

## Attorney General MacDonald Nominated as Chief Justice

By Anna Berry

New Hampshire Attorney General Gordon MacDonald temporarily stepped down from his position on June 6 after he was nominated by Governor Chris Sununu to succeed Chief Justice Robert Lynn in leading the state's highest court. The Executive Council will hold a public hearing on the Supreme Court nomination on Wednesday, June 26 at 10 a.m. in the Executive Council chambers at the Statehouse.



MacDonald delegated his duties to Deputy Attorney General Jane Young during the nomination process.

"I believe it is in the best interest of this Office, as well as the people and institutions we serve, for me to delegate temporarily my duties as Attorney General to [Young] while the nomination is pend-

ing," MacDonald wrote in a public letter. "In my opinion, this unique circumstance constitutes 'cause' under the meaning of the statute [RSA 7:3]."

Lynn will retire from the Supreme Court on August 23, in advance of his 70th birthday, at which time he is obligated by state law to retire.

"I have known Gordon MacDonald for many years," Lynn, who was sworn in as chief justice in April 2018, said in a press release from the Governor's office. "He is truly a great person and an outstanding lawyer. He is smart, hard-working, and thoughtful. His extensive experience in private law practice, his leadership of the Attorney General's Office — probably the State's largest law firm — his commitment to public service, and his temperament and fair mindedness make him eminently well-qualified to serve as the next Chief Justice of the New Hampshire Supreme Court."

Sununu praised MacDonald's leadership skills and independence over the past two years in his role as attorney general.

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## "Frank's" Is Back

By Annmarie Timmons

The state's only law school may have taken Franklin Pierce out of its name nearly 10 years ago, but many intellectual property and patent lawyers never stopped using it — they couldn't afford to.

"It has an international reputation, which is hard to believe, but it does," said Gene Quinn, a patent

attorney, founder of the "IP Watchdog" website and a 1995 graduate of what was then the Franklin Pierce Law Center. "In the world of intellectual property, if you talk to people from overseas, there are three law schools they know: Harvard, Yale, and Franklin Pierce Law Center. It's a very big deal in the IP world."

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## PRACTITIONER PROFILE

### Steinfeld: A Specialty in Storytelling

By Kathie Ragsdale

Friends and colleagues call Joseph D. Steinfeld a brilliant trial lawyer, teacher and writer.

He calls himself a storyteller.

But he's a storyteller whose clients have ranged from Julia Child to the Massachusetts State Democratic Party to the New Hampshire House Judiciary Committee, which hired him in 2000 as special prosecutor for the highly publicized impeachment trial of the chief justice of the New Hampshire Supreme Court.

"That's what a trial lawyer does; you're a storyteller," says the practitioner of almost 50 years. "You get paid to tell stories and you try to tell them in plain English."

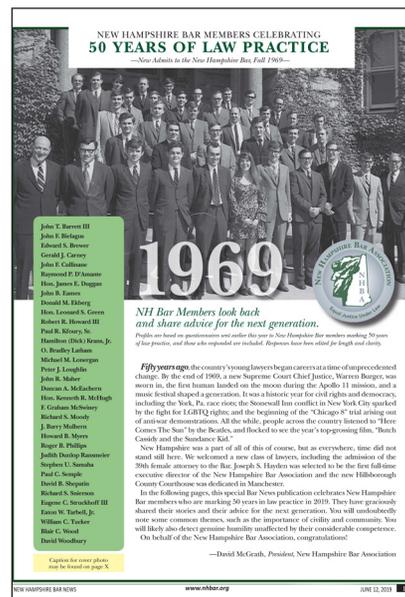
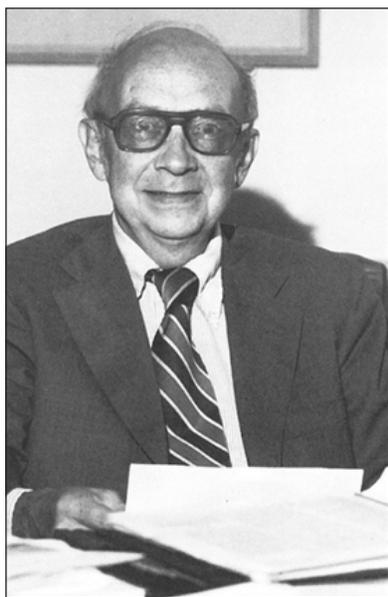
The lawyering urge was implanted in him by his father, who owned a small

textile business in Steinfeld's home town of Claremont and advised him to become an attorney, "because then if you feel like it you can hang your hat on the back of a door and go fishing, and that sounded good to me," Steinfeld jokes.

After graduating from Claremont's Stevens High School in 1957, he went on to Brown University, and then to Harvard Law School, shortly afterward landing a position with the prestigious Boston law firm of Hill & Barlow.

"Hill & Barlow had a long history of supporting unpopular causes and it produced governors Dukakis, Weld and Patrick," Steinfeld says. "I was drawn to the firm because it had very good values and very good trial lawyers and that is what I wanted to become."

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## THE DOCKET



**T-minus 11 days.** The annual attorney licensure renewal deadline is Monday, July 1. Don't delay! Sign into the My NH Bar portal today at [nhbar.org](http://nhbar.org). **Page 2**

**Lawyers & Texting.** The Bar's Ethics Committee provides guidance on modern communications in a new, ongoing series of *Ethics Corner* articles. **PAGE 5**

**Centennial Surprise.** The Bar's oldest member receives a special visit from his alma mater. **PAGE 11**

**Golfing for Good.** Register your team for the Quid Pro Bono Golf Tournament on August 8. **PAGE 15**

## Municipal & Governmental Law and Intellectual Property Law

Counterfeiting in an age of globalization, cease-and-desist letters, new laws that may affect local governments — and more — are covered in this month's practice area section. **PAGES 12-29**

**New Resources for North Country.** Expanding access to justice at the Littleton library. **PAGE 30**

# Annual Attorney Licensure Renewal Deadline: July 1

Notices of annual membership dues for the 2019/2020 fiscal year were delivered the week of June 1, with payment due 30 days from the invoice date. Dues remain unchanged for the 10th year in a row.

Please see the chart of membership categories and their respective dues below. Also included with the annual membership dues is an invoice for mandatory court fees assessed by the NH Supreme Court. The NH Bar Association collects the court fees for the court and then forwards the funds collected to the Professional Conduct Committee (PCC), Lawyer Assistance Program (LAP), Public



Protection Fund (PPF) and NH Minimum Continuing Legal Education Program (NHMCLE).

For your convenience, you may go to the NH Bar Association My NHBar Portal at [www.nhbar.org](http://www.nhbar.org) to pay both in-

voices online using American Express, MasterCard, VISA or Discover. If you prefer, you may pay both NHBA and NH Supreme Court invoices with one check made payable to New Hampshire Bar Association.

In addition to payment of NH Supreme Court Fees and NH Bar Association Dues, do not forget to file your annual Trust Account Compliance and NH Minimum Legal Education affidavits to complete the annual compliance requirements. To file the affidavits, also go to the My NHBar Portal at [www.nhbar.org](http://www.nhbar.org).

Membership Category	NH Bar		NH Supreme Court Fees		
	Dues	PCC	PPF	LAP	NHMCLE
Active Members (4th year plus)	\$310	\$205	\$ -	\$20	\$10
Active Members (through 3rd year)	\$260	\$205	\$ -	\$20	\$10
Full Time Judicial Members	\$255	\$ -	\$ -	\$20	\$ -
Part Time Judicial Members	\$175	\$ -	\$ -	\$20	\$ -
Inactive Members	\$175	\$10	\$ -	\$20	\$ -
Inactive Retired	\$ 25	\$ -	\$ -	\$ 5	\$ -
Limited Active (4th year plus)	\$ 25	\$ -	\$ -	\$ -	\$ -
Limited Active (through 3rd year)	\$ 25	\$ -	\$ -	\$ -	\$ -
Military Active			No Charge for Dues or Court Fees		
Military Inactive			No Charge for Dues or Court Fees		
Honorary Active			No Charge for Dues or Court Fees		
Honorary Inactive			No Charge for Dues or Court Fees		

Note: The Supreme Court has temporarily suspended the annual PPF assessment.

## Corrections

Ever willing to admit his mistakes, which he says he has to do often, attorney Kirk Simoneau wrote to the *Bar News* to point out that he made a mistake in his recent article, "What Every Personal Injury Lawyer Should Know About Employment Law," published in the April issue.

Unemployment benefits are, sometimes, available for injured workers, not injured on the job — look at RSA 282-A:321 and Emp. 503.08 for more information. The article has been updated in the digital edition.

The Manchester Bar Association submitted a photo that was mislabeled and appeared on page 11 in the May edition of

*Bar News*. The photo should have been captioned "from right to left" instead of "left to right." On the same page, attorney Rick Gagliuso's name was misspelled.

The *Bar News* regrets the errors.

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## UNH Franklin Pierce School of Law Celebrates 44th Commencement Ceremony



The University of New Hampshire Franklin Pierce School of Law celebrated its 44th commencement ceremony on May 18 in White Park. The law school awarded more than 75 juris doctor and graduate degrees. Graduates included students from China, South Korea, India, Singapore, Canada, and the United States.

The ceremony featured the awarding of two honorary degrees. Gordon Smith, Chairman Emeritus of Associated Utility Services and a well-respected expert in the field of intellectual property valuation, was awarded one. The other was awarded to Robyn Glaser, Vice President of the Kraft Group and a leader in sports, business, and the law. Glaser, who works closely with the New England Patriots, also delivered the keynote address.

UNH President James Dean, UNH Law Dean Megan Carpenter, Professor Sophie Sparrow and two graduating students who were voted by their peers as speakers — Michele Peltz and Caitlin Foster Poole — also delivered remarks. The occasion marked the first UNH Law commencement for Dean, who became UNH's President last June.

**Above:** (left to right) Honorary degree recipient Gordon Smith, commencement speaker and honorary degree recipient Robyn Glaser, UNH Law Dean Megan Carpenter, UNH President James Dean Jr., Provost Wayne Jones Jr. (Courtesy: UNH Franklin Pierce School of Law).



**Above:** Speakers Reid Butler and Adam Minsky addressed attendees at the “Managing Student Loan Debt and Personal Finances” CLE on May 22 at the Bar Center. **Below:** Attorney and CLE speaker Laura Devine (left) and NH Pro Bono intern Lara Gilroy (right) enjoyed the ice cream social presented by the Bar’s New Lawyers Committee following the program.



An oral argument was held in the House Chamber on June 4 in conjunction with the Statehouse Bicentennial celebration. The Supreme Court justices heard the argument in the case of *John C. Rankin v. South Street Downtown Holdings, Inc.* The event paid tribute to the Supreme Court hearing appeals at the Statehouse when it first opened in 1819.



Windham High School teachers Andrew Haemker (left) and Shannan McKenna were recently recognized for their efforts on behalf of the Project Citizen program, which engages students in civics education. Watch for additional coverage in July’s *Bar News*.



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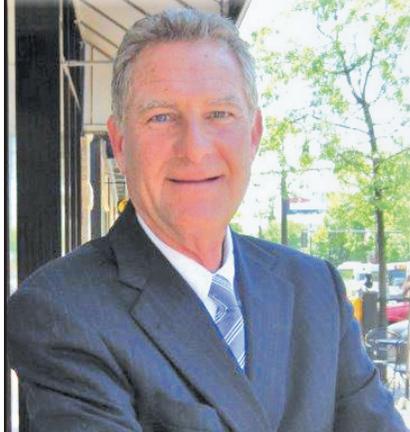
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# We Need a Children's Bill of Rights

By Michael S. Lewis

New Hampshire must adopt a Children's Bill of Rights. It must do so now, as circumstances reveal that New Hampshire children require a means of securing and mobilizing a far stronger, simpler and clearer set of legal rights against the state executive branch — rights that children may assert in causes of action brought before the judicial branch.

Year after year, we, as citizens of this state, have stood by as this state increasingly became aware of crisis-level failures by state executive officials in the area of child protective services. When politicians and officials did next to nothing to address the crisis, children died. Reports in the aftermath told us that we could have done better and that we can do better. Yet our leaders, who we vet and elect, still did nothing or next to nothing by way of meaningful action to address the crisis. The press covered the issue as an afterthought and a *fait accompli*. Advocacy groups and top executive branch

officials who bore responsibility capitulated to the crisis or distracted us with toothless, counter-productive reforms like Marsy's Law. See Michael S. Lewis, "Why Marsy's Law may harm victims," NH Business Review (Mar. 2, 2018); Michael S. Lewis, "With Marsy's Law, officials seek to ride state constitution into Jurassic Park," Concord Monitor (Jan. 17, 2018). Children continued to suffer.

For those seeking a more robust history of the crisis and the state's resistance to solving it, see Michael S. Lewis, "Why we can't wait to address NH's child abuse and neglect crisis," NH Business Review (May 7, 2019); Michael S. Lewis, "Answering alternative facts on child protection," NH Business Review (Oct. 13, 2018); Michael S. Lewis, "The greatest civil rights crisis in



NH history," NH Business Review (Sept. 28, 2013). These articles reference other resources that track the scope and extent of New Hampshire's child abuse crisis.

This year, the New Hampshire legislature, now under the new leadership of New Hampshire attorney and Senator Dan Feltes, took the first responsible series of steps to protect abused and neglected children in years. Among other things, it passed SB6, a bill that meets baseline staffing requirements recommended by numerous internal and external audits of our child protective services system. It also passed SB14, which imposes even greater levels of responsibility for protecting children upon the executive branch through mobile crisis response and stabilization services.

Remarkably, this heroic legislative effort faced substantial resistance within the executive branch. This resistance came despite numerous studies, external and internal to the government, indicating the state's failures and the consequences to abused and neglected children. The consequences

included the murders of several children. Our executive branch officials have resisted meaningful action to protect children even as the executive branch prosecuted New Hampshire's major private institutions, from the Catholic Church to major prep schools, for the historic failures of those institutions to protect children from internal abuse and harm. This behavior is the worst sort of tragic hypocrisy and it calls out for substantial correction.

We now know that we cannot rely on executive branch officials to do their jobs without external coercion through enforceable private causes of action in court. These executive branch officials continuously fail to acknowledge the separate status of childhood as a time of life that is not just a "becoming" for people but is also a treasured part of a person's experience in life, requiring even greater recognition and protection under the law than our executive branch officials have been willing to acknowledge.

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# Is Impeachment without Conviction Worth It?

*Editor's Note: This article is reprinted with permission from the Concord Monitor, which originally published it April 28.*

By Joseph D. Steinfield

In 2000, 19 years ago this month, I got a call from Donna Sytek, the speaker of the house of the New Hampshire legislature. Peter Burling had given her my name, and she invited me to come to Concord to discuss the House-mandated investigation of the state Supreme Court.

The following Monday I drove north from Boston and met with Speaker Sytek and a bipartisan group of legislators. Later in the day she called and asked me to serve as Special Investigator.

I wanted to reflect a bit before giving my answer, though I had little doubt that I would accept the offer. It would be both an honor and a challenge.

But first I wanted to get some advice. So I called retired Massachusetts Chief Justice Edward Hennessey, whom I had

known for many years. I explained my situation and asked for his opinion.

Chief Justice Hennessey told me, "Joe, you should do it. But remember, this is not the ordinary case. The Court is an institution, and part of your job will be to protect it."

I spent the next six months in Concord.

I don't remember thinking about a "trial" in those early days. My assignment was to work with the members of the House Judiciary Committee as they struggled to reach a decision and make a recommendation to the full House membership. It was no simple task, either for me or for them.

In a sense, mine was the easier undertaking. All I had to do was investigate the facts and the law and write a report. They were the ones who had to decide. Part of that meant grappling with the words of the state constitution, not the federal grounds of "high crimes and misdemeanors," but rather "maladministration" and "malpractice."

Ultimately, the committee voted to recommend the impeachment of Chief Justice David Brock. I do not remember anyone ever asking, "But will the Senate convict?" Nor do I believe that question was of any concern to Chairman Henry Mock or the members of his committee. They understood their role in the process and discharged it with exceptional diligence.

In the summer of 2000, the full House of Representatives accepted the recommendation and voted to impeach. Did they consider whether the Senate would convict? I have no idea.

Speaker Sytek then appointed House "Managers" and asked me to take on the role of Special Prosecutor. At that point I did wonder, for the first time, what the



chances were that the Senate would vote to uphold any of the four impeachment counts. I didn't know whether this would be up to a majority, meaning twelve out of 22 senators (two senators had recused themselves), or whether a larger number would be needed.

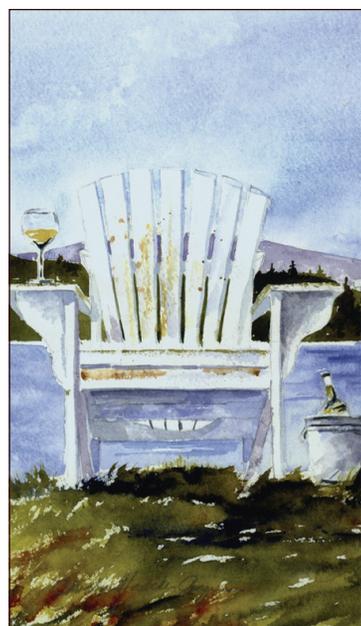
The New Hampshire Constitution doesn't answer that question.

But former U.S. Senator George Mitchell, whom the Senate retained as its

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## Opinions in Bar News

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# Lawyers & Texting: An Ongoing Series

## An Introduction

Today, many clients are requesting that their attorneys correspond with them primarily through text messaging. With the speed and ease of texting, it is easy to see why many clients prefer this method of communication. However, this new method of communication brings with it ethical concerns regarding the New Hampshire Rules of Professional Conduct (Rules).

Communication with clients regarding their representation is an ethical obligation of all attorneys. Prompt correspondence with clients regarding topics that require informed consent and requests for information is required by Rule 1.4. While texting with clients is not prohibited by the Rules and no Rule specifically mentions texting, there are many Rules attorneys should consider. For that reason, the Ethics Committee will be discussing the intersection of texting and the Rules in a series of *Ethics Corners* regarding the following Rules:

- Attorney competence and attorney-client communications (Rules 1.1, 1.4, and 1.6);
- Confidentiality of information and attorney-client privilege (Rules 1.6 and 3.3);
- Preservation of evidence (Rule 3.4);
- Attorney advertising (Rules 7.1, 7.2, and 7.3); and
- Text Retention (Rule 1.15)

Stay tuned, there is a lot for you to consider.

## Part I: Competence and Communication Rules

*Dear Ethics Committee:*

*I have been asked by several clients to use text messaging as my main method to communicate with them. My cell phone has texting ability and it is not a huge issue for me to communicate in this way with my clients if that is what they want. However, is this a permissible method of communication under the NH Rules of Professional Conduct?*

**Answer:** You are correct to consult the rules regarding client communication. Rule 1.4 deals specifically with Client Communications, and requires that a lawyer (1) promptly inform the client of any decision or circumstances that requires the client's

informed consent, (2) reasonably consult the client about the means by which their objectives are to be accomplished, (3) keep the client reasonably informed of the matter, (4) promptly comply with reasonable requests for information, and (5) consult with the client about any relevant limitation on the lawyer's conduct. The second part of rule 1.4 focuses on the attorney's obligation to explain the legal and practical aspects of a matter and, as necessary, to explain the alternative courses of action available to the client. The purpose of this section of the rule is to allow the client to make informed decisions regarding the representation. However, the rule specifies no particular method of communication.

The methods of communication implicate Rule 1.6, which requires that all information relating to the representation of the client be kept confidential, subject to limited exceptions. In addition, the Ethics Committee Comment to Rule 1.1, requires that a lawyer should keep reasonably abreast of readily determinable benefits and risks associated with applications of technology used by the lawyer, and benefits and risks of technology lawyers are similarly using. Finally, the attorney should consider the possibility that privilege might be waived if third parties have access to the text messages on the client's device. For example, text message notifications that include the names of the sender (if accepting text messages from clients) or notification messages that preview the content of messages should be disabled to ensure that inadvertent disclosure does not occur.

The thrust of these rules is that the attorney should use means of communication consistent with their obligation to maintain the confidentiality of client information, and to ensure the client is reasonably informed of the risks of the various modes of communication the attorney might employ. In the case of text messaging, the attorney may wish to confirm that the client, and only the client, has access to the device. The attorney might also encourage the client to use text messages for only limited purposes, such as scheduling and confirming appointments, in order to avoid risks of disclosure.

Text messaging also implicates issues related to file retention and spoliation. A lawyer must retain client communications

as part of the client's file and text messages are part of the client's file. Issues related to file retention were discussed in *Ethics Committee Advisory Opinion #2015-16/05* (See also an additional 2015 Ethics Corner on Texting and File Retention at: <https://www.nhbar.org/resources/ethics/ethics-corner-practical-ethics-articles/2015-12>). File retention and spoliation and the application of the rules to text messages will be addressed in additional separate upcoming Ethics Corner articles.

## Part II: Confidentiality and Privilege (Waivers)

*Dear Ethics Committee:*

*I recently started representing a young woman who was arrested on a DUI charge. She texted me and asked me when her arraignment was and what she could expect at that hearing. I sent her an email back reminding her of the time and briefly explained what would happen. Later that day, she called me at my office very distraught. She said that her mother had seen my response because they share a computer and had read the email. I think I have straightened things out with my client, but what should I do to avoid this in the future?*

**Answer:** You have to balance many things when being responsive to clients: your obligations to promptly communicate with them (N.H. R. of Prof. Cond. R. 1.4), your obligation to maintain confidentiality (N.H. R. of Prof. Cond. R. 1.6), your obligation to stay abreast of the risks and benefits of technology (N.H. R. of Prof. Cond. R. 1.1) and the importance of maintaining the attorney-client privilege.

In recent years, there has been an explosion of new ways to communicate with clients. These include conference calls, emails, video conferencing, and text messaging. Regardless of the form of communication, you should always focus on maintaining the confidentiality of your client's information and the communication.

You should carefully consider how you communicate with your clients and how they communicate with you. At your initial client consultation, you might consider discussing how to communicate with a new client and what type of information will

be shared in what forms of communication. For instance, some information might be best communicated in an email, other information in a letter, and some information might be appropriate for a text message. You should discuss and be aware of your client's circumstances and how those circumstances might impact your ability to confidentially communicate. You should discuss the risks and benefits of the various forms of communication so that the client can make informed choices in how the communications will occur.

One thing to remember is that certain devices have settings which may increase or decrease the likelihood of a confidential communication being disclosed to a third party. Competence and Communication Rules, a recent *Ethics Corner*, has a discussion of this issue.

If you plan on using email in your communications, you might want to discuss who might have access to your client's email and what devices can access those email accounts. Some people share devices with stored login information so that they do not have to enter that information each time they want to access their email. You should discuss what this might mean for the confidentiality of your communications.

Depending on the circumstances, you might suggest that the client create a new email account to ensure that no third party has access to your communications and that the client be careful with that login information. Sometimes family members or significant others want to be involved in communications and kept informed as a matters progress.

You should always remind clients that involving a third party puts the attorney-client privilege at risk, destroying it if that third party is not necessary for the communications between you and your client. See *Prof. Fire Fighters of N.H. v. N.H. Local Gov't Ctr.*, 163 N.H. 613, 615 (2012)(discussing when reasonable precautions must be taken to maintain attorney-client privilege); N.H. R. of Evid. R. 502(a)(5).

Lastly, you might remind clients to be careful with their devices, as the client in your question might inadvertently waive privilege by not exercising the appropriate care. Technology has enabled you to better

ETHICS continued on page 6



Heather M. Burns



Michael S. McGrath

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## Lewis from page 4

See, e.g., Anne Dailey & Laura Rosenbury, *The New Law of the Child*, 127 Yale L. J. 1448, 1451 (2018) (“We envision a ‘new law of the child’ that promotes a wide range of children’s present and future interests in addition to assigning adult authority over children’s dependency and development.”).

The legislature has the power to acknowledge what we have learned about childhood and what we need to do to protect this stage of life for children. The legislature (with the notable exception of the legislature during the 2010 biennium) has a history of being proactive for similarly situated groups. The state now protects the interests of the victims of crimes and of the foster parent community as a result of proactive legislative reform. Both communities have obtained the protections of the law through “bills of rights” that recognize the separate need to protect vulnerable populations from the hitherto uncaring acts of the broader public. See RSA 21-M:8-k (victims bill of rights); RSA 170-E:52 (foster parents bill of rights). And of course, the state separately protects the rights of “consumers” through a robust consumer protection act that supply private rights of action before the judicial branch. RSA 358-A.

Children require even stronger protections than crime victims, foster parents and consumers and we should not hesitate to grant them those in the form of a Children’s Bill of Rights. A bill would, at least, provide for:

- The right of a child to be free from all forms of physical, psychological, or sexual abuse or neglect;
- The right of a child to a safe and healthy

environment secured, at least, by a functional child protective services system;

- The right of a child to receive appropriate medical treatment including therapeutic care for behavioral health;
- The right of a child to legal counsel and to guardianship services in any proceeding affecting the child’s legal rights; and
- The right of a child to privacy in regard to the use and dissemination of personal information about a child by private parties.

Such a bill of rights must provide real private remedies for children in order to create real financial incentives for the state and other actors if these rights are to have any real meaning. Government officials within the executive branch must face real, financial consequences for failing to abide by the rights of children. Decades of litigation over public education has taught us that declarations and injunctions do not remove the scales from the eyes of top policy-makers.

Budgets and the officials who control them must be made to account for their failure to protect children by absorbing the consequences in individual cases. Otherwise, we will never see change and children will continue to suffer without individual remedies that can bring them at least some relief.

New Hampshire has paid lip-service to the ideal of caring for children throughout its history. It’s time for the state to get real about the health, safety and future of our children. We will not live up to our ideals if we fail to secure rights in stark terms through real measures and subject to real remedies, under our laws. A Children’s Bill of Rights is what the times require.

*Michael Lewis is a shareholder at the law firm of Rath, Young and Pignatelli.*

## Steinfeld from page 4

counsel, did. He met with me and counsel for the Chief Justice, a Washington lawyer named Mike Madigan. “Something this serious should not be decided by a simple majority,” he told us. “It will have to be a two-thirds vote to convict.”

I wasn’t surprised. The federal constitution requires a two-thirds vote, and I understood why it made sense here. I knew, however, that any possibility of “winning” the case had just evaporated. Various senators, unencumbered by judicial restraints on public comment, had already made their views known, and as a product of the Claremont school system, I knew how to count to seven. (The irony that many believed the vote to impeach was “payback” for Chief Justice Brock’s opinion in the “Claremont Case” did not go unnoticed.)

I remembered Chief Justice Hennessey’s cautionary words. It’s not about winning, it’s about the court as an institution.

Knowing that the Senate would not convict was, in a sense, a liberating force. My instincts as a trial lawyer did not disappear. I marshaled the evidence and put in the best case I could. But my goal was to help the members of the New Hampshire Senate, and more importantly the public at large, know how the New Hampshire Supreme Court had been conducting the public’s legal business.

The Senate acquitted David Brock, and he continued as Chief Justice for another two years.

I understand that our current national circumstances are far different than those we faced in New Hampshire in the year 2000. But in one respect they are the same.

We are dealing with an institution whose preservation should be uppermost in our collective thoughts and prayers.

*Joseph D. Steinfeld served as Special Counsel in the New Hampshire impeachment proceedings in 2000. He lives in Keene and is Of Counsel to the Law Office of Thomas R. Hanna. He currently serves as Cheshire County representative to the NHBA Board of Governors. He can be reached at [jsteinfeld@hannalandlaw.com](mailto:jsteinfeld@hannalandlaw.com). Copyright 2019.*

## Ethics from page 5

serve your clients’ needs and keep them informed. But, you should always remember the risks that go along with those benefits. — The NHBA Ethics Committee

*These Ethics Corner articles were submitted for publication to the NHBA Board of Governors at its May 6, 2019 Meeting. The Ethics Committee provides general guidance on the NH Rules of Professional Conduct and publishes brief commentaries in the Bar News. New Hampshire lawyers may contact the Committee for confidential and informal guidance on their own prospective conduct or to suggest topics for Ethics Corner commentaries by emailing Robin E. Knippers: [reknippers@nhba.org](mailto:reknippers@nhba.org).*

**Watch for additional articles in this series in upcoming issues of Bar News. Find the Committee’s opinions and guidance at [www.nhbar.org/resources/ethics/](http://www.nhbar.org/resources/ethics/).**

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The law school is currently ranked in the Top 5 for intellectual property and has been the only law school in America annually ranked in the Top 10 for IP since U.S. News & World Report began ranking law schools 28 years ago.

The school was founded in Concord in 1973 as the Franklin Pierce Law Center and it was affectionately nicknamed “Frank’s” by early graduates like former NH Supreme Court Justice Carol Ann Conboy. After its 2010 merger with the University of New Hampshire, the school was renamed the UNH School of Law.

The name was changed to send a clear signal that the law school had made a complete merger with the university, according to current Dean Megan Carpenter.

But, the switch upset alumni like Quinn, who refused to update his professional bio to list the UNH School of Law.

“It was egregiously stupid to have changed the name,” he said. “I made it pretty clear that I was not happy at all.”

And Joe Carrerio Jr. of Salem, a 1996 graduate, voted against the name change when the school polled alumni a decade ago.

“It was like Walmart buying a mom and pop store,” he said. “We lost some of our character.”

And even though Carrerio is no longer practicing law, he was thrilled to hear the news. “I would love for it to return to the original name,” Carr said. “But I know I have a snowball’s chance in hell of that happening. It’s a good compromise.”

Carpenter said alumni asked her regularly if the school could return to its former name. Doing so made official what

was already happening, she said.

“I think everyone continued to put Franklin Pierce on their resumes as ‘formerly known as,’” Carpenter said. “The brand never went away.”

It’s true, said Chelsea VanderWoude, an IP associate specializing in trademark and copyright law at Grossman, Tucker, Perreault & Pflieger in Manchester. She graduated from the UNH School of Law in 2017 but has used the Franklin Pierce name with trademark and copyright law colleagues.

“We sometimes try to work with foreign associates from the same school, and when we are establishing a new relationship, it can help if they see the Franklin Pierce name,” she said. “It has a good reputation in the IP field.”



Dean Megan Carpenter unveiled the new name on May 22. Cover: Many alumni were ecstatic at the news. (Photos: Courtesy, by A. J. Kierstead, UNH Franklin Pierce School of Law)

VanderWoude said the Franklin Pierce brand is so strong that she was surprised the law school and UNH changed the name after the merger.

“In the trademark field, we talk about goodwill,” she said. “Pick a brand name and develop a good reputation that consumers recognize over the years and trust. That is what Franklin Pierce was. It was a lot of goodwill to walk away from.”

Carpenter announced the name change May 22, 2019 at the International Trademark Association annual meeting in Boston, to a room of alumni. She shared the news with students in an email before her remarks and with alumni in an email just afterward.

VanderWoude was at the reveal. The audience was ecstatic. (To see the video,

visit the UNH Law YouTube channel)

“There were tears,” Carpenter said. “It was just incredible, like a Michael Jackson concert from the 1980s. People were just losing it with excitement.”

That reaction was not universal, according to several alumni practicing in New Hampshire. But, they were reluctant to criticize the school publicly.

Others questioned why the name change was announced just after this year’s commencement — rather than before. Carpenter said the degrees were already printed when the board of trustees voted in April to change the name.

She said she waited until after graduation to announce the news to avoid taking away from the celebration of students and their hard work. And, graduates can have their degrees reprinted at no charge.

Eilene Duberow, who will practice intellectual property law at Burns & Levinson in Boston, is one 2019 graduate who will request a reprinted certificate.

“I am proud to be educated at an institution which promotes experiential learning and an IP focus to ready its students for everyday legal practice,” she said.

Jodutt Basrawi is a rising third year who will be happy to have a degree with the Franklin Pierce name. Still, he said he’d like to see the original name in full — Franklin Pierce Law School — make a comeback.

“Every time I say, ‘Franklin Pierce Law Center,’ everyone knows my ambition is set on becoming a patent attorney,” he said. “I don’t have to elaborate. It’s self-evident in the name.”

*Annmarie Timmons is a freelance writer based in Concord.*

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The firm dissolved in 2002, and in 2003 Steinfield moved on to another Boston firm, Prince Lobel & Tye, as a partner. These days, he also maintains an office at Thomas Hanna Law in Keene.

His has been a varied practice, from complex business disputes to First Amendment litigation to fraud, wrongful death and civil rights cases, and Steinfield acknowledges such a diversity would be unusual for a lawyer starting out today.

“I had the benefit of entering the practice of law when you could be a generalist,” he explains. “The first jury case I ever tried was for the plaintiff in a medical malpractice case. Today it would be extremely unusual for a lawyer to do that unless that was the lawyer’s specialty.”

“I’m one of a dying breed,” adds Steinfield, who is the Cheshire County representative to the New Hampshire Bar Association Board of Governors. “The practice of law has become very specialized.”

Many of his cases — and clients — have been high-profile.

While at Hill & Barlow, he represented Julia Child in multiple instances where parties attempted to use her persona for commercial purposes, without her permission.

They became friends, and Steinfield recounts how delightful it was to go out to dinner with her, as chefs would invariably seek to cook up something “special” to impress their celebrity diner and her companion. He also remembers her kindness when a fellow lawyer who had also represented her died of AIDS — then a little-known disease — and Child visited him often and dedicated one of her books to him.

Steinfield also interacted with Mitt

Romney — though not as counsel.

After Romney went to Utah to organize the 2002 Winter Olympics, the Massachusetts Democratic Party hired Steinfield to challenge his eligibility to run for governor of Massachusetts, claiming he was a resident of Utah.

The Ballot Law Commission ruled in favor of Romney, who went on to become governor and the 2012 Republican nominee for president. Romney now lives in Utah and is a senator there, “so I was right — just 16 years ahead of my time,” Steinfield says with a chuckle.

Other clients have included the governor of Puerto Rico, Massachusetts Bay Transportation Authority, the Union Leader Corp. and Boston magazine.

Perhaps his most gratifying proceeding was the impeachment case, which arose when three justices of the Supreme Court faced charges of unethical conduct and Steinfield was hired by the state Legislature to investigate. The House subsequently voted to impeach Chief Justice David Brock and Steinfield was named special prosecutor to try the case before the state Senate.

Critics claimed Brock had been hostile toward the Legislature and that the judiciary needed a housecleaning. Brock’s supporters saw the impeachment move as payback for unpopular court decisions, especially in the 1993 and 1997 Claremont cases regarding how the state should pay for its schools. Separation of powers was also at issue.

Brock was ultimately acquitted of all charges, and Steinfield says now he knew in advance he would not get the two-thirds vote required to convict.

“That really didn’t bother me,” he says. “I am proud of what we did in that case.”

“I believe the case was presented very thoroughly and ethically and that it pro-



Joseph Steinfield (left) shows a document to Mitt Romney (right) during proceedings about Romney’s eligibility to run for governor of Massachusetts.

vided some insights into the Supreme Court and how it functions ... I was a participant in something that was very important in the state of New Hampshire and I was very much honored to do it.”

Peter Burling, who was House Democratic leader at the time, had suggested Steinfield for the position.

“Joe was perfect in that role, just perfect,” Burling says. “He was such a smart, challenging, extraordinarily effective lawyer.

“I come from a family that is nothing but lawyers for three generations and here was this — I would describe him as an atomic power plant of energy and brilliance.”

Steinfield has won similar accolades for his work in arbitration and mediation, which he has been doing as a member of the commercial arbitrators panel of the American Arbitration Association for more than 20 years.

Retired federal judge William G. Bassler, now an independent arbitrator and mediator, met Steinfield two years ago when both worked in Boston on a case for the Association’s international arbitration division. Bassler was chairing the panel and he and his fellow arbitrators would dine together during the two weeks of the proceeding.

They resolved not to discuss the case over dinner and instead talked about books.

“I was so impressed with Joe Steinfield; he’s a voracious reader,” says Bassler. “He’s introspective and not arrogant despite his incredible credentials.”

Steinfield’s love of reading spills over into a love of writing, and he has written a monthly column for the Monadnock Ledger-Transcript in Peterborough and the Keene Sentinel.

Some of the Ledger-Transcript columns served as the basis for a book, “Claremont Boy: My New Hampshire Roots and the Gift of Memory,” which includes reminiscences on everything from growing up in a mill town where his was only the second Jewish family, to meeting a Hebrew-speaking Muslim from the Northern Caucasus Republic of Adygea.

That meeting came on one of Steinfield’s many overseas teaching sojourns, which have included two trips to Russia, as well as Slovenia and Iceland. He has been an adjunct professor of law at Boston College Law School and the University of New Hampshire School of Law, and also teaches lifelong learning courses on contemporary issues and constitutional law in Keene.

He and his wife, concert pianist Virginia Eskin, maintain homes in Keene and Jaffrey.

*Kathie Ragsdale is a freelance writer based in Chester and a frequent contributor to Bar News.*

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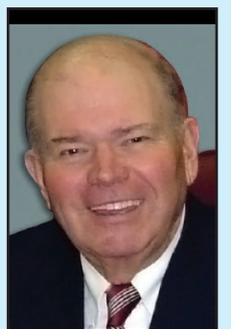
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“Gordon has never been afraid to follow the path or take the action that he believes is right, even when that course may not be the easiest and even when some, including myself, may disagree with him,” Sununu said in the release. “Our Department of Justice is stronger than ever due to Gordon’s leadership and independence, and I am confident that, if confirmed, Gordon will use his unparalleled legal talents and fair-minded approach to lead our judicial branch with distinction.”

In the release, the governor noted that MacDonald has managed a team of over 140 employees at the NH Department of Justice, including more than 60 attorneys, and his accomplishments as attorney general include helping establish the Department’s first-ever Civil Rights Unit. Further, MacDonald spearheaded an effort to create the position of solicitor general, now held by attorney Daniel Will, which consolidated all State appeals under the leadership of a chief legal officer within the Department.

The governor also touted MacDonald’s breadth of experience, from his time as a partner at Nixon Peabody to his service as a volunteer for the NH Bar Association’s Domestic Violence Emergency Project.

A graduate of Dartmouth College and Cornell Law School, MacDonald served as the chair of the NH Board of Bar Examiners and the chair of the NH Supreme Court’s Commission on the New Hampshire Bar in the 21st Century. He was appointed to both positions by the NH Supreme Court.

He is also former chair of the Campaign for Legal Services Leadership Council. MacDonald received the Bar’s Distinguished Service to the Public Award

in 2014 and the John E. Tobin, Jr. Justice Award from the Campaign for Legal Services in 2017.

“The New Hampshire judiciary plays a vital role in the lives of the people of our state,” MacDonald said in a statement. “The prospect of serving as the leader of this branch of government is truly humbling.”

MacDonald, 57, would be the third chief justice in two years to oversee the judicial branch. Former Chief Justice Linda Dalianis retired on April 1, 2018, in advance of her 70th birthday. Dalianis was the first female justice appointed to lead both the NH Superior and Supreme Courts.

MacDonald’s nomination is the third for Sununu. Justice Patrick Donovan, 55, the court’s 109th associate justice, and Justice Anna Barbara “Bobbie” Hantz Marconi, 63, the court’s 108th associate justice, were nominated by Sununu and approved by the Executive Council in 2018 and 2017, respectively.

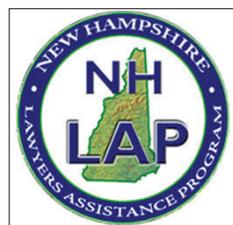
Associate Justice James Bassett, 62, and Senior Associate Justice Gary Hicks, 65, round out the bench. Hicks has the most experience on the Supreme Court — 13 years — and Bassett has served for nearly seven years.

Dalianis weighed in on the nomination in a press release from the governor’s office.

“For many years I have worked with AG MacDonald on legal and judicial issues, and I have the greatest respect for his intellect and thoughtfulness when dealing with matters of import,” Dalianis said. “I have every confidence that he will be an excellent Chief Justice of New Hampshire, and I believe the judicial branch of this state will be in excellent hands with him at the helm.”

## Wellness Tip of the Month: Embrace Non-Alcoholic Alternatives

Whether you are hosting a business function, leading a team-building exercise, throwing a party or just rethinking what you want to have on hand in your fridge, having non-alcoholic alternatives ready to consume is an easy way to signal that drinking alcohol is not necessary. Having pitchers of lemonade or iced teas on tables, seltzer waters with beer in coolers or new and interesting “mocktails” at the bar can help cut alcohol consumption at your next gathering. Small, easy steps go a long way in changing the attitude that alcohol is needed to have a good time.



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<b>SETTLEMENT</b> <b>\$3,750,000.00</b>	<b>Medical Malpractice</b> Mismanaged labor and delivery results in birth injury
<b>SETTLEMENT</b> <b>\$2,250,000.00</b>	<b>Medical Malpractice</b> Improper resuscitation at birth results in neurological injury
<b>VERDICT</b> <b>\$1,950,000.00</b>	<b>Medical Malpractice</b> Inadequate surgical monitoring results in blindness

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## Leaving a Legacy of Justice

*"It is important that we consider this opportunity to give back to the profession that has given so much to each of us over the years, to maintain the high standards of the Bar and the Bar Foundation, and to contribute long after we are gone to the legal needs of those most in need."*  
— Anthony McManus, NHBF Legacy Donors Committee.

In the early years, the Bar Foundation founding members created an endowment in response to offers of donations from several members of the Bar and to recognize future legal and civic programs that would not otherwise qualify for the IOLTA Grant program. The Justice Fund Program was born. During his reign, former Chair Charlie DeGrandpre created the Justice Society as a means to continue feeding the Foundation's Justice Funds. Members of the Justice Society pledged either immediate gifts or planned gifts as a way to carry on their commitment to equal justice for generations to come. In just a few short years, over \$300,000 was

pledged in Legacy donations. Today, the Foundation has 15 endowments with purposes ranging from supporting law-related education to supporting the charitable purposes consistent with the mission of NHBF. Biannual grants are allocated to encourage innovation in the administration of justice, provide community education about the law and improve access to the legal system. This fiscal year, the Foundation expects to award \$95,000 in small grants to non-profit organizations around the state. Past grantees include The Society for the Protection of NH Forests, Catholic Charities of NH, Hope on Haven Hill and the Concord Family YMCA.

### Make Your Mark

By leaving your own Legacy gift, you continue to be part of the Foundation's mission long after retirement, keeping your name alive or memorializing that of a family member. You can choose where your gift goes based on what is important to you. Gifts payable to the Bar Founda-

tion upon the donor's death, like a bequest or a beneficiary designation in a life insurance policy or retirement account are exempt from estate taxes. You can designate a flat dollar amount, or a percentage.

In 1998, then Administrative Judge John Maher and his wife Skye created the Hon. William F. Batchelder Fund in honor of his friend and mentor, designated to "support legal services for the low income and other disadvantaged people in New Hampshire." Over the years, colleagues, friends and family have added to the endowment, making it the Foundation's largest Justice Fund. As a Legacy Donor, the recent late Attorney Bob Winer of Nashua made a generous gift through his estate to the Batchelder Fund. Upon the passing of Judge Batchelder, many donations have been made in his memory. All of these generous gifts will benefit the citizens of New Hampshire for years to come to continue Batchelder's legacy of "grace, integrity and kindness," as described by one donor.

Attorney Anthony McManus, a mem-

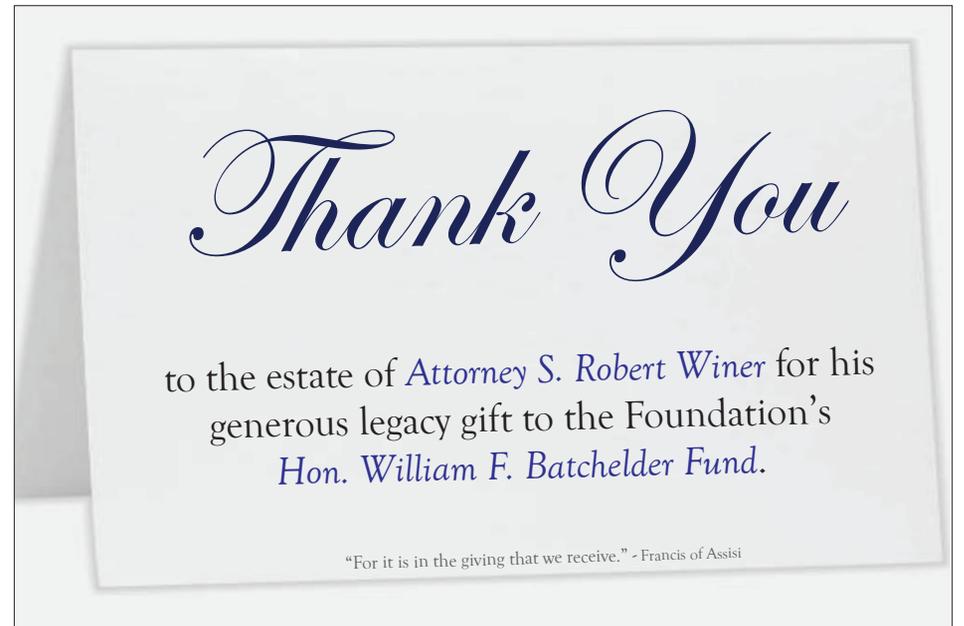
ber of the Foundation's Legacy Donors Committee and a major contributor to this article recently accepted the 2019 Nixon-Zachos award given by the Foundation Fellows. At the close of his acceptance speech, he urged members to add provisions to their estate plan and dedicate a contribution to the future of the Foundation.

"It's only in this way that we can keep alive and honor the work of so many people over so many years and continue to meet the increasing needs of the legal system of our state," McManus said.

*For more information on Legacy Giving, please contact the NH Bar Foundation at (603) 715-3210.*



Attorney Anthony McManus received the 2019 Nixon-Zachos Award at the Fellows Justice Reception. (Left to right) James J. Tenn, Jr, Foundation Co-Chair, David H. Bradley, 2018 recipient, Anthony A. McManus and Jack B. Middleton, Foundation Co-chair and 2016 recipient.





**NEW HAMPSHIRE  
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## Welcome 2019 Foundation Fellows

Left to Right: Donna J. Brown, Jason R. Crance, Daniel J. Feltes, Christine C. List, Susan G. Morrell, Jan P. Myskowski, Paul C. Remus, Kirk C. Simoneau, Kathleen A. Sternenberg, Lisa L. Wolford (missing photo) and Megan A. Yaple.

Community Notes

The University of New Hampshire recently presented a Granite State Award for outstanding contributions to the state to retired New Hampshire Superior Court Justice and World War II veteran **Arthur Bean**. Bean is the NH Bar Association's oldest member.



Bean, who recently celebrated his 100th birthday, attended UNH from 1936 to 1940, leaving the university one class shy of receiving his degree to enter the U.S. Army Air Corps. As a B-17 bomber pilot, he led 29 missions over Germany, and was part of the first wave of bombers when the 8th Air Force launched its 1,300-aircraft as-

sault on Berlin in March 1945. After earning his law degree from Boston University, Bean was an assistant attorney general in the state before opening his own law practice. Named to the N.H. Superior Court in the 1970s, he retired from the bench in 1988, but still worked as a mediator and arbitrator, participating in over 700 cases and working into his 80s.

UNH also surprised Bean with an official degree. "My pride was certainly not good knowing that I didn't graduate and that I should have," Bean told the *Bar News* after he received his diploma. "I was very, very happy."

Bernstein Shur announced that **Ovide Lamontagne** has been elected by his colleagues to serve as a member of the firm's Board of Directors.

Attorney **Jared P. O'Connor**, a Shareholder/Director with Shaheen & Gordon, was honored by the NH Association of Justice as the 2019 Granite State Advocate Award winner. The award is bestowed upon the New Hampshire attorney who "pursues and helps achieve substantial changes in the law of the state which improve our civil justice system, enhance the rights of citizens' access to the courts, preserve the right of

trial by jury or enhance the right of everyone to obtain full, fair and timely remedies for civil wrongs."

The Diocese of Manchester announced that **Meredith Cook** has been appointed to serve as the Diocese's new chancellor. Cook previously served as vice chancellor and associate general legal counsel, and as director of public policy.

**Kimberly J.H. Memmesheimer**, of Hoefle, Phoenix, Gormley & Roberts, was appointed to the board of directors of the Alzheimer's Association's MA/NH chapter.

UNH Law, she focuses on family law, elder law, estate planning and probate.

Rath, Young and Pignatelli announced that **Michael K. O'Neil** joined the firm's Concord office. He is a senior associate supporting the litigation, business and finance and financial institutions practice group.

Preti Flaherty recently announced the arrival of two new Associates: **Bridget M. Denzer** and **Ian B. Huyett**. Denzer, a graduate of Vermont Law School, joined the Environmental Law Practice Group and will work from the firm's Portland office. Huyett, a graduate of Washington & Lee University School of Law, joined the Firm's Litigation Practice Group in Concord.



Attorneys Maureen Raiche Manning (left) and Anna Goulet Zimmerman (right) from Manning and Zimmerman were two of the 70 SHERO honorees recognized on May 15

and serve as role models, were nominated by their peers and colleagues with a donation in their name to the NHWBA. A SHERO Celebration in honor of the nominees was held on May 15 at LaBelle Winery in Amherst.

Coming & Going

**Christine C. List** has joined Primmer Piper Eggleston & Cramer in the Portsmouth, New Hampshire office. She will work within the practice areas of domestic relations, criminal defense, and appellate.

Ransmeier & Spellman recently announced that attorney **Jack Hepburn** joined the firm's Concord office. He is a 2018 graduate of UNH Law and will be working primarily with the firm's conservation and real estate practice groups.

Morneau Law welcomed **Emma D. Stilson** to the firm. A recent graduate of

Local & Specialty Bar News

The **Grafton County Bar Association** held its spring meeting on May 16 and celebrated the retirement of Judge **Thomas Rappa**. Judge Rappa preformed with his band, the Parker Hill Road Band.

There was a business meeting for the **Cheshire County Bar Association** held on May 8. A slate of officers and Board members were voted in for two-year terms: President and Board Member: Benjamin Wyatt; VP and Board Member: Timothy Brock; Treasurer and Board Member: Adam Kossayda; Secretary and Board Member: Angelika Wilkerson; and Board Member at Large: Jane Taylor.

In celebration of its 20th Anniversary in 2018, the **New Hampshire Women's Bar Association** unveiled its SHERO Campaign to honor the women heroes of its members and friends. Over the last year, a total of 70 SHERO honorees, women who are admired

William Foster Batchelder

"There never was any heart truly great and generous, that was not also tender and compassionate."

— Robert Frost

On May 7, 2019, William Foster Batchelder died peacefully at his home in Plymouth, surrounded by his loving family.

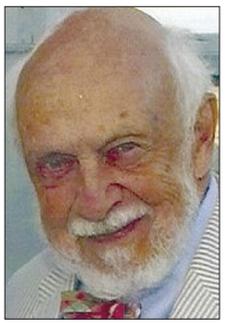
Bill was born in Holderness on Oct. 15, 1926, the only child of Lyman Foster and Ella Fleming Batchelder, both of whom were employed by the Plymouth public school system, Lyman as a custodian and Ella as a second-grade and kindergarten teacher. Bill attended public schools in Plymouth, graduating from Plymouth High School in June 1944. Prior to his graduation, he was enrolled at the University of New Hampshire in December 1943, completing two semesters before he enlisted in the U.S. Navy in October 1944.

On his honorable discharge from the Navy, Bill re-enrolled at the University of New Hampshire, from which he graduated in 1949, and went on to Boston University Law School, obtaining his law degree in 1952.

He then practiced with the Plymouth law firm of William Maynard, later joined by Walter Murphy, and remained in private practice until his appointment by Governor Walter Peterson as a New Hampshire Superior Court Justice in 1970. In 1981, after 11 years on the trial bench, he was appointed by Governor Hugh Gallen to the New Hampshire Supreme Court where he served until his retirement in 1995.

While practicing law in Plymouth, he met, fell in love with and pursued his fu-

ture wife, Elizabeth Hayward, a student at Plymouth Teachers' College, across the pond to England where she was working with a church youth group. They married in 1955 and had six children: Stephen (deceased); Anne Dow (John) of Rumney, Mary Baldwin (Gunnar) of Plymouth, Susan (Joel Page) of East Montpelier, Vermont, Robert (Kimberly) of Sandpoint, Idaho, and David (Bridget Laird) of Seeley Lake, Montana. Bill was blessed with 13 grandchildren and nine great-grandchildren.



Throughout his life, Bill had an unyielding devotion to his wife, family, community and justice. He cherished Squam Lake, the White Mountains, and great food. He had a passion for skiing, hiking, walks on the farm with Betty, gardening, reading, and writing, and he valued his deep companionship with the many dogs he experienced throughout his long life. Beyond his beloved profession, Bill enjoyed holding court with dear friends and family, perched in front of his wood stove with coffee or nice Scotch, embracing family, friendship, scholarship, knowledge, the pursuit of justice and his unbounded love for Betty.

He was widely regarded as a man of integrity and a principled jurist who was committed to reaching fair and impartial

IN MEMORIAM continued on page 12

Kathy's Blog



Kathleen Fortin  
Consultant

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## In Memoriam from page 11

decisions, based on sound legal reasoning and a relentless pursuit of fairness.

Bill will be missed but the seeds of his wisdom leave all whom he touched with hope and love to lift people up and do good. The Batchelder clan and extended family memorialized Bill's passing with an intimate gathering on May 11 at Undercliff Farm, filled with memories, poetry, letters, music, bagpipes, and lots of love.

*In place of calling hours, there will be a Celebration of Life in Bill's honor mid-morning of Sept. 26, at The Barn On-the-Pemi in Plymouth. It would be a privilege for the family to have Bill's friends, neighbors, and colleagues who are so inclined to attend and share in the celebration of Bill's life. In lieu of flowers, please consider donating to the following organizations with which Bill was proud to be associated: The Hon. William F. Batchelder Justice Fund, NH Bar Foundation, 2 Pillsbury Street, Suite 300, Concord, NH 03301 (This fund supports legal services for low-income and other disadvantaged people in New Hampshire); The Young Ladies Library Association, 1 Russell St., Plymouth, NH 03264; Plymouth Historical Society, PO Box 603, Plymouth, NH 03264.*

— The Laconia Daily Sun

### Thomas Archibald Fredenburg

Thomas Archibald Fredenburg, who loved reading other people's obituaries, died on Monday, May 27, 2019, surrounded by family and friends. Tom brought life, energy, and a spirit of social justice to all of the communities he touched.

Tom was born on April 19, 1951, in upstate New York, to Howard Freden-

burg and Elizabeth (Freeman) Fredenburg. He was an avid athlete in his hometown of Cato, New York, playing baseball, basketball, and running cross-country. He attended Oberlin College, where he joined the hippie counterculture and rode with friends in the back of U-Hauls to protests against the Vietnam War.

At Oberlin, Tom met Hilary Thomson, whom he would marry several years later. They spent two years in Huntington, WV, where Tom earned a Master's in Social Work. After deciding that he could do more good with a law degree, Tom studied at Franklin Pierce Law Center in Concord. Tom and Hilary lived in a tent in a campground when they first moved to Concord, and Tom drove a school bus.

Tom's motivation was his love for people, and the guiding principle of all of his projects was that they brought people together. His deep respect and compassion for vulnerable people was part of his professional work as a legal services attorney, and also motivated his other projects. He spent many years at New Hampshire Legal Assistance, representing clients and working on litigation that impacted prison conditions and housing rights.

Later, Tom converted properties into affordable housing in Concord. He recently partnered with the Concord Coalition to End Homelessness to convert a large property on North Main Street into a resource center for the homeless.

Tom also found and built community in Concord through sports, playing basket-



ball in the men's league and coaching innumerable baseball and softball teams. Tom believed that sports gave people an opportunity to become their best selves, and a community the opportunity to come together.

Tom loved music, and sang with various musical groups throughout his life. He sang with the choir at the Unitarian Universalist Church of Concord, and helped found its Wholly Rollers, a men's gospel band. The Wholly Rollers frequently played at fundraisers, including a peace rally at the state house.

In later years, Tom could often be found at the end of a day, having a drink on

the dock, contemplating the view of Snow Pond. Even though he had considered all the facts, Tom Fredenburg chose to be joyful.

He is survived by his wife, Hilary Thomson, his two children, Angus Fredenburg and Maddie Thomson, and his three brothers: John Fredenburg, Hugh Fredenburg, and Ross Fredenburg.

— The Concord Monitor

*In memory of our colleagues, the NHBA Board of Governors has made a contribution to the Bar Foundation.*

## Membership Status Changes

Presented to the Board of Governors May 6, 2019

### Active to INACTIVE:

Tanner, Courtney G., Bedford, NH (April 1)  
 Sia, Beverly S., Bedford, NH (April 1)  
 Regis, Melanie C., Amesbury, MA (April 8)  
 Abbott, Winslow K., Henniker, NH (April 15)  
 Homoleski, Kristina, Auburndale, MA (April 16)

### Active to INACTIVE RETIRED

Geiger, Nancy, Concord, NH (March 18)  
 Robertson, Cindy, Hooksett, NH (March 27)  
 Lenehan, Gary, Stuart, FL (March 20)  
 Hayes, Jillian, Manchester, NH (April 18)  
 Russell, Nancy, Etna, NH (April 19)

### Active to DECEASED:

Keable, Steven, Dover, NH (Oct. 27, 2018)

### Inactive to ACTIVE:

Kowalewski, Melissa, Merrimack, NH (March 22)  
 Sheldon, Gary, Hartford, CT (April 1)  
 Severance, Ethan, Boston, MA (April 12)  
 Dydzak, Theresa, Newport, RI (April 8)  
 Hepburn, Jack, Miller Place, NY (April 15)

### Inactive to INACTIVE RETIRED:

Spickler, Sharon A., Dover, NH (April 1)

### Inactive to Pro Bono Limited

### Active

Hospod, Thomas, Derry, NH (April 8)  
 Mudrick, Melissa, Rindge, NH (April 3)

### Inactive Retired to DECEASED

Connor, Leila G., Manchester, NH (March 29)

### Honorary Inactive to DECEASED:

Harkaway, William, Silver Springs, MD (6/8/2016)



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### Professional Announcements Rates and Sizes for June 2019-May 2020

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1/4 page vertical	\$400	4.92	6.75
1/2 page horizontal	\$595	10	6.75
Full page	\$1165	10	13.63

Additional \$50 charge for color

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### SENDS BEST WISHES TO WILLIAM PRIBIS

After more than 23 years of service to our firm and our clients, Bill Pribis has left the practice of law to pursue an opportunity in the field of education. Bill has spent his entire legal career with Cleveland, Waters and Bass as a dedicated litigation attorney, director and shareholder. Although we will miss his contributions to the firm, we wish Bill success and happiness in his new adventures.



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Takes pride and pleasure in announcing that  
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Michael is a Senior Associate supporting the Litigation, Business and Finance and Financial Institutions Practice Groups. He is admitted to practice in Massachusetts and New Hampshire. He will be working from our Concord office and may be contacted by phone at (603) 226-2600 or mko@rathlaw.com.

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ATTORNEYS AT LAW

Is pleased to announce that  
Attorney Jack Hepburn  
has joined our firm in our Concord office.

Jack joined the firm this April. He received his J.D. from the University of New Hampshire Law School in 2018 and earned his B.A., in Environmental Studies from Green Mountain College in Vermont in 2015. He will be working primarily with the Firm's conservation and real estate practice groups.



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is thrilled to welcome  
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to the team!

Emma recently graduated from the University of New Hampshire Franklin Pierce School of Law in the Daniel Webster Scholars Program and looks forward to bringing her calm and reassuring attitude to help our Clients navigate emotionally-charged situations. She focuses on family law, elder law, estate planning and probate.

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# NH Pro Bono Welcomes Summer Interns

The New Hampshire Bar Association's Pro Bono Referral Program recently welcomed two interns to the Bar Center for the summer.

**Lara Gilroy** has joined the Bar as pro bono intern for the summer. Originally from Virginia, she received her bachelor's degree from American University and is entering her third year at UNH Franklin Pierce School of Law. She was interested in joining the Pro Bono Program because it allows her to work directly with clients and make a real impact on their lives. After graduation, Gilroy hopes to continue to use her law degree to help others. She enjoys hiking, playing piano, fly fishing, indoor cycling, cooking, and spending time with her husband and Lab-Shepard mix.



**Adrián Coss** comes to the Bar fresh off his first year at UNH Law. He is originally from Nogales, Arizona and

is a first-generation US citizen. He graduated from Arizona State University with a BA in English Literature and BS in Business Management. Coss also served as an infantryman in the Army National Guard from 2004-2015 with a deployment to Afghanistan from 2007-2008.



After obtaining his undergraduate degrees, he taught 9th and 11th grade English for two years in St. Louis, MO through Teach for America; he also served as the assistant coach for the school's varsity baseball team. After leaving the classroom, Coss was a patient advocate at Casa de Salud, a community health center for immigrants and refugees in the St. Louis region for two years.

Before starting law school, Coss was the Pro Bono Coordinator for the Volunteer Lawyers Project of the Boston Bar Association. This summer, Adrián is interning at the



NH Bar Association's Low-income Taxpayer and the Domestic Violence Emergency (DOVE) Projects.

Coss' desire to enter the legal profession is rooted in his passion for public interest, racial and social justice, and civil rights. He has identified two specific legal goals: to argue a case before the US Supreme Court and to be a go-to attorney for a community centered activist group.

When he is not retina-deep in casebooks, Coss is an avid reader and obsessive baseball fan. As a proud Arizona native, he is a begrudgingly loyal Diamondbacks fan but has developed an affinity for the Red Sox; you can hear him singing or humming "Take Me Out to The Ball Game" all of opening day.

Welcome, Lara and Adrián!

## Bar Thanks Lawline Volunteers

The New Hampshire Bar would like to thank Donahue, Tucker, and Ciandella for hosting Lawline on May 8. This month was a multi-firm effort, with several attorneys joining DTC for the evening to ensure there was someone to answer questions regarding family law and bankruptcy. There were 50 phone calls taken that evening with Hillsborough County producing the most calls. Family law was the most asked about topic, with probate and consumer law right behind them.

Participating DTC attorneys were Kate Miller, Douglas

Mansfield, Beth MacDonald, Eric Maher, Chris Boldt, Heidi Barrett-Kitchen, Bob Derosier, Amelia Sreter, and Austin Mikolaities. Visiting attorneys Amy Connolly, Teresa Mahoney Mullen, and Cheryl Deshaies helped field calls related to family law and bankruptcy. Directing phone calls that evening was Miko Griswold.

Thank you to Amy Bertolino and Priscilla Lord for coordinating the evening. The NH Bar is grateful to have attorneys and staff volunteer their time for this important public service.

We are now beginning to fill our 2020 calendar! If you would like to participate in a fun, after-hours event with your colleagues (with dinner provided by the Bar!) please contact [YBorghetti@nhbar.org](mailto:YBorghetti@nhbar.org).

Lawline is held the second Wednesday of every month (note that this day was listed incorrectly in last month's *Bar News*), usually at a firm's office; currently February, April, May, June, July, October and December are available.

We are extremely thankful to all our volunteers, past and present.

## Check the Box Support ProBono

Check the box on your annual dues statement to make a tax-deductible donation to the NHBA Pro Bono Referral Program. Your contribution supports the legal efforts of volunteer attorneys, making a real difference for the most vulnerable and needy in our communities.

*"It's satisfying work, and it makes the world a better place."*

– Marilyn Mahoney,  
Manchester attorney

*"Your program changed my life for the better."*

– Kelsey G.  
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# Quid Pro Bono Golf Tournament

Thursday, August 8, 2019

Lake Sunapee Country Club, New London

Please join us at a Quid Pro Bono Golf tournament to help celebrate 26 years of “great golf for a great cause!” The Pro Bono Referral Program is a New Hampshire nonprofit devoted to helping those in need of free legal assistance. By linking low-income clients with volunteer lawyers, Pro Bono brings help and hope to New Hampshire’s most disadvantaged and vulnerable citizens. Some examples of our work include:

- helping domestic violence and stalking victims secure protective orders through the courts;
- assisting families in keeping a roof over their heads when job loss or illness strikes;
- helping elders make financial and other plans when faced with debilitating diseases;
- assuring children receive the financial support to which they are legally entitled;
- and much more!

## Player Registration is now open!

### CONTESTS:

Closest to the Pin, Longest Drive, Hole in One, Putting as well as 1st, 2nd, and 3rd Place Teams

### FEES:

\$140 per person (covers green fees and cart costs in addition to a tax-deductible donation to the Pro Bono Program)

\$119 for Attorneys Admitted to the NHBA after 2014

Golfers may sign up as a team or individually; single players will be matched up with teams. The field is limited to the first 120 players. All payments are due by August 2, 2019. Checks made out to the “NH Pro Bono Program” may be sent to NH Pro Bono Program, 2 Pillsbury Street, Suite 300, Concord, NH 03301. Credit Card payments accepted through the online store at [www.nhbar.org](http://www.nhbar.org).

Please email: [probono@nhbar.org](mailto:probono@nhbar.org) for links to online registration form, or, for returning players, just send us an email with your team information. Thank you!

Please make checks payable to:  
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# Remembering Justice William Batchelder



*Editor's Note: After the death of former NH Supreme Court Justice William Foster Batchelder on May 7 at 92 years old, a number of Bar members shared their memories of the beloved judge. Several are collected here as well as photos and a tribute from our archives. The Plymouth resident spent two-and-a-half decades on the bench, including 14 years on the Supreme Court. Throughout his life, the judge known as "Billy Batch" to the Plymouth community had "an unyielding devotion to his wife, family, community and justice." He was honored by Plymouth State University in 2009 for distinguished public service (see photo of Bill and his wife, Betty, page 17).*

## A Model Justice to Emulate

*Editor's Note: This article is reprinted with permission from the May 24 edition of the NH Business Review. Following its original publication, Governor Sununu nominated Gordon MacDonald as the next Chief Justice of the New Hampshire Supreme Court (see page 1).*



judges willing to serve at salaries far below what they could earn in private practice for the good of New Hampshire's people.

Batchelder's passing, and the upcoming retirement of Chief Justice Lynn, who has served in that position for only a little over a year, points out a fundamental feature of New Hampshire governmental life that is usually under the radar — in New Hampshire, governors, with very little other power, do have the power to appoint our judges, and it only takes three votes on the Executive Council to confirm them to their "lifetime" positions.

While U.S. Supreme Court appointments get incredibly careful scrutiny by those on all sides of the ideological spectrum, New Hampshire judicial appointees seldom get the same scrutiny.

The New Hampshire Supreme Court has five members, so any appointment is important, especially in the fraction of cases that have political or philosophical ramifications. Most of the cases before a supreme court, are routine interpretations of laws that are crying out for a decision when the intent of the legislature is not clear. However, on major issues such as abortion, immigration and family issues nationally, and school funding and other sensitive issues locally, the composition of the court ideologically or philosophically can matter.

Currently, the remaining four justices on the New Hampshire Supreme Court are somewhat split, if the reputations of the judges can be any predictor. Judge Gary Hicks, a Democratic appointee, and judge James Bassett, a moderate Republican, appear to be traditional, moderate New Hampshire judges. Two Sununu appointees, Anna Barbara "Bobbie" Hantz Marconi (one of my former law partners and a good friend) and Associate Justice Patrick E. Donovan, a former assistant attorney general, are assumed to be more conservative.

In any event, while the Legislature slugs it out on prominent issues, Sununu's search for a replacement for Lynn and for a new chief justice should not be overlooked as an important event and may be Governor Sununu's longest-lasting contribution to New Hampshire law, justice and public life.

William F. Batchelder would be a good model for him to emulate.

**By Brad Cook**

The death of William Batchelder is a reminder of the importance of the NH Supreme Court

William F. Batchelder, a New Hampshire Supreme Court justice from 1981 to 1995 and Superior Court judge from 1970 to 1981, died May 7. He was a kind, intelligent, moderate and distinguished justice noted for his friendly demeanor and thoughtful decisions.

Batchelder was a well-respected attorney in Plymouth before Gov. Walter Peterson appointed him to the Superior Court in 1970. Like many of Peterson's appointments, Batchelder came from the firm center of New Hampshire life and politics, being one of those moderate Republicans who did so much for New Hampshire and then the nation in the following years.

As a young attorney, I heard many stories from the senior members of our firm, especially William L. Phinney, who was a close friend of Batchelder's, about what a wise and thoughtful colleague he was in practice.

During his long career, he was honored by many, but no greater accolade could be given to him than that stated by Chief Justice Robert J. Lynn on his death: "I think the best tribute to Justice Batchelder is that because of his kind and caring nature, he never lost sight of what was truly important in life. For Bill, that meant showing concern for the little guy, and, most of all, loving his family, who adored him."

Batchelder gained some notoriety as a participant in the Claremont lawsuit as a judge in the majority. After his mandatory retirement at age 70, his designation to sit with the court when judges had to recuse themselves led to a banning of that practice by the Legislature in what can only be described as a petty shot at Batchelder's moderate positions.

His service pointed out the value of the New Hampshire judiciary's independence and the luck we have had in having talented

### "Don't lie. Don't Cheat. Don't Steal"

"Judges, lawyers, jurors, witnesses, and spectators were always impressed with his thorough preparation and his easy, quiet, almost self-deprecating manner of addressing issues, particularly to juries. I can also recall instances in which some opponent would mistreat him or one of his clients or witnesses, and while I would be ready to fight fire with fire, his cooler head would prevail, maintaining steadfast in his commitment to keep the high ground, invariably with positive results. There are at least two telltales which now can be told: on cross-examination, if his question began with the word 'incidentally,' you could be certain that the *coup de grace* was being delivered. If he became upset with anyone because of some behavior which he perceived as outrageous or egregious, he would

invariably start his response by saying: 'Look, my friend,' an expression I'm told he continued to put good use during his years on both the Superior and Supreme Court bench. ...

In years past he has summed up his advice to the newly-sworn members of the Bar by simply recommending 'don't lie, don't cheat, don't steal.' As Daniel Webster once put it: 'Tell me a man is dishonest, and I will answer he is no lawyer. He cannot be, because he is careless and reckless of justice; the law is not in his heart, is not the standard and rule of his conduct.' Mr. Webster would have admired Bill."

— **Hon. Walter L. Murphy**, in a tribute to Justice Batchelder published in the *NH Bar Journal*, March 1996



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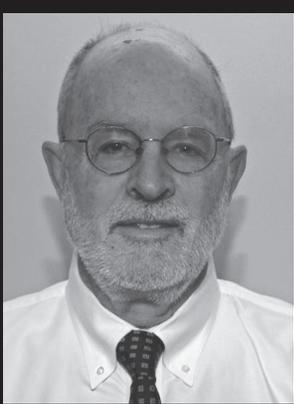
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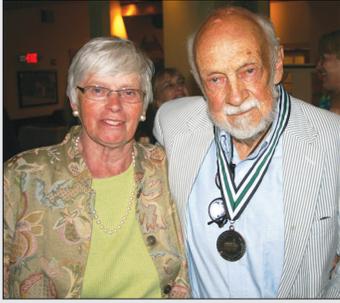


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## A Commitment to Equality Under the Law

While Judge Batchelder is well known for his exemplary service as a Superior Court justice, he made one of his greatest contributions to the cause of equal justice for all while sitting temporarily as a justice of the Supreme Court.

His opinion in *Britton v. Town of Chester*, 134 N.H. 434 (1991), was the single most important advance in what has been a decades-long effort to dismantle barriers to the creation of affordable housing for low and moderate income families in suburbia. *Brit-*



ton involved a challenge to the zoning ordinance of the Town of Chester by a developer and low and moderate income persons, who claimed that the ordinance as applied amounted to a de facto ban on the development of any kind of multifamily housing in Chester. Writing for a unanimous court, Judge Batchelder's opinion struck at the core of NIMBYism (not in my backyard) in four important ways.

First, it recognized that local land use regulations can have serious adverse effects well beyond the borders of a given municipality, and when this occurs such regulations must give way to the welfare of the region of which it is a part.

Second, the opinion recognized that when a town enacts a zoning ordinance that fails to provide reasonable opportunities for the development of housing for low and moderate income people, it con-

travenes the general welfare of the region in which it is situated.

Third, and perhaps most importantly, Judge Batchelder's opinion firmly upheld the close scrutiny to which the trial court subjected the town's zoning ordinance to examine whether the opportunities for the development of affordable housing which existed on paper were, in fact, reasonable and realistic.

Finally, the decision upheld the grant of a "builder's remedy"—a court-ordered building permit—to a successful litigant-developer who proposes a development that provides housing for low and moderate income families, and is consistent with sound zoning concepts and environmental concerns.

Judge Batchelder's opinion in *Britton* formed the basis for New Hampshire's "Workforce Housing" statute (RSA 674:59 et seq.), which continues to expand critically needed housing opportunities for low and moderate income families. His opinion in *Britton* should come as no surprise to anyone who was familiar with his career. He had a steadfast commitment to equality under the law. When confronted with the use of law at the local level to deny equal opportunity to low and moderate income families, he acted decisively in accordance with that commitment.

— Elliott Berry

## He Always Kept the Ball in Play



From the archives

Justice Batchelder (far right) at the Bar's Quid Pro Bono Golf Tournament in 2005.

John Maher said he got to know Justice Batchelder when Maher became a member of the administrative council for the judicial branch in 1990.

"It was really a new venture — before that, it was just top-down management by the Supreme Court," Maher recalled. "What Justice Batchelder did was he molded that group of four people and put us together in a way, a working relationship, where the other courts could get our perspective on things and we could get the perspective of the other courts. ... It became a very professional way of doing business for the court system."

Maher said Batchelder created an atmosphere of giving and openness.

"As a result of that, when the Bar Foundation was considering developing funds ... my wife and I said, 'What better way to pay tribute to the man who actually was the most helpful to me in my professional career — Justice Batchelder?'" Maher said.

(To learn more about the Bar Foundation, see page 10)

Outside of the courtroom, Maher and Batchelder also golfed together.

"His favorite slogan when he would get a good shot was, 'That dog will hunt!'" Maher remembers. "He always kept it in play; he never got upset ..."



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# Moving to a Paperless Law Firm: 3 Tips for Working With PDFs

By Nicole Black

In the past year, there has been an increased interest in moving to paperless law firms. This is because in many jurisdictions, e-filing is becoming a requirement. As the courts make this transition to e-filing, law firms are feeling the pressure to digitize their documents and establish a paperless workflow.

The problem is that this is easier said than done. After all, there's more to a paperless law firm than simply creating digital documents. Processes need to be established that will ensure that every document that enters the firm is scanned, entered into the firm's document management or law practice management system using appropriate naming conventions, and filed in a way that makes the document easily searchable and accessible.

An important part of setting up a paperless workflow that is efficient and streamlined is to ensure that everyone in the firm understands how to work with the most common digital document format: PDFs. PDFs are the backbone of a paperless law firm, and the more familiarity members of your firm have working with PDF documents, the better.

If your firm is paperless or is in the process of transitioning to a paperless environment and you haven't yet trained your staff on the ins and outs of working with PDFs, never fear. You've come to the right place!



This very topic was covered by two experts in February at the ABA Techshow in Chicago. During this presentation — “Polish Your PDF: Beyond the Basics” — Daniel Siegal and Richard Ferguson offered lots of great advice to get you up to speed on using PDFs in a paperless law firm.

### The many benefits of PDFs

PDF documents offer a host of benefits that make them incredibly easy to work with. For starters, when you scan any type of file, once you save it in Adobe Acrobat, you can convert it into OCR (optical character recognition) format, thus making the document instantly editable and searchable. You can also combine multiple scanned files into a single PDF, making it easier to categorize and organize certain types of documents.

Another benefit of working with PDF files is that this format allows you to easily compare two documents so that you can locate any differences between them. PDFs also facilitate collaboration. As the presenters explained, PDF documents can be highlighted, annotated, and comments can be

added in the sidebar. Finally, another benefit that the presenters shared was that the creation of forms is easily accomplished using PDF software.

### Properly redacting documents

Knowing how to properly redact PDF documents is an important skill. In recent years, there have been many publicly shared examples of PDF redaction gone awry in the legal space. If PDF documents are not properly redacted, it's often a simple matter of copy and pasting text from a PDF document into word processing software in order to view the redacted sections.

For that reason, the presenters emphasized the necessity of having a thorough understanding of PDFs so that you can correctly redact them. As the presenters explained, avoid taking shortcuts, such as placing a comment box over select text, since the comment box can be easily deleted, thus revealing the text behind it. If you're not sure how to go about redacting a PDF, find a detailed explanation of how to remove sensitive content from PDF documents through

proper redaction using Adobe Acrobat at: <https://helpx.adobe.com/acrobat/using/removing-sensitive-content-pdfs.html>

### How to create secure PDFs

And last, but not least, the presenters shared advice on how to create secure PDFs. The documents created by lawyers often include sensitive data, which then needs to be shared with others, including clients, expert witnesses, and co-counsel. The good news is that Adobe Acrobat makes it easy to password-protect documents so that they will be safe from prying eyes.

According to the presenters, one way to do this is to create a security envelope using a template. Once you've done so, you choose the documents that you want to place in the password-protected security envelope and then send it to the client or other recipient, who can then open it in Adobe Acrobat after entering the required password. For even more ways to secure your PDFs using Adobe Acrobat check out this blog post: <https://helpx.adobe.com/acrobat/using/choosing-security-method-pdfs.html>.

So there you have it! Lots of great ideas to get you on the path to working with PDFs in a paperless law firm.

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## Small Business Issues Facing Counterfeiting in an Age of Increasing Globalization

By Chelsea VanderWoude

Modern technology allows small companies to easily sell their wares on websites such as Amazon® side-by-side with large companies and reach markets that were beyond imagination — and beyond budget — not so long ago.

But such a wide reach has its downsides. Small businesses, now with the same market reach as large companies, may be exposed to problems such as counterfeiting and intellectual property (IP) theft which were historically problems of Fortune 500 companies.

Without the budget of a Fortune 500 company, what options does a small business have if a counterfeiter steals its brand and business? Depending on the circumstances, any size company may have a wide variety of intellectual property protections including patents and trade secrets. This article focuses specifically on trademark and copyright protections available in case a counterfeiting issue arises and possible steps to take before such a problem arises. Consider a hypothetical:

*Small Co. is a small business in Nashua, NH and has been selling widgets with a large housing and a small consumable (i.e. printer cartridges or single-use coffee pods) for several years. Since its inception, sales of their widget have exploded domestically and internationally, and Small Co. sourced its manufacturing and distribution base to Asia. Small Co. owns U.S. and internationally registered trademarks for the widget's brand name, as well as a utility*



*patent on the functionality of the widget.*

*Small Co. begins to receive complaints from customers that replacement consumables ordered from Small Co. are defective and breaking their widgets. However, Small Co. has no record of sales of the replacement consumable to the identified customers.*

*Small Co. then discovers third parties are selling the widget's consumable replacements online, side-by-side with Small Co. itself — but at a price lower than Small Co.'s. Compounding the issue, Small Co. discovers that the third parties appear to be associating themselves with Small Co. itself, e.g., by using Small Co.'s own product descriptions and product-listing imag-*

*es which appear to be taken directly from Small Co.'s website and advertisements.*

*Small Co. orders some of these replacement consumables from two of these third-party sellers. The products arrive appearing to be poorly made and the packaging also appears to be only slightly different from Small Co.'s.*

*Small Co. believes it has a counterfeiting problem that is costing the company money, sales, and (potentially) reputation.*

*What options are available to Small Co.? They do not have any patent protections over the consumable itself and they do not have valid contact information to serve the entities that are selling the complained-of consumable products.*

### Trademarks

Small Co.'s best option may be to consider a claim for trade dress infringement and/or trademark infringement on the basis that the alleged counterfeiters are copying Small Co.'s packaging and utilizing Small Co.'s trademarks in its marketing in a manner that has caused confusion in the marketplace. The problem, however, is how to advance such claim either informally to the third-party entity, or formally by way of an actual lawsuit. Two initial options are therefore worth consideration.

First, filing trademark registrations with Customs, both in the U.S. and China, if Small Co. has not yet taken such measures. Such should preferably include the word marks of Small Co. as well as those design elements that Small Co. has utilized on its packaging to similarly distinguish its consumable product replacement line of goods. Registering trademarks with Customs can prevent third-parties from importing and exporting goods with the registered trademark unless they are on the trademark owner's approved list of distributors. However, this approach does not do much to prevent infringing importers from concealing infringing materials inside unlabeled, plain shipping boxes. Nevertheless, if the entities in the hypothetical above are shipping the complained-of products into the USA, utilizing trademarks and other design features of Small Co., on their containers, it can serve as an effective method to restrict such activity.

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## So You Think You Can Use Your Trademark Outside the U.S.?

By Peter Kunin

Trademarks are among the most valuable assets owned by companies that focus on individual consumers — from breweries to start-up app developers. Trademarks protect brands and can be found in the form of words (COCA COLA), symbols (Nike's swoosh), and slogans (SHAVE TIME. SHAVE MONEY owned by Dollar Shave Club). However, many smaller U.S. companies do not fully appreciate the need to protect their ability to expand their use of their brands into international markets. This article provides an introduction to the benefits and pitfalls of international trademark protection, with a brief discussion of recent developments in China and Canada.

Many U.S. companies understand the need to register their important trademarks with the U.S. Patent and Trademark Office (USPTO). Registration in the USPTO is not essential, but provides valuable benefits to the trademark owner, such as presumptions of ownership, validity, nationwide priority as of the filing date, and availability of enhanced damages. Under U.S. law, U.S. citizens and U.S. companies can obtain federal trademark registrations only if they have sold their products or services under the trademark. The USPTO requires U.S. trademark applicants to submit evidence of their use of their trademark as well as a signed affidavit regarding their use of the trademark.

By contrast, the vast majority of foreign countries allow companies and individuals to obtain national trademark registrations simply by filing a trademark application with the national trademark of-

“Thus, outside the U.S., there is far greater power accorded to individuals and companies who seek to profit from registering other companies' trademarks, known as trolls and squatters.”

office. Generally, if no third party owns a related mark for related products or services, and if no third party brings an opposition action to block the application, the national trademark office will grant the trademark registration to the applicant — even if the applicant has never used the trademark and has not demonstrated any intent to use the trademark. And unlike patent applications, trademark applications are relatively inexpensive. Thus, outside the U.S., there is far greater power accorded to individuals and companies who seek to profit from registering other companies' trademarks, known as trolls and squatters.

U.S. companies who are selling their products or services abroad, who plan to do so at some point, or who simply wish to do so in order to make them more attractive to investors or potential acquirers, often face a challenge. Their trademark applications can be blocked by national trademark offices or by foreign companies that own related marks. To help avoid this possible stumbling block, U.S. companies should give consideration to foreign trademark applications early — ideally at the time they adopt and first launch their U.S. brands.

Two recent developments highlight the increased challenges faced by U.S. companies. First, China has witnessed an explo-

sion in trademark filings. In 2016, there were 3.6 million trademark applications filed in China. That number increased to 5.7 million trademark applications in 2017. And in 2018, there were almost 7.4 million trademark applications filed in China. Included in these 7.4 million applications are a significant number of applications filed by applicants who do not plan to use the trademark for some or any of the products or services covered by the registration. Anecdotally, I find China to be one of the more difficult countries in which to obtain a trademark registration, largely because the Chinese trademark office readily finds conflicting third-party trademarks that trigger a refusal of my client's application.

Second, Canada is poised to dramatically change its trademark laws, effective June 17, 2019. Among the changes, Canadian trademark applicants will no longer need to use their marks in Canada as a precondition to obtaining a Canadian trademark registration. Canadian commentators predict that trolls and squatters will search the U.S. trademark database for brands that are unprotected in the U.S., and then will file trademark applications for these unprotected brands. One Canadian trademark lawyer told me that he expects a “gold rush” of new trademark filings in Canada. There is

some evidence that this wave of new filings is underway already.

Now, a U.S. applicant is not defenseless. For example, in China, Canada, the EU and other jurisdictions that do not require use before obtaining the registration, these trademark registrations have a shelf life, at least potentially. For example, if the owner of the trademark registration fails to use the mark for a period of years (three years in China, five years in the EU, and three years in Canada), in certain circumstances, brand owners can bring legal proceedings to block a third party application or cancel a registration based on prior use, but this can be uncertain, expensive, and time consuming.

Thus, all trademark owners should regularly review their trademark portfolios and consider filing foreign applications. Protection outside the U.S. can be obtained by filing foreign applications directly with the national trademark offices of foreign countries, or through an international trademark application filed directly with the USPTO and administered through the World Intellectual Property Organization. The strategic options available to U.S. companies seeking foreign trademark protection are beyond the scope of this article. But all companies should remain mindful that their U.S. trademark registrations are valuable here in the U.S. but provide virtually no protection once these companies leave home.

*Peter Kunin is the Managing Director at Downs Rachlin Martin. His practice focuses on trademarks, software and technology licensing, and copyrights. He can be reached at pkunin@drm.com or (802) 846-8342.*

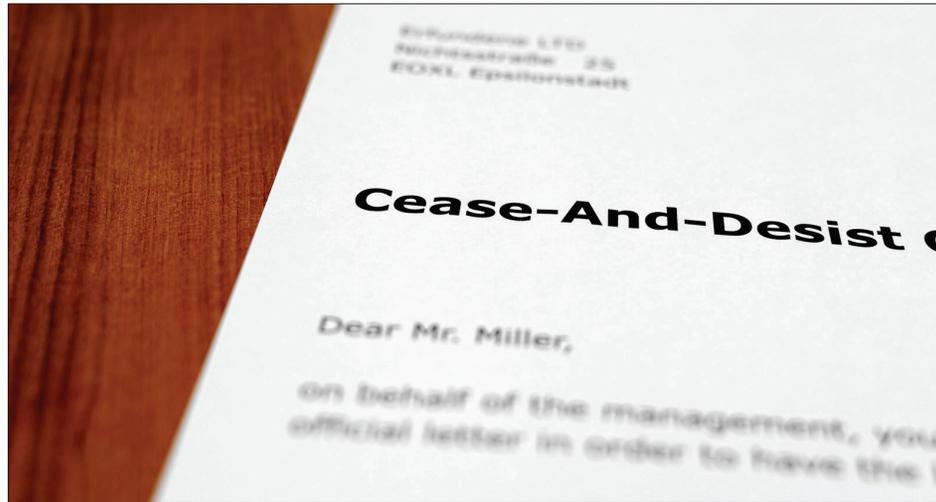
## Important Considerations When Your Client Receives or Plans to Send Cease-and-Desist Letter for Patent Infringement

By Jeremy Walker

Several large verdicts for patent infringement against household names such as Apple, Groupon, and Samsung illustrate the potentially severe consequences that companies face when accused of patent infringement. Patent infringement litigation is often preceded by the accused party receiving a “cease-and-desist” letter. Although most businesses take cease-and-desist letters seriously, others dismiss them as nothing more than a heavy-handed tactic from a spirited competitor. Simply ignoring cease-and-desist letters is not good business practice, and doing so may prove to be a costly mistake.

Patent infringement in the United States occurs when someone makes, uses, sells, offers for sale, or imports a technology or product that is the subject of an enforceable patent. 35 U.S.C. § 271. Whether an accused infringer knew of the patent at issue is irrelevant to a court’s determination of whether there was infringement. The accused infringer’s knowledge of a patent, however, may be relevant to the assessment of damages for infringement of that patent, and cease-and-desist letters often play an important role in laying the groundwork for increased damages.

A patent owner can recover damages for another’s past infringement only if the infringer had constructive or actual knowl-



edge of the patent at issue. 35 U.S.C. § 287. Infringers are considered to have constructive knowledge of a patent if a patent owner had consistently marked its products covered by the patent with the patent number. Actual notice is just what the term implies, and businesses commonly receive actual notice by way of a letter accusing it of infringing a particular patent.

Upon being accused of infringing a patent, a business should exercise due care to determine whether or not it is infringing the patent. If a business fails to exercise reasonable care under the circumstances, and continues with activity that is later found by a court to be infringing, it

may be found liable for “willful” infringement. Companies found to have willfully infringed another’s patent may be ordered to pay up to treble damages and attorney’s fees to the patent owner. For example, in a recent case in a federal court in California, a jury awarded a verdict of \$130 million for infringement of patents related to ear implants used by the hearing impaired. After protracted litigation that extended a number of years, the judge ultimately found willful infringement by the accused and then doubled the jury verdict. *Alfred E. Mann Foundation for Scientific Research v. Cochlear Corp.*, 2018 WL 6190604 (C.D. Calif. Nov. 14, 2018).

So what should a business do if it receives a cease-and-desist letter or a similar letter notifying it that its technology or products may be infringing a particular patent? Certainly it should not just ignore the letter. If the business intends to continue using the technology or product at issue, it should take reasonable measures to assess in good faith whether doing so would infringe the patent.

What are reasonable measures in this situation? The law has fluctuated over the past two decades, and there is no single answer that fits all situations. Generally speaking, courts in patent infringement actions look to all the relevant circumstances to determine whether a party, upon actual notice of a patent, took adequate steps so as not to recklessly disregard the rights of the patent holder. Under earlier legal precedent, accused infringers essentially were required to seek the advice of competent patent counsel to determine whether it was infringing the patent. *Underwater Devices Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380 (1983). Recent decisions by the United States Supreme Court and changes to federal law have relaxed the requirement of obtaining a legal opinion of noninfringement to avoid a finding of willful infringement. See, *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016);

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## Copyright Owners Take Note — Registration Means Registration

### *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*

By Douglas G. Verge

Under current United States copyright law, registration of the copyright in a work is not necessary to create the copyright itself. To the contrary, copyright is created in a work the moment the work is fixed in a tangible format (such as on a piece of paper, on a compact disc, or even on a computer hard drive). But that does not mean that there is no good reason to register the copyright in the work.

Two of the most important reasons to timely register a copyright in a work are (1) to be able to institute a copyright infringement action, and (2) to be able to recover statutory damages and attorneys' fees. Under United States copyright law, registration is a prerequisite to bringing a lawsuit, and if an unpublished work is not registered prior to the infringement, or if a published work is not registered within three months of the date of first publication of the work, the applicant will not be entitled to recover statutory damages or attorneys' fees.

This latter point is particularly significant because often it is difficult to prove actual damages in a case of copyright infringement. Statutory damages entitle a plaintiff to recover damages for infringement of a work in an amount between \$750 - \$30,000, and where infringement is willful, enhanced damages up to \$150,000.



The difficulty for many copyright infringement plaintiffs has been the timing of obtaining registration for the copyright. Imagine that you just distributed your self-published book and within a month find out that someone has infringed your copyright by copying and displaying on the internet large portions of your book. So you hurry up and file your copyright application along with the required fee and deposit of your work. At that point you are all set, right? Prior to March 4, 2019, the answer largely depended on which court you brought the lawsuit in. Some courts took the position that because the date of registration relates back to the date the application was filed along with the fee and deposit, the copy-

right was "registered" as of the filing date. Other courts took the position that registration did not occur until after the copyright office examined the application and issued a registration certificate.

In *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC* (No. 17-571), decided on March 4, 2019, the United States Supreme Court finally put an end to this long-standing dispute, holding that registration means registration — a work is not registered until the Copyright Office examines the work and issues a certificate of registration. The Court's decision has significant ramifications for copyright plaintiffs. One of the most significant aspects relates to the timing in which copyright infringe-

ment actions may be instituted. It typically takes at least seven months for the Copyright Office to examine a copyright application and issue a registration certificate. In practical terms, this means a copyright plaintiff would usually have to wait at least seven months before being able to bring a lawsuit to seek an injunction and recover damages.

There is an option, however, for copyright applicants to seek expedited handling of their copyright applications. Rather than the minimal \$35 fee applicable in many cases to register a work online, an applicant can pay the Copyright Office \$800 and the Copyright Office will typically (but no guarantee) process the application within five working days from the date of filing the application. Even with the expedited handling, if the registration certificate is not obtained prior to the infringement with regard to unpublished works, or within three months of the date of first publication for published works, the applicant will not be entitled to recover statutory damages or attorneys' fees. Accordingly, the expedited handling would only help if the registration certificate is received before any infringement occurs, or, if the work is published, if the expedited certificate is received within a period of three months after the date of first publication.

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# Mission Accomplished: Supreme Court Rules Trademark Licenses Survive Bankruptcy

By Lisa N. Thompson

On May 20, 2019, the U.S. Supreme Court in *Mission Product Holdings, Inc. v. Tempnology LLC*, finally resolved a circuit split regarding the rights of a trademark licensee when the trademark licensor files a bankruptcy petition and rejects the trademark license under Section 365 of the Bankruptcy Code.

The case involved a license granted by Tempnology, LLC (Tempnology) to Mission Product Holdings, Inc. (Mission), to use its “COOLCORE” and “DR COOL” trademarks on athletic apparel. The trademark license was due to expire in July 2016. However, in September 2015, Tempnology filed for bankruptcy reorganization under Chapter 11 and rejected the license agreement pursuant to Section 365 of the Bankruptcy Code. Tempnology argued that it could no longer maintain quality control over the licensed trademarks and sought to terminate Mission’s rights under the license.

In 2015, Mission filed suit in the U.S. Bankruptcy Court for the District of New Hampshire to determine whether Tempnology’s rejection of the license agreement revoked its existing rights to continue using the licensed trademarks. The Bankruptcy Court approved the rejection, relying on the Court of Appeals for the Fourth Circuit’s holding in *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985), and held that the rejection terminated Mission’s right to use



the licensed trademarks.

In November 2016, the Bankruptcy Appellate Panel for the First Circuit reversed the Bankruptcy Court’s ruling, and in a major shift, relied on the Court of Appeals for the Seventh Circuit’s holding in *Sunbeam Products, Inc. v. Chicago American Manufacturing, LLC*, 686 F.3d 372 (7th Cir. 2012). In *Sunbeam*, the Seventh Circuit expressly rejected the *Lubrizol* decision, and held that while rejection of a trademark license does terminate a debtor-licensor’s performance obligations, including its obligation, under trademark law, to continue to police use of the licensed trademarks and exercise control over the quality of the trademarked products, such rejection, however, does not terminate a licensee’s right to use the licensed trademarks.

In January 2018, the Court of Appeals for the First Circuit, in a 2-1 decision, reversed the ruling of the Bankruptcy Appellate Panel, affirming the Bankruptcy Court’s decision. The First Circuit, relying on *Lubrizol*, held that the rejection of the trademark license by Tempnology terminated Mission’s rights to use the licensed trademarks. The First Circuit’s rationale for embracing the reasoning of *Lubrizol* was the *Sunbeam* approach would burden the debtor-licensor with having to continue to exercise quality control over the licensed products if the licensee retained the right to use the licensed trademarks after rejection of the license.

In October 2018, the Supreme Court granted *certiorari* to resolve the split between the First Circuit and Seventh Circuit on the issue of whether, under Section 365 of the Bankruptcy Code, a debtor-licensor’s rejection of a trademark license agreement terminates a licensee’s rights to use the licensed trademarks.

ruptcy Code, a debtor that files for Chapter 11 reorganization may, subject to court approval, choose whether to assume or reject an executory contract. For the debtor-licensor the choice is whether to retain its rights under the license agreement for the remainder of the license term or reject it by terminating the agreement (and the licensee’s right to use the licensed trademarks). When a debtor-licensor exercises its statutory right to reject a license agreement under the Bankruptcy Code the rejection is treated as a breach of the contract and the licensee can assert an unsecured claim for damages against the non-performing debtor-licensor.

The rejection of a license agreement where the debtor is a licensor is governed by Section 365(n)(1) of the Bankruptcy Code, which gives the licensee the option to “retain its rights ... to such intellectual property” for the remainder of the license term and any period for which the licensee may extend the contract as a matter of right under applicable non-bankruptcy law. However, the Bankruptcy Code notably excludes trademarks from the definition of “intellectual property.”

Given the conspicuous absence of trademarks in the Bankruptcy Code’s definition, the issue regarding the rights of a trademark licensee when a debtor-licensor rejects a trademark license in bankruptcy, has led to a 30-year split of authority in the lower courts. Some courts have reasoned that the omission of trademarks from the definition of intellectual property indicates that Congress intended to exclude trademarks from the protections of Section 365(n) of the Bankruptcy Code (under which a debtor-licensor’s rejection of the trademark license terminates the licensee’s rights to continue using the licensed trademarks). While other courts have held that a debtor-licensor’s rejection of a trademark license is essentially a breach that does not terminate the licensee’s right to continue using the licensed trademarks.

The International Trademark Association (INTA) submitted an amicus brief in support of Mission’s petition for Supreme Court review, noting the issue pertaining to the uncertain treatment of trademarks under the Bankruptcy Code presented “the most significant unresolved legal issue in trademark licensing” and that “[a]ll participants in the trademark licensing market will benefit from clear, consistent,

BANKRUPTCY continued on page 24

## Intersection of Bankruptcy and Trademark Law

The Bankruptcy Code provides that only contracts that are considered executory may be assigned, assumed, or rejected. While the Bankruptcy Code does not define the terms “executory” or “executory contracts,” based on case law, a contract is executory where performance obligations remain due by both the debtor and non-debtor. A trademark license is typically considered an executory contract because the licensee is usually required to pay royalties to the licensor and the licensor is required to exercise control over the quality of the licensed products.

Under Section 365(a) of the Bank-

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Second, these counterfeiting actions can and should be reported to a local state agency as well as the local office of the Federal Bureau of Investigation or to Immigration and Customs Enforcement (ICE), which works directly with Homeland Security in investigating these crimes.

In New Hampshire, counterfeiting of goods is a misdemeanor (Class A for the first offense and Class B for any subsequent offense) *See* N.H. RSA § 638:6-b; *See also* N.H. RSA § 638:6 for the misdemeanor statute covering deceptive business practices.

Under federal law, trademark counterfeiting provides penalties of up to 10 years' imprisonment and a \$2 million fine for a defendant who intentionally "traffics in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services," or intentionally "traffics in labels, ... documentation, or packaging ... knowing that a counterfeit mark has been applied thereto." The Trademark Counterfeiting Act, 18 U.S.C. §2320(b)(1)(A) & (b)(3). These federal agencies will be able to subpoena additional records from online service providers such as Amazon® that they may be otherwise unwilling to divulge to the victim company.

**Copyright**

Small Co. may also have a copyright infringement claim as the counterfeiter's product listings include copied images of

Small Co.'s own product listing images from Small Co.'s own marketing campaigns, which is a form of copyright infringement.

Small Co. is therefore able to file DMCA Notice and Takedown requests in the U.S. to any third-party site (for example Amazon®) where the infringing goods are being sold, arguing the unauthorized copying, reproduction, and modification of these images constitutes illegal copyright infringement.

Yet, many copyright owners choose to wait until they have a copyright registration in place before filing a DMCA Notice. After receiving a Notice, the infringing party has the opportunity if they so choose to file a counter-notice defending their position. If the infringing party decides to file a counter-notice, the copyright owner only has up to 14 days to file a copyright infringement lawsuit otherwise the infringing content will be restored on the website. And in the U.S., a copyright registration is required to file a copyright infringement lawsuit. *See Fourth Estate Public Benefit Corp. v. Wall-Street.com LLC et al.*, Docket No. 17-571 U.S. (March 4, 2019).

Counter-notices are somewhat rare for a few reasons including that the accused infringer must provide a physical or electronic signature, accurate contact information, and consent to personal jurisdiction for suit. 17 U.S.C. §512(g)(3). Counterfeiters often rely on fake addresses and a ghost-like presence on the internet. There is typically an extremely low likelihood of receiving a valid counter-notice from a

bona fide counterfeiter.

Therefore, some copyright owners will opt for the risk of a counter-notice in light of the strong benefits of immediate removal of infringing materials.

**Moving Forward**

These actions are only the beginning when dealing with counterfeiting. Until the responsible parties can be found, removing links and filing customs registrations may appear to suffer from a low chance of success, but there are times where such relatively small steps can have a great impact.

Once there are proven counterfeits, online service providers such as Amazon® will work with sellers to help keep these entities off-line and may be able to provide additional information moving forward. Though counterfeiters typically provide fake addresses, they will have to keep changing the address to stay online and eventually they may provide a location pattern for a private investigator to track down a definitive location. Companies like Small Co. can also issue notices to their customers and distributors regarding these counterfeiters to warn individuals from purchasing items that are not manufactured by Small Co. and for which Small Co. therefore cannot be responsible. In addition, there are organizations such as React which provide low cost anti-counterfeiting services that may lower monitoring and enforcement costs for small companies.

Once counterfeiters are identified, there are many forms of civil and criminal suits available in addition to the ones

described above, including actions before the International Trade Commission (ITC) which can lead to strong importation restrictions. But in many cases, counterfeiters may remain anonymous and such lawsuits can be relatively expensive.

In our hypothetical, Small Co. had intellectual property protections, but in the end, was not as proactive as it could have been to help minimize the problems. For example, had Small Co. registered their trademarks with Customs as soon as they secured registration, they likely would have been able to sooner leverage stronger customs enforcement procedures. In addition, Small Co. may have considered design patent protection on the particular ornamental features of their products that served to distinguish their products in the marketplace. Such protection would also likely have improved Small Co.'s request of sellers such as Amazon® to assist in removing infringing products from their listings.

Therefore, a reasonable approach for all new companies, no matter how small they may be when they begin operation, is to view its IP portfolio with *international* risk and pre-emptively seek protections accordingly.

*Chelsea VanderWoude is an intellectual property associate at Grossman Tucker Perreault & Pflieger PLLC specializing in trademark and copyright law.*



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**Patent** from page 20

35 U.S.C. § 298.

That being said, it is still good practice in most circumstances to seek the opinion of patent counsel if a potentially viable claim of patent infringement is received. The first reaction of many businesses upon receiving a cease-and-desist letter is to seek the opinion of their in-house engineers or scientists. Others will seek the opinion of their in-house counsel or their corporate attorney. Although the engineers and the corporate attorney may be very familiar with the technology or product accused of infringing, they likely are not skilled or experienced in determining whether the technology or products infringe the claims of a particular patent. On the other hand, if a business had received competent legal advice from patent counsel that it was not infringing the patent, it may well have a legitimate defense against a claim of willful infringement even if a judge or jury determines that the business had indeed been infringing the patent. In sum, it is critical that businesses accused of patent infringement take the charge seriously and obtain the opinion of competent legal counsel as to whether they are infringing the patent at issue.

On the flipside, it is important for patent owners and their counsel to consider certain key issues before sending a cease-and-desist letter to potential infringers. Sending such a letter to a competitor can serve various goals, including serving no-

tice for purpose of damages, inducing licensing negotiations, or simply serving a stern warning to competitors. But counsel should have in mind that sending these letters can create jurisdiction in the federal courts in the state where the accused infringer is located. Whether the language in a cease-and-desist letter is sufficient to create a “substantial controversy” for declaratory judgment jurisdiction is the subject of Supreme Court and other federal court cases. *See, e.g., Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007). Thus, counsel should be aware that sending a letter to a competitor in California can result in litigation on a competitor’s turf on the other side of the country.

Furthermore, sending out a cease-and-desist letter and asserting patent infringement without sufficient analysis of whether the accused product or process is truly infringing can expose the patent owner to liability for bad faith patent assertion. New Hampshire recently has joined other states that have enacted legislation that allows causes of action for bad faith patent assertion, and this likely will prove to be a powerful tool to push back against those who carelessly make claims of patent infringement. *See RSA 359-M* (2019).

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**Copyright** from page 21

The word “publication” has a very specific meaning under the copyright law. The copyright statute defines publication to mean “the *distribution* of copies or phonorecords of a work to the *public* by sale or other transfer of ownership, or by rental, lease, or lending.” While there is a difference of opinion among authorities on whether posting material on a website is publication, the better view seems to be that such posting would only be considered a display, not publication, unless visitors to the website clearly have the right to download the work posted on the website. Therefore, arguably the three-month publication grace period would not apply to works posted on a website.

So what does this mean for copyright owners? In an ideal world it would mean that copyright owners should obtain copyright registrations before they disclose their works to the public if they want to try to maximize the opportunity to recov-

er statutory damages and attorneys’ fees. However, that is not a very realistic scenario in most cases.

Alternatively, the copyright owner could routinely request expedited handling before making a work public. If there are many works, however, the \$800 could add up quickly, making that option unrealistic as well. Ultimately, prioritizing is key. If a work is very important, then copyright owners should consider paying the \$800 and seeking expedited handling before disclosing the work to the public.

*Douglas G. Verge is a shareholder of Sheehan Phinney Bass & Green and is a member of the firm’s Intellectual Property Law Practice Group. He assists clients ranging from start-ups to those with a national/international presence, in the areas of trademark, copyright and trade secret protection, intellectual property, technology and internet agreements, and privacy and data security.*

**Bankruptcy** from page 22

and equitable rules concerning the rights of a debtor-licensor in bankruptcy.” INTA argued that the Court should adopt “the *Sunbeam* approach because it enhances the value of trademark licenses and promotes the stability of the trademark system.”

**The Supreme Court’s Decision**

In an 8-1 decision, the Supreme Court affirmed the reasoning of the Seventh Circuit in *Sunbeam* and reversed the First Circuit, holding that the debtor-licensor’s rejection of a trademark license does not result in the trademark licensee losing its rights under the trademark license agreement.

Justice Elena Kagan, writing for the Court, concluded that “A rejection breaches a contract but does not rescind it. And that means all the rights that would ordinarily survive a contract breach, including those conveyed here, remain in place.” The Court (citing *Sunbeam*) held that, with respect to trademark license agreements, the breach effected by a debtor-licensor’s rejection “does not revoke the license or stop the licensee from doing what it allows” because outside of bankruptcy, the licensor’s breach would not terminate the licensee’s right to use the licensed trademarks. The Court reasoned that preservation of rights after a breach serves a fundamental rule of bankruptcy — that the bankruptcy estate cannot possess anything more than the debtor did outside of bankruptcy.

The Court also rejected Tempnology’s argument that the omission of trademarks from the definition of “intellectual property” under Section 365(n) of the Bankruptcy Code created a negative inference that a trademark license is terminated upon rejection.

**Implications of the Court’s Decision**

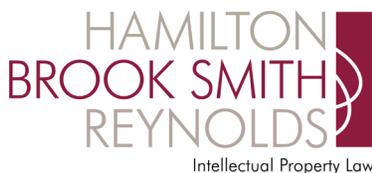
Given that companies of all industries and sizes rely on trademarks to commercialize their brands, it should come as no surprise that, according to the World Intellectual Property Organization, trademarks are the most widely used form of registered intellectual property throughout the

world. Even in bankruptcy, where maximizing the value of a bankruptcy estate is paramount, a debtor’s trademark rights are often key assets (including license agreements), which may produce revenue or can be sold to a third party and can be critical to a licensor’s efforts to reorganize. Thus, how to treat a debtor-licensor’s trademark licenses frequently arises in the context of bankruptcy. The Court’s holding allows for trademark licenses to be treated in bankruptcy consistent with other intellectual property rights under Section 365(n) of the Bankruptcy Code.

One of the main implications of the Court’s ruling is that it addressed the meaning and effect of rejection under bankruptcy law and made clear that the ruling applied to every type of agreement rejected by a debtor under Section 365 of the Bankruptcy Code. Rejection of agreements in Chapter 11 reorganizations is a strategy often used by debtors as a way to walk away from unprofitable or burdensome obligations. Since non-debtors will now retain certain ongoing rights post-rejection, the Court’s ruling may limit the options available to debtors in Chapter 11.

The Court’s decision also provides much needed clarity regarding the treatment of trademark licenses in bankruptcy. It will have significant implications on the rights of trademark licensees because it means that licensees can continue to use licensed trademarks for the duration of the license term despite the debtor-licensor’s rejection of the license agreement pursuant to Section 365 of the Bankruptcy Code. Purchasers of intellectual property assets from bankruptcy estates will also be impacted by the decision since those purchasers now must accept license agreements, that the debtor-licensor entered into prior to bankruptcy, for the duration of the license agreement unless they can otherwise be terminated.

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## Shifting Foundations (Or, Finding a Balance Between Short-term Rental Innovation and Regulation)

*Editor's Note: Part II of a two-part series. To read Part I in the May 15, 2019 issue of Bar News, visit [www.nhbar.org/publications/bar-news](http://www.nhbar.org/publications/bar-news).*

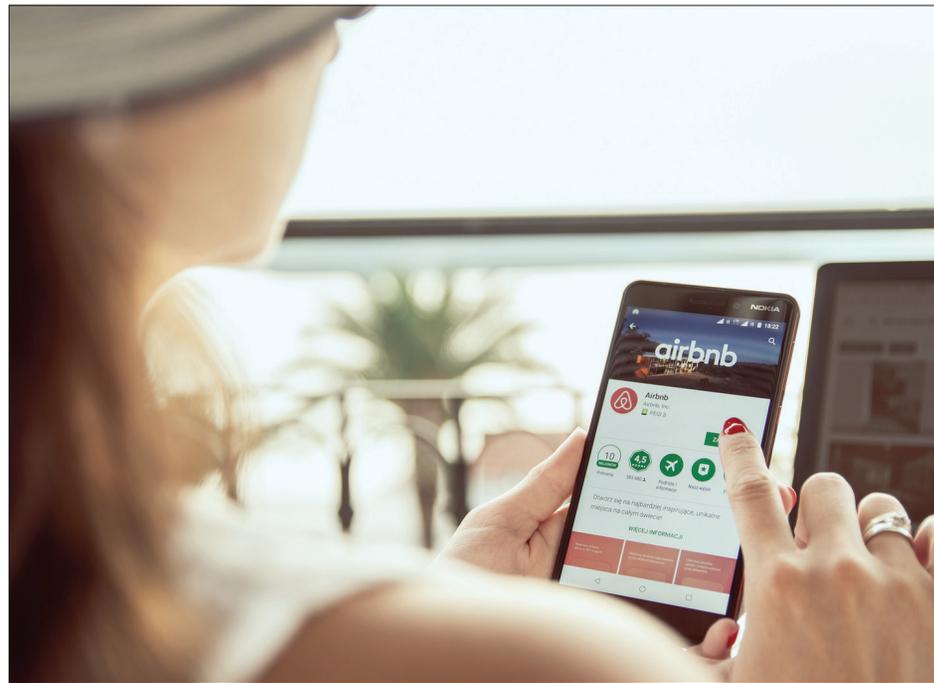
By Jason Dennis

Last month, I wrote that Sedona, AZ presents “at least one compelling case study” on the effect of the short-term rental industry on neighborhood identity. So, what’s up with Sedona?

Well, as referenced last month, Arizona is one of several states that had limited the ability of municipalities to regulate short-term rentals. Sedona, in particular, attracts about 3 million visitors a year, and, in the high season, tourists can outnumber city residents by about 3-to-1. It is estimated that Sedona had 200 to 300 short-term rentals before Arizona’s law went into effect. Now there are more than 1,000 short-term rentals, which is about 20 percent of Sedona’s total housing inventory.

The rhetorical question that the Sedona City Manager recently posed was: “At what point are the community’s residents so outnumbered that there’s no real community left?” And the housing shortage in Sedona has also made it hard to fill important city positions.

For example, applicants for both chief of police and assistant city attorney



declined job offers after they were unable to find housing. Similarly, Sedona’s turnover rate among city employees is about 20 percent. Lastly, Sedona closed one of its two elementary schools in 2018 after enrollment in the district dropped from 1,300 students in 2009 to 766 in 2018 (a drop of about 41 percent).

Sedona is emblematic of why many

localities are starting to regulate short-term rentals. Paris, Amsterdam, and Japan (discussed last month) are not unique to be sure. Even Arizona has changed its stance since last month’s *Bar News* issue.

On May 21, 2019, Arizona Governor Doug Ducey signed HB 2672, which prohibits short-term rentals from being used to hold special events that would other-

wise require a permit or a license and also requires property owners renting out their homes to provide contact information to local authorities in case of a complaint.

Additionally, those offering short-term rentals will have to get a transaction privilege tax license and will be subject to fines for violating tax-related rules.

Closer to home, New England is sharing (pun intended) in the legal activity surrounding the short-term rental industry.

### Short-term rental regulation in New England

In Maine, for example, a recent legislative response to increasing citywide restrictions (such as one that passed in South Portland by a vote of 6,375 to 5,378) was the introduction of a bill that would prevent municipalities from prohibiting or restricting short-term rentals except for narrowly tailored regulations for the protection of public health and safety. The bill has since been killed.

The South Portland restriction that sparked the attempted legislation prevents owners from offering short-term rentals in residential areas if the property is not the owner’s primary residence. The full South Portland regulation can

FOUNDATIONS *continued on page 28*

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## Many New Laws May Affect Local Government

By Cordell Johnston

The New Hampshire General Court's 2019 session will draw to a close in late June. Of the nearly 1,000 bills filed this year, the New Hampshire Municipal Association (NHMA) followed approximately 300 that would affect municipal law or municipal government at some level.

As is true every year, a majority of those bills will not become law. Many died in one house or the other; others have been retained until next year; and some will be vetoed by the governor. At this writing, only a few municipal bills have been signed into law, but many more will be. Here are some of the more notable bills still alive that should be of interest to municipal attorneys. As the session is still in progress, there will be some status changes by the time you read this. Check the legislature's website, [www.gencourt.state.nh.us](http://www.gencourt.state.nh.us), for updates.

### Town meeting postponement

Finally resolving a dispute that began with the 2017 town meeting day blizzard, SB 104 affirms and clarifies the existing authority of the moderator to postpone either session of a town meeting, including the town election, in the event of a weather or other emergency. Consultation with or permission from state officials is not required, although the secretary of state's office must be notified. The bill includes provisions for dealing with absentee ballots and provides



that where town elections are coordinated with multi-town school district elections, the elections may be postponed only if a majority of the town moderators in the district agree. Both houses passed the bill easily, and we anticipate that the governor will sign it.

### Adoption of SB 2

Under current law, a proposal to adopt the official ballot referendum (SB 2) form of town meeting is placed on the official ballot and voted on in the voting booth. HB

415 would change this to provide that the question is placed on the warrant, but not on the official ballot, so it can be debated and voted on at the business session of town meeting. NHMA advocated for this bill; both houses have passed it, and we are optimistic that the governor will sign it.

### Planning and zoning boards

Two bills already signed by the governor affect planning and zoning board procedures. HB 245 amends RSA 676:4, I(b) to allow a planning board to shorten the

21-day minimum period that an applicant must file an application prior to the meeting at which it will be considered for acceptance. HB 136 gives a zoning board of adjustment 45 days (rather than 30) to hold a public hearing after an appeal is filed. Both amendments will take effect July 9 of this year.

### Valuation of utility property

HB 700 resolves (we hope) a long-running dispute between municipalities and utility companies about the proper method for appraising utility property for local property tax purposes. It uses a formula based on a blend of the original cost and the net book cost of the utility company's assets in each municipality. It applies only to distribution assets, not to generation or transmission assets, and not to fee-owned land, office buildings, garages, or warehouses. The formula would be phased in over a five-year period.

HB 700 represents an intensely negotiated compromise that no one is in love with, but all interested parties agreed to accept. Both houses passed the bill with almost no dissent, and the governor is expected to sign it.

### Building codes

HB 562 updates the state building code to include the 2015 editions of the

GOVERNMENT *continued on page 29*

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## New Hampshire's Last Social Safety Net

By Elliott Berry and Candace Gebhart

“Whenever a person in any town is poor and unable to support himself he shall be relieved and maintained by overseers of public welfare of such town, whether or not he has residence there ...”

These words are the foundation of one of New Hampshire's oldest statutory obligations, currently embodied in RSA Chapter 165. The “local welfare” (or general assistance) statute unequivocally mandates that every municipality in the state – regardless of its size – provide assistance that is necessary to enable an indigent person to retain (or obtain) the basic necessities of life (food, shelter, utilities, and essential medical expenses).

For much of its history general assistance operated as an “ad hoc” whereby a poor person would show up at town hall requesting assistance, and the “overseer of the poor” or selectmen would decide whether she was needy and deserving. This dramatically changed when the U.S. District Court for New Hampshire issued its decision in *Baker-Chaput v. Cammet*, 406 F.Supp. 1134 (D.N.H. 1976) in which Judge Bownes ruled that our local welfare statute creates a “property interest” which triggers due process protections for applicants (and recipients). This starts with written applications and written objective, ascertainable standards to determine eligibility. As articulated by Judge Bownes, “due process requires that we be ruled by law, not fiat ... The absence of standards

creates a void in which malice, inductiveness, interference or prejudice can fester.” *Baker-Chaput*, 406 F. Supp. At 1140. The basic requirements of due process have now been codified in RSA 165:1 and RSA 165:1-b, including:

- a) The requirement that every municipality adopt written guidelines, which contain criteria for determining eligibility;
- b) The right of an applicant to a written application and decision (this judicially imposed right is implicit in the statute);
- c) The right of an applicant to a hearing if her application is rejected; and
- d) The right of a recipient to a pre-termination hearing, if the recipient requests

continuing benefits pending appeal.

In recognition of the fact that the need for general assistance often arises as an emergency, all municipalities are required to make a welfare official available during all municipal working hours. This does not necessarily mean that the welfare office must be staffed during all working hours, but the welfare official (or a designate) must be available to deal with emergencies by phone or other means, and, when practicable, must make decisions within a timeframe that will adequately address the client's need (for example, paying a tenant's rental arrearage by the expiration date of an eviction notice). (See *Publicover v. Golden*, 77-110 U.S.D.C.,

NH (1977), ruling that due process required that the Town of Pittsfield render its decision within 72 hours of application.)

One of the most common misconceptions or misapplications of a town's duty to “relieve and maintain” is that an applicant must be a resident of the municipality to which she applies for assistance. This ignores the explicit language of RSA 165:1 which imposes the obligation “... whether or not he [the applicant] has residence there.”

Courts have also made clear that how the applicant became poor and unable to support herself is *not* relevant to the determination of eligibility for general assistance. As early as 1875, the N.H. Supreme Court ruled “it makes no difference, so far as regards the obligation of the town, whether a person be reduced to necessity of his own misconduct or fault, or by the wrongful or careless act of another, or by pure accident or misfortune.” *Hollis v. Davis*, 56 N.H. 74, 86 (1875) (quoted in *Publicover, supra*).

However, once a municipality begins assisting a person, it can impose a number of requirements, including a requirement that the person spend her income and resources solely on basic necessities. Welfare officials are authorized by law to direct applicants or recipients to apply for other forms of public assistance

**SAFETY NET** continued on page 28



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**Safety Net** from page 27

(RSA 165:1-b, I(d), but the program to which she is referred must provide sufficient assistance to meet the person's need, and to the extent it does not, local welfare offices must fill in the gaps.

Notwithstanding the practice of some welfare officials, it is important to note that RSA Chapter 165 allows for no limitation on the amount or duration of assistance for which a person may be eligible. Indeed, the N.H. Supreme Court ruled that Hillsborough County (which at the time of the decision had the same substantive obligations as municipalities, but only for persons who did not have "settlement") must pay for nursing home care for a frail, elderly woman to the extent that the State did not. *Hall v. Hillsborough County*, 122 N.H. 448 (1992). Similarly, the fact that a municipality may have exhausted its welfare budget does not allow it to avoid its obligations under RSA 165:1.

None of the above should lead the reader to conclude that it is easy or pleasant for a person to obtain and retain general assistance. Applicants must be truly destitute to qualify. They must spend all of their money and available resources on their own essential needs. Unlike most other public benefit programs, they cannot keep a limited amount of cash or liquid assets. They must report and verify all income and expenses, usually on a weekly basis, and continue to do so for the entire time they are assisted. This often includes providing receipts for every expense.

Applicants can be required to provide the names and contact information of parents or adult children so the municipality can attempt to obtain reimbursement from them. Recipients are often required to make a thorough search for work and may be required to work for the municipality. A recipient who owns a home will have a lien placed against it (RSA 165:28). Recipients who have obtained funds from inheritance, personal injury judgments, or settlements may have liens placed against these assets. A recipient may be required to repay the assistance they received when (and only if) they are "returned to an income status ... which enables him to reimburse the town or city without financial hardship ..." RSA 165:20-b.

At times the applicant for general assistance must feel as if she is continually running a gauntlet. Nevertheless, this centuries-old system may be the most vital element of the social safety net. Anyone who represents low income families and individuals should keep it in mind.

*Elliott Berry is the managing attorney and Housing Project director at the Manchester office of New Hampshire Legal Assistance. He can be reached at eberry@nhla.org. Candace Gebhart is a paralegal at the Manchester office of NHLA.*

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**Foundations** from page 25

be found at: [https://www.southportland.org/files/8815/3635/3801/09\\_-\\_Ordinance\\_22-Ch\\_14\\_amendments\\_as\\_adopted\\_07-17-18.pdf](https://www.southportland.org/files/8815/3635/3801/09_-_Ordinance_22-Ch_14_amendments_as_adopted_07-17-18.pdf)

In Massachusetts, a new law will go into effect on July 1, 2019 that will be the first state law to create a statewide registry for short-term rentals. In addition, the new law will impact taxation: depending on the locale, the maximum tax imposed on a short-term rental stay could be 17.95 percent, and the tax will apply to the total rent paid (including service fees, cleaning fees, and other fees).

The law will also require hosts to carry liability insurance of at least \$1 million to cover each rental. The MA law can be found here: <https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter337>

In Vermont, a law went into effect on July 1, 2018 that requires short-term rental hosts to comply with general health and safety standards and to register with the Department of Taxes.

An earlier version of Vermont's short-term rental legislation would have required hosts to pay an annual registration fee of \$65. Hosts will be assigned meals and rooms tax numbers, and they will be required to post the numbers on the websites where they advertise their rentals.

Of note, Vermont's Joint Fiscal Office had estimated that short-term rental operators were failing to remit a cumulative \$2 million in meals and rooms taxes to the state each year.

**Debate in the Granite State**

Here in New Hampshire, Airbnb reached an agreement with the State back in 2017 to collect NH meals and rooms tax; however, not all of Airbnb's competitors do so. State Rep Ed Butler (D-Hart's Location), who is also an owner of The Notchland Inn, has sponsored HB653 (retained in committee) that would make hosting companies "primarily responsible for payment of the tax..."

Butler also intends to reintroduce a bill on "disorderly houses" which could address the circumstances of short-term rental properties being filled with unduly loud parties or otherwise vexing vacationers. The question, as is often the case, may be one of definition. Last session, a consensus on the definition of "disorderly

houses" could not be reached.

Another bill pending in the Senate Election Law and Municipal Affairs Committee, SB69, would grant affirmative authority to municipalities to implement the licensing of short-term rentals and to charge a fee to defray the cost of such licensing.

SB69 also seeks to eliminate two inspection exclusions that apply to private dwellings to:

i) allow the state fire marshal, the state fire marshal's authorized officers, or the fire chief to obtain an administrative inspection warrant under RSA 595-B, if need be, to inspect all buildings and premises within their jurisdiction; and

ii) allow town health officers to enter any part of a property that is being used as a short-term rental, without the consent of the owner, for investigation of sanitary conditions.

Given that one of the distinctions in the short-term rental industry is between more corporate-like hosts who buy multiple homes and rent them out for profit and home-owners that rent out extra space in the home where they live to pay their bills; another legislative option could be to require certain short-term rental hosts to pay NH Business Profits Tax (BPT), which tax revenue could be used to develop affordable housing options.

On the opposite end of the tax spectrum, and in lieu of the various short-term rental restrictions that have been implemented all over the world, one creative approach suggested on NHPR's The Exchange by Jac Cuddy, executive director of the Mt. Washington Valley Economic Counsel, is to provide a tax incentive to property owners who use their properties for long-term rental housing instead of as short-term rental properties.

The current regulation enforcement approach in Laconia is complaint-based-enforcement. Last October, the City Council decided that it would only recommend enforcement under its zoning ordinance (which only permits "boarding/rooming/lodging house" use in its shore-front residential and commercial resort zones) when neighbors or others, such as the police or code enforcement officers, complain. Failure to comply could subject property owners to fines of \$275 per day.

**Airbnb's response to increasing regulation**

Facing increasing scrutiny and regu-



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lation, what has Airbnb done to protect its business model? For one, it has made multiple agreements, such as the one it made with New Hampshire, to collect the appropriate, applicable lodging taxes. It has also increased oversight.

Additionally, Airbnb has recently partnered with real estate company Century 21. Now, for example, Parisian renters can request an Airbnb-friendly lease, which explicitly allows a renter to sublet an apartment on Airbnb. In return, Airbnb will still get its transaction fee, the landlord will get 23 percent, and Century 21 will get 7 percent of the host's rental fee. One might say it's a win-win-win-win.

Airbnb is also partnering with developers to create home-sharing based communities such as Niido (<https://www.niido.com/>), which currently has communities in Nashville and Orlando. These communities are officially "powered by Airbnb."

Residents in these communities who sublet their units on Airbnb pay the company a percentage of their home-sharing rental income in return for access to the same amenities that visitors will have. These Airbnb partnerings may be as much politically motivated as business-related, creating advocates and political allies that may help keep increasing short-term rental regulations and prohibitions at bay.

**NYC litigation update**

By way of brief update to the New York City litigation referenced in last

month's *Bar News* (read at [www.nhbar.org/publications/bar-news](http://www.nhbar.org/publications/bar-news)), just after the issue went to press, Airbnb agreed to turn over redacted information for more than 17,000 listings.

A couple days later, Airbnb was court-ordered to turn over information on even more listings and also to provide less anonymized information.

**Conclusion:**

**Location, location, location**

So, with all that is going on in the world of home-sharing and short-term rentals, if you find yourself wondering what will become of the home-sharing concept and services like Airbnb; the answer, which ultimately may have to be a creative one, is likely to begin with that almost axiomatic legal phrase: "it depends."

And it will likely depend on a well-known real estate agent mantra: "location, location, location."

*Attorney Jason B. Dennis is a general practitioner with Hastings Malia, just across the NH border in Fryeburg, ME. His general practice includes municipal law and civil litigation. He can be reached at (207) 935-2061 or jdennis@hastingsmalia.com.*

**Government** from page 26

component codes. The House and Senate approved different versions of the bill, so it may go to a committee of conference. HB 710 provides, among other things, that local building code decisions may be appealed to the state building code review board, rather than directly to superior court. The bill has passed both houses; it may also require a committee of conference before going to the governor.

**Land use board appeals**

SB 306 would establish a three-person board to hear appeals from local land use board decisions dealing with housing and housing development, as an alternative to the superior court. The board is modeled on the Board of Tax and Land Appeals; its members would be appointed by the supreme court and have appropriate experience in questions of land use law or housing development. An appellant could appeal to either the appeals board or the superior court, and any appeal from the appeals board would be directly to the supreme court. The standard of review and hearing procedure would be the same in the housing appeals board as in the superior court under current law.

The Senate passed SB 306, but then tabled it and subsequently included the text of the bill in the state budget bill. As of this writing, the budget is headed to a committee of conference between the House and Senate. SB 306 itself will die on the table, but the housing appeals board will be in-

cluded in the final budget bill if it survives the committee of conference.

**Right-to-Know Law ombudsman**

SB 313 provides for appointment of an ombudsman to hear Right-to-Know Law complaints, as an alternative to filing a complaint in superior court. The ombudsman process would be less formal than superior court, but the ombudsman would have authority to order the same remedies as the court. Either party would have the right to appeal the ombudsman's decision to the superior court, where review would be *de novo*. SB 313 is in the same status as SB 306 — passed and then tabled by the Senate, then included in the budget bill and now headed to the budget committee of conference.

**Stay informed**

These are only a few of the bills that have become, or may become, law in 2019. The governor will be signing, and vetoing, bills through June and into July. NHMA publishes a Final Legislative Bulletin every year that summarizes all of the new laws affecting municipalities. The Bulletin should be available on NHMA's website, [www.nhmunicipal.org](http://www.nhmunicipal.org), by early August.

*Cordell Johnston is Government Affairs Counsel at the New Hampshire Municipal Association, representing the interests of towns and cities before the New Hampshire legislature and state agencies. He can be reached at 603-230-3323 or cjohnston@nhmunicipal.org.*



**Contribute to *Bar News* Practice Area Sections**

*NH Bar News* features a special content section each month dedicated to specific areas of the law, and welcomes member and non-member article submissions.

- July..... **Federal Practice & Bankruptcy & International Law**
- August..... **Worker's Compensation & Personal Injury Law**
- September..... **Environmental & Telecommunications, Utilities and Energy Law**
- October..... **Alternative Dispute Resolution**
- November..... **Family Law & Children's Law**
- December..... **Business Law & Business Litigation**
- January..... **Criminal Law & Health Law**
- February..... **Tax Law & Insurance Law**
- March..... **Trust & Estate Law**
- April..... **Labor & Employment Law**
- May..... **Real Property Law**
- June..... **Municipal & Government Law & Intellectual Property Law**

Please contact Editor Anna Berry at [aberry@nhbar.org](mailto:aberry@nhbar.org) or (603) 715-3234 about contributing to the sections listed above.



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# Collaborative Effort Aims to Increase Access to Justice in North Country with New Research Resources

Meagan Carr, director of the Littleton Public Library, recently announced that the Library now offers online access to Westlaw, one of the world's premier legal research databases, and to law books about New Hampshire law, according to a press release from the New Hampshire Law Library. Access to Westlaw is free and is available now on a dedicated computer terminal whenever the Littleton Public Library is open.

"We are very excited to have these wonderful resources available to the Littleton community and surrounding areas," Carr said in the release. "We are also looking forward to hosting public education workshops to better help legal professionals and library customers use these resources to their fullest extent."

The law books and Westlaw access are funded through a partnership with the New Hampshire Law Library. The Law Library,

located in the Supreme Court building in Concord is the state's only public law library and provides services to the courts, attorneys, government agencies, and the public.

"Making the Littleton Public Library the primary access point for legal research sources in the North Country is a win-win," Mary Searles, director of the Law Library, said in the release. "Researchers will be helped by professional librarians and will have free access to authoritative, reliable legal information while Littleton Public Library can expand its services to legal professionals and library customers in the North Country."

The project was facilitated by the NH Bar Association's Committee on Cooperation with the Courts and Supreme Court Justice Anna Barbara Hantz Marconi. The Coos County Bar was an early supporter of the project as well. Bar members who



Littleton Public Library.

worked on the project include Peter Roth of the NH Department of Revenue, Stephanie Hausman of the Public Defender's office, clerk of court Kate Geraci, and area attorney Sandra Cabrera of Waystack Frizzell.

"We are very excited about the fruit-

tion of a project long in the making," Justice Hantz Marconi said. "The collaboration of the NH Law Library, the Littleton Public Library, the Supreme Court, and the NH Bar Association will make access to justice a bit easier for people seeking legal answers in the North Country."



Administrative Services Commissioner Charles M. Arlinghaus (left), Administrative Judge David D. King (middle), and NH Supreme Court Chief Justice Robert J. Lynn (right) officially opened the new 6th Circuit – Probate Division – Concord Courthouse serving Merrimack County at a dedication ceremony on May 31. The courthouse was converted from the former Administrative Office of the Courts (AOC) across from the New Hampshire Supreme Court. The original, two-story building was constructed in 1997.

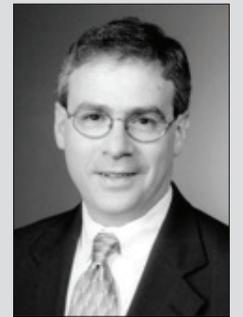
## Honigberg Nominated to Superior Court

Governor Chris Sununu nominated Public Utilities Commission Chair Martin ("Marty") Honigberg on June 5 to serve as a Superior Court judge, according to a press release from the Governor's office. Sununu selected Chairman Honigberg for nomination from a list of candidates recommended by the Governor's bipartisan Judicial Selection Commission.

"Marty has served this State admirably as Chairman of the Public Utilities Commission, and I am honored to nominate him to serve as the next Justice of the Superior Court" said Governor Sununu in the release. "I am confident that, if confirmed, he will utilize the experience he has gained over a stellar career and continue to serve our state well as a judge."

Honigberg, of Concord, was appointed to the PUC in 2013 and

became chair in 2014. Prior to his time at the PUC, he was a partner at Sulloway & Hollis, where he practiced in commercial litigation and administrative law. From 2001 to 2003, Honigberg served as Special Counsel to Governor Jeanne Shaheen and served as a Senior Assistant Attorney General at the New Hampshire Department of Justice from 1994 to 2000.



The Executive Council will hold a public hearing on the nomination on Wednesday, June 26 at 2 p.m. in the Executive Council Chambers.

## NH e-Court Program Update

## Online Dispute Resolution: Discovery Phase In Progress

### Online Dispute Resolution: Possible Circuit Court Pilot

The New Hampshire Judicial Branch (NHJB) is currently exploring whether, and how, to incorporate an online dispute resolution (ODR) option into certain case types, beginning with Circuit Court cases. Online dispute resolution is gaining traction nationwide as an effective process that allows parties to negotiate an agreement and file it with the Court without having to travel to a courthouse, take time off of work, and find childcare. The Court sees ODR as an access to justice opportunity with the potential to significantly improve outcomes for

all parties. A request for information (RFI) from potential vendors is active. From there, the NH Judicial Branch (NHJB) will determine whether to move forward with a request for proposals (RFP).

Should the initiative be approved, the NH Circuit Court will provide a mechanism for the public to participate in ODR services that have been incorporated into the current small claims e-filing process. ODR for Small Claims will also serve as a pilot for possible expansion of ODR into other case types.

Attorneys, the NHJB would like to hear from you. What questions or concerns do you have about ODR? Can you envision ODR as a component service of the court, and if so, how? How can ODR improve outcomes for all parties? Are you concerned about any unintended consequences, and if so what are those concerns? Please send your thoughts to Heather Scheiwe Kulp, Alternative Dispute Resolution Coordinator, at [HKulp@courts.state.nh.us](mailto:HKulp@courts.state.nh.us).



Source: NH Judicial Branch

May 2019

## Administrative Appeals

**Appeal of Steven Silva, No. 2018-0296**

**May 10, 2019**

**Affirmed.**

- Whether defects in procedural notice requirements for termination of a State employee bar a subsequent termination proceeding with procedurally correct notice requirements

On appeal from the Personnel Appeals Board (PAB), the PAB upheld the decision of the respondent, the New Hampshire Department of Health and Human Services (DHHS), to suspend and subsequently terminate the petitioner's employment.

The Court identified the relevant facts as follows. The petitioner started working at the New Hampshire Hospital in 1999. In 2015, he was terminated for violating the hospital's sexual harassment policy. The petitioner appealed the termination to the PAB. In 2016, the PAB found that the petitioner's 2015 termination did not comply with the New Hampshire Administrative Rules because DHHS did not provide the petitioner with all of the evidence it relied upon to justify the termination prior to the termination, which deprived the petitioner of the opportunity to refute the evidence. PAB ordered to reinstate the petitioner retroactively and award him back pay and benefits. DHHS resumed paying the petitioner but suspended him so it could conduct an investigation. In 2017, after completing the investigation, DHHS terminated the petitioner again. The petitioner appealed his suspension and his 2017 termination to the PAB, and argued that the PAB cannot terminate or suspend him for the same conduct. After hearing, the PAB upheld the suspension and subsequent termination.

The Court noted it will not set aside a PAB decision except for errors of law, unless the petitioner demonstrates by a clear preponderance of the evidence that it is unjust or unreasonable. PAB's rulings on issues of law are subject to a *de novo* review.

## At-a-Glance Contributor



**Laura D. Devine**

Civil Litigation Attorney  
Boyle Shaughnessy Law  
Manchester, NH

In reaching its conclusion, the Court noted that procedural, not substantive, protections are afforded to a petitioner when the PAB finds that a challenged action was taken in violation of an applicable rule. Specifically, the Court observed that the PAB correctly applied the law when it concluded that reinstatement of the petitioner was required. The Court observed that there is nothing that bars the State from correcting its procedural error and re-starting the termination proceeding for the same substantive conduct. The Court rejected the petitioner's *res judicata* argument because there was no final judgment on the merits. The Court rejected the petitioner's collateral estoppel arguments and noted that the five prerequisites were not satisfied.

*Gary Snyder, SEIU Local 1984, Concord, for the petitioner; Gordon J. MacDonald, Attorney General, Concord; Jill A. Perlow (on the brief and orally), for the respondent.*

## Contract Law

**Pro Done, Inc. v. Teresa Basham & a., No. 2018-0060**

**May 3, 2019**

**Reversed and remanded.**

- Whether New Hampshire law recognizes a cause of action for breach of contract based upon a covenant not to sue, where the contract does not expressly provide the non-breaching party is entitled to consequential damages for breach of contract

The trial court dismissed the plaintiff's amended complaint on the basis that the covenant not to sue did not give rise to a cause of action for breach of contract. The amended complaint contained three counts, breach of contract, tortious interference with contractual relations, and civil conspiracy. The trial court dismissed the remaining two counts on the basis that they were not reasonably susceptible to construction that would permit recovery because they rested on a theory that there was a contractual relationship with the plaintiff that imposed ongoing duties. This appeal followed.

The Court explained the relevant facts as follows: The three sibling defendants each received a portion of their father's one third ownership interest in three companies, known as the Pro-Cut entities, to be held in trust by the fourth defendant. In 2012, the sibling defendants negotiated with an owner of the Pro-Cut entities to sell their interests to him. In November 2013, trustee of the trust, on behalf of the sibling defendants, executed 15 Securities Redemption Agreements (SRA), with the Pro-Cut buyer as part of the sale. The terms of the SRAs were explicitly binding on the heirs, personal representatives, successors and assigns of the parties. Each of the 15 SRAs also contained a separate document, entitled "Release," which was also executed by the trustee of the trust. The Release contained language which stated that the seller "forever releases, discharges, quit claims and covenants not to sue and otherwise agrees not to enforce any claim, cause of action, right, title or interest ... against the Company ... including but not limited to any claim based on any future transaction that the Company or any unit holder may enter into in relation to the equity of the Company." Each sibling defendant received \$750,000 as a result of the aforementioned transactions.

Following the sales which were executed through the above-discussed SRAs, one Pro-Cut entity acquired another Pro-Cut entity and changed its name. Then, three unrelated companies, known as Snap-On, purchased the Pro-Cut entities for \$41.3M. Pro-Cut International was then renamed Pro Done, Inc. Here, Pro-Done, Inc. alleges it is a successor

or assignee of the Pro-Cut entities which were successors to the SRAs.

After Snap-On purchased the Pro-Cut entities, the defendants subsequently filed a lawsuit, against Snap-On in the U.S. Dist. D. N.H. The sibling defendants served subpoenas onto Pro Done, and Snap-On asserted rights to indemnification against Pro Done.

The plaintiff, Pro Done, then filed suit against the defendants and claimed, (1) breach of contract; and in the alternative (2) tortious interference with contractual relations; and (3) civil conspiracy. The Court noted that the standard of review is whether the allegations are reasonably susceptible of a construction that would permit recovery.

The Court held that New Hampshire law recognizes a cause of action for breach of contract based upon a covenant not to sue, where the contract does not expressly provide the non-breaching party is entitled to consequential damages for breach of contract. The Court observed that a lawyer, in drafting a covenant not to sue, may include damages including attorneys' fees as a consequence of a breach. Therefore, the Court reversed and remanded the matter to the trial court and noted that based it has consistently recognized the distinction between an express covenant and not to sue and a release

*Michael Lewis, Rath, Young & Pignatelli, Concord, with Kenneth Bartholomew and R. Terry Parker (on the brief), for the Pro Done, Inc. Timothy McLaughlin, Shaheen & Gordon, Concord, William Christie and Alexander Campbell (on the brief), for Teresa Basham & a. Biron Bedard, Ransmeier & Spellman, Concord, for Trustee of the Paul R. Hopper 1997 Trust (joined in brief for Basham & a).*

## Criminal Law

**State v. Laryssa Benner, No. 2017-0687**

**May 17, 2019**

**Affirmed.**

AT-A-GLANCE continued on page 32

## Superior Court Judicial Evaluation Notice

The Chief Justice of the Superior Court is currently in the process of conducting judicial evaluations in accordance with Supreme Court Rule 56 and RSA 490:32 and invites you to participate in this process. The following Justices are presently being evaluated:

Hon. Mark E. Howard	Strafford County Superior Court
Hon. Amy B. Messer	Hillsborough County Superior Court-Northern District
Hon. David W. Ruoff	Cheshire County Superior Court and Hillsborough County Superior Court-Northern District

An evaluation may be completed online at [www.courts.state.nh.us](http://www.courts.state.nh.us) until **AUGUST 30, 2019**. On the Judicial Branch website, look to the left side of the page under **Resources** and you will see a link for **Judicial Performance Evaluations**. Click on the **Current Superior Court Evaluations** link and choose the specific Judge you would like to evaluate. While responses will be shared with the judges being evaluated, they are treated as confidential, and the identity of the respondent will remain anonymous.

If you do not have access to the Internet or would prefer to have a hard copy of the evaluation mailed to you, please contact my office by calling (603) 271-2030 and request that one be mailed to you. As stated above, while responses will be shared with the Justices being evaluated, they are treated as confidential, and the identity of the respondent will remain anonymous. In fact, if you request a hard copy of the evaluation form, we ask that you do not sign the completed evaluation.

Your help with this evaluation process is invaluable and we greatly appreciate your taking the time to help us with this endeavor.



## OPEN HOUSE

Please join the New Hampshire Supreme Court  
in honoring the service of

## Chief Justice Robert J. Lynn

on the occasion of his retirement

**Thursday, August 8, 2019**

2:00 - 4:00 PM

New Hampshire Supreme Court  
One Charles Doe Drive, Concord, NH

Portrait Unveiling at 3:30 p.m.

No state funds were used for this event.

- Whether procedures employed by trial court in imposing a deferred sentence violated a defendant's due process rights and whether the trial court erred in finding sufficient evidence that conditions of deferred sentence were violated

The defendant was sentenced to twelve months in the house of corrections for a misdemeanor theft. The sentence was deferred two years. The sentencing order provided that thirty days prior to the expiration of the period, the defendant may petition the court to show cause why the deferred sentence should not be imposed. Here, the deferred period for the sentence expired. The defendant did not petition the court and the State did not move to impose the sentence. Then, pursuant to the terms of the sentencing order, the court issued a warrant for the defendant's arrest. The defendant was subsequently arrested. The defendant moved to close the case and argued that the trial court lacked the authority to impose the deferred sentence because a motion to impose was not timely filed. The State objected and asserted that the State bore no burden and that the order clearly placed the burden on the defendant to move for a show cause hearing. A hearing was held and the court indicated it agreed with the State's position that a deferred sentence is different because it will be imposed unless the defendant timely petitions and shows cause as to why it should not be imposed. This appeal followed.

The Court noted that the relevant facts were as follows: At the hearing, the defendant made an oral motion to terminate the sentence, but presented no evidence. The deferred sentence included requirements that the defendant undergo a drug and alcohol abuse evaluation and abide by any treatment recommendations and be of good behavior. The trial court noted that the State bore no burden, but allowed it to present evidence to make a record. The State called the defendant's sister to testify. The defendant's sister reported that the defendant had pleaded guilty to criminal charges in Vermont four weeks earlier and had not completed a drug treatment program.

On appeal, the defendant argued that

the trial court violated her due process rights by placing the burden upon her to establish good cause as to why the sentence should not be imposed. The defendant also argued that there was insufficient evidence for the court to conclude that the good behavior and drug treatment provisions of the sentence were violated. Last, the defendant argued that there was no evidence that her guilty plea was to a crime as opposed to a violation. The Court conducted a *de novo* review. The Court also noted that trial judges possess broad discretionary powers with regard to sentencing.

The Court observed that there is a disparity between the case law addressing the issue of the burden of proof. The Court decided the case on the view that the State bore the burden of proof because the State did not dispute that it bore the burden of proof. On appeal, the defendant challenged the notice and disclosure requirements. The Court observed that the defendant failed to establish she was prejudiced by the State's failure to provide her with advance notice of the evidence it relied on at the hearing. The Court noted that the defendant stated on the record that she was not surprised by her sister's testimony. The Court also noted that it did not matter whether the guilty plea was to a crime or a violation because the conditions of the sentence required her to be of good behavior, not simply to not commit crimes.

*Andrew Wolpon, assistant appellate defender, Concord, for the defendant. Gordon MacDonald, attorney general (Stephen Fuller, assistant attorney general), for the State.*

**State v. Katlyn Marin, No. 2016-0701  
May 10, 2019  
Affirmed.**

- Whether the defendant's incriminating statements made before her Miranda warning violated her constitutional rights

The defendant was convicted of second degree murder of her three-year-old daughter. This appeal followed. Prior to trial, the defendant moved to suppress statements made to police prior to being advised of her Miranda rights. The pre-Miranda statements consisted

of three sets of statements, in her home, in a police cruiser, and in a family waiting room at the police station. Each contained a different version of circumstances giving rise to her daughter's fatal injuries. The trial court concluded that the defendant was not in custody until after she was advised of her Miranda rights.

The Court noted the relevant facts as follows. On November 25, 2014, the defendant called 911 and reported her daughter was unconscious. First responders and an officer responded to the home. The officer asked the defendant to step into an adjacent bedroom to obtain information for the purpose of facilitating medical treatment. The officer stood near the open door for a while and at some point closed the door. The unconscious daughter was subsequently transported to the hospital. A second officer arrived and introduced himself to the defendant and asked what happened to her daughter. The defendant stated that she distrusted police and wanted to go to the hospital. The officer left the bedroom and the defendant started using her cell phone. The officer then told her she could not use her phone and took it. The officer told the defendant she had to leave the house because it was being secured as a crime scene. The defendant wanted to go upstairs and the officer did not let her. The officer told the defendant that the children were being transported to the police station and he would prefer the defendant to go with her children. The defendant was told the children would remain in police custody until the police could determine what happened.

The defendant agreed to accompany the children to the police station. During the five-minute drive, a new officer asked the defendant what happened to her daughter. The defendant told different stories at each point. The family was escorted into a family waiting room. A new officer joined the conversation. The defendant gave another version of events of what happened to her daughter. The conversation continued for several hours, then, DCYF took custody of the two children. An officer then moved the defendant into a special investigations room. The officer obtained consent to photograph the home, collect her clothing, and examine and photograph her body for injuries to verify the defendant's story. The defendant did not give

consent to review her cell phone, and agreed with the officers that she was there voluntarily. The police took a break. When they returned, the defendant told an officer she was bored and wanted to talk. The officer then told the defendant that she was no longer free to leave and the police were obtaining a warrant. He explained that they could continue talking if she waived her Miranda rights and asked her to consent to an audio and video recording. The defendant did not consent to recording, but waived her Miranda rights. The officers then questioned her for hours, stopping periodically for breaks.

On appeal, the defendant argued that the trial court erred when it (1) found she was not in custody prior to being advised of her Miranda rights; (2) failed to address her argument that the illegal obtained pre-Miranda statements tainted the post-Miranda statements. The Court conducted a *de novo* review. The Court concluded that the trial court did not err when it found that she was not in custody when she gave the court the pre-Miranda statements in her home, the police cruiser, and in the family waiting room at the police station. A defendant must be advised of her Miranda rights when there is a custodial interrogation by the police. In a custody analysis, two discrete inquiries are required, including (1) circumstances giving rise to the interrogation and (2) whether a reasonable person would have felt she was at liberty to terminate the interrogation and leave. After conducting an analysis of the above-facts, the Court concluded that the defendant was not in custody until she was advised of her Miranda rights. Therefore, the Court held that the trial court did not err when it denied the defendant's motion to suppress.

*Andrew Wolpon, assistant appellate defender, Concord, for the defendant. Gordon MacDonald, attorney general (Erin Fitzgerald, assistant attorney general), for the State.*

**State v. Jean Claude Mfataneza, No. 2017-0693  
May 10, 2019  
Affirmed.**

- Whether the trial court erred in concluding

**PUBLIC NOTICE**

The Executive Council will hold a public hearing on the nomination of:

**MARTIN HONIGBERG**

of Concord, NH

to serve as:

**ASSOCIATE JUSTICE for the  
STATE OF NEW HAMPSHIRE  
SUPERIOR COURT**

**THE PUBLIC HEARING WILL BE HELD:  
WEDNESDAY, JUNE 26, 2019  
AT 2:00 PM**

**EXECUTIVE COUNCIL CHAMBERS  
STATE HOUSE, CONCORD, NH**

**PURSUANT TO RSA 91-A:2 THIS MEETING IS OPEN TO THE PUBLIC  
THIS IS AN OPPORTUNITY FOR THE PUBLIC  
TO COMMENT ON THE NOMINEE**

Executive Councilors:  
Michael J. Cryans  
Andru Volinsky  
Russell E. Prescott  
Theodore L. Gatsas  
Debora B. Pignatelli

**PUBLIC NOTICE**

The Executive Council will hold a public hearing on the nomination of:

**GORDON J. MACDONALD**

of Deering, NH

to serve as:

**CHIEF JUSTICE for the  
STATE OF NEW HAMPSHIRE  
SUPREME COURT**

**THE PUBLIC HEARING WILL BE HELD:  
WEDNESDAY, JUNE 26, 2019  
AT 10:00 AM**

**EXECUTIVE COUNCIL CHAMBERS  
STATE HOUSE, CONCORD, NH**

**PURSUANT TO RSA 91-A:2 THIS MEETING IS OPEN TO THE PUBLIC  
THIS IS AN OPPORTUNITY FOR THE PUBLIC  
TO COMMENT ON THE NOMINEE**

Executive Councilors:  
Michael J. Cryans  
Andru Volinsky  
Russell E. Prescott  
Theodore L. Gatsas  
Debora B. Pignatelli

ing that RSA 265-A:8 requires only that the Administrative License Suspension warnings be reasonably conveyed by reasonable methods in order to satisfy the statute and be admissible at trial, rather than that the warnings be subjectively understood by the individual driver

This appeal followed a bench trial on stipulated facts. The defendant was convicted of aggravated driving while intoxicated. Prior to trial, the defendant moved to exclude admission of the Administrative License Suspension (ALS) form and corresponding breathalyzer test results from evidence. The defendant argued that similar to Miranda warnings, a person must knowingly, voluntarily, and intelligently consent to testing in order for the results to be admissible in a trial. He argued that because of a language barrier he did not consent. The defendant testified that he signed the form because where he is from, in the Congo, people are required to do what police officers tell them to do. The trial court applied a standard that the police officer must reasonably convey the warnings in a reasonable manner. After conviction, the defendant appealed.

The Court noted that to resolve this issue on appeal, it was necessary to determine the proper interpretation of RSA 265-A:8, which constitutes a *de novo* review. The Court noted that under the Implied Consent Law, a motor vehicle operator, shall be deemed to have given consent to the tests it describes when arrested for any offense arising out of facts alleged to have been committed while the person was driving a vehicle while under the influence of intoxicating liquor or controlled drugs, provided that the tests are administered at the direction of a law enforcement officer having reasonable grounds to believe the person has been driving while under the influence. Further, it was noted that the very act of driving on New Hampshire's roads implies consent to take the test.

Additionally, they noted that nothing in the record suggested that the officer acted unreasonably in the circumstances. Specifically, there was evidence that the defendant (1) knew the officer from prior encounters; (2) had spoken to the officer in English in these encounters; (3) told the officer twice at the police station that he spoke English; and (4) affirmatively indicated to the officer that he understood the statements on the form.

*Christopher Johnson, chief appellate defender, Concord, for the defendant. Gordon MacDonald, attorney general (Sean Locke, assistant attorney general), for the State.*

**State v. Paul Spaulding, No. 2019-0028  
May 17, 2019  
Affirmed.**

- Whether the trial court erred by ordering the defendant to be detained without bail

The trial court ordered that the defendant be detained without bail pending the resolution of the charges against him. The defendant then filed this appeal.

The Court explained the relevant facts. The defendant was charged with two counts of misdemeanor domestic violence and one count of criminal threatening with a deadly weapon. The trial court held a probable cause hearing which included the following evidence. At 2:00 a.m. on December 16, 2018, there was a call regarding a domestic argument between the caller's mother and the defendant. The caller informed the dispatcher that the defendant had discharged a firearm outside. The police arrived and observed yelling from the apartment including that the defendant was very angry and vocal, the officers heard the defendant yell, "I'm going to kill the b\*\*\*\*."

The police observed two guns, one which was missing one round of ammunition. At the police station, one magazine of ammunition was seized from the defendant as well as a knife with a six inch blade. The police interviewed the complainant and her daughter. They also interviewed a neighbor who reported that he heard a "pop" which he believed to be a gunshot.

The trial court ordered that a preventative detention order be put in place and cited that the combination of alcohol, domestic violence, threats to kill, to shoot the door down, the discharge of a firearm, the defendant's combativeness with the police, and the fact that he was armed with a knife and two loaded semi-automatic pistols, warranted detention without bail.

The Court reviewed the trial court detention order with an abuse of discretion standard. The defendant argued that there was a lack of proof of clear and convincing evidence of danger. The Court noted that the trial court has broad discretion to order that a defendant be held without bail and here, the trial court did not abuse its discretion.

*David Rothstein, deputy director public defender, Concord, for the defendant. Gordon MacDonald, attorney general (Elizabeth Woodcock, assistant attorney general), for the State.*

**Family Law**

**In Re: Haley St. Pierre and Adam Thatcher, No. 2018-0013  
May 31, 2019  
Affirmed.**

- What circumstances allow a trial court to rescind a paternity affidavit and whether the trial court can grant primary custodial responsibilities to a party in an emergency motion

The trial court granted the emergency motion of the petitioner, Haley St. Pierre, to relocate with her child to Florida.

The Court set forth the relevant facts as follows. In August 2012, the petitioner met and started a romantic relationship with the respondent. Later that year, they moved in together. Six months later, the petitioner traveled out of state and had sexual relations with another man. Shortly thereafter, she discovered that she was pregnant. She notified the respondent that he was the father and notified the other man that he was not. The respondent later learned of the sexual relations with the other man and asked if that man could be the father. The petitioner assured him the child was his. On October 31, 2013, the child was born and the parties completed an affidavit of paternity at the hospital. Soon after, the parties married. They divorced the following year. Shortly thereafter, the petitioner re-started a romantic relationship with the other man. She then filed a petition to change the paternity affidavit and custody order. Specifically, she claimed that the child was not the respondent's, but actually the child of the other man. In March 2017, after a hearing which included testimony by the parties and the other man, the court noted that in challenging paternity beyond the 60 days from the filing of the paternity affidavit, the challenge must be made on the basis of fraud or material mistake of fact. The court noted that here there either was a material mistake of fact or fraud in executing the affidavit. The court found that the other man was the biological father and rescinded the paternity affidavit and amended the child's birth certificate to correctly reflect this fact.

The trial court noted the biological parents because they were an intact couple, and declined to change the child's last name. The trial court ruled that the respondent would retain his status as stepparent and not lose his ability to ask for parenting rights and respon-

sibilities. A strong bond was noted between the respondent and the child and it was concluded that parenting time with the respondent was in the child's best interests. The trial court denied the petitioner's request to relocate the child to Florida.

Later, the petitioner filed a second motion to relocate the child to Florida on an emergency basis and cited changed circumstances. Specifically, that the petitioner married the biological father (instead of merely being engaged), and that the respondent was supervising the child when she fell into a campfire and suffered severe second-degree burns, and he failed to obtain prompt medical treatment for her. The trial court allowed the emergency motion to relocate the child and this appeal followed.

On Appeal, the Court reviewed the trial court order so long as the record demonstrates an objective basis sufficient to sustain the court's judgment. The Court noted that the trial court has broad and flexible equitable powers.

The Court concluded the record supports the trial court's rescission of the paternity affidavit based on its determination that there was a material mistake of fact made by the parties in executing the paternity affidavit. Further, the Court concluded that there was sufficient basis in the record to support the trial court's order granting primary custodial responsibilities to the petitioner.

*Jay Markell, Family Legal, Concord, for the petitioner. R. Peter Decato, Decato Law Office, Lebanon, for the respondent.*

**Real Estate**

**Kenneth Riso, & a. v. Gregory Riso, & a., No. 2018-0268  
May 10, 2019  
Affirmed.**

- Whether a defendant may forfeit his right to a statute of limitations defense through his conduct in litigation

The sole issue on appeal was whether a defendant may forfeit his right to a statute of limitations defense through his conduct in litigation.

The Court noted the relevant facts as follows. Petitioner and respondent are siblings. This litigation commenced following the death of their mother on March 10, 2019. Also at issue in the litigation were two checks dated March 6, 2012, and March 7, 2012 both drafted payable to the respondent, and signed by him, from the late-mother's checking account, which were processed for payment on March 15, 2012. The underlying action, a petition to partition, was filed on June 8, 2016, the respondent filed an answer on August 29, 2016, and asserted a statute of limitations affirmative defense. The court noted that the respondent

was not a credible witness, and there was no evidence that his mother had agreed him to pay the funds subject to the drafts or authorized him to sign, and that the petitioners learned of the checks well over a year after March 2012 during discovery in separate litigation. Based on this, the trial court ordered that the proceeds from the sale of the mother's home to be distributed to the mother's children, excluding the respondent, according to their respective ownership percentages. Following the order, on February 20, 2018, both parties filed motions to reconsider and challenged the initial analysis. The respondent did not pursue the statute of limitations defense in his motion to reconsider. The trial court then made a finding of conversion, determining that the respondent had wrongfully converted the funds of his mother's estate when he wrote and delivered the two checks. The court then allowed the respondent to receive his ownership share, but it was to be applied against the amount the court found the respondent owed the estate (the total of the checks). On March 1, 2018, nearly two years after the petition was filed, and following the court ruling on the initial motion to reconsider, the respondent filed a second motion to consider. In that second motion to reconsider, the respondent raised for the first time, the statute of limitations defense originally raised in his answer. The trial court denied the motion. The trial court concluded that by actively participating in the litigation, and failing to present his limitations defense until a post-trial motion to reconsider, the respondent had forfeited his right to the defense. This appeal followed.

The Court reviewed the trial court ruling for clear error. The Court observed that while generally trial court rulings on motions to reconsider are subject to a discretionary review, waiver is a question of fact which is reviewed for clear error.

The Court noted that where a party's action or inaction is deemed to incur the consequence of loss of a right, or as here, a defense, the term forfeiture is more appropriate. The Court held that a party may forfeit a statute of limitations through his conduct in litigation.

*William Gramer, Devine, Millimet & Branch, Manchester, for the petitioners. Jan Myskowsky, Concord, for the respondent.*

**Wayne Sabato v. Fannie Mae, No. 2012-632  
May 3, 2019  
Affirmed.**

- Whether the balance of the plaintiff's homestead exemption remained an interest in the property or was extinguished by the foreclosure sale of the second mortgage

AT-A-GLANCE continued on page 34

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FEBRUARY 2019

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24	25	26	27	28		

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The trial court denied Fannie Mae's motion for summary judgment and granted the plaintiff's motion for summary judgment in part. Each party filed a motion for reconsideration, which was denied and this appeal followed.

The Court explained the relevant facts as follows: In 2001, the plaintiff's wife obtained the subject property in Pelham by warranty deed. The deed acknowledged that she was a married person and granted a mortgage on the property. The plaintiff did not sign the initial mortgage. Both the plaintiff and his wife have resided in the property since 2001. The plaintiff's wife then refinanced the original mortgage and executed a new mortgage (the first mortgage). The plaintiff did not sign the first mortgage. In 2005, the plaintiff granted a second mortgage on the property to a separate mortgagee. Both the plaintiff and his wife signed the second mortgage. The second mortgage was assigned to an entity which then foreclosed in 2014. The foreclosure sale was subject to the first mortgage and then the property was sold to Fannie Mae. In 2016, the plaintiff and his wife received notice that they may be evicted. The plaintiff then commenced this action to establish his homestead right. The plaintiff argued that the foreclosure of the second mortgage did not affect his homestead right because he had not waived the right in the first mortgage. Fannie Mae argued that because the plaintiff waived his homestead interest in the second mortgage, he could not now assert any homestead right.

In partially granting the plaintiff's motion for summary judgment, the trial court concluded that prior to the execution of the second mortgage, the plaintiff had an un-

cumbered homestead right. The trial court also concluded that the plaintiff's signature was sufficient to waive his homestead right relative to the second mortgage, which was only to the extent necessary to enforce the second mortgage.

The Court conducted a de novo review and considered the evidence in the light most favorable to each party in its capacity as the nonmoving party.

The Court affirmed the trial court ruling that at foreclosure, the plaintiff's homestead right had priority over the first mortgage. The plaintiff had waived his homestead right as to the second mortgage. The court concluded that the balance of the plaintiff's homestead exemption remained an interest in the property and was not extinguished by the foreclosure sale of the second mortgage. The Court also affirmed the trial court conclusion that the plaintiff waived his homestead right only to the extent necessary to enforce the second mortgage. The Court concluded that the plaintiff's present homestead interest is the difference between \$120,000 and the amount owed on the second mortgage note at the time of the foreclosure sale. The Court stated that its decision does nothing more than recognize that the remainder of the plaintiff's homestead interest continues to exist in the property, and that in order to clear that interest from its title, Fannie Mae must either pay the plaintiff its value or partition the property.

*Robert Shephard, Smith-Weiss Shepard, Nashua, Tanya Spony (on the brief), for the plaintiff. Jonathan Flagg, Flagg Law, Portsmouth for the defendant.*

## Supreme Court Orders

Pursuant to its constitutional authority and powers of general superintendence over the New Hampshire Bar Association and its members, the Supreme Court assesses each member of the association, as of June 1, 2019, as follows, for the purpose of funding the operations of the New Hampshire Supreme Court Attorney Discipline System, including the Professional Conduct Committee.

Membership category	Assessment
Active (over three years)	\$205
Active (through third year of admission)	\$205
Inactive	\$ 10
Active Military and Active Honorary	\$ 0
Inactive Retired, Inactive Military and Inactive Honorary	\$ 0
Full-time Judicial	\$ 0
Part-time Judicial	\$ 0
Pro bono Active	\$ 0

These assessments are due and payable on or before July 1, 2019. The New Hampshire Bar Association shall collect the assessment for the account of the Professional Conduct Committee and shall report to the court on or before September 15, 2019, the names of members who have not fully paid. If the Board of Governors of the New Hampshire Bar Association grants a member's request for abatement of bar dues, it may grant a waiver of this fee.

Issued: May 8, 2019  
 ATTEST: Eileen Fox, Clerk of Court  
 Supreme Court of New Hampshire

Pursuant to its constitutional authority and powers of general superintendence over the New Hampshire Bar Association and its members, and pursuant to Supreme Court Rule 55, the New Hampshire Supreme Court suspends the assessment to fund the Public Protection Fund (PPF) for the fund year beginning on June 1, 2019, and ending on May 31, 2020.

Pursuant to its constitutional authority and powers of general superintendence over the New Hampshire Bar Association and its members, and pursuant to Supreme Court Rule 58, the court assesses each dues-paying member of the association as of June 1, 2019, as follows, for the purpose of funding the Lawyers Assistance Program (LAP).

Membership category	LAP Assessment
Active over three years	\$20
Judicial	\$20
Part-time judicial	\$20
Active three years and under	\$20
Inactive	\$20
Inactive retired	\$ 5
Pro bono active	\$ 0

The members of the association exempted from the PPF assessment by order dated July 22, 1998, are exempted from the assessment for the LAP. The LAP assessment is due and payable on or before July 1, 2019. If the Board of Governors of the New Hampshire Bar Association grants a member's request for abatement of bar dues, it may grant a waiver of the assessment.

The New Hampshire Bar Association shall collect the assessment for the account of the LAP and shall report to the court on or before September 15, 2019, the names of those members responsible for the assessment who have not fully paid.

Issued: May 8, 2019  
 ATTEST: Eileen Fox, Clerk of Court

Supreme Court of New Hampshire

Pursuant to its constitutional authority and powers of general superintendence over the New Hampshire Bar Association and its members, and pursuant to Supreme Court Rule 53.3, the court approves the assessment of a \$10.00 annual fee to support the operations of the NHMCLE Board.

Issued: May 8, 2019  
 ATTEST: Eileen Fox, Clerk of Court  
 Supreme Court of New Hampshire

In accordance with Rule 39(2)(a)(1), the Supreme Court appoints Superior Court Justice Neals-Erik William Delker to the Committee on Judicial Conduct, to serve a three-year term commencing July 1, 2019, and expiring on July 1, 2022. Justice Delker is appointed to replace Justice Steven M. Houran, whose term is expiring and who is not eligible for reappointment.

In accordance with Rule 39(2)(a)(2), the court reappoints Rockingham County Superior Court Clerk Maureen F. O'Neil to the Committee on Judicial Conduct, to serve a three-year term commencing July 1, 2019, and expiring on July 1, 2022.

In accordance with Rule 39(2)(a)(5), the court reappoints Mr. Edwin (Chip) S. Underhill, IV, to the Committee on Judicial Conduct, to serve a three-year term commencing July 1, 2019, and expiring on July 1, 2022.

Issued: May 16, 2019  
 ATTEST: Eileen Fox, Clerk of Court  
 Supreme Court of New Hampshire

In accordance with Rule 58.2(A) and (C), the Supreme Court reappoints Attorney Christopher Nicolopoulos to the Lawyers Assistance Program (LAP) Commission. Attorney Nicolopoulos is reappointed to serve a three-year term expiring on March 1, 2022.

Issued: May 17, 2019  
 ATTEST: Eileen Fox, Clerk of Court  
 Supreme Court of New Hampshire

### LD-2019-0003, *In the Matter of Desmond P. FitzGerald, Esquire*

On February 25, 2019, the Attorney Discipline Office (ADO) filed a certified copy of an order of the Massachusetts Supreme Judicial Court, suspending Attorney Desmond P. FitzGerald from the practice of law for a period of four months and staying two months of the suspension for a period of one year subject to Attorney FitzGerald's compliance with certain conditions set forth in the court's order.

The Massachusetts disciplinary matter arose out of Attorney FitzGerald's representation of a client in post-conviction proceedings and in an appeal of his criminal convictions. After reviewing the record of the Board of Bar Overseers, the Supreme Judicial Court found that Attorney FitzGerald repeatedly violated multiple Rules of Professional Conduct. It found that his conduct in filing two motions for a new trial reflected a lack of diligence and competence, some of which adversely affected the administration of justice and failed to meet the clients' lawful objectives. The court found that Attorney FitzGerald's representation of

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his client on appeal similarly demonstrated a lack of competence and diligence, violated the rules of the tribunal, and adversely affected the administration of justice. The court found that content of the appellate brief Attorney FitzGerald filed reflected a lack of competence and diligence and that his false statement in his appeal brief supporting the primary argument on appeal prejudiced the administration of justice. The court found that, in light of the value of the services received by the client, Attorney FitzGerald's fees were clearly excessive.

The Supreme Judicial Court ruled that Attorney FitzGerald violated the following Rules of Professional Conduct and Massachusetts Rules of Court:

1. Rule of Professional Conduct 1.1, which requires a lawyer to provide competent representation to a client;
2. Rule of Professional Conduct 1.2(a), which requires a lawyer to seek the lawful objectives of his client;
3. Rule of Professional Conduct 1.3, which requires a lawyer to act with reasonable diligence and promptness in representing a client;
4. Rule of Professional Conduct 1.5(a), which prohibits a lawyer from charging a clearly excessive fee; and
5. Rule of Professional Conduct 3.4(c), which prohibits a lawyer from knowingly disobeying an obligation under the Rules of a tribunal, except in limited circumstances inapplicable in this case;
6. Rule of Professional Conduct 8.4(d), which makes it professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justices.

The Supreme Judicial Court imposed a four-month suspension, but stayed two months of the suspension for one year, subject to Attorney FitzGerald's compliance with the following conditions:

1. Attorney FitzGerald must obtain an evaluation from the Law Office Management Program (LOMAP) with respect to his law office practices;
2. Attorney FitzGerald must enter into a two-year mentoring agreement, satisfactory to Massachusetts bar counsel, calling for general supervision of his practice and the performance of his office systems including implementation of recommendations made by LOMAP; and
3. If Attorney FitzGerald continues to practice in the appellate courts, he must take a continuing legal education class, acceptable to bar counsel, on the topic of appellate practice.

In accordance with Supreme Court Rule 37(12)(b), the court ordered that a copy of the order of the Supreme Judicial Court be served on Attorney FitzGerald. It ordered Attorney FitzGerald and the ADO to inform the court if they contended that the imposition of identical or substantially similar discipline was unwarranted. Attorney FitzGerald filed a response

in which he asked the court to stay the entire four-month suspension during the one-year period of the Massachusetts stay. The ADO notified the court that, in its view, the sanction of a four-month suspension, with two months stayed for a period of one year, subject to the same conditions imposed by the Supreme Judicial Court, was warranted.

Rule 37(12)(d) provides for the imposition of reciprocal discipline by this court unless the respondent attorney or the ADO demonstrates, or the court finds, based upon the face of the record from which the discipline is predicated, that: (1) the procedure followed by the jurisdiction imposing discipline was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; (2) the imposition of the same or substantially similar discipline by the court would result in grave injustice; or (3) the misconduct established warrants substantially different discipline in New Hampshire.

Having reviewed the order of the Supreme Judicial Court, the court concludes that none of these factors are present. It appears from the order that Attorney FitzGerald participated fully in the Supreme Judicial Court proceeding. Considering the nature and extent of Attorney FitzGerald's misconduct, the court does not find that the imposition of the same discipline would result in grave injustice or that his misconduct would warrant substantially different discipline in New Hampshire. Accordingly, the court concludes that a reciprocal suspension of four months, with two months stayed for one year on compliance with the conditions imposed by the Supreme Judicial Court, should be imposed.

Therefore, the court suspends Attorney FitzGerald for a period of four month, with two months of the suspension conditionally stayed for a period of one year on the condition that Attorney FitzGerald comply with the conditions imposed by the Supreme Judicial Court. Two months of the suspension shall take effect on June 1, 2019, unless a motion for reconsideration is filed.

Attorney FitzGerald shall provide the ADO with the results of the evaluation of his law practice by LOMAP, and with a copy of the mentoring agreement required by the Supreme Judicial Court's order. Attorney FitzGerald shall also advise the ADO whether he has taken a continuing legal education class related to appellate practice.

Attorney FitzGerald is hereby assessed all expenses incurred by the Attorney Discipline Office and Professional Conduct Committee in the investigation and prosecution of this matter. See Rule 37(19).

Lynn, C.J., and Hicks, Bassett, Hantz Marconi, and Donovan, J.J., concurred.

DATE: May 20, 2019  
ATTEST: Eileen Fox, Clerk

◆  
**R-2019-0004, In re Suggested Amendments to the New Hampshire Rules of Criminal Procedure and the Supplemental Rules of the Superior Court of New Hampshire for Electronic Filing**

Advisory Committee on Rules Chair, Justice Patrick Donovan, recently received a suggestion to amend the New Hampshire Rules of Criminal Procedure and the Supplemental Rules of the Superior Court of New Hampshire for Electronic Filing. All but one of the suggested amendments to the existing court rules are designed to facilitate the implementation of electronic filing in criminal cases in the Superior Court, which is currently scheduled to begin in August 2019. In light of this timing, Justice Donovan referred the suggested amendments directly to the Court pursuant to New Hampshire Supreme Court Rule 51(f) ("Special Cases").

On or before July 3, 2019 members of the bench, bar, legislature, executive branch or public may file with the clerk of the supreme court comments on the suggested amendments. An original and one copy of all comments shall be filed. Comments may also be emailed to the court at: [rulescomment@courts.state.nh.us](mailto:rulescomment@courts.state.nh.us).

The language of the suggested amendments is set forth in the attached Appendices A-R.

The current rules of the New Hampshire state courts are available on the Internet at: <http://www.courts.state.nh.us/rules/index.htm>.

Date: May 20, 2019  
ATTEST: Eileen Fox, Clerk  
Supreme Court of New Hampshire

◆  
Pursuant to Part II, Article 73-a of the New Hampshire Constitution and Supreme Court Rule 51, the Supreme Court of New Hampshire adopts the following amendments to court rules.

**I. Pro Hac Vice Fee Increase**

*(These amendments increase the fees charged to out of state counsel who seek to appear pro hac vice from \$250.00 to \$350.00.)*

1. Amend Supreme Court Rule 33(5), as set forth in Appendix A.
2. Amend Supreme Court Rule 49(I), as set forth in Appendix B.
3. Amend Rule of Criminal Procedure 52, as set forth in Appendix C.
4. Amend Superior Court Rule 19(e), as set forth in Appendix D.
5. Amend Superior Court Rule 201(II), as set forth in Appendix E.
6. Amend Circuit Court – District Division Rule 1.3(C)(5), as set forth in Ap-

pendix F.

7. Amend Circuit Court – District Division Rule 3.3(I)(B), as set forth in Appendix G.

8. Amend Circuit Court – Probate Division Rule 19(E), as set forth in Appendix H.

9. Amend Circuit Court – Probate Division Rule 169(IV), as set forth in Appendix I.

10. Amend Circuit Court – Family Division Rule 1.3(M) as set forth in Appendix J.

11. Amend Circuit Court – Family Division Rule 1.21(D), as set forth in Appendix K.

**II. Supreme Court Rule 51. Rulemaking Procedures.**

*(This amendment adds to the membership of the Advisory Committee on Rules the General Counsel of the Attorney Discipline Office or his or her designee.)*

1. Amend Supreme Court Rule 51(d) (1)(A), as set forth in Appendix L.

**Effective Date**

The amendments shall take effect on July 1, 2019.

Date: May 22, 2019  
ATTEST: Eileen Fox, Clerk  
Supreme Court of New Hampshire

◆  
The Supreme Court appoints Jackie Waters, N.H. e-Court Program Director, to the Access to Justice Commission. Ms. Waters is appointed to serve a three-year term beginning June 1, 2019 and expiring May 31, 2022.

Issued: May 31, 2019  
ATTEST: Eileen Fox, Clerk of Court  
Supreme Court of New Hampshire

◆  
**LD-2017-0013, In the Matter of Christopher M. Tremblay, Esquire**  
The court on June 4, 2019, issued the following order:

Christopher M. Tremblay's petition for reinstatement is granted on the condition that he comply with the terms of the mentoring agreement that he entered into with the Attorney Discipline Office.

Christopher M. Tremblay is reinstated to the practice of law in New Hampshire, effective immediately.

Lynn, C.J., and Hicks, Bassett, Hantz Marconi, and Donovan, J.J., concurred.

Eileen Fox, Clerk

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SOCIAL SECURITY

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CIVIL RIGHTS; § 1983; ADA

5/9/19 Cheryl Donlon v. Hillsborough County, et al.  
Case No. 18-cv-549-LM, Opinion No. 2019 DNH 081

Plaintiff sued Hillsborough County and several of its employees alleging numerous claims arising out of injuries she suffered due to inadequate medical care while she was a pretrial detainee at Valley Street Jail. Defendants moved for judgment on the pleadings and plaintiff sought to amend her complaint. Defendants objected, arguing that the proposed amendment was futile. The court granted plaintiff's amendment in part and denied it in part. It found that amendment of her § 1983 claim against the individual employees for deliberate indifference of her serious medical condition and her negligence claim against Hillsborough County would be futile. But the court allowed amendment of two other claims: plaintiff's § 1983 claim against Hillsborough County and her claim that the County violated the Americans with Disabilities Act by failing to accommodate her disability.

29 pages. Chief Judge Landya McCafferty.

5/6/19 Martin v. SSA  
Case No. 18-cv-461-JL, Opinion No. 2019 DNH 073

In this appeal from a denial of Social Security disability insurance benefits, the decision of the Acting Commissioner to deny those benefits was reversed, and the matter was remanded, because the Administrative Law Judge improperly assessed the claimant's statements about his symptoms.

20 pages. Judge Joseph N. Laplante.

5/6/19 Wallaga v. SSA  
Case No. 18-cv-687-JL, Opinion No. 2019 DNH 076

In this appeal from a denial of Social Security disability insurance benefits, the decision of the Acting Commissioner to deny those benefits was affirmed over claims that the Administrative Law Judge had erred by: (1) failing to give claimant a supplemental hearing before relying on evidence he had solicited from a medical consultant after claimant's first hearing; and (2) improperly weighing several medical opinions when determining that claimant did not have a severe medically determinable impairment prior to her date last insured.

26 pages. Judge Joseph N. Laplante.

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DRM is committed to client service and providing resources for professional growth and development. We offer excellent mentorship and training, as well as leading technology, competitive salary, and a comprehensive benefits package, including industry-leading paid parental leave and two exceptional retirement plans.

Please submit a cover letter and transcript along with resume for consideration. To apply, please visit [DownsRachlinMartinPLLC.appone.com](http://DownsRachlinMartinPLLC.appone.com).



Business Sense • Legal Ingenuity

### Corporate/Commercial Attorney | Lebanon, NH

Downs Rachlin Martin PLLC seeks an experienced corporate/commercial attorney to join its Lebanon office. The ideal candidate will be licensed to practice in New Hampshire, have a portable book of business with compatible clients and have a minimum of ten years of experience in corporate/commercial law. The ideal candidate will also be active in the New Hampshire business and civic community and be committed to growing DRM's regional presence. Relevant experience would include the formation of corporations, limited liability companies and other business organizations, commercial loan transactions, equity financings (including private equity and venture capital) and mergers and acquisitions (including sales of stock and assets, management buyouts, recapitalizations and reorganizations). Experience with ESOPs, B-corps or other focused practices would be highly valued.

DRM is committed to client service and providing resources for professional growth and development. We offer excellent mentorship and training, as well as leading technology, competitive salary, and a comprehensive benefits package, including industry-leading paid parental leave and two exceptional retirement plans. To apply, please visit [DownsRachlinMartinPLLC.appone.com](http://DownsRachlinMartinPLLC.appone.com).

## Corporate Associate

Do you like working with entrepreneurs? Are you interested in joining a collaborative and innovative legal practice? Cook, Little, Rosenblatt & Manson, p.l.l.c. is a highly-regarded boutique business law firm with an opening in its corporate practice group. Our ideal candidate has strong academic credentials and 5-10 years of sophisticated corporate experience. We offer competitive compensation, as well as a platform for you to develop client relationships, become involved with local organizations, work with high-growth businesses, and build your practice in a supportive and collegial environment.

To learn more about the firm, visit our website at [www.clrm.com](http://www.clrm.com). To apply, please send your resume to Lisa Roy, Hiring Coordinator, at [lroy@clrm.com](mailto:lroy@clrm.com).



## Corporate Associate

Do you like working with entrepreneurs? Are you interested in joining a collaborative and innovative legal practice? Cook, Little, Rosenblatt & Manson, p.l.l.c. is a highly-regarded boutique business law firm with an opening in its corporate practice group. Our ideal candidate has strong academic credentials and 2 - 5 years of sophisticated corporate experience. We offer competitive compensation, as well as a platform for you to develop client relationships, become involved with local organizations, work with high-growth businesses, and build your practice in a supportive and collegial environment.

To learn more about the firm, visit our website at [www.clrm.com](http://www.clrm.com). To apply, please send your resume to Lisa Roy, Hiring Coordinator, at [lroy@clrm.com](mailto:lroy@clrm.com).



### CIVIL BUREAU FULL-TIME LITIGATION ATTORNEY OPENING

The Civil Bureau serves as litigation counsel to the executive departments and agencies of State government, providing advocacy before state and federal courts and in administrative proceedings.

The ideal candidate, a member of the New Hampshire Bar, will have substantial experience before trial and appellate courts in both routine and complex civil disputes, including employment, contract and tort cases, as well as other areas typically representative of a general litigation practice. Excellent analytical and writing skills are a must. Federal or state court clerkship experience preferred.

The salary is competitive and commensurate with experience; a superior benefit package, including health, dental, and life insurance is available.

Please send cover letter and CV to: New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301, c/o Dianne Martin, Chief of Staff or via e-mail at: [dianne.martin@doj.nh.gov](mailto:dianne.martin@doj.nh.gov).

The Office of the Attorney General is an Equal Employment Opportunity employer and does not discriminate on the basis of race, color, national origin, gender, age, sexual orientation, handicapping condition, and/or disability. For more information about the New Hampshire Department of Justice, please visit our website: [www.doj.nh.gov](http://www.doj.nh.gov).

## Hearings Officer

NH Department of Labor  
Position Number #10991  
Salary Range: \$53,176.50- \$75,133.50

The Department of Labor has a vacancy for a full time Hearings Officer. The position will be responsible for holding administrative hearings relative to workers' compensation and NH labor law, rendering written decisions in accordance with applicable statute/regulation.

**Minimum Qualifications:** Bachelor's degree and five years of related experience (an advanced degree may be substituted for years of experience).

**How to APPLY:** Please go to the following

website to submit your application electronically through NH 1st: <http://das.nh.gov/jobsearch/employment.aspx>. A paper application may be sent to: New Hampshire Dept. of Labor, 95 Pleasant Street, Concord, NH 03301. Please reference the position number that you are applying for: #10991 Hearings Officer. Position will remain open until a qualified candidate is found. EOE.

For questions about this position please contact Sarah Fuller, Hearings/Rules Administrator at (603) 271-3597.

## PARALEGAL – SERVICE CREDIT UNION

The Paralegal shall provide legal administrative support and assistance to the Legal Department, including but not limited to organization and maintenance of third party contracts; preliminary review and analysis of credit union third party contracts; review and process subpoenas and other legal requests for member documents; and review and respond on deceased member account legal issues. Reports to the Associate General Counsel.

- Manage third party contracts, including follow-up with contract owners to provide notice of contract renewal dates.
- Review and analyze certain credit union third party contracts, consulting with the Associate General Counsel as necessary.
- Assist contract owners with tracking, measuring, reporting, and contract terminations.
- Review and process subpoenas and other legal requests for member documents and information.

Criteria:

- Certified Paralegal (NALA) or Registered Paralegal (NFPA) required
- Bachelor's degree in business or law preferred
- Experience working with third party relationships and contracts preferred
- Financial institution experience preferred

Full job description can be found on our website: <https://servicecu.org/about-scu/employment-opportunities/>

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## Claims Analyst

RiverStone is a global insurance industry leader specializing in the acquisition and management of insurance portfolios. With a highly skilled team employed in the US and Europe, RiverStone has amassed unrivaled industry and regulatory experience, and is a recognized market leader in the resolution of complex insurance claims arising from multiple lines of business including APH (asbestos, environmental, and mass tort) construction defect, brown and blue water marine, workers compensation, and major bodily injury liabilities.

An immediate opportunity exists for a **Claims Analyst**. Reporting into the Unit Manager, the Claims Analyst will directly handle claims including professional liability, construction defect, medical, legal and other professional malpractice, general liability, asbestos, pollution, and health hazard. Day to day activities will include: coverage analyses, liability and damage investigations, comprehensive evaluations, litigation management, negotiation, mediation participation and trial attendance as cases require. Potential responsibilities may include special projects and participation in due diligence efforts to evaluate potential new business acquisitions.

**Opportunities in Manchester, NH**

**Duties and Responsibilities:**

- Reviews loss notices; confirms and interprets policy coverages; establishes adequate reserves; and investigates and handles claims involving primary and excess coverages
- Responsible for assignment to and control of work of defense counsel, assignment of expert witnesses, and interfacing with peer carriers including design and execution of defense and indemnity contracts, evaluation of liability and damages, and participation in settlement conferences
- Ensures proper file setup, reserving, general handling and application of company procedure and coverage interpretation philosophy
- Participates in developing claims handling techniques, including defense coordination, expense control, and strategy
- Provides specific claims information to senior management relative to all new notices of loss and maintains specific financial and general statistical records which are used for reporting to management
- Maintains diary control of reported cases to ensure maintenance of proper reserves to reflect the company's exposure and adequate notice to reinsurers, and recovery of specific amounts when payment exceeds the company's retention
- Performs special projects and assignments related to area of authority

**Qualifications/Experience:**

- Must have a minimum of five years of experience in handling commercial line and/or multi-line claims or comparable experience.
- College Degree (4 yr.) required.
- Excellent analytical, interpersonal and communication skills, both written and oral required.
- Proven track record of working independently and meeting assigned deadlines.
- 5-10 years handling complex claims and coverage issues preferred.
- Possession of a JD, CPCU, SCLA, CCLA desired.

We offer an exceptional health benefits program, company matching 401K, tuition reimbursement, employee stock purchase plan, and additional site specific perks (on site gym, yoga classes, dry cleaning services, and more).

For additional information, and to apply online, please visit [www.trg.com/join-us](http://www.trg.com/join-us).

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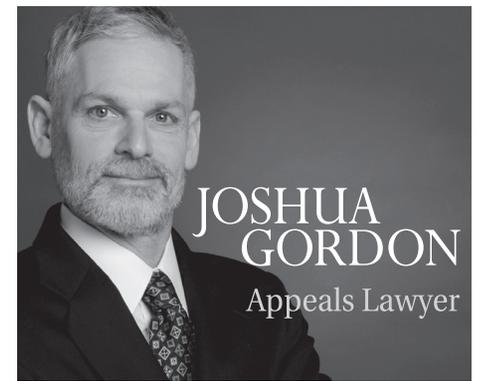


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# Continuing Legal Education **GUIDE**

**June  
2019**

[nhbar.org/  
nhbacle](http://nhbar.org/nhbacle)

High Quality, Cost-Effective CLE for the New Hampshire Legal Community

## Calendar Overview

### JUNE

**21** Friday • 8:30 a.m. - 10:30 a.m.  
**13<sup>th</sup> Annual Ethics CLE**  
• In Person FULL • Webcast ONLY  
• 120 min. ethics/prof.  
• Concord • NHBA Seminar Room

**28-29** Friday & Saturday  
**Annual Meeting**  
• In Person  
• Bretton Woods • Omni Mount Washington Resort

### JULY

**18** Thursday • 8:00 a.m. - 5:35 p.m.  
**Second Annual CLE by the Sea**  
• In Person  
• Up to 360 credit minutes  
• Salisbury, MA • Blue Ocean Event Center

### AUGUST

**6** Tuesday • 8:30 a.m. - 4:30 p.m.  
**2019 Emerging Leaders' Summit**  
• In Person  
• Manchester • St. Anselm College

### SEPTEMBER

**12** Thursday • 9:00 a.m. - 4:00 p.m.  
**A Practical Guide to Evidence Video Replay**  
• In Person Video Replay  
• 360 min. credit • incl. 60 min. ethics/prof.  
• Concord • NHBA Seminar Room

**13** Friday • 9:00 a.m. - 4:30 p.m.  
**MASTERS IN LITIGATION: Persuasion Strategies and Visuals for Litigators with Larry Kaye**  
• In Person • Webcast  
• 360 min. credit  
• Concord • NHBA Seminar Room

**27** Friday • 9:00 a.m. - 4:15 p.m.  
**Writing and Speaking to Win with Steven Stark**  
• In Person • Webcast  
• 360 min. including 60 min. ethics/prof.  
• Concord • NHBA Seminar Room

## CLE HIGHLIGHT



Whether you're in the car, hiking, running or traveling CLEtoGO!™ provides CLE self-study credits

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Membership period 7/1/19 – 6/30/20

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- **ONLY** \$99 fee for full-day seminars, including materials and lunch.
- **ONLY** \$85 fee for half day and \$65 fee for breakfast seminars including materials and refreshments
- Special low membership cost for new lawyers

For more information contact Cheryl Moore  
(603) 715-3260 or email [cmoore@nhbar.org](mailto:cmoore@nhbar.org)

## 5 Ways to Register

**Mail** NHBA•CLE  
2 Pillsbury St.  
Suite 300  
Concord, NH 03301

**Phone** (603) 715-EASY (3279)

**Fax** (603) 224-3729

**Email** [cmoore@nhbar.org](mailto:cmoore@nhbar.org)

**Website** [www.nhbar.org/nhbacle](http://www.nhbar.org/nhbacle)

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The Massachusetts Bar Association, the Maine State Bar Association, The NH Bar Association,  
The MA Academy of Trial Attorneys, The MA Women's Bar Association and the LOMAP Massachusetts

## Second Annual CLE BY THE SEA N.E. STRATEGIC SOLUTIONS FOR SOLO AND SMALL LAW FIRMS

Thursday  
**July 18**

 Up to 360 min. NHMCLE Credit • 8:30 a.m. - 5:35 p.m.

NOT ALL TOPICS qualify under the NH Supreme Court Rule 53, see asterisks.

 In person



### TOPICS

**You're Doing It All Wrong \* (Plenary)**

**Successfully Recover, Analyze, and Prepare Audio, Video & Digital Evidence or Custody Evaluations**

**How to Avoid Implicit Bias and Discriminatory Conduct and Communications with Clients and Employees; and a Brief Overview of the Massachusetts Paid Family Medical Leave Act or**

**Drafting the Most Effective Medicaid Trusts**

**The Latest in Legal Tech: What Really Matters to Your Practice (Plenary)**

**New Developments in OUI Marijuana or**

**Which State Has Jurisdiction under the UCCJA?**

**Dirty Tricks: Understanding Spying, Hacking & Stealing Data in Legal Matters or**

**Branding for Lawyers: Developing Business and a Career as Yourself \***

**Understanding Essential Documents Related to Business Valuation and Financial Damages and Crossing State Lines in Discovery Requests or**

**'Straight Cash, Honey: How to Make More Money in Your Law Practice Than You Ever Have Before \***

**For registration & more information go to [newburyportbarassociation.org](http://newburyportbarassociation.org)**



## Facilitated Video Replay

### A Practical Guide to Evidence: *What You Need to Know in Every Court*

Thursday 9:00 a.m. - 4:00 p.m.

**Sep 12**

 360 min. credit. incl 60 min. Ethics/Prof.

 Video Replay



Learn the Rules of Evidence from a practical point of view. The presenters focused on the rules, how litigators should use them and how courts interpret them in various courts and cases, from *pro se* proceedings in state district court to complex litigation in federal court. The presenters have years of experience actually in court applying the rules of evidence. If you are a litigator or prepare matters for litigation, this CLE will give you a solid, practical foundation to work from.

#### Who should attend?

Lawyers who go to court, try cases, argue motions and those who prepare cases for trials and hearings.

#### ORIGINAL FACULTY

**Anthony F. Sculimbrene**, Program Chair/CLE Committee Member, Gottesman & Hollis, PA, Nashua  
**Karinne E. Brobst**, Milford Police Department, Milford  
**James P. Harris**, Sheehan Phinney Bass & Green, PA, Manchester  
**Todd J. Hathaway**, Wadleigh, Starr & Peters, PLLC, Manchester  
**Hon. Joseph N. Laplante**, US District Court, Concord  
**Kirsten B. Wilson**, Kirsten Wilson Law, PLLC, Portsmouth

 Check-in & continental breakfast begin at 8:30 a.m. NH Bar Association Seminar Room, Concord

 New Hampshire Practice

#### PROGRAM PRICING

VIDEO REPLAY: \$195 NHBA Member; \$99 NHBA-CLE CLUB Member.

**Featuring  
the entire  
NH Supreme  
Court**

## APPELLATE ADVOCACY 2019

Wednesday 9:00 a.m. - 4:30 p.m.

**Oct 30**

 360 min. credit incl. 120 min. Ethics/prof.



Webcast



In person



**Special Resources:**  
Attendees will receive copies of the newly revised Appellate Practice Manual produced by NHBA • CLE.

#### NH SUPREME COURT

**Hon. Robert J. Lynn**, Chief Justice, NH Supreme Court  
**Hon. James P. Bassett**, NH Supreme Court  
**Hon. Patrick E. Donovan**, NH Supreme Court  
**Hon. Anna Barbara Hantz Marconi**, NH Supreme Court  
**Hon. Gary E. Hicks**, NH Supreme Court

#### FACULTY

**Doreen F. Connor**, Program Co-Chair, Primmer Piper Eggleston & Cramer, Manchester  
**Theodore M. Lothstein**, Program Co-Chair, Lothstein Guerriero, PLLC, Concord  
**Eileen Fox**, Clerk, NH Supreme Court, Concord  
**Timothy A. Gudas**, Deputy Clerk, NH Supreme Court, Concord  
**Stephanie C. Hausman**, NH Appellate Defender Program, Concord  
**Christopher M. Johnson**, NH Appellate Defender Program, Concord  
**Daniel E. Will**, NH Attorney General-Dept. Of Justice, Concord

*Additional faculty to be announced.*

#### PROGRAM PRICING

SEMINAR (preregistered): \$209 NHBA Member; \$159 Members in practice less than 3 years; \$99 NHBA-CLE CLUB Members; \$139 Paralegals, law office staff; \$249 Other/non-NHBA affiliated. Walk-in on the day of the program is an additional \$15.

 Check-in & continental breakfast begin at 8:30 a.m. NH Bar Association Seminar Room, Concord

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**For more information go to [nhbar.org/nhbacle](http://nhbar.org/nhbacle)**

# Developments in the Law 2019



Friday 9:00 a.m. - 4:30 p.m.  
**Oct 25** 360 min. credit.  
 incl 60 min. Ethics/Prof.



This annual CLE seminar is a must for all practicing New Hampshire attorneys. In a convenient one-day program format, this program offers a complete survey of important legal developments affecting NH practice.

**Can't make the live program?  
 We will be coming to a location near you!**

As a member service, Video Replays of this program are being offered at various locations throughout the state!

### PROGRAM FACULTY

- Corey M. Belobrow**, Program Chair/CLE Committee Member, Maggiotto, Friedman, Feeney & Fraas, PLLC, Concord
- Christine S. Anderson**, Ansell & Anderson, PA, Bedford
- Thomas M. Closson**, Jackson Lewis, PC, Portsmouth
- Tracey G. Cote**, Shaheen & Gordon, PA, Concord
- Timothy A. Gudas**, NH Supreme Court, Concord
- Christopher M. Johnson**, NH Appellate Defender Program, Concord
- Gregory A. Moffett**, Preti, Flaherty, Beliveau & Pachios, PLLP, Concord
- William C. Saturley**, Preti, Flaherty, Beliveau & Pachios, PLLP, Concord
- Laura Spector-Morgan**, Mitchell Municipal Group, PA, Laconia
- Roy W. Tilsley**, Bernstein, Shur, Sawyer & Nelson, PA, Manchester

### Video Replay Locations:

- Fireside Inn, W. Lebanon  
Thursday, November 7
- White Mountain Hotel, N. Conway  
Friday, November 8
- Common Man Inn, Plymouth  
Thursday, November 14
- Holiday Inn, Portsmouth  
Friday, November 15
- Best Western, Keene  
Thursday, December 5
- NH Bar Association, Concord  
Friday, February 7, 2020

Check-in & continental breakfast begin @ 8:15 a.m.  
 The DoubleTree Hilton Downtown Manchester, Manchester  
 New Hampshire Practice

**SEMINAR** (preregistered): SEMINAR FEE (pre-registered): \$219 NHBA Member; \$159 Members in practice less than 3 years; \$99 NHBA•CLE CLUB Members; \$139 Paralegals, law office staff; \$95 Full-time students; \$249 Other/non-NHBA affiliated. Walk-in on the day of the Program is an additional \$15.

**VIDEO REPLAY** (pre-registered): \$195 Registration; \$99 NHBA•CLE CLUB Member.

## NHBA • CLE REGISTRATION FORM

Send with payment to: NHBA•CLE, 2 Pillsbury Street, Suite 300, Concord, NH 03301 or FAX with MasterCard, VISA, AMEX or Discover to (603) 224-3729  
 (please complete one form for each registrant)

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Seminar Title	Date of Live Attendance	Book Only	DVD Purchase	CD Purchase	Fee

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**For more information go to [nhbar.org/nhbacle](http://nhbar.org/nhbacle)**

Co-sponsored by the NH Society of CPAs and the NH Bankers Association

## 2019 Emerging Leaders' Summit

Tuesday 8:30 a.m. - 4:30 p.m. @Saint Anselm College  
**Aug 6** Credit TBD In person



The NH Bar Association, New Hampshire Society of CPAs, NH Bankers Association and the Financial Planners of Northern New England present the 2019 Emerging Leaders' Summit!

This event is designed to help financial and legal professionals expand their knowledge of tools and strategies to assist them on their path to being a true leader.

This year's program will include presentations on self-branding, change management, tips for keeping new employees happy (without making your current staff feel undervalued), and so much more.

Don't miss this amazing opportunity to network with your peers and gain the skills you need to reach your goals!

More information to be announced.

To register go to the **WWW.NHSCPA.ORG** website under Professional Development  
 or call **(603) 622-1999**

The program is being held at the  
**Institute of Politics, Saint Anselm College**

## LITIGATORS • LITIGATORS • LITIGATORS

### MASTERS IN LITIGATION: Persuasion Strategies and Visuals for Litigators



with Larry Kaye

Friday 9:00 a.m. - 4:15 p.m.  
**Sep 13** 360 min. Live Webcast In person



#### Persuasion Strategies for Every Litigator ~ Morning Program

Being able to persuade your audience is vital for every litigator.

In this fast-paced CLE session, veteran trial attorney Larry Kaye, President of The Winning Litigator, LLC, a full-service national trial consulting firm, will reveal 25 effective persuasion strategies to assist you in winning over judges, juries and mediators, including:

- Theme building strategies
- Strategies in packaging and presenting evidence
- Strategies in choosing case vocabulary and rhetoric
- Strategies in developing and presenting a mediation statement
- Strategies to get juries, judges and mediators to take the right notes
- Strategies for examining witnesses
- Opening statement and closing argument strategies
- Personal presentation and public speaking strategies

These strategies cover almost every aspect of the cycle of litigation. Whether you litigate jury or bench trials, arbitrations, or administrative proceedings, you'll take away an excellent group of persuasion strategies that you can apply immediately in your practice.

This CLE session is an excellent choice for seasoned veterans as well as newer attorneys.

#### Becoming Visual: Create Dynamic Litigation Graphics -- Even if You're Not an Artist ~ Afternoon Session

Litigation graphics and exhibit boards are one of your most important persuasion tools, and can be used especially effectively when

- A timeline or sequence is important
- There is a potential for information overload in a trial or mediation
- Language and processes are highly technical
- Calculations are complex
- Evidence seems disjointed and not compelling
- Complex trials require synthesis of volumes of evidence

In the afternoon, Larry will show you how to create effective litigation graphics, even if you are not an artist.

This session includes:

- How to determine when to use litigation graphics
- How to plan for your use of graphics for mediation and trial
- How to produce a huge variety of dynamic litigation graphics on a tight budget
- Tools and applications for creating litigation graphics
- How to choose color palettes and stock images for demonstratives
- When and how to work with a graphic artist
- Creative ways of using litigation graphics
- Techniques for maximizing the persuasive value of litigation graphics

**\*Additionally, participants are invited to bring for discussion and critique graphics they are working on, or have used in the past.**

Check-in & continental breakfast begin at 8:30 a.m.  
 NH Bar Association Seminar Room, Concord

#### PROGRAM PRICING

**Early Bird! Prepaid by August 16, \$225\* • Prepaid after August 16, \$250\***

Morning Only Live or Webcast \$179; Afternoon Only Live or webcast \$179; Both half day webcasts \$250  
 \*Price includes continental breakfast, lunch, refreshments and materials.



## Save the date for these upcoming programs

- A Practical Guide to Evidence Video Replay ~ Sept. 12
- Litigation Techniques ~ Sept. 13
- Writing & Speaking to Win ~ Sept. 27
- Lifecycle of an Employee ~ Oct. 10
- Administrative Law ~ Oct. 18
- Developments in the Law 2019 ~ Oct. 25
- Appellate Advocacy ~ Oct. 30
- 37<sup>th</sup> Annual Tax Forum ~ Nov. 20
- 19<sup>th</sup> Superior Court Judicial Forum ~ Dec. 6
- Midyear Meeting 2020 ~ Feb. 21
- International Law ~ Mar. 12
- 19<sup>th</sup> Annual Labor & Employment Law ~ Mar. 20
- Workers' Compensation ~ Mar. 25
- Nuts & Bolts of Criminal Law ~ Mar. 27
- In House Counsel ~ Apr. 2
- DWI ~ Apr. 8
- Business Split-ups ~ May 7
- Construction Law ~ May 14

and more to come!

For more information go to [nhbar.org/nhbacle](http://nhbar.org/nhbacle)

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## Writing & Speaking to Win

Friday  
**Sep 27**

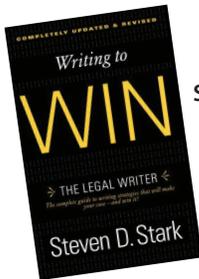
9:00 a.m. - 4:15 p.m.  
360 min. Credit

Webcast  
In person



### WRITING TO WIN ~ Morning Program • 9:00 a.m. - 12:15 p.m.

Do you know what your writings are really saying to your clients and peers? Understanding the law is one thing, but knowing how to communicate it in a meaningful way is another. Being unclear in communication can cause costly errors and disastrous effects in the cases you handle.



All attendees will receive a copy of Steven Stark's book on **Writing to Win**

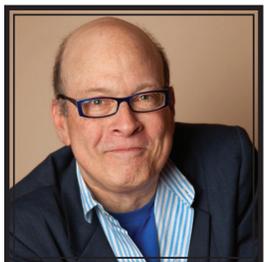
(see information on the brochure and online.)

- The Do's and Don'ts of Legal Prose
- How to Write and Edit More Efficiently
- How to Apply Storytelling to Your Writing
- How Studying Advertisements Can Help Your Arguments

### SPEAKING TO WIN ~ Afternoon Program • 1:00 - 4:15 p.m.

Be your best in the courtroom, boardroom and classroom. Whether you are called upon to give legislative testimony, a presentation to clients, or comments to the press, you'll come to understand what makes a great speaker effective, and discover how to use those techniques yourself.

- The Five Key Ingredients of Oral Legal Prose
- Conveying the Message Right as a Lawyer
- Enhancing the Message and Getting Started
- Delivery, Voice and Appearance
- Visual Aids, Humor and Dealing with Nerves
- Oral Argument before a Judge
- Technical Talks and Presentations to Legal Audiences
- Handling Questions
- Appearances on Television or Before the Press
- What to Say When You or Your Client Is in Trouble
- How to Deal with a Hostile or Indifferent Audience



**Steven D. Stark**, a writer, teacher, lawyer, artist, and consultant, is the author of four books, one e-book, and two poetry chapbooks. He has been a commentator for CNN, National Public Radio, and the Voice of America, where his role was to try to interpret American culture to the rest of the world. A former columnist for the Boston Globe and Montreal Gazette (where he wrote about the culture of world sports), he has written extensively on

American culture and politics in such publications as the New York Times, Los Angeles Times, Washington Post, and the Atlantic Monthly. A former lecturer on law at Harvard Law School, he has a vast background in the fields of legal writing, communication, and inter-cultural studies and has taught writing and speaking to thousands of lawyers, judges, business people, and government officials all over the world. He is a graduate of Harvard College and Yale Law School and devotes a substantial amount of his work to public interest, human rights, and pro bono organizations all over the world.

For more information and details go to [nhbar.org/nhbacle](http://nhbar.org/nhbacle)

Check-in & continental breakfast begin at 8:30 a.m.  
NH Bar Association Seminar Room, Concord

#### PROGRAM PRICING

Early Bird! Full day Prepaid by August 30, \$225\* • Prepaid after August 30, \$250\*  
Morning Only Live or Webcast \$179; Afternoon Only Live or webcast \$179; Both half day webcasts \$250  
\*Price includes continental breakfast, lunch, refreshments and materials.



### Recently Added Online Seminars

#### When We're 64: Answers to Elder Clients' Frequently Asked Questions

Original Program 5/31/19 - 300 General & 60 Ethics/Prof. Minutes

#### 23 Mistakes Experienced Contract Drafters USUALLY Make

Original Program 5/29/19 - 300 General & 60 Ethics/Prof. Minutes

#### Recent Changes to Medicare Reimbursement for Outpatient Services at NH Hospitals

Original Program 5/28/19 - 60 General Minutes

#### Managing Student Loan Debt & Personal Finances

Original Program 5/22/19 - 165 General Minutes

#### Intellectual Property Law for the General Practitioner

Original Program 5/16/19 - 195 General & 30 Ethics/Prof. Minutes

#### Solo & Small Firm Flight Plan in the 21st Century

Original Program 5/10/19 - 270 General & 90 Ethics/Prof. Minutes

#### Issues in Advanced Personal Injury Law

Original Program 5/9/10 - 300 General & 60 Ethics/Prof. Minutes

#### Essentials for Applying the New Alimony Law

Original Program 5/7/19 - 60 General Minutes

Learn more or register at  
[nhbar.inreachce.com](http://nhbar.inreachce.com)



### Virtual Learn@Lunch Webcast Series

Tune in on Tuesdays for our one hour webcasts.

#### Uniform Access to Digital Funds Act

October 15 • 12-1:00 p.m.

#### Polling Place/Election Issues

December 3 • 12-1:00 p.m.

More to come!

Be sure to visit our catalog for archived Learn@Lunch or 1-Hour or Less Programs.

(Browse by Subject Matter from the CLE catalog home page.)

For more information go to [nhbar.org/nhbacle](http://nhbar.org/nhbacle)



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– Cheryl Ischy, Legal Administrator  
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