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# VERMONT BAR JOURNAL

#### **DEPARTMENTS**

#### PRESIDENT'S COLUMN

 Meet VBA Board President, Judith Dillon <u>Kim S. Velk, Esq.</u>

#### **PURSUITS OF HAPPINESS**

8 — Erik Ramakrishnan and La Belle Province Kim S. Velk, Esq.

#### WRITE ON

13 — Change in the Legal Writing Classroom: The NextGen Bar Exam and Generative Al Catherine Fregosi, Esq.

#### WHAT'S NEW

- 18 VBA Annual Report 2022-2023 <u>Bob Paolini, Esq.</u>
- 20 Section Chair Reports
- 35 BOOK REVIEW
- 36 IN MEMORIAM
- 37 CLASSIFIEDS



Detail from "Autumn in Oirase," Kawase Hasui, 1933. Collection of the Rijksmuseum, Amsterdam. On loan from the Royal Society of Friends of Asian Art (bequest Maartje Draak, 1996). Public Domain. For more information, see https://tinyurl.com/mr3vjcxc.

#### **FEATURES**

- 24 State of Vermont v. Robert Lyle Percy: Historic Criminal Justice Cases the Hon. Dean B. Pineles (Ret.)
- 27 A Word from the VBF President, Amelia W.L. Darrow, Esq.
- 28 VBF Honor Roll
- 32 Why Are Lawyers So Terrible at Cybersecurity? Sharon D. Nelson, Esq., John W. Simek, Esq. and Michael C. Maschke
- 34 Why Documenting What You're Not Retained to Do Can Be Important Too Mark Bassingthwaite, Esq.

Try out the Crossword Puzzle by Kevin Lumpkin, Esq. on page 32!

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#### **ADVERTISERS INDEX**

ALPS	12
Berman & Simmons	25
Biggam Fox & Skinner	4
Caffry Law, PLLC	12
Cleary Shahi & Aicher, P.C.	10
Dinse	15
Law Pay	11
Marks Powers LLP	14
Northeast Delta Dental	17
O'Connor, First, Joslin	
Pajcic & Pajcic	9
Preferred Properties	21
Primmer Piper Eggleston & Cramer PCInside Fron	t Cover
SANA	16
Silverlake Pyschological Consultants	33
TCi Technology Consultants, IncInside Bac	k Cover
Trust Company of Vermont	k Cover
Unsworth LaPlante, PLLC	6
Vermont Lawyers Assistance Program	38
VT Private Eye	18

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# PRESIDENT'S COLUMN

# **Meet VBA Board President, Judith Dillon**

**KSV:** I'm meeting with the new President of the VBA Board of Managers, Judith Dillon, Judith, can you tell us a bit about your background? Where did you grow up and where did you go to school?

JD: I grew up in New Jersey with my parents, sister, and brother. At times my Scottish grandparents lived with us. I was the first in my family to go to a four-year college, so I had to figure out the process on my own. I followed a high school friend to the schools she was researching. UVM was one of those schools and we made a trip to Burlington, just the two of us, in the fall of my senior year. I fell in love with the UVM campus, school of Natural Resources, and decided that's the school for me. I went to VLS.

**KSV:** What led you to consider law as a profession?

JD: I was a political science and environmental studies major and initially thought about going to graduate school in political science but wasn't ready to dedicate another 3-5 years in graduate school. After graduating I worked in a halfway house for pre-release inmates and helped provide them with the skills, housing, and services needed to better prepare them to avoid the decisions and situations that led to their entering the system. The experience also put in focus the disparity in sentencing and treatment/sentencing based on economics, race, and gender. I wanted to be involved in the legal system at the beginning of the process.

**KSV:** Have you always practiced in Vermont?

JD: Yes.

**KSV:** What law jobs have you had during your career so far?

JD: I have been fortunate to have had a diverse career. I was a judicial clerk for Vermont's trial court Judges in Rutland County, working in the Family, Criminal, and Civil dockets which was great exposure for a new attorney. I then accepted a job at Lisman & Lisman, a general practice firm in Burlington, where I worked as a litigation attorney on family, criminal, employment, contract, and whatever services our clients needed. It was a great experience, and I had some talented mentors and colleagues there. I was exploring the idea of having and raising a child on my own and thought that private practice might not afford me the work-life balance I needed so I transitioned to working for the state. After my daughter was born, I served as an Assistant Attorney General assigned to the Vermont Agency of Transportation. I was embedded with the Agency working with a great group of talented men and women maintaining and developing the state's transportation infrastructure. To serve the Agency, I litigated matters in state, federal, and administrative tribunals. I practiced in a wide range of substantive areas including employment, environmental, land use, eminent domain, contract, construction, transactional work, to name a few. I expanded my environmental experience and practice at the Agency of Natural Resources.

**KSV:** Were there other attorneys or judges or others who mentored you or helped you determine your path?

JD: Yes! I've had several mentors some of whom I did not recognize at the time. My first mentor was Judge Francis McCaffrey for whom I clerked at the Rutland Family Court. Despite the challenges, stress, and work demands of the family court docket, he displayed patience, compassion, and respect for all parties appearing before him. He was also very thoughtful and caring with court staff and security personnel. He was not swayed by labels or titles and treated all with the same degree of respect and dignity. Although he provided me with insight and advice on trial strategy, effective examination techniques, and writing, his temperament, grace and compassion towards vulnerable children and parents appearing before him has had a more lasting impact on me. I have strived to employ his work ethic, empathy, compassion, and grace in my career as a lawyer.

When I worked at Lisman & Lisman, Carl Lisman and Mary Kirkpatrick were both important mentors. Both Mary and Carl worked tirelessly for their clients and had a tremendous work ethic. Mary was very generous in providing me with opportunities to develop my litigation skills and experience. I had a small claims trial days after my start date. Later when I became a parent, I was reminded of the model Mary provided in balancing the demands of being an effective advocate with the responsibilities of family and parenthood.

Finally, Pat McDonald, who served as the Secretary of the Agency of Transportation was an important role model. She was the head of an Agency that had been modeled on a military hierarchy and was transitioning from an overwhelmingly male workforce. She garnered respect from her employees by



Judith L. Dillon, Esq.

respecting and trusting them. She was a very effective leader.

**KSV:** What do you find most interesting about your work, currently? What do you find the most challenging?

JD: As Executive Director of the Vermont Labor Relations Board, I work with a lay Board from different professional backgrounds. Board members rely on me to provide training on process and legal standards to enable them to hear cases, deliberate, and reach decisions. I enjoy providing this education and engaging in exchanges with the Board on changes in labor and employment law and policy. I value the time I spend in hearings advising the Board on issues that emerge. I also like the times when I can serve as an informal mediator to help parties resolve Unfair Labor Practice cases. I have also had the privilege and responsibility of facilitating many union elections, a great example of democracy in action.

I have many roles and responsibilities in this position from legal counsel, executive director, chief educator, hearing director, decision drafting, election oversight, supervising the Board Clerk, to more administrative tasks like scheduling, budget development, and office management. Like many busy Vermont lawyers, my biggest challenge is balancing these responsibilities.

**KSV:** What are some things to do when you're not working?

**JD:** Since the pandemic, walking has become my social life. I have walking dates with different friends during the week in

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and around central Vermont. Now that we can move about freely again, I enjoy traveling. I'll be heading to Buenos Aires, Argentina over Thanksgiving to visit my daughter who is studying there. We're looking into a trip to Patagonia while down there. I visit and enjoy spending time with my family, all of whom are in New Jersey. I enjoy hiking, cross-country skiing, paddle boarding, reading, and hanging out with my dog Tessa. I like to dream about purchasing or rebuilding (I have no construction or technical/automotive skills) a camper van and traveling across the country. I dipped my toe in that world recently when I extended a work trip to Vancouver and rented a 1989 Westfalia van. I explored and camped on Vancouver Island. It was great. I drove to the Pacific Rim National Park Reserve, stayed in some beautiful spots, and enjoyed the cold Pacific water.

**KSV:** That sounds like a great adventure. I know you've been active with the Bar for a long time but are there any other community organizations or other things that you're involved in?

JD: I served as a member of the East Montpelier Selectboard. I did not run this past March in anticipation of the added time commitments required of the VBA President. I serve on the Vermont Bar Foundation. When my daughter was in school, I chaperoned many class trips, chaired the mentoring program, Twinfield Together Mentoring Program, volunteered with the Four Winds nature program, and worked backstage at many dance performances.

**KSV:** When did you become interested in serving on the VBA Board? What sparked your interest?

**JD:** Early in my career, I edited the Final Report of the Task Force on Gender Bias in the Legal System and was involved with the Women's Section and Employment Law Sections. After my daughter was born, I did not have much time or energy to look beyond my work and parenting responsibilities to get more involved with the Bar other than attending CLEs. As my daughter progressed through high school, I had more time to dedicate to other interests outside of raising her. Before she was a judge or VBA President, Beth Novotny was the person who revived my interest in the Bar and serving as a Board member.

**KSV:** What have you found rewarding about serving on the Board so far?

**JD:** Working with the dedicated and talented members of the VBA staff. We are fortunate to have many overqualified and committed people working for the Board who guide the Board and provide support and resources to the membership. I love the collaboration and problem solving of the Board. I have been impressed with the nimbleness

of the VBA to respond to emerging issues and needs. The work of the Bar during COV-ID 19, responding to and addressing ODYS-SEY problems, and most recently providing legal services to people impacted by flooding, demonstrates the willingness and ability of our members to come together, pool our resources, and develop creative solutions.

I enjoy working with the newer lawyers in the Young Lawyers Division and the outreach they have been doing to support new lawyers. I have enjoyed chairing and working on the Workforce Development Committee to try to recruit, retain, and support new lawyers in Vermont. I am proud of the new Loan Repayment Assistance Program we developed to provide support to new lawyers burdened by student loan debt.

**KSV:** Sometimes VBA Board presidents have a focus or theme for their year in office. Do you have a particular focus in mind for your upcoming year in office?

JD: I would like to continue the work of the Workforce Development Committee to help address the demographic challenges facing the Vermont Bar. The WDC has been dedicated to attracting, retaining, and supporting new lawyers to provide legal services to Vermonters to replace those lawyers retiring or leaving the profession. I would also like to assist those lawyers on the other side of their legal careers to transition out of the practice of law. There are a number of lawyers thinking about retirement or transitioning out of legal practice, that may not know how or what steps to take to protect themselves or their clients' interests. The Bar can serve as a bridge to assist these lawyers with succession planning, but I think there is an opportunity here for the Bar to match some of these lawyers with newer lawyers seeking legal experiences and developing practices in Vermont. Retiring lawyers can serve as mentors or partners to newer lawyers.

**KSV:** What would you tell a young person thinking about practicing law in Vermont?

JD: Vermont is unique, and attorneys here can be leaders early and often in their careers. The Vermont Bar is collegial, and we are often generous with our time providing advice and mentorship to newer lawyers. Vermont offers a diversity of practice opportunities. It is a great place to live and work and most attorneys recognize and strive to support work-life balance.

**KSV:** Last question: Is there anything I haven't asked you about that you'd like to share with our members as you start your presidential year?

**JD**: I am honored and humbled to begin serving as your VBA President. I encourage anyone to reach out to me or Bob Paolini with any questions, needs, or ideas.



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# **PURSUITS OF HAPPINESS**

# Erik Ramakrishnan and La Belle Province

**KSV:** Thanks for agreeing to be interviewed, Erik. As you know, for this feature, we talk to attorneys who have interests and passions outside of the practice of law which help keep them balanced. When I heard that one of your passions was visiting Quebec, I knew I had found my subject for this feature. Full disclosure – I'm deeply linked with Quebec myself, and I'm sure lots of our readers are as well! You mentioned you go up to Quebec about every other week, is that right?

**ER:** About that. Sometimes possibly more often. I live about two miles away.

**KSV:** Great. We're going to want to know all about your favorite places and your tips but let's start at the beginning. You're one of the lawyers in our VBA Incubator project, so I know you are from California – is that where you were born and raised?

**ER:** I was born and raised in Michigan. I moved to California when I was barely an adult and lived there for over twenty years before moving to Vermont a year ago. My brother

works for the City of Burlington and moved to Vermont a decade ago when he was first hired. My parents followed five years later, so the pressure has been on for a while to find my way here, too.

**KSV:** Where did you go to law school? **ER:** Santa Clara University School of Law.

**KSV:** And can you tell me about your legal career to date – a little summary about what you have done professionally and are doing now?

**ER:** Yep. I started my professional life as a teacher. I taught special education classes in Fremont, California for about five years. If you recall the whole Enron crisis and the devastation that did to California's state budget, which brought down Governor Davis and put Arnold Schwarzenegger in office, that's when I was teaching. To balance the state budget, the Legislature enacted the infamous "Triple Flip" and "VLF Swap," which were clever ways to get around state constitutional mandates for minimum education funding. Long story short, it was a terrible time to be a teacher, so I ran away kicking and screaming, and ended up work-



ing for the Santa Clara County Tax Assessor for a year. (Like your friendly local listers except you work in a three-story office in a tower block.) There were talks about layoffs, and as the last in I was slated to be the first out under union rules. Someone told me once when I was a teacher that I should be a lawyer because I had a good understanding of our labor agreement, so on a whim I applied to Santa Clara and got accepted even though my LSAT score wasn't fantastic. I ended up graduating fourth in my class, but right in the middle of the Great Recession, so it took a while to find work. I ultimately found a job as a research attorney for the Superior Court of California, Santa Clara County. That was a three-year position, so before my three years ended, I found work in the County Counsel's Office in Kings County, California, near Fresno. I worked there for four years and then wanted to return to the Bay Area. By happenstance, I ended up back in Fremont, but this time working for the city instead of the school district. After two years, I got recruited to work for the city's outside housing law firm, Goldfarb & Lipman in Oakland. I worked there for about a year and a half before being recruited to work at Berliner Cohen in San Jose. I loved working at Goldfarb, but the commute to Oakland was slowly killing me and, well, money. At Berliner I represented both local agencies and developers and became respected for my knowledge of state law respecting land use entitlements for multifamily housing development projects. Now I'm working for myself here in Vermont, mostly doing freelance and contract extra-help work back to California, but also taking on some local clients.

**KSV:** Tell me about how you came to relocate to Vermont.

**ER:** My family was already here. COVID taught me I could work anywhere in the world I wanted. One day I was talking to a friend while she was going through chemo and told her I was tired of California and wanted to work for myself closer to my folks but was afraid to make such a huge change. She took off her wig to display her bald head and told me life is short. So here I am.

**KSV:** Did you choose Alburgh partly because it is close to the Canadian border?

**ER:** Exactly. To be as close as possible in Vermont to Montreal.

**KSV:** OK. Million-dollar question – how did you first get introduced to Quebec?

ER: Growing up in Michigan I got Radio-Canada on the radio, which is the French language equivalent of the Canadian Broadcasting Corporation. I loved listening to that station even though I didn't understand a word that was being said because I just thought French was the most beautiful sound. When I got to high school and could sign up to take a foreign language, I chose French and studied it for four years. My senior year, after I turned 18, I announced I was going to drive to Montreal. My mom promptly informed me that she didn't care if I was technically an adult, I wasn't driving my rickety old car all by myself twelve hours from home in a different country. She told me to take one of my parents' cars and to take my dad with me, who two years earlier had contracted encephalitis and was still working through his physical and occupational therapy to help him recover. I didn't



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fight her because after everything my dad had been through, I thought a father-son adventure sounded like fun, so off we went to Montreal together. And I fell in love with the city. It's bilingual, has history, has places to go and things to do, has Mount Royal Park in the middle, and was just cool, cool, cool. So later in life after my brother moved here and then my parents, whenever I would visit family before the pandemic I would fly direct from San Francisco to Montreal, spend a couple days there, rent a car, and then come on down to Vermont. And on my way through the Quebecois countryside and stopping off in places like Chambly I realized there's more to Quebec to love than just Montreal. I had long since given up on studying French, but when the pandemic came along and I needed something to occupy my mind, I picked it up again, and since moving here have been trying to improve in earnest, although it's a bit harder at age 45 than it was thirty years ago when I first started to learn.

**KSV:** Are you able to say what it was that captured your fancy?

ER: It's just so amazing that someplace could be so close and yet you really know you're in a different society when you're there. The language is different. The town/ city planning is different. The architecture is different. The money is different. The system of measurement is different. The road signs are different. And not to sound unpatriotic, but it just seems like kinda' a better society in many ways. It's pluralistic instead of monocultural. I feel safer walking the streets there than here. And problems like homelessness and urban blight just aren't as extreme as they seem here. Plus, with the rich history and wealth of activities ... I don't know how to express it other than to say Quebec generally, and Montreal in particular, is my happy place.

**KSV:** What is it that keeps you going back?

ER: All of the above. To help me learn French, I make it a goal to watch two films in French each month, typically in St.-Jeansur-Richelieu. Sometimes I see something dubbed, but Quebec has its own movie industry, and I've seen some beautiful Quebec films, especially La cordonnière and Les hommes de ma mère. I also attend Meetup events, especially events for practicing French with other French language learners. I've made some friends doing that, including a friend I regularly go biking with. And my dad and I enjoy watching C.F. Montreal play at Stade Saputo. So those are some of the activities that give me cause to keep returning.

**KSV:** Were you in Vermont during the pandemic? Were you able to get north during the time of the restrictions?

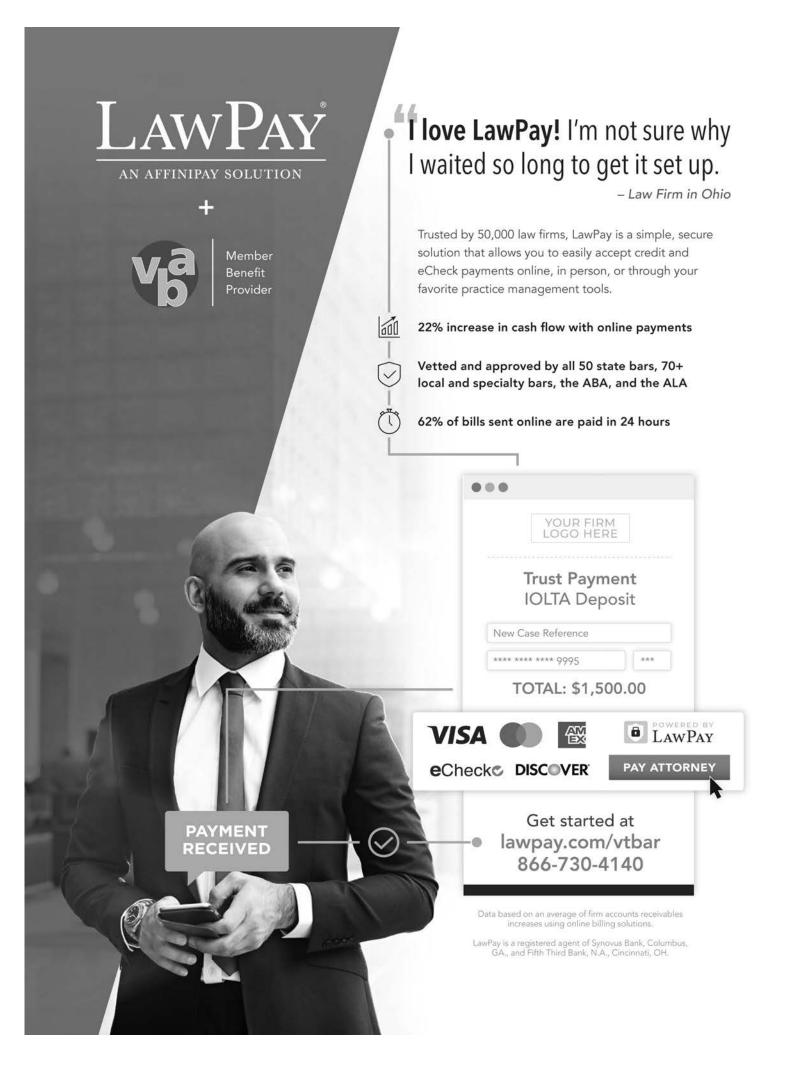
**ER:** I moved here in late 2022, but I did visit Vermont twice in 2021, once because my mom broke her shoulder and my parents needed help for a couple weeks, and later in the year when the restrictions started letting up. The latter visit I came through Montreal, but that was probably a mistake because it was a terrible pain crossing the border at the time, and although I never had symptoms and no one in my family got COVID from me, I did have a positive result when taking my test to go back across the border to the airport and ended up having to spend an extra couple weeks here before flying out from Burlington.

**KSV:** If a friend were to ask you where they should visit in Quebec, what jumps to mind, and why?

ER: Although I'd rather live in or near Montreal than Quebec City, everyone has to see Quebec City once in their life. The old city is amazing, and you wonder if you accidentally stepped through a portal into Europe when you're there. There are some great museums, the provincial parliament building is interesting to tour, and as a matter of historic importance it's worth visiting the Plains of Abraham. On the bucket list for a vacation to Montreal would be the Old Port and Ville Marie, the Fine Arts Museum, Pointe-à-Callière, Mont-Royal, the Biodome, and the Botanical Gardens. As unreligious as I am, I can never get over the beauty of Notre Dame Basilica. I always just think it's amazing that the Gothic style was created for utilitarian purposes when people were working with stone, and here folks mimicked that with wood, which was just so much extra work to make a thing of beauty! Old downtown Longueuil is worth a visit on the other side of the river, as is Chambly. Further away from the city, the zoo in Granby is one of the better zoos I've been to, and Sutton is an amazing place with wonderful hiking spots, vineyards, and relatively inexpensive fine dining. Close to my home here in Alburgh, anyone who likes cheese should visit Fromagerie Fritz Kaiser! Also nearby is the resort town of Venise-en-Québec. And for a cheap but delicious meal, try out Café Choco Choc in Lacolle.

**KSV:** How about activities up there? I know you recently went up for a bike ride, right? Any other interesting Quebec-special things that you like to do there?

**ER:** I've biked all over there, especially with a friend in and around Montreal. There's a great trail close to my home that starts in Lacolle, and I've biked to Pike River from my house more than once. Other than biking, I've mentioned several tourist spots, plus Meet-up events, cinema, and sporting events. Centra Segal in Montreal is the premier English theater in Montreal if someone enjoys theater. And there's always a festi-



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**KSV:** Any other tips for potential fellow travelers?

ER: A significant percentage of the population in Quebec is bilingual, especially in Montreal, so it is possible to get by entirely in English there. But people do tend to appreciate if you make some effort to start the conversation in French. An acquaintance who only speaks French but who enjoys visiting Burlington once asked me why people here in the US don't at least try saying "bonjour" and "merci" when addressing someone visiting from Quebec. I responded that I think people are afraid of sounding like they're making fun of French. He responded that he didn't think anyone would take it that way.

**KSV:** Do you find that being in Quebec or planning trips there, what have you, helps you cope with the stress of your job? Are you able to forget about work when you're up there?

**ER:** Oh yes. I usually only visit on the weekend, and since starting to work for myself I have created a strict rule that weekends are sacrosanct. No working allowed. So that helps too.

KSV: How's your French, by the way?

ER: It's getting there, slowly but surely. I understand it a lot better than I speak or write it, but recently a French speaker told me I have a Quebec accent, which felt like a compliment. I've realized that there are different registers of French in Quebec, as I'm sure is true of any language anywhere. Recently I was in Quebec City and took an entire guided tour in French. I understood every word. Then back out on the street someone approached me to ask me something and I asked myself, "Wait, was that French?!" And it was once I got the person to slow down and ask their question again. Certain registers I understand very well, and others make me feel like I'm still a beginner.

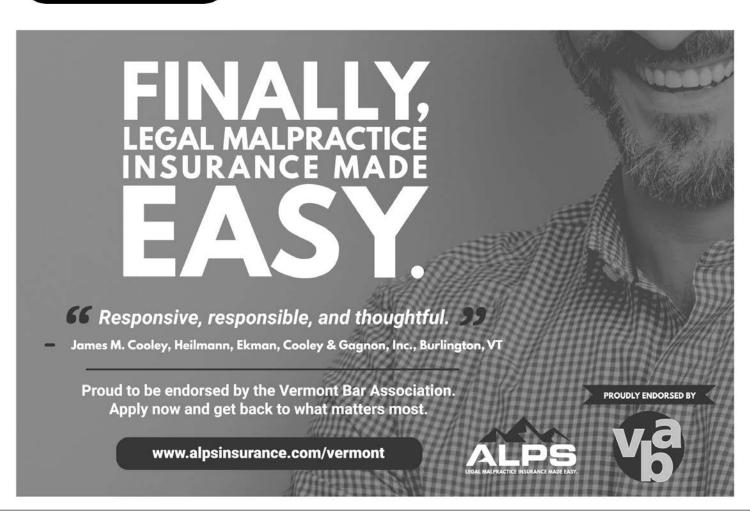
**KSV:** Erik, is there anything else about your love for Quebec that I didn't ask you about and which you'd like to share?

**ER:** Oh, I think I've talked your ear off enough. Thanks for listening!

**KSV:** Thanks so much for talking with us and *bon voyages*!

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





### **WRITE ON**

# Change in the Legal Writing Classroom: The NextGen Bar Exam and Generative Al

Legal education has been remarkably static for close to 150 years. In the late nineteenth century, law school Dean Christopher Langdell introduced the casebook and Socratic method at Harvard.1 At the same time, Langdell solidified the law school curriculum, requiring first-year students to take Civil Procedure, Contracts, Criminal Law, Property, and Torts.<sup>2</sup> This 1L schedule likely sounds familiar: not only did other schools pick up Langdell's curricular and pedagogical innovations, many schools have stuck with the same basic schedule and teaching methods since the early twentieth century.3 The casebook and Socratic methods have been finessed, and law schools have added classes in statutory interpretation, legal research, and legal writing, but in many ways little has changed in the delivery of legal education since Langdell's deanship.4

Change may<sup>5</sup> now be coming from two directions, both of which could lead to shifts in law school curriculum generally and legal writing instruction specifically. First, the National Conference of Bar Examiners (NCBE) will roll out the new NextGen bar exam beginning in July 2026.<sup>6</sup> Jurisdictions will adopt the NextGen bar exam on their own schedules, but current Uniform Bar Exam (UBE) jurisdictions (including Vermont) are expected to transition to the NextGen exam over the next few years. This is a big deal for legal writing and, perhaps even more so, for legal research.

The NextGen exam introduces direct skills testing in seven areas, including the core skills of legal writing and legal research.7 The new exam also clarifies the list of documents a test taker may need to analyze or produce during the exam. According to NCBE, the NextGen exam is "[d]esigned to balance the skills and knowledge needed in litigation and transactional legal practice."8 To that end, the NextGen exam won't exclusively focus on memos and briefs, but will also do things like give students draft contract provisions and ask them to identify language that should be changed while suggesting ways to change the language consistent with governing rules, relevant facts, and a client's expectations.9 In short, the NextGen exam will evaluate writing and research skills to a degree not seen in earlier bar exams. This is a good thing, given that surveys have showed a desire for law school graduates to have

practice-ready skills, including writing and research skills. <sup>10</sup> The NextGen's skills orientation should match not only changes law schools have already made, <sup>11</sup> but also the skills employers and others say they want from new graduates.

Enter generative Al.

Generative AI is a type of artificial intelligence that can create new content, such as text, images, music, or video, based on existing data. It uses machine learning techniques to learn from the patterns and structure of the input data and then generate new data that has similar characteristics. For example, generative AI can produce realistic images of faces, animals, or landscapes that do not exist in real life, or write stories, poems, or essays based on a given topic or prompt. Several generative AI programs reliably produce natural language responses to questions. For example, Microsoft Bing in Creative Mode, which uses a version of GPT-4, produced the three sentences at the beginning of this paragraph when asked to define generative Al. Most of the focus on generative Al in recent months has been on Open Al's ChatGPT interface. 12 That model is a chatbot built on a generative pretrained transformer (GPT), a type of neural network that processes natural language and generates text based on a given prompt. These programs are trained on a large volume of digital text, and over time the program learns the features of text such that it can generate responsive natural language that mimics human writing or speech.

Generative AI such as GPT also improves over time. For example, in June 2023, I gave ChatGPT the following prompt: "Is a plow a point source under the Clean Water Act?" Legal research and writing classes at Vermont Law & Graduate School assign a similar question to first-semester students, and I wanted a general idea of what a student would see if they ran this simple legal question through generative AI.

ChatGPT produced three paragraphs in response to the prompt. The first paragraph began with the purpose of the Clean Water Act and finished with the definition of a point source. The text did not say where either point of information came from, so the reader would have no way of knowing if the Clean Water Act is statutory, or the point source definition is regulatory or from caselaw. The reader would also

have no way of checking the accuracy of ChatGPT's answer without independent legal research.

The second paragraph of ChatGPT's response addressed the prompt directly. That paragraph began with a direct answer to the question posed, followed by a sentence giving the reasoning for the conclusion. The paragraph ended with a third and final sentence suggesting an alternative analysis might be appropriate in limited factual circumstances. The ChatGPT response then concluded by telling the reader that the answer to the prompt depended on many factors and the analysis given in ChatGPT's answer may not be reliable. The paragraph finished this way: "If you have specific concerns or questions about a particular situation, it's advisable to consult with legal or environmental professionals who can provide guidance based on the specific circumstances and relevant regulations in your jurisdiction."

Overall, the text of ChatGPT's June answer was clear but conclusory. The introductory paragraph framed the issue by providing the relevant purpose and definitions, but without legal references. The second paragraph responded to the prompt directly, but there were flaws here too. The ChatGPT response did not anticipate related questions or points, nor did it fully explain the conclusions it reached; the analysis was fairly superficial and further information would need to be elicited through additional questions.

I gave ChatGPT the same prompt in September 2023. In that response, it kept the legal disclaimer language, and it added more analysis and anticipation of related questions. There was marked improvement over the June response.

First, the September response is four paragraphs instead of three. While a longer response is not necessarily a better response, in this case the added text was helpful. Instead of beginning with the purpose of the Clean Water Act, the September answer begins with a conclusion sentence responding directly to the prompt. Legal writing students are taught to begin with a conclusion sentence, and ChatGPT used that style too. Like the June response, the September response leaves out all legal references. It is therefore still no help with specific sources for legal research, and independent legal research would be neces-

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sary to check ChatGPT's accuracy. But the September response otherwise improves on the content of the June response. ChatGPT's second and third paragraphs include more detailed analysis. The detail included anticipates follow up questions, providing terms that might be used for a follow up search and a more precise description of the reasons for ChatGPT's conclusion and possible alternative analysis. Like the June response, the September response concludes by noting the limitations of the given analysis and suggesting the reader seek further assistance from regulatory, environmental, or legal professionals.

Both the June and September responses to my prompt used GPT-3.5. The most recent version, GPT-4, is even more sophisticated, including in the legal field.

A couple of recent studies have shown GPT-4's legal capabilities; these studies indicate GPT-4 not only performs better than previous versions, GPT-4 is also competent to perform some legal tasks, including limited analysis and writing.<sup>13</sup> In the first study, researchers investigated whether any of the more recent versions of GPT (GPT-3, GPT-3.5, and GPT-4) could achieve a passing score on the Uniform Bar Exam. 14 On the bar exam's multiple-choice component, GPT-3 outperformed statistical chance with a 34.2% accuracy rate, GPT-3.5 demonstrated just under 50% accuracy, and GPT-4 accurately answered 75.7% of guestions. 15 On the essay portion of the exam, researchers observed the same distinction between GPT versions. They noted GPT-3 produced a "thin" output even when told to include more explanation, "vaguely" recited rules but did not connect those rules to relevant facts, and "consistently reach[ed] improper legal conclusions."16 Both GPT-3.5 and GPT-4 performed much better, though GPT-3.5 still missed critical legal rules, which meant that its overall analysis and conclusion were incorrect.<sup>17</sup> GPT-4, on the other hand, not only reached the correct answer, but along the way it identified all critical rules, connected rules to facts, and stayed on topic.18 The researchers noted that GPT-3.5 "intellectually meander[ed]" and addressed topics "out of scope with respect to the specifics of the question that was posed."19 In other words, GPT-3.5 struggled with issue spotting, one of the skills tested on the NextGen bar exam, while GPT-4 was able to accurately spot and analyze issues.

The essay portion of the Uniform Bar Exam relies on a test taker's knowledge of the law, but the final portion of the exam is just the opposite: for the Multistate Performance Test (MPT), test takers are given a library of sources and case facts and directed to produce a written document based exclusively on the given materials. Researchers tested GPT's capacity with this part of the exam by giving GPT-3.5

and GPT-4 source and factual documents, and then breaking the MPT issue into four discrete prompts.<sup>20</sup> GPT's performance on the MPT was on par with its essay performance. GPT-3.5 missed several points of authority and reached the incorrect conclusion on some elements of the ultimate legal question presented.<sup>21</sup> GPT-4, by contrast, correctly interpreted and used the law, reaching correct conclusions on the legal questions presented in the MPT.<sup>22</sup>

Ultimately, GPT-3.5 scored 213 points and GPT-4 scored 297 points on the Uniform Bar Exam.<sup>23</sup> The current passing score in Vermont is 270.<sup>24</sup> The lowest national passing score is 260, and the highest national passing score is 273.<sup>25</sup> GPT-3.5 might not have achieved a passing score in any jurisdiction, but GPT-4 is well over the margin in all jurisdictions.

In conclusion, researchers noted "[a]s the demand for better, faster, and more affordable legal services is only increasing in society, the need for supporting technology is becoming more acute." While there are still a host of concerns with using GPT and generative AI more generally in a legal context, such as its propensity to hallucinate sources and inability to apply ethics in decision making, researchers concluded GPT and generative AI nonetheless represent a "long-awaited legal force multiplier." 27

A second recent study reached a similar conclusion after examining GPT's performance on two different exams, both of which tested legal analysis skills.<sup>28</sup> In this study, researchers looked at GPT-4's performance on an upper-level insurance law exam and an undergraduate introduction to law exam, which resembled an introductory law school class designed to develop legal reasoning skills.29 Researchers used actual exams from the prior academic year, enabling them to compare AI responses with actual student exams.<sup>30</sup> Unlike the bar exam study discussed above, this study included student test takers. Researchers gave students in the two courses a supplemental exam after their own final exams ended, which students then completed with assistance from GPT-4.31 Researchers also had GPT-4 produce four additional exams.32 Al and Al-assisted exams were then compared with real student exams from the prior academic year.<sup>33</sup> Researchers thus could compare three kinds of exams: Algenerated, Al-assisted, and student.

Al assistance dramatically improved performance on introduction to law multiple choice questions but had less effect on essay performance within the same exam.<sup>34</sup> Student mean multiple choice score equaled 59.1, while Al-assisted mean multiple choice scores jumped to 88.0, reflecting a 28.9 point increase with use of Al.<sup>35</sup> By contrast, the student mean essay score equaled 49.5, while Al-assisted mean

scores were only 3.5 points higher at a mean score of 53 points.<sup>36</sup>

The researchers also examined whether access to Al changed performance for some students more than others. They hypothesized GPT might establish a performance floor for students at the bottom of the class, effectively preventing them from failing.<sup>37</sup> For high performing students, researchers hypothesized less of an effect overall because, in the researchers' words, "their innate skills already surpass the Al's capabilities."38 Data supported these hypotheses, and the researchers concluded that low performing students did improve with access to Al.39 High performing students did not improve with access to AI; the inverse seemed to occur, and high performing students seemed in some instances to be harmed by AI assistance.<sup>40</sup> More specifically, researchers found that Al-assisted exams showed more organizational and issue spotting problems, as well as overlooking relevant authority or variations on rules.41 This was consistent with earlier studies, and researchers noted "access to GPT-4 seems to have at times crowded out some of the higher-order legal reasoning that requires significant effort, such as spotting hidden issues or considering the implications of rule variations."42

The value of AI assistance did not just vary according to student class placement; it also varied by exam type and prompting strategy. For exam type, researchers found that AI performed significantly better on the introduction to law exam than on the more complex insurance law exam. For prompting strategy, researchers found that AI performed best with a grounded prompt and worst with basic prompting.<sup>43</sup>

This study included observations on the specific skills of writing and analysis. For the insurance law exam, researchers found Al-assisted exams showed better writing skills: they "were generally better written at the sentence level than human-only exams, containing easily understandable sentence constructions and few spelling or grammatical errors."44 But clear construction was not enough to save the analysis in these Al-assisted exams. On that metric, researchers found that Al-assisted exams often included conclusory analysis or did not state the relevant legal doctrine.<sup>45</sup> Organization was also off, with the researchers noting that Al-assisted exams were more likely than student exams to introduce rules partway through analysis, thus ignoring the standard IRAC structure law students are taught to use.46 While prompt style produced some variation in analytic quality, Al-only exams had many of the same errors.<sup>47</sup> These exams were particularly likely to demonstrate conclusory analysis that failed to fully analyze given facts. 48 On the other hand, researchers also noted that COMMITTED TO ACHIEVING

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"[r]elative to both human and Al-assisted exams, all of the Al-only exams exhibited especially strong writing and organization of analysis."<sup>49</sup>

The researchers had similar observations for the introduction to law exam. Alassisted exams tended to be better written than student exams. 50 They also tend-

ed to accurately highlight important facts.<sup>51</sup> Unsurprisingly, Al-assisted and Al-only exams had difficulty specifically addressing cases mentioned in the prompt, though researchers noted the Al-only exams performed much better at this skill when given a grounded prompt.<sup>52</sup>

What does all this mean for the legal

writing curriculum and classroom?

For starters, it means faculty should consider whether students will use generative Al in their post-graduation jobs or even summer internships. As the studies described above show, GPT-4 is competent to perform some legal tasks. There are several ways generative AI such as GPT can be useful for lawyers.<sup>53</sup> At a general level, this includes using generative AI to summarize and analyze cases, write first drafts, and edit written work.<sup>54</sup> GPT-4 is already being used for some of these tasks by commercially available interfaces such as CoCounsel, Casetext's "Al legal assistant for every practitioner."55 CoCounsel can sort documents, including legal text, and respond with natural language interpretation that includes citations.<sup>56</sup> Essentially, it can complete legal analysis of a given universe of sources. Casetext claims that it is used by over 10,000 law firms;<sup>57</sup> even if only some of those firms use or will use CoCounsel, that still represents a significant margin of the job market, which suggests a fairly good number of graduates will probably go on to jobs where they are expected to use generative AI for some tasks.

If we take it as given that some law school graduates will use generative Al during their careers, then faculty need to consider whether the law school curriculum should teach students to work with these tools. We teach students to use other resources, such as major online legal research databases, and it seems possible generative AI could become as embedded in legal practice as those tools. To ensure students are prepared for practice, it likely makes sense for law schools, and legal writing programs specifically, to incorporate generative AI into the classroom.

There are a few reasons for this. First, as discussed above, generative AI such as GPT is likely to become a more useful, and more frequently used, tool in practice. While we should all know that we cannot rely exclusively on ChatGPT for brief writing,<sup>58</sup> generative AI is still a reasonable tool for many tasks, such as help with first drafts and editing existing language. Services such as CoCounsel advertise that they can do even more. Generative AI is most likely here to stay, and if facility with generative AI is part of getting a student practice-ready, then law school curriculum can benefit students (and employers) by introducing them to this skill. The legal writing classroom is the best place to begin this instruction because of the nature of the skills we already teach in legal writing classes.

The NextGen bar exam will directly test legal writing and drafting. Material from NCBE says the purpose of this is "to test the extent to which an examinee can complete a legal writing or drafting task based

on the relevant rules and standards and consistent with a client's objectives, interests, and constraints."59 We know that five basic kinds of writing and drafting tasks may be given to NextGen test takers; three of these five tasks will ask test takers to edit or otherwise work with given language, one of the five will ask test takers to draft a document using a given set of sources, and the final task will ask test takers to either draft or edit material.<sup>60</sup> Because the Next-Gen bar exam content includes both drafting and editing, it makes sense to teach students both how to draft documents and how to edit given materials. Generative AI offers an excellent tool for producing basic documents for students to edit, and, because of its editing capabilities, it also offers a way to help students compare different edits to the same document. It seems the NextGen bar exam will test this skill, and generative AI is a new tool legal writing faculty can use to help students develop this skill.

Through use of generative AI to produce first drafts and edit documents, students will also have an opportunity to learn the risks and benefits of this technology. Rule 1.1 of the Vermont Rules of Professional Conduct governs the duty of competent representation.61 In 2012, the ABA added comment 8 to this rule; that comment requires attorneys to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."62 One obvious risk is that generative AI, including GPT-4, can hallucinate, producing inaccurate answers with made up sources.<sup>63</sup> This is a problem for students (or attorneys) hoping to rely on GPT for non-grounded research assistance or analysis. Students can learn the risks of generative AI while learning how to use it efficiently and effectively, but only if law school classrooms work with students to develop this knowledge and skill.

Between the NextGen bar exam's addition of skills testing to generative Al's possibilities as a learning and practice tool, legal writing curriculum is at the cusp of a broader changing perspective on legal education. It is an exciting time to teach, and classrooms will need to stay on top of technological and pedagogical innovations. Navigating generative Al's risks and benefits with students is a great place to start.

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Rachel Gurvich, et al., Reimagining Langdell's Legacy: Puncturing the Equilibrium in Law School Pedagogy, 101 N.C. L. Rev. F. 118, 129-30 (2023).

- <sup>3</sup> *Id.* The 2023-2024 Vermont Law & Graduate School 1L curriculum includes Langdell's five requirements, as well as Legislation & Regulation, Constitutional Law, and two classes in legal research and writing.
- <sup>4</sup> Some have started to call for change in legal education more broadly. We have learned a great deal in the past century about cognitive science and how humans learn, and it may now be appropriate to reconsider legal pedagogy. See generally id. (discussing ways modern legal classroom differs from classroom of a century ago and suggesting ways to improve legal education).
- I am intentionally using the word "may" here. Much of the detail around the NextGen bar exam is still unknown. Some sample questions have been released, but full exams are not available. It is therefore difficult to predict the effect of the NextGen bar exam with any certainty. The same is true for generative Al. It is certainly the hot topic in legal writing circles right now, but it may turn out to be a little longer before it is ready for widespread use in legal practice. Generative AI may also be either less appealing to students than some people fear or easier to detect than it is now. Either of those options would minimize the net effect of generative AI on legal writing curriculum and legal education generally. <sup>6</sup> Nat'l Conf. of Bar Exam'rs, Implementation Timeline, NEXTGEN: BAR EXAM OF THE FUTURE, https://nextgenbarexam.ncbex.org/about/implementation-timeline/ (last visited Sept. 12, 2023).
- <sup>7</sup> Nat'l Conf. of Bar Exam'rs, BAR EXAM CONTENT SCOPE 1-4 (2023), https://nextgenbarexam.ncbex.org/pdfviewer/ncbe-nextgen-content-scope-may-24-2023/.
- <sup>8</sup> Nat'l Conf. of Bar Exam'rs, NextGen: Bar Exam of the Future, https://nextgenbarexam.ncbex.org/ (last visited Sept. 12, 2023).
- <sup>9</sup> BAR EXAM CONTENT SCOPE, supra note 7, at 4. <sup>10</sup> See, e.g., Nat'l Conf. of Bar Exam'rs, Recommendations, NextGen: Bar Exam of the Future, https://nextgenbarexam.ncbex.org/overview-of-recommendations/ (last visited Sept. 12, 2023) (noting changes to bar exam "guided by prevailing views expressed by stakeholders... that the bar exam should test fewer subjects and should test less broadly and deeply within the subjects covered, that greater emphasis should be placed on assessment of lawyering skills to better reflect real-world practice and the types of activities newly licensed lawyers perform").
- <sup>11</sup> NextGen: Bar Exam of the Future, supra note 8. As NCBE notes on its website, "the exam will reflect many of the key changes that law schools are making today, building on the successes of clinical legal education programs, alternative dispute resolution programs, and legal writing and analysis programs." *Id.*
- OpenAl's GPT architecture has been incorporated into other interfaces too, such as GPT for Docs, Sheets, and Slides, which assists with drafting in Google programs, and Microsoft Bing in Creative Mode, which provides natural language descriptions in response to internet searches. As discussed later in this column, GPT-4 (the most recent iteration) also powers CoCounsel, Casetext's Al assistant. CASETEXT, https://casetext.com/ (last visited Sept. 12, 2023).
- <sup>13</sup> Daniel Martin Katz, et al., *GPT-4 Passes the Bar Exam* (Apr. 5, 2023) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4389233; Jonathan H. Choi & Daniel Schwarcz, Al Assistance *in Legal Analysis: An Empirical Study 6* (Minn. Legal Stud. Research Paper No. 23-22, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4539836.
- <sup>14</sup> Katz, et al., *supra* note 13 at 1-2.
- <sup>15</sup> *Id.* at 4 tbl.2.

- <sup>16</sup> *Id.* at 7-8.
- <sup>17</sup> *Id.* at 8.
- <sup>18</sup> Id.
- <sup>19</sup> Id.
- <sup>20</sup> Id. at 9. Researchers divided essay and MPT questions into single segment prompts. GPT-3.5 and GPT-4 both performed better and produced more detailed answers when given discrete prompts rather than multi-issue prompts. Thus, for each essay researchers gave the GPT both the essay vignette and a single prompt, and for each MPT researchers gave the GPT the full library of sources and facts and a single prompt. Id. at 7, 9. Human test takers must process all prompts in an essay or MPT at the same time, producing one unified answer that addresses all parts of a given question.
- <sup>21</sup> *Id.* at 9.
- <sup>22</sup> Id.
- <sup>23</sup> *Id.* at 10.
- <sup>24</sup> Uniform Bar Examination Minimum Scores, Nat'L CONF. OF BAR EXAM'RS, https://www.ncbex. org/exams/ube/ube-minimum-scores (last visited Sept. 12, 2023).
- 25 Id
- <sup>26</sup> Katz, et al., *supra* note 13 at 11.
- <sup>27</sup> Id.
- <sup>28</sup> Choi & Schwarcz, supra note 13 at 6, 11-12.
- <sup>29</sup> *Id.* at 11-12.
- <sup>30</sup> *Id.* at 13-14.
- <sup>31</sup> Id.
- <sup>32</sup> *Id.* at 14.
- <sup>33</sup> *Id.* at 14-15.
- <sup>34</sup> *Id.* at 20. This conclusion agrees with one point from the bar exam study: researchers there noted that GPT-4's strong performance on the bar exam multiple choice gave it "substantial latitude" on the essay and MPT parts of the test.
- Katz, et al., *supra* note 13 at 10. <sup>35</sup> *Id.* at 18 tbl.1.
- <sup>36</sup> Id.
- <sup>37</sup> *Id.* at 20.
- <sup>38</sup> Id.
- <sup>39</sup> *Id.* at 21. <sup>40</sup> *Id.* at 25.
- <sup>41</sup> *Id.* at 27.
- <sup>42</sup> *Id.* at 27 n.69.
- <sup>43</sup> *Id.* at 22. A grounded prompt provides the AI with relevant sources for use in producing an answer. A basic prompt involves simply asking the AI a question, without any provided sources. *Id.* at 16.
- <sup>44</sup> *Id.* at 28.
- <sup>45</sup> Id.
- <sup>46</sup> Id. <sup>47</sup> Id.
- 48 Id.
- 49 Id.
- <sup>50</sup> *Id.* at 29.
- <sup>51</sup> Id.
- <sup>52</sup> Id.
- <sup>53</sup> See generally Daniel Schwarcz & Jonathan H. Choi, Al Tools for Lawyers: A Practical Guide, MINN. L. REV. HEADNOTES (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4404017.
- <sup>54</sup> See generally id. It is worth mentioning that the use of generative AI raises some ethical considerations. For law students, use of generative AI to create or edit a draft that the student will turn in as their own work feels a little like plagiarism: the student's final work product isn't fully and independently produced by the student, instead the student has help from generative AI. Even if it isn't exactly plagiarism under the traditional definition of that term, use of generative AI will, at the very least, impede skill development when the AI is used as a shortcut. See Michael L. Smith, Language Models, Plagiarism, and Legal Writing, 22 U.N.H. L. Rev. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.



cfm?abstract\_id=4542723 (comparing generative AI use with plagiarism, and arguing legal writing programs should teach students both skills since both are used in practice). For this reason, schools and even individual faculty should develop policies around generative AI may raise other ethical concerns for practicing attorneys, though these ethical concerns are likely to be quite different from the concerns relevant for students, given that attorney ethics serve different purposes than law school plagiarism bans. For further discussion of generative AI and ethical concerns related to the practice of law, see Schwarcz & Choi, supra note 53 at 19-21.

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- 55 CASETEXT, https://casetext.com/cocounsel/ (last visited Sept. 12, 2023).
   56 Id
- <sup>57</sup> Id.
- <sup>58</sup> Benjamin Weiser, ChatGPT Lawyers Are Ordered to Consider Seeking Forgiveness, N.Y. TIMES (June 22, 2023), https://www.nytimes.com/2023/06/22/nyregion/lawyers-chatgpt-schwartz-loduca.html.
- <sup>59</sup> Bar Exam Content Scope, *supra* note 7, at 4. <sup>60</sup> *Id*.
- <sup>61</sup> VT. RULES OF PROF. CONDUCT r. 1.1; MODEL RULES OF PROF. CONDUCT r. 1.1 (Am. Bar. Ass'n), https://www.americanbar.org/groups/professional\_responsibility/publications/model\_rules\_of\_professional\_conduct/rule\_1\_1\_competence/.
- <sup>62</sup> MODEL RULES OF PROF. CONDUCT, Rule 1.1 cmt.8; VT. RULES OF PROF. CONDUCT r. 1.1 cmt.8.
- <sup>63</sup> Cade Metz & Keith Collins, 10 Ways GPT-4 Is Impressive but Still Flawed, N.Y. TIMES (Mar. 14, 2023), https://www.nytimes.com/2023/03/14/technology/openai-new-gpt4.html.

# **WHAT'S NEW**

## **VBA Annual Report 2022-2023**

The VBA Annual Report covers VBA activities during the period September 1, 2022 – August 31, 2023 time-frame.

As you know I have returned as Executive Director. I want to thank the VBA Board of Managers for its faith in me to resume this position. I also need to acknowledge the outstanding staff that support the membership every day. One of the first things I did was to name Lisa Maxfield as Associate Executive Director. Lisa, formerly our CFO, has earned that promotion after nearly 30 years of service to the VBA. Laura Welcome remains our Program Coordinator and has served in that role for about 15 years. Kim Velk, Esq. has been our Director of Education and Communication for about 18 months and, working with Laura, has produced great programming for our members. I am constantly impressed by her energy and ability to research current trends in the law and seek out educational opportunities to keep VBA members informed and up to date. Tom Barrett, our Lawyer Referral Coordinator, also with the office for about 18 months, has shown great skill in managing that service which benefits not only Vermonters seeking legal help but our members as well. Mary Ashcroft, Esq. our Legal Access Coordinator, who was planning on retiring, has decided to extend her time at the VBA after 15 years of service. Her work is so important in so many areas that VBA President Andrew Manitsky is recognizing her at the Annual Meeting with a President's Award; well done Mary! Our newest staff member is Erica Back, our Office Administrator, who's been with us for about 2 months but who has already gotten into the flow of work and fits in perfectly with the team.

#### **New Programs**

We've done a few new things this year. Vermont notary commissions expired at the end of January 2023. The Office of Professional Regulation of the Secretary of State's Office had mandated, for the first time, that non-attorney notaries who were not otherwise exempt had to complete a minimum of one hour of relevant continuing education prior to re-commissioning.

Through the good graces of Real Estate Section Co-Chair Jim Knapp, the VBA developed an approved 1.5-hour training. We made the session available to all for a modest \$25. Jim delivered that training via Zoom on Oct. 31 to nearly 1000 attendees. This was the largest audience ever for a VBA training. It was recorded for our digital library and has been viewed (as of the date of this writing) 3238 times.

This was a significant undertaking. The community of notaries in Vermont is large and not necessarily familiar with continuing education requirements. One of those requirements was documenting that they

had completed the course. Our staff was kept very busy explaining how to view the recording and access the certificate of completion. Jim graciously agreed to take questions from recording viewers and is already thinking of how best to train them again when commissions expire again in January 2025.

The VBA also now sponsors what we call "Brown Bag Law Study." These are basic programs for those engaged in the 4-year law office study program (LOS). They are not what we would call traditional CLEs but are introductory to enable LOS participants to become familiar with the terms of different areas of substantive and procedural law which will help them navigate the bar exam. To date we've held five programs, usually two one and a half hour sessions a month. We've done Property Law, Criminal Law, Torts, Family Law, and Contracts. Thanks to all the practitioners who volunteered their considerable time and effort to present these sessions. More are planned for the new fiscal year.

In July Vermont was rocked by flooding which affected many businesses and homes. The VBA responded by creating a Flood Victims Legal Response Project. Members of the VBA have volunteered to provide legal advice to Vermonters who are facing legal issues arising from the flooding of their homes, businesses, or places of employment. The VBA has also received a Vermont Bar Foundation grant to fund a new low bono project that will make lawyers available to provide limited legal services again at no cost to flood victims. Lawyers can elect to work pro bono for flood victims or receive a low bono stipend. Mary Ashcroft is administering this project, matching requests from Vermonters with an appropriate volunteer lawyer. The VBA has a Small Business Legal Assistance Project, partnering with the Vermont Law & Graduate School, to link low bono lawyers with small business owners who need advice and legal services related to their businesses in such areas as business formation, leases and contracts, business succession, intellectual property, employment law, business tax issues, regulatory compliance, and other business-related matters. The SBA grant can also be used to assist small businesses with flood related issues.

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# The New Vermont Superior Court Division Database

If you were at the Annual Meeting in Lake Morey in September last year, you'll recall that then-incoming VBA President Andrew Manitsky pledged that during his presidential year, the VBA would make Vermont trial court opinions available through a searchable database. Mission accomplished! As Andrew prepares to hand the gavel over to incoming President Judith Dillon, we can report that the database is up and running and growing. You can now search, read, and cite a large (approaching 5,000 cases) database of Vermont Trial Court decisions. This was a big project, accomplished by Andrew's efforts and excellent cooperation from our partners in the judiciary and at Fastcase. Fastcase is, of course, the legal research platform available to all VBA members as a benefit. Andrew will be recognizing this fruitful collaboration with a President's Award to Fastcase at the 2023 Annual Meeting in Burlington on Sept. 29.

#### **Civility and Professionalism**

Andrew's other pledge back at Lake Morey was to advance the cause of civility and professionalism in the Vermont Bar. In late January, the VBA launched a survey on "civility and professionalism." The response was excellent. The survey was sent to Vermont lawyers, state and federal judges, court staff, paralegals, and other participants in our legal system. Nearly 700 responses came back. Andrew wrote about the responses in his President's Colum. Along with Bar Counsel Mike Kennedy and the Hon. Mary Miles Teachout (Ret.), he led a CLE seminar at the Mid-Year Meeting in March to discuss the survey and the responses. It was a standing room only crowd and they had a lot to say. The conversation continued with other professional organizations (Vermont judges and trial lawyers making it a theme of their meetings this year as well). The VBA will pick the topic up again at the Annual Meeting. Certainly in 2023, we had our consciousness raised about the importance of civility and professionalism.

#### **Continuing Business**

The monthly Section/Division Chairs and County Bar Presidents Zoom Calls are continuing. These monthly meetings provide an opportunity to share information between the VBA and County Bars.

We continue to offer a wide range of CLEs through Zoom, many of which are recorded for viewing in our digital library. Our Mid-Year Meeting in March at the Equinox broke the post-pandemic record for attendance at an in-person meeting with about 225 on hand. The Trial Academy was held in July at Vermont Law and Graduate School and the Young Lawyer's Division managed to host the Mid-Winter Thaw at its traditional timing in January. The VBA also continued to provide necessary programming for first-year requirements for newly admitted attorneys. Thank you to our member attorneys and those judges who have been willing to share their expertise for these programs.

The Workforce Development Committee continues its efforts to recruit and retain lawyers and has led the way to create a Mentor and Advice Program, which pairs seasoned attorneys with newly admitted members in a six-month mentorship program. Many of the requests for mentors come from lawyers that are not yet in Vermont. The committee has completed work on a loan repayment assistance program (LRAP) that was once funded by the Vermont Bar Foundation.

VBA Access to Justice initiatives have proven invaluable to disadvantaged Vermonters especially during the time of the pandemic. Our projects use grant funds to pay private attorneys to represent low-income Vermonters and crime victims in cer-

tain cases. Legal Access Coordinator Mary Ashcroft has placed more than 400 cases with the more than 150 attorneys who participate on our low bono referral panel. Our thanks go to all of them, and we ask more of our colleagues to join the effort. Please contact Mary Ashcroft at mashcroft@vtbar.org for more information.

The VBA Lawyer Referral Service continues to assist clients in need of Vermont counsel. The VBA fields over 500 calls per month and the program has earned more than \$1 million in LRS revenue for our 125 LRS panel members.

The VBA continued its focus in the arena of public education by co-hosting the annual Constitution Day with the Vermont Law and Graduate School as well as organizing the Young Lawyers Division and Diversity Section's annual Martin Luther King Poster Essay Contest for middle-school students.

The VBA continues to partner with the Vermont Law and Graduate School in the VBA/VLGS Incubator Project. This project assists new lawyers starting solo practices in underserved legal and geographic areas of Vermont. The VBA/VLGS teams provides day-to-day mentoring and weekly check-ins, review of business plans, smart start-up grants, referral of low bono and pro bono cases. This project is also part of the VBA's commitment to workforce development.

The VBA Sections and Divisions chairs and members have been working hard to facilitate legislative initiatives, CLE programming, contributions to the *Vermont Bar Journal*, and much more. We thank all of you for what you do. Please take a moment to read about their accomplishments and remember to utilize our online community platform, VBA Connect, to join sections and divisions of your choosing to stay informed and network with your peers.

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



VBA Mid-Year Meeting

March 29, 2024

Hilton Burlington Lake Champlain

### **WHAT'S NEW**

# **2023 Section Reports**

#### **Appellate Law Section**

Co-Chairs Bridget Asay and Ben Battles

The Appellate Section organized a well-attended and very interesting CLE program in September 2022, "Appellate practice in state and federal court: A Q&A with Judge Beth Robinson, U.S. Circuit Judge for the Second Circuit." Many thanks again to Judge Robinson for participating in the program. Co-chair Bridget Asay was appointed to the Advisory Committee on the Rules of Civil Procedure in 2022 and is assisting the Committee with its review of appellate rules.

#### **Arbitration of Fee Complaints Section**

Chair: Jeffrey Messina

The VBA Arbitration of Fee Complaints Committee has been hard at work. In addition to actively working with members of the Bar and community to resolve fee disputes, the Committee is currently reviewing and updating the processes and procedures for a complainant to commence and parties to participate in fee dispute resolution. These developments generally include: proposed Committee name change; proposed revised process to institute resolution proceedings; proposed draft agreements to participate in resolution proceedings; proposed rules; and, proposed revised adjudicative system. A comprehensive announcement will follow formal adoption of the changes.

Questions can be directed to Jeffrey Messina at jmessina@flynnmessinalaw.com

#### **Bankruptcy Law Section**

Chair: Alexandra Edelman

The Bankruptcy Section met again in person for the first-time post pandemic for the popular Holiday Luncheon and CLE day on Dec. 2, 2022. Everyone was happy to be back together for a full day (6.75 CLE credits, including an hour of ethics). Save the date for the next Annual Bankruptcy Section Holiday CLE, which will be held on December 1, 2023 at the Windjammer in South Burlington.

The Bankruptcy Section also kept busy this year with the creation of a Local Rules Revision Advisory Group, the Bankruptcy Court's issuance of a new Standing Order concerning the location of hearings, a revised Pro Se Guide on the Bankruptcy Court's website, a discussion and presentation regarding the SCOTUS decision in Bartenwerfer v. Buckley, a continuing discussion on guidance concerning discharge of student loan obligations in bankruptcy,

and regular Bankruptcy Bench-Bar Meetings with Judge Cooper.

The next Bankruptcy Bench-Bar Meeting will be held on Friday, September 22, 2023 at 12:30 p.m. in Rutland. Special guests, William Harrington, Lisa Penpraze and Olga Allen, from the United States Trustee's Office will be at the meeting to give a presentation on the rollout of the Zoom 341 Meeting Platform.

#### **Collaborative Law**

Chair: Nanci Smith

The Collaborative Law Section continues to support its family law members with ongoing trainings, best practices, and collegial support about this exciting and developing interdisciplinary, out-of-court family practice area. This year we participated in the national Annual Divorce with Respect Week, where Collaborative professionals from each discipline across the country (legal, financial and emotion) offer free 30-minute consultations about Collaborative Divorce and other peaceful, non-adversarial divorce processes. As a group, we recently curated and attended a presentation from the foremost expert in the area of the use of a Child Specialist in complex divorces involving minor children. This year, the IACP (International Academy of Collaborative Professionals) is hosting its 24th Annual Networking and Educational Forum in Toronto, Canada. If you miss this event and are interested in how to include Collaborative divorce as part of your practice, please reach out. The two-day introductory training is the first step, and they are offered throughout the year. Our interdisciplinary practice group CPVT continues to meet monthly on the first Thursday of each month at 12 PM via Zoom. If you are interested in learning more about our interdisciplinary divorce practice, please feel free to contact me at nanci@nancismithlaw.com or Corey Wood cwood@bpflegal.com to receive a link to our practice group meeting to join us and meet the rest of the team.

#### **Conflict Resolution**

Chairs: Neil Groberg, Richard Hecht, Erik Wheeler

"In a world filled with conflict, the importance of those valiantly seeking alternatives is more critical than ever." With co-chairs, Neil Groberg, Rick Hecht, and Erik Wheeler continuing at the helm, the Dispute Resolution Section maintained its efforts in this regard by extending the mission of the Section- advancing non litigious conflict reso-

lution

The Section continued its well-regarded and well-attended Zoomed "Chewing On Conflict" CLEs. Matt Duss, a Visiting Scholar with the Carnegie Endowment for International Peace, appeared in a session and discussed conflict resolution in the context of foreign policy and in particular the war in Ukraine. We anticipate continuing these discussions with one already planned for October or early November 2023 and welcome ideas. In addition, Vermont arbitrators and mediators presented CLEs at VBA and other association events.

The section and its co-Chairs, on a pro bono basis, worked with, mediated at its behest, and assisted the Conflict Assistance Program of the Burlington Community Justice Center. This program seeks to resolve conflict among neighbors in Burlington and surrounding towns.

Overall, with over 125 members, the Dispute Resolution Section strives to make mediation, arbitration, and facilitation more utilized, accepted and publicized in Vermont's legal community and the public in general. The Section welcome suggestions from all Bar members, regarding opportunities for the Dispute Resolution Section to enhance its mission.

Submitted by Neil Groberg.

#### **Diversity**

Chair: Alfonso Villegas

The Diversity Section sponsors the Martin Luther King Jr. Poster-Essay Contest. This year the quote students were asked to grapple with was: "Life's most persistent and urgent question is, what are you doing for others?" The VBA received excellent submissions from across Vermont. I want to especially thank the VBA's Director of Education and Communication, Kim Velk, for collecting submissions and for coordinating, organizing, and helping to present the winners to Governor Scott. I would also like to thank Kevin Lumpkin (Sheehey, Furlong & Behm P.C.) for helping judge this year's submissions. Finally, I would like to thank Governor Scott and his staff for presenting the awards and supporting Martin Luther King, Jr.'s memory.

The Vermont Supreme Court is embarking on the path to identify blind spots in diversity, equity, and inclusion within the Judiciary. In January 2022, the Vermont Supreme Court established the Judiciary Commission on Diversity, Equity, and Inclusion. The commission is charged with advancing racial and social equity in pursuit

of equal justice under the law by identifying disparities in our judicial system, understanding what causes those disparities, evaluating solutions, and implementing changes. On March 31, 2023, the Commission submitted its first report. A second report is due September 2023. A third report is due March 2024 that will propose how to implement recommended solutions, which the Commission will oversee. My concern is that the Judiciary will miss opportunities to implement simple but impactful changes now while they debate on the best tools to track data.

An important legal development is that the Supreme Court ended affirmative action for college admissions in Students for Fair Admissions, Inc. v. Presidents and Fellows of Harvard College, 600 U.S. \_\_, (2023) on the basis of the Equal Protection Clause of the 14th Amendment. Most of the opinion was spent on whether the plaintiffs had standing and on pushing back against vigorous dissents by Justices Sotomayor, Kagan, and Jackson. Somehow, 45 years of affirmative action in college admissions is enough to make up for 181 years of systemic – and often brutal and inhumane - slavery, segregation, and racism that has existed since the signing of the Constitution in 1787. Since Students for Fair Admissions, groups behind the successful challenge to affirmative action have sued two major U.S. law firms over their fellowships that promote diversity. The American Alliance for Equal Rights has sued Perkins Coie and Morrison & Foerster in Miami regarding their fellowship programs, accusing them of discriminating against white candidates.

If you have an idea for an event (a CLE, a networking event, or a talk to commemorate history) or for writing an article, please contact the Diversity Chair.

#### **Elder Law Section**

Chair: Glenn A. Jarrett

Among the activities members of the Elder Law Section have participated in this past year are membership on a committee analyzing the new Power of Attorney law and presenting at a VBA seminar on Enhanced Life Estate Deeds.

#### **Environmental Law**

Chair: Gerry Tarrant

On June 15, 2023, the Environmental Section sponsored a comprehensive CLE on key regulatory and environmental laws that were expected to pass the 2023 Legislative Session.

Less than a month later, Vermont experienced devastating flooding throughout much of the State. Almost immediately the VBA requested the Chair of the Environmental Section to work with other Vermont lawyers, and the chairs of various VBA sec-



tions to revise and update the Vermont Disaster Legal Assistance Manual written in 2012. The Manual will be placed on the VBA website to aid practitioners in advising and assisting clients impacted by flooding and other catastrophic events. The Environmental Section's Chair worked with attorney Jim Knapp to address property and environmental issues within the framework of municipal regulations, permits and bylaws, State of Vermont development, environmental and health laws and regulations, and the involvement of federal agencies such as FEMA and the EPA. The Section's analysis addresses the ability of a business or individual to recover from a disaster, including addressing potential title disputes caused by flooding, receiving state and federal assistance, resolving insurance claims, and redeveloping property on a reasonable time frame consistent with applicable laws and regulations.

#### **Family Law Section**

Chair: Patricia Bennelli

This year the Family Law Section emerged from the pandemic to resume Family Law Day. On June 9, the section presented a well-attended CLE. The morning included a long awaited update on family law cases from the Vermont Supreme Court and recent changes in relevant rules and statutes, of which there were many. This included a presentation by Maya Tsukazaki, Vermont Poverty law Fellow, on modifications to state law which will affect petitions for vulnerable noncitizen youth and ease path to safety and eventual citizenship here in the United States.

In the afternoon, Meg York, a professor from Vermont Law and Graduate School, presented a riveting program on special family law considerations for the LGBTQ+community and ways in which we, as family law practitioners, can support our LGBTQ+clients. There are more CLEs on the horizon before the end of this year, and the section is working on drafting language to amend at least one statute which affects family law. It's good to be back in action.

#### **Federal Practice Section**

Chair: Justin Barnard

The Federal Practice Section has not had any activity over the past year. Hoping for more activity in 2023-2024!

#### **Immigration Law Section**

Chair: Sidney Collier

The Immigration Law Section was fortunate to partner with some terrific Vermont immigration advocates to present on immigration issues this year.

Representatives from Community Asylum Seekers Project (CASP), Vermont Asylum Assistance Project (VAAP), and the Vermont Law School's Center for Justice Reform Clinic, formerly Immigrant Assistance Project, presented 'Seeking Asylum: Why it Matters and How You Can Help' at the VBA's Annual Conference in Lake Morey. Members of these same organizations teamed up to present 'Seeking Asylum: Preparing an Asylum Case" at Pro Bono Day to introduce attendees to the process of representing asylum-seeking Vermonters.

Following the 2022 passage of Act 98 by the Vermont Legislature, many noncitizen, at-risk youths under the age of 21 in Vermont became eligible to seek special findings regarding their wellbeing before Vermont juvenile courts. Representatives from CASP, VAAP, and the law school, and the Vermont Bar Foundation's Poverty Law Fellow spoke at the Young Lawyers Division's Mid-Winter Thaw on how, with these state court findings, noncitizen youth become eligible to apply for Special Immigrant Juvenile Status (SIJS), a pathway to the legal status that some young noncitizens need to pursue employment, higher education, and healthcare.

A member of the Immigration Law Section also presented an Introduction to Immigration to the attendees of the Vermont Family Mediators conference in April 2023.

Vermont's noncitizen population continues to grow and is seeking safety, employment, and stability. The Vermont Asy-

lum Assistance Project (VAAP) is seeking to grow its roster of pro bono attorneys to represent asylum seekers coming to the State. VAAP will provide training and mentoring to pro bono attorneys - no immigration law experience is necessary! For more information on VAAP and to sign up to volunteer, please visit: www.vaapvt.org.

As always, the ILS welcomes members to post questions and comments on VBA Connect and provide suggestions on CLE seminars and how to increase engagement with this group and other members of the bar

#### **Insurance Law Section**

Chair: Doreen F. Connor

Members of the Insurance Section presented a CLE at the Mid-Winter Thaw in January of 2023.

Our topic was "Insurance Coverage for the Non-Coverage Practitioner."

It was well attended, and we received lots of positive feedback.

#### **International Law & Practice Section**

Chair: Mark D. Oettinger

2022/2023 has been a notable time for those of us who follow public (and private) international law. Remarkably, the initiation of war in Ukraine was met with immediate court filings...before both the ICJ and ICC. In responding to requests for preliminary relief, each court opined that Russia's stated justifications for its aggression were pretextual, and the war therefore illegal. Did the court rulings have an effect on the war? In my opinion, and in the opinion of many far better-informed "public international law watchers," the answer is a resounding, "Yes!" The war rages on, but would the world have come so openly and generously to Ukraine's defense in the absence of the rapid and categorical condemnation of Russia's aggression by both courts? Perhaps not. Naming and shaming works...even in the absence of complete "enforceability." The key, in my opinion, is the instantaneousness and near-ubiquity of information. To borrow from an old adage, the arc of the moral universe is informed by transparency.

Private international law was also notably disrupted by the pandemic. For example, the US/Canada border was all but closed for 19 months. World-wide productivity shrank, logistics slowed to a crawl, inflation spiked, and the workforce fell apart. "Disruption," of course, is often cited in a positive light. And "chaos is opportunity," right? It doesn't always feel that way, but there are certainly benefits to rebuilding systems in the face of changed circumstances.

Further to the subject of change and opportunity, the VBA's International Law & Practice Section will be presenting at the VBA Mid-Year Meeting in Burlington on March 29, 2024. If you are interested in presenting, or in suggesting topics, please let me know. In addition, I encourage more VBA members to join ILP, and I would also like to urge current members to take a larger role in setting our agenda and steering our path. One of the greatest strengths of ILP is its promotion of direct interaction between and among committee members on subjects that are of mutual interest. We welcome you to join us.

#### **Paralegal Section**

Chair: Carie Tarte, RP®, AIC

In the last year, the Paralegal Section has rolled out its "Pathway to the Paralegal Profession" program-a 12-week course to help people already working in the paralegal field supplement their existing skills, and to teach skills to those who would like to enter the paralegal profession. Sadly, one of the paralegals that spearheaded this Pathway program and was a champion for paralegal education, Tina Wiles, passed away in January of 2023.

Our first Pathway program, which is currently in its second, 12-week run, offers an introduction to Vermont Real Estate Law and Title Searching. Attorney Jim Knapp has presented this twelve-week course covering an introduction to Vermont real estate law topics, including a brief history of the development of Vermont real estate law, conveyancing and transfers of real estate, estates and interests in land, common encumbrances, mortgages, taxation of real property, real estate transfer taxes, and land use regulations. Each session is 1 1/2 to 2 hours, scheduled in the afternoon and evenings and is available as a hybrid program, with in-person instruction in Burlington, and an online option provided through Zoom. In conjunction, a supplemental 6-week course was also provided by Attorney Knapp that addresses the process of searching titles with direct experience in using online title examination re-

In addition to our Pathway program, the Paralegal Section continues to monitor limited legal licensure programs throughout the country. In November of 2022, a roundtable discussion with Paralegal Section members and various stakeholders with STEPS, Vermont Law Line, Legal Services Vermont, Vermont Legal Aid, and the Vermont Judiciary was held to discuss generally how limited legal licensure could increase access to justice in Vermont. Based upon input from this roundtable, a Steering Committee of nine paralegals was created to begin the process of drafting a limited legal licensure program for Vermont.

#### **Practice and Procedure Section**

Chair: Gregory A. Weimer

I have continued as liaison between the VSC Civil Rules Committee. I am currently tasked with revising the Rule 16.1 Scheduling order forms and will be presenting drafts of the revised form to the committee at September's meeting.

I am going send out a request to the Practice and Procedure members for any ideas on article topics or any new developments members think might be seminar worthy.

#### **Probate and Trust Section**

Chair: Mark A. Langan

The Probate and Trust Section of the VBA has been busy with a legislative agenda. The Section organized a subcommittee consisting of representatives from the Real Estate Section and Elder Law Section of the Bar and the Trust Committee of the Vermont Bankers Association to review the Uniform Power of Attorney Act (UPOA) which was introduced by the House Judiciary Committee in April 2022 supported by AARP. After considerable review and revisions, the legislature passed it in 2023 and made it effective on July 1, 2023. 14 V.S.A. § 4001 et seq.

In addition, the Probate and Trust Section reviewed and submitted the Uniform Directed Trust Act (UDTA), the Uniform Trust Decanting Act (UDA), and a statutory Tenants-by-the-Entirety Trust statute which would allow spouses to transfer an asset to trust but maintain the creditor protection feature of tenants-by-the-entirety property. Those legislation initiatives will be carried over to the 2024 session.

#### **Real Property Law Section**

Co-Chairs Jim Knapp & Benjamin Deppman Education - Co-chairs Benj Deppman and Jim Knapp were active in presenting several CLE programs on real estate topics, including the new power of attorney statute, and general topics involving real property. Continuing the annual tradition of Real Estate Law Day, the real estate section, with the help of a number of volunteer presenters, provided a six part mini-series broadcast on our own VBA Zoom network covering topics of special interest to real estate practitioners such as litigating a real estate dispute; common issues in common interest communities, enhanced life estate deeds, title standards, and 21st century closings. The real estate co-chairs supported the Brown Bag Law Program (the VBA's new education program for people in the law office study program) by presenting the sessions on real estate and contract law.

Legislation - Co-chair Benj Deppman served on the special committee assembled to assess, review and suggest revisions to the Uniform Power of Attorney Act which passed this session.

Other - The real estate section in the VBA Connect continues to be a vibrant and active community, providing answers to questions posed by new practitioners and those with more experience. Thank you to all the section members who take the time to answer questions for our colleagues seeking new solutions for clients or confirmation that their own ideas are good.

Submitted by Jim Knapp

#### **Worker's Compensation Section**

Co-Chairs Erin Gilmore & Brendan Donahue

The Vermont Workers' Compensation Adjusters' conference was held on June 1-2, 2023 in Burlington, Vermont. Section members presented continuing education seminars for adjusters on workers' compensation basics, forms, recent caselaw, and legislative changes. Legislation that became effective on July 1, 2023 altered the calculation of temporary partial disabil-

ity benefits, increased and expanded dependent's benefits, and expanded the application of 21 V.S.A. §640b to include preauthorization for prescription medications and durable medical equipment. The fall Vermont Workers Compensation Adjusters' conference is planned for October 26-27, 2023, at which section members will present continuing education seminars for adjusters. The Section plans to resume its annual bench/bar meetings during the next cycle of conferences.

#### Young Lawyer's Division

Chair Pam Eaton

The Young Lawyers' Division has been back at it this year with a variety of events and advocacy. 2023 started out with a bang during our annual Mid-Winter Thaw held in Montreal. The YLD put together a great selection of panelists from Vermont and beyond to discuss issues of wellness, diversity, ethics, and more! The YLD is already ramping up planning for the 2024 Mid-Winter Thaw and are looking forward to another successful event.

The YLD also hosted a number of social events this year. We have a trivia group that participates at Tuesday night trivia at the events this year. We have a trivia group that Vermont Comedy Club. We hosted a "Dinner with a Judge (and Justice!)" event that allowed several young lawyers to get to know members of the judiciary. The YLD's "Race Judicata" marathon team annihilated the Vermont City Marathon course. "Race Judicata" is currently preparing to take on the Heady Trotter in Stowe. In further effort to encourage wellness among attorneys, the YLD hosted a 5k-mixer event in Burlington. The showing of support from the YLD was strong, even with the record temperatures.

The YLD has also heard the concerns from our newest member about concerns in completing the first-year requirements for licensure. The YLD put together a survey of the first-year members and is currently compiling the information we received so we can provide feedback to the Board of Bar Examiners.



# State of Vermont v. Robert Lyle Percy: Historic Criminal Justice Cases

Nine years late. May my daughters have your courage and may they have a fairer and faster criminal justice system.

Attorney General Jeffrey Amestoy to Susan Sweetser, Oct. 25, 1990, after the Vermont Supreme Court finally affirmed the conviction of her assailant, Robert Percy.

Two of the most notorious and significant cases in Vermont's criminal justice history involved a defendant named Robert Lyle Percy from Elmore, Vermont. They are notorious, not only because of their seriousness (sexual assault, kidnapping), but because of the inordinate amount of time it took to bring them to final resolution, and other important reasons as well.

The case involving victim Susan Sweetser took from late 1980 to 1990, and the one involving victim Susan Kremelberg took from early 1981 to 1992. All the while, these cases generated intense public scrutiny, most notably by Lori Campbell of the Burlington Free Press and Sally Johnson of the Rutland Herald, many of whose articles are cited herein.

An explanation for why the cases took so long to work their way through the criminal system would require a detailed analysis of court records, so my discussion is limited to general time frames only. Regardless, the cases took over ten years, which under any circumstances is far too long.

These cases are also remarkable because these two courageous women decided to shed their anonymity. In the spring of 1990, they joined forces to go public about the tortuous legal process that repeatedly revictimized them. Their stories resonated throughout the legal community and the general public.

As a result, the Vermont legislature and Supreme Court enacted a series of major reforms, starting in 1991. While these cases are now decades old, they are still relevant. Many critical aspects of today's criminal justice system would not exist if it were not for the lengthy pursuit of justice by these tenacious women.

The cases are also significant because the defendant posed a unique defense at the time -- insanity as a result of Post Traumatic Stress Disorder (PTSD) from his combat experience in Vietnam in the 1970s.

Moreover, the parallel tracks of the two

cases are striking—a full trial in each with a verdict of guilty, followed by a Supreme Court reversal in each, followed by a retrial in each with a verdict of guilty, followed by a Supreme Court affirmance in each, all of which took a full decade.

My primary focus here is on the Kremelberg case because of my personal involvement, but first a summary of the Sweetser case which is equally important.

On the evening of Dec. 7, 1980, Ms. Sweetser was driving along a deserted section of Route 12 between Elmore and Worcester during a snowstorm when Percy leaped in front of her car causing her to stop abruptly. He jumped into the car and forced her to drive to an isolated location off the main road where he physically and sexually assaulted her. He then had her drive back to Route 12 where he got out of the car and fled.

Two weeks later, he was arrested and charged with sexual assault and kidnapping. At trial in the fall of 1981, Percy relied on the insanity defense which he claimed arose from his combat experience in Vietnam. The jury returned a verdict of guilty on the sexual assault charge (although not the kidnapping charge). Four long years later, however, the conviction was reversed and remanded in State v. Robert Percy, 146 Vt. 475 (1986).

The case was then retried to a jury in May 1988, again with a verdict of guilty. The defense here was mistaken identity, not insanity. This time, the Supreme Court upheld the conviction in State v. Percy, 156 Vt. 468 (1990), now nearly ten full years after the commission of the offense.

Vermont Attorney General Jeffrey Amestoy communicated directly with Sweetser immediately after the decision was announced: "Nine years late. May my daughters have your courage and may they have a fairer and faster criminal justice system." 1

The Kremelberg case unfolded with a similarly terrifying scenario. On the late afternoon of Jan. 16, 1981, Percy was working at a gas station in Stowe. Although he had a serious criminal record, including sexual assaults and prison time, he was out on bail in the Sweetser case. At the time, the bail statutes did not permit the court to deny bail if the defendant was a danger to the public, only a risk of flight

Ms. Kremelberg pulled in for gas, but Percy told her she had a flat tire. He lured her to a dark area of the station where he kidnapped her at gunpoint. He then forced her to drive south, raping her twice along the way, once in Vermont and once in Connecticut, where he was apprehended after she managed to escape.

The defendant was convicted in Lamoille District Court after a lengthy trial by court without a jury of sexual assault, kidnapping, carrying a dangerous weapon while committing a felony, and assault and robbery with a dangerous weapon, again involving the insanity defense. This was long before my involvement.

These convictions, however, were again overturned by the Supreme Court and the case remanded, State v. Percy, 149 Vt. 623 (1988). The Court said it was up to the trial judge to determine the proper course of action on remand.

However, following remand, the trial judge recused himself and no action was taken for nearly a year, obviously creating an unacceptable delay contrary to judicial canon 3A (5) which requires judges to dispose of cases promptly. I then rotated into that court as presiding judge and inherited the Percy case.

As a first order of business, I scheduled the retrial as soon as practicable for October 1990. I then ordered a change of venue from Lamoille County to Woodstock Superior Court in Windsor County, about seventy-five miles away.

As an example of the incessant publicity surrounding the case, on Sept. 2, 1990, the Boston Sunday Globe ran a lengthy story, with photos of both Sweetser and Kremelberg, titled, "Vermont Rape Victims Kept Waiting for Justice. Two Cases have Dragged on for Nearly 10 Years."<sup>2</sup>

Susan Sweetser got raped. Then Sue Kremelberg got raped. And then, both women say, came the most enduring abuse—at the hands of Vermont's criminal justice system.<sup>3</sup>

The trial began on Oct. 16 with jury selection. Both the state and the defendant were well represented—Phillip Cykon and David Tartter, both assistant attorneys general, for the state, and James Dumont, an experienced defense attorney, representing Percy.

On that date, the Burlington Free Press began its trial coverage: "Percy Rape Trial Begins. Potential Jurors Hear Description of 10-Year-Old Case."4

This trial, held in Windsor Superior Court, promises to be a long and emotional one—filled with psychiatrists, hypnosis testimony, Vietnam War stories and the victim's testimony of nine hellish hours almost a decade ago.<sup>5</sup>

The jury was empaneled on Oct. 17, with three men and nine women, and they were sequestered for the duration of the trial.

"It's a heavy responsibility. It really is a lot to expect of any average citizen, but it is the way I've decided to proceed in this case," Pineles said.<sup>6</sup>

The trial lasted 11 days, but despite the extraordinary inconvenience, the jurors remained good natured and dedicated to their oath throughout.

Both sides presented their opening statements, as recounted by the Rutland Herald in an article headlined, "Insanity Is Key to Defense."<sup>7</sup>

Cykon told the jury that Percy was cool and purposeful, and knew exactly what he was doing as demonstrated by his conduct.

The prosecutor suggested Percy was clearly in touch with reality throughout the nine-hour ordeal, checking more than once to make sure she had locked her car door, ordering her to put her cash on the dashboard, ordering her to undress and perform certain sexual acts, not only in Stowe but later behind a shed in Connecticut.<sup>8</sup>

The same Herald article, accompanied by a front-page photo of Dumont, went on to describe his opening statement.

"This case is about mental illness," said James A. Dumont, the Middlebury lawyer who is defending Percy. Dumont said there was "no question" that Kremelberg was raped or that Percy was the rapist. Rather, he said, the issue is whether Percy was sane when it happened."

The state then presented its case. Several witnesses testified about Percy's rational and scheming behavior leading up to the kidnapping, attempting to show that Percy did indeed know exactly what he was doing in Stowe, Vermont that day, and not in Vietnam.

Then on the 18th, Cykon called Sue Kremelberg to the witness stand. In her dramatic and riveting testimony she described in detail the nine-hour ordeal of being kidnapped at gunpoint, being repeatedly raped, and finally escaping in Connecticut. Despite the excruciating testimony, she

managed to keep her composure.

As reported on the front page of the Burlington Free Press on Oct. 19, along with three photos of Kremelberg, "Victim Describes Rape in Percy Case. She Says She Expected to Die." 10

Percy jumped into her car at the Stowe gas station and ordered her to drive away:

"At that point, he pulled a gun out, and I was so scared I just drove."

Percy told her to turn onto Vermont 100. He asked her to turn a few more times until he told her to pull off the road.

"He told me to take my clothes off. I refused. So he started to choke me. He tied my hands behind my back with electrical tape," Kremelberg said. "I was pleading with him to let me go. I had to be home with my husband and baby."

The article continued with a graphic description of the sexual assault. She prayed to stay alive but expected to die.<sup>11</sup>

The state then rested its case.

Percy's insanity defense was based again on the claim that he suffered from PTSD and had a flashback to his time in Vietnam while at the Stowe gas station, perhaps triggered by the smell of gas which was common in Vietnam. He claimed to believe the woman needing gas was a Vietnamese woman who had betrayed his military company.

One of the defense witnesses, Terence Fitzgerald, whose picture was on the front page of the Rutland Herald, described the horrors of Vietnam in the accompanying article on Oct. 20, "War Stress Detailed at Rape Trial." 12

A veteran testified Friday that he had driven trucks with accused rapist Robert Percy in Vietnam under sleepless, hazardous conditions so stressful that "we ate speed for breakfast, smoked dope all day and took heroin at night to go to sleep."13

The Burlington Free Press, also with a front-page article and picture of Fitzgerald, put it this way: "Witness Tells of Life in Vietnam. Percy Jury Hears of Horror, Constant Drug Use." 14

The jury must decide if Fitzgerald's testimony of decapitated bodies, the liquid fire of napalm, sniper attacks and round the-clock drug use among Vietnam War soldiers supports or discredits Percy's insanity defense.<sup>15</sup>

Another of the defendant's witnesses, a psychiatrist and professor emeritus at Dartmouth Medical School, Dr. Henry Payson, then testified. He stated that he had injected Percy with sodium amytal and put him under hypnosis, and that all Percy would talk about was Vietnam when questioned about the crime, supporting the flashback theory.<sup>16</sup>

The final defense witness, Dr. Lawrence Colb, was the principal investigator under a federal grant to study PTSD among Vietnam veterans. As reported in the Burlington Free Press on Oct. 23, "Witness Says Percy Suffered Flashback."<sup>17</sup>

"He [Percy] was sort of reliving Vietnam experiences and acted them out in violent ways," Colb said. "He was one of those individuals with a severe (post-traumatic stress disorder) complicated with the use of drugs and alcohol. I think he misperceived Mrs. Kremelberg as one of those Vietnamese women and was dangerous." Colb told the jury that Percy was insane.<sup>18</sup>

The state rebutted this defense by presenting its own expert witness, Dr. Stanley Brodsky, a forensic psychiatrist, as described in the Burlington Free Press on Oct. 24, "Accused Rapist is Called Sane." 19

I believe he was fearful of the charg-

es pending against him [in the Sweetser case]. He knew he was out on bail. He planned to jump bail, he commandeered an automobile with a gun, threatened the life of an individual. On the way, he was fully aware he was in Vermont," Brodsky said.<sup>20</sup>

Following closing arguments and my instructions, the case went to the jury for deliberation.

Was Percy guilty of the horrific crimes or was he not guilty by reason of insanity? The jury answered the question on Oct. 25. "Jury Finds Percy Guilty," as reported in a headline in the Rutland Herald, along with a dramatic front-page photo of an elated Sue Kremelberg.<sup>21</sup>

After deliberating for 3 ½ hours Wednesday night, the jury went to bed, came back in the morning and talked for another hour before reaching a verdict. The jury foreperson stood and replied, "Guilty" as Vermont District Judge Dean Pineles read off the charges—sexual assault, kidnapping, assault and robbery, and commission of a felony with a gun.<sup>22</sup>

A bold headline also appeared on the front page of the Burlington Free Press, "Percy Guilty Again," along with a similar photo of Kremelberg smiling broadly with her fist raised in the air.<sup>23</sup>

After 10 years and two trials, rape victim Sue Kremelberg embraces justice. "We get to sleep tonight."<sup>24</sup>

The Free Press also ran another front page story, "Jurors give thumbs-up." 25

Minutes after pronouncing Robert Percy guilty of all charges, the jurors cheered and gave the thumbs-up sign from their bus as they passed Sue Kremelberg standing outside the courthouse.<sup>26</sup>

The verdict reverberated beyond Vermont because of the case's startling characteristics.

For example, a story in The Boston Globe on Oct. 26, headlined, "Vermont Man is Convicted of 1981 rape," summarized the history of both the Sweetser and Kremelberg cases.<sup>27</sup>

It also referenced the intention of Attorney General Amestoy to work to improve the criminal justice system so that sexual assault victims would never have to endure such an ordeal again.

Amestoy said yesterday that an improved criminal justice system may begin to emerge during the upcoming

26

legislative session. He said he will push for several changes in January.<sup>28</sup>

An article in the far-away Tampa Bay Times on Oct. 26, "Nine years later, man convicted of rape again," also referred to Amestoy.<sup>29</sup>

State Attorney General Jeffrey Amestoy predicted the women's public complaints would yield improvements in the Vermont's criminal justice system. He will push for ways to speed up the Vermont Supreme Courts' review of appeals...

Then the emotional sentencing hearing took place on Feb. 7, 1991. After hearing testimony and arguments, I imposed a lengthy, incapacitating sentence so Percy would never be able to victimize women again.

As the front-page headline in the Burlington Free Press read, "Percy Receives 40–60 Years. Sentence Ends Tortuous 10-Year Rape Case." 30

The "Quote of the Week" in that paper's edition of Feb. 10, 1991, reported my final comments:

"I can't find a glimmer of hope here, Mr. Percy. I cannot take a risk." Vermont District Court Judge Dean Pineles on sentencing rapist Robert Percy of Elmore [Vermont] to 40 to 60 years in prison. 31

The Vermont legislature did focus its attention on criminal justice reform in its 1991 session and thereafter. For example, the Vermont constitution was ultimately amended to permit judges to deny bail for dangerous defendants. An anti-stalking law was enacted, as were crimes of domestic violence, aggravated kidnapping and aggravated sexual assault, the latter two with a maximum sentence of life in prison. And a sex offender registry was also created.

Moreover, the legislature enacted a monumental piece of legislation, creating the Vermont Center for Crime Victim Services which oversees a range of victim-oriented services, both in and out of court.

Also in 1991, the Vermont Supreme Court placed limits on the taking of depositions in criminal cases, including, among other reforms, prohibiting defendants themselves from being present, as reported in the New York Times on July 12, 1991, "Vermont Restricts Depositions in Criminal Cases."

Crime victims in Vermont [including Susan Sweetser] have long pressed for restricting depositions, arguing that the process is abused by defense lawyers as a delaying tactic and, in some

cases, to intimidate or confuse witnesses.<sup>33</sup>

The Court's new rules were designed to mitigate these problems.

Susan Sweetser and Susan Kremelberg can stand proud, knowing of their important role in bringing about these reforms.

And in 1992, the Supreme Court upheld Percy's conviction and sentence in the Kremelberg case, 158 Vt. 410 (1992). Finally, the legal ordeals of both women were over, although it is unlikely that the emotional scars from their ordeals will ever be erased.

#### Conclusion

These cases taught the Vermont legal establishment and the public a significant and painful lesson which resounds today. Victims entangled in the criminal justice process should not have to endure an endless series of proceedings that undermine their dignity and repeatedly re-victimize them. Rather, they deserve respect and support, as well as a swift and fair resolution their cases. While the rights of criminal defendants must be zealously protected, they should not overshadow the parallel rights of victims.

Fortunately the Vermont legislature and Supreme Court grasped this lesson and took bold action to remediate the serious problems brought to light by these two brave women.

Susan Sweetser herself said it best.

"The only way that I could make any sense out of what had happened to me and what had happened to Sue was to do everything I humanly could to ensure that it never happened to anyone else or any other families. I couldn't change individuals and their individual behavior, but I could change the system that allowed for Robert Percy to be walking the streets, having a job, being among us, when he was still such a huge danger to the public, and I could change the system that allowed for me and Sue to be re-victimized over and over and over again." 34

Let the histories of these cases be a reminder to the legislature when considering criminal justice issues.

Years later, Percy died in prison (date unknown).

Judge Pineles retired from the Vermont trial bench in 2005 after 21 years, following which he was actively involved in international rule of law work including 28 months in Kosovo as a criminal judge with the European Union Rule of Law Mission. His memoir, "A Judge's Odyssey: From Vermont to Russia, Kazakhstan and Georgia, Then on

to War Crimes and Organ Trafficking in Kosovo" (Rootstock Publishing, Montpelier 2022) is available in bookstores and on Amazon. He is a graduate of Brown University. Boston University Law School and Harvard Kennedy School, and is a frequent lecturer and commentator on events in Kosovo and the Balkans, having published numerous articles on Balkan Insight and other publications. He lives in Stowe with his wife Kristina Stahlbrand, his fellow traveler and indispensable critic and editor.

<sup>1</sup> Royal Ford, Vermont Man Is Convicted on 1981 Rape, THE BOSTON GLOBE, (Oct. 26, 1990).

<sup>2</sup> Royal Ford, Vermont Rape Victims Kept Waiting for Justice. Two Cases Have Dragged On for Nearly 10 Years, THE BOSTON SUNDAY GLOBE, (Sept. 2, 1990).

<sup>4</sup> Lori Campbell, Percy Rape Trial Begins. Potential Jurors Hear Description of 10-Year Old Case, Burlington Free Press, (Oct. 16, 1990).

Sally Johnson, Insanity is key to Defense, Rut-LAND HERALD, (Oct.18, 1990).

8 Id.

<sup>9</sup> Id.

<sup>10</sup> Lori Campbell, Victim Describes Rape in Percy Case. She Says She Expected to Die, Burlington FREE PRESS, (Oct. 19, 1990).

Id.

<sup>12</sup> Sally Johnson, War Stress Detailed at Rape Trial, Rutland Herald, (Oct. 20, 1990).

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<sup>14</sup> Lori Campbell, Witness Tells of Life in Vietnam. Percy Jury Hears of Horror, Constant Drug Use, Burlington Free Press, (Oct. 20, 1990).

<sup>15</sup> Id.

<sup>16</sup> Lori Campbell, Doctor Describes Percy Hypnosis, Burlington Free Press, (Oct. 21, 1990).

<sup>17</sup> Lori Campbell, Witness Says Percy Suffered Flashback, Burlington Free Press, (Oct. 23, 1990). <sup>18</sup> Id.

<sup>19</sup> Lori Campbell, Accused Rapist is Called Sane, BURLINGTON FREE PRESS, (Oct. 24, 1990).

<sup>21</sup> Sally Johnson, Jury Finds Percy Guilty, RUTLAND HERALD, (Oct. 26, 1990).

<sup>23</sup> Lori Campbell, Percy Guilty Again, BURLINGTON Free Press, (Oct. 26, 1990).

<sup>25</sup> Lori Campbell, Jurors Give Thumbs-up, Defender will Appeal, Burlington Free Press, (Oct. 26, 1990).

<sup>26</sup> Id.

<sup>27</sup> Royal Ford, Vermont Man is Convicted of 1981 Rape, THE BOSTON GLOBE, (Oct. 26, 1990).

<sup>29</sup> Nine Years Later, Man Convicted of Rape Again, TAMPA BAY TIMES, Oct. 26, 1990

<sup>30</sup> Lori Campbell, Percy Receives 40-60 Years Sentence Ends Tortuous 10-Year Rape Case, Burlington Free Press, (Feb. 10, 1991).

31 Quote of the Week, Burlington Free Press, (Oct. 10, 1991).

32 Sally Johnson, Vermont Restricts Depositions in Criminal Cases, New York TIMES, (July 12, 1991).

<sup>33</sup> Id.

<sup>34</sup> Sweetser, Susan, email to author, Sept. 6, 2023. Quoted here with permission.

# A Word From the VBF President

Whenever I'm asked why I became a lawyer, I have a ready answer. I'd been in northern India for months my second time there in two years. I was twenty years old, a student of Tibetan culture, language and politics. For an internship, I'd volunteered to teach for a semester at the Tibetan Homes Foundation school in Mussoorie, Uttar Pradesh. Most of my classes were with students who had been born in India, in Tibetan refugee settlements. Two classes were for recent arrivals, young people who had traveled the dangerous route on foot out of Chinese occupied Tibet over the Himalayan passes to safety in India.

Refugee life was tenuous for the Tibetan people. Like the mountain passes they had to carefully scale to leave their home, they now had to navigate the crumbling rocks of

a culture in exile. Living there, I witnessed some of the challenges of refugee life. I was also studying about Tibet under the Chinese regime. A young person with limited world experience, I wondered how I might help. One day while walking on a steep road in Dharamsala which was the home of the 14th Dalai Lama and the seat of the Tibetan government in exile, I met an American man. He told me he was a student at the Fletcher School of Law and Diplomacy. He spoke about how the study of law gave him new tools, ones that might allow him to contribute in some way. That is when my desire to do something became a plan to go to law school.

I'd guess many practitioners have had experiences that galvanized them to act. Maybe some have not found their way easily. My career has not been a straight path. I've farmed, handled global music licensing, worked in suicide prevention, clerked for an appeals court judge in the International Criminal Tribunals located in The Hague, and lawyered in private practice in southern Vermont. I've served on many boards and raised a family. I'm back in school again as an LLM in taxation candidate at Boston University Law School.

As I look back, I wonder about my impact. Law school did in fact give me the tools, and experience has sharpened them. Have these tools been well used? I have a



chance once again to do something as I now step into the role of President of the Vermont Bar Foundation (VBF). What an honor to lead an organization that helps Vermonters find legal representation and advocacy when they may otherwise have no support. The work and vision of the organization is exemplary. And there is work to do.

In writing, I am reminded that every member of the Vermont Bar is a member of the VBF. So, I ask you to join me and participate in the work. Maybe you have a story like mine, a moment when you knew that lawyering was not just a job but a way to do something meaningful. As we look around us and see struggle in the eyes of our neighbors and family, friends, and fellow Vermonters, we ask how we can help. Many Vermonters are vulnerable. We do our best work when we come together with the right tools.

Amelia W.L. Darrow, Esq. is the President of the Vermont Bar Foundation and an attorney practicing elder law and estate planning at the Brattleboro law firm of Secrest & Darrow, PLC.

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Rose Law Firm

Samuelson Law Offices

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# Why Are Lawyers So Terrible at Cybersecurity?

#### Let Us Count the Ways in Which Lawyers Are Terrible at Cybersecurity – and Then Talk About the New ABA Resolution on Cybersecurity

It is absolutely true that we tear our hair out (figuratively) when we attempt to give law firms good cybersecurity solutions at a modest price and they decline. Mind you, they know that we have seen a significant rise in law firm data breaches in 2023. The headlines are everywhere. The gnashing of teeth by law firm managing partners is legendary and evident in all the headlines.

"Too expensive" is the first reaction. We constantly wonder if they understand how expensive a data breach is. "We're not a target" is the second reaction. That comes mostly from the smaller firms – who have

not apparently observed that small/midsize firms are being attacked with vigor.

"It's too disruptive to our operations" is often heard. Had they ever observed the disruption of a data breach, they might understand that true disruption to law firm operations is possible.

One of the classic reactions is "we have cyberinsurance." While having cyberinsurance is a very good thing, it is not going to help a law firm whose data has been taken. And many cyberinsurance companies have strict policies about security measures the firm must take just to be covered – we can't tell you how many times they have affirmed, for instance, that they use multifactor authentication (MA) everywhere. Their noses are longer than Pinocchio's. And that's only one example of commonly

misrepresenting the firm's security posture. Guess what? If your answers to a cyberinsurance company's questionnaire are not truthful, you may not have the insurance coverage you thought you had.

# The American Bar Association Adopts Resolution 609 at its August Annual Meeting

We were glad to see the ABA Adopt Resolution 609 in August 2023. It was sorely needed.

We loved the words of Ruth Hill Bro, a special adviser to the ABA Cybersecurity Task Force (which author Nelson served on for a number of years): "Cybersecurity is a journey, and you never really arrive."

Well put. Our own mantra is "there is no

#### **CROSSWORD PUZZLE**

by Kevin Lumpkin, Esq.

Kevin is a litigation partner at Sheehey Furlong & Behm in Burlington, and in his spare time he enjoys puzzles and trivia of all kinds, especially crossword puzzles. Kevin did not have enough time to come up with a new theme for this issue, so this is an updated version of the first puzzle he constructed.

Note: For those readers who regularly solve the New York Times crossword, this puzzle is about a Wednesday-level difficulty. See page 37 for the Spring Journal's Crossword Solution.

#### Across

- 1 Promenade
- 5 Burn a bit
- **9** Like the outfits at an '80s party
- **14** Faddish berry
- **15** Fit
- **16** Archaic anesthetic
- 17 Premier League club that plays at Selhurst Park\*
- 20 Prynne of "The Scarlet Letter"
- 21 Blueprint fig.
- 22 Rio maker
- 23 It may be open at a bar
- **25** Sup
- **26** Web feed format
- 27 Doomsday scenario involving an accident at a 9-Down\*
- **33** Pro \_\_\_\_
- **34** \_\_\_ tai
- **35** Edges
- **37** Middling
- **38** Titular Broadway orphan
- 41 Buckets
- **43** Magazine that debuted on March 3, 1923
- 45 Miss Cleo's gift, briefly
- **46** Care
- 47 Consolation prizes of a sort\*
- 51 Winter hours in Colchester

- **53** Bard's nightfall
- 54 "Evil Woman" band
- **55** 4G
- 56 Pluck
- 58 Senators' home
- **63** Nuptial wish list, or a place to find the first words of 17-, 27- and 47-Across.
- **66** \_\_\_ Gay (W.W. II plane)
- 67 App store?
- **68** \_\_\_\_ goes to the runner
- 69 Drive-in restaurant chain
- 70 Stud fee?
- 71 Finks

#### Down

- Speed of sound metric
- 2 Land measure
- **3** Big name in chips
- **4** Enumerate
- 5 Common trait among politicians and cult leaders
- **6** "2001" computer
- 7 Austrian peaks
- 8 Harvested
- **9** Nuclear power generator
- 10 Yadda yadda yadda
- **11** Its name means "fortress inside a city"
- **12** Housing swaps?

2	3	4		5	6	7	8		9	10	11	12	13
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- 13 Tilikum and others
- **18** Motif, musically
- 19 Shakespearean monarch
- 24 Water color?
- **27** Eye on TV?
- **28** Bit of amusement
- 29 Put one's foot down
- **30** Actress Rapace
- **31** Frisco gridder
- **32** City with Marlins and Dolphins
- **36** Cantation
- **39** Elba, e.g.
- **40** Afterword
- **42** They're worth 6 pts.
- **44** Plaintive

- **48** Ernest's offscreen friend, in films
- 49 Paradox
- **50** Words of denial
- **51** Cary of "The Princess Bride"
- **52** Court fig.
- **57** Transport to Barcelona
- 59 Ivan, e.g.
- 60 "\_\_\_ girl!"
- 61 Mandamus, for one
- **62** They might have it in Montpelier
- **64** 551, in Latin
- 65 Tolkien creature

set it and forget it in cybersecurity." More than ever, this is true in a time when Generative AI is causing consternation with its ability to produce (as one example) phishing emails without any of the usual tell-tale signs that they are phishing emails. They get the grammar and spelling right, they use real-life logos and they may even corrupt otherwise "good AI" to be bad. The "tricks of the trade" at corrupting AI are spreading across the internet like wildfire.

#### The Essence of ABA Resolution 609

It may not be entirely new, but for the first time, artificial intelligence has made an appearance, as well it should. The best way to give readers useful information is to quote the essence of the resolution directly:

"RESOLVED, That the American Bar Association urges all lawyers to keep informed about new and emerging technologies and protect digital products, systems, and data (including Artificial Intelligence and Machine Learning) from unauthorized access, use, and modification;

FURTHER RESOLVED, that the American Bar Association urges lawyers to enhance their cybersecurity and infrastructure to protect confidential client information and to keep clients informed;

FURTHER RESOLVED, That the American Bar Association urges lawyers and law firms to conduct cybersecurity due diligence regarding third-party and vendor products and services;

FURTHER RESOLVED, That the American Bar Association urges lawyers to advise clients, on their legal duty to raise the level of their own cybersecurity measures;

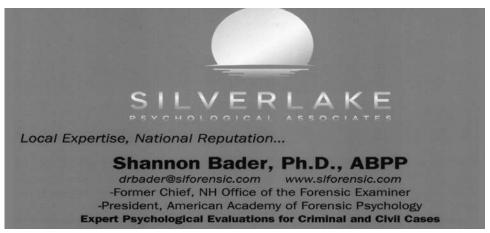
FURTHER RESOLVED, That the American Bar Association urges lawyers and law practices to incorporate cybersecurity and emerging technologies into their education and training programs; and

FURTHER RESOLVED, That the American Bar Association urges lawyers and law practices to enhance cybersecurity through a diverse and technologically competent workforce."

Most of this is an updated restatement of what has gone before, but the updates were sorely needed. Get a cup of coffee, read the resolution again and take note of what you are NOT doing in your firm.

#### **ABA Also Adopts Guides for Al**

At the August meeting, the ABA also adopted Resolution 604, which contains guidance for the use of artificial intelligence. Some time back, the ABA had adopted resolutions about AI and the legal profession. However, Resolution 604 encompasses principles for the design, development and deployment of AI by technology orga-



nizations.

As we have often said, "The greed of the tech titans may pave the road to Skynet."

Apparently, we are not alone in worrying about the future of Al.

Resolution 604 states that AI developers should ensure their products are subject to human authority, oversight and control, include accountability measures if developers have not taken reasonable steps to mitigate harm or injury; and provide transparency and traceability for their products.

A noble attempt to formulate good guidelines, but where is the enforceability? And Al developers have a strong motivation (the obscene amounts of money they are raking in) to make their Al a black box (you don't know how it works, in simple terms).

What this means for lawyers who use Al is not currently clear. How can lawyers be ethically competent with the technology of Al if they don't know how it works?

#### ABA Forms Task Force on Law and Artificial Intelligence

We learned on August 28 that the ABA has formed the ABA Task Force on Law and Artificial Intelligence to analyze how AI will impact the legal profession and to discuss the new ethical questions that the technology will raise for lawyers.

The ABA is going about this the right way. There are seven "special advisors" to the new task force. They include former U.S. Homeland Security Secretary Michael Chertoff and Seth Waxman, a former U.S. Solicitor General.

Other advisors include former U.S. Patent and Trademark Office director Michelle Lee and former U.S. Department of Homeland Security general counsel Ivan Fong. The group will be chaired by Lucy Thomson, a Washington D.C. based lawyer and security engineer. Some heavy hitters there!

We are truly glad to see that the furiously fast adoption of generative AI has result-

ed in a coalition of many people who want to put guardrails around a technology that is so potentially dangerous and impactful. Lawyers certainly need ethical guidance on this new technology.

#### **Final Words**

To quote our good friend Ed Walters, founder of Fastcase and now the Chief Strategy Officer of vLex, "The most important question when working with Al is 'what could possibly go wrong?'"

The answer, as we have already seen, is "a lot."

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# Why Documenting What You're Not Retained to Do Can Be Important Too

In my experience, too many lawyers appear to be quite comfortable running with an assumption that their client's understanding of what the scope of representation is aligns with theirs. This is one of the reasons why I suspect trying to convince lawyers to document scope of representation on all new matters is a never-ending task. Getting buy-in on documenting what one has been retained to do is hard enough. Now, I'm going to add to this advice a recommendation that lawyers should also be thinking about documenting what one has not been retained to do. It's an uphill battle, I know; but it's a battle worth fighting. Here's an example of why.

A nonprofit regularly reaches out to a plaintiff personal injury lawyer on behalf of clients of the nonprofit. After a family member was shot and killed by police, this nonprofit retained the lawyer for the purpose of gathering as much information about the shooting as she could, to include obtaining video footage of the shooting from the police department. The purpose was to provide the nonprofit's client with information that would help the client understand what led to the shooting. While the lawyer worked with the nonprofit's client, the nonprofit paid her fee. Documentation of the lawyer's role was minimal, consisting primarily of a few emails with both the nonprofit and its client, none of which properly addressed the issue other than to say she would take care of gathering information.

What the lawyer found out was pretty much what she expected. The fatal shooting appeared to be justified. Of course, this process wasn't something she could take care of in a few short weeks. So, while a significant amount of information had been obtained and shared with the nonprofit's client, more than a year into this effort she was still trying to obtain some additional video footage. This is when things went off the rails. While reaching out to ask about the additional video footage, the nonprofit's client also wanted to know what the recent running of the statute of limitations meant for her case. Of course, in the lawyer's mind she never agreed to pursue this claim. She viewed her role to be limited to information gathering. Unfortunately, the nonprofit's client appeared to see it differently.

After that call, the lawyer's immediate concern was how her reputation might

be damaged when the nonprofit's client complains to the nonprofit. Her fear was future referrals from the nonprofit might dry up. In my mind, I was concerned about the possibility of a grievance and/or a malpractice claim being filed.

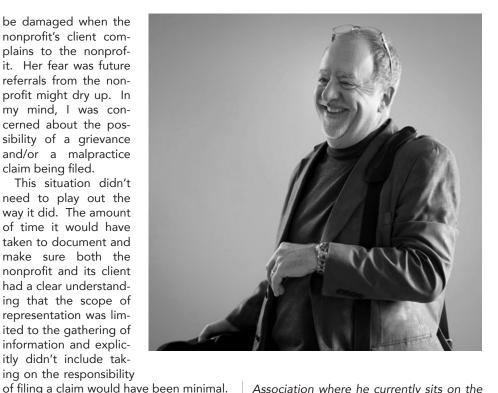
This situation didn't need to play out the way it did. The amount of time it would have taken to document and make sure both the nonprofit and its client had a clear understanding that the scope of representation was limited to the gathering of information and explicitly didn't include taking on the responsibility

I do understand the hassle factor here; and I will readily admit that many times running with assumptions about the scope of representation work out just fine. All I can say is this. Are you prepared to deal with the consequences when running with such an assumption proves to be the wrong call? This story isn't a one off. The failure to properly document scope misstep is one malpractice insurers regularly must address. With every new matter, take the time to clarify and document that you and your client have a mutual understanding of what your scope of representation is, and when called for, what it isn't. Five min-

utes really can prevent a serious headache

down the road.

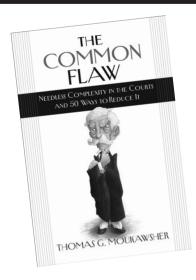
Since 1998, Mark Bassingthwaighte, Esq. has been a Risk Manager with ALPS, the nation's largest direct writer of professional liability insurance for lawyers. In his tenure with the company, Mr. Bassingthwaighte has conducted over 1200 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management, ethics, and technology. Mr. Bassingthwaighte is a member of the State Bar of Montana as well as the American Bar



Association where he currently sits on the ABA Center for Professional Responsibility's Conference Planning Committee. He received his J.D. from Drake University Law School.

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# **BOOK REVIEW**



The Common Flaw: Needless Complexity in the Courts and 50 Ways to Reduce It

by Thomas G. Moukawsher Brandeis University Press, 2023. Reviewed by Gary G. Shattuck, Esq.

Fifty. As in: Ways to Leave Your Lover; Shades of Grey; Hawaii Five-O; number of American states; years of marriage for a golden anniversary; and, of course, the "The Big Pineapple" (\$50 dollar bill). But wait, there's more! Now, 61-year-old, firsttime author (and sitting Connecticut judge) Thomas G. Moukawsher adds to this random genre with his legal treatise The Common Flaw: Needless Complexity in the Courts and 50 Ways to Reduce It (Waltham, MA: Brandeis University Press, 2023). While Moukawsher's goal to identify more than four dozen instances calling for reform may not sound as punchy as the others, it is, after all, the law. It is a topic that most people certainly have, at least, a passing, general love-hate understanding of, and opinion on, but lack the depth of knowledge or day-to-day personal stake in it that its practitioners, i.e., law students, law clerks, associates and partners, and at the top of the food chain, judges do. The question then is whether Moukawsher can wring out so many areas calling for attention that he is able to shake his peers from their lethargy to reset the way contemporary business is conducted to favor a larger, albeit skeptical, public audience.

Over the course of 51 chapters spanning 240 pages, punctuated by 51 pithy cartoons, Moukawsher soundly nails his 50 theses to the law's front door calling for reform. They vary widely in length from 33 pages (Chapter 1 – Prefer Humanity to Complexity) to just one (Chapter 48 - Courts Must Reimagine Themselves). Stretching to accomplish his goal, a few do become somewhat

repetitive as they seek to distinguish themselves from a broadly stated issue raised in an earlier chapter that could have included them all at one time. Regardless, in their totality they display the depth of the author's concerns for the legal profession probing deeply its interstices in search of deficiencies and then offering thoughtful suggestions for change.

The thread that ties it all together is Moukawsher's call to reorient the law from its staid, formalistic rituals that "sucks the oxygen out of an ordinary human problem" (43) to, instead, focus more directly on people's needs, or humanism. His arguments effectively seek to reject entrenched procedural tyrannies befalling the profession in favor of a new paradigm embracing a kind of compassionate pragmatism. If any chapter should be read foremost to put the current challenges into context, it is the first where he provides an excellent overview of how the law has become so complex over time to reach the state where it is now.

Setting the stage for what follows, Moukawsher first asks how have we passed from the most basic natural law teachings of Aristotle, Plato, and St. Thomas Aguinas invoking intuitive, utilitarian, realistic resolutions to everyday human challenges to, instead, favor those expounding a bevy of confusing -isms, i.e., the positivists, textualists, originalists and economics-based views. To demonstrate an extreme, he presents the outlandish example of an otherwise well-respected jurist, Seventh Circuit Court of Appeals Judge Richard Posner. In it, Posner inexplicably advocates reliance on a convoluted, incomprehensible eighteenth-century process called the "Bayesian decision theory," accompanied by an equally convoluted and incomprehensible Rubik's cubelike mathematical equation, to determine if a witness can believed. (21-22) Whatever happened, one might ask, to simple commonsense to resolve life's problems? And, as the author reminds on several occasions, law is art, not science.

Neither is Moukawsher hesitant to take aim at, for lack of a better word, dissembling, Janus-like formalistic means relied upon by the U.S. Supreme Court. In particular, he singles out Justice Samuel Alito's recent majority (leaked) opinion in *Dobbs v. Jackson Women's Health Organization* utilizing unhelpful, formalistic reasoning and language to justify overturning the landmark *Roe v. Wade* abortion case. In doing so, Moukawsher contends that such a process tends to undermine the Court's credibility, offering, instead little more than a "pretense of objectivity." (234) Tracing the role of judging in general and its overall



problem with drafting unnecessarily complex decisions, he notes the presence of competitiveness among overworked law clerks straining on their behalf attempting to make both themselves and their judgementors stand apart. To provide a return to normalcy, he suggests that judges should instead take a more hands-on "village elder" persona in their work invoking more approachable, commonsense reasoning.

Structurally, Moukawsher thoroughly dissects virtually all aspects of legal practice steering disputes through the system guestioning if they need to be so formal, so process-driven that they cloud the underlying issue(s) at hand. The burdensome costs associated with such practice simply forces the parties to settle not on the merits of a case, but on their need to avoid financial ruin. To drive home his points, he makes frequent reference to real life circumstances using actual trials and to diverse Hollywood movie portrayals as examples. He argues for a wide range of changes, among them: drafting concise, to-the-point arguments in complaints, motions and briefs (Chapter 38, The Best Legal Writing Is Literature, Not Formula), eliminating burdensome discovery requests constituting a "cat and mouse" game, minimizing needless arguments over standing and subject matter jurisdiction, the increased use of mediation, streamlining trials, imposing time limitations on the parties, and embracing technology (i.e., Zoom) to obtain more diverse juries and reduce hardships in securing witness testimony. He further warns that such modernity will certainly upend the profession's traditional reliance on court reporters; indicating that their days are numbered. Moukawsher is a realist and notes that while the codified and self-imposed rules the law operates by are difficult to change, then certainly its practitioners can alter their habits to focus on the merits of cases to be sure to reach more humanist, or "user friendly," resolutions.

Lastly, because of the seriousness and rapidity of recent revelations leaking from

all three branches of government, some of Moukawsher's effort has been, in some way, in the language of diplomats, OBE, or "over-taken by events." This is because his goal to identify 50 areas needing attention might not even be enough for just a few months ago nobody could have envisioned the threat posed by artificial intelligence penetrating so quickly into all aspects of life. This includes the law where attorneys blindly submit error-ridden computer-generated briefs citing non-sensical arguments and non-existent citations. Nor could anyone have ever imagined the reports of political bias within and ethical breaches by Supreme Court justices or the breathtaking, dystopian allegations of serious racketeering crimes involving a former president, ones facilitated by a cadre of enabling attorneys, shaking the foundations of our democracy.

These tests notwithstanding, the central thrust Moukawsher's book makes it even more important to seriously consider implementing at least some of the changes he suggests sooner rather than later to strengthen the practice and to mitigate the presence of such threats. Reducing the complexity of the legal system, thereby making it more understandable to the general public, will allow the basic honesty of the courts to shine through and remove the skepticism that many have of their fairness. (Chapter 51 - Steady Courts May Mean A Steadier Country). The stakes are high, he says, because the credibility of the profession depends on such changes in order to meet the needs of its customers, some of whom who are becoming increasingly belligerent and willing to physically strike out against the status quo and the people charged with upholding its values.

Gary G. Shattuck, Esq. is a former Vermont State Police commander, assistant attorney general, and assistant U.S. attorney who also acted as a legal advisor to governments in Kosovo and Iraq and as Vermont's anti-terrorism coordinator. He is the author of several publications concerning Vermont history written from a legal perspective, most recently Night-Rider Legacy: Weaponizing Race in the Irasburg Affair of 1968 (White River Press, 2022).

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**

#### Joseph A. DeBonis, Sr.

Joseph A. DeBonis, Sr., aged 80, passed away peacefully on May 26, 2023, at The Pines at Rutland, surrounded by Ann, his wife of 55 years, his children, and grandchildren. The three passions in Joe's life were first and foremost his family, his beloved law practice, and his hometown of Poultney. Joe was a pillar in the town of Poultney, Vermont, where he was born on March 21, 1943. Through his law practice in town, countless civic organizations, and as a life-long member of St. Raphael Church in Poultney, Joe served generations of friends and neighbors in the community he loved.

Joe spent his early years living on the family farm in South Poultney and attended the local elementary school there. He survived polio as a young boy and overcame the lingering impact of the disease to become a successful college graduate, attorney, husband, and businessman. Joe graduated Poultney High School, Class of 1961, the University of Vermont, Class of 1965 and the Maine School of Law, Class of 1968. Joe met Ann while attending law school in Maine. They married at the Sacred Heart Church in Portland, Maine on June 1, 1968, and moved to Rutland, where Joe was employed by the law firm of Ryan, Smith and Carbine.

In 1970, they built a home on the hill overlooking the family farm in South Poultney, and Joe established a law practice in Poultney, serving as the quintessential small-town lawyer. Richard Wright became a long-standing partner as the practice grew and served the surrounding towns in the area. He undertook several business ventures in Poultney, including The Brass Butterfly, The Original Vermont Store, that Ann owned and operated for many years, and took interests in commercial real estate. He continued practicing law well into his mid-70s, until his deteriorating health led to his retirement in 2019.

Joe's dedication to the community included serving in many civic organizations in Poultney and throughout Rutland County and the State of Vermont, including his role as Poultney Town Moderator for over 20 years. He served as past President of Poultney Rotary Club, Poultney Community League, and the Rutland Bar Association. Additionally, he served on the board of the Vermont Real Estate Commission and was a longtime member of St. Raphael Parish Council and Men's Club. He also acted as an Adjunct Professor at Castleton State College, where he inspired young minds with his extensive knowledge of the real estate industry.

Joe is survived by his wife Ann and his three sons, Dan (Shannon) of Brookline, MA, Joe Jr. (Leanna) of Poultney and Kevin (Shawna) of Charleton, NY, sister-in-law Barbara of Poultney, seven grandchildren, Emily, Jacob, Lindsey, Danielle, Zachary, Haydan and Austen, along with many nieces, nephews and cousins. He was predeceased by his parents, Dan and Theresa DeBonis, his brother Bill DeBonis and his brother Sam DeBonis and wife Bobbie.

#### John L. Williams

John Leo Williams, age 84, died on Friday, June 30, 2023, at his home in Sarasota, Florida. A Masonic service will be held in Vermont and Florida on dates yet to be determined. John Williams was born in Rutland, Vermont on October 16, 1938, the son of John Malcolm Williams and Esther Wendell Williams. He spent his formative years in Poultney, Vermont where he graduated from Poultney High School in 1956. He then went on to graduate from Mount Hermon Preparatory School in 1957, Middlebury College in 1960 and Boston University Law School in 1964. John was an excellent student and excelled at football and lacrosse in both high school and college. John's professional career as a lawyer in both Vermont and Florida lasted from 1964 to 2003.

In Vermont, he served as president of the Rutland County Bar Association, the Vermont Bar Association of Young Lawyers, the Vermont Trial Lawyers Association, and served on the Board of Governors of the Vermont Bar Association. In Florida he was a member of the Florida Bar Association, the Sarasota County Bar Association, and the Academy of Florida Trial Lawyers. John was also active in several charitable and fraternal organizations. As a Freemason John served as Master of Morning Star Lodge 37 in Poultney in 1980-81 and as Deputy Grand Master Fourth Masonic District, Grand Lodge of Vermont in 1988-89. He also served as Master of the Sarasota Builders Lodge 376 F&AM, now Phoenix Lodge 346. As a Shriner, he served as potentate of Cairo Shriners in 1984 and as a member of the Patrol and Drum Corps of Cairo Shriners from 1965 to 1991. He was a member of Sahib Shriners, Sarasota, and a member of Cabiri Chapter 179, where he served as secretary-treasurer. He served as Impresario of Rutland Court 105, Royal Order of Jesters, from 1985 to 1991 and was a member of Sarasota Court 189 ROJ. As a member of Fraternal Order of Eagles, he served as treasurer of the Fair Haven Aerie 3907 and secretary of the Sarasota Aerie FOE 2756. As a Rotarian he served as president of the Poultney Rotary club and the Sarasota Gulf Gate Rotary Club. Upon retirement he stayed active in the Shrine and Rotary while enjoying hunting in Vermont, traveling with friends, spending time with family, and volunteering as a naturalist at Myakka River State Park, Florida. John was predeceased by his wife, Arleen Mayer Williams. He is survived by daughters Laura A. Williams of South Burlington, VT, Jennifer K. Dukes of Albuquerque, NM, son LtCol. Marcus W. Williams, USMC Ret. of Colorado Springs, CO, and sister Judith K. Williams

#### Alan B. George

PhD. of Santa Fe N.M.

Alan Barry George, 81, passed away peacefully at his home in Proctor, Vermont, on August 2, 2023. He was born in Lorain, Ohio, on April 2, 1942, the eldest son of Alson Button and Mary Elizabeth (Bock) George. He graduated from Lorain Senior High, attended Kent State University, and earned his law degree from Case Western Reserve University in 1968. He was a lawyer. His practice focused on public utilities, administrative and regulatory issues, mergers and acquisitions. He represented clients in rate, securities, antitrust and major construction contract cases in state and federal courts. He served on the Judicial Conduct Board, the Human Services Board, and was an original director of Vermont Legal Aid. He was a career member of the Vermont Bar Association and a Past President of the Rutland County Bar Association, generously mentoring many young lawyers over the years. Alan was a member of the Rutland Country Club. He was also a formidable competitor in the Rutland rotisserie baseball league. But he will mostly be remembered as a die-hard fan of the Cleveland Indians (now Guardians). His faith that they would win another World Series in his lifetime never flagged. He is survived by his daughter, Sarah George, her husband, Michael Ellemers, her mother, Corinne Roberts Ludy, his brother David George, nieces Linda, Rachel, Alison, and nephew Andrew. He was predeceased by his brother Richard and his half-brother Kingston. For most of his life Alan made his home on a beautiful property in Pittsford, Vermont. In the summer he could be found in the garden. In late winter and early spring he would be in the sugarhouse making maple syrup. He loved Vermont but he also maintained lifelong friendships in Ohio. The family wishes to thank his dearest friend, Valerie Bandersky of Amherst, Ohio, for the affection and companionship she shared with him in recent years. He will be missed.

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



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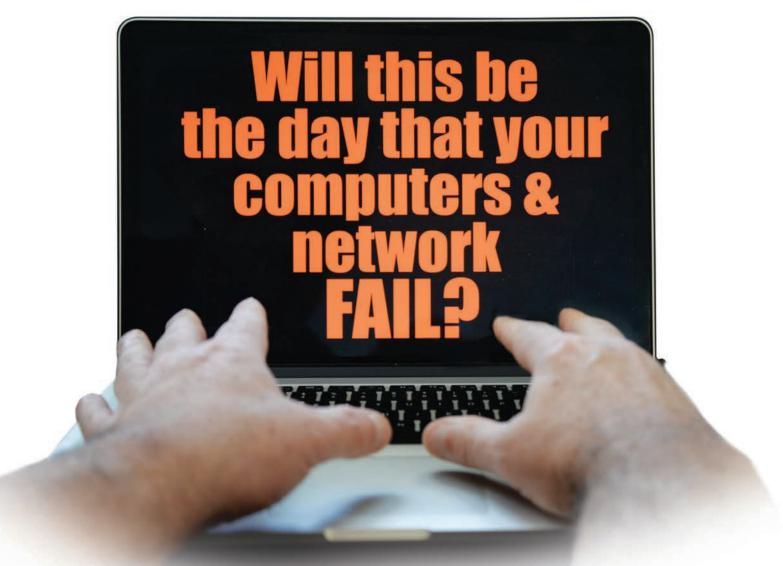
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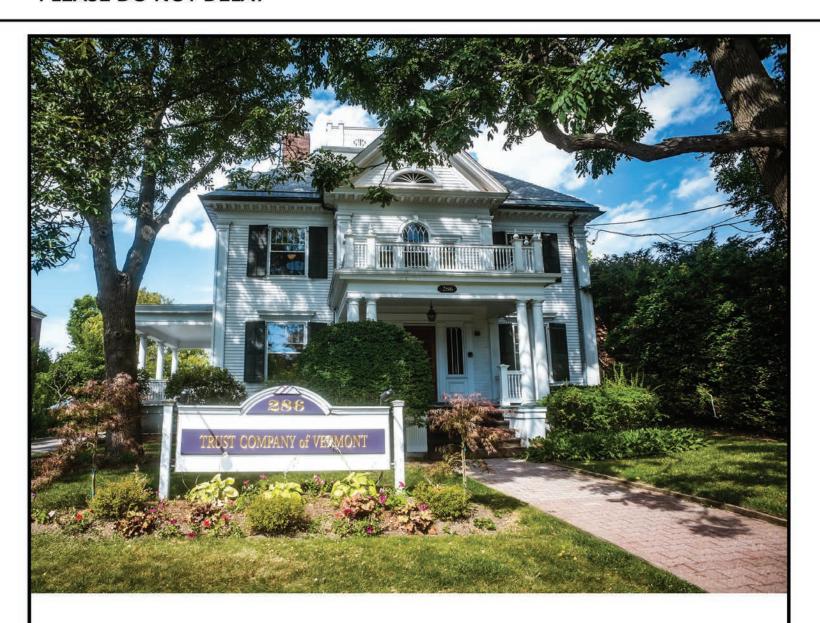
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