The Story of Women’s Suffrage in NH

By Kathie Ragsdale

Imagine trying to vote in every election for nearly five decades and always being turned away.

Or attempting – unsuccessfully – to champion an early Equal Rights Amendment before President Calvin Coolidge.

Or drawing on your family’s abolitionist roots to found an organization advancing the then-outrageous cause of women’s suffrage.

The three New Hampshire women who undertook those actions – Marilla Marks Young Ricker, Sallie W. Hovey and Armenia S. White, respectively – are among the pioneers being remembered this year as the nation celebrates the 100th anniversary of the 19th Amendment granting women the right to vote.

The New Hampshire Bar Association is celebrating the occasion with an 11-day observance in September – rescheduled from the spring because of coronavirus – to both educate the public about the 19th Amendment and examine the importance of the privilege known as voting.

The three-pronged centennial celebration will include a display of the American Bar Association’s 19th Amendment Traveling Exhibit in the New Hampshire State Library’s Exhibit Hall Sept. 7 through 18, free and open to the public. The six-banner, free-standing exhibit, “100 Years of Voting,” includes historic photos and artifacts recounting the battle for ratification and outlining remaining challenges to women’s rights.

A second component involves the Bar’s Law Related Education program, A Lawyer and Judge in Every School, which partners volunteer attorneys and judges with schools to provide legal education to students.

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Priorities and Perseverance During the Pandemic

By Scott Merrill

Over the past month, the world has been swept away by the media’s coverage of the COVID-19 pandemic. Images and stories from around the country depict eerily empty streets in New York City where some hospitals are operating at capacity, while nurses and doctors work to save lives in most major cities around the country. Schools and beaches are closed nearly everywhere, many foreign college students are stranded, and unemployment is higher than it has been since the Great Depression.

Around the country, social distancing and the use of face masks has become the ‘new normal.’ Even opening day for major league baseball is indefinitely postponed and the NCAA tournament was canceled. It is not ‘business as usual’ and many people are wondering when it will be.

During this time of rapid change, New Hampshire’s judicial branches and the legal community have been working hard to maintain their commitment to justice and their clients, fielding questions in a host of practice areas, while making up to the minute adjustments in response to Governor Sununu’s declaration of a state of emergency and the Emergency Orders that have followed.

COVID-19 has led to the Judicial Branch suspending in-person hearings and most law offices have stopped seeing clients in person accept in extreme situations.

The Courts

On April 1, according to David King, Administrative Judge for the New Hampshire Circuit Court, the circuit courts had 21,118 hearings scheduled during the weeks covered by the supreme court orders.

“Cancelling, rescheduling or otherwise triaging this many cases is difficult and a somewhat fluid situation,” he said, “particularly when we have no idea where the state will be on May 4.”

All New Hampshire Judicial Branch courts remain open during regular business hours but public access to courthouses and/or clerk’s offices has been restricted. Only individuals who are filing for emergency relief or who are scheduled for in-person court proceedings are being admitted.

Prioritizing and Adjusting

Attorneys around New Hampshire are currently advising clients on a variety of changes related to COVID-19. Barry Needelman, an Environmental Attorney at McLane Middleton said:

“We have two priorities right now. First, continue to provide great, timely service to our clients. Second, do all we can to support our employees personally and professionally, and ensure we’re diligent about keeping them connected and engaged.”

Overall, Needelman said, the attorneys he works with are holding up very well.

“Because of our heavy investment in technology over the last few years, they are all able to work remotely effectively and handle their cases relatively seamlessly.”

PRACTITIONER PROFILE

An Authentic Commitment to People

By Kathie Ragsdale

Anu R. Mullikin’s journey toward a legal career began 8,000 miles and nearly five decades ago, in a town in the south of India.

She was 5.

Her parents introduced her to her aunt, R. Vasatha Iyengar, an attorney in a time and place where female lawyers were uncommon. The young Anu was impressed with her sari-wearing relative.

“I announced I was going to be a lawyer,” Mullikin recalls. “I’m one of those people, I set my mind to do something and I do it.”

Her parents were from India but had moved to Fort Worth, Texas, so her mother – a surgeon and fellow of the United Kingdom’s Royal College of Surgeons – could complete a residency to be able to practice in the United States.

“I was born in Fort Worth and lived there until I was seven months old. You can tell from my accent,” says Mullikin, with trademark humor.

When she was 5, the family moved to Manchester after her mother took a job as chief of laboratory services at the Veterans Administration Hospital, while her father commuted to his professor’s job at what is now UMass Lowell.

Mullikin attended public elementary school, then Derryfield, a private day school for grades six through 12, before getting a degree from UMass Lowell and moving on to law school at Boston University.

While still at Derryfield, she met John Mullikin and became partners in a romance that persists to this day.

“The boyfriend I had in high school made me break fast this morning,” she says of her husband of 27 years.

After getting her law degree, she took a job at Devine Millimet, where she had been a summer associate between her second and third year of law school, moving on to Mullikin & Anderson.

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THE DOCKET

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Lawyers Risking Careers. Jack Middleton tells the story of the lawyers who represented Elba Chase. PAGE 3

All Things Cyber. Ryan Barton discusses why cyber security is more important than ever in the wake of COVID-19. PAGE 6-7

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Court Orders. The Supreme Court issues orders in response to COVID-19. PAGE 33
Reflections during a Pandemic: A Message from the Director

By George Moore
Executive Director

I’m sitting in my home library trying to think of further ways the Bar Association can help its members in the near-term future. As COVID-19 ramps up, commerce has slowed to an ebb, and law practices, particularly for solos and small commerce, have been impacted by the pandemic. We have fielded many inquiries from members and from the public about how we can and will continue to operate. We are also receiving many suggestions for ways that lawyers can help. We are doing what we can to answer these questions, and to process possible solutions. The situation is changing every day, and new and different challenges seem to arise daily as well. In response, we are changing our strategy as we remain in contact with the Supreme Court to provide the best information that we can. We are listening, so keep those cards and letters coming!

You will note that we still have a “Save the Date” notice for the upcoming Annual Meeting in the current Bar News and on our website. Rest assured that we are continuing our in-house planning for this event, but we are mindful of its relative importance in the greater scheme right now. Our planning is only intended to allow us to be prepared if we are able to go forward with the event in a time frame that results in minimal costs to the Association. This is not pie-in-the-sky planning, we have a deliberate time frame and decision points driving the process.

Our officers and our executive director remain in contact with the Supreme Court for CLE’s and other events in the future. We are securing reliable information as to how lawyers can take advantage of federal and state programs designed to help the economic distress. We are working with the court system to have a workable plan to deal with the backlog of continued trials and hearings. When the pandemic recedes, it will not be pretty. Not economically. Not institutionally. Not personally. The Bar has set points driving the process.

We are also receiving many suggestions for ways that lawyers can help. We are doing what we can to answer these questions, and to process possible solutions. The situation is changing every day, and new and different challenges seem to arise daily as well. In response, we are changing our strategy as we remain in contact with the Supreme Court to provide the best information that we can. We are listening, so keep those cards and letters coming!

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Our officers and our executive director remain in contact with the Supreme Court to provide the best information that we can. We are listening, so keep those cards and letters coming!
By Jack Middleton

This is a story about New Hampshire lawyers who risked their careers, and certainly, their professional standing, by taking on unpopular clients. The story begins in the early 1950s, when, following the end of World War II, American leaders were concerned with the threat of communism and communist takeover. The paranoia, labeled “The Red Scare,” became well known to the American public – and the world – as a result of a campaign against alleged communists by the Senate Committee on Government Operation and the Senate Permanent Subcommittee on Investigations chaired by Wisconsin senator Joseph McCarthy. The Committee held 36 days of hearings on television which were called by critics, “the largest witch hunt in American History.” Senator McCarthy hit his peak in 1954 when Boston lawyer Joseph Welch, representing the Army, rebuked and discredited McCarthy. Following a very incisive criticism by Edward R. Murrow, Senator McCarthy met his downfall.

The concern about communist activities spread to the states and in New Hampshire in 1951, the legislature passed the Subversive Activities Act. In 1953, the NH legislature passed a joint resolution relating to the investigation of subversive activities, authorizing the state’s Attorney General, “to make full and complete investigations with respect to violations of the subversive activities act of 1951,” thus creating a one-man legislative committee. These laws were recodified in 1955 as RSA 388, which was repealed in 1973.

The introduction to Chapter 193 of the New Hampshire Laws of 1951, states, “whereas, the World Communist movement is not a political movement, but is a worldwide conspiracy having sections in each country… it is essential to the preservation of the state’s security, that sections of a sedition nature be clearly and expressly defined,” declaring sedition a felony. The New Hampshire law of 1953, laws Chapter 307 state that, “the Attorney General is hereby authorized and directed to make a full and complete investigation with respect to violations of the sedition act. The Attorney General was authorized, “to act upon his own motion… the Attorney General is directed to proceed with criminal prosecutions under the Subversive Activities Act.”

Thus, was the investigation of communist activity in New Hampshire launched under the auspices of Attorney General Louis C. Wyman. He didn’t take the Attorney General long to identify Elba Chase Nelson for interrogation since she had been a candidate three times for Governor of New Hampshire on the Communist Party ticket. In addition, beginning in 1940 she was the Secretary of the New Hampshire Communist Party and in that role criticized the “vicious intentions” of the “subversive law” which she called a “thought control law” which destroys the guarantees of the Bill of Rights.

Mrs. Nelson was born in Latvia in 1891, which was then a part of the Russian Empire, and she immigrated to the United States in 1903. In 1912 she married Fred Chase and moved to Washington, New Hampshire. She joined the Communist Party in 1928. Mr. Chase died in 1933 and she married Charles Nelson, a farmer, in 1938. She had four sons, three of whom served in the military during World War II, and a daughter. She was active in town affairs, such as the Cancer Society, and served as town treasurer for many years.

On October 5, 1953, she was subpoenaed to appear before the Attorney General on December 7th, 1953, and was required to bring any records that she had of a long list of organizations that covered ten typewritten pages attached to the subpoena.

On October 22, 1953, Mrs. Chase wrote to John R. McLane, then President of the New Hampshire Bar Association, for counsel since she could not afford a lawyer. Mr. McLane was a very prominent lawyer in Manchester, a graduate of Dartmouth College and Harvard Law School, a Rhodes Scholar, and son of a former Governor of New Hampshire. Mr. McLane met with Mrs. Nelson on October 29 and appeared with her together with his law partner, Arthur A. Greene, Jr., before Superior Court Judge Wescott in the Merrimack County Superior Court. Judge Wescott ordered Mrs. Nelson to answer the questions and when she refused found her in contempt. He ordered her jailed in the Manchester Valley Street Jail where she spent the nights of December 7 and 8, 1953. According to John McLane, Jr., Mr. and Mrs. McLane visited her that night in jail and brought her a toothbrush, toothpaste, and pajamas. The following day she appeared in court and pleaded the fifth amendment. Judge Wescott found that she had purged her contempt and she was released.

During this time, Mr. McLane’s law partner, Stanley M. Brown, prepared and filed a frontal attack on the statutes in a Petition for Declaratory Judgment to quash the subpoena on the basis that the statutes were unconstitutional and the proceedings violated her constitutional rights. Judge Wescott refused to rule on those issues and the case was transferred without ruling to the New Hampshire Supreme Court. Argument in the Supreme Court took place in January and the Court ruled on April 30, 1954, holding that the 1951 and 1953 laws were constitutional. A Writ of Certiorari was filed but denied in the United States Supreme Court.

The denial of appeal at the federal level brought the legal proceedings with respect to Mrs. Nelson to a close and there appears to have been no further activity involving her with the Attorney General’s investigation. Many years later John McLane, Jr. was interviewed for an article in the New Hampshire Bar Journal and was asked about The Nelson Case. He described Mrs. Nelson as “a pretty harmless little old lady but these were the McCarthy days of red hating and witch hunts.”

Question: “Was that a popular position your father took in defending a known communist?”

Answer: “Absolutely not. But despite the hysteria about communists, I know there were many members of the Bar that wrote to my father and told him that they thought this was one of the finest things the New Hampshire Bar had ever done.”

In the meantime, the investigation of suspected communists spread under Attorney General Wyman. Wyman, it has been reported, interrogated 150 persons during his investigation. At least four New Hampshire residents sought recourse in the courts from interrogation by the Attorney General. Those included: Hugo DeGregory, who was represented by Jim Cleveland, a prominent Concord lawyer, and who was subsequently elected to the United States House of Representatives; Gordon Kahn, represented by the Concord firm of Tiffany and Osborne; Visit University of New Hampshire Professor Sweezy, who ran for President on the Progressive Party ticket in 1952, who was represented by Bill Phinney with Joe Millimet filing an amicus brief on his behalf; and Willard Uphaus, represented by Hugh Bownes, of Nighswander, Lord & Bownes. Bownes was a Marine officer wounded in the South Pacific, and went on to be the United States District Judge for New Hampshire and Judge of the First Circuit Court of Appeals.

Also representing Dr. Uphaus was Bob Reno of Orr & Reno. These lawyers fought hard for their clients. Jim Cleveland for Mr. Nelson.

LAWYERS continued on page 8

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QDRO Questions…?

We’ve got answers.

Attorney Sheliah Kaufofed at Russman Law Offices skaufoled@russmanlaw.com (603) 772-3433
Eight Qualities of Good Leadership

By Joseph D. Steinfield

If you google the words “leadership qualities” you will find no shortage of entries. But rather than open those links and write about what others have to say, I decided to offer observations based on my own experience.

Show Empathy: This word is little more than a century old, and it has more than one meaning. But you can boil it down to the ability to put oneself in the other person’s shoes. Which is not to say that we can always understand what someone else is going through, but if you can put your own opinion, bias, or point of view aside, and recognize that others may see or feel things differently, you are doing what good leaders do.

Listen Closely: Good listening skills are an essential part of leadership because those who have them understand that effective decision making, more often than not, comes from getting information and advice from others. One practical way to improve this skill, despite the fact that it involves touching others, is to use your thumb and index finger to pinch your lips together. Another, and perhaps safer, way is to adopt a self-imposed rule: Speak last.

Be Patient: “Act in haste, repent at leisure,” as the expression goes. Sometimes leaders have no choice but to make quick decisions and hope for the best. But in the usual case there is time. The words “I’ll sleep on it” are often the right ones.

Pay Attention to Detail: It is all well and good to see the world from 30,000 feet, but a good leader must be willing to dig in, ask questions, and learn about the subject at hand. This quality is the opposite of “follow the leader,” though some successful leaders claim to be doing just that. More likely, they have studied the facts and the available options and only then decided whether the original instinct was the right way to go.

Delegate Responsibility: Good leaders take their turn when it comes to standing guard at night, but effective leadership means an ability to delegate responsibility. “I’ll do it myself,” or “Only I can do it” are recipes for bad outcomes. Besides, delegating real responsibility is the best way to turn members of the team into stakeholders.

Share the Credit and Take the Blame: Leaders should share the credit because it’s the right thing to do, and it instills a sense of commitment and a willingness to work even harder. The other side of the coin is taking the blame when things go wrong, for at least two reasons. One is that the failure of leadership may have contributed to the unhappy outcome. The other is that it may not be any one person’s fault, or for that matter anyone’s fault. Sometimes it’s just bad luck. But another day will come, and team members will never forget who had their back. As the sign on President Truman’s desk said, “The buck stops here.”

Use Meetings Effectively: It isn’t enough to have a shared vision. Leaders have no choice but to hold meetings.

• A good leader plans ahead and circulates an agenda in advance whenever possible. Having a written agenda helps keep meetings short, which is always better than long.

• Attendance matters, so a reminder the day before is critical, as is an invitation to those unable to be there to attend by phone.

• A successful meeting is one where many voices are heard, not just those who shout the loudest. A leader shouldn’t call on just one person, for fear that the person will feel picked on or that others will think the leader is playing favorites. But asking for comments from several people, including those on the phone, will ease tensions and help raise the right questions and produce good ideas.

• Meetings don’t exist for their own sake, they are supposed to lead somewhere. So be sure someone keeps a record and, before you adjourn, think about and ask the group what comes next. Since one meeting often leads to another, try and set the next date. And be sure to circulate the minutes to all, including group members who did not attend.

Integrity Matters: This one speaks for itself.

Here is one additional suggestion. Read the book Endurance by Alfred Lansing. It tells the story of Ernest Shackleton’s incredible 1915 voyage to Antarctica. He epitomizes good leadership.

Joseph D. Steinfield lives in Keene. He is a member of the Board of Governors representing Cheshire County. He can be reached at joe@joesteinfield.com. Copyright 2020.
Five Tips For Effective Use Of The NHBA Dispute Resolution Committee

By Bryan K. Gould

Disputes with clients (and other lawyers) are among the more perplexing challenges facing lawyers. We are hard-wired to build relationships of trust and confidence with our clients. When that relationship breaks down it can be both disconcerting and unfamiliar terrain. The NHBA Dispute Resolution Committee is a free mediation and arbitration service, the purpose of which is to try to interrupt the spiraling deterioration of the relationship and come to a prompt and fair resolution of the underlying issue.

As a member of the committee for nearly thirty years, I offer five observations and suggestions for the most effective use of the committee’s services:

1. **Get the dispute to the committee early.** In many cases if we’re alert and honest with ourselves we can recognize the development of a client dispute before it turns bitter. As soon as it appears as though the dispute is persistent, seriously consider suggesting prompt committee mediation to your client.

2. **Denial is not a strategy.** Disputes with clients typically do not get better with time. Take advantage of the opportunity to put the dispute behind you.

3. **Talk to a colleague.** We often see lawyers who participate in committee proceedings entirely on their own. It is very difficult for any party to a dispute to consider facts or arguments objectively. At a minimum, confer with a lawyer whose judgment you trust and be forthright about the client’s arguments with that lawyer. You will likely need the more detached perspective.

4. **Participate in good faith.** The lawyers on the committee are unpaid volunteers, but there are instances in which committee members work harder to resolve a dispute than the lawyer who is party to it. Not only is this contrary to the lawyer’s interest, it also has the effect in most cases of further inflaming the client.

5. **It beats the alternative by a wide margin.** Particularly in disputes initiated by the client, it is unlikely that the controversy will go away if the committee’s process fails. Getting the matter resolved in the committee is far preferable to a complaint for malpractice or with the Attorney Discipline Office.

No one looks forward to a falling out with a client or a colleague, but if it happens the Dispute Resolution Committee provides an efficient and effective means of ending the controversy if it is used wisely.

Bryan K. Gould is an attorney with Cleveland Water, and Bass in Concord, NH. His practice includes the areas of commercial (business) litigation, appellate litigation, state constitutional law, municipal law, and environmental law.

Lessons Learned

7 Keys to Enhancing Resilience

By Sherry Dutra

Professional burnout is more common amongst lawyers than many would typically think, even in the best of times. In the midst of the coronavirus pandemic, lawyers are dealing with a wide range of challenges as they balance helping their clients with managing business operations and the economic impact on their firms. Never has resilience been more critical to overall well-being. There is no question that you will encounter situations in the coming days and weeks where the outcome isn’t quite what you expected or you’ll experience what you might view as a “failure”. To weather the inevitable challenges you’ll face, resilience will be a muscle you’ll want to enhance. Resilience will allow you to ride the roller coaster of this volatile and uncertain time and equip you, now and long after this crisis is over, to effectively make the impact you desire without burning out in the process.

What is Resilience?

The dictionary.com definition of resilience is, in part, “the ability to recover readily from adversity or the like; buoyancy”. The word buoyancy brought a childhood memory to mind. I grew up near the ocean and used to play for hours in Cape Cod Bay. I can remember tossing around a beach ball with my friends while we splashed in the water. No matter what any of us did to push that ball under the water, it always popped right back up to the surface – ready for the next game. Resilience is very much like that beach ball.

No matter what you face, if your resilience is strong, you can stand back up, learn from your experience, reset your course, and be ready for what’s next.

7 Keys to Enhancing Resilience

Here are some practical keys that you can incorporate into your life that will support you in enhancing your resilience. These keys will not only positively impact your professional life but also your personal life. So, what are you waiting for? Let’s explore.

1. **Stay aligned with your purpose.** I believe that we all have a purpose and that discovering yours will keep you on track no matter what circumstances arise. What are you uniquely equipped to offer to the world? What brings you the most joy and passion? The answers to these questions will give you some clues to your purpose. With a defined purpose, that you are aligned with, you naturally attract people, resources, ideas, and opportunities that support you.

2. **Practice gratitude:** Take a few moments each day, throughout the day, to appreciate and express gratitude for the people and things in your life. Stopping to notice what you are grateful for on a regular basis develops a habit of looking for good things and releases dopamine that supports a positive outlook.

3. **Set clear goals:** Research has shown that the brain loves a good goal. It will work tirelessly to give you what you focus on. The most successful and resilient people set specific, measurable and time-based goals and consistently take action with the certainty that they will achieve them.

4. **Be present while working on those goals:** A 2010 Harvard study found that people spend 47% of their waking time thinking about things other than what they are working on. When you are focused on the past or focused on the future, you are taking your energy away from what’s going on right in front of you. Mindfulness, or being focused on the moment, has been shown to modify brain processes that support resilience. And, experiencing and enjoying the moment is part of the journey.

5. **Act “as if”:** Your brain doesn’t know the difference between a robust vision and reality. Don’t believe that? Then, take a moment and imagine that you have a beautiful, fragrant, juicy lemon in your hand. Cut off a slice of that lemon. Breathe in that lemony scent. Now, bring it to your mouth and take a great big bite. Salivating yet? You didn’t really just take a bite out of a lemon, did you? Yet, in creating that vision, your body reacted “as if” you had. So, start to take action in accordance with who you want to be. Act “as if” you already are being, doing, and having whatever it is you want to create in your practice. Your attitude will be shifted to a more optimistic place and your resilience will build.

6. **Build a supportive team:** Going it alone typically doesn’t work. Without the support of others, we tend to getStuck in the moment, has been shown to modify brain processes that support resilience. And, experiencing and enjoying the moment is part of the journey.

RESILIENCE continued on page 8
Cyber Security More Important Than Ever in the Wake of COVID-19

By Ryan Barton

The technology essentials of working from home – tools, cybersecurity, and culture.

The unprecedented impact of COVID-19 has disrupted businesses in many ways and caused a mass exodus from the traditional office. Working from home is now the norm for millions of Americans.

As business leaders scramble to continue operations with a scattered workforce, they must make good technology, cybersecurity, and culture-setting decisions to ensure efficiency, reliability, security, and positive long-term impact of working from home.

Technology tools. Many organizations already leverage remote access, and staff are setup with remote access as part of flexibility and business continuity planning. In these scenarios, it’s helpful to review each role and determine what technology resources they need access to that aren’t readily available from home (such as check printers). For those who need a way to connect to云 services, there are three different methods to consider:

1. Direct connection to cloud services.

Part of the value of the cloud is how easily it can be accessed from anywhere. Review which of your applications and services are already in the cloud and can be directly accessed by staff. Microsoft Office 365 or Google G Suite are common providers for email, collaboration, and file storage. If you already use them, review what other apps and features are included, as most organizations underutilize these powerful suites.

2. VPN to office resources. A VPN (Virtual Private Network) allows network resources to be accessed remotely. Typically, this function is handled by the firewall. If you are having slow, frustrating, or unreliable VPN, work with your IT team on a different VPN solution, as solutions like OpenVPN can bypass the firewall and increase speeds. You may also need to work with your corporate ISP to increase speeds to support a whole new type of remote access work.

3. Remotely control a computer at the office. Some software does not work well over a VPN. In those cases, two computers are required: one stays at the office and one goes home with the employee. A secure piece of software is used to control the office computer from anywhere. This allows software like QuickBooks (which doesn’t work effectively over a VPN) to function well. Windows has a built-in tool called Remote Desktop Connection (which must be secured appropriately), and there are many 3rd party tools such as GoToMyPC or LogMeln, or industry tools supported by companies like Mainstay Technologies.

Cybersecurity. As we grapple with new health, societal, and business risks, it’s easy to deprioritize cybersecurity risks. And yet, in recent weeks cyberattacks are on the rise, including targeted attacks on working from home. In addition, working from home lowers defenses unless great care is taken. The combination of increased threats with decreased protections creates a real risk, at a time when many businesses are most vulnerable to the pain of an attack. Here are three actions you can take:

1. Prohibit use of home computers. Any system not managed by your IT department/service provider shouldn’t connect to your environment. There’s just no way to ensure that it is appropriately secured. This is especially true when it comes to connecting with a VPN.

2. Utilize Multi-Factor Authentication (MFA). Secure remote access methods with MFA, so it isn’t just a username and password that is required for access.

3. Continue training – remind staff of the risk. Remind your staff to be extra vigilant with emails, phone calls, and links. Working from home typically increases the volume of email, and the rapid change in our world is increasing anxiety. Hackers love to leverage a sense of urgency when guards will be down.

Culture. Most team members are used to coming into an office. Most managers are used to managing face-to-face. Remote work changes the feel of work significantly. And in this time of uncertainty and threat, all of us face challenges to our mental health and emotional wellbeing. Being mindful of how we work remotely has a significant impact on the culture of our remote teams. Here are three recommendations to support your team:

1. Teach people how to work remotely in a healthy way. There are a lot of tips
This crisis will pass. How its passing will change our behavior long-term is unknown. But the more effectively and securely we work together, remotely, the better prepared we will be to thrive in the crisis and flourish after.

Ryan Barton is the founder and CEO of Mainstay Technologies. Mainstay provides IT and Information Security services to organizations throughout northern New England, including many attorneys, with a focus on both deep expertise and on warm personal relationships. It has received many awards as a company, including Best Companies to Work For, Business of the Year, Business Excellence, and the Torch Award for Marketplace Ethics. He is a devoted husband, father of three (ages 2, 3, and 4), and a voracious reader.

To kickoff the new decade, the Bar News has launched this regular column devoted to cybersecurity and information privacy. Contact news@nhbar.org if you’d like to contribute an article on these critical issues facing the profession.

Due to the COVID-19 pandemic our hours will be changing. Effective immediately, Casemaker Support will be open from 9am to 5pm EST Monday-Friday. As always we can be reached by phone at 877.659.0801, email at support@case-makerlegal.com and live chat. When these hours change again, we will let you know via social media and these weekly emails. We appreciate your understanding. Now let’s talk about folders in Casemaker4.

Like its predecessor CasemakerLegal, Casemaker4 also allows you to store documents you find over the course of your research. Using the Folders feature you can access your documents from anywhere you can access the internet. Saving hard drive space and paper:

1. The first thing you will need to do is create a new folder. You can create a folder at any time by clicking on the folder link in the upper right or the Folder menu option under the My Account menu. In addition, if you are on the document you wish to save, you can click the Save to Folder icon and type a name for your folder into the New Folder field and click the + button.

2. Once a folder has been created, you can save to your folder at any time. Just click the Save To Folder icon from the Document Toolbar, choose your folder, and click Save. If you prefer to drag and drop simply click the Folder icon, and this time choose the folder you would like to use and click ok. This allows the icon to represent the folder you have chosen. Next click and drag the title of the document to the grey toolbar area. Your chosen folder name will appear, and you can drop the document title on top of it.

When you are ready to view the contents of a folder, click the Folders link in the Features toolbar or the Folders option under My Account. Once there, on the left of your screen is a listing of all of your folders. Clicking your folder will display its contents in the central area of the page.

Once the folder is open you have the opportunity to move, rename, and delete the entire folder using the options menu at the top of the folders list. On the right you can use the corresponding check boxes to move an individual document to a different folder, or to add it to the print queue, print directly, download, email, or remove. Don’t worry if you have accidentally deleted a document or folder, that you need. You also have access to a Trash file. That is all for this week! We will back with more tips and tricks next week. Thanks again for making Casemaker a valued Member Benefit.

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DeGregory appeared in the New Hampshire Supreme Court on at least six occasions and the Uphaus case was docketed in the United States Supreme Court on seven occasions. Professor Sweezy did better than most since the United States Supreme Court overturned his finding of contempt in 1957. The Uphaus case concerned the refusal of Dr. Uphaus to turn over the guest registrations for 1954 and 1955 at the New Hampshire World Fellowship Center in Albany, New Hampshire as a matter of conscience. He was found in contempt and ordered to jail for one year or until he purged his contempt by producing the records. He remained on bail for five and a half years during the lengthy appeals but finally served a one year sentence. He never produced the records.

All of these prominent New Hampshire attorneys, in the highest traditions of the profession, worked diligently for the best interest of their clients, despite the fact that such representation was very unpopular at the time. In a speech on the occasion of the dedication of the American Bar Association building in Chicago on November 2, 1953, then Associate Justice Robert H. Jackson said: “But there are occasions when the lawyer will be false to his client and to his profession if he is not ready to risk his own standing on a hard and perhaps unpromising contest. Rights, whether given by Constitution, statute, or common law, are but scraps of paper unless a lawyer will go into the courtroom and there give concrete effect to abstract words.”

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Message from page 2

The black plague. Technically, it was the bubonic plague but widely known at the time as the “black death.”

Thought to have originated in Central or East Asia it likely spread along the Silk Road through India, the Middle East, and finally Europe. Like the Coronavirus, it was principally an infection of the lungs and respiratory system. The best estimates are that 33% to 40% of the population of Europe died, which amounted to 25 million souls. The mortality in other infected areas remains unknown.

Of course, for those experiencing the bubonic plague, the concept of an airborne contagion was unthinkable. Doctors simply chalked it off to bad astrology and a misalignment of the planets. To the masses it was simply the wrath of God. The real culprits were rats and fleas, carrying the mutant bacillus, which was spread by contact. As Tuchman tells us, the identity of the actual cause was not known for another 500 years.

After rereading the problems of the 14th century, and reflecting on the knowledge we have today, I’m feeling considerably better. It’s still terrible, but medicine, technology, and pharmacology are on it. We will beat this virus and rebuild. To steal a phrase from Maureen Dowd, “Thank God the Doctor is in the house.” In Dr. Fauci we trust.

Now back to those original ideas to make the Bar Association a nimble and more valuable asset for members!
Susan Martore-Baker, president of Catholic Charities of New Hampshire, as well as a board member of the Bishop’s Charitable Assistance Fund, says Mullikin has brought a genuineness to her service on the board that he appreciates.

“Most people are inherently good and have some interest in philanthropy and sometimes need some guidance,” she says.

Mullikin says her seven years of service as a board member for the New Hampshire Charitable Foundation helped shape her perspective on the importance of charitable giving. She is now vice chair of the board of Catholic Charities of New Hampshire, as well as a board member of the Bishop’s Charitable Assistance Fund, and enjoys counseling such nonprofits on how to build their endowments to continue their efforts.

Her work has won the admiration of Susan Martore-Baker, president of Cambridge Trust Company of NH, who met Mullikin in the early 1990s when they happened to sit together at a New Hampshire Estate Planning Council dinner.

“Over the years we have had many opportunities to work together on behalf of clients,” says Martore-Baker. “I find Anu’s technical abilities in estate planning exceptional. Her clients find her explanations of very complex matters understandable, and they appreciate her sensible approach to planning for their estates.”

Likewise, Thomas E. Blonski, president and CEO of Catholic Charities of New Hampshire, says Mullikin has brought a genuineness to her service on the board that he appreciates.

“The best thing about her is her authenticity,” Blonski says. “What you see is what you get. It’s unvarnished and it’s awesome. She has a great wit and great character and integrity. It’s refreshing.”

Mullikin says her work informs her personal life and vice-versa.

When she was starting out in her 20s, she explains, she had no experience with circumstances like aging parents. Now that her own parents are both turning 90, Mullikin says, she adds, her interactions with her parents “makes me better at advising my clients… It works both ways.”

Likewise, Blonski adds, her interactions with her clients “makes me better at advising my clients… It works both ways.”

Known for her vivacity, Mullikin laughs when asked if there is anything normally rewarding.”

“I have truly enjoyed the work I have done,” she says of her law practice. “It’s hard, it’s very stressful but it’s extraordinarily rewarding.”
NH Bar Foundation 2020 Annual Appeal
You Make the Difference

Organizations and Projects that received funding from Justice Grants

New Hampshire Public Radio – Criminal Justice Reporting
Filmmakers Collaborative – It’s Criminal Documentary
NH Supreme Court Society – Oral History Project
UNH Law – Warren B. Rudman Center – Summer Fellowships
Concord Family YMCA – Youth & Government Program
Institute on Disability at UNH – NH Leadership Series Project
Hope on Haven Hill – Navigating Justice Systems
NH Judicial Council – Judicial Council Presentation
Catholic Charities of NH – Office of Immigration and Refugee Services “Know Your Rights”

NH Bar Association – We The People: The Citizen and the Constitution and Beyond High School
NH Institute for Civics Education – Project Citizen and 2016 William W. Treat Lecture Series
Bridges: Domestic & Sexual Violence Support Services – AmeriCorps Court Advocate
The Society for the Protection of NH Forests – Model Conservation Easement Deed
Rochester Recreation Department / Rochester Police Department – Rochester Teen Night
NH Legal Assistance – Youth Law Public Education

Your contributions, endowments and legacy gifts, combined with other fundraising efforts help to fund the Justice Grant Program which supports the rule of law, access to justice and civil education projects. In 2018, $91,000 was granted to non-profit organizations across NH.

With your support, and as a direct result of relationships built with local banks and credit unions that hold IOLTA funds, the NH Bar Foundation is steward of the largest unrestricted source of funding for civil legal services in New Hampshire.

The NH IOLTA Program will be granting $950,000 in FY 2020-2021.

Your donation directly impacts the lives of NH residents.

Donations can be made online at nhbarfoundation.org or call us at 603-715-3210

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— Martin Luther King Jr.

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Join the Mug Club today and take your morning cup of coffee from satisfying to fulfilling.

All gifts are tax deductible as allowed by law.
UNH Franklin Pierce School of Law welcomes a new Director for the Daniel Webster Scholars (DWS) Honors Program. Current Director of Legal Residences, Courtney Q. Brooks will take over when John Garvey, who started the program, retires this May.

The DWS program is a first of its kind bar alternative program that allows students to be accepted into the New Hampshire bar the day before graduating. The innovative program was featured in the Wall Street Journal and the New York Times.

McLane Middleton recognizes attorney Alexandra S. Cote with the 15th annual Jack B. McDill Memorial Pro Bono Legal Services Award for her outstanding commitment to serving citizens in need. The award is named after Jack McDill, who has worked tirelessly for nearly 65 years giving back to those most in need. Lexi is an associate in the firm’s Litigation Department. She assists clients with various civil litigation matters, primarily focusing on real estate and land use litigation, probate litigation, and environmental litigation.

Marquis Who’s Who, the world’s premier publisher of biographical profiles, presents John “Jack” Mcgee Jr. with the Albert Nelson Marquis Lifet ime Achievement Award.

Mcgee celebrates many years’ experience in his professional network, and has been noted for achievements, leadership qualities, and the credentials and successes he has accrued in his field. Mcgee is the owner of his own general practice law firm, Flynn and Mcgee, PA, and has practiced in all areas of the law.

Shelia Kaufold has become a member of Russman Law Offices. Kaufold will focus her practice on estate and trust planning, probate and trust administration, special needs trust, elder law, probate litigation and estate disputes, guardianships, partition actions, QDRO’s and civil litigation.

Mitchell Municipal Group welcomes Joseph H. Driscoll, IV to the firm.

Alfano Law Office announces the opening of their Exeter office at 129 Water Street in Exeter, NH. The firm is pleased to announce that Terrie Harmon has joined the team. Her practice areas include foreclosure avoidance, bankruptcy litigation, bankruptcy avoidance and non-bankruptcy financial workout. She also represents clients in IRS and state taxation issues.

The NH Bar Association would like to thank the Inns of Court for hosting Lawline at the NH Bar Center on Wednesday, March 11th. Attorneys Emily Evin, Terrie Harmon, Simoneau, Clara Lyons, Ned Sackman and Caroline Leonard fielded over 25 questions from the public. Questions came in from all over the state pertaining to a variety of legal issues, including family law, probate, debt collections, and landlord/tenant.

Lawline is held on the second Wednesday of each month from 6:00 pm to 8:00 pm. The Bar forwards phone calls from people who are looking for general legal advice and information to the Lawline host’s office, and the host assembles a small group of volunteers to answer them for two hours. The Bar also provides a light dinner for all volunteers. For more information or to volunteer to host a Lawline event, please contact NHBA Lawline Coordinator Erynn Greenburg at egreenburg@nhbar.org.

In the News

Community Notes

In Memoriam

Paul Arthur Rinden

Paul Arthur Rinden, 92, passed away peacefully at home on Friday, February 21, 2020. He was the eldest of three children born to missionary parents Reverend Arthur and Gertrude Rinden in China in 1927. The family emigrated to the US in 1937.

Rinden graduated from Northfield Mount Hermon in Massachusetts where he was captain of the ski team and nurtured a love for the poetry of Whitman. In 1949 Paul graduated from Yale with a degree in history and from Columbia 2 years later with his JD.

He practiced law in Concord, NH, interrupted by a stint as NH State Senator, for more than 30 years.

Paul married his late wife Constance in Tarrant in 1958.

He is survived by 3 children, 8 grandchildren, 2 great grandchildren, his two sisters, Margaret Kanost and Eadaik Holley, and his friend Jonathan Hall.

To offer a message of condolence or share a memory, please visit emily.evin.aze@gmail.com.

John C. Newman

John C. Newman (Jason) passed away peacefully at his home in White River Junction, Vermont on March 15, 2020 at the age of 69. His wit, his erudition, his love of life and for his family, and his example as a devoted and compassionate Buddhist will be deeply missed.

Jason was born in Dayton, Ohio and lived in many cities in the U.S. and the Hague, Netherlands as a child before settling in the Washington, D.C. area. He obtained a bachelor’s in comparative literature at Ohio University and a law degree and master’s in taxation from Georgetown University. He moved to Paris, France in 1979, and was admitted to the French bar in 1982 as a Conseil Juridique. He returned to Washington in 1984 and moved to Rutland, Vermont in 1995. He practiced law from the time he entered law school, first in Washington with the Antitrust Division of the Department of Justice, as a public defender and a tax attorney; in Paris, France as a tax attorney; and, finally, in Washington and Rutland, Vermont as an estate and trust attorney. For over 30 years, he maintained the French Tax and Business Guide, one of the most successful guides in French on taxation.

Jason was an avid traveler, with an interest in languages, art, history, cultures, food and wine. He was happiest with friends and family around the dinner table, followed closely by touring the French (or any) countryside or a museum. He had a great sense of humor and in conversation drew on an enormous range of interests and knowledge, which made time spent with him both thoroughly enjoyable and usually very informative. He also loved tennis, hiking, kayaking, and taking in Vermont’s natural beauty.

A member of the Shambhala community since the 1980’s, Jason became a student of Chogyam Trungupa Kimoapo, and later his son, Sakyong Mipham Rinpoche, and practiced Tibetan Buddhism for the rest of his life. He taught often, and his meditation and other programs were, in the Shambhala tradition, characterized by its openness and humor. Jason’s Buddhism provided a him great deal of comfort and perspective and during his final days, as he viewed his death as a transition rather than an ending.

Jason is survived by his daughters, Alison and Stephanie, from his first marriage to Susan Stuck; his stepsons, Xavier and Jefferson Guest, from his marriage to Sophie Leger; his siblings, Jennifer De Francesco, Jake, and Jeff; many nieces and nephews; and his loving companion for the last three years, Andrea Doukas, who provided great care and comfort during his final months. Donations can be made to the Karme Choling Shambhala Meditation Center or Shambhala Center White River Junction. A memorial service will be announced at a later date, due to Covid 19 travel restrictions.

Arrangements were under the direction of the Rand-Wilson Funeral Home of Hanover, NH.
that wish to participate to discuss concepts of the law in conjunction with an available K-12 curriculum. The theme for this year’s discussions is the 19th Amendment.

According to Law Related Education Coordinator Robin E. Knippers, that program will also allow for circulation of the Bar’s “Beyond High School: A Guide to Your Rights and Responsibilities” publication to high school seniors before they graduate. The guide provides students with information on their rights and responsibilities once they turn 18.

Noting that a survey last year showed respondents viewed voting as the most important right they gain with adulthood, Knippers says 19th Amendment discussions should be “very timely because of all the voting laws changing even here in New Hampshire.”

“This right to vote is of such importance, like everything in life we take for granted,” she adds. “I’m just so excited about what the students can learn.”

The celebration’s culminating Law Day event will take place Sept. 10 – the 101st anniversary of the day New Hampshire ratified the amendment.

Featured will be at least two presenters – Plymouth State University professor and historian Linda Upham-Bornstein, and Susan Ware, author of “Why They Marched: Untold Stories of the Women Who Fought for the Right to Vote” – who will speak on some of the champions of the suffrage movement.

And champions there were, starting with New Hampshirites Ricker, Hovey and White.

Ricker is probably the best known of the state’s suffrage advocates. “They put up her portrait in the legislative building in Concord because she was so pre-her time,” notes Jennifer Parent, past president of the New Hampshire Women’s Bar Association and co-chair of its First 100 Women Committee.

The free-thinking Ricker, born in 1840, was the state’s first female attorney, an unsuccessful congressional candidate, who would-be ambassador to Colombia whose application was turned down, and a candidate for governor who was not allowed on the ballot because of her gender.

Independently wealthy after her husband died young, she attempted to vote in 1870 in Dover, insisting she had a right to do so as a property owner and taxpayer. Denied the opportunity, she tried again every election for some 50 years. She died just months after the 19th Amendment was ratified.

She continues to inspire. “Marilla Ricker was such an amazing trailblazer, fighting for a woman’s right to practice law, to vote, and to serve in public office,” says Marilla Manning, a former three-term state representative, founding member of the New Hampshire Women’s Bar Association (NHWBA) and winner of the NHWBA’s 2019 Marilla M. Ricker Achievement Award. “Marilla represents the principle that every person deserves opportunity and equality, something I firmly believe in.”

Likewise, Christina Ferrari, president of the NHWBA and winner of the New Hampshire Bar Association’s 2020 Philip S. Holf-mann Award for Gender Equity, calls Ricker “a remarkable woman who I have to thank for my right to practice law in the State of New Hampshire as a woman… She was incredibly fearless.”

Ricker’s story within the political, economic and legal context of the late 19th Century will be the subject of the Sept. 10 talk by Upham-Bornstein, a longtime resident of New Hampshire’s North Country and the History, Heritage and Culture Coordinator for the Center for Rural Partnerships at Plymouth State.

“Instead of engaging with others of like economic means at social parties, she sought to work for those who lived below the level of historical and legal scrutiny by first obtaining a legal degree and then representing those accused of a crime,” says Upham-Bornstein. “She was known as the Prisoners’ Friend. Her sacrifice and that of many others to tear down the barriers for women in the 20th Century inspired by own feminist views in the early 1970s.”

Also impressive, to author Ware, was Anna Howard Shaw, “generally considered the founder of the suffrage movement in New Hampshire in 1868,” she says.

Born into a longtime abolitionist family, White and her husband were active in the anti-slavery and temperance causes, but White reserved special fervor for the suffrage movement. She was the first president of the New Hampshire Woman Suffrage Association and was largely responsible for the state legislature granting women the right to serve on school committees, in 1871, and to vote for school committee candidates, in 1878 – before any other New England state had done so, according to her obituary in a 1916 New Hampshire magazine, “The Granite Monthly.”

Though New Hampshire suffragists tried and failed in 1903 to get an amendment to the state constitution granting broader voting power, “its credit, New Hampshire fairly early did get on the bandwagon of (19th Amendment) ratification,” says Ware. Sallie W. Hovey was another fighter for women’s rights in the state. “She got impatient with the mainstream suffrage movement so she threw her hat in with the National Woman’s Party,” says Ware. The National Woman’s Party prioritized passage of a federal constitutional amendment for women’s suffrage over attempts to gain the vote at the state level.

The New Hampshire representative to the board of the National Woman’s Party, Hovey picketed the 1920 Republican convention in Chicago and was part of a 1924 delegation to Washington D.C. to press President Coolidge for passage of the Equal Rights Amendment, which remains unratified to this day.

New Hampshire’s suffragists were also notable for their ability to draw big-name suffrage leaders to the state for speaking engagements, according to Ware.

“I was really quite struck by the number of suffrage luminaries who spoke here,” she says. “It’s like a Who’s Who. I think that’s partly because of the proximity to Boston. Lucy Stone and Susan B. Blackwell, spoke here, and the British suffragist Emmeline Pankhurst, Anna Howard Shaw.”

“What that means is, local suffrage groups had to have invited them, and convinced them that their time was best spent here,” she adds. “It’s a way of showing the connection between the New Hampshire state organizations and the national movement.”

But challenges remain for those seeking full equality for women, according to Ware.

“One of the things I’m trying to do is give people a sense that the story doesn’t end in 2020,” says Ware. “It’s part of something much longer and bigger. When I talk to people today, they’re quite eager to make connections between the suffrage movement and voting rights today. People are concerned about voter suppression and the election.”

Manning says that while strides for women’s rights have been made, “more work needs to be done” and she recommends Bar members consider joining the Gender Equality Committee or the NHWBA to help advance those efforts.

Ferrarri, who keeps an RBG (Ruth Bader Ginsburg) action figure on her desk for motivation, says much work remains to ensure equal rights for women “not only in New Hampshire but across the United States.”

Even within the legal profession, she says, “we continue to face discrimination and harassment based on, among other things, gender, gender identity, and marital status. Such misconduct occurs in workplaces, in interactions with colleagues, opposing counsel, and clients, and even in our courts.”

Ferrarri also calls for gender and pay equity in the profession and more representation for women as equity partners, in board rooms, as executives, in courtrooms, in government and in public service.

“To increase the pace of change, we need a diversity of voices advocating for gender equity,” she adds.

Ware, too, says there is strength in numbers.

She maintains a “suffrage forest” in the woods at the end of the lower fields on her Hopkinton farm featuring markers honoring the 19 suffrage pioneers explored in her book.

“I walk there every day,” she says. “It’s just magical. The trees are talking to each other.”

Respondents viewed voting as the most important right they gain with adulthood, but collectively, they’re stronger.”
Forty-Eight Admitted to NH Bar

The following members were admitted to the New Hampshire Bar Association on March 18, 2020.

Alanna M. Driscoll, Andover, Mass.
Frances B. Dallmeyer, Chelmsford, Mass.
Diane Thi Chea, Lowell, Mass.
Nicole Reilly, Middleton, Mass.
Benjamin K. Lemcke, Canton, Mass.
Renee L. Whitenett, Canton, Mass.
Liane M. Keister, Boston, Mass.
Andrew S. Levine, Boston, Mass.
Douglas C. Galloway, Boston, Mass.
Joshua A. Lewin, Boston, Mass.
Mary K. Sexton, Boston, Mass.
Dyan P. Gagnon, Brookline, NH.
Christopher F. Leavett, Newport, RI
Michael R. Hagopian, Pawtucket, RI
John J. Bolton, Providence, RI
William H. Grumet, Nashua, NH
Mark A. Perkins, Bedford, NH
Christa B. Shute, Concord, NH
Rachael E. De Orio, Keene, NH
Katherine A. Gabriel, Keene, NH
Anthony F. Kline, Roxbury, NH
Steven E. Schindler, Rutland, VT
Frank E.J. Di Grim, Bedminster, NJ
Paul J. Brozo, New York, NY
Christopher H. Boyle, Philadelphia, PA.
Theodore F. Roberts, Baltimore, Md.
Shannon M. Blankenbeker, Dallas, Texas
Timothy D. Ducar, Scottsdale, Ariz.
Joseph T. Burton IV, Westboro, MA
Michael R. Grady, Newington, NH
Rachel M. Judd, Boxford, Mass.
Ian R.A. Oxenham, Plainfield, NH
Jacob M. Wagner, Andover, NH
Jennifer B. Black, Wakefield, MA.
Robert S. Hillison II, Boston, MA.
Michelle L. Andritzhetto, Boston, MA.
Melissa A. Celli, Boston, Mass.
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NEW OFFICE ANNOUNCEMENT

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129 Water Street, Exeter NH 03833

Mitchell Municipal Group, P.A.
 Welcomes

Joseph H. Driscoll, IV

to our firm. We would also like to congratulate

Naomi N. Butterfield

on her one year anniversary with us.

Walter Mitchell, Laura Spencer-Morgan, Jae Whitley

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Is pleased to welcome Terrie Harman, of counsel, to the firm.

Terrie represented clients as Harman Law Offices in the federal and state courts of New Hampshire and Maine.

Her practice areas include foreclosure avoidance, bankruptcy litigation, bankruptcy avoidance and non-bankruptcy financial workout. She also represents clients in IRS and state taxation issues. Other areas of practice include unfair debt collection, consumer rights, foreclosure defense and litigation, probate litigation, guardianship and conservatorship, and debt management. In bankruptcy matters, she represents consumers and businesses in Chapter 7, 11 and 13 proceedings. She is a former Chapter 7 Bankruptcy Trustee and has lectured to legal, accounting, banking, and community organizations.

Terrie also is admitted to practice before the US Supreme Court and First Circuit Court of Appeals.

Alfano Law Office, PLLC
129 Water Street
Exeter, NH 03833

(603) 856-8411

tharman@alfanolawoffice.com
www.alfanolawoffice.com
Membership Status Changes

Presented to the Board of Governors February 20, 2020

Active to INACTIVE:
Carbone, Matthew, W Newton, Mass. (Dec. 27, 2019)
Svirk, Sultana, Revere, Mass. (Dec. 31, 2019)
Sabatello, Alison, Medford, Mass.(Jan. 1, 2020)
Larkin, Benjamin, Dover, NH (Dec. 30, 2019)
Hickok, Marshall, Gilford, NH (Dec. 31, 2019)
Barnard, Victoria, Richmond, NH (Dec. 30, 2019)
Foley, Patrick, St. Louis, Mo. (Dec. 30, 2019)
Fox, Eileen, Manchester, NH (Jan. 9, 2020)
Wright, Shayna, Manchester, NH (Jan. 17, 2020)
Duffy, James, Southborough, Mass. (Jan. 9, 2020)

Active to INACTIVE RETIRED:
Burlingame, Roger, Gilmanton IW, NH (Dec. 27, 2019)
Burnett, Rand, Westmoreland, NH (Dec. 20, 2019)
Latici, Steve, Gilmanoton, NH (Dec. 30, 2019)
Richardson, Gary, Hopkinton, NH (Dec. 31, 2019)
Moquin, Edward, Manchester, NH (Dec. 31, 2019)
Brooks, Gary, Hanover, NH (Dec. 31, 2019)
McKenney, Robert, Amherst, NH (Dec. 31, 2019)
Lynn, Robert, Windham, NH (Jan. 1, 2020)
Goodnow, Judith, Bow, NH (Jan. 17, 2020)

Active to RESIGNED:

Active to DECEASED:
Mitchell, Lynne, Plymouth, NH (Dec. 25, 2019)
Manougian, Victor, York, Maine (Dec. 20, 2019)

Inactive to ACTIVE:
Mathews, III, Edward, Portsmouth, NH (Dec. 27, 2019)
Johnson, Steven, Salida, Colo. (Jan. 6, 2020)
Cafsan, Sarah, Armonk, NY (Jan. 2, 2020)
Storey, Jessica, New Hampton, NH (Jan. 14, 2020)
Koegler, Carolyn, Hopkinton, NH (Jan. 2, 2020)
Champagne, Susan, Manchester, NH (Jan. 17, 2020)
Goodnow, Judith, Bow, NH (Jan. 17, 2020)

Inactive to INACTIVE RETIRED:
Gervais, Marc, Watertown, Mass. (Dec. 31, 2019)
Moore, Karen, Bedford, Mass. (Jan. 24, 2020)

Inactive to RESIGNED:
Page, Blaine, Boulder, Colo. (Dec. 31, 2019)
Sklar, Debbie-Ann, Bedford, NH (Jan. 1, 2020)

Military Inactive to MILITARY ACTIVE:
Hebert, Jason, USAF, Italy (Jan. 29, 2020)

Judicial to ACTIVE:
Coughlin, John, Amherst, NH (Jan. 7, 2020)

Honorary Active to INACTIVE RETIRED:
Friberg, John, Hopkinton, NH (Dec. 31, 2019)

Resigned to DECEASED:
Yeaton, Vinton, Dover, NH (Jan. 25, 2017)
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Scholarships are awarded each year to ensure that all admitted students can attend. Please consider making a donation to the Leadership Academy Scholarship fund.

Please send checks payable to the New Hampshire Bar Foundation 2 Pillsbury St. Unit 300 Concord, NH 03301.
Pandemic from page 1

he said, “The only area that has had some challenges thus far has been the trusts and estates practice.”

This includes situations where clients may need to sign documents in-person. “We’re accommodating that need by adhering to a strict set of social distancing protocols which we established that protect our clients and employees while still allowing the signings to occur.”

Labor and Employment

Labor and Employment attorneys have been busy over the past month as well, informing their clients about expansions of the Family Medical Leave Act (FMLA) because of the pandemic, along with a host of other employment related issues.

Attorneys Terri Pastori and Beth Deragon of Pastori-Krans have been fielding questions and offering advice in a quickly changing environment.

One of the many issues employers are worried about, they agreed, were possible workers’ compensation claims stemming from COVID-19 exposure at work or during job-related activities.

“There could also be an uptick in workers’ compensation claims for employees who suffer injury while working remotely (e.g. an employee trips on a cord in a makeshift home office, employee injures an arm because she does not have the proper work set up). In weighing the risk of continuing to conduct business in light of the risk to employees’ health, it is foreseeable that employers could violate OSHA standards.”

With record numbers of unemployment filings across the country, an important issue that has come up according to Pastori and Deragon involves unemployment claims related to COVID-19.

Under the CARES Act, the two trillion dollar federal relief plan unveiled on March 31, unemployment insurance provisions will include an additional $600 per week payment to each recipient for up to four months; and extend benefits to self-employed workers, independent contractors, and those who have exhausted unemployment benefits for an additional 13 weeks through March 31, unemployment insurance provisions related to COVID-19.

Deragon said that while she is glad the DOL is doing something to address unemployment because of those directly affected by COVID-19, the Act “comes too late.”

“I’m not knocking it, but I don’t think it will have a prophylactic effect,” she said. “People are being laid off now. This may not be enough to band the revenue losses.”

For “non-essential” workers and their employers, those revenue losses could take their toll as time goes on, according to Pastori.

“We’re seeing businesses just close down and those employees are out of work. Some employers have expanded unemployment benefits but that’s not 100 percent,” she said, adding, “Bills don’t change and businesses have an obligation to pay them. One good thing about the Act. It does allow you to avoid drawing from your sick leave. It’s not a perfect solution, but I don’t know what would be.”

Landlord Tenant Law

Landlord and Tenant Attorneys like Brian Shaughnessy have had their hands full during the pandemic. On March 17, Governor Sununu issued Emergency Order #4 prohibiting the initiation of eviction proceedings for the duration of the State of Emergency.

Shaughnessy quickly responded by sending out a letter to his clients that addresses concerns of both tenants and landlords regarding lease payments.

“The purpose of this letter,” Shaughnessy’s letter begins, “is to correct a common misconception that tenants do not have to pay rent and landlords do not have to operate the property. We anticipate that some tenants may need to arrange payment plans, or otherwise wait until some Government assistance is made available in order to make the required rental payments. We are willing to work with our tenants in order to get through this unprecedented emergency and are asking for our tenants to cooperate with us in good faith as we all get through this together.”

On April 3, Governor Sununu issued Emergency Order #24 that adds to Emergency Order #4 by allowing and providing for “initiation eviction proceedings against tenants who cause damage to property or who present a threat to the health and safety of their neighbors.”

Social Perspectives and Constitutional Rights

When asked about the limits of governmental authority during a pandemic and the importance of the use of a “social contract,” Attorney Joe Steinfield offered an intellectual perspective that takes the current political climate into considerations.

“What you call a social contract is essential,” Steinfield said. “The authors of ‘How Democracies Die’ emphasize two longstanding ‘norms’ that characterize a democratic society – ‘mutual tolerance’ and ‘forbearance.’ The latter is defined by them as ‘the intentional restraint of one’s power in order to respect the spirit of the law, if not its letters.’ These are the ‘guardrails’ under which we have always operated, at least until recent times.”

Deragon cited what she called the “excessive partisanism” of the current political landscape as “wreaking havoc on our customary norms” in a democratic society and with our partnership continues with the current pandemic, raises constitutional questions.

Two constitutional issues that came to mind for Steinfield included President Trump’s attempt to bar CNN reporter Jim Acosta and Trump v Hawaii, where the Supreme Court upheld a travel ban by a 5-4 vote.

“The press, by definition (and as a matter of First Amendment law) must have access to the workings of government,” he said, adding that the Supreme Court’s ruling in Trump v Hawaii, “excludes deference to executive power.”

“We are a country of laws and not men,” as John Adams wrote in the Massachusetts constitution. Without the rule of law there cannot be a democracy. And without adherence to these unwritten rules, the administration of our laws is greatly hampered and, ultimately, undone,” Steinfield said.

Legal Services at the New Hampshire Bar Association

While the New Hampshire Bar Association has been closed to the public, the staff is using their letter writing skills to write letters to the clients of their at-risk at-torneys and their clients are provided with necessary services.

One of the programs that will be need-ed is the NH Free Legal Answers website administered by the Pro Bono Referral System.

Free Legal Answers provides NH at-torneys with online resources to help low-to-moderate income people with critical legal advice on civil legal matters from the comfort of their couch. All that is needed is a computer or mobile device and an internet connection to participate.

“We are seeing an uptick in questions, particularly around housing and parenting matters,” said Pro Bono Director Virginia Martin. “In the weeks ahead, we expect these inquiries to continue to increase and could use more volunteers to help with this effort.”

According to Martin, “All legal services programs at the NHBA continue to adapt to the challenges brought by COVID-19 to ensure they remain open and running and available to the public. The growing stream of issues and questions arising from the pandemic is expected to turn into a flood in the coming months.”

For a full list of these services, visit the New Hampshire Bar Associations website at www.nhba.org.

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NEW HAMPSHIRE BAR NEWS

Legal Services at the New Hampshire Bar Association

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For a full list of these services, visit the New Hampshire Bar Association’s website at www.nhba.org.

Professional Development and Programming

According to Professional Development Director at the NHBA, Joanne Hinnendael, the department has been working on adding programs into the online catalog for members to take on-demand.

“NHBA-CLE partners with Heinrich, and CLE events, and offers additional pro-bono and law school programs. Who ‘share’ our programs so we can offer them to our members,” Hinnendael said. “If we have a problem to report a topic, if the CLE Committee doesn’t have a current program, we look for one in the shared programs. Please email us if you have a suggestion!”

CLE has also activated a 10% discount on any online programs people have purchased that will run through at least May 4.

Professional Development staff are currently working on an up to the moment list of webinar topics to be offered over the coming weeks.

Moving Forward

Despite the quickly changing legal landscape, Attorney Needleman said he and his colleagues have found it gratifying to be able to help individuals and businesses during this difficult time.

“Our employment lawyers have been very busy. We’ve also hosted several webinars in the last few weeks (with more scheduled) targeted specifically at issues arising out of the pandemic,” he said. “They’ve been well received and the attendance has been extraordinary. Coupled with the information we’ve been posting regularly on our webpage, we’re all proud that we’re able to help many people manage through this crisis.”
**Book Review**

**Mere Civility** is a Deep Dive into the History of Freedom of Expression

“Mere Civility: Disagreement and the Limits of Toleration,” by Teresa M. Bejan

Reviewed by Jan Myskowski

Unlike most modern democracies around the world, the United States does not punish hate speech. We have laws that punish hate crimes, but hate must be coupled with executed acts of violence to be punish-able. Hateful words alone are protected by the First Amendment. Why are we so ex-treme in sanctifying speech and expression? Why do we stand alone in protecting speech that has virtually no value to society?

Our national and local communities seem to be splitting at the seams. We are polarized, public debate is vitriolic at best, and our public leaders are themselves the purveyors of hate speech. It’s natural that we find ourselves craving civility. It’s tempting to find solace in social pressures that make certain modes of speech “politically incor-rect.” But we have never been willing to compromise the legal line we have drawn in the sand when it comes to governmental regulation of speech. Unlike most developed democracies, we are convinced that putting so much as a toe in that water will instantaneously convert our government to a machine of oppression. We look at situations like China’s oppression of its ethnic Uighurs and see what we consider to be the bottom of that slippery slope.

What we don’t seem to consider is whether the currently hostile social climate is the result of non-governmental, social re-expression of speech. Perhaps we simply created a pressure cooker within which ugly, politically incorrect speech was trapped for too long. Maybe when people who are inclined to use ugly words feel stifled, they start to pick up sticks and stones.

With these questions in mind, I found myself drawn to Teresa M. Bejan’s *Mere Civility: Disagreement and the Limits of Toleration*. Bejan does not answer these questions, but *Mere Civility* goes a long way toward explaining our unique national perspective on this topic, and perhaps more importantly, it very effectively illustrates the complexity of the problem.

Spoiler alert. *Mere Civility* is a bit of a slog. Bejan is a scholar, and her writing is scholarly. There are almost 100 pages of end notes in a book with only 174 pages of text. Nevertheless, I recommend it to you. *Mere Civility* is worth the effort.

Bejan takes us on a deep historical exploration of the world in which religious toleration and freedom of expression emerged, both in Europe and the colonial Americas. She begins by exploring the definition of “civility,” reminding us that our “civility crisis” implicates much more than simple courtesy. In our culture of protected speech and stable legal systems, we tend to forget that civil strife often involves the oppression of a minority by a majority holding political power (which, even today, often includes control of religious expression – as in the Chinese oppression of its Uighurs). Civility, as the opposite of strife, is often achieved through the suppression of certain modes of speech for the sake of maintaining order. Bejan reminds us that we cannot address our current civility crisis without touching upon our sa-cred freedom of expression.

Against this backdrop, Bejan takes us on a tour of the origins of tolerance philosophy by examining the contributions of three icons of political philosophy: Roger Williams, Thomas Hobbes and John Locke. Sound gripping? Bejan does a nice job of avoiding a rash of college survey facts, and instead focuses on the precise contributions each made to the evolution of toler-ance.

Williams, Hobbes, and Locke were contemporaries whose philosophies evolved in the context of the fallout from the Ref-ormation. Viewing tolerance through their lenses reminds us that the expressive liberty we enjoy now resulted almost entirely from a very painful and very violent struggle to separate religious expression from government regulation. Williams, Hobbes and Locke each lived and wrote before the separa-tion of church and state existed. The religious upheaval they witnessed was much more than an academic debate about theology. Religion was institutional power, and those challenging traditional religious insti-tutions faced brutal oppression and reprisal by the state itself. The Puritans came to the New World more as refugees than adventur-ers.

The world in which Williams, Hobbes, and Locke lived was perhaps as uncivil as it has ever been, and each of them had a very difficult time on how best to quell the dis-cord. Williams advocated that the state had a duty to elimi-nate discord by homeogenizing society. For Hobbes, the vindication of belief itself, and its potential to generate social strife, justified empowering the state to regulate belief, to dictate which beliefs were con-cealed, and to eliminate strife in the process. Locke held the contrary view that trust was the foun-dation of peaceful coex-is-tence, and that diverse reli-gious sects could only cohabit the same political space if each felt secure from persecution. Like Hobbes, however, he viewed the state as playing an important role. He would have the state create an environment in which trust could form by punishing oppressive behavior, such as re-ligious insult. Locke would have been very comfortable criminalizing hate speech.

Only Williams (a Puritan) advocated a full separation of church and state. Al-though Bejan is clearly most sympathetic to Williams’ approach, she bluntly calls out his failings, in part to emphasize the merit of his very practical philosophy. Williams hated Quakers, he hated Catholics, and he was disgusted by the indigenous popula-tion. But he was steadfast in his commit-ment to tolerating their freedom of expres-sion and to permitting their free exercise. He believed that by maintaining open lines of communication, however tumultuous that may become at times, he had a better chance of converting those whose views he despised.

Bejan concludes with an attempt at an ag-nostic summation, but she makes little ef fort to hide her alignment with Roger Wil-liams. John Locke’s view is very tempting these days—punishing hateful speech would certainly feel good. But Bejan’s subtle message seems to be that we cannot curb surly words without potentially oppressing the surly. And as tempting as it may be to oppress the surly, we cannot escape the likelihood that doing so will re-sult in a very temporary calm. The words “Limits of Toleration” in Bejan’s subtitle might as well have another endnote: sticks and stones may break my bones, but names will never hurt me.

Jan P. Myskowski is a partner at Myskowski and Matthews, PLLC in Concord, NH. He has practiced in the area of trusts and estates for 24 years and counsels clients with respect to wealth transfer, probate avoidance, transfer tax mitiga-tion, business suc-cession planning, and public benefits planning.
Dopesick: A Heartbreaking and Informative Perspective on the Opioid Crisis in the U.S.

By Beth Macy
Hatchet Book Group (2018)
Paperback; 376 pages

Reviewed by Jonas Cutler

Beth Macy’s book “Dopesick” trudges us to those squarely in the middle of the opioid crisis, girls turned into junkie prostitutes, the athlete who became a dealer then prisoner for life because someone died from a dose he sold, and the grieving parents that buried their addicted children who overdosed.

“Dopesick” is a good read for those that want to get a better understanding of causes of the opioid crisis while breaking your heart.

“Dopesick” was prematurely published in 2018. Just in this last quarter (Q4 2019) President Trump contributed his salary to combating the opioid crisis. Executives, during a call with analysts and investors, reported that theft has grown so bad it will narrow Home Depot’s operating profit margins next year. “This is happening everywhere in retail,” Chief Executive Officer Craig Menear said. “We think this ties to the opioid crisis.” (See Home Depot Faces Twitter backlash after blaming opioid crisis for recent rise in store thefts, USA Today, December 11, 2019) Just to-day (January 7, 2020) it was reported on WMUR that Dover public library is installing locks on bathroom doors because of past overdoses there.

Macy walks us through the origins of the opioid crisis in the 90’s, starting with doctors asking patients to “rate their level of pain on a scale of 1 to 10.” Pain management became a necessary treatment point in the most routine cases resulting in a 30-day script for painkillers. This was coupled with aggressive marketing efforts on the part of Purdue Pharma, the maker of OxyContin. More than 5,000 doctors, nurses, and pharmacists attended free conferences from 1996 through 2001 resulting in sales growth from $1 million in 1996 to $40 million. Lastly, patients/consumers already being programmed that simply taking a pill can solve what ails them.

Macy’s tells us that the current opioid epidemic started in rural America with those such as Maine timber workers and Virginia coal miners. Employment in these industries dried up and people were searching for income. “The federal disability program was becoming a de facto safety net for the formerly employed,” according to Macy. This was coupled with, “[a]llmost to a person, the addicted twenty-something that had taken attention-deficit medication as children,” thus programing them from an early age to simply find a pill that will make life better.

We learn that drug overdoses are the leading cause of death for Americans under 50, killing more people than guns or car accidents, at a rate higher than the HIV epidemic at its peak. Macy gives her conclusions to solve this crisis, but the reader will likely find them to be incomplete band aids, probably causing more harm, rather than being real solutions.

In the final chapters she advocates for “harm reduction programs” aimed at reducing the negative consequences of drug use without necessarily ending it. These include needle exchange programs, supervised injection sites, and wider naloxone distribution. Medication Assisted Therapies or MAT whereby the addict is treated with pharmaceuticals for very extended times, some for life, to prevent them from being dopesick, are labeled as the addiction treatment gold standard, i.e. just find a pill that will make life better.

We now know that this response was exactly what Purdue Pharma baked into their business plan. In the U.S., Purdue Pharma called its secret proposal Project Tango, the attorneys general of Massachusetts and New York have stated in their recent filings against the owners. In internal documents, Purdue illustrated the connection between opioids and addiction with a graphic of a blue funnel. The top end was labeled “Pain treatment.” The bottom: “opioid addiction treatment.” The slideshow said they had an opportunity to become an “end-to-end provider” – opioids on the front end, and addiction treatment on the back end. In the document, the company suggested that officials change the country’s laws to allow for easier access to naloxone, get naloxone into needle exchange programs, detox centers and supervised injecting clinics, and establish a national, free take-home naloxone program. (See Sackler-owned opioid maker pushes overdose treatment abroad, Chicago Tribune December 17, 2019) They likely didn’t enter into the mortuary business because their customers didn’t have any more money by that point.

Jonas Cutler has been a member of the New Hampshire Bar since 2003. He is currently working as compliance for a Fortune 500 insurance company in Des Moines, Iowa.
Tips for Creating a Fertility Friendly Workplace

By Catherine Tucker

From Hollywood (Chrissy Teigen, for example) to Nashville (country artist Luke Bryan) to Charlotte, North Carolina (NASCAR driver Kyle Busch), the past few years have seen a boom in celebrities opening up about their struggles to have a family. Even Michelle Obama is talking about it in her memoir, Becoming. With all this talk about infertility, employers are beginning to recognize the need to create a fertility friendly workplace. Here are some pointers on how to do that:

Health Plan Coverage: Infertility is not a choice; it’s a medical condition faced by 1 in 6 New Hampshire couples at some point in their lives. The New Hampshire Legislature recognized this by enacting RSA 417-G, which requires fully insured group health plans in New Hampshire to provide comprehensive fertility coverage as of 2020. Comprehensive coverage includes benefits for infertility diagnostics, fertility treatments, and fertility preservation. The latter applies for infertility diagnostics, fertility treatments, and fertility preservation. The latter applies for infertility diagnostics, fertility treatments, and fertility preservation. The latter applies for infertility diagnostics, fertility treatments, and fertility preservation. The latter applies for infertility diagnostics, fertility treatments, and fertility preservation. The latter applies for infertility diagnostics, fertility treatments, and fertility preservation.

If your business is fully insured through a New Hampshire group plan, your insurance carrier should be automatically adding coverage for protected classes of employees. If your company’s health plan is self-funded, or is otherwise exempt from RSA 417-G, consider voluntarily offering fertility coverage. Fertility coverage is relatively inexpensive, and is actually cost-effective because patients with insurance coverage are more likely to choose treatment options that minimize the risks of a multiples pregnancy. The cost savings from avoiding twin and triplet pregnancies actually outweigh the costs of the necessary fertility treatments. If you would like more information about this, Drummond Woodsum attorneys Mark Broth, Matt Upton and Anna Cole can help. A group of highly specialized attorneys focused on providing human resource professionals with the guidance they need in dealing with personnel matters.

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Calendar Overview - See the next page for our online classes!

SPECIAL NOTICE:
Our upcoming programs in May and June are continuing to be on the schedule unless we receive an executive order to work remotely due to the COVID19 pandemic. It is in the best interest of all to protect everyone's safety and health. If we do postpone any of our upcoming programs, you will receive a notice. It will also be displayed on our website and social media pages. Thank you!

MAY

7 Thursday • 9:00 a.m. - 2:00 p.m.
Business Split-Ups: Issues Arising from Corporate and Limited Liability Company Fractures
• In Person • Webcast
• 240 min. including 30 min. ethics/prof.
• Concord • NHBA Seminar Room

14 Thursday • 9:00 a.m. - 4:30 p.m.
Basic Construction Law 2020: The Revenge of Hammer and Nails
• In Person • Webcast
• 360 min. including 30 min. ethics/prof.
• Concord • NHBA Seminar Room

20 Wednesday • 9:00 a.m. - 4:30 p.m.
Signposts on the Tax Road
• In Person • Webcast
• 360 min. including 60 min. ethics/prof.
• Concord • NHBA Seminar Room

21 Thursday • 9:00 a.m. - 12:15 p.m.
Rules of the Roads - a look at NH road laws
• In Person • Webcast
• 180 min.
• Concord • NHBA Seminar Room

28 Thursday • 9:00 a.m. - 4:30 p.m.
Elder Abuse
• In Person • Webcast
• 360 min. including 60 min. ethics/prof.
• Concord • NHBA Seminar Room

JUNE

19 & 20 Friday & Saturday
NHBA Annual Meeting
• In Person • Credits TBD
• Portsmouth • AC Hotel by Marriott Portsmouth

17 Wednesday • 9:00 a.m. - 4:30 p.m.
Clearing the Haze: Cannabis & CBD in the Workplace - Legal Issues, Ethical Issues, and Medical Update
• In Person • Webcast
• 360 min. including 45 min. ethics/prof.
• Concord • NHBA Seminar Room

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CLE HIGHLIGHT

COVID19

Important Message and Special Offer from NHBA-CLE

Dear Bar Members,

In response to the current public health crisis, NHBA•CLE has postponed live programming through May 4, 2020. All programs will be rescheduled as soon as we know it is safe to resume group activities.

While you are working remotely, earn CLE credits to complete your NHMCLE Licensure Renewal requirements by June 30. We have over 300 online, on-demand programs available from both NHBA•CLE and our partners across the country. Check them out in our CLE Online Catalog.

Due to the current circumstances, we are offering you a 10% discount on purchases of NHBA•CLE Online Seminars and CLEtoGo programs from now until May 4. Use coupon code 10PERCENT when you check out.

We look forward to resuming the NHBA’s top quality, in-person programs as soon as we are able.

We are committed to supporting our members in providing high-quality, comprehensive programs 24 hours a day, 7 days a week, 365 days a year.

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Email  
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Website  
www.nhbar.org/nhbacle

All webinar registrations must be made online.
Constitutional Law/Corporate Rights: What Clients Should Ask (San Francisco, CA Bar)

Artificial Intelligence in Criminal Justice (NACDL)

Post Conviction Relief Act 101 (A Beginner’s Guide) (through online partnership with Jenkins Law Library)

Employment Law 101

Managing Climate Change (through online partnership with Georgetown Law)

ETHICS/PROFESSIONALISM

65th Annual Institute: Ethics for In-House Counsel – Best Practices for Establishing (and Maintaining) Attorney-Client and Work-Product Privileges in an Electronic World (through online partnership with Rocky Mountain Mineral Law Institute)

Multijurisdictional Practice & State UPL (through online partnership with Cumberland School of Law CLE)

Covid – 19: Key Legal Issues Impacting Health Care Providers

Contextual Data: The Next Wave of e-Discovery (through online partnership with Georgetown Law)

Masters in Litigation with Larry Kaye

Persuasive Direct Examination (through online partnership with NACDL)

Insurance Law

First Party Homeowners’ Insurance Claims

INTELLECTUAL PROPERTY LAW

Intellectual Property Law for the General Practitioner

REAL PROPERTY

Legal Trends in Historic Preservation (through online partnership with Georgetown Law)

TRUST & ESTATE AND ELDER LAW

Revised Uniform Fiduciary Access to Digital Assets Act

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New Rules for the Fair Labor Standards Act

By Terri L. Pastori, Beth A. Deragon, and Ashley D. Taylor

The Fair Labor Standards Act (the “FLSA”), which is enforced by the US Department of Labor (the “USDOL”) has been around for over eighty years and continues to be the stalwart of federal wage and hour laws. The FLSA set the standard of the 40-hour work week, overtime, minimum wage, restricting child labor, mandating recordkeeping, and hour laws. The FLSA requires that employers pay overtime to any non-exempt employee who works more than 40 hours in a given workweek. Overtime pay is “time and a half” or 1.5 times the employee’s regular rate of pay for hours in excess of 40. The December 12, 2019 rule (which went into effect January 15, 2020) clarifies how the regular rate must be calculated, including whether certain soft benefits and payments can be excluded from calculation of an employee’s regular rate of pay.

The final rule enumerates a variety of soft benefits (i.e. employee “perks”) that are excludable from the regular rate of pay provided they are not connected to hours worked, services rendered, job performance, or other criteria linked to the quality or quantity of an employee’s work. Examples of soft benefits include wellness programs, gym access, tuition benefits, adoption assistance, and employee discounts. Also excludable are perks such as coffee and snacks for free at work and raffle prizes which are considered gifts. Additionally, payments related to expense reimbursements, most paid meal breaks, and payouts of accrued paid time off are considered excludable under the new rule. “Show-up pay,” which compensates employees sent home by their employer due to the lack of work, is considered excludable from the regular rate of pay provided the employer actually paid the employee for the time they were sent home. The final rule also clarifies that show-up pay, which is typically paid at the employee’s base hourly rate, should be considered as part of the employee’s regular rate of pay.

Beginning January 1, 2020, employers must make $684.00 or more per week, annualized to $35,568.00 per year, in order to maintain exempt status (previous salary threshold was $455.00 per week). Employers may reclassify employees, limit overtime worked, and use nondiscretionary bonuses and incentive payments to satisfy up to 10% of the employee’s salary to reach the new minimum salary threshold. The total annual compensation threshold for employees meeting the “highly compensated” exemption increased to $107,432.00 (from $100,000.00); $35,568.00 of which must be paid weekly on a salary or fee basis.

The USDOL, the next step in the inquiry is to look at how much the employee is paid – the “minimum salary threshold.”

The Fair Labor Standards Act (the “FLSA”), which is enforced by the US Department of Labor (the “USDOL”) has been around for over eighty years and continues to be the stalwart of federal wage and hour laws.
Proposed “Card Check” Union Election Bills – Historical Context for an Old Proposal

By Mark Broth and Anna Cole

During the current legislative session, two bills have been proposed (one in the House – HB 1399 - and one in the Senate – SB 448) that would amend the Public Employee Labor Relations Act to bypass the union election process and allow for certification of a bargaining unit’s exclusive representative (i.e., union) upon receipt of written authorization from a majority of the employees in the bargaining unit. Such a process is often referred to as a “card check” process. Currently, certification of an exclusive representative is performed through a secret ballot election. RSA 273-A:10.

While the proposed change in the process may sound novel, those who have long worked in the public sector may remember that a similar, but short-lived, change was made to the PELRA during the Obama Era. In 2007, the federal Employee Free Choice Act sought, among other things, to permit private sector union recognition based on authorization cards. As a result, a number of states saw similar proposed changes to their public employee labor relations laws. While the Employee Free Choice Act failed, the proposed change to New Hampshire law went into effect in September 2007. The modification was short-lived, however, and was repealed in August of 2011.

Returning to the present, it may appear that history is repeating itself. At the federal level, we have seen the Protect the Right to Organize (PRO) bill pass the House. PRO includes a variety of measures that private sector unions have long sought and includes a provision that would place the burden of proof on the employer to demonstrate that the employer did not undermine the union election. If the employer fails to meet that burden, the NLRB could then rely on authorization cards to recognize the union. More expansively than the PRO bill being discussed at the federal level for private employers but just like their 2007 New Hampshire predecessors, the New Hampshire bills seek to adopt the broader card check method. As may often be the case in such circumstances, the criticisms of the proposed New Hampshire amendment have primarily remained the same.

For example, many have raised concerns that the card check is an anti-democratic process, because it does not allow all members of the bargaining unit the opportunity to weigh in on the selection of the exclusive representative – once a majority is reached, the prospective union could simply stop approaching additional members of the bargaining unit. Additionally, critics have raised concerns regarding potential coercion, because it does not allow employees to pressure, mislead, or otherwise improperly influence employees to sign an authorization card. Finally, there are concerns that the card check process deprives employees of the ability to learn the employer’s perspective on unionization because it can take place before the employer is even aware that a union-organizing drive has begun. The existing secret ballot process, which has operated successfully for over 40 years with few claims of improper election interference, essentially eliminates these coercion and undue influence concerns. In that sense, the proposed amendment to the current secret ballot process appears to be a solution in search of a problem.

Even if adopted, it is somewhat unlikely that proposed change in the law will have a significant effect on the public sector union landscape. Currently there are relatively few employees who could unionize (by being part of a bargaining unit consisting of 10 or more employees that share a community of interest) who have not already done so. Therefore, where the proposed amendment does not seek to alter the current 10-employee minimum, it is unlikely that many public employees would have the opportunity to take advantage of the card check process.

Anna Cole and Mark Broth are members of DrummondWoodsum’s Labor and Employment Group. Their practices focus on the representation of private and public employers in all aspects of the employer-employee relationship.
ERISA Cases Front and Center at the United States Supreme Court This Term

By John E. Rich, Jr.

Timing has always been a key element in my life. I have been blessed to have been in the right place at the right time. - Buzz Aldrin

Although none of the justices of the United States Supreme Court have walked on the moon like astronaut Buzz Aldrin, the justices’ decision to hear three cases involving retirement plan participants’ right to sue under the Employee Retirement Income Security Act of 1974 (“ERISA”) could not have been more well-timed. The Court’s decisions will impact the extent to which employers and retirement plan fiduciaries will face ERISA claims as a result of 2020 stock market losses by retirement plans.

Claims Against Fiduciaries Failing to Act on Inside Information

Retirement Plans Committee of IBM v. Jander (No 18-1165) involves a claim that IBM fiduciaries violated their ERISA fiduciary duty by continuing to invest employer stock ownership plan (ESOP) assets in IBM common stock despite knowing that the stock’s market price was artificially inflated due to IBM’s failure to disclose losses incurred by one of its business units. The case raises the inherent conflicts between fiduciaries who own company stock and those who do not. The case is also an early case out of which the Court will be asked to decide whether it will hear the merits of the new argument.

In a 2015 case, the Court held that in order to state a claim under ERISA for breach of the fiduciary duty of prudence based on inside information, a plaintiff must plausibly allege that a prudent fiduciary in the defendant’s position could not have concluded that an alternative action would do more harm than good to the plan. The decision at the Court of Appeals for the Second Circuit had subverted that pleading standard and opened a circuit split by permitting a claim based on typical allegations that the harm of an eventual disclosure of an alleged fraud typically increases the longer the fraud continues.

On January 14, 2020, the Court vacated and remanded the case back to the Second Circuit because new arguments were raised at the Court including IBM’s argument that ERISA imposes no duty on an ESOP fiduciary to act on inside information. Because the Second Circuit did not consider the new arguments, the Court vacated the judgment of the Second Circuit and remanded the case back for the Second Circuit to determine whether it will hear the merits of the new arguments.

Although the case involves an ESOP that is designed to invest primarily in employer stock, the case has broad implications for any retirement plan subject to ERISA in which employer stock is an investment option. Unless the Second Circuit reverses itself, the case could be back before the Supreme Court in the future.

Actual knowledge Required for ERISA Three Year Statute of Limitations

In an opinion released on February 26, 2020, the Court ruled against Intel Corporation in, Intel Corporation Investment Policy Committee v. Sulyman (No. 18–1116), a case with potentially far reaching implications to employers who maintain Section 401(k) retirement plans. A class action lawsuit was brought alleging that various Intel fiduciaries had breached their fiduciary duties under ERISA by offering two investment funds that were imprudently overinvested in “alternative investments” such as hedge funds and private equity and failed to disclose relevant facts about those allocations to plan participants. The Supreme Court decision focused solely on the time a plaintiff has to bring such a claim. ERISA Section 413 allows a plaintiff as long as six years to file suit following an alleged ERISA breach or violation, but if a plaintiff has “actual knowledge” of a breach or violation, that period is reduced to three years.

Mr. Sulyman received numerous ERISA mandated investment disclosures while an Intel employee from 2010 to 2012, some exceeding the three-year period. Although Mr. Sulyman had received the mandated notices and visited the website that hosted some of the disclosures many times, he testified at the trial court that he did not remember reviewing the relevant disclosures and had been unaware of the allegedly imprudent investments while working at Intel.

The Supreme Court ruled that a plaintiff does not necessarily have “actual knowledge” of the information contained in disclosures that he receives but does not read or cannot recall reading. The Court read the ERISA “actual knowledge” requirement to mean that the plaintiff must in fact have become aware of that information and it would be inappropriate to impute knowledge based on the disclosures. The case now goes back to the District Court where the plaintiffs can try and prove the allegations.

If an employer wants to avail itself of the shorter three-year statute of limitations for many ERISA allegations, steps should be taken to ensure that participants acknowledge or otherwise affirmatively demonstrate that they have read the various plan and investment disclosures. Pension Plan Participants Standing to Sue

The Court heard oral argument on January 13, 2020 in Thole v. U.S. Bank (No. 17–1069) and rules on the issue of whether plan participants have standing to sue under ERISA.
Editor’s note: this is the 17th N.H. Bar News article co-written by employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss-Ford (employer advocate). Here they discuss this fall’s N.H. Supreme Court opinion, Burnap v. Somersworth, 2018-0624, which upheld the dismissal of an employment discrimination case on summary judgment.

By Nancy Richards-Stower and Debra Weiss-Ford

Nancy: So, summary judgment, the enemy of employment civil rights cases, roars back into our lives again, this time, under state law. Argh.

Deb: But, Nance, summary judgment is the most efficient way to sweep away weak cases.

Nancy: I’ll stick with summary judgment is the enemy of civil rights cases. So, it was with some distress I read Burnap v. Somersworth.

Deb: Following an investigation and School Board hearing, Burnap was fired as the Dean of Students at Somersworth High School for alleged sexual harassment. She asserted that the investigation was biased and her termination was actually motivated by discrimination based on her sexual orientation. The supreme court upheld the superior court’s summary judgment order in favor of the employer. Besides the defendant’s victory, what’s your concern?

Nancy: Well, it appears that the New Hampshire Supreme Court adopted a “pretext plus” standard for discrimination cases decided under the burden shifting framework of McDonnell Douglas Corp. v. Green (plaintiff puts on evidence of a prima facie case: she’s a member of a protected class and suffered an adverse action; defendant puts on evidence that her termination was based on a non-discriminatory reason; then plaintiff must show that the employer’s given reason is false, and is a pretext for discrimination)

Deb: For many years the federal circuits were divided between “pretext only” and “pretext plus” standards. In “pretext only” jurisdictions, once the plaintiff offered evidence that the motivation proffered by the employer for its action was a lie, she survived summary judgment (and could win at trial). In “pretext plus” jurisdictions, proving the employer’s stated motivation was a sham (pretext) wasn’t enough. If the employee showed that the employer’s reason was total nonsense (pretext), she’d still lose, unless she offered additional evidence (the “plus”) that discrimination was the real reason.

Nancy: Right, until 2000, when along came the U.S. Supreme Court’s decision in Reeves v. Sanderson Plumbing. (While Reeves was a post-trial Rule 50 motion for judgment as a matter of law, the standard for deciding summary judgment motions is the same, and Reeves informed summary judgment law.) Reeves held that the evidence setting forth a prima facie case of discrimination along with the rejection of the employer’s evidence of its motivation as a lie (pretext) can be enough to overcome summary judgment. That is, under Reeves, once there is evidence, which, if believed, would show that the employer’s stated reason was a sham, summary judgment can be avoided.

Deb: But, the totality of the plaintiff’s proffered evidence must provide some basis for the conclusion that the employer’s motivation was illegal discrimination.

Nancy: Burnap says that “the plaintiff must do more than dispute the employer’s stated justification; she must “elucidate specific facts which would enable a jury to find that the reason given was not only a sham, but a sham intended to cover up the employer’s real motive”: here, sexual orientation discrimination.” But Reeves held that after a jury believes an employee’s evidence that the employer had lied, “discrimination may well be the most likely alternative,” especially when the evidence failed to reveal an alternative non-discriminatory reason (like, “I didn’t reject you because of your age; I hired young Ben, instead, because he’s my cousin.”) While Reeves didn’t instruct that plaintiff should win at trial in every case where plaintiff offers evidence to contradict the employer’s reason, it did allow at the summary judgment stage, when all inferences are to be made in favor of the non-moving party, she could survive without having to prove the lie was motivated by discriminatory animus.

Deb: For example?

Nancy: Say my client is an excellent coder and has successfully coded 100 new games in the last year. Then she complains that she is being sexually harassed and is fired. She sues, alleging retaliation. The employer’s non-discriminatory reason is that she was a lousy coder. Well, she has asserted in her prima facie case of retaliation that she was a good coder, had complained about sexual harassment and was fired soon after. Thus, by proffering some evidence that she was a good coder, she has disputed the “lousy coder” pretext. That should be enough to survive summary judgment. She should not have to prove that the reason the employer asserted he was a lousy coder was to cover up its actual, retaliatory motive.

Deb: I agree that this language in Burnap may lead to some confusion: Of course, the plaintiff must do more than dispute the employer’s stated justification; she must “elucidate specific facts which

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A Few Workplace Lessons from the COVID-19 Experience

By Beth Rattigan

In what felt like minutes, the country’s response to COVID-19 went from “it’s just a cough/common cold” to “social distance” to “businesses closed” to “stay-in-place” mandates. The corona virus pandemic has accelerated changes in work practices that were not fully developed prior to the outbreak. Many businesses turned to remote work as the answer to keep businesses running, while protecting employees. Lawyers as a whole are incredibly fortunate that much of our jobs can be done at home. For many, this is not the ideal situation – we are used to multiple computer screens, large desks, printers, scanners, administrative staff nearby, and a quiet space away from family members and home life distractions. Although our profession has been known for being slow to change and modernize, lawyers were forced to quickly adapt.

Reduced business travel, video meetings and work from home policies have now been tested and refined. These changes may lead businesses to rethink their current infrastructure, including real estate square footage, in favor of smaller offices. Human Resource practices are also likely to change. Fewer humans confined in one space may mean fewer human resource issues among staff, while expanding the need for developing skills focused on maintaining productivity, developing new policies, and managing remote work arrangements. We all have learned some things along the way from which businesses may benefit in the future, particularly remote work capabilities and the need to adopt changes to the way a remote workplace is managed.

Staying Compliant with Employment Laws in a Work From Home Environment

As a preliminary matter, all employment discrimination and wage laws still apply to a workforce working from home. For example, if layoffs continue to be necessary, employers need to be mindful when making decisions based on salary alone within the same job category, as that could invite disparate impact claims of age discrimination. If it is necessary to select one person in a certain team or group, employers should make sure the decision is based upon a non-protected characteristic and the reason for making the decision should be documented.

Wage and hour laws are more difficult to manage remotely. Hourly, non-exempt employees working from home must be paid for all time worked in accordance with the Fair Labor Standards Act. It is easy when working from home for an employee to become distracted with household tasks, childcare or running errands during the middle of the work day, with the thought that the lost time can be made up later in the day. It is also common when working from home to let the workday bleed into evenings and weekends. Without clear direction, there can be lower productivity and the risk of overtime liability. It is crucial that managers and supervisors are clear with their hourly employees that employees need to carefully track and report their time worked. Employers can and should set clear expectations with employees about when they are expected to be available and working. Hourly employees may need to be reminded that normal business hours are still in effect and that when they “clock-in” they are to be working and not doing non-work tasks during these hours. For companies that have a policy requiring pre-approval for overtime, employers should reiterate and remind employees that policy is still in effect when working from home.

Employers also need to be cognizant of potential costs incurred while employees work from home. Under the Fair Labor Standards Act, an employer does not have to reimburse an employee for equipment they use to work from home such as internet or printer paper, unless the cost of such “necessary” items would cause the employee’s travel expenses. It is also important to remember that employees continue to need breaks, and may miss the opportunity to communicate in writing with hourly employees about hours, breaks, and the need to obtain approval before working overtime.

Employers also need to be clear that managers and supervisors are clear that employees are to be working and not doing non-work tasks during these hours. For companies that have a policy requiring pre-approval for overtime, employers should reiterate and remind employees that policy is still in effect when working from home. It is also important to remember that employees continue to need breaks, and may miss the opportunity to communicate in writing with hourly employees about hours, breaks, and the need to obtain approval before working overtime.

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Telework in the Time of COVID-19

By Anne Jenness

This is certainly not the article that I originally planned to write. But, as with so many things right now, the material I intended to present about telework no longer seems relevant in the face of a global pandemic. Instead of what I had planned, this article about teleworking is now directed at the various corporate lawyers and others who are (trapped) in conference calls, being asked difficult employment law questions, with no employment lawyer in sight. To help these attorneys guide discussions before consulting with employment counsel, this article describes two areas where telework policies may be unusually thorny under current circumstances. In particular, this article addresses two potentially innocuous-seeming questions. The first, whether a particular job can be done remotely, and the second, whether employees will be productive while doing those jobs from home.

Can This Job Be Done Remotely?

Employer Issue: Employers may be seeing an increase in employees requesting telework in light of health concerns, ranging from the general fear of becoming sick to a more specific concern that makes an employee more susceptible to COVID-19 (which may be a disability under the ADA). Many of these jobs have always been performed on-site and have at least some components that include face-to-face interactions.

Selected Legal Considerations: NH RSA 354-A, Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA). Background: The Equal Employment Opportunity Commission (EEOC) has long taken the position that remote work could be a reasonable accommodation under the ADA and has produced a Fact Sheet for employers outlining its position as early as 2003. The Fact Sheet (available at: https://www.eeoc.gov/facts/telework.html) sets forth the EEOC’s position that employers should, as part of the ADA interactive process, consider remote work under circumstances where remote work would allow the employee to perform the essential functions of their job.

Courts have, at times, been skeptical of this EEOC position, stating, for example, that “an employee who does not come to work cannot perform any of his job functions, essential or otherwise.” EEOC v. Ford Motor Co., 782 F.3d 753, 761 (6th Cir. 2015) (internal citation omitted). However, shortly after its decision in Ford Motor Co., the Sixth Circuit distinguished the facts of another ADA case involving telework, in Mosby-Meachem v. Memphis Light, Gas & Water Div., 883 F.3d 595 (6th Cir. 2018). While not controlling in New Hampshire, Mosby-Meachem offers attorneys an important perspective on how courts and juries may evaluate a temporary request for telework as a reasonable accommodation under some circumstances, and must not dismiss the possibility of telework as an accommodation simply because a job has previously been performed only onsite. Indeed, there is a strong possibility that courts and juries may be particularly receptive to temporary remote work as a reasonable accommodation in light of the COVID-19 pandemic. Employers may face a variety of barriers to engaging in a standard interactive process under constraints related to COVID-19 (for example, it may be difficult for employees to obtain medical appointments). To avoid missteps, employers may consider offering telework programs to interested employees on a short-term basis, while specifically noting that certain employees may not be performing all essential functions of their jobs due to emergency circumstances. Employers should also familiarize themselves with the abundant technological resources to facilitate remote work, including meeting sites like Zoom, Google Meet, Skype, and Webex, and group chat platforms like Slack, Microsoft Teams, Gchat, and other branded products. For employees who cannot attend work and cannot feasibly perform their duties from home, employers should carefully consider whether the Family and Medical Leave Act (FMLA), the Emergency Paid Sick Leave Act (EPLA), or ADA may require that the employee be permitted to take leave time.

Will Employees be Productive?

Employer Issue: In light of recent school closures, employers may be unusually concerned about whether their employees will be able to work effectively in their (potentially chaotic) homes.

Selected Legal Considerations: NH RSA 354-A, Title VII of the Civil Rights Act, NH RSA 275:37-b, the Families First Coronavirus Recovery Act (FFCRA), including the expanded provisions of the FMLA (EFMLA) and the EPSLA. Background: When making decisions about teleworking, employers should not consider factors like the presence of children in the employee’s home, or any caretaking responsibilities.

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Confidential Investigations Are Back

By Julie A. Moore

Workplace investigations routinely take place once an employer receives a complaint of workplace misconduct, such as sexual harassment, discrimination or retaliation. Standard practices have emerged over the years, but the muddies were watered on whether witnesses interviewed in internal investigations could be told to keep the matter confidential during the investigation. An answer has emerged, and confidentiality is back.

The Equal Employment Opportunity Commission (“EEOC”) has long espoused that confidentiality in investigations must be maintained to the greatest degree possible. For example, in its “Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors” (1999), the EEOC states that “an employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible.” The EEOC guidance, however, was at odds with a decision by the National Labor Relations Board (“NLRB”), in Banner, which prohibited private employers from issuing blanket confidentiality admonitions in workplace investigations. In Banner, the NLRB held that a private employer’s efforts to protect the confidentiality of harassment allegations was presumptively unlawful.

The following list, neither all-inclusive nor exhaustive, are examples of behaviors that can have an adverse effect on the company and may lead to disciplinary actions up to and including termination:

1. Refusing to courteously cooperate in any company investigation. This includes but is not limited to, unauthorized discussion of investigation or interview with other team members. (Emphasis added)

2. To obtain and preserve evidence while employees’ recollection of relevant events is fresh.

3. To encourage the prompt reporting of concerns such as harassment, bullying and criminal misconduct, without chilling employees into silence and fearing retaliation.

4. To protect employees from the dissemination of their sensitive personal information. A confidentiality rule also gives employees a plausible defense against potentially intense internal pressure or threats from others to reveal what was asked and said. Now, employees can say, “Sorry. I can’t talk about it. If I did, I could get fired!”

On balance, the NLRB stated that the potential adverse impact on Section 7 rights is outweighed by the substantial and important justifications associated with the employer’s maintenance of confidentiality rules.

Importantly, under the new precedent, confidentiality can be enforced without restriction during an open investigation. This means that participants in the investigation can be told not to discuss the investigations of any incidents, and participants in the investigation can be told not to discuss the interviews conducted – meaning what was learned or disclosed in the course of the investigative interview.

Employees not involved in the investigation are free to discuss the incidents without limitation. Employees are free from generally discussing workplace issues and disciplinary policies/procedures. Practice pointers for employment attorneys:

1. Review policies relating to harassment, discrimination and other misconduct – and procedures relative to conducting internal investigations.

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SCOTUS to Issue Highly Anticipated Employment Decisions in 2019-2020 Term

By Jennifer L. Parent

As it has done since 1917, the United States Supreme Court opened its 2019-2020 Term on the first Monday in October. But this term has proven to be anything but business as usual.

Not long after the start of its current term, Chief Justice John Roberts presided over the Senate’s impeachment trial, which lasted almost three weeks from mid-January to early February 2020. Shortly thereafter, on March 16, the Court closed its doors to the public and postponed oral arguments through April 1 due to the coronavirus global-pandemic. In its press release on the public closure, the Court explained that this postponement of proceedings for public health concerns is not its first. The Court also postponed proceedings in October 1918 in response to the Spanish flu epidemic and in August 1793 and August 1798 in response to the yellow fever outbreaks. In issuing its current order, however, the Court advised that internal operations would continue (some justices participating in conferences remotely by telephone) and that it was not extending any current deadlines.

How the ever-changing COVID-19 restrictions and increasing number of state closures will impact the Court’s 2019-2020 Term is still too soon to determine. In the meantime, we all await decisions from some of the employment cases pending at the Court, some of which are included below.

**Title VII - Transgender & Sexual Orientation Protections**

One of the most anticipated decisions in the employment area will come from a trio of cases that will address the scope of the term “sex” under Title VII. Oral argument was held in these cases on the second day of the term, October 8, 2019.

The Court will answer in **Bostock v. Clayton County, Georgia** et al., v. Zarda **et al., v. Waterhouse**. Essentially, the Court will consider whether the term “sex” only means biological sex or whether the term extends to include (1) whether the term includes transgender or gender-stereotype protections found in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); (2) whether sex stereotyping under Price Waterhouse v. Hopkins is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). The arguments by the parties generally concern the interpretation of the term “sex” as used in Title VII and the Court’s decisions that have followed, including the sex-stereotype protections found in Price Waterhouse. Essentially, the Court will consider whether the term “sex” only means the status of male or female based on reproductive biology or whether the term extends to cover new applications, even when Congress may not have envisioned them at the time of enactment in 1964.

New Hampshire’s Law Against Discrimination, RSA 354-A, protects employees from discrimination based on both gender identity and sexual orientation. Those protections are the result of specific amendments adding these groups to the protected categories enumerated in the law. The State of New Hampshire Attorney General’s office did not submit or join in any briefs filed on the question before the Court in this trio of cases, noting it did not have time to review the filing before the filing deadline. Instead, it filed a letter of support of the amicus brief filed by the States of Illinois, New York, California, et al., arguing in favor of providing protections for transgender and sexual orientation under Title VII. (February 20, 2020 letter from New Hampshire Attorney General’s Office).

**ADEA Standard for Federal Employees**

The Court heard oral argument on January 15, 2020 in **Babb v. Robert Wilkie, Secretary of Veteran Affairs** (No. 18-882) on whether the federal sector provision of the Age Discrimination in Employment Act requires a public-employee plaintiff to prove that age was a but-for cause of the challenged personnel action. The ADEA requires that federal agencies’ “personnel actions affecting employees…who are at least 40 years of age…shall be made free from any discrimination based on age.” Babb argues that this language creates liability for age discrimination any time the federal government considers age rather than needing to prove but-for causation. As many of you will recall, in University of Texas Southwestern Medical Center v. Nassar, 570 U.S. 338 (2013) and Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009), the Court determined the statutory language “because” in 42 U.S.C. § 2000e-3(a), and “because of” in 29 U.S.C. §623(a)(1) required a private-sector plaintiff to prove but-for causation.

**Deferred Action for Childhood Arrivals (DACA)**

Another highly anticipated decision concerns the DACA program from the Obama administration in 2012. Oral argument was held on November 12, 2019 on another trio of consolidated cases – **Department of Homeland Security v. Regents of the University of California** (No. 18-587), **Trump v. NAACP** (No. 18-588), and **Wolf v. Vidal** (No. 18-589). These cases impact the workplace because under the DACA program, if a person is qualified, that person is eligible for temporary legal status and a work permit, renewable every two years. The questions presented in those cases include (1) whether the Department of Homeland Security’s decision to wind down the DACA policy is lawful. Another trio of consolidated cases – **Vidal et al., v. Trump (No. 18-588)**,

**A Trio of Employment Cases**

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**Title VII - Transgender & Sexual Orientation Protections**

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also be mindful of state laws—RSA 354-A:6 and 354-A:7—which prohibit discrimination in the workplace based on sex, physical disability, or pregnancy, childbirth, and related medical conditions. While the issues have not yet been conclusively decided in New Hampshire, the cautious route is for employers to treat infertility as both a “pregnancy” related medical condition and a “disability” with schedule flexibility offered as a reasonable accommodation.

The Family and Medical Leave Act (FMLA) provisions may also kick in, depending on the nature of the medical treatment involved; for example, an employee undergoing a laparoscopic uterine surgery will likely be out of work for more than three days. Don’t forget about another federal law, the Pregnancy Discrimination Act (PDA), which prohibits discrimination based on pregnancy, childbirth, and related medical conditions. You don’t want to deny a flexible work schedule to an employee undergoing in vitro fertilization when other employees are granted flexibility for their medical appointments.

Mental Health Support: Infertility is emotionally challenging and mentally draining. We all know happy employees are better players. Striving to make it easy for employees to perform their jobs.

Pregnacies at the Workplace: Pregnancy announcements at work will continue to happen. Co-workers often want to express their excitement to the new mom (or dad) with an in-office baby shower or other celebration. Employers need to understand that these seemingly innocuous events can be a tremendous trigger for infertile individuals. Therefore, employers should think carefully about how to balance the desire of some employees to celebrate with not making things worse than they need to be for the employee struggling with infertility.

In addition, consider participating as a workplace in National Infertility Awareness Week and/or the New England Walk of Hope. Spreading awareness of infertility among co-workers benefits everyone in the long run and shows employees struggling with infertility that they are valued members of the team. Maybe you can grant paid or unpaid leave for your employees to attend Resolve’s yearly Advocacy Day in Washington, D.C.? If your company participates in a charitable giving program, consider adding a local infertility-focused non-profit (such as Resolve New England) as a recipient. Even better—match the gifts made by employees. Another local option is to form an employee team to run a road race on behalf of AGC Resolve New England. A large employer may consider offering its own peer support group run by Resolve New England. A large employer may consider offering its own peer support group. Employees should also be made aware of any existing employee assistance programs available. Some companies even offer “fertility coaches” as part of their benefit package—patient care advocates with expertise in the very complicated area of infertility.

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ERISA from page 24

1712) on whether ERISA plan participants have standing to sue even if a defined benefit pension plan is fully funded. Participants in the U.S. Bank’s pension plan filed a class action seeking injunctive relief under ERISA Section 502(a)(3) and restoration of the plan’s losses under Section 502(a)(2). The plan fiduciaries allegedly breached their fiduciary duties causing a $750 million loss. Because U.S. Bank, which bore the investment risk in the defined benefit plan, subsequently contributed the necessary funds to fully fund the plan, the Eighth Circuit Court of Appeals held that there was no actual or imminent injury to the plan that caused injury to the participants and the participants no longer had standing to sue. In so holding, the Eighth Circuit departed from holdings of other circuits and rejected the long-held position of the U.S. Department of Labor that ERISA provided remedies even though plan participants had not yet suffered any individual financial harm and the plan did not (yet) face a risk of default.

A decision against U.S. Bank, coupled with the stock market losses in 2020, could cause the start of a wave of pension plan fiduciary litigation similar to that faced by large 401(k) plans over the past two decades.

John E. Rich, Jr. chairs the Tax Department at McLane Middleton, Professional Association. He specializes in employee benefits, pension, ERISA and tax-related matters. He can be reached at john.rich@mclane.com or (603) 628-1438.

Summary from page 25

would enable a jury to find that the reason given was not only a sham, but a sham intended to cover up the employer’s real motive.” (Emphasis added)

Nancy: Deh, that quote is from a federal case that predated Reeves by a full decade (Medina- Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990)). It sure looks like “the plus” in the “pretext-plus” world I thought Reeves knocked out in 2000. Also, what about the axiom, reiterated in Reeves, that the court “must disregard all evidence favorable to the moving party that the jury is not required to believe”?

Deh: Nance, you’ve railed against summary judgment for decades.

Nancy: Well, you can’t see fidgety fingers, rolling eyes, sweaty foreheads or hostile stares on a paper affidavit drafted by counsel. Absent video footage, cross examination is the best way to prove mendacity. You can’t cross examine an affidavit. Or, as in the case of the Somersworth School Board members, their nine affidavits.

Deh: I know we disagree, but I think there were insufficient facts in the record for a jury to determine that the employer fired the employee based on her sexual orientation and used sexual harassment as a pretext. The Court was just throwing out a case that never should have been brought.

Investigations from page 28

1. Consider using a confidentiality form / templates consistent with this decision.
2. Talking points about role of investigation, confidentiality and retaliation that are usually given.
3. Consider using a confidentiality form / templates consistent with this decision.

Julie A. Moore is an employment attorney and HR consultant who specializes in conducting workplace investigations, training, policy development, and counseling. wwwEmploymentPG.com

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We represent only employees. We love this work. We fight for severance agreements. We fight against non-competition mandates. We negotiate at times of hire, termination and in-between. We litigate in New Hampshire and Massachusetts, in state and federal courts and agencies (wrongful termination, discrimination, harassment, whistleblower rights, wage claims, unemployment, free speech, USERRA rights, etc.).

Job loss is often followed by serious health conditions, mental and/or physical. Job losses crush careers, marriages, homes, tuition, medical insurance, and retirement. So, our favorite work is saving jobs unfairly at risk. We can’t promise fabulous results, but we work really, really hard to get them.

Employment law is complicated. Let us help.

SCOTUS from page 29

Religious Exemptions

In the consolidated cases of St. James School v. Biel (No. 19-348) and Our Lady of Goodlupes School v. Morrissey-Berru (No. 19-267), the Court will consider whether the First Amendment Religion Clauses prevent civil courts from adjudicating employment discrimination claims brought by an employee against the employee’s religious employer, where the employee carried out important religious functions. The First Amendment Religion Clauses prohibit governmental interference with ministerial employees of a religious group. At issue is whether important religious functions alone are sufficient for application of the “the ministerial exception” to bar a discrimination suit or is something more needed such as a formal title or extensive training. The oral argument that was scheduled for April 1, 2020 has been postponed.

With the Court still operating during these COVID-19 restrictions in place (albeit remotely for some justices), we hope to see decisions on those employment cases above where oral argument has already been held.

Jennifer L. Parent chairs the Litigation Department at McLane Middleton, Professional Association and is a member of the firm’s Employment Law Practice Group. She can be reached at (603) 628-1360 or jennifer.parent@mclane.com.
COVID-19 from page 27

responsibilities an employer may have for others in the home. These types of consid-
erations could lead to telework decisions that are based on stereotypes or implicit bias
about gender, marital status, familial status, or other protected categories under NH RSA
354-A and/or Title VII of the Civil Rights
Act of 1964. Rather than focusing on pos-
sible distractions in the home, employers
should set appropriate expectations, monitor
employee performance, and offer flexibility
to employees who demonstrate success in
performing job duties with minimal super-
vision. Additionally, employers should be
mindful that NH RSA 275:37-b specifically
prohibits employers from retaliating “against
any employee solely because the employee
requests a flexible work schedule.” While
the statute does not require the employer to
permit such a schedule, businesses are wise
to consider such requests, and listen to em-
ployee suggestions about how work could be
performed from a remote location.

COVID-19 Pointer: Employers should
focus on providing all employees with flex-
ibility to the extent possible, while setting
and meeting mutual needs,” and the DOL sup-
ports “voluntary arrangements that combine
telework and intermittent leave.” The DOL’s
FAQs may be viewed at: https://www.dol.
gov/agencies/whd/pandemic/fera-ques-
tion

It may even be appropriate, on a tem-
porary basis, to relax productivity expecta-
tions as employees adjust to telework and
respond to restrictions on travel and group
gatherings. To that end, some employ-
ers may consider adding paid “Emergency
Time Off” to temporarily augment existing
paid time off policies. Such policies may in-
clude a small bank of hours each week for
teleworking (or onsite) employees to use to
eengage in emergency-related activities not
covered by the FFCRA (e.g., shopping during
off-peak times, volunteering in the commu-
nity). These policies give further flexibility
to employees, while allowing the employer to
set expectations regarding any reduction in
work capacity. Employers should ensure that
“Emergency Time Off” policies are of
limited duration (no more than a few weeks
or so), and reserve the right to extend such
policies if circumstances warrant. Policies
should also be explicit that the leave time
will be lost if unused. Employers must also
carefully consider how these policies could
interface with the FMLA, EFMLA, and/or
EPSLA.

Anne Jeaness is an attorney at Gallagher,
Callahan and Cartwright who works in the
litigation and corporate departments, spe-
cializing in employment law, workplace and
school investigations, and workplace audits.

Lessons from page 26

wage to go below minimum wage. How-
ever, New Hampshire requires employers to
reimburse employees for expenses not “nor-
mally borne by the employee as a precondi-
tion of employment” within 30 days of proof
of payment. This means employers should
carefully consider all requests by employees
who are told to work from home and are in a
position where working from home was not
previously expected. Employers should offer
employees are set up with a functioning
workspace and if reimbursements are issued,
they are issued for all employees in like posi-
tions.

Privacy and Confidentiality
Concerns

Another area that is likely to become
blurred is privacy. Most employees will be
working on at least one employee-owned
device, if not more. When in the privacy of
one’s own home, an employee may be more
likely to use an employer-owned computer
or phone for non-work-related reasons,
that could veer into inappropriate use. Again,
remind employees that any employer issued
equipment is owned by the company, there
is no expectation of privacy for portable
equipment or device, and they may only be used
for business purposes and in accordance with
any workplace policies. It is advisable to send
written reminders to employees about such
policies. Additionally, if employees have tak-
en home other equipment such as printers or
scanners, be clear that this equipment is also
owned by the company and should be used
for business purposes only.

An issue of concern for certain busi-
nesses, particularly law firms, is the safe-
guards of client information. In law firms,
employees should be instructed to work
only on firm-provided devices and refrain
from saving client files to personal devices
or portable media. Other reasonable steps
to protect information related to client mat-
ters should be considered. For example, if
a lawyer’s spouse or partner is also a lawyer
the two should keep their home workspaces
separate to the extent practicable. Lawyers
should close a door, step into another room,
or step outside if they take client or other
confidential calls when others are around.

Another modern era concern of working
from home is the risk of eavesdropping smart
speakers, such as Amazon Echo or Google
Home. As convenient as these devices may be,
it is important to understand how home digital
assistants listen, record, and share information.
Law firm employees should mute or turn these
devices off before having conversations that
are intended to be confidential.

Frequent Communication is
Key to Fostering a Strong
Remote Work Culture

Beyond the challenges related to adapt-
ing to employment laws, productivity or pri-
cacy and confidentiality issues, a significant
threat to a remote workforce is isolation from
coworkers and the resulting loneliness that
could be experienced by many workers. Re-
 mote work by its nature drastically changes
social interaction between employees that
may be necessary for team work. One lesson
from this COVID-19 situation is a greater un-
derstanding of the need for frequent commu-
nication in a variety of modes - phone, email,
imstant messaging, and video conferencing -
to maintain a strong remote work culture. It
is extremely important for not just the CEO,
but the entire leadership team to check-in and
communicate with employees across all sec-
tors.

A Chief Executive Officer can be a calm-
ing and motivating force in these times and
this is even more true when employees are
dispersed in separate home environments.
Employees rely on leaders to take action and
set the tone. A good leader goes a long way to helping employees under-
stand the issues and know what to expect so
that employees feel safe enough to return to concentration.

Managerial employees with supervisory
responsibilities should regularly communicate with team members to ensure that everyone
responsible for a project or work goal is on the
same page. Without in-person interaction,
sometimes get lost in translation when they are exclu-
sively transmitted by e-mail. Phone calls and
video conferencing platforms in a variety of
formats. This could take the form of daily one-one calls and weekly
team meetings via one of the many interac-
tive messaging or conferencing platforms
available (Zoom, Skype, FaceTime, WebEx,
Slack, Microsoft Teams, GoToMeeting, etc.). The important feature is that the calls/meet-
ings are regular and predictable, and that they
are for a fixed purpose so that everyone knows
that they can consult with their manager, and
that their concerns and questions will be heard.
Some employers find that remote work be-
comes more efficient and satisfying when
managers set expectations for the frequency,
means, and ideal timing of communication for
their teams. For example, “We use vid-

eoconferencing for daily check-in meetings,
but we use IM when something is urgent.”

Such communications are also impor-
tant to ensure that colleagues do not be-
come socially isolated. Loneliness is one of
the most common complaints about remote
work, with employees missing the informal
social interaction of an office setting. With
fewer opportunities to interact, some em-
ployees will suffer more than others, but over
a longer period of time, isolation can cause
any employee to feel less connected to their
organization and can result in leaving employ-
ers to decide to leave the organization.
Lack of contact with fellow employees can also lead to interpersonal challenges and
problematic human resource situations. It is well
known that context matters. Without the ben-
efit of in-person contact, remote workers are
less willing to give coworkers the benefit of
the doubt in difficult situations. As a sentence
in an e-mail or Slack message meant to be
humorous or clever can be perceived instead
as biting sarcasm or an insult. While office
banter and bad jokes might be dismissed in
person, careless messaging can be easily mis-
interpreted in other modes of communica-
tion. This is not a new phenomenon, but the
impact is greatly magnified when everyone
is working remotely. The need for frequent,
supportive communication for remote work-
ners cannot be overemphasized.

Conclusion

The COVID-19 pandemic forced em-
ployers into a situation that might have been
unimaginable previously, with all or many
employees working from home. Many of the
lessons learned will have lasting value beyond
the COVID-19 outbreak, particularly for
organizations that continue to prioritize
remote work.

Beth Rattigan is an employment lawyer
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Court Orders in Response to COVID-19

Following the Governor’s March 13, 2020 declaration of a State of Emergency under RSA 4:45, and pursuant to the emergency powers granted under RSA 490.6:2-a, New Hampshire Supreme Court Senior Associate Justice Gary E. Hicks has issued a list of orders in response to the COVID-19 pandemic. The New Hampshire Circuit, Superior and Supreme Courts will remain open on a restricted basis, consistent with the New Hampshire Supreme Court’s obligation to mitigate the risks associated with COVID-19. To see the full list (and any updates) of orders please visit the website www.nhbar.org.

NH Circuit Court Judicial Evaluation Notice

In accordance with Supreme Court Rule 56 and RSA 490:32, the New Hampshire Judicial Branch Circuit Court Administrative Judge routinely conducts judicial evaluations and invites you to participate in this process. The following Judges/Masters are presently being evaluated:

- Michael Alfano, Justice 7th and 10th Circuit Courts
- Mark Derby, Justice 9th Circuit Courts
- Michael Mace, Justice 2nd and 4th Circuit Courts
- Erin McIntyre, Justice 6th and 9th Circuit Courts
- Margaret-Ann Moran, Justice 5th and 6th Circuit Courts
- Kerry Steckowycz, Justice 9th and 10th Circuit Courts
- Janet Sabers, Justice 1st and 2nd Circuit Courts

An evaluation may be completed online at www.courts.state.nh.us. 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 link for Current Circuit Court Evaluations and then choose the Judge/Martial Master you would like to evaluate. While responses will be shared with the Judges/Martial Masters 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 a hard copy of the evaluation mailed to you, please e-mail the Circuit Court Administrative Office at Lcammett@courts.state.nh.us or call 271-6418 and one will be mailed to you. Please include the name(s) of the judge/master you would like to evaluate as well as your name and address. As stated above, while responses will be shared with the Judges/Martial Masters 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. All evaluations must be completed online or be returned no later than May 15, 2020.

New Hampshire Supreme Court Advisory Committee on Rules

The New Hampshire Supreme Court Advisory Committee on Rules will hold a PUBLIC HEARING at 12:30 p.m. on Friday, May 29, 2020, at the Supreme Court Building on Charles Doe Drive in Concord, to receive the views of any member of the public, the bench, or the bar on court rules changes which the Committee is considering for possible recommendation to the Supreme Court. Comments on any of the court rules proposals which the Committee is considering for possible recommendation to the Supreme Court may be submitted in writing to the secretary of the Committee at any time on or before May 28, 2020 or may be submitted at the hearing on May 29, 2020. Comments may be e-mailed to the Committee on or before May 28, 2020 at rulescomment@courts.state.nh.us. Comments may also be mailed or delivered to the Committee at the following address:

N.H. Supreme Court Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301

APPENDIX A

Amend Supreme Court Rule 42(XI)(f) as follows (proposed deletions are in strike-through, proposed additions are in bold):

(f) An applicant who has failed the New Hampshire bar examination within five years of the date of filing a motion for admission without examination shall not be eligible for admission by motion. An applicant who is not permitted to refile the New Hampshire bar examination pursuant to Rule 42(X) shall not be eligible for admission without examination. An applicant who has resigned from the New Hampshire bar shall not be eligible for admission by motion, but may be eligible for readmission upon compliance with the requirements of Rule 37(15).

Did you know?

Best Practices for Attorney e-Filing

Lead Attorney: When entering information for the party that you represent in a new case or filing an appearance in an existing case, always add a Lead Attorney for your client. This information is located on the Party Information screen. DO NOT ADD ANY LEAD ATTORNEY INFORMATION FOR THE DEFENDANT WHEN SUBMITTING A NEW CASE as they will add in their own attorney information when they file into the case. Identifying a Lead Attorney when you e-file means that attorney will be automatically copied on all court generated documents. It also speeds the process by eliminating extra manual steps in the court’s filing acceptance process.

Petition to Annul: The Superior Court has provided a new instruction sheet for filing a Motion to Annul. Before e-Filing, please review these instructions located on the Electronic Services webpage to ensure forms are properly applied and avoid possible delays.

New Hampshire Supreme Court Advisory Committee on Rules

Public Hearing Notice

The changes being considered concern the following rule:

1. Amend Supreme Court Rule 42(XI)(f) as set forth in Appendix A.

New Hampshire Supreme Court Advisory Committee on Rules
By: Patrick E. Donovan, Chairperson and David S. Peck, Secretary
March 13, 2020

NH e-Court Program Update

In response to the COVID-19 pandemic, the NH Judicial Branch has temporarily closed court kiosks as of March 30 and is strictly limiting on-site court operations. Fortunately, attorneys can still use e-Filing for specific electronic case types. See Electronic Services web page for complete details: https://www.courts.state.nh.us/nh-e-court-project/electronic-services.htm

To make the e-Filing process easier, consider using templates! Templates simplify filings for common parties, events, and documents when filing a new case or filing into an existing case. Having a template eliminates the need to enter common information over again whenever a new case is created or when you’re filing into an existing case.

When creating a new filing using a template, the information can be modified as needed for the particular filing. The modification is tracked in the Party Information screen. Conveniently, templates created by an individual filer are accessible by all users within the firm.

Templates are easy to make and maintain. Learn how to make a template here: https://www.courts.state.nh.us/nh-e-court-project/docs/How-to-Use-Templates-in-File-and-Serve.pdf

Become an e-Filing Wizard! In February, the NH Judicial Branch participated in the NH Bar Association 2020 Midyear Meeting. We spoke to many attendees and offered e-Filing training and helpful tips. In exchange, we received constructive feedback on e-Filing in the state. The experience was invaluable. We will remain fully engaged with—and accessible to—the bar community and look forward to continuing the dialogue on e-Filing.

If you missed our booth in the Exhibitor Hall, you can still check out our new information sheets specific to e-Filing in each court. Use your smart phone camera to scan these QR codes to find the information of interest to you or visit our Electronic Services webpage.

Did you know?

Best Practices for Attorney e-Filing

Lead Attorney: When entering information for the party that you represent in a new case or filing an appearance in an existing case, always add a Lead Attorney for your client. This information is located on the Party Information screen. DO NOT ADD ANY LEAD ATTORNEY INFORMATION FOR THE DEFENDANT WHEN SUBMITTING A NEW CASE as they will add in their own attorney information when they file into the case. Identifying a Lead Attorney when you e-file means that attorney will be automatically copied on all court generated documents. It also speeds the process by eliminating extra manual steps in the court’s filing acceptance process.

Petition to Annul: The Superior Court has provided a new instruction sheet for filing a Motion to Annul. Before e-Filing, please review these instructions located on the Electronic Services webpage to ensure forms are properly applied and avoid possible delays.

Please see the NHJB website for COVID-19 updates: https://www.courts.state.nh.us/aoc/corona-covid-19.htm
March, 2020

CRIMINAL LAW

March 6, 2020  
Vacated and Remanded

• Whether a sentencing form that was silent on the issue of whether a sentence was to run consecutive or concurrent to a sentence that a defendant was then serving, should be construed in-favor of the defendant’s subjective belief that the sentence would be concurrent when the prosecution is aware that the defendant is currently serving a sentence.

In February, 2017, Mr. Nathaniel Smith (the “Defendant”) entered into a plea agreement with the State to plead guilty to charges related to sale and possession of a controlled drug. As part of the plea agreement, there was an agreement on the sentences that would be requested by the State. Sentencing on the underlying matter was deferred pending the Defendant’s anticipated participation and cooperation in other prosecutions. However, after the plea agreement was executed, a dispute arose as to whether the sentences in the plea agreement were to run consecutive or concurrent to the sentence that the Defendant was then serving on an unrelated matter. This dispute concluded with the Defendant filling a Motion to Enforce the Plea Agreement.

In his motion, the Defendant argued that the sentences were to be served consecutively, but argued that under the prevailing case law in New Hampshire, because the State was aware at the time of the plea agreement that the Defendant was serving time, and that the plea agreement was silent on the issue, that the sentences were required to be served concurrently, or concurrent to the sentence that the Defendant was then serving on a family division divorce matter. The Trial Court then concluded that the Defendant’s arguments, found that the case was distinguishable from the cases cited in the Defendant’s motion and, therefore, denied the Defendant’s motion. The Trial Court then concluded that the sentences in the plea agreement were to be served consecutively to the sentence he was then serving. The Defendant’s appeal followed the denial of his motion.

In reviewing the matter, the Court noted that it found the earlier precedent addressing the Defendant instructive and offered analysis based on those cases. Specifically, the Court found that the earlier decisions in State v. Rau and Crosby v. Warden be instructive on the issue of how to interpret the plea agreement in the instant case. Citing Rau, the Court provided that, “[t]he conclusion of the sentencing proceeding, a defendant and the society which brought him to Court must know in plain and certain terms what punishment has been exacted by the Court.”

In vacating and remanding, the Court found that the bargaining power between the State and a defendant is unequal and, therefore, applied the rule of construction that a plea agreement must be interpreted against the drafter when a Court is forced to interpret ambiguous language. The Court further held that the State should be required to provide a defendant an agreement that is clear with respect to the promised sentence and that upon review, a Trial Court must consider the specific terms of the agreement as the defendant would reasonably understand them.

The Court also found that a presumption that sentences found in plea agreements are to be interpreted as being concurrent, is consistent with guidance from the New Hampshire Legislature. Finally, the Court reasoned that this rule would not limit the ability of prosecutors to offer a plea agreement that would be conditioned upon a consecutive sentence, as it would only require the prosecutor to state explicitly that the plea agreement was to run consecutive to the sentence.

CIVIL LITIGATION

March 6, 2020  
Interlocutory Appeal Question Answered in the Negative and Remanded

• Whether an expert in a toxic tort matter is required to consider the “dose-response relationship” in reaching an opinion on causation.

After noting developmental issues with their twin children, the Lenos moved out of an apartment that they had been renting from Ms. Sandra Moscicki (“Moscicki”) in July, 2010. Soon thereafter, Moscicki brought action against the Lenos for unpaid rent and the Lenos counterclaimed against Moscicki, alleging that their children had suffered harm from lead exposure from the apartment rented from Moscicki.

In preparing for their case, the Lenos retained a psychologist to perform a neuropsychological examination on their children. The test indicated that the Lenos’ son tested at “the lowest score that one could achieve” on the Reynolds Intellectual Assessment Scales. The psychologist opined that his opinion on the cause of the son’s deficits by stating, “It is more likely than not that the lead exposure is a substantial factor to [his] deficits.” The Lenos also retained a medical doctor trained in pediatrics to issue a report on the Lenos’ children. The pediatrician discussed the general consequences of low levels of lead exposure to children’s development. In addressing the Lenos’ son’s developmental deficits, the pediatrician, relying on the report from the psychologist, concluded with a degree of medical certainty that the son had been exposed to lead and had experienced lead poisoning at a young age, at high levels and over a sustained period of time.

Prior to trial, Moscicki moved to exclude the testimony of the psychologist and pediatrician as to the impact of the lead exposure and any effect it may have had on the Lenos’ son’s development. Moscicki argued that both doctors’ conclusions were unsupported by the prevailing medical literature in failing to address the dose-response relationship. Moscicki’s contention was that the dose-response relationship did not support the conclusions of either doctor. The Trial Court held an evidentiary hearing at which both doctors testified in addition to Moscicki’s experts.

The Trial Court ultimately concluded that the doctors would be allowed to testify to their conclusions and Moscicki took an interlocutory appeal on the issue. The Trial Court certified the question of whether in the State of New Hampshire, in a toxic tort case, the dose-response relationship for the toxin at issue, as recognized in the scientific literature, is an inherent or implicit and necessary component of the methodology that an expert witness must consider.

In declining to adopt a bright-line rule, the Court specifically relied on New Hampshire Statute and the Rules of Evidence. Specifically, the Court looked to New Hampshire Statute 702, but also noted that in order to be admitted, expert testimony was required to meet a threshold issue of reliability, which can be found at NH RSA 516:29-a. The Court noted that the New Hampshire Statute codified the principles that can be found in the Daubert case. When the Court applied the Rule and Statute, the Court concluded that as long as an expert’s methodologies and conclusions were able to pass the threshold test, the issue of weight of the evidence should be left to the adversarial process. The Court specifically noted that the current principles require a Trial Court to determine whether the proffered testimony is based on generally accepted techniques and theories and does not require a Court to exclude testimony where the testimony is not supported by the theory or technique that has the most acceptance.

In conclusion, the Court provided that it should be left to the Trial Court to determine whether an expert’s exclusion of the dose-response relationship would have an effect on the reliability of an expert’s principle methods.

March 11, 2020  
Affirmed

• Whether a District Court has jurisdiction to hear an eviction case concerning property that is currently the issue of a family division divorce matter.

Mr. Nicholas Saykaly (the “Defen-
The Court began its analysis by looking to the statute that created the Circuit Court system. The Defendant asked the Court to adopt the bright-line rule that once property is subject to a case in the Family Division, that Divison would have exclusive jurisdiction over the property. In December, the Court adopted such a rule, the Court found that while the Family Division has exclusive jurisdiction over the divorce proceeding itself, the Division does not have exclusive jurisdiction over the assets themselves. In so finding, the Court relied on the fact that the Legislature had written into the establishing statute language that conferred to a certain amount of judicial economy. The Court concluded that the Defendant’s argument would lead to a rigid barrier that would undermine the flexibility that the Legislature had written into the statute. The Court ultimately concluded that the District Court had sufficient subject matter jurisdiction to hear the case.

The Court also developed an analysis of whether the Defendant was a tenant for purposes of an eviction proceeding. In concluding that the Defendant was indeed a tenant, the Court noted that the owner of a leasehold is entitled to a reasonable expectation.


Mr. Brian C. Shaughnessy & Mr. James B. Kazan of Shaughnessy Raiche, PLLC on the Brief and Mr. Shaughnessy orally for the Plaintiff. Mr. Andrew S. Winters and Mr. Elroy E. Segurra of Cohen and Winters, PLLC on the Brief and Mr. Winters orally for the Defendant.

Mr. Diminico, who is President of the Defendant’s Board of Directors, but then sought Court intervention in the form of an injunction, requesting that the Defendant be ordered to return his lot to its prior condition. The Defendant maintained that the Plaintiff’s rights of possession ended at the natural footprint of his manufactured home, and that the Defendant retained the ability to carry out development of the lot that the Plaintiff’s manufactured home occupied. The Trial Court found for the Plaintiff and the Defendant’s appeal followed.

The Court, in affirming the finding of the Trial Court, found that the Plaintiff had possessed interest in the entire lot, not just the natural footprint of his manufactured home. The Court based this on the review of the Lease Agreement between the parties, as well as the Cooperative Membership Agreement. The Court concluded that both documents inherently gave the Plaintiff a possessory right in more than the mere footprint of his manufactured home. The Court also noted that the Vice President of the Defendant’s Board of Directors testified that the plan lay out the cooperative accurately and fairly depicted the Plaintiff’s cooperative. In addressing whether the Defendant’s development violated the Plaintiff’s covenant of quiet enjoyment, the Court concluded that the deforestation and other actions interfered with the Plaintiff’s beneficial use or enjoyment of the premises and, therefore, affirmed the finding that the Defendant had violated the covenant.

The Court then addressed the Trial Court’s limitation on the amount of remuneration, finding that the amount the Trial Court ordered was inappropriate and that amount requested by the Plaintiff would be disproportionate to the value of the Plaintiff’s lot. The Court agreed with the Trial Court that the Plaintiff was entitled to just compensation. In addressing whether the Plaintiff would not fully repair the damage done, it would “go a very long way toward restoring [the Plaintiff’s] seclusion and privacy and vegetation.”

Finally, the Court addressed the Trial Court’s denial of the Plaintiff’s request for attorney’s fees. In affirming the Trial Court’s determination, the Court looked to whether the actions that led to a violation of the covenant of quiet enjoyment on the part of the Defendant was willful. Concluding that a finding of a willful violation could not be found, the Court affirmed the Trial Court’s denial of the statutory request for attorney’s fees.

Mr. David M. Stamatis and Mr. William B. Parnell of Parnell, Michels & McKay, PLLC, on the Brief, with Mr. Stamatis orally for the Plaintiff; Mr. Robert W. Shepard of Smith-Weiss Shepard, P.C. on the Brief and orally for the Defendant.


March 31, 2020

Whether evidence in a taking case was sufficient to support the finding of just compensation.

The State of New Hampshire (the “State”) appeals a determination of just compensation in a takings case where property of Torromeo Industries (the “Petitioner”) was taken.

Prior to the State’s taking, the Petitioner owned a single undivided lot in Plaistow (the “Town”), New Hampshire, which was located in the Town’s Industrial I Zone. Before the taking, the Petitioner’s property was considered a legally permitted pre-existing nonconforming use, as it did not meet the zoning requirements and also contained a family residence. In 2015, the State took a portion of the Petitioner’s property by way of eminent domain to construct a two-lane service road. As a result of the taking, the Petitioner sought a determination of the condemnation damages from the New Hampshire Board of Tax and Land Appeals. The matter ultimately ended in a bench trial, with the Trial Court determining a value for the just compensation of the taking.

In its analysis, the Court first discussed how a fair market value is arrived at in taking cases. The Court specifically discussed the sale comparison approach, the income capitalization approach and the reproduction less depreciation approach, finding that all three approaches are valid, but had issues. The Court then addressed further what just compensation can mean in a partial taking case, such as the instant case.

The Court addressed with the State on the issue of whether the evidence on the record supported the Trial Court’s finding that the resulting residential lot could have been a separate saleable lot prior to the taking. In doing so, the Court was careful to note that the Petitioner could not have been presented on the issue of whether the Petitioner’s property could have been subdivided before the taking. The Court also noted that the issue of whether the Petitioner’s property could have been subdivided prior to the taking, the Court concluded that the record was lacking for evidence to support the Trial Court’s finding of a just value under the sales comparison approach.

Ultimately, the Court concludes that it cannot discern how the Trial Court would have ruled had it not found that the residential lot could have been a saleable lot prior to the taking, and thus that the Petitioner would have been entitled to just compensation. The Court, therefore, remanded the matter for further proceedings on the matter of just compensation.


March 13, 2020

Vacated and Remanded

Whether evidence in a taking case was sufficient to support the finding of just compensation.

The State of New Hampshire (the “State”) appeals a determination of just compensation in a takings case where property of Torromeo Industries (the “Petitioner”) was taken.

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Ultimately, the Court concludes that it cannot discern how the Trial Court would have ruled had it not found that the residential lot could have been a saleable lot prior to the taking, and thus that the Petitioner would have been entitled to just compensation. The Court, therefore, remanded the matter for further proceedings on the matter of just compensation.

At-a-Glance from page 35

FAMILY LAW
In the Matter of Crystal Ndyaija & Joshua Ndyaija, Nos. 2018-0086; 2018-0153; No. 33938, March 11, 2019
Affirmed in part, vacated in part and Remanded

• Whether the Court erred in: dismissing a motion for contempt; denying a motion regarding parental interference; denying a motion to restrain; modifying child support; denying a motion to alter a parenting plan; ordering a party to pay attorney’s fees; granting a motion to approve daycare enrollment for a child; whether the family division had proper jurisdiction to hear a divorce case when it was ambiguous as to whether a separate related matter had been filed in a foreign state.

Mr. Joshua Ndyaija (the “Respondent”) filed a number of appeals following several different findings of the Court that found in favor of Ms. Crystal Ndyaija (the “Petitioner”). At the outset, the Court was asked to address whether the Family Division had proper subject matter authority to hear the case considering there had been an earlier family matter filed in a foreign state. In concluding that the Family Division had proper subject matter jurisdiction, the Court reviewed and analyzed the issue under the Uniform Child Custody Jurisdiction and Enforcement Act (“the “Act”). Specifically, the Court concluded that New Hampshire should be considered the child’s “home state” under the Act and that the previously filed family matter had been filed in the foreign state had been concluded prior to the initiation of the divorce proceeding in New Hampshire. The Court then addressed whether the Court had jurisdiction under RSA 458:5 and RSA 458:6, the Family Division had jurisdiction, ultimately concluding that the Family Division properly retained its jurisdiction.

Next, the Court analyzed the various rulings that the Respondent had appealed. In concluding that the Family Division had not unsustainably exercised its discretion in denying the Respondent’s Contempt Motion, the Court concluded that there was no evidence on the record to suggest that the Petitioner had acted “willfully or with malice.” Thus, the Court concluded that the Family Division had not unsustainably exercised its discretion in making a Contempt Order against the Petitioner. In concluding that the Family Division had not unsustainably exercised its discretion in denying the Respondent’s Motion to restrain and parental interference, the Court again found that the record before it did not support a reversal.

Further, the Court sustained the Family Division’s finding on the Respondent’s respective income, the Court did vacate the new Support Order that had been issued finding that the Petitioner had failed to adequately provide information on the Child Support Worksheet. The Court further remanded to the Family Division the issue of whether the Petitioner had failed to comply with Family Rule 1.25. The Court affirmed the Family Division’s finding that the Respondent was not entitled to a deviation from the presumptive child support payment based on the fact that the special circumstances the Respondent claimed were not, in fact, special circumstances. The Court vacated and remanded the issue of what arrearage payment the Respondent was required to make, specifically finding that the record did not reflect whether the Family Division had taken into consideration the fact that the Respondent had continued to pay the current child support amount during the pendency of the review of the request for modification. The Court also affirmed the decision of the Family Division to order that the Respondent pay child support directly through the Division of Child Support Services, finding that the Respondent had not developed his argument for its review.

While the Court ultimately concluded that the Family Division acted within its discretion on denying the Respondent’s different motions to change the parties parenting plan, and in sua sponte changing the parties parenting plan, and in sua sponte changing the Petitioner’s parenting plan, the Court ultimately concluded that based on the record, the Petitioner was not entitled to her attorney’s fees. This finding was based on the fact that the Court ultimately concluded that some of the Respondent’s motions were legally insufficient to be granted, because the Respondent had not included prior to the initiation of the divorce proceeding in New Hampshire. The Court then addressed whether the Court had jurisdiction under RSA 458:5 and RSA 458:6, the Family Division had jurisdiction, ultimately concluding that the Family Division properly retained its jurisdiction.


Supreme Court Orders

ADM-2010-0073, In the Matter of Jeanine P. McConaghy, Esquire
On September 27, 2010, Attorney Jeanine P. McConaghy was suspended from the practice of law for failure to pay her 2009/2010 bar dues and court fees. Attorney McConaghy has now paid all bar dues and court fees owed since the time of her suspension. On March 19, 2020, she also filed a petition for reinstatement with the court.

The petition for reinstatement is granted. Attorney McConaghy is reinstated to practice law in New Hampshire, effective immediately.

ISSUED: March 30, 2020
ATTEST: Timothy A. Gudas, Clerk

ADM-2019-0030, In the Matter of Christina E. Caiazza, Esquire
On December 17, 2019, Attorney Christina E. Caiazza was suspended from the practice of law for failure to respond to show-cause notices and/or appear at show-cause hearings on October 31, 2019 and November 21, 2019, relating to her late payment of bar dues and court fees.

On March 17, 2020, Attorney Caiazza filed a petition for reinstatement with the court. The petition for reinstatement is granted. Attorney Caiazza is reinstated to practice law in New Hampshire, effective immediately.

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

ISSUED: March 30, 2020
ATTEST: Timothy A. Gudas, Clerk

U.S. District Court issues Speedy Trial Order

The United States District Court has passed the following order clarifying Speedy Trial ADM-1 Act Findings in response to Order 20-10: Exigent Circumstances Created by COVID-19.

This order is signed by each district judge on this court. This order is intended to clarify that each district judge on this court adopts the exclusionable time and “ends of justice” findings contained in the Speedy Trial Act in Order ADM-1, Order 20-10: Exigent Circumstances Created by COVID-19.

This is true with respect to each individual criminal case continued due to the COV-19 public health emergency.

The justice on this court agrees—in light of the unique circumstances presented by this public health emergency as described in ADM 1, 20-5—that in assessing individual findings in each separate case would be redundant and unnecessary and a waste of scarce judicial resources. The Speedy Trial Act “ends of justice” findings in exercising discretion—due to the Court’s awareness of all public health emergency—applique generally to all cases before this court. Thus, a particularized finding in each case would be redundant.

This order is also intended to apply retroactively to all cases previously continued. Cf. United States v. Correa, 182 F. Supp. 2d 326, 327 (S.D.N.Y. 2001) (holding that, following September 11, 2001, the court’s “ends “in these extraordinary circumstances should exercise, authority to make a retroactive exclusion of time in the interests of justice”).

“Except for the right of a fair trial before an impartial jury, no mandate of our Constitution authorizes a waste of scarce judicial resources. The judges on this court agree—in light of the unique circumstances presented by this public health emergency—the District Court has the power to exclude time due to the COVID-19 emergency. In exercising this discretion, the court adopts the excludable time and “ends of justice” findings in exercising discretion—due to the Court’s awareness of all public health emergency—applique generally to all cases before this court. Thus, a particularized finding in each case would be redundant.

SO ORDERED.
Date: March 22, 2020
Landya B. McCaffery
Chief Judge

Paul J. Barbadoro
District Judge

Joseph N. Laplante
District Judge

Joseph A. DiClerico, Jr.
District Judge

Steven J. McAuliffe
District Judge

The Supreme Court appoints Attorney Steven B. Scudder to the Access to Justice Commission, which was established by Supreme Court order dated January 12, 2007. Attorney Scudder is appointed to serve a three-year term beginning April 1, 2020, and expiring on March 31, 2023.

Issued: March 17, 2020
ATTEST: Timothy A. Gudas, Clerk
Supreme Court of New Hampshire

ADM-2019-0026, In the Matter of Joseph S. Votta, Jr., Esquire
On November 14, 2019, Attorney Joseph S. Votta, Jr. was suspended from the practice of law for failure to pay his 2019/2020 bar dues and court fees, as well as the $100 in delinquency fees assessed for late payment, and for failure to respond to the show-cause notice and/or appear at the show-cause hearing on October 31, 2019.

Attorney Votta, Jr. has now paid his 2019/2020 bar dues and court fees as well as the associated delinquency fees. On March 10, 2020, he also filed a petition for reinstatement with the court.

The petition for reinstatement is granted. Attorney Votta, Jr. is reinstated to practice the law in New Hampshire, effective immediately.

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

ISSUED: March 30, 2020
ATTEST: Timothy A. Gudas, Clerk

Pursuant to RSA 490:4 and Rule 1 of the Supreme Court Rules, the Supreme Court authorizes attorneys and guardians ad litem to file a motion in RSA 169-C cases to bill up to an additional $180 (3 hours) for case-specific work done between March 16 and May 3, 2020. In all other respects, these bills shall comply with the requirements of Supreme Court Rules 48 and 48-A.

Issued: March 30, 2020
ATTEST: Timothy A. Gudas, Clerk
Supreme Court of New Hampshire

Pursuant to RSA 494:1, IX, the Supreme Court appoints Attorney Richard E. Samdperil, a member of the New Hampshire Bar Association, to the Judicial Council. Attorney Samdperil is appointed to replace retired Supreme Court Justice James E. Duggan, who has recently re-signed from the Judicial Council. Attorney Samdperil shall serve the remainder of Justice Duggan’s term, which expires on December 31, 2020.

Issued: April 8, 2020
ATTEST: Timothy A. Gudas, Clerk
Supreme Court of New Hampshire
that he received any misrepresentations or claim—because the plaintiff failed to plead overbroad and beyond tailoring as to preclude of showing that the class definitions were so Additionally, Sig Sauer failed its burden of demonstrating the existence of a concrete, particularized, dural posture—these allegations demonstrated obligation to do in a motion-to-dismiss proce would still not fully compensate him for the injury by offering detailed factual allegations sufficiently pled a legally protected economic design that causes older models of the pistol an alleged defect in the semi-automatic pistol, In this putative class action concerning a former state prison inmate (released from custody after he filed suit) asserting claims that defendant state prison officials had violated his federal civil rights, the court dismissed the plaintiff’s injunctive relief claims as mooted by his release from custody, but otherwise denied defendants’ motion for summary judgment, which was based on their affirmative defense of exhaustion of administrative remedies under the Prison Litigation Reform Act (“PLRA”). The court concluded that defendants had failed to present any evidence or non-conclusive, specific facts to support their affirmative defense under the PLRA that plaintiff, while incarcerated, had failed to exhaust available administrative remedies. 17 Pages. Judge Steven J. McAuliffe.** WRONGFUL DEATH** 3/30/20 Straw, et al. v. N.H. Dep’t of Health and Human Servs., et al. Case No. 18-cv-195-JL, No opinion number. The court granted the defendants’ motion to dismiss in this complex wrongful death action because the plaintiffs failed, despite several attempts, to state any claims that confer the federal court with subject matter jurisdiction. The court lacked diversity jurisdiction due to the citizenship of the parties. The plaintiffs failed to establish that the private party defendants were state actors subject to 42 U.S.C. § 1983 and failed to establish violations of federal secured rights by the county-affiliated defendants. The plaintiffs also failed to state claims under the Americans with Disabilities Act, Rehabilitation Act, or Health Insurance Portability and Accountability Act. 35 pages. Judge Joseph N. Laplante.
ASSOCIATE ATTORNEY – McDonald & Kanyuk, PLLC, with offices in Concord, New Hampshire and Wellesley, Massachusetts is currently seeking a full-time associate attorney. The candidate must be willing to spend 60% of his or her time in the Concord, New Hampshire office. The ideal candidate should have at least 2 years of experience in trusts and estates law, strong writing skills, a desire to learn advanced estate and tax planning techniques and must be admitted to the Bar in NH (or eligible to waive in or willing to take the Bar in NH). Bar license in MA is a plus but not required. The successful candidate will work with inbound trusts looking to take advantage of NH’s progressive Trust Code and the opportunities that it and its favorable trust income is credited. The successful candidate will work with inbound trusts looking to take advantage of NH’s progressive Trust Code and the opportunities that it and its favorable trust income tax environment creates. Please contact Laurie McDonald, Office Manager at lmcdonald@mckan.com.

ASSOCIATE ATTORNEY – Bosen & Associates, PLLC is an established New England business law firm that handles commercial transactions, litigation and estate planning. We are seeking a full-fledged experienced commercial attorney to handle our practice. The ideal candidate will have experience in commercial real estate and litigation. We offer a competitive salary and benefits. Please email your resume and cover letter to bosen@bosenandassociates.com. All inquiries will be kept confidential. No calls please.

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Antioch University has an immediate opening for an Assistant General Counsel to join a collegial and dedicated team of professionals in the Office of General Counsel. Antioch University provides learner-centered education to empower students with the knowledge and skills to lead meaningful lives and to advance social, economic, and environmental justice. Antioch University includes five campuses, several low residency programs, and an online division.

LOCATION: This position will be based at the Antioch University New England campus in Keene, NH. Candidates will also be considered for the Antioch University Los Angeles campus in Culver City, CA, or the Antioch University Santa Barbara campus in Santa Barbara, CA.

MINIMUM REQUIREMENTS: A J.D. from an ABA-accredited law school is required. Applicant must be a member in good standing of the state bar of New Hampshire or California, or be admitted within one year of employment. Preference will be given to candidates with experience in higher education, Title IX or other civil rights, litigation, complex contracts, risk management, or labor and employment matters.

Salary will be commensurate with qualifications and experience. Health insurance, retirement, and other benefits are included.

We encourage applications from candidates with underrepresented backgrounds and diverse experiences who are interested in this opportunity.

Applicants should apply online to submit a resume, cover letter and contact information for three professional references at our website at www.antioch.edu/jobs.

PARALEGAL – Alfano Law Office, PLLC seeks an experienced paralegal to assist with our litigation practice. Please send a cover letter and resume to Paul@alfanolawoffice.com.

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