle, Francis Layden. Some knew him for his surreal humor and the enjoyment he had in sharing it with others. For many years, if Tom was not at work, he was on the golf course at Rutland Country Club. More recently, he took on a new hobby of motorcycle riding. He enjoyed riding the back country roads on his Harley V-Rod alone or with friends, followed up by an ice-cold beverage at the Moose Lodge. Tom was a devoted provider; always ensuring his children were cared for. He was known for his sound, logical advice and for being their #1 sports fan. Surviving are his two daughters, Andrea L. Rumsey, of Burlington, and Christie P. Pickett, of Tampa, Florida; a son, Matthew Layden, of Rutland; a sister, Marcia Tomasi, of Rutland; three grandchildren, Benjamin and Annabelle Rumsey, of Burlington, and Madison Pickett, of Tampa, Florida. He was predeceased by his wife, Paula Layden; and his brother, Edward Layden Jr.

### Mark J. DiStefano

After a brief battle with cancer, **Mark J. Di Stefano** died on March 22, 2022. He spent his final days at home surrounded by his loving family.

He was born in 1956 in Washington, D.C., the son of Joseph and Jane (Holbrook) Di Stefano. He grew up in D.C. and abroad and attended high school in Rome, Italy. He graduated from Cornell in 1978 with a degree in history and languages and later moved to Vermont, where he graduated from Vermont Law School in 1984.

Mark was devoted to his family. His children were his greatest joy. He had two daughters, Emma and Rachel, with his first wife Maryann Zavez. Later in life, he met and married Bridget Asay, and had a son, Benjamin. For many years, he lived in Randolph, Vermont, where Emma and Rachel

grew up. He loved watching their sporting events, taking them camping, and sugaring in the backyard every spring.

Mark dedicated his legal career to public service. He held several positions in the Vermont Attorney General's Office, including Chief of the Civil Division. As an environmental lawyer, he worked creatively and tirelessly to protect and preserve Vermont's natural resources—recovering millions of dollars for environmental cleanups and helping to preserve wildlife habitat and open spaces. Among other important cases, he represented the state in landmark Act 250 litigation that ultimately led to the protection of thousands of acres of critical bear habitat near Killington.

Mark is survived by his wife Bridget Asay; his children Emma Zavez, Rachel Di Stefano (and her partner Paul Bianco), and Benjamin Asay; his stepmother Amalia Di Stefano; his siblings Christine Di Stefano, Paola Di Stefano (and her husband James), Jonathan Di Stefano (and his wife Toni), and Anna Di Stefano; and numerous nieces and nephews.

### George T. McNaughton

**George Theodore "GT" McNaughton** passed peacefully on March 24, 2022 at his home in Springfield, Vermont. He was 70. GT was born in Coldwater, Michigan, to Ford Blaine and Lena Mae (Mulchahey) McNaughton on April 17, 1951. He was the youngest of three brothers. He grew up in Fremont, Indiana, where he graduated from Fremont High School. He received his bachelor's degree from University of Oregon, his law degree from Indiana University, and a master's degree from the University of Notre Dame. He returned to Fremont and married his high school sweetheart, Beth Hadene Tredway, in 1973. They lived in Fremont where their lives revolved

around raising their six children, their membership in the LDS church, and GT's law practice. On Aug. 30, 1988, Beth unexpectedly died, leaving him a widower with six young children. GT remarried to Susan Stookey, and they were married from 1990 to 1996. In 1994, they and their now seven children moved to Springfield, Vermont. In Springfield, GT devoted himself to a new community. He practiced law with George Lamb at Lamb and McNaughton, PC, served on the school board, worked on restoring and keeping Park Street School as a town treasure, made a run as Springfield State Representative, and had just stepped down as selectman this past term. In 1997, he married Kathleen Maugherman, with whom he spent the next 25 years at their home in Springfield. He was predeceased by his first wife, Beth Tredway McNaughton; and two stillborn children, Laddie and Lassie. He was also predeceased by his daughter-in-law, Laura Cody McNaughton. In addition to his wife, Kathleen McNaughton, he is survived by his many children, Justin and Candace (née Baker) McNaughton, of Toronto, Ontario; Nathan and Marina (née Wood) McNaughton, of Weathersfield, Vermont; Heidi Mills McNaughton, of Springfield, Vermont; Ethan McNaughton, of Weathersfield, Vermont; Zachary and Wendi (née Dowst) McNaughton, of Cavendish, Vermont; Brigham and wife Bethany (née Walls) McNaughton, of Kittery, Maine; Ian McNaughton, of Norfolk, Virginia; and Aaron Kent, of Morrison, Colorado. He is also survived by his stepdaughters, Amy Maugherman Lewis, of Angola, Indiana; Audri Maugherman Stockman, of Angola, Indiana; and Dawn Maugherman, of Lagrange, Indiana. Additionally, he is survived by his two brothers, Earl McNaughton, of Arizona; and Lee McNaughton, of Springfield, Vermont. Finally, he is survived by his 20 grandchildren.



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# VBA CLE Coming Attractions

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## **Procrastinators' Week: June 20-24**

### **Monday:**

- 2022 Wage & Hour Law in a Nutshell: The Basics & Beyond (1.0 MCLE)
  - What Can Dead People Tell Us?
- Postmortem Toxicology for Attorneys (1.0 MCLE)

### **Tuesday:**

- Medication Misadventures (1.0 MCLE)
- Mindful Moments for Wellness (1.0 MCLE - wellness)
  - Adult Guardianship in Vermont: Overview, Issues, & Alternatives\* (1.5 MCLE)

### **Wednesday:**

- Stay tuned for a Probate Extravaganza! Moderated by Mark Langan, Esq., with four 1-hour programs (4.0 MCLE)

### **Thursday:**

- Siri & Alexa are Out to Get You (1.0 MCLE - ethics)
- The Ins & Outs of Dietary Supplements (1.0 MCLE)
- Court-Ordered Mental Health Treatment in VT\* (1.5 MCLE)

### **Friday:**

- Racial Bias & Civil Rights Violations in Algorithms (1.0 MCLE - diversity/equity/inclusion)

*Asterisk \* indicates Vermont-specific programming meeting Rule 12(a)(1) and Rule 15(c) of the Vermont Rules of Admission.*

***More programs will be added as they are confirmed.***

## **Save The Date**

**Annual Meeting** September 30<sup>th</sup> at Lake Morey Resort in Fairlee, VT

**Basic Skills in Vermont Practice & Procedure** (remote dates TBD)

**Pro Bono Conference** in October  
at the State House in Montpelier (date TBD)

**Real Estate Law Day** (remote dates TBD)

**Bankruptcy Holiday CLE** December 2<sup>nd</sup> (location TBD)

*And don't forget to check our website for the LIVE webinar and webcast options as well as the latest titles in our digital library!*

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Following training, officers will find themselves assisting soldiers and retirees, advising military commanders, and representing the Vermont Army National Guard in administrative matters. Position assignments include the Office of the State Judge Advocate at Camp Johnson in Colchester, Vermont; the 86th Infantry Brigade Combat Team (Mountain) at the Joint Readiness Center in Jericho, Vermont; and the Trial Defense Detachment based in Williston, Vermont.

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