



THE VERMONT BAR JOURNAL

234

Summer 2023, Volume 49, No. 2

The New Vermont Superior Court Decision Database
Lawyers Help Flood Victims



Complex Legal Challenges require legal teamwork

Legal Complexity Requires Legal Teamwork

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Try out the
Crossword Puzzle
by Kevin Lumpkin, Esq.
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PRESIDENT'S COLUMN

Vermont Trial Court Decisions

There is a 2007 Vermont Trial Court decision that a number of litigators have emailed (and faxed!) to each other over the years: *Mashteare v. Fletcher Allen Health Care*.¹

It was a medical malpractice case. Judge Matthew Katz was presiding in Chittenden County Superior Court, and the parties had a discovery dispute over the production of expert materials. Plaintiff asked for the expert's prior litigation history. Defendant responded that, "at the deposition," it would produce the expert's "complete file." Plaintiff, of course, wanted the file sooner than that, and also wanted to know for sure that the expert's prior litigation history would be in that "file." So, Plaintiff's counsel sent a "26(h) letter," as a prelude to filing a motion to compel.

Discovery disputes are common everywhere, including Vermont. Indeed, in response to the VBA's survey on civility and professionalism, the word "discovery" appeared **65 times**. Among other things, you reported that (within the past six months) lawyers engaged in: *discovery violations; refusing to produce reasonable discovery; bad faith discovery responses; and hiding documents in discovery*. At least one person attributed a bad motive to discovery disputes, observing: *lawyers get paid less if there are fewer motions and discovery skirmishes*. Obviously, this is not good.²

Back to *Mashteare*. Was the "26(h) letter" sufficient to set up the motion to compel?

As litigators know (or ought to know), V.R.C.P. 26(h) specifically states that a motion to compel can't be filed unless the parties have first "conferred" about their dispute. And that's why the letter wasn't enough. The Court stated in stark terms: "There is no such thing as a 26(h) letter."

The Court observed that the "purpose of Rule 26(h) is to resolve problems." The Court also considered the Latin root of the word "confer," namely, *conferre*, meaning "to bring together." The Court explained:

Exchanges of letters, as here, fail to meet that purpose. The Rule does not precondition a motion to compel upon writing a letter, sending an e-mail or, as once suggested, 'my paralegal called his paralegal.' Rather, it admonishes 'confer.' . . . [T]his being a medical case, we are constrained to note that *coitus* derives as well from the Latin, *itus* meaning

come together – an act poorly suited to performance by exchange of letters. It would therefore appear that Rule 26(h) envisions some closer proximity when it speaks of 'confer' than merely sending letters.³

Despite the *Mashteare* decision (which, as noted above, has been circulated among some litigators – and for good reason), disputes turning on Rule 26(h) continued.

For example, seven years later (in 2014), in *Harleysville Worcester Ins. Co. v. Evergreen Roofing, et al.*, Plaintiff moved to compel the production of documents from one of the defendants. The parties had not actually conferred. The Chittenden Superior Court (Toor, J.) denied the motion, explaining:

While the court is certainly aware that emails and text messages have overtaken much of what used to be telephone calls or meetings, the court still believes in the value of actual human contact. The talking can be on the phone or in the same room, and might be most effective over a cup of coffee or some stronger drink, but the court leaves the particulars to counsel. Nonetheless, the court does require direct voice contact.⁴

And six years after that (in 2020), in *Passera v. Global Values, Inc.*, the Washington Superior Court (Tomas, J.) was faced with motions from both sides regarding whether the deposition of another former employer could proceed. Plaintiff said nothing to the Court about whether he conferred with opposing counsel. Defendant certified only that he had sent "an email" about the dispute and "received no response," with Plaintiff complaining that he was afforded little time to respond. The Court denied both motions for failure to follow Rule 26(h).

Significantly, none of the three cases discussed above cites to any Vermont Trial Court case (or, for that matter, Vermont Supreme Court case)⁵ in setting forth the requirements of Rule 26(h). Instead, all three cases rely on federal authorities. In other words, *Passera* did not cite *Harleysville*. And neither *Passera* nor *Harleysville* cite Judge Katz's decision in *Mashteare* (from 2007). Why not? Because there was no reliable way for counsel or judges to find these decisions, much less cite them.

Until now.



Andrew Manitsky, Esq.

As the result of an historic⁶ collaboration among the VBA, the Vermont Judiciary, and Fastcase, you can now search, read, and cite a robust database of Vermont Trial Court decisions.⁷ As of the writing of this column, there are 4,337 cases available on Fastcase. Like Westlaw and Lexis, Fastcase is a compilation of searchable, legal databases, and it is *included* in your membership with VBA. (And because of its recent merger with vLex, Fastcase is now the world's largest global law library.)

Simply go to the VBA website. Click on "Fastcase" at the top of the page, check the jurisdiction "Vt Super," and you are good to go. In the search box, type in "26(h)" and you will be shown all three cases we just discussed: *Mashteare v. Fletcher Allen Health Care*, 2007 Vt Super 052102 (2007); *Harleysville Worcester Ins. Co. v. Evergreen Roofing, LLC*, 2014 Vt Super 110703 (2014); and *Passera v. Global Values, Inc.*, 2020 Vt Super 060201 (2020).⁸ If you need any help using Fastcase, it's available for free.⁹

It is our hope that fuller access to the Vermont Trial Court's decisions will help to provide more transparency and predictability in our legal system. Our jurisprudence will be richer, and the important and well-reasoned decisions of the Vermont Trial Courts will be cited with much more frequency in both state and federal courts here in Vermont and across the country. Practitioners will be able to better advise clients on likely outcomes, and can more readily cite to Vermont case law in making

MARKSPOWERS^{LLP}*Prepared. Patient. Persistent.***DONALD (TAD) POWERS, ESQ.⁺****MICHAEL MARKS, ESQ.⁺****ADAM L. POWERS, ESQ.****THE MEDIATION FIRM***⁺National Academy of Distinguished Neutrals**⁺Best Lawyers for Mediation & Arbitration***www.markspowers.com****1205 THREE MILE BRIDGE ROAD
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arguments. Judges can more easily review Vermont case law when considering pending matters and when writing opinions, which will lead to even more consistency in rulings.¹⁰

And more than that. I believe that all of these things – increased transparency, predictability, and consistency – will ultimately help promote respect for the rule of law.¹¹ As you know, a central part of our mission at VBA is to promote the understanding of, and respect for, the rule of law. With the percentage of adults saying they have “great or a lot of confidence” in the U.S. Supreme Court dropping from **57%** in July 2018 to **39%** in June 2023,¹² this issue is as critical as ever.

* * *

This is my final President's Column. Although I will continue as a member of VBA's Board of Managers for one more year, my term as President ends on September 29 – at the conclusion of our Annual Meeting in Burlington. I hope to see you there.

I want to thank you for the opportunity to serve as President, for supporting my efforts, and for your thoughtful feedback throughout my term. I am enormously grateful to our Board, Executive Director Bob Paolini and the entire VBA staff, our Section Chairs, our County Bar Presidents, the Vermont Judiciary,¹³ Bar Counsel Michael Kennedy, the Vermont Bar Foundation, the crew at Fastcase,¹⁴ and all of the incredible behind-the-scenes work done by VBA members. It is humbling to be a part of this team.

The VBA is committed to supporting and elevating the practice of law in Vermont. We are here to help you, and to help you better serve your clients and the public. As always, please be in touch with your thoughts, questions, and suggestions.

¹ Thanks to Barbara Blackman for emailing it to me.

² An engaging and entertaining CLE entitled “Advanced Civility & Professionalism” will be offered at the VBA's Annual Meeting on September 29 in Burlington, and this issue will be discussed in depth.

³ In a footnote, the Court also noted that the word “contiguity” derives from Latin, namely, *contiguus*, which means “to touch on all sides.” The Court concluded, however, that “the authors of 26(h) did not intend to go that far.”

⁴ Professionalism requires that we know and follow the rules. But civility (a specific part of professionalism) plays a role here, too. Indeed, the *Harleysville* Court cites, in a footnote, Peter F. Langrock, *Breaking Bread*, 7 Vermont Bar Journal at 30 (Vol. 31, No. 2, Summer 2005) (“It is hard to break bread with opposing counsel one night, and then return to the courtroom in a belligerent mood. Belligerence has little place in the courtroom, and the socialization of libations and food goes a long way in undermining such tensions”).

⁵ In a footnote in *Passera*, the Court cites an unreported Vermont Supreme Court decision, *Volovitz v. High Ridge Owners Ass'n*, No. 2007-

272. That case involved the failure to follow a court order, and was thus of no moment.

⁶ I love writing “an historic,” because it seems classy. But the usage might be incorrect. See, e.g., Grammarist at <https://grammarist.com/usage/an-historic/> (“In all main varieties of English, the use of *an* as the article preceding *historic* (**an historic**) is an unnecessary affectation”).

⁷ Chief Superior Judge Thomas A. Zonay has asked the judges to continue to submit civil (including environmental) decisions as they are being issued, and encouraged them to submit past decisions they have copies of in files, binders, and electronically. In fact, Vermont Supreme Court Associate Justice Harold E. Eaton, Jr. has already submitted more than 100 of his decisions from when he was a Superior Court Judge.

⁸ There is a not-so-hidden logic to the citations format. For example, in “2020 Vt Super 060201,” “2020” is the year of decision, “Vt Super” is Vermont Superior Court, and “060201” indicates that the decision was issued on June 2 (0602) with that it was the first (01) decision issued that day.

⁹ There are several avenues here. First, on June 26, 2023, VBA and Fastcase provided a free, one-hour CLE focused on the “Vt Super” database. We had 100 attendees; the CLE was recorded and is now available on the VBA website. Second, Fastcase provides free and friendly assistance. You can email them at support@fastcase.com or call them at 1-866-773-2782. Finally, you can always call VBA at 802-223-2020, and we will help you.

¹⁰ See Stillwell, H., *Shadow Dockets Lite*, 99 Denv. L. Rev. 361, 378 (2022) (“Less precedent means less clearly established law for society members to rely upon in conducting their affairs....[It] means more uncertainty, forcing litigants to expend resources asking judges to decide issues judges may have already decided....”); Brown, R. et al., *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 Cornell L. Rev. 1, 4 (2021) (“The fact that the vast majority of federal appellate decisions are non-precedential and contain limited reason-giving seems at odds with the core organizing principles of the federal judicial system. It also calls into question the system's commitment to some of its fundamental values, including equal treatment, reason-giving, predictability, and transparency.”). See also *Restatement (Second) of Conflict of Laws* § 6(2)(f) (1971) (listing “certainty, predictability, and uniformity of result” as a factor relevant to the choice of law).

¹¹ Accord, Thompson Frost, Kem T., *Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities*, 67 Baylor L. Rev. 48, 51 (2015) (“Predictability is a defining feature of the rule of law. Achieving predictability of outcomes within a jurisdiction and uniformity in the law across parallel jurisdictions helps assure consistency in judicial decisions, giving people a greater sense of certainty in the way courts will resolve disputes. In this way, predictability lends strength and legitimacy to a rule-of-law system”).

¹² PBS NewsHour/NPR/Marist Poll.

¹³ Special thanks, in particular, to Chief Justice Paul Reiber, Chief Judge Thomas Zonay, State Court Administrator Therese Corsones, and Chief Staff Attorney Robert Hubbard.

¹⁴ Special thanks, in particular, to Steve Errick, Joe Patz Vineyard, and Dan McCade.



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PURSUITS OF HAPPINESS

Kevin Lumpkin – The Puzzling Attorney

KSV: Hi Kevin – and thanks so much for agreeing to talk with us about your “Pursuit of Happiness.” As you know, for this feature, we interview attorneys with interests outside of the practice of law that help keep them balanced or provide fulfillment. Lots of readers of the *Vermont Bar Journal* probably already know you for your work as a principal at Sheehy, Furlong & Behm in Burlington and as the immediate past chair of the VBA Young Lawyer’s Division, but many others likely recognize your name from the crossword puzzles you create for each issue. I want to hear all about that, but let’s start at the beginning. Can you tell me a little about your origins? Where did you grow up?

KL: Thanks for thinking of me for this feature! I am originally from outside of Albany, New York but bounced around a lot as a child before finding my adoptive, hopefully forever home of Vermont.

KSV: Did you have your sights set on being an attorney in your formative years? When did you get on on that path?

KL: I actually went into college thinking I would be a doctor since both of my parents are in medicine. Second semester organic chemistry really killed those dreams, and I found that I took much better to political science classes.

KSV: Where did you go to college and law school?

KL: UVM and Vanderbilt – I have at thing for V schools.

KSV: What brought you back to Vermont after finishing your JD?

KL: It was always in the back of my mind, but what really brought me back was the opportunity to clerk in our trial court system – first in Bennington and then in Chittenden and Addison.

KSV: Can you tell me a little about your early lawyer jobs?

KL: There’s not much to tell – I got some great experience and exposure as a trial court clerk and shortly thereafter started as an associate at Sheehy!

KSV: How long have you been with Sheehy?

KL: It will be 10 years this November.

KSV: Tell me about your practice there.



KL: We have a general civil litigation practice and it’s hard to develop very specific specialties beyond that, but my focus has tended to be complex commercial litigation and medical malpractice. I’ve had some great intellectual property and employee mobility litigation, some class actions, some antitrust, and plenty of breach of contract-type claims.

KSV: So we know a bit know about what you do for work, let’s talk about what you do for fun. You’ve contributed a crossword puzzle to every *Vermont Bar Journal* since the Winter 2022 issue. I’m guessing that your history with crosswords didn’t start with that contribution. Can you share your crossword-interest origin story?

KL: Sure – it started out as a hobby just solving the *New York Times* crossword occasionally, and then when I realized I could start and maintain a streak it became an obsession. My *New York Times* streak currently stands around 1,200 days in a row, but I also subscribe to independent crossword outlets like AVCX, the Inkubator, and Lucky Streak (all highly recommended!)

KSV: Ah, now I understand why you use the *Times* as the benchmark for defining the difficulty-level of your own puzzles. And you have solved the *Times* crossword every day for more than three years?

KL: Every day like clockwork! It’s the start of my morning routine, and then I often move on to puzzles from other outlets which tend to be more avant-garde and creative than the *Times* can get away with.

KSV: Do you do other kinds of puzzles – like Sudoku or Wordle etc.?

KL: I dabble in other puzzles, but nothing beats the crossword.

KSV: I’ll confess to being a non puzzler. They seem to me like a way to manufacture stress and I’m not looking for that. But then, I’m also not gifted in solving them. – well, I’m OK at Wordle – sometimes. I’m guessing you are a good puzzle solver?

KL: I try to be! It’s mostly about pattern recognition, but what makes it really fun is deciphering creative clues. Sometimes it’s misdirection – like EURO for “Capital of Italy” instead of ROME – and sometimes it’s just fun, like EVE for “First lady?”

KSV: Tell me what what else you like about them.

KL: I also like seeing new constructors start to push the limits of what you can do with the medium. I am seeing unique grid shapes, constructors not caring as much about symmetry, and really cool themes that take advantage of the fact that many crosswords are solved on a computer these days.

KSV: Have you done any competitive puzzle solving?

KL: Yes! So far I’ve only entered online tournaments because I usually solve on a computer and I’m not sure how well my speed translates to paper, but I’ve loved the one-day and seasonal tournaments put on by Boswords.

KSV: Do you find that working on them, either solving them or writing them, is a way to cope with lawyer stress? They must demand a high level of concentration.

KL: It’s probably more of a way to get in the zone for work. I am always going for speed, so it’s a little rush of mental energy and I try to carry that into my work day.

KSV: When did you get started with writing your own crosswords?

KL: Pretty quickly after I got into solving – I found a few webinars and had one in-person session with a veteran constructor, built out a word list, and discovered it’s not that difficult to get started with the basics.

KSV: Can you share a little about your process with coming up with a puzzle for the VBJ?

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KL: Mostly I just try to keep my wordplay brain active and noticing things that have double meanings. Like when I hear about the Vermont Bar Foundation, I picture a crossword puzzle shaped like a house with "VERMONTBAR" at the bottom, making it the *foundation* for the house. But it turns out that's really challenging to construct, so I haven't cracked that one yet.

KSV: How long does it take to get one ready for our readers to solve?

KL: Once I have the theme entries laid out on the grid, not that long. I use computer software that relies on a word list to come up with the fill, and it's just a matter of finessing that. Or throwing away the whole grid because there is no fill that works! That's what takes a long time.

KSV: Is the VBJ the only beneficiary of your crossword creations? Do you aim to write them some day for other outlets – maybe even the *Times*?

KL: That's definitely a goal, but for now I'm happy cutting my teeth in the VBJ. I have a puzzle going that I think might be worthy of submission to a wider publication, but it's not quite ready yet.

KSV: If someone was interested in trying their hand at writing crosswords, what advice would you offer?

KL: Read the Deb Amlen series "How to Make a Crossword Puzzle" in the *Times*, join XWord Info, buy a license for construction software, and go from there!

KSV: I know you're interested in lots of other things – tell me what else you do for fun.

KL: All of the nerdy hobbies – I'm in an online trivia league and I get pretty into *Jeopardy!* I also really love theater and getting out to see live performances as much as possible. I try to get down to see shows on and off Broadway a few times a year.

KSV: Kevin, thanks so much for your contributions to the VBJ, and the VBA, I hope we can count on your crossword puzzles for year to come.

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



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WRITE ON

Training Antifragile Lawyers

Introduction

If you were going to argue a case before the Supreme Court of the United States, you might first “moot” your argument – present your argument to smart people who will pepper you with tough questions and skepticism so that you are better prepared for the real argument. Mooting is a stressful experience – it is a sustained intellectual attack, designed to make the person sweat, think on their feet, and ultimately perform better on the real day.

This process – making a person stronger by imposing stress – is an example of what Nassim Nicholas Taleb calls antifragility.¹ In his book *Antifragile*, Taleb explains that people and systems may be one of three things: (1) *Fragile*. These things are delicate, vulnerable, and cannot repair themselves (think fancy wineglass).² (2) *Resilient*. These things can withstand shock and recover from difficult stressors (think travel coffee mug).³ (3) *Antifragile*. These things don’t just withstand shock; they “get[] better” from it.⁴ Whereas the resilient “stay the same” after stress, the antifragile “thrive and grow when exposed to volatility, randomness, disorder, and stressors.”⁵

Our bodies are antifragile.⁶ When we lift weights, we impose trauma on our bodies by creating micro tears in our muscles. In recovery, our bodies rebuild those tears and make the muscles stronger.⁷ Our immune systems too “require[] exposure to a range of foods, bacteria, and even parasitic worms in order to develop [the] ability to mount an immune response to real threats.”⁸ Vaccines similarly make us stronger by introducing small amounts of a particular antigen in order to trigger an immune response.⁹ When our body encounters the real disease in the future, it will be better prepared to attack that particular pathogen.¹⁰

Enter Safetyism

“Safetyism,” a term coined by First Amendment expert Greg Lukianoff and social psychologist Jonathan Haidt in their book, *The Coddling of the American Mind*,¹¹ describes a culture where “[s]afety” trumps everything else, no matter how unlikely or trivial the potential danger.¹² Attention to safety grew in the United States in the latter half of the twentieth century, beginning with physical safety: car seats and seat belts, childproofing, bicycle hel-

metts, padded playgrounds, and declines in cigarette smoke and lead paint.¹³ Kids became physically safer – a “triumph” of the last century, although a trend that some believe has gone too far and resulted in less independent and more anxious kids and teens.¹⁴

In the last twenty years, the notion of “safety” “underwent a process of ‘concept creep’ and expanded to include emotional safety.”¹⁵ Haidt and Lukianoff document a current trend in higher education that extols “safety” but is actually about “emotional comfort.”¹⁶ Emotional safetyism “presumes an extraordinary fragility of the collegiate psyche, and therefore elevates the goal of protecting students from psychological harm. The ultimate aim, it seems, is to turn campuses into ‘safe spaces’ where young adults are shielded from words and ideas that make some uncomfortable.”¹⁷

To illustrate, Haidt and Lukianoff describe efforts “to scrub campuses clean of words, ideas, and subjects that might cause discomfort or give offense.”¹⁸ At Oberlin college, students urged faculty to use trigger warnings to “show students that you care about their safety.”¹⁹ Students there similarly requested that faculty use their preferred pronouns, “not because this was respectful or appropriately sensitive but because a professor who uses an incorrect pronoun prevents or impairs their safety in a classroom.”²⁰

In other instances, school administrators and faculty have been reprimanded, publicly shamed, or fired for comments that, at worst, touch on sensitive subjects.²¹

- At Harvard Law School, students learning criminal law “often ask teachers not to include the law of rape on exams for fear that the material would cause them to perform less well.”²² One teacher was “asked by a student not to use the word ‘violate’ in class—as in ‘Does this conduct violate the law?’—because the word was triggering.”²³
- At an anti-racism seminar for high school students taught by Vincent Lloyd, a black professor and Director of the Africana Studies program at Villanova University, the students voted out of the seminar two of the students, and then read to Lloyd a “prepared statement” about how certain students had been “harmed,” and how the students “didn’t feel safe because

[Lloyd] didn’t immediately correct views that failed to treat anti-blackness as the cause of all the world’s ills.”²⁴ (Lloyd later described the experience as “A black professor trapped in anti-racist hell.”)

- At Cornell University, undergraduate students asked the administration to pass a resolution requiring trigger warnings²⁵ in syllabi, notifying students in advance of any “traumatic content” and noting that students would not be penalized for “opt[ing] out of exposure” so long as they made up the work.²⁶ (The answer from the administration: no.)²⁷
- At Stanford Law School, CUNY Law School, UC Hastings, Williams College, UC Berkeley, Middlebury, and many other schools, controversial speakers invited to speak on campus have ignited not just protests – a welcome and appropriate form of voicing dissent – but threats of violence, hateful messages, and disruption so extreme that certain events had to be cancelled.²⁸ Why? Because “[t]hese students have been taught from the earliest age that harmful speech has no place in educational institutions” because it makes them “unsafe.”²⁹
- Nationwide, the number of “disinvitation attempts” of campus speakers has increased remarkably since 2015, reflecting a majority view that “college students should not be exposed to ‘offensive’ ideas.”³⁰ Similarly, the number of attempts to “professionally sanction scholars” at higher education institutions (“cancel culture”) has skyrocketed from four attempts in 2000 to 145 in 2022.³¹

The free speech implications of campus “safetyism” are obvious. Prohibiting someone from speaking about a certain topic or expressing a particular view is antithetical to the First Amendment. But even on private campuses, the implications are equally dire.

“College campuses should be a place where all ideas and views can be expressed. A primary goal of higher education is to empower students to critically analyze ideas across a broad spectrum of disciplines. The strengths and weaknesses of ideas are determined not by conformity to any pre-

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existing orthodoxy, but through the process of rational argument and evidence-based reasoning. This is how better ideas gain more legitimacy and worse ideas are exposed and rebutted.”³²

In other words, decreased exposure to different ideas and viewpoints does not make students safer. If anything, it may harm them in the long run. In the same way that our muscles atrophy from lack of exercise, students may become “more fragile and less resilient” when protected from words and ideas that differ from their own.³³ The result: adults less able to cope with and flourish in a diverse, pluralistic society.

The Law School Paradox

The trend towards “safetyism” on campuses – mandating trigger warnings, cancelling speakers, sanctioning professors with certain viewpoints or who use certain language – is particularly counterproductive at law schools. The practice of law (or at least litigation) involves several fundamental skills: (1) listening to clients and absorbing their stories; (2) researching cases with similar fact patterns; (3) crafting thoughtful and sophisticated arguments based on the law and facts; and (4) listening to the other side’s perspective and determining how best to overcome it.

It is hard to imagine approaching any step in this process with an unwillingness or inability to hear certain words. In so many fields of law a lawyer will undoubtedly encounter difficult stories. A criminal defense lawyer or prosecutor will hear no shortage of horrific stories about violent crimes, racketeering, extortion, or sexual abuse of minors, to name just a few. An immigration lawyer may hear about severe persecution of their asylum-seeking clients – female genital mutilation, gang violence, human trafficking, and forced and child marriage. A family lawyer might hear about traumatic divorce and child abuse. A medical malpractice or products liability lawyer will no doubt hear upsetting stories about life-changing or even fatal injuries. A civil rights lawyer will encounter countless stories about invidious discrimination based on race, gender identity, religion, nationality, pregnancy, and disability, to name a few.

A lawyer sitting across the desk from a client cannot, upon hearing these stories, call the client out for not providing a trigger warning; for not using inclusive language; or for expressing certain political or social viewpoints. In a lawyer-client setting, it will never be about the lawyer’s feelings or making the lawyer feel safe. No matter how upsetting the content, as an advisor, advocate, negotiator, and evaluator,³⁴ a

lawyer must be able to stay calm, ask difficult questions – including details about traumatic events – and advise on the best path forward.

This is where antifragility comes in. A lawyer who has not exercised their listening skills – absorbing variegated information and viewpoints no matter how offensive – will not have the skills to really hear and process difficult information, let alone craft sophisticated arguments based on troubling facts. If law students are used to silencing viewpoints with which they disagree, how will they argue cases and respond to their opponents?³⁵ What will they do in court when a judge or a witness says something unexpected and offensive? “Law students are entering a profession in which their job is to make arguments on behalf of clients whose very lives may depend on their professional skill. Just as doctors in training must learn to face suffering and death and respond in their professional role, lawyers in training must learn to confront injustice or views they don’t agree with”³⁶ and “listen, compromise and advocate.”³⁷

This doesn’t mean that we should ignore the pleas for safety in the classroom. We can and should consider students’ different experiences and backgrounds when presenting material; support diversity, equity, inclusion, and accessibility to the fullest extent; strive to use inclusive language; accommodate those who may be processing trauma; and most importantly, “treat students with humanity.”³⁸ We may have the right to say something; that doesn’t mean we should say it.³⁹

But creating an inclusive and respectful classroom environment is not at odds with a commitment to academic freedom and spirited debate.⁴⁰ In fact, when faced with a difficult and sensitive topic, “[n]aming [the] perceived harm, exploring it, and debating solutions with people who disagree about the nature and fact of the harm or the correct solutions” not only fosters learning and growth, it is “the very essence of legal work. Lively, candid, civil, and evidence-based discourse in disagreement” is healthy for our pluralistic society, and it is also “a professional duty.”⁴¹ Observ[ing] . . . this duty matters most, not least, when we are convinced that others haven’t.”⁴²

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¹ NASSIM NICHOLAS TALEB, ANTIFRAGILE: THINGS THAT GAIN FROM DISORDER 3-4 (2012).

² GREG LUKIANOFF & JONATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND 23 (2018) [hereinafter CODDLING].

³ *Id.*

⁴ NASSIM NICHOLAS TALEB, *ANTIFRAGILE: THINGS THAT GAIN FROM DISORDER* 3 (2012).

⁵ *Id.*

⁶ CODDLING, *supra* note 2, at 22-23.

⁷ Annie Hayes, *What is Hypertrophy? Experts Explain the Science Behind Building Muscle*, *MEN'S HEALTH* (Aug. 5, 2021), <https://www.men'shealth.com/uk/building-muscle/a37009576/hypertrophy/>; CODDLING, *supra* note 2, at 22.

⁸ CODDLING, *supra* note 2, at 21.

⁹ *Id.*; *How Do Vaccines Work?*, *WORLD HEALTH ORGANIZATION* (Dec. 8, 2020), <https://www.who.int/news-room/feature-stories/detail/how-do-vaccines-work#:~:text=Vaccines%20contain%20weakened%20or%20inactive,rather%20than%20the%20antigen%20itself.>

¹⁰ CODDLING, *supra* note 2, at 21; *How Do Vaccines Work?*, *WORLD HEALTH ORGANIZATION* (Dec. 8, 2020), <https://www.who.int/news-room/feature-stories/detail/how-do-vaccines-work#:~:text=Vaccines%20contain%20weakened%20or%20inactive,rather%20than%20the%20antigen%20itself.>

¹¹ CODDLING, *supra* note 2, at 24, 30.

¹² *Id.* at 30.

¹³ *Id.* at 24.

¹⁴ CODDLING, *supra* note 2, at 24; see, e.g., Alison Gopnik, *Should We Let Toddlers Play with Saws and Knives?* *WALL ST. J.* (Aug. 31, 2016), <https://www.wsj.com/articles/should-we-let-toddlers-play-with-saws-and-knives-1472654945>; see generally LET GROW, <https://letgrow.org/> (last visited May 26, 2023) (describing "movement for childhood independence"); CODDLING, *supra* note 2, at 163-94 (describing "paranoid parenting" and "the decline of play").

¹⁵ CODDLING, *supra* note 2, at 24.

¹⁶ *Id.* at 27.

¹⁷ Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, *THE ATLANTIC* (Sept.

2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/>.

¹⁸ *Id.*

¹⁹ CODDLING, *supra* note 2, at 24 (emphasis added) (quotations omitted).

²⁰ *Id.* at 24-25 (emphasis added) (quotations omitted).

²¹ As one college professor recently wrote, "[n]ow boat-rocking isn't just dangerous – it's suicidal." Edward Schlosser, *I'm a Liberal Professor, and My Liberal Students Terrify Me*, *VOX* (June 3, 2015), <https://www.vox.com/2015/6/3/8706323/college-professor-afraid>.

²² Jeannie Suk Gersen, *The Trouble With Teaching Rape Law*, *NEW YORKER* (Dec. 15, 2014), <https://www.newyorker.com/news/news-desk/trouble-teaching-rape-law>.

²³ *Id.*

²⁴ Vincent Lloyd, *A Black Professor Trapped in Anti-Racist Hell*, *COMPACT* (Feb. 10, 2023), <https://compactmag.com/article/a-black-professor-trapped-in-anti-racist-hell>.

²⁵ While faculty should always respect and accommodate a student who is processing trauma, there is extensive literature debunking the theory that trigger warnings help to protect students or help them cope with trauma. See, e.g., Payton Jones et al., *Helping or Harming? The Effect of Trigger Warnings on Individuals with Trauma Histories*, 8(5) *CLINICAL PSYCH. SCI.* 905, 905 (2020) (finding "no evidence that trigger warnings were helpful for trauma survivors, for participants who self-reported a posttraumatic stress disorder (PTSD) diagnosis, or for participants who qualified for probable PTSD"); Benjamin W. Bellet et al., *Trigger Warning: Empirical Evidence Ahead*, 61 *J. BEHAV. THERAPY & EXPERIMENTAL PSYCHIATRY* 134, 139 (2018) (finding, among other things, that "trigger warnings may have unintended yet po-

tentially deleterious consequences for those they aim to protect"); Mevagh Sanson et al., *Trigger Warnings Are Trivially Helpful at Reducing Negative Affect, Intrusive Thoughts, and Avoidance*, 7(4) *CLINICAL PSYCH. SCI.* 778, 778 (2019) (documenting analyses showing that people, including those with a "history of trauma," "reported similar levels of negative affect, intrusions, and avoidance regardless of whether they had received a trigger warning"); Katherine Rosman, *Should College Come With Trigger Warnings? At Cornell, It's a 'Hard No.'*, *N.Y. TIMES* (Apr. 12, 2023), <https://www.nytimes.com/2023/04/12/nyregion/cornell-student-assembly-trigger-warnings.html?searchResultPosition=1> (noting that trigger warnings "disempower[] people by reducing their identities to traumatic events and 'infantilize[]' students whom professors should be preparing for adult life").

²⁶ Cornell University Student Assembly, *Resolution 31: Mandating Content Warnings for Traumatic Content in the Classroom* (March 23, 2023), https://assembly.cornell.edu/sites/default/files/resolution_31_-_content_warnings.pdf.

²⁷ Katherine Rosman, *Should College Come With Trigger Warnings? At Cornell, It's a 'Hard No.'*, *N.Y. TIMES* (Apr. 12, 2023), <https://www.nytimes.com/2023/04/12/nyregion/cornell-student-assembly-trigger-warnings.html?searchResultPosition=1>.

²⁸ See, e.g., CODDLING, *supra* note 2, at 49, 81-90; Josh Blackman, *Law Schools Face an Inflection Point with Diversity, Equity and Inclusion*, *ABA JOURNAL* (May 1, 2023), https://www.abajournal.com/voice/article/law-schools-face-an-inflection-point-with-diversity-equity-inclusion?utm_medium=email&utm_source=salesforce_663937&utm_sid=01958561&utm_campaign=weekly_

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²⁹ Josh Blackman, *Law Schools Face an Inflection Point with Diversity, Equity and Inclusion*, ABA JOURNAL (May 1, 2023), [https://](https://www.abajournal.com/voice/article/law-schools-face-an-inflection-point-with-diversity-equity-inclusion?utm_medium=email&utm_source=salesforce_663937&utm_campaign=weekly_email&utm_content=&additional4=&additional5=&sfmc_j=663937&sfmc_s=57679856&sfmc_l=1527&sfmc_jb=31007&sfmc_mid=100027443&sfmc_u=19718021)

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jb=31007&sfmc_mid=100027443&sfmc_u=19718021 (emphasis added).

³⁰ CODDING, *supra* note 2, at 48 (citing data from Foundation for Individual Rights and Expression (FIRE)).

³¹ Komi Frey & Sean Stevens, *Scholars Under Fire: Attempts to Sanction Scholars from 2000 to 2022*, FIRE (2023), at 2, <https://www.thefire.org/research-learn/scholars-under-fire-attempts-sanction-scholars-2000-2022>.

³² Erwin Chemerinsky & Howard Gillman, *Free Speech Doesn't Mean Hecklers Get to Shut Down Campus Debate*, WASH. POST (March 24, 2022), <https://www.washingtonpost.com/opinions/2022/03/24/free-speech-doesnt-mean-hecklers-get-shut-down-campus-debate/>; see Kalven Committee, *Report on the University's Role in Political and Social Action*, UNIVERSITY OF CHICAGO (Nov. 1967) ("The university is the home and sponsor of criticism; it is not itself the critic. . . . A university, if it is to be true to its faith in intellectual inquiry, must embrace, be hospitable to, and encourage the widest diversity of views within its own community."); see generally Letter from Jenny S. Martinez, Dean of Stanford Law School, to Stanford Law School Community (March 22, 2023) [hereinafter SLS Letter], https://law.stanford.edu/wp-content/uploads/2023/03/Next-Steps-on-Protests-and-Free-Speech.pdf?mkt_tok=ODgOLUZI0zMDcAAAGKqNfmuFz2S_PCzkgUjC.

³³ See CODDING, *supra* note 2, at 22, 30.

³⁴ MODEL RULES OF PRO. CONDUCT Preamble (AM. BAR ASS'N 1983).

³⁵ Erwin Chemerinsky & Howard Gillman, *Free Speech Doesn't Mean Hecklers Get to Shut Down Campus Debate*, WASH. POST (March 24, 2022), <https://www.washingtonpost.com/opinions/2022/03/24/free-speech-doesnt-mean-hecklers-get-shut-down-campus-debate/>.

³⁶ SLS Letter at 6.

³⁷ Katherine Rosman, *Should College Come With Trigger Warnings? At Cornell, It's a 'Hard No.'*, N.Y. TIMES (Apr. 12, 2023), <https://www.nytimes.com/2023/04/12/nyregion/cornell-student-assembly-trigger-warnings.html?searchResultPosition=1>.

³⁸ *Id.*

³⁹ Erwin Chemerinsky, Remarks at webinar on Integrating Doctrine & Diversity: Responding to Classroom Controversy (May 10, 2023).

⁴⁰ SLS Letter at 6-7.

⁴¹ *Id.* at 7. Of course, lawyers are also bound by the professional duty not to engage in conduct related to law practice that is harassing or discriminatory "on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status." MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016). See generally Rodney A. Smolla, *The Tensions Between Regulation of the Legal Profession and Protection of the First Amendment Rights of Lawyers and Judges: A Tribute to Ronald Rotunda*, 22 CHAPMAN L. REV. 285 (2019).

⁴² SLS Letter at 7.



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WHAT'S NEW

Lawyers Helping Flood Victims — the VBA Responds

As every Vermonter is aware, a storm that dumped up to two months' worth of rain in two days starting July 10, 2023, caused catastrophic flooding around the state. The event was comparable to Tropical Storm Irene, which struck the state in 2011, and while the devastation was distributed a bit differently this time the damage was on par. Our VBA office on Court Street in Montpelier was spared but the calamity suffered by our neighbors is, almost literally on our doorstep and, metaphorically in our small state, on every doorstep.

We immediately began hearing from members who wanted to help, and we moved quickly to mobilize our response. There are now a couple of VBA-sponsored and co-sponsored projects available to provide this help.

Vermont Flood Relief Legal Assistance Project

The VBA is recruiting attorneys to provide pro bono advice over the phone for up to half an hour to answer pressing questions from flood victims. We expect questions to range across many areas of law including working with insurers and FEMA, employment loss, payments for mortgages, child support, or student loans, landlord/tenant issues and any other disruption or need brought about by the flooding.

We are also looking for lawyers to provide short-term limited-service assistance to flood victims—up to 5 hours—to help with more complex matters. This might include interpreting and enforcing insurance policies, investigating mortgage forbearance, seeking child support modification, intervening with landlords etc. The Vermont Bar Foundation expedited approval just days after the flood for a new low-bono project grant to provide participating attorneys \$75 per hour for up to 5 hours



of work for flood victims. Interested attorneys can thus choose to participate on a low bono or pro bono basis.

Interested? The sign-up form and more information are available at the VBA website (www.vtbar.org) under the "For Attorneys" tab.

Flood victims will be matched with lawyers who have indicated expertise in the areas in which the victims have questions. Flood victims can call the VBA (1-800-639-7036 weekdays from 8 am to 4 pm). The sign-up form and more information for victims can also be found on the VBA website.

Help for Small Businesses

Well before the rain started falling, the Vermont Law and Graduate School and the VBA had established a project fund-

ed by the Small Business Administration (SBA) to, among other things, link low bono lawyers with small business owners who need advice and legal services related to their businesses. It can also be used to assist small businesses with flood related issues. The program will cover non-litigation legal needs for a business. We expect those needs to be similar to the questions mentioned above, but there will be a few issues unique to businesses. For those who cannot recover, they will need to wind up and close out their entities, negotiate an end to their commercial lease, and possibly file bankruptcy. For those who rebuild, there may also be employment questions, and contract review.

If you are a Vermont attorney and interested in joining the panel, go to the VBA website to sign up. Again, attorneys can find the form and more information about the project and other pro bono opportunities under the "For Attorneys" tab.

If you have questions about either project, please contact VBA Legal Access Coordinator, Mary Ashcroft, Esq. at mashcroft@vtbar.org.

Other ways to help

If you have expertise to lend to assist flood victims, or to train other attorneys in how they can assist, the VBA wants to hear from you. Attorney experts in areas of disaster relief and recovery – working with insurance companies, FEMA, housing issues, etc. – are needed to teach others what they know. If you can provide a CLE or an article on a topic related to disaster relief and recovery, please contact info@vtbar.org.



WHAT'S NEW

Legislative Update 2023

Here's a quick update on the bills enacted this session in which the VBA played a part as well as others of particular significance to our members.

Uniform Power of Attorney Act

The first, as many of you are already aware, is the new Uniform Power of Attorney Act, Act 60 (formerly H. 227). The VBA did two CLE's focusing on the changes in June. Thanks go out to the Probate & Trust Section, led by Chair Mark Langan as well as the Property Law Section and the Elder Law Section for their contribution in the drafting process.

Links to all the acts mentioned here can be found on the "Bills Passed" page of the Vermont Legislature. <https://legislature.vermont.gov/bill/passed/2024>.

Here's a summary of the new Power of Attorney Act:

Act No. 60 (H. 227). An act relating to the Vermont Uniform Power of Attorney

Subjects: Court procedures; power of attorney This act enacts the revised Uniform Power of Attorney Act (UPOAA) in Vermont. The UPOAA standardizes and modernizes the law of powers of attorney and provides a simple, customizable power of attorney form that any person can use, with or without an attorney. The act also repeals the existing chapter of Vermont law governing powers of attorney and repeals language in the Uniform Trust Act that would be inconsistent with the UPOAA.

Effective Date: July 1, 2023

Reproductive Rights Shield Bills

The VBA testified on this bill (H. 89) dealing with legally protected health care activity as there was language in the initial draft that would have impeded the attorney-client relationship. That language was removed without much objection. Here is the Act summary and link to the Act. I am also including the same for a companion bill (S. 37):

Act No. 14 2023 VT LEG #370627 v.2 This act summary is provided for the convenience of the public and members of the General Assembly. It is intended to provide a general summary of the act and may not be exhaustive. It has been prepared by the staff of the Of-

fice of Legislative Counsel without input from members of the General Assembly. It is not intended to aid in the interpretation of legislation or to serve as a source of legislative intent. Act No. 14 (H. 89). An act relating to civil and criminal procedures concerning legally protected health care activity Subjects: Civil and criminal procedure; legally protected health care This act defines "legally protected health care activity" for purposes of Vermont law to include reproductive health care services and gender-affirming health care services and reaffirms that access to such services is a legal right in Vermont. The act declares interference with legally protected health care activity, whether or not under the color of law, against the public policy of Vermont and the act shields providers and patients from litigation seeking to interfere with these established health care services. The act identifies "abusive litigation" as litigation or other legal action to deter, prevent, sanction, or punish any person engaging in legally protected health care activity by filing or prosecuting any action in any other state where liability, in whole or part, directly or indirectly, is based on legally protected health care activity that occurred in Vermont. Lawsuits are considered to be based on conduct that occurred in Vermont if any part of any act or omission involved in the course of conduct that forms the basis for liability in the lawsuit occurs or is initiated in Vermont, whether or not such act or omission is alleged or included in any pleading or other filing in the lawsuit. The act creates a private right of action for a person who has been subject to abusive litigation to counter-sue for damages for the amount of any judgment issued in connection with any abusive litigation, and any and all other expenses, costs, or reasonable attorney's fees incurred in connection with the abusive litigation and with the tortious interference action. The act establishes a policy of noncooperation with abusive litigation concerning legally protected health care. Vermont courts are prohibited from ordering a person found in Vermont to give testimony or a statement or produce documents or other things with any proceeding in a tribunal outside Vermont concerning abusive litigation involving legally protected health care activity. No public agency or employee, appointee,

officer or official, or any other person acting on behalf of a public agency may knowingly provide any information or expend or use time, money, facilities, property, equipment, personnel, or other resources in furtherance of any interstate investigation or proceeding seeking to impose civil or criminal liability upon a person or entity for the provision, seeking or receipt of, or inquiring about legally protected health care activity that is legal in Vermont or assisting any person or entity providing, seeking, receiving, or responding to an inquiry about legally protected health care activity that is legal in Vermont. With respect to extradition, the Governor is directed not to surrender a person charged in another state as a result of engaging in legally protected health care activity unless the executive authority of the demanding state alleges in writing that the accused was physically present in the demanding state at the time of the commission of the alleged offense and that thereafter the accused fled from the demanding state. Finally, Act No. 14 Page 2 of 2 2023 VT LEG #370627 v.2 Vermont courts are prohibited from issuing a summons where a prosecution is pending in another state concerning legally protected health care activity or where a grand jury investigation concerning legally protected health care activity has commenced or is about to commence for a criminal violation of a law of the other state unless the acts forming the basis of the prosecution or investigation would also constitute an offense if occurring entirely in Vermont. The act establishes a civil offense for interference with access to a health care facility that is modeled after the federal Freedom of Access to Clinic Entrances Act (18 U.S.C. § 248) and permits persons who provide legally protected health care, persons who assist others in obtaining such care, and persons who exercise their legal right to obtain such services to participate in the Safe at Home address confidentiality program that is currently available to victims of domestic violence, stalking, sexual assault, or human trafficking.

Effective Date: May 10, 2023

Act No. 15 2023 VT LEG #370784 v.2 This act summary is provided for the convenience of the public and members

of the General Assembly. It is intended to provide a general summary of the act and may not be exhaustive. It has been prepared by the staff of the Office of Legislative Counsel without input from members of the General Assembly. It is not intended to aid in the interpretation of legislation or to serve as a source of legislative intent. Act No. 15 (S. 37). An act relating to access to legally protected health care activity and regulation of health care providers Subjects: Health insurance; professional regulation; health care; Office of Professional Regulation; health care providers; Board of Medical Practice; pregnancy centers; reproductive health care services; gender-affirming health care services; medical malpractice insurance; emergency contraception; protected health information This act adds definitions to statute for the terms "gender-affirming health care services," "legally protected health care activity," and "reproductive health care services;" prohibits a medical malpractice insurer from adjusting a health care provider's risk classification or premium charges based on the health provider providing legally protected health care activity; requires (in statute) that health insurance plans and Medicaid cover gender-affirming health care services and abortion-related services; prohibits a health care provider from being subject to professional disciplinary action for providing or assisting in the provision of legally protected health care activity and establishes new unprofessional conduct standards; establishes a new "unfair and deceptive act" regarding limited-services pregnancy centers to prohibit false and misleading advertising about services; requires the Green Mountain Care Board and the Agency of Human Services to include access to reproductive and gender-affirming health care services as part of ongoing projects and analyses; requires the Office of Professional Regulation to submit a report regarding the State's participation in interstate compacts (current and future) and directs Vermont compact delegates to support protections for health care providers in compacts; allows pharmacists to prescribe emergency contraception and permits pharmacies and colleges and universities to make nonprescription emergency contraception and other contraceptives available by vending machine; requires Vermont's public institutions of higher education to report on their students' access to reproductive and gender-affirming health care services; and, lastly, limits the circumstances under which covered entities and business associates may disclose information regarding legally protected health care

activity.

Multiple effective dates, beginning on May 10, 2023

Residency Requirement for End-of-Life Care

H. 190 is the bill that removed the residency requirement from patients' choice at end-of-life laws:

Act No. 10 (H. 190). An act relating to removing the residency requirement from Vermont's patient choice at end-of-life laws Subjects: Health; patient choice at end of life; residency This act eliminates the requirement that a patient with a terminal condition must be a Vermont resident in order to be eligible for medication to be self-administered to hasten the patient's own death in accordance with Vermont's patient choice at end of life laws.

Effective Date: May 2, 2023

Small Claims Jurisdiction

Act 46 (S. 33) raised the small claims jurisdiction limit to \$10,000 as well as enacting other miscellaneous changes:

Act No. 46 2023 VT LEG #371339 v.2 This act summary is provided for the convenience of the public and members of the General Assembly. It is intended to provide a general summary of the act and may not be exhaustive. It has been prepared by the staff of the Office of Legislative Counsel without input from members of the General Assembly. It is not intended to aid in the interpretation of legislation or to serve as a source of legislative intent. Act No. 46 (S. 33). An act relating to miscellaneous judiciary procedures Subjects: Criminal procedure; court procedure; miscellaneous amendments This act makes a number of changes to court and Judiciary procedures, including adding "judicial master" to the list of judicial officers that a Chief Superior Judge may specially assign to hear a case in the Superior Court; permitting all parties required to make an oath in a court proceeding to instead file a declaration that the statement is true, subject to the penalties of perjury, without having to swear the statement in person before a notary; raising the jurisdictional limit for small claims actions from \$5,000.00 to \$10,000.00; permitting the jurors' oath in criminal cases to be affirmed rather than sworn; permitting the State to have the same appeal rights in youthful offender proceedings that it has in criminal proceedings; clarifying that tampering with an ignition interlock device on behalf of another person who is prohibited from driving with-

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out the device is a civil violation; permitting service providers, court diversion programs, community-based providers, and treatment programs to have access to juvenile case records; making juvenile records available to the National Instant Criminal Background Check System for purposes of conducting a background check when a person under 21 years of age purchases a firearm; providing that information related to the offense directly or indirectly derived from the risk and needs screening that must be offered to a child prior to the preliminary hearing in a juvenile proceeding cannot be used against the child in the case for any purpose; providing that, prior to the approval of a youthful offender disposition case plan, the court may refer a child directly to a youth-appropriate community-based provider; permitting notice that a person's DNA has been removed from the State DNA database to be provided by regular rather than certified mail; providing that when a person charged with DUI pleads guilty to the lesser offense of negligent operation, the person will be able to use an ignition interlock device right away after the conviction; establishing a new statute of limitations for tort claims based on environmental contamination that provides that a claim based on environmental contamination accrues so long as the contamination remains on the property; permitting the Chairs of the House and Senate Committees on Judiciary to designate another member to serve on the Sentencing Commission; prohibiting a law enforcement officer from engaging in a sexual act with a person whom the officer is investigating or whom the officer knows is being inves-

tigated by another officer; allowing persons under 21 years of age to possess tobacco in connection with Indigenous cultural tobacco practices; permitting relief from abuse orders to be mailed to defendants instead of personally served on them if they attend the hearing when the order is issued; and extending the sunset for the Vermont Sentencing Commission from July 1, 2023 to July 1, 2025 and directing the Commission to report (1) to the House and Senate Committees on Judiciary by December 15, 2023 on whether any modifications should be made to the statutory definition of stalking and (2) to the General Assembly by December 1, 2023 on whether to eliminate cash bail. Act No. 46 Page 2 of 2 2023 VT LEG #371339 v.2

Effective Date: June 5, 2023

Workplace Discrimination

Act 80 (S. 103) deals with discrimination in the workplace. Members of the Labor & Employment Law Section testified numerous times on the bill in both chambers. Here is the summary:

Act No. 80 (S. 103). An act relating to amending the prohibitions against discrimination Subjects: Labor; employment practices; discrimination; equal pay; agreements not to compete; fair employment; public accommodations This act amends the Fair Employment Practices Act to:

- prohibit pay discrimination on the basis of race, national origin, sexual orientation, gender identity, and disability;
- prohibit agreements to settle a claim of employment discrimination from in-

cluding a provision that prevents the employee from working for the employer or an affiliate of the employer in the future;

- provide that harassment and discrimination need not be severe or pervasive to be unlawful;

- provide that, except when an employee is alleging pay discrimination or disparate impact discrimination, the employee is not required to identify another employee to whom the employee's treatment can be compared for purposes of showing that unlawful discrimination occurred; and

- define and provide statutory direction on the interpretation of the term "harass" for purposes of employment discrimination.

This act also amends the Fair Housing and Public Accommodations Act to:

- define and provide statutory direction on the interpretation of the term "harass" for purposes of public accommodations discrimination; and

- provide that harassment and discrimination need not be severe or pervasive to be unlawful.

Effective Date: July 1, 2023

Forensic Facility for Mentally Ill Incompetent Criminal Defendants

Act 27 (S. 89) concerns the establishment of a forensic facility:

Act No. 27 2023 VT LEG #370763 v.2

This act summary is provided for the convenience of the public and members of the General Assembly. It is intended to provide a general summary of the act and may not be exhaustive. It has been prepared by the staff of the Office of Legislative Counsel without input from members of the General Assembly. It is not intended to aid in the interpretation of legislation or to serve as a source of legislative intent. Act No. 27 (S. 89). An act relating to establishing a forensic facility Subjects: Health; human services; judiciary Sec. 1 of this act expresses the intent of the General Assembly to establish an initial forensic facility in the nine-bed wing of the current Vermont Psychiatric Care Hospital by July 1, 2024. Sec. 2 of this act specifies that such a forensic facility wing established by the Departments of Mental Health and of Disabilities, Aging, and Independent Living would be excluded from the certificate of need process pursuant to 18 V.S.A. chapter 221, subchapter 5. Sec. 3 of this act directs the Department of Mental Health to initiate an amendment to its "Rules for the Administration of Nonemergency Involuntary Psychiatric Medications" by August 1, 2023. This section also directs the Departments of Mental Health

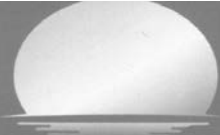
and of Disabilities, Aging, and Independent Living to begin drafting amendments to the "Licensing and Operating Regulations for Therapeutic Community Residences" by September 1, 2023. Sec. 4 of this act requires the Agency of Human Services to present the following information to various committees of the General Assembly: • a staffing and programming plan for the forensic facility; • whether additional resources are needed to establish the forensic facility; and • an assessment of laws, regulations, rules, and policies governing psychiatric hospitals and therapeutic community residences to ensure that they can co-exist in the same building. Sec. 5 of this act requires the Departments of Mental Health and of Disabilities, Aging, and Independent Living to submit an annual report to the General Assembly on January 15 between 2025 and 2030 addressing: • the average daily consensus at the forensic facility; • the number of individuals waitlisted for the forensic facility, and where they receive treatment or programming while waiting; • the aggregated demographic data about the individuals served at the forensic facility; and • an account of the number and types of emergency involuntary procedures used at the forensic facility. Sec. 6 of this act establishes the Working Group on Policies Pertaining to Individuals with Intellectual Disabilities Who Are Criminal-Justice Involved. The Working Group is tasked with assessing whether a forensic level of care is needed for individuals with intellectual disabilities who are charged with a crime of violence against another person, have been determined incompetent to stand trial or adjudicated not guilty by reason of insanity, and are committed to the custody of the Commissioner of Disabilities, Aging, Act No. 27 Page 2 of 2 2023 VT LEG #370763 v.2 and Independent Living. The Working Group is required to submit a report containing proposed legislation by December 1, 2023.

Effective Date: May 30, 2023

Competency and Sanity in Criminal Cases

Act 28 (S. 91) concerns competency to stand trial and insanity as a defense:

Act No. 28 2023 VT LEG #371338 v.2
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not intended to aid in the interpretation of legislation or to serve as a source of legislative intent. Act No. 28 (S. 91). An act relating to competency to stand trial and insanity as a defense Subjects: Criminal procedures; competency to stand trial; insanity as a defense This act separates the initial psychiatric examination that must occur when the question of a criminal defendant's sanity at the time the offense was committed or competency to stand trial has been raised. As a result, the initial examination will evaluate the defendant's competency, not the defendant's sanity. The act permits the examination to be performed by doctoral-level psychologists with training in forensic psychology. Current law requires the initial examination to be conducted by a psychiatrist. This provision sunsets in one year, and during that year the Joint Legislative Committee on Justice Oversight will study and report back on whether this new option should be kept, repealed, or expanded to include other mental health professionals. The act provides that subsequent competency evaluations after completion of the initial one will only be ordered by the court if circumstances have changed. In determining whether to order a subsequent evaluation, the court must consider any clinical evidence provided by the treating physician indicating that the defendant's competency may have changed. The act also permits the court to issue an arrest warrant for a defendant who has received notice of a competency evaluation but failed to appear for it. The act reflects current practice by express-

ly providing that the defendant is presumed to be competent, has the burden of proving incompetency by a preponderance of the evidence, and cannot be tried for an offense if found to be incompetent. The act requires the Department of Mental Health and the Department of Disabilities, Aging, and Independent Living to submit reports on cumulative competency evaluations and on whether a plan for a competency restoration program should be adopted in Vermont. Effective Date: July 1, 2023

"The Big Bill"

Act 78 (H. 494), the appropriations bill, also known as the "the big bill," added a new judge to the judiciary as well as one law clerk and five additional staff positions. It also funded the court's development of its own network separating it from the Agency of Digital Services.

Childcare Bill and Accompanying Payroll Tax

Finally, members should be aware of Act 76 (H.217), the childcare bill that will impose a new payroll tax as of 1 July 2024.

Sec. 24 of this act establishes a payroll tax known as the Child Care Contribution that will provide funding for the Child Care Financial Assistance Program. Please read and prepare for the changes; they can be found starting on page 34 of the Act.

Bob Paolini, Esq., is the Executive Director of the Vermont Bar Association.



SAVE THE DATE: SEPT. 29, 2023, FOR THE VBA ANNUAL MEETING.

It will be at the Hilton Burlington Lake Champlain and will include CLEs on the Shield Law and Employment Law. (These sessions will also be recorded for later viewing in the digital library if you can't make it to the live meeting).

BE WELL

Find Ways to Experience “Type I Fun”/Healthy Summer Activities to Lower Stress

Now that the summer of 2023 is well upon us, it's good to look for ways to incorporate mindfulness into your summer adventures. This means choosing to put your attention on a specific activity, in the present moment, without judgment. Many times, we do things that our culture or society tells us are “healthy” and will bring well-being into our lives. However, often these activities may not truly be beneficial to us, especially in challenging weather like heat and humidity, or dense smog. These exact weather conditions have prevailed during much of our Vermont summer due to the hundreds of forest fires currently burning in Quebec with the El Niño bringing the smoke into Vermont and the surrounding Northeast. For example, I went running in high pollen counts with temperatures higher than 75 degrees with 90 percent humidity and this caused my first anaphylactic reaction this summer, where my throat closed, and I had to be rushed to the emergency room for steroids and epinephrine to survive! My body literally rejected this “healthy” activity.

Now, that may be an extreme example of a “healthy” activity actually becoming dangerous, almost deadly, but the same considerations apply even when the weather conditions are fabulous. For example, you might go running on a perfect day, but you feel miserable and hate every step until you are done, or you might go for a bike ride when the weather is pleasant but experience such bad neck or back pain that you pray for the experience to end. When these unpleasant conditions occur, your nervous system sends a stressed signal to

the rest of your body, flooding your system with the stress hormones adrenaline, epinephrine and in the longer term, cortisol. These stress hormones slow down digestion and metabolism, which means if you are using these exercises to lose weight, they are actually having the opposite effect. You can gain weight by being stressed out doing exercise that stresses you out or that you do not enjoy.

So, my guidance is simple, apply the three types of the “Fun Scale” to your summer activities and adventures, because not all fun and healthy activities are created equal. Type I **Fun is enjoyable WHILE it is happening.** Also, known as, simply, “fun.” Type II Fun is miserable or extremely challenging while it is occurring, but **fun in RETROSPECT.** This sort usually begins with the best intentions, and then things go awry. The activity is so hard you can't believe you did it, like many of my days backpacking on the Long Trail. Type II Fun isn't fun while you're doing it, but you wake up the next morning excited to do it again and again and again! Type III Fun is **NOT FUN AT ALL.** Not even in retrospect. Afterwards, you can't even find a reason why did it in the first place. Now, the categories into which your types of fun fall is highly subjective and subject to shifting from one level to another, especially when you realize you gained valuable insights and lessons from a Type III fun event, so it then is altered to a Type II Fun. As many outdoor enthusiasts exclaim, it doesn't have to be “fun” to be fun.

When you apply the Fun Scale to your healthy activities in a mindful way, try to

stay in the Type I categories, to lower the levels of stress hormones that are generated. Because a Type II fun will absolutely generate stress during and after the activity, even if you feel such a sense of accomplishment you want to do it again. Sometimes, just the awareness that you will feel amazing when the activity is completed can take Type II fun and make it less stress-inducing. But that takes time and experience: a training of your body and mind to do the hard thing, but still feel a level of current and future enjoyment in it.

Thus, as stressed lawyers, join me in Type I Fun and healthy activities this summer amidst a challenging professional climate that we cannot always control. What we can control is the activities we choose to do that will directly benefit our nervous systems to stay in the happy hormone places. And if the weather is not favorable for the activity you are planning, or you know it will dramatically increase, not decrease, your stress levels, don't do it. It will not have as much of a positive impact and your body may even reject it, like mine does!

Stay happy and healthy this 2023 summer and join me the VBA Annual Meeting in Burlington on September 29 for an experiential Wellness CLE and at the regularly scheduled mindfulness webinar CLEs and presentations at various legal events and conferences with the Vermont Bar Association. If you are ready to improve your overall wellbeing and need someone to help support you, please contact me at thehappyhumanprojects@yahoo.com to discuss opportunities to incorporate mindfulness and wellness into your stressful lives as attorneys through private group workshops, courses or 1:1 coaching.

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.



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Supporting Noncitizens in Vermont: Vermont Poverty Law Fellow Update

I remember the surprise on the faces of many of my mentors and peers in Washington, D.C. when I told them that I would be moving to Vermont to practice immigration law. Flatlanders, as well as many Vermonters, do not think of immigration legal services as a high need in the state of Vermont. However, very soon after beginning my role in the immigration clinic at Vermont Law and Graduate School as the eighth Vermont Poverty Law Fellow, I was struck by the significant dearth of immigration legal services in the state. As of this writing, Vermont is the only state in the country with only a law school clinic listed on the Immigrant Advocates Network, a national directory of immigration service providers. This is noteworthy in a state where the 2020 census still reports that 4.3 percent of the population was born outside of the United States.

Now more than ever, legal services for noncitizens in Vermont are essential, so I am incredibly thankful that supporting this underserved population is the mission of my fellowship. In the past few years, Vermont has not only welcomed hundreds of individuals from Afghanistan, but also asylum seekers fleeing crises from other countries around the world. In addition, increased immigration enforcement locally, as well as massive backlogs and added procedural complexities in adjudicating immigration petitions, make immigration legal services even more urgent.

In the past nine months, I have worked with clients from fifteen different countries and every inhabited continent, ranging from recent arrivals to the United States to a client who has lived in Vermont for four decades. Noncitizens may choose to come to Vermont for employment, to reunite with family, or for educational opportunities, sometimes without intent of staying permanently until a crisis or incident of violence changes their plans. Our clients also choose to come here because of Vermont's reputation as a champion of human rights, or because of support they receive from the robust community support networks throughout the state.

Now, in the volatile world of immigration law, attorneys, advocates, and noncitizens are forced to find creative solutions, including innovations at the state level. Since the passage of Act 98 during Vermont's 2022 Legislative Session, an area of focus during my first three quarters has been supporting vulnerable noncitizen children in ob-

taining Special Immigrant Juvenile Status. I have now represented several Vermont high school students through this process, each of whom can now continue planning for their education, their careers, and overall futures in the United States.

I see part of my mission as Vermont Poverty Law Fellow being to raise awareness of the needs of noncitizens in Vermont, also recognizing that Vermonters with lived experience in the immigration system are too often ignored and need to be heard. As I approach my second year as the fellow, I hope to identify more opportunities to maximize my impact through pro se assistance, education, and systems advocacy.

This work would not be possible without the Vermont Bar's support of the Vermont Bar Foundation's Vermont Poverty Law Fellow fund. Thank you for your support and thank you for selecting me as your fellow.



Thank you Vermont Bar Foundation!

The Foundation approved a request to fund a new VBA project to assist flood victims within 48 hours of the grant proposal.

Read more about the new "Vermont Flood Relief Legal Assistance Project" in the "What's New" section of this issue and go to the VBA website to sign up to help.



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Dark Musings: What Happens to Bad Attorneys?

Ever wonder what happens to bad attorneys when they die? Maybe there's a special place in hell for the bad actors who've stolen from their elderly clients, then fled the country with their au pair or cabana boy; or the perennial bad boys who've lied under oath to protect their political candidate clients?

Or maybe there's a realm of purgatory, or even just good old Karma coming back to bite them while they're still living?

This discussion arose in our office on a recent late Friday when we were all punchy with humor – the result of exhaustion. We imagined what our particular purgatory might be if we were ever to intentionally step outside our ethical boundaries.

Picture 60's TV sitcom *Gilligan's Island*, but without the fun characters or bamboo

car. Instead, you're stranded on a desert island with your most challenging and difficult clients; FOREVER. You know the ones. The client who drops in and wants to pay \$100 for advice on the spot, talks non-stop and can't be deterred; the seasonally unbalanced client who "runs away" to your office during episodes; the disbarred attorney looking to be your new client; the client who telephones relentlessly, incapable of waiting for a call-back; the habitual tambourine player (yep, you read that right); and the jackpot of all clients – the one who watched all 456 episodes of TV's *Law & Order*, loudly knows more than ANYONE on earth, and who cannot accept advice. All deserving of your respectful service; but for infinity?

Imagine. All of them, with you, alone, no

escape. Oh yeah, and there's no fruity alcoholic beverages in cute coconut cups with little umbrellas on top to numb your pain.

We could laugh at the concept in our "end-of-the-week-brain-overload" condition, thinking of each other in such a situation. We could even think of some historic and infamous legal figures we wouldn't want stranded with us either. We could find levity in the discussion, knowing that a violation casting our own office into this realm would be extremely unlikely. But truly just the possibility alone made us wonder why anyone would ever stray from the straight and narrow?

Julia Compagna is an associate at Sargent Law Office in Morrisville.



CROSSWORD PUZZLE

by Kevin Lumpkin, Esq.

Kevin is a litigation partner at Sheehy Furlong & Behm in Burlington, and in his spare time he enjoys puzzles and trivia of all kinds, especially crossword puzzles. Read more about Kevin in this month's "Pursuits of Happiness" at page 8. Kevin constructed this puzzle in about 3 hours on the day it was due when his original theme idea fell apart. He apologizes for the obscurity of 54-Down; it could not be avoided.

Note: For those readers who regularly solve the New York Times crossword, this puzzle is about a Wednesday-level difficulty. See page 29 for the Spring Journal's Crossword Solution.

Across

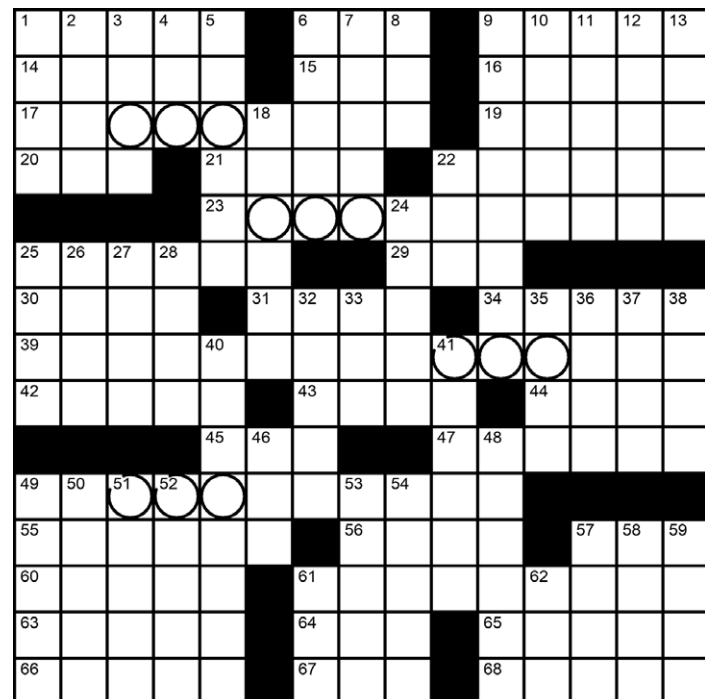
1. Muslim headscarf
6. Mayor Pete's agency (abbr.)
9. City whose name is Spanish for "flat"
14. "African unicorn"
15. "Where the Wild Things ____"
16. Permit
17. Warren Buffett, for one
19. Business that makes cuts in order to turn a profit?
20. Neon, for one
21. Apt name for a protestor?
22. Dee Dee, Tommy, Joey or Johnny of punk
23. Analyzed for the geological record
25. Proximal's opposite
29. Home to the Burj Khalifa, for short
30. Apropos of
31. Hop kiln
34. They might be painted at a 19-A
39. 2023, for one (others include 2011, 1999, 1987, and 1975.)
42. Font flourish
43. "Buona ____" (Italian greeting)
44. Home in Havana
45. "A lawyer shall not make an agreement for, charge, or collect an unreasonable ____ or an unreasonable amount for expenses." V.R.P.C. 1.5(a).
47. Chef and food writer Samin ____
49. Former first and second lady
55. Greek goddess of wisdom
56. Starting from

57. Simpsons character Disco ____

60. Go viral, as a hashtag
61. Post-CLE events depicted literally in 17-A, 23-A, 39-A, and 49-A
63. Give ground-ball practice, maybe
64. Added coins to, as a parking meeter
65. Word meaning connection frequently seen in Commerce Clause and personal jurisdiction analyses
66. Didn't make public for a while
67. Vaccine watchdog org.
68. Organic chemical compound

Down

1. Mrs. ____, proprietor of the best dumpling place in Burlington. Or for those not from Burlington: ____ Kong.
2. Non-profit organization (who knew?) whose mission is to "offer a wide range of home furnishing items of good design and function, excellent quality and durability, at prices so low that the majority of people can afford to buy them."
3. Punches
4. Letters of interest?
5. "The Taming of the Shrew" sister (or "10 Things I Hate About You" sister)
6. Senegal's capital
7. Big name in toothbrushes
8. Face card's value in blackjack
9. Rose Bowl city



10. "A ____? He's Supposed to be Dead!" (The Emperor's New Groove quote)
11. Parcel out
12. Nary a soul
13. Held title to
18. ____ Approval
22. Genetic messenger
24. Word before space or limits
25. Word after old or dog
26. "Gotcha"
27. Castor or Pollux
28. Singer Amos
32. Befuddled
33. Her pronoun partner
35. Kindergarten stuff
36. Letter-shaped bridge support
37. Fictional Simpson with an I.Q. of 159

38. "Now!"
40. Intermittently
41. Return fee?
46. Noteworthy span
48. "Sure, I guess"
49. Pet peeves?
50. Heart chambers
51. Butler of "Gone With the Wind"
52. Japanese box lunch
53. Bleated
54. Old food label std.
57. Send private messages?
58. Loyal
59. One-sixth of the world's ground surface until 1991, in brief
61. Partner "4 lyfe"
62. Kisses, symbolically

Breached Law Firms Bemoan: “The Class Action Attorneys Have Found Us”

Remember the Golden Ticket from Willy Wonka?

A lot of lawyers thought they had discovered a golden ticket when they discovered ChatGPT. They were enthused about how fast it was and how they could utilize it for legal research, drafting legal documents, case analysis, legal compliance, composing client communications and the list goes on. It was dizzying in its speed and the conversational language was irresistible – and understandable.

Sadly, many lawyers did not comprehend that they were feeding confidential data to the AI, and that the history of their conversations with ChatGPT could be recalled and even used to train the AI.

If you were keeping an eye on developments, you might know that OpenAI, the creator of ChatGPT, announced on April 25 that it had added the option to turn off chat history for ChatGPT, which meant you could keep your confidential data safe. But if you weren't watching developments – and many lawyers were not – you blithely went along feeding your data to the AI.

There was a reason that Apple and Samsung prohibited the use of generative AI – in Samsung's case, employees unintentionally leaked confidential data. Apple likely feared the same fate. Some law firms have also prohibited the use of ChatGPT. But many more have not, and therein lies the threat.

Timing is Everything – and the Timing is Terrible

Along with the knowledge that many lawyers may have inadvertently given confidential data to ChatGPT, law firms managing partners are facing a tidal wave of law firm data breaches. We have never seen so many law firm data breaches in such a short period of time. It's a one-two punch of considerable proportions.

While some of the reported breaches are only coming to light in 2023, many of the breaches have taken place in 2023, the very time when ChatGPT became much more commonly used.

It really has become “open season” for law firms being the target of so many cyberattacks – thereby endangering the security of their proprietary data. And if you want one more reason to groan, ChatGPT is a great tool for cybercriminals who want

to craft better and more effective phishing emails. No more spelling and grammatical errors to shout “phishing email!” at law firm employees.

In late June the UK's National Cyber Security Centre (NCSC) released a threat report indicating that cybercriminals are laser-focused on going after law firms. The NCSC has reported that nearly 75% of the UK's top 100 law firms have been impacted by cyberattacks.

Do you really think it's much different in the U.S.? We certainly don't.

Class Action Lawsuit Attorneys and Data Breaches

Following the reports that Bryan Cave Leighton Paisner had suffered a data breach came word in late June that a class action lawsuit had been filed against the firm. According to a data breach report by Mondelez, the firm's client, more than 51,000 current and former employees' data was acquired by the attackers who breached the firm.

The complaint said that Bryan Cave was hired in part to provide data and privacy advice and accused the firm of negligence, breach of implied contract, breach of contract, unjust enrichment and invasion of privacy.

We suspect that further class action suits will more rapidly follow the revelation by any law firm that it has been breached. This will no doubt be the despair of the breached law firms who understand full well that class action lawyers receive very handsome rewards for their successes. Class members? Not so much.

The authors have noted that as we have been offered a paltry award of \$7.50 for the settlement recently agreed to by Google after it was accused of “storing and intentionally, systematically and repeatedly divulging” users' search queries and histories to third-party websites and companies. Wow! A whole \$7.50 to waste energy filing out a form and assembling documentation.

We're not saying that class actions don't have their uses, but a storm of law firms filing class action lawsuits against other law firms is going to complicate an already complicated data breach landscape.

Law Firms Need to Pony Up More Cybersecurity Funding

Considering the double whammy of leaked confidential data and a steep increase in data breaches, it is time for law firms to get serious about battling data breaches. PriceWaterHouseCoopers' Annual Law Firms Survey reported that the top 1000 law firms spent less than 1% (only .46%) of their fee income on cybersecurity.

We've heard all the excuses. “It costs too much.” “It takes too much time.” “It takes too much training.” “We have cyberinsurance.” That last one could be the subject of another column. Read your policies carefully. Most of them now have strict requirements for your cybersecurity – if it turns out you didn't abide by the requirements, there may be no payout. A good many policies will not cover the payment of ransoms or will not cover damage resulting from state-sponsored attacks. Frequently, you are paying more and getting less.

Final Words:

One lesson from the recent rash of law firm data breaches is this: “If you can't afford strong cybersecurity, you sure can't afford a data breach.”

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Do Lawyers Need To Be Concerned About Deepfakes?

The short answer is yes, everyone does; but the reason lawyers need to be concerned requires a longer explanation.

What is a deepfake?

The word “deepfake” comes from combining the words “deep learning” with the word “fake.” A deepfake is digital content that can be created using powerful techniques from machine learning and artificial intelligence to manipulate existing or generate new visual and audio content that can easily deceive others who view or hear it. Deepfakes aren’t by definition all bad, for example deepfake technology is used by the film industry. It’s only when a bad actor creates a deepfake for use in furtherance of a cyberattack, fraud, extortion attempt, or other scam that they become a serious concern.

Isn’t creating a deepfake crazy hard to do?

Not anymore. Jai Vijayan, Contributing Writer at Dark Reading recently stated: “It’s time to dispel notions of deepfakes as an emergent threat. All the pieces for widespread attacks are in place and readily available to cybercriminals, even unsophisticated ones.”

Researchers with the security company Trend Micro expressed similar concerns in an online post² this past September with this opening statement: “The growing appearance of deepfake attacks is significantly reshaping the threat landscape. These fakes bring attacks such as business email compromise (BEC) and identity verification bypassing to new levels.” They went on to say that more serious attacks will be forthcoming because of the following issues:

1. “There is enough content exposed on social media to create deepfake models for millions of people. People in every country, city, village, or particular social group have their social media exposed to the world.
2. “All the technological pillars are in place. Attack implementation does not require significant investment and attacks can be launched not just by national states and corporations but also by individuals and small criminal groups.

3. “Actors can already impersonate and steal the identities of politicians, C-level executives, and celebrities. This could significantly increase the success rate of certain attacks such as financial schemes, short-lived disinformation campaigns, public opinion manipulation, and extortion.

4. “The identities of ordinary people are available to be stolen or recreated from publicly exposed media. Cybercriminals can steal from the impersonated victims or use their identities for malicious activities.

5. “The modification of deepfake models can lead to a mass appearance of identities of people who never existed. These identities can be used in different fraud schemes. Indicators of such appearances have already been spotted in the wild.”

Why do lawyers need to be concerned?

I would hope it would be self-evident. Due to the amount of other people’s money law firms are responsible for coupled with the amount and variety of sensitive and confidential information lawyers maintain, law firms have been and will continue to be an attractive target for cybercriminals and scammers. The only thing that is changing is the sophistication of the attacks.

As a lawyer, you need to know that a tool that enables someone to create a deepfake of you exists. That deepfake could be used to hack your Amazon Alexa; manipulate a colleague, family member, friend, or employee into moving money; used to hijack your bank account, bypass an identity verification process, or even to plant fake evidence in an attempt to blackmail you. All that person needs is a good photo or a short voice recording. How many people do you know, including yourself, who have already posted all kinds of audio, video, and photos in the social media space? You and I both know it’s practically all of us.

My purpose in sharing all of this is not to instill fear. Rather, it is to create awareness and an appropriate level of concern. We all need to continue to stay abreast as to how the attack vectors continue to change in order to have an opportunity to be proactive

in our efforts to avoid falling prey to these ever evolving cyberattacks and scams.

What should law firms do about the deepfake threat?

As with so many cyber and scam threats, there is no one step you can take and there are going to be no guarantees that any combination of steps will successfully block this threat. All you can do is try your best. That said, the following are becoming more important than ever.

1. Use multifactor authentication on every critical or sensitive account or service. Think bank and other financial accounts, cloud-based services such as practice management programs, email accounts, remote access, and the list goes on.
2. Mandate the use of an out-of-band communication process to verify the legitimacy of every request to transfer funds, regardless of the communication channel the person making the request uses. And if you are not already aware, an out-of-band communication is a method of challenge and response to the requestor of a transfer, payment, or delivery of money using a communication method that is separate and distinct from the communication method the requestor originally used.
3. Conduct periodic mandatory training that over time covers all the various tactics utilized in social engineering attacks. Include current examples in order to demonstrate how these attacks “look and feel.” Note that mandatory means no exceptions; all lawyers and staff must participate.
4. Encourage social media users to limit their presence on social media and to minimize the posting of high-quality personal images online.
5. Consider using biometric verification processes for access to critical accounts such as banking or other financial accounts. The reason why is biometric data typically has minimal public exposure.



6. Make all conference calls, video calls, etc. private and/or password protected. The goal is to ensure that only trusted known individuals have the ability to participate.

Since 1998, Mark Bassingthwaighe, Esq. has been a Risk Manager with ALPS, the nation's largest direct writer of professional liability insurance for lawyers. In his

tenure with the company, Mr. Bassingthwaighe has conducted over 1200 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management, ethics, and technology. Mr. Bassingthwaighe is a member of the State Bar of Montana as well as the American Bar Association where he currently sits on the

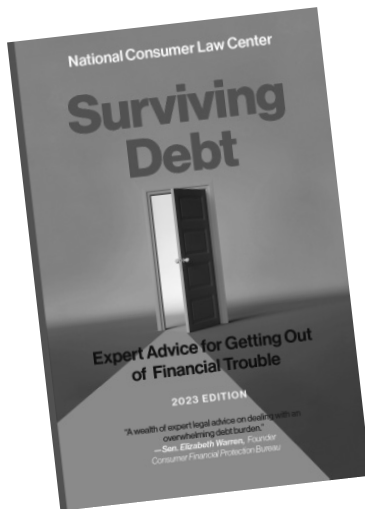
ABA Center for Professional Responsibility's Conference Planning Committee. He received his J.D. from Drake University Law School.

¹ <https://www.darkreading.com/threat-intelligence/threat-landscape-deepfake-cyberattacks-are-here>

² https://www.trendmicro.com/en_us/research/22/i/how-underground-groups-use-stolen-identities-and-deepfakes.html



BOOK REVIEW



Surviving Debt, (14th ed, 2023), a publication of the National Consumer Law Center, by Andrea Bopp Stark and Jon Sheldon
Reviewed by Michael Kiey, Esq.

If you are looking for plain talk from experts about getting out of big financial trouble, the 14th edition of *Surviving Debt* published by the National Consumer Law Center (NCLC) is worth considering for your reference library.

The co-authors are NCLC attorneys Jon Sheldon and Andrea Bopp Stark. Jon was present at the creation of *Surviving Debt* as the author of the 1992 edition and 2019, 2020, and 2021. I like this long-term perspective. Andrea Bopp Stark focuses on fair debt collection practices and mortgage servicing issues. She is a graduate of the University of Vermont and was a presenter at the VBA 2020 CLE on Foreclosure Defense and Mediation along with Judge Helen Toor and Attorney Rebecca Rice.

The book is well organized in four parts. Part One - Basic Debt Survival Strategies - includes dealing with higher versus lower priority debts, comprehensive information about credit reports, and responding

to debt collectors. This part also includes a detailed treatment of reverse mortgages.

The second part deals with specific types of debt such as student loans, car loans, leases and repossessions, debts involving an abusive partner, and defending your home from foreclosure.

Part three covers bankruptcy as a valuable option for a fresh start. Part four is a glossary and index.

When I browsed the index, the chapter on abusive partner- created debts caught my attention. Jon Sheldon shared that the 2023 edition added "Debts Involving an Abusive Partner" as a sadly compelling, timely new chapter. And there are other significant chapter updates including: student loans, credit reporting, debt collection, landlord-tenant, medical debt, utility terminations, and mortgage loan modifications.

The Introduction to the new chapter on abusive partner (including a marital partner) debts outlines the coverage: to provide financial solutions for victims of domestic abuse through coercion (even of the victim's pet) and fraud (such as identity theft) and the narrator describes how financial abuse limits the independence of the victim.

Toward the end of the introduction, the writer addresses the reader directly: "If you are a victim of financial abuse, it is important to understand that the financial harm is not your fault." Further: "Safety should always be your highest priority." The use of "you" and "your" appears consistently throughout the book. This is a plus for communicating. It draws the reader into the material and makes it relevant to a victim or someone counseling an abused.

Other chapters are also very useful to victims of financial abuse. Because taking action to prevent or respond to financial abuse will impact credit reports, the comprehensive chapter on reports and scores has essential information including detailed convenient contact information for

the three main credit bureaus. The updated chapter on Medical Debt offers this useful piece of information to a person struggling with what debts to pay: As of July 1, 2022, all three credit bureaus agree not to include any medical debt in a person's credit report if the debt is less than one year delinquent when reported.

Surviving Debt has excellent content and good readability. It's available in print form for \$20, with free shipping from NCLC, or as an e-book at \$9.99 at various outlets.

Today's financial world is challenging to navigate under the best of conditions. Scams are ingenious, frequent, and quickly executed in our electronic world. *Surviving Debt* is an outstanding resource of information and actions to help those in financial distress and their counselors to make sound decisions, get back on track financially, and promote emotional health.

Michael Kiey served on the Commission on the Well-Being of the Legal Profession-Bar Association Committee. He has acted as judge for the Vermont Law and Graduate School Appellate Advocacy Program. He has been a member of the bar and the Vermont Bar Association since 1994.



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.

IN MEMORIAM

David Santos

David Manuel Santos, 67, of Huntington, died unexpectedly on June 18, 2023 in Huntington, Vermont. David was born December 20, 1955 in Fall River, Massachusetts, the only child of Manuel and “Bella” (Balbina) Santos. David’s father served in the Army in WWII and was later a postal worker on the overnight mail train from Providence to New York. He also played several musical instruments and loved to cook. He often took Bella and David on “mystery drives,” taking a seemingly random route and eventually ending up somewhere fun, typically an ice cream stand at one of the many creameries that still existed at that time. David continued this tradition. David’s mother was a gifted seamstress who worked until she retired in a textile factory in Fall River. She attended church every day. Both were hardworking, first-generation Americans whose parents were from the Açores. David was an altar boy until his father’s unexpected death when David was twelve. David went to Fall River Catholic schools from kindergarten through high school, graduating from Bishop Connolly in 1973. David’s working class, Catholic, Fall River roots remained central to his identity, though he became an atheist. At 17, during the Vietnam war, following in his father’s footsteps, he voluntarily enlisted in the U.S. Army. After his Army service, he served in the National Guard.

David attended Northeastern University, working nights as a security guard. One of his Northeastern co-ops was with Rhode Island Legal Services which inspired him to become a civil legal services lawyer and was where he met his first wife and mother of his children, Lillian Moy. David graduated from Emory University School of Law in 1984 having “booked” Administrative Law. His first job as a lawyer was with Georgia Legal Services. He loved to talk about his experiences circuit riding to rural counties and rural life in Georgia, particularly the unparalleled peaches. David went on to work providing civil legal services for poor people until his death, working in turn for Georgia Legal Services (Milledgeville); Legal Assistance of Central Massachusetts (Fitchburg); Northeast New Jersey Legal Services (Patterson); Western Mass Legal Services (Springfield), and, finally, Legal Services Vermont. He was a career legal services lawyer, helping thousands of poor people protect their rights to housing, income, and safety.

David loved cooking for his daughters, Katie Moy Mostris and Maria Moy-Santos,

and taking them camping, kayaking, and canoeing. They remember the hundreds of miles he drove each week to be with them during their childhood and beyond.

David met his love, Rachel, in 2002 while working at Legal Services Vermont. They began living together in September 2003 in Richmond, moved in 2005 to Huntington, and married in March 2015, continuing to live in Huntington. In 2017, they both became first-time homebuyers, purchasing the Huntington home they had rented since 2005. In 2006, Rachel and David realized David’s lifelong dream of travelling to the Açores.

David loved meeting new people and striking up conversations on a wide variety of topics. His knowledge was vast, with no bit of information too trivial to remember. He had a big laugh and a generous heart as well as a wicked, but not mean-spirited, sarcastic streak. He relished the finer things in life. His plans for how he would spend his millions when he won the lottery always included the many things he would do and buy for others. He had a gift for making people, even overly serious ones like Rachel, laugh.

David demonstrated his love through service: making coffee every morning, researching and cooking delicious meals, running errands, doing dishes, and bringing home treats. He loved to cook, especially for people. He loved gardening vegetables. He was the sappiest man in the world, loving to read and watch romantic comedies, including the Hallmark and Lifetime channels, and especially Christmas specials. One of his favorite movies was *Miracle on 54th Street*. He was an equally massive fan of Harry Potter and Bernard Cornwall. He also loved war movies, especially those that focused on camaraderie. His favorite vacation spot was the Southeastern Massachusetts shore, just south of Fall River where David and Rachel planned to spend another summer vacation this year.

A Memorial Service for David is scheduled for 1 PM on September 9 at Rock Point Center, 20 Rock Point Road in Burlington.

Judith F. Dickson

Judith F. Dickson, 77, died Thursday, July 6, 2023, at her home in Burlington, Vt., surrounded by her children and her beloved dog, Sadie. She died of congestive heart failure that had been plaguing her — but not stopping her! — for a number of years. In her final weeks, she had many visits from

family members and dear lifelong friends.

Judy was born in Boston, Mass., on December 21, 1945, to Edith and Francis Földes, Hungarian Jews who had immigrated to the U.S. in September 1941. She and her two sisters grew up in Pittsburgh, where Judy was a ball of energy as a child — twirling batons, practicing dance moves, playing tennis with her friends, and horseback-riding with her father. In high school, Judy was a star cheerleader and also began discovering political activism through her Unitarian Church youth group.

In 1963, Judy followed her older sister Eva to Connecticut College, graduating in 1967, and then attended the Harvard Graduate School of Education. After teaching at HeadStart in the Boston area for several years, Judy attended law school at Northeastern University. She met her husband, Don Dickson, when they were both grad students in Cambridge, Mass. They married in 1972, and Judy followed Don to Vermont after finishing law school in 1976. They settled down on Ledgemere Street in the “Five Sisters” neighborhood of Burlington, where they lived for over 40 years and raised their three children, Amy, David, and Jeff.

Judy was a fighter. At the age of 19, she was diagnosed with Hodgkin’s lymphoma, a disease that, at the time, did not leave many survivors. She persevered through college while undergoing radiation, but her cancer returned a year later. With her doctor father’s help, Judy enrolled in the first ever clinical trial for combination chemotherapy at the National Institutes of Health. This involved frequent flights from New England to D.C., on which Judy would attempt to keep up with her coursework between bouts of chemo-induced nausea. This treatment was ultimately successful, and gave Judy almost 60 more years, but the experimental doses of radiation and chemotherapy also resulted in slowly progressing damage to her heart and lungs that led to her cardiovascular disease later in life.

Judy was also a fighter for civil rights and social justice. She spent the bulk of her legal career at Vermont Legal Aid, where she directed the Disability Law Project for over 25 years. Judy was a relentless advocate for young people, collaborating with schools and other agencies to meet the needs of each of her clients. Always ready to fight for the rights of her own kids too, in the late 1990s Judy co-founded Parents for Civil Unions, which helped lay the groundwork for same-sex marriage in Vermont. After retiring from Legal Aid, Judy put her legal expertise to work volunteer-

ing for the Vermont Refugee Resettlement Program, where she helped countless New Vermonters get green cards. Her identity as the child of immigrants made her passionately committed to helping others access the same opportunities. Judy was an active member of the Vermont Bar Foundation for many years and received the Vermont Bar Association's Distinguished Pro Bono Service Award in 2013.

While juggling full-time work and a wide variety of volunteer service, Judy always had time for her family. She taught her children how to ski and spent countless winter weekends shepherding all three kids up and down the slopes. In the summers, Judy loved to spend time with her family in Wellfleet on Cape Cod, swimming with her kids and sisters in the ponds and walking the beaches. Judy was a fantastic cook and loved to spend time in the kitchen. In the last few years, Judy's grandson, Jonah, always looked forward to baking cookies and scones with Grandma.

Judy also always had time for her friends. She stayed close with a number of classmates from elementary school through law school, while maintaining correspondence and taking trips with them throughout her life. In Vermont, many of her friendships were forged with a network of women who were carving out their career paths as a new generation of women lawyers, academics and politicians. Judy loved to read, and her multiple monthly book groups were a highlight of her social life for decades. Friends of Judy loved her wit, her big smile and her wry sense of humor. She suffered no fools, but she was always glad to talk, listen and laugh with a friend.

Judy is survived by her three children, Amy, David and Jeff Dickson; her grandson, Jonah Dickson; her sister and brother-in-law, Barbara and Richard Wolkowitz; and nieces and nephews, Nicholas and Emily Travers and Eva and Daniel Wolkowitz. She was predeceased by her husband of 48 years, Don Dickson, and her sister and brother-in-law, Eva and Jeff Travers.



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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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