Housing Advocates Focusing on Rent Relief as Surge in Evictions Looms
Long-term Housing Solutions are the Ultimate Goal

By Scott Merrill

With a surge in the number of evictions due to historic unemployment looming in New Hampshire, policy leaders and housing advocates have been forced to confront realities that existed prior to the COVID-19 pandemic. These realities include a lack of affordable housing and a homeless population in need of safe shelter.

According to Ellisa Margolis, Director of Housing Action NH, an advocacy group focused on affordable housing, just under half of renters in the market were cost burdened pre COVID-19. A rental cost burden is defined as 30 percent or more of monthly income spent on housing costs.

“If tenants can’t pay their rent, then landlords cannot pay their mortgages and towns may not be able to collect the tax dollars that are needed to pay for the roads, the schools, and the other vital services such as caring for those who are looking for a place to live.”

According to New Hampshire Employment Security (NHES), unemployment stood at 16.3 percent for the month of April, (the national average in April was 14.7 percent), this is the highest unemployment rate in the history of recorded data stretching back to 1976.

The Eviction Moratorium

The March moratorium on evictions to provide relief for tenants unable to pay their rent was set to expire June 5th but was recently extended by Governor Sununu. It now expires June 26th. Federally subsidized housing under the CARES Act, which includes section 8 vouchers, expires July 26th.

PRACTITIONER PROFILE

A Small Town Lawyer with an “Exacting” Mind

By Kathie Ragsdale

Thomas Pancoast may be the quintessential North Country lawyer – part legal advisor, part raconteur, and so can-do that he delivered one of his own daughters in the back seat of a 1971 Plymouth Fury.

He has maintained an office in his Littleton home for 41 years. He has almost no overhead, and no staff. He answers his own phone.

Meetings with clients — many of them repeat patrons or their children — often border on social events.

“I will sometimes have clients come and they’ll ask my advice or shoot the bull about something that has nothing to do with the law,” says Pancoast, who recently turned 75. “I’m not much of an extrovert. I don’t really need to go anywhere, but I do find these client encounters substitutes for a social life in a way and it’s satisfying.”

But don’t let the aw-shucks demeanor fool you.

“His work as a small-town solo practitioner can easily go up against that of larger firms ‘down south,’” says 35-year friend and colleague Mark Russell, a partner in the Littleton firm Samaha Russell Hodgdon PA. “His unsurpassed curiosity and engagement compels Tom to peek under rocks that others might not think to turn over, ensuring that his clients are always well represented and protected from the unexpected.”

So exacting is Pancoast’s mind, adds Russell, that “he is the only person I know who insists upon, and knows how to properly place the diresis in Coos,” the name of New Hampshire’s northernmost county.

A native of Ardsley in Westchester County, New York, Pancoast grew up in Florida but loved spending time in the 18th Century farmhouse his artist grandfather used as a summer place in Southbury, Connecticut.

“If it had no utilities, it was a step back in time,” says Pancoast.

The place had such nostalgic appeal, he adds, “I resolved I wanted to live in rural New England.”

That opportunity came years later when he graduated from Vanderbilt University with a degree in electrical engineering, went on to Yale Law School to liberalize his education and decided to

PANCOAST continued on page 8

Housing Advocates Focusing on Rent Relief as Surge in Evictions Looms

By Scott Merrill

With high unemployment in New Hampshire and around the country, individuals who can’t pay their rent could have a ripple effect, according to Margolis, leading to more people in need of shelter.

Margolis and a host of stakeholders around the state are currently pushing for a new set of beliefs and practices regarding housing issues to maintain public health and to prevent people from living on the streets or in shelters.

“The moratorium was very important in the name of public health, and to stabilize people in their homes, because it provided some relief,” Margolis said. “But after this there will be a pent-up demand for eviction and then you’ll have people owing several months’ rent. It was hard enough to pay the median rent in our state but now imagine adding 3 months to that and you can see how easily it becomes insurmountable.”

So far, late rental payments have not been a problem, according to attorney Brian Shaugnessy, adding that this could change.

Shaugnessy, President of the New Hampshire Bar Association’s Pro Bono Program, notes that with a surge in evictions expected, The New Hampshire Bar Association is providing a free hotline, 833-832-1996, to assist tenants.

HOUSING continued on page 12

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HOUSING continued on page 12
Saying Goodbye to an Amazing Group of People

During my tenure on the Bar Association’s Board of Governors, and during my time as President, I have had the opportunity to serve with and talk to many past Presidents. Not one of them claimed that their presidency went exactly as planned. My term has been no exception.

The world changed for all of us in 2020, and the challenges of meeting the needs of clients, of defending their rights and their businesses, and of helping our communities, stretched the resources and creativity of lawyers and institutions around the state. Lawyers and courts were asked to rapidly adapt to a new reality of work at home, video conferencing, remote hearings, and the world of Zoom. The transformation, and adaptation to this new reality, has been profound, and I wonder if we will ever go back to the way things were. What we have accomplished is unprecedented, and as we begin to roll out the back of this, I’m optimistic that we will continue to innovate and to find creative new ways to represent our clients, serve our communities, and support our families.

It has not all been perfect. The burden and backlog on courts is manifest, and it will take tremendous effort and cooperation to get things back on track, but I am proud of the strength and determination on the part of our Supreme, Superior, and Circuit Court leaders in making tough decisions to keep us, and the public safe, while still protecting the rights of criminal defendants, the abused and neglected, and others in difficult, pressing situations. Hats off to the justices and judges for their tireless efforts.

This is not to say that everything has been easy. It hasn’t. Lawyers all over the State have faced the same daunting challenges facing other businesses. Particularly hard hit have been the small and solo firm practitioners. They have seen their business drastically reduced, and have had to make the same accommodations for their employees and their families, while still diligently trying to serve their clients. Upwards of 50% of my day through March and April was taken up with answering calls from members who needed reassurance that we would help them survive.

And help we did. After an initial upheaval, we quickly shifted our efforts to virtual CLE, and responded to concerns about dues waivers and other obligations keeping folks up at night. In turn, our Supreme Court responded to provide relief and guidance to allow flexibility in meeting our MCLE and dues requirements. Bar staff continued to put out information, to publish Bar News and update the website so that members could stay connected and well informed.

I have repeatedly said of our Bar, “the closer you look, the better we look,” and I stand by that statement now more than ever. It is true of our members, our staff, our programs, and our profession.

Finally, through all of this, I have to say that lawyers have continued to show concern, fear, trepidation, or even anger during this time, ever did so without asking how I was doing. It felt good, and it made me proud. I wish I could have had more time to see all of you in person, and to participate in programs like the Annual Meeting that brought us all together before COVID-19. I wish that this year as your Bar President could have been different, however, it was special in its own way. I have truly loved this year as your President, and I will miss it. I wish Dan, Richard, Sandra, the Board – oh, what a great Board – as well as George and the Bar team, all the best. I offer my support and admiration for them and all they do.

Best wishes, and be well.

Edward D. Philpot, Jr.
Concord, NH

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Senator Hassan Addresses the Legal Aid Community

“Tooling Up” for a “Tsunami” of Cases

By Scott Merrill

While the pandemic fuels Great Depression levels of unemployment and proctor-take to the streets calling for justice after the murder of George Floyd in Minneapolis on Memorial Day, the legal aid community in New Hampshire is committed as ever to providing equal justice and systemic change for the poor.

“We are, indeed, in times that are unprecedented,” Senator Maggie Hassan said, speaking to a group of over 40 political leaders and members of the legal services community on June 4th.

“My mother, who is quite a grammarian, always tells me not to overuse certain words and I’ve been trying to think of words that are different than ‘unprecedented’ to describe these times,” Hassan said, “and I just can’t.”

The luncheon meeting, held on Zoom, hosted by Ovide Lamontagne, the Chair of the Campaign for Legal Services, was held to provide updates about the legal services community’s successes and concerns as they move forward during the pandemic.

Hassan reminded the group that their “voices have never been more important than they are right now.”

“One of the things that always makes me proud of our state as a citizen and as a lawyer, and a member of the NH Bar, is the depth of commitment for providing legal services to all Granite Staters. You do an extraordinary job elevating the issues and helping average people understand why legal services are so important and I’m incredibly grateful to you all for that.”

Hassan began there was “concern that victims of domestic violence would still be residing in their homes with their abusers. Cut off from access.”

“Safe places for leaving home, like trips to the grocery store or bringing kids to school, are no longer available. And people couldn’t access court houses because normal business hours.”

Because of this restricted access, the courts convinced a working group of the Coalition, NHLA, court staff, and private attorneys.

“Collectively, we developed a process for safely filing domestic violence and stalking petitions electronically,” Jasina said. “We needed a solution that would allow victims of sexual violence and stalking to access critical services and for filing protective orders without compromising own health or court staff.”

The plan went into action last week. Now, between the hours of 8-3, domestic violence victims connected with a crisis center or the Strafford County Family Justice Center, can file domestic violence and stalking petitions electronically.

“It’s not a safe location and they can access that protection without having to go to a courthouse without risking exposure to themselves or others,” Jasina said. “It’s a great real opportunity to access the protections they desperately need while also maintaining their health and we’re very excited that process is in place and we’re grateful for all of those who came to the table in a very short period of time.”

NHLA represents clients in protective order cases, stalking orders, divorce and parenting cases.

While Jasina said they have seen a decline in referrals and that this was not unexpected due to stay-at-home orders. Recently, she added, as restrictions are being lifted, NHLA is seeing an increase in the number of referrals, although it is “not anywhere close to numbers prior to pandemic.”

“But, we do expect to see those numbers in referrals increase significantly as restrictions are lifted even further. We’ll see an influx of protective order requests, we’ll see an increase for divorce and parenting assistance. And now we’re trying to turn an eye to see how we can meet that need because we know it will be overwhelming. We would love to be able to represent everyone referred to NHLA for assistance, but that need far exceeds the resources that we have. As you know many victims will go unrepresented in their protective order and family law cases.”

At the Legal Advice and Referral Center (LARC), Steve McGivney said he fields a number of questions recently from clients who are receiving letters from landlords threatening evictions for non-payment.

“The landlords are telling our clients what non-payment of rent is doing to them. And they’re saying that as soon as they’re able, as soon as the moratorium lifts, they are prepared to start proceedings to evict them.”

Clients are calling in, McGivney said, “not with a written eviction notice but, with an oral threat or text from a landlord that their days are numbered.”

“These are clients who have lost jobs and some aren’t coming back. They feel hopeless and want to know what to do. We’re telling these folks that if they’re behind in rent they can go to a local welfare office for support. We’re in collaboration with NHLA and NH Pro Bono Referral Program and we’ve all agreed in our meetings over the last couple of weeks that we’re waiting for the tsunami to hit and we’re trying to prepare.”

Sarah Mattson Duston, Executive Director for New Hampshire Legal Assistance (NHLA), said 40 percent of NHLA’s funding comes through the Judicial Council and JOLTA Grants through the NH Bar Foundation. “Both of those funding sources are vulnerable, she said, due to a decline during the economic downturn.

“We are very grateful to the Bar Foundation for its efforts to maintain level funding for civil legal aid during the next year. That support helps us plan effectively for the surge in need that is already upon us. We will advocate for continuation of state funding as well as new and expanded funding. We need to be at the national level to continue funding the legal aid community and for low income renters. We’re in collaboration with NHLA and the NH Bar Association’s Pro Bono Referral Program to meet the needs that have arisen over the past several months.

LARC is planning to hire another attorney with CARES Act funds to address employment and housing related issues.

“We are building an integrated system to provide a full range of services in collaboration with NHLA and with the volunteers through the Bar Association who give so much of their time through the pro bono program,” she said, adding “We’re hoping to be completely tooleed up for the surge in the next couple of weeks.”

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**Opinions**

**Reminiscences of Columbia Law School and Ruth Bader Ginsberg**

By The Honorable John Lewis

I attended Columbia Law School in New York City from 1970 to 1973. It was a tumultuous time to find one’s place in the world.

The Vietnam War raged, spewing out its poison, and badly framign our national unity. Many students continued to resist the draft and other forms of involvement with the military effort, flirting with, or adopting, counter-culture values. In the wake of this upset and division, the country veered to the right, retreating from the ambitions and goals of Lyndon Johnson’s Great Society, with Richard Nixon as President.

To a fair degree, my classmates at Columbia in the early 1970’s were not just out of college, seamlessly moving forward into careers in law. Many were older and more mature. They had done military service, taught, or had carried out other jobs or pursuits, responding in different ways to the Vietnam War effort. My classmates were mostly white males, but Columbia was enrolling an increasing number of women, African Americans, Hispanics, and other minorities, many of whom went on to have very distinguished careers.

Whatever their backgrounds, my classmates generally treated government pronouncements, and those coming from other older authority figures in education and business, with some skepticism. They remained sensitive to the persisting inequalities, racism, and sexism of our society, and a good number of them had not lost the aspiration to do something to change things for the better. Indeed, some had come to the Law School with this in mind.

To right credit, Columbia Law offered much that appealed to students who were coming to the law to work to make our society more equitable. Having gone through major student upheaval in the late 1960’s, the Law School had, though somewhat grudgingly, opened the door to some student participation in its decision making, and had also put in place impressive clinical education programs to enable students to venture out of the traditional classrooms and work in significant ways, through case development, to promote civil rights and equality.

I benefited greatly from these clinical programs. I enrolled in the Employment Rights Project, which focused on Title VII and equal employment law; and I marveled as this program, initially run by Professor George Cooper and Director Harriet S. Raah, pursued major litigations, and achieved impressive successes and improvements particularly for women. Among those litigations were those against Newsweek, Reader’s Digest, the prestigious New York law firm of Sullivan & Cromwell, and the New York Times. Significantly, Professor Cooper was directly involved in getting the Supreme Court, in the landmark case of Griggs v. Duke Power Co, 401 U.S. 424 (1971), to rule that Title VII prohibited not just intentional employment discrimination, but also employment practices that adversely impacted on African Americans without job-relatedness justification.

To recall, the tax deferral system that is offered to New Hampshire homeowners did not go down to the U.S. District courthouse in lower Manhattan to watch Title VII proceedings that involved our clinic. It was all very inspiring. Indeed, I went on after a federal court clerks’hip to litigate for the Equal Employment Opportunity Commission (EEOC), working in an enforcement region extending from Maine to Virginia, and seeking Title VII relief in several cases.

I was particularly privileged to also assist then Professor Ruth Bader Ginsberg in the preparation of two Briefs she principally authored for the American Civil Liberties Union, (one in the landmark Frontiero v. Richardson case, 411 U.S.677 (1973)), challenging on equal protection grounds the sex-based classifications contained in certain federal statutes and federal regulations. I obtained credit in the Briefs for my work, and came to very much appreciate the devotion of the ACLU team and the legal successes that were achieved.

During that time, I had some personal interactions with then Professor Ginsberg. She impressed me as young (about 40), intense, private, scholarly, a brilliant advocate and writer, someone who possessed incredible endurance and fortitude. Though she had taken on many burdens and tasks, she did not forget to involve her students in her work. She was a professor who got to the point, fully devoted to the mission of making our society a better place for women. She left me with the strong impression that she was a major force to be reckoned with.

Years later, I came to be acquainted with Bill Clinton through my wife, Cindy, who had been a classmate of his at George-town, and when he became President I wrote him a letter early on suggesting that he keep Ruth Bader Ginsberg in mind for important responsibilities. Though my letter focused on the U.S. Attorney General position, and I doubt it had much, if any, impact, I was thrilled when President Clinton appointed her to the Supreme Court.

As a Justice, Ruth Bader Ginsberg has carried out her duties in an admirable manner. She has worked hard to keep the Court from veering altogether away from a progressive course. She continues to embody the best of Columbia Law School.

John M. Lewis served as an associate justice of the New Hampshire Supreme Court. He presently performs ADR services, practices some law, and teaches.

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**Underutilized Property Tax Relief for Homeowner**

By Ruth Heintz

Exemptions, credits, abatements, deferrals. All of these forms of property tax relief are essential to enabling continued home ownership for people with limited financial means. This article focuses on deferrals – RSA 72:38-a “Tax Deferral for Elderly and Disabled” – which are a clear deferral. All of these forms of property tax relief, including exemptions, credits, abatements, deferrals typically should “mature” at the homeowner’s death or when he or she sells, or otherwise conveys the property. Deferrals do not burden municipalities. The homeowner may have owned the home for decades, even half a century. The homeowner may have built the home, or parts of it. The quality of life of staying in one’s own home and community, including superior physical and mental health, can be priceless.

Deferrals Do Not Burden Municipalities

Except for the staff time to process the deferral applications, deferrals do not create a financial burden for municipalities. Unlike other forms of property tax relief, the municipality is not giving up the right to the property tax money. The receipt is only being delayed for that particular homeowner.

The deferred taxes must be paid when the owner of the property subject to a tax deferral dies or sells, or otherwise conveys the property. Deferrals result in a revolving door of funds: if a town has been granting deferrals all along, deferrals typically should “mature” at the same rate they are being granted. The municipality essentially is issuing a loan to the distressed homeowner. Moreover, with mortgage interest rates currently below 4%, the 5% interest rate stipulated in RSA 72:38-a provides for a windfall. Further, municipalities are protected from exceeding the “security pledged” as the statute caps deferrals at 85% of the property’s equity value: RSA 72:38-a, I.

Municipalities Must Notify Homeowners

Notice of tax relief is required in all

**PROPERTY TAX continued on page 9**

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**Opinions in Bar News**

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The Perception Gap in Gender Equality

By Natalie Laffamme

There are issues in life where progress ebbs and flows. As many of you know, each decade the NHBA Gender Equality Committee surveys our profession’s progress toward overcoming gender disparity. If you are feeling like our recent progress has sent mixed signals, the data shows you are right. Comparing the latest survey of 2017 with GEC’s historical data, there has been improvement since the first survey in 1987. More women have entered the legal profession, been appointed to the bench, become partners in law firms, and, overall, report less overt gender discrimination. While things have progressed, that progress appears to have slowed or even stagnated.

One major gap that has not closed is the perception gap. There is a large difference in how male and female attorneys perceive issues of gender equality in the profession. Female attorneys are much more likely to perceive gender disparity or differential treatment than male attorneys. This gap existed in both the 2009 and 2017 surveys. Those surveys presented a series of statements about the treatment of male and female attorneys and asked respondents to either agree, disagree because there is equal treatment, or disagree because the opposite is true. The 2017 data reported that 55% of female attorneys agreed that “male attorneys tend to attain more respect/status than female attorneys,” while only 16% of male attorneys agreed that statement was true, for a perception gap of 39%. (More male attorneys, 50%, disagreed with that statement on the basis that there was equal treatment.) There was a similar 40% perception gap in responding to the statement “male attorneys more easily progress up the pay scale than female attorneys,” with 55% of female attorneys and 15% of male attorneys agreeing. Those beliefs remained virtually unchanged since 2009 when 54% of female attorneys and 16% of male attorneys agreed.

This disparity was found in every question in the entire section. For example: “Female attorneys have more difficulty being promoted than male attorneys.” (52% of female and 15% of male attorneys agreed); “Male attorneys attain partnership status faster than female attorneys” (48% of female and 15% of male attorneys agreed); “Female attorneys have more difficulty being hired initially than male attorneys,” (25% of female and 9% of male attorneys agreed); and “Male attorneys are more likely to be assigned choice cases than female attorneys” (35% of female and 8% of male attorneys agreed). Once again, the 2009 data supported this perception gap.

Female attorneys were also more likely than male attorneys to have observed certain behaviors. Sixty-six percent (66%) of women had, in the past year, personally observed or experienced frequent, occasional, or one-time use of inappropriate names, titles, or terms of endearment toward female attorneys outside of court, in routine interactions among attorneys and law firm staff. Only 26% of men reported observing this treatment of female attorneys. Sixty-five percent (65%) of female attorneys, compared with 23% of male attorneys, had observed condescending treatment of female attorneys by male attorneys or staff members. Sixty-one percent (61%) of female attorneys have heard a sexist joke during routine interactions in the last year, but only 38% of male attorneys reported the same.

Why do male attorneys perceive far less gender disparity than female attorneys? Some of the open-ended responses to the 2017 survey hint at three explanations. First, many men do not view gender equality as an issue that has anything to do with them. Several male respondents stated that they had no opinion on certain questions because they were male and their comments were not relevant. Second, while both male and female respondents commented on how much progress has been made over the past few decades, a number of male attorneys viewed this progress as complete. One respondent suggested that female attorneys should accept “the fact that gender discrimination is a relic of the past.” Several individuals pointed to the fact that more women had joined the bar, or were graduating from law school, as an indication that there was no longer any inequality and doubted that “this much time and effort on gender is warranted.” Third, it cannot be ruled out that some male attorneys deliberately choose not to see any discrimination or gender inequity. A handful of respondents attacked the very idea of the survey itself and demonstrated a hostility toward even examining these issues. The “premise” of gender inequality was called “ridiculous and stupid,” as well as “stupid, dishonest, and exploitive.” Others stated that the survey was “a waste of time” and predicted that any data gathered from it would likely be “entirely useless.”

Although, we may not convince everyone that gender inequality still exists, work can be done to narrow the perception gap. The large differences in men and women’s experiences and perceptions in our profession demonstrate that relying on subjective, personal, or anecdotal judgments about gender equality may not give a real or complete picture. Just because people do not perceive problems does not mean they are not there, but it does make it less likely that the problems will go away. Until everyone — both women and men — notice inequality, the profession is unlikely to make further progress.

For useful tools on how to recognize gender disparity in your firm, please log in to the NHBA member portal and navigate to the GEC’s Materials and Links page.

Natalie Laffamme is a solo practitioner and a member of the NHBA’s Gender Equality Committee.
Vendor Management – Is It Manageable?

By Cameron G. Shilling and John F. Weaver

Whenever lawyers and law firms entrust sensitive information to vendors, we must ensure that they safeguard it at least as rigorously as we are required to do. We give such information to a multiplicity of vendors, often without fully realizing we are doing so. Some examples include due diligence rooms, expert witnesses, software providers for practice-specific applications, business valuators, cloud providers for email and record retention, copy rooms, accountants and tax preparers for clients, human resources consultants, and so on.

We frequently entrust sensitive information to vendors without critically considering whether we should do so, and without knowing how to ensure we are doing so appropriately and ethically. Consequently, vendor management is one of our biggest cybersecurity risks and challenges.

Vendor Categorization

Not all vendors pose the same risks, nor should they be managed identically. Effective vendor management requires categorizing and addressing them differently.

For example, we entrust certain vendors with large amounts of highly sensitive information, such as e-discovery firms, financial services professionals for clients, information technology providers, and benefits administrators. To fulfill our obligations to ensure that these vendors properly safeguard the information we give them, we must conduct appropriate due diligence.

That can include reviewing documents, such as their written cybersecurity policies, training materials, and insurance. That can also include asking them to complete written questionnaires and answer follow up inquiries. In addition to due diligence, we must enter into meaningful information security agreements with these vendors.

We give other vendors similarly large quantities of sensitive information, but due diligence is not feasible. Examples include Microsoft, Google, Wolters Kluwer, Kroll Ontrack, Anthem, Fidelity, TD Bank, etc. These vendors commonly offer industry-accepted certifications that we can rely on in lieu of due diligence, and will enter into their own form security agreements.

Many vendors fall into a middle category. These include vendors that we give lesser amounts of sensitive information or that we provide sensitive information only episodically, such as expert witnesses, private investigators, guardians ad litem, landlords, cleaning services, couriers, and document storage and destruction companies. Likewise, vendors we entrust with meaningful amounts of information that is not particularly sensitive can fall into this middle category. For them, moderate due diligence (such as just reviewing their cybersecurity policies) and entering into appropriately tailored information security agreements often suffices.

Finally, vendors fall into the lowest risk category if they receive information that is confidential but is not legally protected, or if they do not have direct access to information. Examples include a website host, business development consultant, and food service vendor. While we should enter reasonable confidentiality agreements with them, due diligence is typically unnecessary.

Diligence and Agreements

Though diligence and agreements are required, persuading some vendors to cooperate can be challenging. Diligence should be thoughtfully tailored to not overwhelm vendors, but nonetheless be sufficient to determine whether they truly implement cybersecurity safeguards appropriate to the quantity and sensitivity of information entrusted to them. Lawyers and law firms may have to decline to retain vendors that refuse to comply with reasonable diligence requests or have not adopted sufficient cybersecurity protections.

Negotiating effective information security agreements require equal perseverance and foresight. For example, such agreements must select an appropriate legal regulation, achievable industry standard, or otherwise defined set of cybersecurity criteria that the vendor must meet. The agreement also must artfully address issues that are commonly divisive and contrary to the vendor’s form services agreement, such as limitation of liability, breach notification, termination of the services agreement, ownership and return of information, and cyber insurance.

While challenging, vendor management is both critically important and manageable. Success is achievable through patience, flexibility, resourcefulness, and experience.
Reflections on a Pandemic: Week Thirteen

By Terri M. Harrington

Week thirteen. Just thirteen weeks ago, the events unfolding in China and Italy regarding an unknown and little understood virus appeared disconnected and inconceivable. How much things have changed in thirteen weeks. The global response to the invasion of a foreign virus has been widespread and thorough. For some, these past thirteen weeks have passed in a blur of frenzied activity. Those on the front lines who have readied our health care system, prepared our first responders, stocked our food and essential shelves, shipped our packages, and delivered our mail have covered our most essential needs while exposing themselves and their loved ones to potentially devastating health consequences. Hats off to our educators who had to completely revamp the way education is delivered in our schools and universities in a matter of a few short days. What a marvel of modern technology but such a source of anxiety for those having to adapt so quickly to such wide and systemic change. For the rest of us, time has slowed in ways that was unimaginable a few short months ago.

The call of constant change is all around us. Office spaces have closed to be replaced by kitchen tables, makeshift home offices or couch cushions piled with laptops. The line between work and home is blurred without the advantage of a morning commute, a school drop off or a court hearing to attend. No lunch meetings, hallway encounters, or office pop-ins. It is virtually impossible to gauge how our friends, neighbors, extended family, colleagues, and clients are really doing in this time of heightened stress and uncertainty. Add to all of this, record unemployment and economic uncertainty for many.

It is not hard to see why experts tracking the effects of this pandemic are stating the next devastating consequence will be in the form of a “Second Wave” of mental health issues that stand to impair the functioning of half the population. All this was a cause of concern before the explosion of a civil rights crisis that has spilled onto the streets of America in the last seven days. For citizens of color and others, anxiety, anger, and frustration, has exponentially increased. There has never been a more apt use of the tired phrase, “when it rains, it pours.”

It is not hard to see why experts tracking the effects of this pandemic are stating the next devastating consequence will be in the form of a “Second Wave” of mental health issues that stand to impair the functioning of half the population. All this was a cause of concern before the explosion of a civil rights crisis that has spilled onto the streets of America in the last seven days. For citizens of color and others, anxiety, anger, and frustration, has exponentially increased. There has never been a more apt use of the tired phrase, “when it rains, it pours.”

There are two sides to every coin, and this situation is no different. For those of us who have had time slow, there are a myriad of silver linings. More time to connect to those closest to us. More time to breathe. More time to sit outside and enjoy nature. More time to recognize what is essential and what is not. More time to hear the inner voice that shows us the way to what really matters. We are walking more, outside more and more connected to our neighbors and communities. The fragility of health, human connection and our need for a clean, healthy environment has been brought to the forefront in a way that is simply unimaginable in our modern, technology laden, materialistic culture. What was essential is no longer essential. What was primarily important is no longer of importance. This gift of clarity is the unforeseen roadmap in building the way forward to more health, balance, and productivity.

The flip side of this coin is the human cost to our collective wellbeing. All signs point to at least a fifty percent increase in mental health issues that impair functioning. Anxiety from worrying about contracting a potentially fatal disease cannot be overstated. Depression from imposed isolation, financial stress, boredom, and insomnia are just some of the short-term trends experts are noting. Projected trends are for a rapid and significant increase in addiction disorders – alcoholism, drug addiction, gambling, shopping, and overeating. They are all on the rise as many turn to unhealthy coping strategies. Without the usual social norms in place, there are few eyes upon us to observe the ways we are choosing to cope. Once workplaces and businesses reopen, it will be apparent that many of us will need help to come back into balance.

Nothing about this current pandemic is easy. Yet, it remains an essential truth: We are all in this together. Doing your part is not simply staying at home, washing your hands, and wearing a mask. Doing your part is working consciously to stay connected. Make a phone call to someone you are thinking about. Ask the obvious, yet uncomfortable question if you are concerned about poor coping strategies. Take the time to reflect on how you are feeling and what it is you need to get through the next week, day or hour. Remember to turn off the news and stop engaging with social media. Neither is a substitute for human connection. Get outside. Everyday. Rain or shine. Breathe in the fresh New Hampshire air and the quiet, the fresh New Hampshire air and the sounds of late spring in the northeast. Remember to ask for help. There is no shame in vulnerability. There is only strength. By sharing our collective vulnerability, we can truly find hope and meaning in “We are all in this together.”

If you or someone you know needs help in dealing with the effects of the pandemic or any other issue, there is independent, free, confidential help available for all NH judges, lawyers, and law students. Please call 603-491-0282 or email tharrington@lapnh.org. New Hampshire Lawyers Assistance Program is ready to help.

Cam Shilling chairs and John Weaver is a member of McLane Middleton’s Information Privacy and Security Practice Group. Founded in 2009, the firm’s team of three attorneys and one technology paralegal assist businesses and private clients to improve their information privacy and security compliance, and address any security incident or breach that may arise.

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use his jurist doctor to make a living even though “I never had any intention of being a lawyer.”

He and his first wife chose New Hampshire’s North Country to live out that ambition.

“We ended up looking at the White Mountains and Franconia Notch,” Pancoast recalls. “I thought, ‘those mountains ought to keep the city away for a while.’”

He worked for a small Littleton firm for a couple of years, then hung out his own shingle in 1973. He has a general practice, with concentrations in real estate, estate planning, business and home law.

Among his most memorable cases in those early years was one in which he himself was the plaintiff.

Soon after moving to Littleton, Pancoast bought a couple hundred acres in nearby Monroe, did an extensive title search, and purchased an additional six acres to give him more frontage.

He delighted in swinging by the property after he got out of court “to walk around on my land,” until one day he discovered a ramshackle cabin built on the land.

“I hop out of my car and this guy came out, Clyde Royce;” he remembers. “He was a mountain man, kind of filthy and ill-kempt, and he had about 10 dogs. He said he’d been told by the tax collector that nobody owned the land and I said I owned it and to get out.

Pancoast ended up suing Royce and he went to court on the appointed day, only to find that the court had helped Royce file an appearance, “so I have a pro se defendant squatter,” he says.

Judge Cy Perkins called the two men into chambers, whereupon Royce said he had dragged the cabin down the road and it was no longer on the property.

“The gavel comes down and I won my case,” Pancoast says, adding that he suddenly felt “kind of out of my element.”

Perkins “—a big bear of a man but very fair” — loved hunting, and soon Clyde Royce with four teeth in his head started having a conversation with the judge about deer hunting there,” says Pancoast.

Nevertheless, the cabin was gone and he had prevailed.

Three daughters — Jessica, MacLean and Alexandra -- also came along during those early years of practice, the first two while Pancoast and his first wife were living in the tiny town of Easton outside of Littleton.

Pancoast delivered MacLean in the back seat of that Plymouth Fury halfway to the Littleton Hospital, and Alex was one of only two children born to Easton families in 1977 — the other being Olympic ski medalist Bode Miller.

“Alex is not the international rock star that Bode Miller is, but has done quite well for herself,” says her father.

Indeed, Alexandra is a graduate of Duke and Georgetown Law, is special counsel to the Manhattan law firm Milbank and lectures at Duke Law School. Jessica graduated from Princeton and now lectures at Duke Law School.

Alexandra graduated from Harvard and received her M.D. and Ph.D. from the University of Pennsylvania, where she is a neuropathologist on the faculty of the medical school.

“They are my legacy and I am insu-

ferably proud of them,” Pancoast says of his daughters.

He acknowledges that he was something of a workaholic during his early years as a practitioner — something he believes may have led to the dissolution of his first marriage.

“That episode caused me to change my focus and recalibrate my life balance and so, ironically, divorce was a gift of sorts,” he says.

Pancoast’s father had worked in sales and management of radio stations all his life and in 1985, Pancoast built and operated the North Country’s first FM radio station, which he ran until 1993 and sold in 2000, all the while practicing law on the side.

When he returned to his legal career full-time, “I just kept it kind of limited and found I enjoyed it a lot more,” he says.

He has also found time for civic and professional engagement, and served on the Littleton Planning Board and school board; was a director of the Littleton Savings Bank, later the Saver’s Bank; and for 26 years served on the New Hampshire Board of Bar Examiners, grading the real estate question on the semi-annual bar exam.

Pancoast says much has changed in the practice of law over the past 50 years.

General practitioners like himself in the early 1970s “did everything,” he says. “You might have a divorce client in the morning, then go to court for a DWI, then somebody comes in in the afternoon with a personal injury or an assault.”

These days, some fields — like employ-

ment law — have become so specialized that “the progression is kind of narrowing the area I’m competent to deal with,” he adds.

Still, “After you do this 50 years, it really becomes part of who you are,” Pancoast says. “I recognize maybe it’s time to hang it up but I’m not sure I can do that because it becomes part of your identity.

Colleagues say Pancoast has every reason to keep doing what he does so well. Retired Superior Court Justice Timo-

thy Vaughan has known him for 45 years.

“In addition to being Littleton neighbors, Tom and I represented our clients in a variety of legal matters prior to my appointment to the Superior Court in 2002,” Vaughan says. “Tom is among the brightest, most competent, thorough law-

yers I have had the privilege to work with during my years of practice.

Pancoast says he has no immedi-

ate plans for closing shop — as long as he can keep practicing in the North Country and Littleton’s “very wholesome environ-

ment.

“When I see people who cannot imagine leaving Manhattan, I think, ‘if you only knew’:” he says. “But I’m not going to tell them because I don’t want them coming here.”
property tax bills. All New Hampshire municipalities are mandated, by RSA 76:11-a, II, to include “prominent” notice of the availability of the various forms of property tax relief. The actual notice provided by New Hampshire’s municipalities partly depends on the assessing and tax software vendor utilized, and partly on the requests by the municipality to that vendor. I have yet to see one that is adequate. Typically, the notice is printed on the back of the tax bill along with other information, all in a uniform type. The information is cryptic and often not fully accurate. But the duty of municipalities extends beyond providing written notice with the tax bills. Under Part 1, Article 1, of the New Hampshire Constitution, municipal officials are required to provide meaningful assistance to all citizens who seek their help in resolving municipal-related issues. See Carpenter v. Town of Rye, 120 N.H. 96 (1980) and Savage v. Town of Rye, 120 N.H. 409 (1980). The first time a homeowner approaches their town or city regarding difficulty paying property taxes, they should be informed about all the types of property tax relief potentially available and relevant to the taxpayer’s circumstances. 

A Deferral Does Not Require a High Standard

When RSA 72:38-a originally was enacted in 1973, it specified that “The Selectmen or assessors are authorized to grant a tax lien for the whole or a portion of the taxes due in lieu of the full payment thereof, plus interest at an annual rate of five percent; such a tax lien may be granted from time to time.” In 1977, the legislature added the provision that the assessing officials may grant the tax deferral for all or part of the taxes due “if in their opinion the taxpayer’s ability to pay, and who have some equity in their homes, must show that it is not reasonable for them to relocate, refinance or otherwise obtain additional public assistance.” The regulations (N.H. Code Admin. R. Rev. 417) furnish no further clarification of how an “undue hardship” or “possible loss of said taxpayer’s property” (emphasis added). Unlike the elderly exemption under RSA 72:39-a, the various veterans’ credits, and other optional exemptions, there are no income and asset limits and the “Ansara standard” does not apply to deferrals. Ansari v. Nashua, 118 N.H. 879, 881 (1978), (“We hold that plaintiffs who claim that they are entitled to an abatement because of poverty and inability to pay, and who have some equity in their homes, must show that it is not reasonable for them to relocate, refinance or otherwise obtain additional public assistance.”). The regulations (N.H. Code Admin. R. Rev. 417) furnish no further clarification of how an “undue hardship” or “possible loss of said taxpayer’s property” are determined; there is no support for the proposition that the homeowner has to be in abject poverty or must establish that money is spent only on necessities. The fact that the original statute contained no standard whatsoever indicates that the relief intended to be broadly available and generously granted. The fact that payment of the tax is only postponed, not forgiven outright, also suggests that the “undue hardship” contemplated by the statute does not require seniors and people with disabilities to give up pets, gardening, giving gifts, travel, culture, entertainment, and other modest expenditures which give them pleasure.

What Are the Logistics of Granting a Deferral?

To qualify, the homeowner must be 65 or older, or eligible for Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) disability benefits; and have owned the home for at least five years if the request is based on age, or one year if the request is based on receiving disability benefits; and be living in the home. The property owner must apply for a deferral of the previous year’s property taxes no later than March 1 using the New Hampshire Department of Revenue Administration (DRA)’s Form PA-30 “Elderly and Disabled Tax Deferral Application.” If the property is subject to a mortgage, the owner must have the mortgage holder’s approval of the tax deferral by signing off on the form; however, “[a]uthorization does not grant the town a preferential lien.” RSA 72:38-a, III. The town or city has until July 1 to decide whether to allow the tax deferral. RSA 72:34. IV. The assessing officials shall file notice of each tax deferral granted, within 30 days, with the registry of deeds of the county in which the property is located to perfect it. RSA 72:38-a, V. If the taxpayer is unhappy with the town’s decision, the taxpayer can file an appeal with either the Board of Land and Tax Appeals or the Superior Court by September 1 of the year following the tax bill. RSA 72:34-a.

What if the Municipality Has Never Granted a Deferral?

RSA 72:38-a does not provide for “retroactive” deferrals. If a municipality has failed to notify struggling qualified taxpayers about the availability of deferrals, that would be a compelling situation for an abatement pursuant to RSA 76:16. Select-board members or assessors, for good cause shown, may abate any tax, including prior years’ taxes, including any portion of interest accrued on such tax. RSA 76:16, (a).

Another creative solution we have used in working with various towns is a promissory note and mortgage structured to bring the same financial relief to the homeowner, while providing security for the town.

Homeowners Can Obtain More Information from Legal Aid

Homeowners who need legal advice about property tax relief can contact the Legal Advice and Referral Center (LARC) by submitting an on-line application at www.nhlegalaid.org, or by calling (603) 224-3333. Persons at least 60 years old can contact New Hampshire Legal Assistance’s Senior Citizens Law Project at 1-888-353-9944. New Hampshire Legal Assistance handles property tax cases for eligible low-income people at risk of losing their homes. Our pamphlet “Having Trouble Paying For Property Taxes!” is available at: https://www.nhla.org/assets/customContent/2018.03.12_Property_Tax_Pamphlet_FINAL_with_RH_edits.pdf. A concise double-sided information sheet is available upon request. And the New Hampshire Municipal Association is a great resource for towns and cities unfamiliar with the logistics of granting RSA 72:38-a deferrals.

Ruth Heintz is managing attorney in the Berlin office of NH Legal Assistance.
During the past three months life has brought a lot of us a fresh look at just how fragile each day can be, particularly for those among us who are the least able to respond to the unexpected. We are learning lessons we should have already known about how those with the least are experiencing the greatest hardships from the terrible virus that has spread across our communities throughout our nation. The virus has exposed unpleasant realities about the shortcomings and bias in our social institutions, including our health-care, law enforcement, and political systems. At the same time, our justice system is facing enormous challenges. How to function without human contact. How to respond to the injustices that have been exposed in our hospitals, nursing homes, and in our streets.

Many of us are working from home, watching the terrible toll this pandemic has caused, the closing of businesses and loss of jobs, and the unrest that has exploded in our streets. We are frustrated by the response of so many in positions of responsibility. We see how unprepared we were for much that has happened, and we better understand measures we should have taken over a long period of time to anticipate such a crisis. Many of us are asking, what can we do now? How can we help those who are suffering? How can we contribute now so that such suffering does not have to happen to the same terrible degree in the future? Many of us in the legal profession are involved with a wide range of non-profit organizations. We have witnessed the serious decline they have experienced in donations, the ability to pay staff and deliver important services badly needed in these challenging times. We read about the lack of resources and increased demand for services New Hampshire non-profits are confronting daily. We even see articles in which journalists are seeking donations to keep their publications alive. What can we do? What should we do?

During this difficult time there are many living in New Hampshire who cannot afford, but badly need, the help of an attorney.

For decades New Hampshire lawyers have volunteered their time, services, and money to assist our fellow residents who cannot afford our services, but are confronting the possibility of eviction, facing demands by the IRS, or suffering the effects of domestic violence. New Hampshire was one of the first states in our nation to establish an IOLTA program through our non-profit arm, the New Hampshire Bar Foundation. Over the last five decades millions of dollars have been raised through interest on lawyers’ trust accounts and the generous donations of lawyers and their firms. These funds have gone to funding New Hampshire Legal Assistance, our Bar Association pro bono programs, or LARC.

The Foundation has also made Justice Grants to numerous groups trying to address the needs of the young, working to develop a better understanding of civics and the importance of social discourse, and addressing inequities in our state. Most of all, the funds raised by the New Hampshire Bar Foundation have been used to provide thousands of New Hampshire residents with the assistance of a lawyer when they most needed that assistance in the midst of a crisis. Without the help of an attorney from New Hampshire Legal Assistance or a volunteer pro bono attorney these fellow residents would have faced their crisis alone and without the knowledgeable representation they desperately needed.

Today, more than ever, the New Hampshire Bar Foundation needs the support and involvement of New Hampshire attorneys from every part of our state. Solo practitioners, small and large firms, public sector lawyers, and in-house counsel all have a stake in assuring that the New Hampshire justice system works effectively, fairly, and impartially for everyone who comes through its doors.

Participating in the IOLTA program, encouraging your personal banker to be involved and to maintain adequate interest rates on your trust account funds is more important now than it has been for a very long time. The Bar Foundation struggled through the challenges of the 2008 recession which caused a significant decline in revenue. The Foundation has worked its way back to raising nearly a million dollars annually for the important organizations it supports. We are once again facing a challenge that requires the active support of all New Hampshire attorneys. I have been a solo or small firm lawyer for most of the 42 years I have been practicing law. I know the challenges we too face during these difficult times. I also understand that public confidence in our system, respect for and appreciation of the role of our profession is also important for all of us.

Some of the New Hampshire lawyers who created the Bar Foundation are no longer with us. A handful are still here. It is time for the rest of us to stay the course, keep the Bar Foundation strong, and be sure it has the resources it needs to continue its important work. Now, more than ever.

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In the News

Community Notes

The Manchester Board of Mayor & Aldermen have appointed Attorney Patrick Arnold a commissioner of the Manchester Transit Authority (MTA), term to expire May 1, 2025. The MTA manages and operates the community’s mass transit service, school district transportation, and the city’s downtown shuttle service.

Lawline Thank You

The NH Bar Association would like to give a huge thanks to Orr & Reno for hosting Lawline in Concord on Wednesday May 13th. Attorneys Peter Burger, Bob Carey, Jonathan Eck, Laura Hartz, James Laboe, John Malmberg, Lindsay Nadeau, Nicole Paul, and Steven Winer, as well as assistance from support staff Kate Kindel, fielded over 400+ calls from the public and provided brief legal advice and information during the two-hour event. A variety of questions were answered but most centered around Landlord/Tenant, Probate, Family law, and Employment law.

In Memoriam

George Louis Manias

George Louis Manias, beloved and cherished husband, father and grandfather, passed away on the morning of Monday, May 18, 2020, in Concord, NH.

George Manias was born in Concord, NH on July 31, 1935. George graduated from Tufts University in 1958. He met the love of his life, Diane Haeussler of Medford, MA, on the first day they arrived at Tufts as freshmen. Following graduation, George served in the U.S. Army, and was honorably discharged to attend Suffolk University Law School in Boston, MA. He married Diane in 1961 and graduated from Suffolk as a Doctor of Jurisprudence in 1963. They remained married and in love for 57 years. Together they raised and nurtured a loving family with their two children, Bill and Xanthi.

George was a highly respected attorney and, ultimately, a revered justice on the New Hampshire Superior Court. He began his legal career at the Office of the NH Attorney General and then practiced law as a partner at the firm of Cleveland, Waters & Bass in Concord, NH. George was honored to be appointed to the NH Superior Court by then-Governor John H. Sununu in 1985. George was proud to serve on the Superior Court until his retirement in 2000, and continued to work as a judge in senior status performing various judicial roles until 2019.

More than anything, and above all else, George adored his wife, children and grandchildren, and reveled in their adventures, successes and interests - all to which he devoted his undivided attention and all of which his family attributes to his unwavering guidance, care, and love.

Though George was highly respected in the legal and judicial communities, he was an extremely humble man who was more concerned with his roles as a dedicated and loving husband, father, grandfather and uncle. George was always present and available, without hesitation, to his children, grandchildren, nephews and nieces as a caring and trusted mentor, advisor, confidante, storyteller, historian and family guardian.

George was preceded in death by his loving wife, Diane; parents, Louis and Xanthoula Manias; his brother, Constantine Manias; and his adored grandson, Andrew William Manias.

He is survived by his children, Bill Manias and his wife, Gretchen, of Houston, TX, and Xanthi Manias Gray and her husband, Daniel, of Portsmouth, NH; grandchildren Hayden Manias of Houston, TX and Lannon, Kealey and Ainsley Gray of Portsmouth, NH; and his sister Dorothy Kokulis Stokes, of Venice, FL and Concord, NH.

Due to current circumstances, a private family service will be held at Blossom Hill Cemetery in Concord, NH and a memorial service will be held at a later date.

In lieu of flowers, for those desiring, memorial contributions in George’s name may be directed to the Concord Hospital Trust at www.ch-trust.org.

Arrangements are entrusted to the Bennett Funeral Home of Concord. Fond memories and expressions of sympathy may be shared at https://www.BennettFuneral.com for the family of George L. Manias.

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

STAY CONNECTED

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Program, has years of expertise handling landlord tenant issues. So far, he said, he has not seen an uptick in eviction proceedings with his clients but explained this could be because the landlords he works with know they can’t bring cases forward at the moment.

“Every chance I’ve had, I ask my clients what’s going on, and so far it has not been a big number.”

While eviction actions for non-payment of rent are going to move forward telephonically, cases brought to court based on behavioral issues are more difficult to do virtually, according to Shaughnessy.

Evictions based on behavior, such as a lease violation or disruptive behavior, he explained, are more time consuming because they often require witness testimony beyond the parties.

“The days of the cattle calls, if you will, are likely over,” he said, referring to the high number of cases that would often be heard in courts prior to the pandemic.

The pressure on the court system because of new eviction cases, combined with fewer circuit court judges and statutes that call for 10 day timeframes when being handled virtually, is an issue Shaughnessy is concerned about.

Timeframes are tight," he said. "This was a difficult task because of the many pieces involved" Stone said.

Emergency shelter spaces before the pandemic were very large dorms with bunkbeds spaced only 2 to 3 feet apart. The demand for housing was so high pre pandemic, according to Stone, that her shelter was often operating above their normal capacity.

“The situation was already very overcrowded. And then COVID came and things became unsustainable.”

Stone and her team identified the problems and contracted with the Port Inn Hotel one mile from the shelter. The hotel has been accommodating 40 people, including individuals and several families.

“It was hard. It took money and we had to find the space,” she said. “It took a lot of new planning and it was tough but we’ve had tremendous leadership amongst our homeless service committees.”

Two groups were immediately identified as high risk according to Stone. This included the most medically vulnerable people at the shelter as well as those who were continuing to go to jobs in the community potentially bringing the virus back to the shelter.

“Having removed that number of people, we were able to reallocate space at the shelter,” Stone said. “We were able to put more space between everyone while following CDC guidelines of wearing masks, portable hand washing stations, and social distancing.”

“Now the challenge is sustainability,” she said. “The question is where do we go from here? We can’t go back. We have an essential service. This is why we’ve asked for a 25-million-dollar shelter adaptation fund and our proposal is that three quarters of that money go to infrastructure improvements.

Camping for Survival

With the weather becoming warmer, more of the homeless population have chosen to camp, according to Stone.

At the Concord Coalition to End Homelessness, people come to the Resource Center on North Main Street on Monday’s, Wednesday’s and Fridays for services. Many of those people are currently camping in various locations near downtown Concord.

Julie Green, Director of Case Management, said the shelter serves both men and women with up to 40 people at a time.

The people who come to the resource center to get care during a crisis for the homeless during have become homeless for various reasons according to Green.

“No one asks to be homeless.” Stone said. “A lot of people become homeless because of mental health issues, drug addiction or because of a work injury.”

Green’s biggest concern at the moment is guiding clients through housing options. This has been difficult, she explained, because of social distancing.

“A lot of people were feeling like they were being singled out for having a disease. But, we’ve gained a good reputation with people,” Green said.

One of the people at the Resource center on a Wednesday morning in late May was Brian. He was with his daughter Brenda who is ten months pregnant, and his fiancé Travis. The three of them have been camping behind the Everett Arena in Concord along the Merrimack River while they wait for more permanent shelter.

Brian said he moved to New Hampshire from Plymouth, MA to find work, adding that, “he’s trying to get something going.”

“I used to go camping for fun and this is just for survival,” he said, “I have nothing to hide. I’m just a person trying to survive in a hostile world.”

Tim Potter, 59, who was at the resource center for lunch, said he is currently living under the 393 bridge. A former construction worker, Potter had been staying in a crew building at a nursing home in Peterborough before the pandemic.

“The conditions are terrible,” Potter said, referring to the environment beneath the bridge. “You try to clean it up and then it’s just dirty again.”

Walter Healey, 65, and a roofer for 27 years, agreed with Potter. He said that he’s been sleeping on the ground, covering himself with a tarp.

“Flat on the ground. I just cover myself up,” he said.

Healey expressed frustration with the lack of affordable housing in the area.

“There are plenty of old buildings that could be used to house people,” he said. “The only plus to being outside right now is that it’s warm.”

According to Stone, “despite every one’s efforts, there has been growth in encampments.

“We would like to provide more humane conditions for people,” she said, adding-

| Housing from page 1 |

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- New Hampshire Bar News |

Julie Green, Resource Center Clinical Director, case manager, and Anthony. Photo by: Scott Merrill

JUNE 17, 2020
www.nhbar.org

NEW HAMPSHIRE BAR NEWS
ing that, the CDC has advised services such as portable toilets and handwashing stations go to encampments.

“Was it convenient to you and me when our favorite café shut down or a library closed…. for a lot of people that was where people were able to have meals and bathe,” Stone explained. “Communities have been good partners, but I think that they’re going to run out of patience soon and we need good solutions.”

Housing not Band aids

Stone said she believes state legislators have heard this and are ready to help. Cross-roads has received some funding through the state’s Bureau of Homeless and Housing through DHHS. Yet, affordable housing, Stone explained, is the key to keeping people off the streets.

“We would like to come out of this with new resources for housing because shelters are not the answers,” she said. “Shelters are a band aid. A great needed band aid when people experience an emergency and they don’t have anywhere to be. But, they should just be a stop along the way to permanent housing.”

Stone said there may be more housing choice vouchers coming through HUD to local housing authorities, adding, “this would be fabulous because there aren’t nearly enough.”

The challenge, she explained, is that vouchers can be issued to people who qualify and are in need but there aren’t enough available houses to rent. Moreover, she explained, individuals who do receive vouchers are on a tight schedule to secure housing.

“We need landlords to work with us who are willing to accept the vouchers. But, right now, if someone is issued a voucher, they start a time clock and if they don’t identify and secure an apartment within a certain amount of time, they lose the voucher and go to the bottom of the waiting list,” Stone said. “So if we get a lot of vouchers ‘great, they’re kind of like the golden ticket,’ but if you can’t find a landlord who will accept it and the department won’t pass required inspections… the vacancy rate is just so low that it’s very competitive and people are competing against people without vouchers.”

The Ripple Effect

According to Elliot Berry, Managing Attorney and Co-Director of the NH Legal Assistance Housing Justice Project:

“Housing is about the most basic need people have. If we can’t stop the evictions, a lot of people’s lives are going to spin out of control. Vacancy rates are about as low as you can get.”

Berry said the problem is a lack of rental housing in general. “In times of pandemic, vacancy was less than one percent and when you combine that with high rents you have a dangerous situation.”

Berry, who has devoted his career to seeking solutions to provide affordable housing, said most of his work has involved advocating in court and outside of court for people who have been evicted. Like other housing advocates, he is concerned that a wave of new evictions could be coming.

“Our housing calls are now dramatical-ly down for obvious reasons, but it’s obvious that there’s a wave of new evictions coming,” he said. “Landlords and tenants. It’s a classic win-win for landlords and tenants. It’s a classic calm before the storm and we’re particularly hard on lower-income renters, many of whom are paying over 50% of their income on housing costs.”

The other part of the problem, Frost said, is a lack of incentives for municipalities and developers to build affordable housing.

Several bills in the legislature are currently addressing this. One of those bills, HB 1248, expands the RSA 79-E Community Revitalization Tax Relief Incentive by enabling communities to adopt “housing opportunity” zones where new housing development would get tax relief for several years.

For Berry, the lifting of the moratorium in late July on federally subsidized non-payment cases is when a big wave could hit. This includes Section 8 and other privately owned non subsidized units where owners have a federally backed mortgage.

Long-term Goals

While affordable housing advocates all agree that resources are necessary to maintain and enhance shelter operations with evictions looming, the long term goal is permanent housing.

“Although this is a crisis it’s also an opportu-nity and we’re trying to think strategi-cally to take advantage of the resources that are coming in right now,” Berry said. “The long-term goal, that will hopefully come out of this, is not having people who are living in camps now go back to shelters.”

And Kuhn agrees.

“When we’re talking about the COVID emergency, housing is healthcare, and we’re hoping the state will recognize this and allo-cate some of the funding to long term hous-ing solutions.”

Like Shaughnessy, Berry is concerned for landlords, tenants, and the court’s ability to handle the load. “In normal times, there are thousands of cases of eviction for non-payment. So that’s not going to change for the better and then you’re going to have a lot of other types of evictions for all the other reasons that we had prior to the pandemic. So, I think this is really going to be challenging for landlords, tenants and homeless providers,” he said. “I’ve been talking with the admin office of courts and there could be a risk of being utterly overwhelmed.”

Berry said, he’s hopeful there will be an announcement in the next two weeks about the rent stability programs that Margolin and other advocates have been pushing for.

“We want people to understand we’re looking for a way to help everyone,” he said, “landlords and tenants. It’s a classic win-win situation.”

Affordable Housing Incentives

When it comes to providing affordable housing and keeping people off the streets, housing advocates face a complex web of social and market realities. According to Berry, there needs to be more incentives to invest in affordable housing, both for developers and municipalities.

The major delivery program for this at the moment, Berry said, is the low income housing tax credit administered through the IRS that provides investors with tax credits.

“There’s a spotty record at best with municipalities complying with statutory mandates and courts to create opportunities for the development of workforce affordable housing within their land use regulations,” Berry said, adding “There’s just not enough funding.”

The federal government stopped funding public housing and we don’t have a viable rent subsidy program for the creation of new subsidized units nationwide. That’s problematic. Housing authorities and other non profits are going to have to do the job. There’s just not enough money to be made in the private sector.”

With this said, Berry has seen some progress in several bills being proposed but he is also concerned with how the term “affordable” is defined.

“The Governor is now proposing a bill with incentives to get municipalities to do their job of compensating for affordable housing but ‘affordable’ is defined as 50 percent of median income in the region,” Berry said, explaining that in areas such as Portsmouth, “that’s incredibly high.”

According to Ben Frost, Managing Director of Policy & Public Affairs at New Hampshire Housing, the problems with building affordable housing are complicated by myths and a lack of incentive for developers.

“One of the myths of affordable housing – and housing generally – is the number of children associated with new construction. The assumption is that with each new development will come a great number of children that will overwhelm the schools and compel dramatically higher school budgets. The real numbers just don’t bear it out,” Frost said.

A typical new single family home generates 0.64 public school students and new multi-family units generate 1.7 public school students per unit according to the study.

“Bedroom count is the key – larger homes tend to be occupied by larger families. Smaller homes (e.g., 2 bedroom apartments) tend to have very few children associated with them and that’s where the real need is,” Frost said, citing a case study based on four New Hampshire communities that exposes one of the myths of affordable housing.

With statewide vacancies below one percent, Frost said, it’s extremely hard for many people to find any housing. And for those who do, “Prices are being pushed up, and people wind up paying too much – paying more than 30% of their income on housing. This is especially hard on lower-income renters, many of whom are paying over 50% of their income on housing costs.”
Rule 1.6 Disclosure of a Client’s Identity – Ethics Committee Advisory Opinion #2019-20/01

ABSTRACT: Unless one of the exceptions in Rule 1.6 applies, Rule 1.6 prohibits the disclosure of the identity of a client.

ANNOTATIONS: Rule 1.6’s phrase “information related to the representation of a client” includes the identity of a client.

Rule 1.6 does not distinguish between confidential information and non-confidential information.

An attorney may disclose the identity of a client after obtaining the client’s voluntary informed consent.

An attorney may disclose the identity of a client if the disclosure is “impliedly authorized in order to carry out the representation” of the client.

Rule 1.6 contains other limited exceptions to the general prohibition against revealing the identity of a client.

Subject to the exceptions contained in Rule 1.6, Rules 1.6 and 1.9 prohibit the disclosure of the identity of a former client.

Subject to the exceptions contained in Rule 1.6, Rules 1.6, 1.9 and 1.18 prohibit the disclosure of the identity of a prospective client from whom the lawyer receives or reviews information but with whom no lawyer-client relationship ensues.

Rule 1.6 and the Disclosure of a Client’s Identity

The Ethics Committee was asked whether a lawyer would violate the Rules of Professional Conduct by disclosing the identity of a client. The answer is yes, unless one of the exceptions in Rule 1.6 applies to the particular situation.

Rule 1.6 provides that “[a] lawyer shall not reveal information related to the representation of a client unless the client gives informed consent.” The rule is interpreted to mean that the client’s identity is protected under Rules 1.6.”

The answer to the question turns on whether the client’s identity is “information related to the representation of a client.” The term “information” is not defined in Rule 1.6, and Rule 1.6 does not expressly state that the identity of a client is among the information it protects. Rule 1.6 uses the broad term “information” without categorizing any information as “confidential” or “non-confidential.” All information, therefore, is protected so long as it is “related to the representation of a client.” See ABA Model Rules of Professional Conduct, Rule 1.6, Comment 4 (“The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation regardless of whatever its source.”). And although the Rule is perhaps most intuitively applied to substantive information that a lawyer has learned from the client, the Rule’s plain language also covers “client representation” under a plain reading of that language.

Plain reading finds support in the ABA’s comments to Model Rule 1.6. Comment 4, for example, explains that the Rule permits an attorney to “use … a hypotheti- cal to discuss issues relating to the representation so long as there is no reasonable likelihood that the listener will be able to as- certain the identity of the client or the situa- tion involved” (emphasis added). The language of Rule 1.6(b)(5) also supports this conclusion, limiting the information that may be disclosed to “information related to the identity of the client.” See ABA Model Rule 1.6, Comment 13 (stating that Rule 1.6(b)(5) encompasses only “limited information” that includes a client’s identity—the implication being that such information ordinarily cannot be disclosed under the Rule).

When the underlying purpose of Rule 1.6 is to protect the identity of a client, the Rule becomes clearer still. As explained in Comment 2 to ABA Model Rule 1.6, the protection afforded to information relating to the representation “contributes to the trust that is the hallmark of the client-lawyer relationship” and encourages clients “to seek legal assistance and to communicate freely and frankly with the lawyer even as to embar- rassing or legally damaging subject matter.”

There are many contexts in which revealing the mere identity of a client could indirectly reveal that client’s personal life that the client would not want others to know, thereby damaging that trust and discouraging full and frank lawyering. For example, a client who approaches a lawyer about a potential divorce. Such a client would undoubtedly expect the lawyer not to disclose anything to anyone except the client’s right shares with the lawyer but would also probably not want it known that the client has met with and retained a divorce lawyer. Similarly, a business would not expect the white-collar criminal defense lawyer who it hired to conduct an internal investigation of possible criminal activities to reveal the existence of such a client-lawyer relationship.

Many jurisdictions have addressed this topic, perhaps none more comprehensively than the New Jersey Supreme Court in In re Advisory Opinion No. 544, 103 N.J. 399, 408 (1986). The court considered Rule 1.6 and the identity of a client in the context of a legal services organization that provided representation to mentally impaired or disabled entitled persons. The court held that disclosure of clients’ identities “would be tantamount to the revelation of the mental and financial status of the indi- viduals” as well as the disclosure of a legal problem that required the services of an attorney, and that “depending upon the nature of such additional or collateral infor- mation that is revealed by the disclosure of a client’s identity, the need for confidentiality could appropriately cloak even identity.” In re Advisory Opinion No. 544, 103 N.J. at 408. Thus, the court concluded that in this context:

client information that serves to identify the client would clearly be protected under Rule 1.6. As noted, this rule accords confidentiality to any information relating to the representation of a client. Manifestly, this would include a client’s identity.

Accordingly, we hold that under current standards governing attorney conduct, the identity of a client shall not be disclosed to any private or public funding agency in the absence of appropriate consent or other legal jus- tification. Any justification for so ruling would be that a client’s identity constitutes information relating to the representation of a client under the current Rules of Professional Conduct.

Id. at 409; see also In re Groebel, 703 N.E.2d 1045, 1047 (Ind. 1998) (“[I]nfo- rmation relating to the representation of a client, as stated in Prof. Cond. R. 1.6(a), is a broad definition and has been construed to include personal information relating to rep- resentation regardless of the source. Thus, ‘information’ may include the identity or whereabouts of a client.”) (alteration in original) (citation omitted).

Many other jurisdictions have similarly concluded that Rule 1.6 protects a client’s identity. See, e.g., Wisconsin Professional Ethics Committee Opinion 99-40 (2017) (client identity is protected by Wisconsin Supreme Court Rule 201.6); Ohio Bd. of Professional Conduct Opinion 2016-08 (Oct. 7, 2016) (noting that Rule 1.6 “prohibits the release of . . . the cli- ent’s identity without the client’s consent”); Missouri Informal Advisory Opinion 2015- 09 (2015) (opining that attorney could not disclose client names on financial disclo- sure form because client name is among the confidential information protected under Missouri Ethics Advisory Opinion 2015-18).

Rule 1.6 contains other limited exceptions to the protection of a client’s identity. The answer is yes, unless one of that Rule’s exceptions apply.

The protection of Rule 1.6 also applies to former clients and to prospective clients even when no lawyer-client relationship en- sues. Rule 1.9 identifies a lawyer’s duties to former clients.

1. We note at the outset that this opinion deals solely with the question of whether a client’s identity is protected by the Rules of Professional Conduct. This question should not be confused with the somewhat related question of whether a client’s identity is protected by the client-lawyer privilege. See, e.g., In re Advisory Opinion No. 544, 103 N.J. 399, 408 (1986) (“[A] client’s identity per se might not be necessarily con- sidered a privileged communication as such”).

2. Comment 13 refers to Rule 1.6(b)(7), which is the ABA analog to New Hampshire Rule 1.6(b)(5).

NH RULES OF PROFESSIONAL CONDUCT:
Rules 1.6, 1.9, 1.18

SUBJECTS: Confidentiality
Client information
• By the NHBA Ethics Committee
This opinion was submitted for publication to the NHBA Board of Governors at its January 6, 2020 meeting.

The NHBA•CLE Annual Ethics CLE will be held on June 26 and will cover recent ethics opinions. Go to www.inreachce.com for more information.
19 Tips From Attorneys to Get You Through the Rest of COVID-19

By Nicole Black

MyCase recently conducted a nationwide survey of legal professionals to understand the financial, operational, and individual changes law firms are making to maintain business continuity during this time.

In our law firm survey, we asked respondents what advice they would give to fellow law firms to endure the COVID-19 era. Below is a sampling of actionable responses broken out by topic.

TIME MANAGEMENT
“Prioritize! Not everything is an emergency. Make a plan and stick to it.”
— Whitney, Johnny W. Thomas Law Office, P.C.

“Create a schedule every day and be accountable to others to complete the schedule.”
— Glen Van Dyke, Van Dyke Litigation and Trial Attorneys

“Focus on mental health, try to impose structure, get exercise, and make a list of the most important items you have to accomplish – try to do at least one important thing, like completing a filing and getting it out to the court, per day.”
— Brice, Breton & Simon PLC

ROUTINE
“Keep the same office hours at home that you did at the office.”
— John, J. Thomas Black, P.C.

“Get up each morning, get dressed for work just as you always did, and the same hours as well. Nothing has changed except the location of your office. And to remember when working remotely, you might experience a few glitches, remain calm, it’s a small price to pay to still have your job, your paycheck, and be able to work from home and keep safe, keep your coworkers safe as well as your family members.”
— Dawn, Greg Coleman Law

“Set up a routine and stick to it. Have some down-time and fun activities planned ahead. Take the time off.”
— Martine, Simplex Legal

FINANCES
“Be as flexible as you can while meeting the needs of clients. It may cost a little bit of money now to implement new tools, but if it helps keep you in business, it will be worth it. Look into the options for small business loans as a safety net. Keep marketing, yet adjust to current restrictions, like video calls instead of in-person meetings, mediations when court is canceled, etc.”
— Heather Stuart, Godfrey Law & Associates, PLLC

“Increase streams of revenue, find ways to market services to needs coming out of the COVID crisis, use technology to keep costs low and efficiency of your workforce high.”
— Joshua Kotter, AVantGarde Law, LLC

“Research into state and local business loans or assistance. Consider taking cases outside of your normal area of practice and field, especially if you are knowledgeable in another area.”
— Celeste Jameson, Law Office of Donna Jameson, LLC

STAFF
“It’s a time to start trusting people, maybe relax some policies that you put in because you were concerned employees weren’t working hard enough, too distracted, etc. A little trust will go a long way to making remote employment work.”
— Michael, Cook Law

“Bring your staff on board for a brainstorming process. Empower them; give them a voice.”
— Peggy, Law Office of Peggy J. Bristol

TECHNOLOGY
“Hang in there. This too shall pass. This is the time to make sure your software is working the best for your firm and optimizing its efficiency.”
— Michelle Howser, Howser & Associates

“This is the time to work on systems, policies and team culture. Use this downtime to revamp your firm from the inside so that it is well prepared to handle a larger volume of work once the pandemic is over.”
— Ilona D. Anderson, Saenz & Anderson, PLLC

“Research into state and local business loans or assistance. Consider taking cases outside of your normal area of practice and field, especially if you are knowledgeable in another area.”
— Celeste Jameson, Law Office of Donna Jameson, LLC

“Iron out the financial, operational, and individual challenges law firms are making to maintain business continuity during this time.”
— Rebecca Pescador, Whole Family Legal, LLC

“Bring your staff on board for a brainstorming process. Empower them; give them a voice.”
— Peggy, Law Office of Peggy J. Bristol

“Research into state and local business loans or assistance. Consider taking cases outside of your normal area of practice and field, especially if you are knowledgeable in another area.”
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“Hang in there. This too shall pass. This is the time to make sure your software is working the best for your firm and optimizing its efficiency.”
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“This is the time to work on systems, policies and team culture. Use this downtime to revamp your firm from the inside so that it is well prepared to handle a larger volume of work once the pandemic is over.”
— Ilona D. Anderson, Saenz & Anderson, PLLC

Increase your technology competence.”
— Anthony, Greene Law Group PLC

“Automate.”
— Barry, Law Offices of Matthew Brekhus

“Move everything to the cloud. EVERYTHING.”
— Eduardo, Access Law

“Move as quickly as possible to virtual interactions and cloud-based software.”
— Joy, Crain & Wooley

“Accommodate your clients as best you can, and adopt as much technology as you comfortably can.”
— Sarah, Ambrogi Law Office

“Good online case management software really does make a world of difference. Get it, learn it, use it. For example, our struggles with signatures are much less with MyCase because many of those items we can use electronic signatures, especially right now. It can keep you in touch with staff and give you access to all your case information.”
— Rebecca Pescador, Whole Family Legal, LLC

Take a look at our complete survey results on remote work, finances, and productivity.
New Report From The USPTO Concludes Patenting Software In The United States Has Become Easier And More Predictable

By Kevin McGrath

In April 2020, the United States Patent and Trademark Office (USPTO) released a report from a recent study of Section 101 rejections in U.S. patent applications. The study tracked changes in USPTO decisions that typically receive Section 101 rejections, changes to USPTO examiner guidance have resulted in a 25% decrease in the likelihood of receiving a Section 101 rejection and a 44% decrease in examination uncertainty. The recent report suggests the pendulum is swinging back from the high rate of rejections and uncertainty following the Supreme Court’s 2010 Alice v. CLS Bank decision and the current environment is much more conducive to patenting software and computer-implemented inventions. Section 101 came to the fore as a result of disputes between the USPTO and the trade mark filer, such recent changes can be seen personally in my practice.

Section 101 to came to the forefront as a possible tool to combat “patent trolls” that were viewed as using vague, overbroad, and obvious business method and software patents to extort money out of businesses. Such patents were susceptible to invalidation under Section 101 if they merely claimed an abstract idea, such as performing a traditional and well known method of doing business on generic computer components. The Supreme Court’s 2010 Bilski v Kappos decision invalidated a patent claiming a computerized method of hedging against financial risk and provided guidance. In 2014, the Alice decision expanded on Bilski and other Section 101 decisions and set forth a two-part test for determining whether a claim is abstract and therefore ineligible. First, determine whether the claim is directed to a patent-ineligible concept and if so, second, determine “whether it contains an ‘inventive concept’ sufficient to ‘transform’ the claimed abstract idea into a patent-eligible application.”

The Alice decision required the applicant to persuade the USPTO that the trademark amounts to a generic term.10 The Alice Report shows the Alice decision had an significant impact on patent applications in “Alice-affected technologies” resulting in a 31% increase in the likelihood of a Section 101 rejection in the 18 months following the decision.11 Following Alice there was also a 26% increase in examination uncertainty reflecting a high degree of variability across examiners, which the report attributes to the open-ended nature of the Alice test. The increased rate of rejections and uncertainty increased patent examination costs and led to the abandonment of many patent applications.

The Alice decision had an even larger impact on litigation. In the five years following Alice, there was a 1056% increase in the number of claims findings in which the court found the claim invalid under Section 101.9 And in AIA trails before the USPTO Patent Trial and Appeal Board (PTAB) in the five years following Alice, there was an 88% likelihood a claim challenged under Section 101 would be found invalid. The developing caselaw appears to be creating somewhat of a safe harbor for software inventions that can be characterized and improved by technological means, but significant uncertainty and variability across decisions remains for software inventions that are claimed as a tool.

In an effort to bring greater clarity and predictability to the patent examination process, the USPTO issued revised guidance for examiners in January 2019.12 Key changes in the January 2019 guidance included focusing and constraining the identification of an abstract idea and creating a new step that allowed for a determination of eligibility if a claim recites an abstract concept. The Alice Report concludes the January 2019 guidance had a significant impact. As noted above, the study found the guidance resulted in a 25% decrease in the likelihood of receiving a Section 101 rejection in technology areas where those rejections are most often issued and perhaps more importantly, a 44% decrease in uncertainty in examination in those same technology areas. The Alice report was also illustrative of the changing environment across decisions remains for software patentability.

The USPTO is also illustrative of the changing landscape of standards for review of genericness and descriptiveness. As noted above, in an effort to bring greater clarity and predictability to the patent examination process, the USPTO issued revised guidance for examiners in January 2019.12 Key changes in the January 2019 guidance included focusing and constraining the identification of an abstract idea and creating a new step that allowed for a determination of eligibility if a claim recites an abstract concept. The Alice Report concludes the January 2019 guidance had a significant impact. As noted above, the study found the guidance resulted in a 25% decrease in the likelihood of receiving a Section 101 rejection in technology areas where those rejections are most often issued and perhaps more importantly, a 44% decrease in uncertainty in examination in those same technology areas. The Alice report was also illustrative of the changing environment across decisions remains for software patentability.

The U.S. Court of Appeals for the Fourth Circuit affirmed. The USPTO petitioned the Supreme Court to reverse and on May 4, 2020, the Supreme Court heard oral argument.

The issue up for review at this time is whether the term “ZERO” of a generic top-level domain (com) to an otherwise “generic” term (i.e. booking) can create a protectable trademark where the government is advocating a bright line rule that gTLDs are inherently generic and cannot add an applies for trademark registrability. It will now be interesting to see how the Supreme Court responds, and whether or not they will support the USPTO’s view that the mark “booking.com” is generic and unregisterable under such a bright line rule, or whether such terms should be considered as a whole and on a case by case basis where the applied-for trademark may still be considered descriptive as a whole and eligible to provide “acquired distinctiveness” evidence to support registration.

Aside from how the Supreme Court may rule on the particular facts of the booking.com case, the overall treatment of the Booking.com trademark applications at the USPTO is also illustrative of the changing landscape of standards for review of genericness and descriptiveness. As noted above, in an effort to bring greater clarity and predictability to the patent examination process, the USPTO issued revised guidance for examiners in January 2019.12 Key changes in the January 2019 guidance included focusing and constraining the identification of an abstract idea and creating a new step that allowed for a determination of eligibility if a claim recites an abstract concept. The Alice Report concludes the January 2019 guidance had a significant impact. As noted above, the study found the guidance resulted in a 25% decrease in the likelihood of receiving a Section 101 rejection in technology areas where those rejections are most often issued and perhaps more importantly, a 44% decrease in uncertainty in examination in those same technology areas. The Alice report was also illustrative of the changing environment across decisions remains for software patentability.

The USPTO continued on page 21

The Changing Standard of Review for Arguably Descriptive Trademarks

By Chelsea VanderWoude

Those who seek to secure a trademark registration for an arguably descriptive mark with the United States Patent and Trademark Office (“USPTO”) now face significantly different challenges relative to just three short years ago. Describing marks or service marks that only describe the goods, but “whether the relevant public would understand the term to be generic.” On remand, Coca-Cola disclaimed the term ZERO meaning Coca-Cola agreed not to enforce against any third party who used the term ZERO on its own in relation to their own low-calorie sodas. In 2018, Trademark Examiners have applied the reasoning in Royal Crown into their analysis of arguably descriptive and highly descriptive trademark applications. At a 30,000-foot view from the past three years, one can find decisions from the USPTO denying registration on the basis of genericness for “Serial” for the world-renowned, arguably famous, podcast show, for “The Vitamin Shoppe,” and now, for “Booking.com.”

Booking.com appealed the USPTO’s refusal to register Booking.com to the U.S. District Court for the Eastern District of Virginia. The District Court reviewed Booking.com’s survey evidence and concluded that the general public did not associate “Booking.com” with general online hotel booking services, i.e. the mark was not generic. The District Court held that the survey evidence indicated that consumers now associated the mark “Booking.com” with a specific source.

“Today at the USPTO, applicants seeking to register an arguably descriptive mark may face an entirely different process including refusal that the proposed trademark fails to function as a mark or that the trademark amounts to a generic term.”

In Royal Crown Company, Inc. v. The Coca-Cola Company, 892 F. 3d 1358 (Fed. Cir. 2018), Coca-Cola’s application for COKE ZERO was opposed by Royal Crown, on the basis that ZERO was generic and could not indicate a source. Coca-Cola argued that the term ZERO was descriptive and not generic, had acquired distinctiveness, and was recognized by consumers as identifying a beverage as sourced from Coca-Cola. The USPTO initially held for Coca-Cola on the basis that Royal Crown failed to show that ZERO was used by the public to describe soft drinks or drinks that contained fewer than five calories.

On appeal, the Federal Circuit vacated the USPTO’s decision finding that the USPTO erred in its legal analysis of whether Coca-Cola’s mark was generic by examining only the general class of applied-for goods, i.e. beverages, but not the specific type of goods at issue, i.e. low-calorie or calorie-free beverages. In addition, the Federal Circuit held that the USPTO failed to determine whether, if not generic, the marks were at least highly descriptive. The Federal Circuit also noted that the test to determine if a term was generic is “not only whether the relevant public would understand the term to be generic,” but whether the relevant public, or its members, would understand the term to be generic.

The USPTO continued on page 21
By Lisa N. Thompson

In response to the coronavirus pandemic, the Supreme Court in mid-March announced that it would postpone oral arguments for the remaining 20 cases that had been scheduled for late March and April. The Court would hear half of the cases from its current term in May and defer the remaining cases to its next term, which begins in October. The $9 billion copyright dispute between Google and Oracle (Google LLC v. Oracle America, Inc.) is one of the cases that has been rescheduled for the next term.

In early May, in an unprecedented move, the Court announced that it would hear oral arguments for 10 of the postponed cases via telephone conference with the lawyers and justices participating remotely. In another historic move, the Court confirmed it would provide live audio of the hearings to be streamed for broadcast to the public.

**U.S. Patent and Trademark Office v. Booking.com B.V.**

The Court’s first telephone oral arguments were held on May 4, 2020, U.S. Patent and Trademark Office v. Booking.com B.V., a trademark case which raised the question of whether a business can create a registrable trademark by combining an unprotectable generic term with a generic top-level domain name such as “.com.” Booking.com is an online travel and hotel reservation company. In 2012, it filed several trademark applications to register the mark BOOKING.COM, both as a word mark and stylized versions of the mark. The United States Patent and Trademark Office (USPTO) rejected the applications. The USPTO examining attorney found the terms “booking” and “.com” were generic and unregistrable since combining the generic term “booking,” which is used by countless third parties to refer to online reservation services, with the generic top-level domain name “.com,” merely communicates to consumers that the business offers online hotel reservation services. The examining attorney concluded that the company had not shown that the marks had acquired secondary meaning and were merely descriptive. The Trademark Trial and Appeal Board affirmed the rejections. Booking.com appealed to the U.S. District Court for the Eastern District of Virginia. The district court agreed with the USPTO’s determination that the term “booking” is generic when used for online hotel reservation services. However, the district court concluded that BOOKING.COM was a brand rather than a generic service. The district court held that if Booking.com could show that consumers recognized BOOKING.COM as a brand and had acquired secondary meaning the marks would be eligible for registration. Booking.com introduced survey evidence showing that consumers recognized the mark as a brand rather than a generic service. The district court held that Booking.com’s survey evidence and evidence of its substantial advertising expenditures was sufficient to demonstrate secondary meaning and therefore the marks were registrable.

The USPTO appealed to the U.S. Court of Appeals for the 4th Circuit. The court, relying on the survey evidence submitted by Booking.com, showing that consumers recognized BOOKING.COM as a brand, affirmed the district court. The Lanham Act 15 U.S.C. §1501 et seq. provides that generic terms cannot be registered as trademarks. The statute does not define the terms “generic” or “descriptive.” However, courts have explained that allowing a business to monopolize a generic term would undermine trademark law.

Last year the USPTO filed a petition for writ of certiorari urging the Supreme Court to hear the case.

**UPDATE continued on page 22**
Update on NHBA•CLE Postponed Programs

We were as excited as you to see everyone at our live in-person programs scheduled for the spring. Unfortunately, quarantine changed our lives and how we continue to offer programs.

We’ve been working with the chairs of all programs that were postponed and will be scheduling those as remote webcasts. Some of the full day programs will probably be scheduled as two half day programs, and some will be full days. For instance, the Elder Abuse CLE was offered as a full day webcast on May 28th and was very successful.

So far, we’ve scheduled the following:

- Clearing the Haze: Cannabis & CBD in the Workplace
- 19th Annual Labor & Employment Law
- In House Counsel Essentials
- Business Split-ups: Issues Arising from Corporation & LLC Fractures

Watch for updates on the other programs. We expect to schedule a number of programs in August for those who needed the extra time to complete their NHMCLE requirement. If you are only looking to complete your ethics credits for the year, consider registering for the two-hour annual ethics update scheduled on June 26.

Closing a Law Practice

Wednesday, June 24, 2020
8:30 a.m.-10:30 a.m.
Webcast Only • 120 min. Ethics/Prof.

Discover:
- Your ethical responsibilities when closing your practice
- What you can do now in your practice to help prepare for retirement – no matter if you are 20 years away from retirement or only months away
- Real-world practice management techniques to implement now to make closing your practice easier
- Best practices – electronic and non-electronic methods
- Specific steps and tips you’ll need to close your practice

Faculty
Russell F. Hilliard, Program Chair/CLE Committee
Member, Upton & Hatfield, LLP
Gary W. Boyle (ret.), Littleton
Stephanie K. Burnham, Hage Hodes Professional Association
Mark P. Cornell, Deputy General Counsel, Attorney Discipline Office
George R. Moore, NH Bar Association

14th Annual Ethics CLE

Friday, June 26, 2020
8:30 a.m.-10:30 a.m.
Webcast Only • 120 min. Ethics/Prof.

This CLE will cover issues of ethics and professional responsibility of current interest, including:
- Confidentiality of Client Identity
- The Duties of Lawyers Who Serve on Nonprofit Boards
- Social Media and Contact with Jurors
- Ethical Concerns When Working Remotely
- The Duty to Report Ethical Violations
- A Judicial Perspective on Frequently Occurring Issues

Faculty
Hon. Patrick E. Donovan, Associate Justice, New Hampshire Supreme Court
Thomas J. Donovan, Director of Charitable Trusts, NH Attorney General’s Office
Mitchell M. Simon, UNH Franklin Pierce School of Law and Devine Millimet
Elizabeth M. Murphy, Assistant Disciplinary Counsel, N.H. Attorney Discipline Office
Mark T. Knights, Nixon Peabody LLP
Richard Guerriero, Lothstein Guerriero, PLLC, Program Chair

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Original Program Date 11/17/2018
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Original Program Date 3/29/2019
360/30 NHMCLE Minutes

Tax Issues in Divorce
Original Program Date 11/30/2018
360/60 NHMCLE Minutes

Developments in the Law 2019
Original Program Date 10/25/2019
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A Practical Guide to Evidence
Original Program Date 3/22/2019
360/60 NHMCLE Minutes

Tools & Tips for Neutral Case Evaluation
Original Program Date 12/4/2019
120/0 NHMCLE Minutes

Intellectual Property for the General Practitioner
Original Program Date 5/16/2019
225/30 NHMCLE Minutes

Silent Trusts
Original Program Date 2/18/2020
60/0 NHMCLE Minutes

Carrying a Firearm in NH: The Basics
Original Program Date 9/10/2019
60/0 NHMCLE Minutes

First Party Homeowners’ Insurance Claims
Original Program Date 3/13/2019
210/0 NHMCLE Minutes

The Secure Act
Original Program Date 3/21/2020
60/0 NHMCLE Minutes

Issues in Advanced Personal Injury Litigation
Original Program Date 5/9/2019
360/60 NHMCLE Minutes

New programs being offered online to NH Bar members!

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14th Annual Ethics CLE June 26

PREVIOUSLY RECORDED WEBCASTS ON DEMAND

8 Mistakes Experienced Contract Drafters Usually Make Original Program Date 5/14/20
COVID-19 and Family Court Original Program Date 5/15/20
Contract Drafting and Enforcement in the Age of the COVID-19 Pandemic Original Program Date 5/20/20
Rookie Mistakes Real Estate Lawyers Usually Make in Drafting Provisions Original Program Date 5/19/20
#Hashtag Ethics Original Program Date 5/21/20
Effects of COVID-19 in Workers’ Compensation Original Program Date 5/22/20
Selecting Trademarks That Are Memorable and Entitled to Protection

By Mark A. Wright and Catherine S. Yao

Trademarks or service marks, collectively referred to here as trademarks or marks for convenience, are typically words, logos, and/or slogans used to brand goods or services and identify the source of such goods/services. Selecting a trademark is often a balance of a few different considerations. A trademark should be memorable; it should attract the eye, ear, and mind of a potential purchaser and elicite desirable consumer responses. Ideally, from the perspective of protection and enforcement, a trademark is distinctive and capable of building a strong association between the mark and the products/services you provide.

In practice, protectability/enforceability under trademark law often run counterintuitively to common marketing practices. From a marketing perspective, a name that immediately conveys the product or characteristics of the product, the less protection is likely to be afforded to that mark under trademark law. Moreover, descriptiveness tends to significantly increase the likelihood that a third party has selected or will select the same or similar mark for the same or similar goods, making protecting and enforcing your mark much more difficult.

When selecting a mark, attention should be given to the “spectrum of distinctiveness,” which evaluates the extent to which trademarks may be entitled to protection. Fanciful, arbitrary and suggestive marks are deemed inherently distinctive and make strong trademark candidates, while descriptive marks that use words effectively and make strong trademark candidates, while descriptive marks that use words effectively describing the function, characteristics, or quality of a product or service, are the weakest trademarks.

Where a mark lands on the spectrum (in particular, arbitrary, suggestive, or descriptive marks) and its relative strength is evaluated in view of the goods or services with which the mark is in use and/or for which protection is sought. A mark that is considered descriptive or generic in one industry, and therefore entitled to little to no trademark protection, may be considered arbitrary and entitled to relatively strong protection in another industry. For example, the wording “computer” would not be protectable as a trademark for computer products; however, it may be protectable as a trademark for clothing.

Included below are examples of marks that fall within each category of the “spectrum of distinctiveness” or “spectrum of protectability.”

**Fanciful Marks**

A fanciful mark is a mark created solely to function as a trademark, i.e., made up words that do not have any dictionary meaning or have otherwise fallen completely out of common usage. Fanciful marks are immediately entitled to trademark protection and may be protected in both competitive and noncompetitive industries. For example, KODAK® is a fanciful trademark for photographic supplies.

In some cases, fanciful marks are a cropped portion of a word or portions of different words combined to create a fanciful word. For example, portions of words having positive connotations to elicit a positive response, such as ACURA® from accurate, may serve as strong, fanciful trademarks.

**Arbitrary Marks**

An arbitrary trademark is a mark that has a known, common meaning, but is used as a trademark for a product or service that has no relationship to the common meaning. A prevalent example of an arbitrary trademark is APPLE® used in connection with electronic devices. As with fanciful marks, arbitrary marks are inherently distinctive and immediately entitled to protection as trademarks.

**Suggestive Marks**

A suggestive mark is one that suggests or hints at, but does not describe, the qualities or characteristics of the product. At times, the line between suggestive marks and descriptive marks may seem somewhat thin and unclear. By way of explanation, the US Patent and Trademark Office’s (USPTO) manual of examining procedure explains suggestive trademarks as being marks that, “when applied to the goods or services at issue, require imagination, thought, or perception to reach a conclusion as to the nature of those goods or services.” Descriptive marks, on the other hand, are considered to immediately convey some information about the relevant goods/services.

Suggestive marks are also considered inherently distinctive and, therefore, entitled to trademark protection immediately upon use. While some marks, such as PLAYSTATION® for a video game system may appear more noticeably suggestive, other marks, such as JAGUAR® for automobiles, are also considered suggestive, as it calls to mind attributes, such as speed and sleekness, that may be associated or desired to be associated with the relevant goods.

**Trademarks to Avoid**

The weakest type of trademark is a descriptive word that is not inherently distinctive and simply describes the function, quality, or characteristics of relevant products or services. Surnames and geographic names often present the same obstacles to protection and registration. Merely descriptive marks weigh fall at the opposite end of the distinctiveness spectrum from fanciful marks.

Descriptive marks are given very limited protection.

**PROTECTION continued on page 21**
and my colleagues report the same. We have seen a noticeable reduction in Section 101 rejections and in cases that do receive rejections, the evolving USPTO guidance has made it easier to overcome the rejections. While uncertainty with patent applications claiming business method and software inventions remains, the caselaw and recent USPTO guidance provide a roadmap that experienced practitioners can use to prepare patent applications designed to pass the evolving Section 101 standard and to overcome Section 101 rejections. The recent developments over the past 18 months have brought some welcomed predictability to patent applications for computer-implemented inventions that technology companies have long sought.


3. “Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, and may also obtain a patent for any new and useful improvement on an article which has been patented. But no patent shall be granted for any plant, or for any invention which is the subject of a patent on the same invention by another country, nor shall anything hereunder be construed to give to any inventor any right whatever to the use of any invention which he discovers or makes by accident or without intention.” 35 U.S.C. § 101.

4. See, e.g., Saved by Alice, Electronic Frontier Foundation (available at https://www.eff.org/alice).


7. Alice-affected technologies are defined in the report as technology areas where Section 101 has been more heavily litigated. See Alice Report at 8.

8. See Alice Report at 3.


Kevin McGrath is a director at Downs Rachlin Martin. His practice focuses on intellectual property, specifically patents.
Court to reverse the Fourth Circuit, citing decisions from other circuit courts that found similar marks such as HOTELE.

From page 17

In a unanimous decision, the Court willful infringement by the defendant in...Romag Fasteners, Inc. v. Fossil

On April 27, 2020, the Court issued a decision in Romag Fasteners, Inc. v. Fossil Group, Inc.

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Municipal & Governmental Law

What in the [World] Country is Going on With Short Term Rental Regulation?

By Jason B. Dennis

Last year, I wrote a two-part article on short term rentals, an industry (and area of the law) in a state of flux. This year, I have taken a look at the legislative activity in various states—or, to paraphrase the concept popularized in the dissent of Justice Louis Brandeis in New State Ice Co. v. Leebmann, 285 U.S. 262 (1932), the various laboratories of democracy—across the country.

Coronavirus (COVID-19) has slowed, if not stopped, the legislative process in many, if not all, states; but there are a number of bills that have recently been passed into law or recently introduced that affect (or will if passed) short term rental in a variety of ways. It is possible that some of the bills referenced in this article will have been killed or passed by the time of publication.

By region, some of the “novel social and economic experiments” involving short term rentals include the following:

New England

Here in New Hampshire, at least two bills related to short term rentals were introduced between December 3, 2019 and January 8, 2020. The first bill (HB 1579), which sought to reduce the percentage of the meals and rooms tax that short term rental operators could retain and also to credit revenue from the tax to the affordable housing fund, was voted inexpedient to legislate on February 19, 2020.

The second bill (SB 458), which would have a broad impact across the State, seeks to bar municipalities from prohibiting short term rentals. This bill, pending in the Senate Election Law and Municipal Affairs Committee, provides that local legislative bodies “shall not prohibit the use of a building or structure as a vacation rental or short-term rental and shall not regulate the use of such structure or building as a vacation or short-term rental based on the structure or building’s classification, use or occupancy.”

A similar bill previously introduced in Maine (LD 209) was killed on March 26, 2019.

Rhode Island has two short term rental bills pending: (1) HB 7776, which would require that short term rental hosting platforms only list properties that are registered with the State’s Department of Business Regulation; and (2) SB 2482, entitled the Unlicensed Rentals Act, which provides a list of short term rental requirements divided into the categories of consumer safety, insurance, accessibility requirements, and civil rights. The bill seeks to clarify that all short term rental units are “public accommodations” and to make it unlawful for short term rentals to discriminate on the basis of “race, color, sex, gender identity, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status or military discharge status.”

Contrary to New Hampshire’s SB 458, a bill introduced in Vermont (HB 567) on January 7, 2020 and referred to the Committee on General, Housing, and Military Affairs seeks to specifically allow municipalities to regulate short term rentals. Three other bills appear to be pending in the same Committee: HB 655, which seeks to enact privacy protections; HB 280, which seeks to enact inspection and licensure protocols; and HB 891, which seeks to enact as Vermont state law an owner occupancy regulation similar to the approach a number of municipalities here in New Hampshire have taken. The pertinent language of this bill is: “A person may not offer all or part of a dwelling unit as a short-term rental unless the person has occupied the dwelling unit as his or her primary residence for (1) 270 days of the preceding year; or (2) if the person has owned or leased the dwelling unit for less than a year, more than 70 percent of the days that the person has owned or leased the dwelling unit.”

Mid-Atlantic

In New Jersey, bills that appear to...
New Hampshire Supreme Court Finds Statute Terminating Municipality’s Duty to Provide Excess Proceeds Three Years After Tax Deed Unconstitutional

By Eric Maher and Elaina Hoepner

The New Hampshire Supreme Court recently issued its second decision in Polonsky v. Town of Bedford, in which the Court determined that RSA 80:89, VII, which establishes a three-year limitation on a municipality’s duty to remit excess sale proceeds from the sale of tax-deeded property violated the Takings Clause in Part I, Article 12 of the New Hampshire Constitution.

By way of brief background, RSA chapter 80 establishes the tax deeding procedure. Generally, if a taxpayer fails to pay a municipal property tax bill by the due date, the tax collector may issue a tax lien on the property by paying all back taxes, interest, costs, and a penalty upon thirty-days’ notice. This repurchase right, however, exists only for three years from the date that the tax deed is recorded with the registry. As RSA 80:89, VI provides, “if the municipality has complied with the provisions of this chapter, it shall not have any liability whatsoever to any former owner for the amount of consideration received upon disposition of the property.” If the municipality seeks to sell the property during the three-year redemption period, the municipality must provide the taxpayer with ninety days’ notice, informing the taxpayer of his/her right to repurchase the property, and, if the municipality sells the property during that redemption period, the Town must remit any sales proceeds in excess of the back taxes, interest, costs, and penalties (“excess proceeds”) to the taxpayer.

The pertinent facts in Polonsky are as follows: The Town of Bedford issued tax bills for Tax Year 2008, 2009, and 2010. The plaintiff failed to pay his real estate taxes for those years, resulting in Bedford imposing tax liens on the property. After the two-year redemption period, Bedford’s tax collector issued a tax deed conveying the property to the plaintiff of his/her right to repurchase the property in 2013 and again in 2015, Bedford informed the plaintiff that his right to repurchase the property was no longer operative because the three-year redemption period set forth in RSA 80:89, VII expired. The plaintiff brought suit, arguing that Bedford’s intent to keep excess proceeds from an eventual sale of the property violated his rights to equity of redemption. With that element established, the trial court found that RSA 80:89, VII would result in the “plaintiff being deprived of a $300,000 property for a $90,442.42 tax lien.” Bedford appealed.

The Supreme Court affirmed the trial court’s decision. The Supreme Court noted that there was no dispute that the taxing of property by tax deed was a taking; therefore, the Court assumed without deciding that a taking occurred when the tax deed was executed. With that element established, the Supreme Court held that the termination of the municipality’s duty to pay excess proceeds to the former owner three years after the tax deed is recorded, as provided for in RSA 80:89, VII, violates Part I, Article 12 of the New Hampshire Constitution. In support of the Court’s holding, the Court noted that Bedford’s tax collector decided without deciding that a taking occurred when the tax deed was executed. With that element established, the Supreme Court held that the termination of the municipality’s duty to pay excess proceeds to the former owner three years after the tax deed is recorded, as provided for in RSA 80:89, VII, violates Part I, Article 12 of the New Hampshire Constitution. In support of the Court’s holding, the Court noted that Bedford’s tax collector decided without deciding that a taking occurred when the tax deed was executed. With that element established, the Supreme Court held that the termination of the municipality’s duty to pay excess proceeds to the former owner three years after the tax deed is recorded, as provided for in RSA 80:89, VII, violates Part I, Article 12 of the New Hampshire Constitution.

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The trial court initially interpreted RSA 80:89, VII to not preclude a claim to recover excess proceeds even though the three-year redemption period may have passed. In Polonsky v. Town of Bedford I, 171 N.H. 89 (2018) the Supreme Court reversed the trial court. The Supreme Court found that RSA 80:89, VII was clear and unambiguous RSA 80:89, VII and acted as a time bar to a claim for excess proceeds. However, the Supreme Court remanded the case back to the trial court to determine whether RSA 80:89 violates the Takings Clause found in Part I, Article 12 of the New Hampshire Constitution.

On remand, the trial court found that RSA 80:89, VII violated the Takings Clause of the New Hampshire Constitution and that the plaintiff was entitled to the excess proceeds of the eventual sale of the property. Specifically, the trial court noted that RSA 80:89, VII would result in the “plaintiff being deprived of a $300,000 property for a $90,442.42 tax lien.” Bedford appealed.

The Supreme Court affirmed the trial court’s decision. The Supreme Court noted that there was no dispute that the taking of property by tax deed was a taking; therefore, the Court assumed without deciding that a taking occurred when the tax deed was executed. With that element established, the Supreme Court held that the termination of the municipality’s duty to pay excess proceeds to the former owner three years after the tax deed is recorded, as provided for in RSA 80:89, VII, violates Part I, Article 12 of the New Hampshire Constitution. In support of the Court’s holding, the Court noted that Bedford’s tax collector decided without deciding that a taking occurred when the tax deed was executed. With that element established, the Supreme Court held that the termination of the municipality’s duty to pay excess proceeds to the former owner three years after the tax deed is recorded, as provided for in RSA 80:89, VII, violates Part I, Article 12 of the New Hampshire Constitution.

By way of brief background, RSA chapter 80 establishes the tax deeding procedure. Generally, if a taxpayer fails to pay a municipal property tax bill by the due date, the tax collector may issue a tax lien on the property by paying all back taxes, interest, costs, and a penalty upon thirty-days’ notice. This repurchase right, however, exists only for three years from the date that the tax deed is recorded with the registry. As RSA 80:89, VI provides, “if the municipality has complied with the provisions of this chapter, it shall not have any liability whatsoever to any former owner for the amount of consideration received upon disposition of the property.” If the municipality seeks to sell the property during the three-year redemption period, the municipality must provide the taxpayer with ninety days’ notice, informing the taxpayer of his/her right to repurchase the property, and, if the municipality sells the property during that redemption period, the Town must remit any sales proceeds in excess of the back taxes, interest, costs, and penalties (“excess proceeds”) to the taxpayer.

The pertinent facts in Polonsky are as follows: The Town of Bedford issued tax bills for Tax Year 2008, 2009, and 2010. The plaintiff failed to pay his real estate taxes for those years, resulting in Bedford imposing tax liens on the property. After the two-year redemption period, Bedford’s tax collector issued a tax deed conveying the property to the plaintiff on May 31, 2011. After the plaintiff informed the plaintiff that his right to repurchase the property was no longer operative because the three-year redemption period set forth in RSA 80:89, VII expired. The plaintiff brought suit, arguing that Bedford’s intent to keep excess proceeds from an eventual sale of the property violated his rights to equity of redemption in the subject property under Part I, Article 12 of the New Hampshire Constitution and that the New Hampshire statute RSA 80:89, VII violated Part I, Article 12 of the State Constitution by allowing Bedford to take his property without just compensation.

The trial court initially interpreted RSA 80:89, VII to not preclude a claim to recover excess proceeds even though the three-year redemption period may have passed. In Polonsky v. Town of Bedford I, 171 N.H. 89 (2018) the Supreme Court reversed the trial court. The Supreme Court found that RSA 80:89, VII was clear and unambiguous RSA
By Weston R. Sager and Charles P. Bauer

Municipalities could be liable under Title II of the American Disability Act (“ADA”) for failure to provide reasonable accommodations during ad hoc police encounters such as arrests, use of force, stop and frisks, motor vehicle stops, and similar ad hoc situations. In light of this recent legal development in the federal courts, municipalities and their police departments are encouraged to take affirmative steps to more fully understand and comply with the ADA and limit liability exposure to ADA claims.

Title II of the ADA addresses discrimination by government entities, and provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. To establish liability under the ADA, benefits of the services, programs, or activities shall, by reason of such disability, be excluded from participation in or be denied the benefits of some public entity’s services, programs, or activities or was otherwise discriminated against; and (3) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff’s disability.” Buchanan v. Maine, 469 F.3d 158, 170–71 (1st Cir. 2006).

Although the U.S. Supreme Court has not yet ruled that the ADA applies to ad hoc police encounters, lower federal courts, working under the assumption that the ADA applies to police arrests, use of force, stop and frisks, motor vehicle stops, and similar ad hoc situations, have developed two theories regarding disability discrimination claims:

• The first theory—known as the “effects” theory—is where police misperceive the effects of an individual’s disability as criminal activity and make an arrest based on their misperception. Gray v. Cummings, 917 F.3d 1, 15 (1st Cir. 2019); see also, e.g., Gohier v. Enright, 186 F.3d 1216, 1220 (10th Cir. 1999) (defendant mistaken for someone resisting arrest); Jackson v. Town of Sanford, No. 94-12-P-H, 1994 U.S. Dist. LEXIS 15367, at *23–*24 (D. Me. Sep. 23, 1994) (stroke victim mistaken for someone who was driving under the influence).

• The second scenario—known as the “accommodator” theory—is where police officers “properly investigated and arrested a person with a disability for a crime unrelated to that disability, but they failed to reasonably accommodate the person’s disability in the course of investigating or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees.” Gray, 917 F.3d at 15 (brackets omitted); Gohier, 186 F.3d at 1220–21 (citing Gorman v. Burch, 152 F.3d 907, 912–13 (8th Cir. 1998)).

The applicability of the ADA to ad hoc police encounters has been applied differently among the federal circuit courts of appeal—particularly when exigent circumstances arise. The Fifth Circuit Court of Appeals, for example, generally exempts officers from needing to make reasonable accommodations under the ADA in the presence of exigent circumstances. See Haines v. Richards, 207 F.3d 795 (5th Cir. 2000) (“While the purpose of the ADA is to prevent the discrimination of disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public.”). Other federal circuit courts, such as the Ninth Circuit Court of Appeals, view exigent circumstances as one factor in analyzing the reasonableness of the police officers’ actions. See Sheehan v. City & Cty. of San Francisco, 743 F.3d 1211 (9th Cir. 2014), rev’d in part and cert. dismissed in part by 135 S. Ct. 1765 (2015).

Although the First Circuit Court of Appeals has yet to render a formal decision regarding if and how the ADA applies to ad hoc police encounters, the closest this court has come to ruling on this issue is the recent case Gray v. Cummings, 917 F.3d 1 (1st Cir. 2019). In that case, a patient suffering from bipolar disorder was admitted to a hospital after experiencing a manic episode. After about six hours, the patient managed to escape the hospital on foot. Hospital staff called the police department asking that the patient be “picked up and brought back.” A municipal police officer responded to the call in his cruiser. He found the patient walking barefoot near the hospital. The officer exited the cruiser and followed the patient on foot from about 100 feet away. Within about 30 seconds, the police officer got to within about 5 feet of the patient, who was unarmed. The patient then turned around in a threatening manner towards the police officer. The patient started to walk towards the officer, at which point the officer took her to the ground by physical force. The police officer ordered the patient to put her hands behind her back, but she did not comply. When the patient continued to resist, the police officer used his Taser on the patient. The officer then handcuffed the patient and called an ambulance to take her back to the hospital.

The patient later sued the police officer and the town that employed the officer alleging liability under 42 U.S.C. § 1983, Title II of the ADA, and various state laws. A magistrate judge granted, and a district court judge affirmed, summary judgment on all counts.

GRAY MATTERS continued on page 26

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Drummond Woodsum’s attorneys are experienced at guiding towns, cities, counties and local governments through a variety of issues including:

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Municipal & Governmental Law
The Court found that this outcome was no longer required by RSA 80:89, which provides remedies to avoid an unconstitutional taking because the statute did not require a municipality to sell property within three years. The Court noted that such remedies did not avoid the unconstitutional taking because the statute did not require a municipality to sell property within the three-year redemption period – which is the only time period in which the statute requires the payment of the excess proceeds. The Court found that this outcome was no different than Thomas Tool: “the municipality acquires the property free of any obligation to provide compensation to the owner, regardless of the equity in the property that exceeds the amount owed.”

The Court also rejected Bedford’s argument that RSA 80:89 did not constitute a “statute of limitations.” The Court concluded that, in the absence of a constitutional mandate that taxpayers could petition to compel the Town to sell the property within three years, the property acquired by tax deed, except as provided in RSA 80:89, did not constitute a “statutory taking.” The Court further cited its decision in Gray if and until the First Circuit Court of Appeals or the U.S. Supreme Court rules otherwise. Even though the First Circuit has not provided definitive guidance on the applicability of the ADA to ad hoc police encounters, municipalities and their police departments are encouraged to review and update their practices, policies, and trainings to more fully comply with the ADA. Otherwise, municipalities could face legal exposure arising from this area of developing federal law.

Wesley R. Sager is an attorney in the appellate unit of the New Hampshire Department of Justice – Office of the Attorney General.

Charles P. Bauer is a shareholder at Gallagher, Callahan & Gartrell, PC in Concord, NH where he specializes in municipal defense, insurance defense, civil rights litigation, and alternative dispute resolution. This article represents the opinions and conclusions of its authors and not necessarily those of Gallagher, Callahan & Gartrell, PC or the Attorney General. The material presented herein may not be understood to be an Opinion of the Attorney General, which are formal documents rendered pursuant to statutory authority, nor to express the views of the Attorney General.
be at least somewhat unique have been introduced in both the General Assembly (AB 4146) and Senate (SB 2412) seeking to mandate short term rental refunds for reservations/stays that would occur during a “public health emergency.” Another relatively comprehensive bill introduced in the General Assembly (AB 669) distinguishes between short term rentals and seasonal rentals and seeks to specifically permit municipalities to regulate and/or prohibit short term rentals. The bill also proposes certain conditions for any ordinance adopted pursuant to its authority.

In Virginia, HB 1384, which had a Committee 3rd Reading Deadline of May 31, 2020, seeks to create the New York State Rental Operators’ Occupation Tax Act. This would impose a tax upon persons engaged in the business of short-term rental at a rate of 5% of the gross rental receipt from such renting, leasing, or letting—plus an additional tax of 1% of 94% of such gross rental receipts.

In Indiana, HB 1123, which would be effective July 1, 2020, would, among other things, prohibit the offering of a short term rental if the property is designated as affordable or subject to rental assistance, is subject to any law that prohibits the leasing or subleasing of the property, or is subject to an enforcement order issued under the unsafe building law. HB 1123 would also make it a Class C infraction for an owner to fail to correct or remove a listing on a platform displaying a missing or erroneous permit number.

Michigan has a number of tax related short term rental bills pending, and it also has legislation pending (HB 4563) that would establish that “a short-term rental is rented for 14 days or less in a calendar year is a residential use of property and a permitted used in all residential zones.” In addition, HB 453 would require that “have the effect of totally prohibiting the establishment of a land use, including, but not limited to, a short-term rental…”

South
Georgia HB 523 seeks to prevent local legislative bodies from banning short term rentals and from requiring registration to rent the property; however the language of the bill makes clear that should it become law, it is not to “be construed to affect the validity or enforceability of private covenants restricting residences used as short-term rentals or long-term rentals or of other contractual agreements among property owners that relate to the use of residences as short-term rentals or long-term rentals.

In Louisiana, HB603 and SB179 both seek to provide for registration and regulation of short-term rentals with the state fire marshal.

Similar to New Hampshire’s SB 458, South Carolina’s HB 4516 seeks to prevent municipalities from prohibiting short term rentals.

Another unique bill was introduced in Tennessee, which seeks to allocate revenue from the short-term rental occupancy tax imposed by Hamilton County on short term rental units in Chattanooga to be used solely for improvements to certain city-owned youth and community facilities.

Midwest
Illinois HB 2919 seeks to create the Short-Term Rental Act, which would bar local legislative bodies from enacting or enforcing any ordinance, regulation, or plan that prohibits short term rentals and restricts local regulation on the basis of a short-term rental’s classification, use, or occupancy. HB 2919 would permit local regulation of short-term rentals in order to protect public health, safety, sanitation, traffic control, solid or hazardous waste control, pollution control, and certain other specified circumstances.

Additionally, Illinois SB 3386, which had a Committee 3rd Reading Deadline of May 31, 2020, seeks to create the Long-Term Rental Operators’ Occupation Tax Act. This would impose a tax upon persons engaged in the business of short-term rental at a rate of 5% of the gross rental receipts from such renting, leasing, or letting—plus an additional tax of 1% of 94% of such gross rental receipts.

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NH Supreme Court Overturns Precedent for Accessing Personnel Files for Public Employees
By Jonathan Van Fleet
The Concord Monitor

The legal exemption cited by the Concord School Board to withhold a 100-page report examining how staff responded to accusations of inappropriate conduct by former teacher Howie Leung has been overturned by the New Hampshire Supreme Court.

Lawyers for the school district said the entire report is related to the firing of Principal Tom Sica and Superintendent Terri Forsten could not be publicly released because it involved “internal personnel practices,” which were categorically exempt from the right-to-know law.

A Concord parent, the Monitor and the ACLU have sued to obtain the report written after it was contradicted to the state constitution and New Hampshire Constitution, said ACLU Legal Director Gilles Bissinnette, who argued the case before the Supreme Court.

The Supreme Court, which has ruled on similar cases, is categorized as an arbitrator decision on a Frankfort police officer.

“This exemption had been used by government agencies to prevent access to critical information such as that concerning police officer misconduct, or how a school district responded to allegations of sexual abuse by a former teacher,” Bissinnette said. “The N.H. Supreme Court’s decisions appropriately narrow this previously broad exemption, as well as require the examination of public interest to ensure government accountability in the Granite State.”

Specifically, the Supreme Court’s ruling will allow judges to apply a balancing test to weigh privacy concerns against the public’s interest in disclosure.

The ruling was applauded by the ACLU of New Hampshire, “The N.H. Supreme Court today took a foundational step toward construing its provisions in favor of disclosure and interpreting its exemptions restrictively,” wrote, “For these reasons, a narrow interpretation of the ‘internal personnel practices’ exemption accords with our constitution and the right-to-know law’s underlying purpose.”


DECISION continued on page 32

Amy Feliciano Announced as the New Court Clerk for Hillsborough County Superior Court-South

The New Hampshire Judicial Branch is pleased to announce the appointment of Amy M. Feliciano, Esq., of Londonderry, N.H., as the new court clerk for Hillsborough County Superior Court-South. Attorney Feliciano will begin her new position on June 1, 2020, and has served as the deputy clerk for Hills-South since May 2015.

Feliciano performs administrative duties for the superior court, including scheduling hearings, working closely with judges and attorneys, and supervising court staff.

Before serving as deputy clerk, Feliciano was an assistant county attorney for nine years inStrafford County’s Attorney’s Office, where she represented the state in a wide variety of felony and misdemeanor cases. She also worked as a victim’s witness advocate in the Strafford County District Office inFramingham for six years before relocating to New Hampshire. Feliciano holds a juris doctor from New England School of Law and graduated magna cum laude from the University of Massachusetts–Amherst, where she majored in psychology.

“I am thrilled to hire Amy Feliciano as the new Clerk of Court for Hillsborough County, Southern District,” noted Superior Court Judge Tina Nadeau. “During her time as deputy she has helped run the court with professionalism and approachability. She assists the drug court team regularly and has offered wise input as an effective team member.”

Feliciano succeeds long-time clerk, Marshall Buttrick, who retired at the end of May.

Nadeau noted that, “Attorney Feliciano has worked under Clerk Buttrick as the deputy clerk for the past five years and excelled there beyond my expectations. She was also stepped up as acting clerk when Clark Buttrick was needed elsewhere in the State to assist with the operation of other courts. Throughout her service as deputy she has gained my complete confidence, and because of her capabilities, I can rest easy now that one of the best clerks in the state is retiring. I know that the members of the bar respect Attorney Feliciano and are as excited as I am that she will be the new clerk.”

May 2020

Administrative Law

Appeal of NH Department of Environmental Services, No. 2018-0650

May 27, 2020

Affirmed in part, vacated in part, and remanded.

• Whether the Department of Environmental Services has the authority to restrict the height of all accessory structures or only those that are “small” such as a gazebos or a shed

Petitioner, New Hampshire Department of Environmental Services (“DES”), appealed a decision of the New Hampshire Wetlands Council remanding an administrative order issued by DES that directed the respondents, Bryan and Linda Corr, to cease and desist unpermitted works on their lakefront property. The Wetlands Council (“Council”) found the following facts in reaching its decision: the Corrs owned lakefront property in Moultonborough, New Hampshire. At purchase, the property had a boathouse which was partially collapsed as a result of snow load. It was constructed grandfathered or nonconforming structure for the purpose of the Shoreland Protection Act and DES regulation. The height was approximately seventeen feet. The Corrs planned to replace the boathouse and hired a land use consultant to assist them with the process, which required approval from the Town of Moultonborough (the “Town”) as well as a Wetlands Permit by Notification (“PBN”) with DES. The PBN did not require information regarding the building height. The respondents were issued a permit but prior to starting the construction, decided to set the boathouse back from shore by approximately ten feet. The building height a maximum of twenty-seven feet from the shoreline is capped at twelve feet. DES issued an administrative order, which the Corrs appealed to the Council. The Council notified DES that they planned to challenge the DES’ authority to restrict the height of the structure.

DES subsequently moved to dismiss the proceeding before the Council, which was granted in-part and denied in-part. The hearing officer left three factual determinations to be resolved by the Council. An evidentiary hearing was held and the Council issued a written decision which stated in-part that given the placement of the new placement of the structure ten feet back from the shoreline, as well as the storm water management features, “it was possible that the structure to become more nearly conforming than the existing structure.” DES subsequently filed a motion to reconsider, contending that the Council had improperly overruled a legal determination made by the hearing officer, specifically that the Corrs’ structure should be

Plaistow Circuit Court Closure as of June 16, 2020

Pursuant to the New Hampshire Supreme Court’s order of May 12, 2020, the Plaistow Circuit Court will close on Monday, June 15, 2020 due to safety and accessibility concerns resulting in de-accreditation of the courthouse by the Court Accreditation Commission.

Starting June 16, 2020, all new District Division cases administered in the Plaistow Circuit Court from the following towns will be filed in the following new locations:

The towns of Atkinson, Hampstead and Plaistow will go to the 10th Circuit – District Division – Salem.

The towns of Danville, Kingston and Newton will go to the 10th Circuit – District Division – Brentwood.

Hearing notices in existing cases transferring from Plaistow and Brentwood have been sent to parties and counsel of record, and notices have posted in the impacted courts and on the Judicial Branch website.

Questions about specific cases should be directed to the Trial Court Information Center at 1-855-212-1234 or to the Clerks Katie Tripp (Salem and Plaistow) or Lori Anne Hensel (Brentwood).

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be regulated as a nonconforming structure rather than accessory structure, the Council had ignored the DES hearing officer’s legal determination that DES has the right to restrict the height of accessory structures on their lakefront property. The Court agreed with the respondents that DES did not have the authority to limit the height of their structures, stating that the plain language of the statute does not grant DES the authority to restrict the height of all accessory structures, only those that are “small.” The Council found that the alleged “small” accessory structure such as a gazebo or a shed, and given that finding, DES lacked authority to regulate the height. The Supreme affirmed the Council’s decision to the extent that concluded twelve-foot height restriction does not apply to their structure. However, all other aspects of the decision were vacated.

The plaintiffs appealed to the New Hampshire Supreme Court with instructions to grant the respondents’ appeal and to vacate the administrative order, which relied fully on the alleged height violation.

**Constitutional Law**

**Caroline Casey & a. v. New Hampshire Secretary of State & a., No. 2019-0693 (U.S. District Court)**

**May 20, 2020**

**Remanded.**

- Certified questions of law from the U.S. District Court, District of New Hampshire regarding the definition of domicile and resident as it relates to college students and temporary residents and whether such temporary residents need to obtain New Hampshire driver’s licenses and register their vehicles in New Hampshire.

The U.S. District Court for the District of New Hampshire certified five pending questions of law. The Supreme Court answered Questions 1, 2, and 5 in the affirmative and declined to answer Question 3.

The plaintiffs in this case are college students who wish to vote New Hampshire while attending college who “do not intend to remain in New Hampshire after graduation” and the New Hampshire Democratic Party.

The college students both possess driver’s licenses issued by states other than New Hampshire and neither owned a vehicle. In 2018, both registered to vote in New Hampshire. The plaintiffs sued the New Hampshire Secretary of State and New Hampshire Attorney General, represented by the U.S. Constitution the defendants’ interpretation and implementation of the 2018 amendments to RSA 216:6-A which changed the definitions of residents and residents so they no longer apply to only to individuals to intend to remain in New Hampshire for the indefinite future.

The Supreme Court that the 2018 amendments burden the right to vote and violate the First, Fourteenth, Twenty-Fourth and Twenty-Sixth Amendments of the U.S. Constitution. The plaintiffs also claimed that the 2018 amendments indirectly make voter registration an effective declaration of residency that triggers the obligation to obtain a New Hampshire driver’s license and vehicle registration under motor vehicle code. The college students allege that if they must obtain a New Hampshire driver’s license as a result of the amendments then they may be subject to voter registration fees and a possible fee for canvassing. The Supreme Court held that the 2018 amendments indirectly make voter registration an effective declaration of residency that triggers the obligation to obtain a New Hampshire driver’s license and vehicle registration under the motor vehicle code. The Supreme Court held that the 2018 amendments indirectly make voter registration an effective declaration of residency that triggers the obligation to obtain a New Hampshire driver’s license and vehicle registration under the motor vehicle code.

The Court noted that the relevant New Hampshire definitions of resident and residence are similar to the definitions for voting eligibility. The Court continued that bona fide residency “most important” place of physical residence, and defines resident and residence in the Amendments as effectively the same definition as domicile for voting eligibility under RSA 654:1. The court noted that the definitions of resident and residence in the 2018 Amendments are effectively the same definition as domicile for voting eligibility under RSA 654:1. Second question, a student who claims New Hampshire domicile is necessarily a New Hampshire resident. The Court declined to answer the question as to whether an individual who is a temporary resident for voting purposes can ever be an individual who claims residence in any other state for any purpose. The court noted that the answer to the question is not whether the student claims New Hampshire domicile or the defendant’s claims and therefore declined to answer. Regarding Questions 4 and 5, the Court noted that the relevant New Hampshire driving license statute states the establishment of a bona fide residence in the state.

A person who is a non-resident must obtain a New Hampshire driver’s license within 60 days of establishing bona fide residence, or wherein they are not permitted to drive their motor vehicle without registering it. However, the term bona fide residence is not the same as domicile within the motor vehicle code.

The Supreme Court noted that the 2018 amendments mean when a person has indicated through all of their actions that New Hampshire is the “most important” place of physical residence, to the exclusion of all other places which they may live. The Court noted that under the motor vehicle code, a non-resident must register their vehicle in New Hampshire, (1) within 60 days of establishing bona fide residence, or (2) when they have a “regular abode” here for more than six months in any year, and principal place of the vehicle located in their New Hampshire abode. Question 5 is answered stating that college students who reside in New Hampshire for more than six months in any year are required to obtain New Hampshire driver’s licenses if they wish to drive in the state and required to register in New Hampshire any vehicles they keep in the state.


**Fortune Laurel, LLC v. High Liner Foods (USA), Incorporated, Trustee & a., No. 2019-0357 (District Court)**

**May 8, 2020**

**Affirmed.**

- Whether due process allows a New Hampshire Court to maintain quasi jurisdiction for an attachment of funds despite dismissal of underlying action for lack of personal jurisdiction.
The Town of Salem had publicly released a copy of the audit report but made redactions pursuant to the Right-to-Know law exemption; (1) “internal personnel practices” exemption and (2) the exemption for “personnel... and other files.” The Town specifically redacted information to protect the identity of participants in internal affairs investigations; related to a particular employee’s scheduling of outside details and time off; the manner in which an employee arranged for vacation leave and time off work; and the names of employees paid for outside details during hours they were also receiving regular pay. The trial court then ordered the Town to provide a copy of the audit report containing only the redactions it upheld. The issue before the Supreme Court was the interpretation of RSA 91-A:5, IV, which exempts from disclosure under the Right-to-Know law, records pertaining to “internal personnel practices; confidential, commercial, or financial information;... and other files whose disclosure would constitute an invasion of privacy.” The Court observed that Fenniman cannot be reconciled with Fenniman cannot be reconciled with an invasion of privacy. The Court observed that Fenniman cannot be reconciled with an invasion of privacy. The Court observed that Fenniman cannot be reconciled with an invasion of privacy. The Court observed that Fenniman cannot be reconciled with an invasion of privacy. The Court observed that Fenniman cannot be reconciled with an invasion of privacy. The Court observed that Fenniman cannot be reconciled with an invasion of privacy. The Court observed that Fenniman cannot be reconciled with an invasion of privacy. The Court observed that Fenniman cannot be reconciled with an invasion of privacy. The Court observed that Fenniman cannot be reconciled with an invasion of privacy. The Court observed that Fenniman cannot be reconciled with an invasion of privacy.

The Court overruled Fenniman “to the extent that it broadly interpreted the ‘internal personnel practices’ exemption and its progeny to the extent that they had relied on that broad interpretation. The Court remanded the issue to the trial court to determine (1) whether the arbitration decision can be considered a ‘personnel file’ or ‘part of a personnel file’; and (2) whether disclosure of the material would constitute an invasion of privacy. The Court denied the request for attorneys’ fees in light of Fenniman.


- Whether the “internal personnel records” exemption under the New Hampshire Right-to-Know law, RSA 91-A:5, IV, should be a per se rule or whether it requires a balancing test.

The plaintiffs Union Leader Corporation and American Civil Liberties Union of New Hampshire, appeal an order in Superior Court which denied their petition to release the redacted information to protect the identity of participants in internal affairs investigations; related to a particular employee’s scheduling of outside details and time off; the manner in which an employee arranged for vacation leave and time off work; and the names of employees paid for outside details during hours they were also receiving regular pay. The trial court then ordered the Town to provide a copy of the audit report containing only the redactions it upheld.

The issue before the Supreme Court was the interpretation of RSA 91-A:5, IV, which exempts from disclosure under the Right-to-Know law, records pertaining to “internal personnel practices; confidential, commercial, or financial information;... and other files whose disclosure would constitute an invasion of privacy.” The Court observed that Fenniman cannot be reconciled with an invasion of privacy. The Court observed that Fenniman cannot be reconciled with an invasion of privacy. The Court observed that Fenniman cannot be reconciled with an invasion of privacy. The Court observed that Fenniman cannot be reconciled with an invasion of privacy. The Court observed that Fenniman cannot be reconciled with an invasion of privacy. The Court observed that Fenniman cannot be reconciled with an invasion of privacy. The Court observed that Fenniman cannot be reconciled with an invasion of privacy. The Court observed that Fenniman cannot be reconciled with an invasion of privacy. The Court observed that Fenniman cannot be reconciled with an invasion of privacy.

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- Whether the trial court erred in denying a motion to suppress evidence pursuant to a search of a rental car following a motor vehicle.

The defendant was convicted of two counts of possession of a controlled substance with the intent to distribute subsequent offense.

The Court noted the relevant facts as follows. A state trooper made a traffic stop on Interstate 95 northbound for failure to properly signal with a lane change on two occasions while operator/defendant passed a tractor trailer. After making the stop, the trooper learned that the defendant was on parole for a murder. During the traffic stop, the trooper made numerous observations which were later included as a basis for reasonable articulable suspicion which expanded the scope of the stop. These included: (1) the vehicle took longer than usual for the defendant to stop the car after acknowledging he was being pulled over; (2) the defendant was visibly nervous, including that his hand was visibly shaking; (3) three cell phones were present in the vehicle; (4) the officer could detect an odor of marijuana; (5) the defendant volunteered that he was operating a rental car; and (6) the defendant and his passenger reported conflicting stories regarding where they were coming from, where they were going and how long they had known each other.

The trooper asked the defendant to exit the vehicle after smelling marijuana. The officer conducted a pat and frisk for weapons and contraband because of the odd behavior and knowledge that the defendant was on parole for murder. Nothing was found during this search. At one point while outside the vehicle, the defendant volunteered that the trooper could search his vehicle. The conversation continued, the trooper later asked if he could search the vehicle, and if the defendant would sign a written consent form. The defendant immediately signed the consent form. The trooper searched the vehicle and found two plastic bags containing drugs.

The trial court found that the trooper had lawfully expanded the scope of the stop when he asked the defendant to step out of the vehicle because he had reasonable, articulable suspicion of drug activity when he made the request. On appeal, the defendant argued that the trooper did not have reasonable articulable suspicion to expand the scope of the initial stop. The only intent to expand the stop was tainted by an unconstitutional intention. The Court held that the odor of marijuana remains a relevant factor that can be considered in determining whether a reasonable articulable suspicion of criminal activity exists. The Court noted that if the trial court had provided a per se rule to the detected odor of marijuana that would be an error. The Court noted that the totality of the circumstances identified by the trial court provided the trooper with a reasonable, articulable suspicion of criminal activity which was sufficient to justify expanding the scope of the stop by asking the defendant to exit the rental vehicle. The Court rejected the argument that law enforcement must ask a particular set of questions at a particular point in time during an investigatory stop for its expansion to comport with the constitution.

Donna Brown, Walleigh, Starr and Peters, Manchester, for the defendant. Gordon MacDonald, attorney general (Sean Locke, assistant attorney general) for the State.


- Whether an insured’s amendment of coverage terms of insurance policy creates a new policy under RSA 264:15, I, and requires an insured to reject in writing uninsured motorist coverage.

The plaintiff was involved in a motor vehicle accident in November 2015 and sought uninsured motorist benefits pursuant to his Allstate Indemnity Company umbrella insurance policy. Allstate denied the coverage because in 2011, when the initial umbrella insurance policy took effect, he had declined uninsured motorist benefits in writing. The plaintiff filed a declaratory judgment action to determine whether his insurance policy provided uninsured motorist coverage. The trial court entered summary judgment in favor of Allstate and ruled that the plaintiff’s policy did not include uninsured motorist coverage because the policy in effect in November 2015 was a renewal of the policy in which he had declined uninsured motorist policy in writing.

The court noted that the relevant facts were as follows. In 2011, the plaintiff applied for a personal umbrella insurance policy from Allstate which provided him with $2M worth of coverage. After the policy became effective, he submitted to Allstate a completed personal umbrella policy declaration. Jane MacDonald, attorney general (Sean Locke, assistant attorney general) for the State.

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rejected” each year Allstate sent coverage. In 2015, Allstate again sent to the plaintiff a policy renewal offer, however, the plaintiff requested that Allstate reduce his coverage limit from $2 million to $1 million for the policy period from 2015 to 2016. Allstate sent the plaintiff amended personal umbrella policy declarations in bold font that he had rejected uninsured motorist coverage. The trial court found that it was undisputed that the plaintiff made no written request for uninsured motorist coverage.

The plaintiff advanced several arguments in an effort to obtain coverage under RSA 264:15, I (Supp. 2019) and negate the fact that he had rejected uninsured motorist coverage in writing in 2013. First, he argued that because his coverage limit was reduced from $2 million to $1 million on February 2, 2015, the 2015 to 2016 policy was a new policy to which his 2011 waiver of uninsured motorist coverage did not apply. He next argued that because he did not execute a new written waiver of uninsured motorist coverage for the 2015-16 policy, Allstate was required by statute to provide him with uninsured motorist coverage. In opposition, Allstate argued that he never revoked his waiver by requesting uninsured motorist coverage in writing as required by statute.

The trial court granted this motion for summary judgment and noted that it was undisputed that the plaintiff rejected uninsured motorist coverage in 2011 and that he had never subsequently requested uninsured motorist coverage in writing. It determined the applicable policy was a renewal. The Supreme Court affirmed.

Mark Morrissette, McDonell & Oshurn, Manchester, for the plaintiff. Silas Little, Fernald, Taft, Falby, Manchester, for the defendant.

Property Law

Balzotti Global Group, LLC, & a., v. Shepherds Hill Proponents, LLC, & a., No. 2019-0120 May 27, 2020

Affirmed.

• Whether the plaintiffs’ claim brought in February, 2018 were time-barred or if the discovery rule tolled the statute of limitations; and whether certain evidence was properly admitted or should have been barred by the work-product doctrine.

The plaintiffs appealed an order of the Superior Court dismissing their complaint against the defendants on the ground that their claims are time-barred. The parties have a long and complicated business relationship (and litigation history) dating back to 1999. This litigation pertains to a failed condominium development project.

The relevant facts are as follows: Shepherds Hill Development Company, LLC (the “Development Company”) obtained approval to construct 400 condominium units in Hudson. After work had begun, the real estate market crashed and the Development Company filed for bankruptcy. The Development Company reorganized in the bankruptcy court and created Shepherds Hill Proponents, owned by the individual defendant. As part of the reorganization, the Development Company issued a promissory note to the plaintiff Balzotti’s wife for $714,000, guaranteed by the Proponents and the individual defendant. As units were sold, the note was to be paid down. The note was interest free if paid within five years. In 2010, Balzotti’s wife issued a demand for payment on the note and forced the Development Company into involuntary bankruptcy. This was dismissed without prejudice because the court found it had been brought in bad faith and Balzotti was ordered to pay attorneys’ fees and punitive damages. By 2011, according to the original condominium declaration, the Association was governed by an elected board. The Development Company made an offer to the board to be granted an additional five acres, a “Twenty-Fourth Amendment” to the declaration purport that three land units only from undeveloped portions of the condominium common area. The Association filed a complaint for declaratory and injunctive relief against the Development Company. The trial court ruled that the Development Company’s right to develop convertible land into condominium units (the Development Right) expired on February 26, 2013 and that the undeveloped land belonged to the Association. The Development Company appealed this ruling. While the appeal was pending, the note was reassigned to Global Group, owned by Balzotti. The individual defendant testified that he met with Balzotti in the summer of 2014 to discuss the note and the status of the condominium development.

In February 2018, the plaintiffs sued the Development Company, and the defendants asserting a number of claims regarding the loss of the Development Right. The plaintiff moved to attach condominium property it self to satisfy a potential judgment. Plaintiff sought to only attach the Development Right not the condominium property. The defendants moved to dismiss and argued that the plaintiffs’ claims were time-barred because they were brought more than three years after the Development Right was lost. In invoking the discovery rule, plaintiffs argue their claims were timely because Balzotti did not know or reasonably discover that the Development Right had been lost until he learned in 2016 that the N.H. Supreme Court had affirmed the trial court’s 2014 decision. The trial court held an evidentiary hearing to determine whether Balzotti knew or should have known about the loss of the Development Right and determined that it was by either February 2013 or the summer of 2014. Therefore, the action was time-barred. The plaintiffs filed a motion for reconsideration and then filed this instant appeal.

Also on appeal was whether the defendants were barred by the doctrine of judicial estoppel from asserting the statute of limitations as an affirmative defense because of representations by the defendants in the 2010 bankruptcy proceedings, which was rejected by the Court. Further, the plaintiffs contested the admission of a timeline of events into evidence at the evidentiary hearing. The Supreme Court held that the timeline contained facts only and therefore is not required attorney work product or attorney client privilege.

Matthew Johnson, Devine, Millimet and Branch, Manchester, for the plaintiff. Emile Bussiere, Jr., Bussiere & Bussiere, Manchester, for the defendant Ernest Thibeault. John Sullivan, Preti Flaherty, Concord, for the defendants. Shepherds Hill Development Company, LLC and Shepherds Hill Proponents, LLC. Jeremy Walker and Joseph Foster, McLane, Middleton, Manchester, for Ernest Ralph Caruso. Thomas Aylesworth, Moriarty Troyer & Malloy, Massachusetts, for the defendant Shepherds Hill Homeowners Association.

Edward Favart v. Steven Oulette, & a., No. 2019-0197 May 22, 2020

Affirmed in part reversed in part remanded.

• Whether an implied easement may be inferred based upon historical use of properties.

This lawsuit originated in 2017, when the plaintiff filed a lawsuit requesting the court to order removal of the docks that the defendants had installed on the plaintiff’s property while enjoining the defendants from interfering in any manner with the plaintiff’s use of his property. The plaintiff appealed an order of the trial court which ruled that the current owners of the plaintiff’s land benefited from and the plaintiff’s land is burdened by an easement by implication. The trial court also concluded that installation and use of a dock is a reasonable use of the easement and because there was no evidence that the easement had been expressly rescinded, it was a vested right of the current owners.

The Supreme Court reviewed the matter de novo and noted that the court’s finding of an implied easement was supported by the law and evidence considered by the trial court. The Court reversed the ruling that the scope of the easement included the dock because there is no evidence that a dock had ever been installed in the beach area of the burdened parcel. The Court held that installation and use of a dock is not within the scope of the easement under the traditional approach or the modern approach.

The Court ruled that easement by implication is presumed to exist if during unity of titles, the owner imposes apparently permanent and a servient estate on one settlement in favor of the other, which at the time of severance, its title is in use and reasonably necessary for the fair enjoyment of the tenement of which such use is beneficial. Gary Kinyon, Bradley & Faulkner, Keene, for the plaintiff. Silas Little, Fernald, Taft, Falby and Little, Peterborough, for the defendants.
Supreme Court Orders

On January 24, 2020, the New Hampshire Court Accreditation Commission, see RSA 490:5-a to -e, notified the Board of Selectmen and the Town Manager of the Town of Plaistow, New Hampshire and the New Hampshire Bureau of Court Facilities that it had voted unanimously to designate the building located at 14 Elm Street, Plaistow, New Hampshire currently housing the 10th Circuit - District Division - Plaistow as “not accredited” effective May 1, 2020. See RSA 490:5-d, 5-e. This designation resulted from a comprehensive review of the safety of the facility, including inspections by Commission members and review of its compliance with State and Federal safety and accessibility standards by the Governor’s Commission on Disability, the United States Marshal’s Service, and the Office of the New Hampshire State Fire Marshal. See RSA 490:5-c. The current lease agreement on that facility between the Town of Plaistow and the New Hampshire Department of Administrative Services expires June 30, 2020, and will not be renewed.

Pursuant to its constitutional authority and powers of general superintendence over the New Hampshire court system, see N.H. CONST. pt. II, art. 73-a, the authority granted in RSA 490:4 to supervise trial courts, see also RSA 490-F:2, and in order to protect the rights, safety, and security of the public and Judicial Branch employees who must conduct business at the 10th Circuit – District Division - Plaistow, the Supreme Court enters the following orders:

1. All Judicial Branch activity at the 10th Circuit – District Division – Plaistow facility will cease on or before June 30, 2020.
2. All District Division cases whose jurisdiction emanates from the towns of Atkinson, Hampstead, and Plaistow currently heard at the 10th Circuit - District Division – Plaistow, and all cases filed on or after June 16, 2020 arising from those towns, will be administered and adjudicated at the 10th Circuit – Family Division – Salem effective June 16, 2020.
3. All District Division cases whose jurisdiction emanates from the towns of Atkinson, Hampstead, and Plaistow currently heard at the 10th Circuit - District Division – Plaistow, and all cases filed on or after June 16, 2020 arising from those towns, will be administered and adjudicated at the 10th Circuit – District Division – Salem effective June 16, 2020.

All other existing cases shall continue to be administered and adjudicated at the Circuit Court location in which they are currently pending. Nothing in this order prohibits any party from requesting a case transfer as the interests of justice or efficiency may so require.

Issued: May 12, 2020
ATTEST: Timothy A. Gudas, Clerk of Court Supreme Court of New Hampshire

In accordance with Rule 42(l)(a), the Supreme Court reappoints Attorney Rose M. Culver, Mr. Thomas E. Blonski, and Dr. Susan Fischer Davis to the Committee on Character and Fitness, to serve three-year terms commencing June 1, 2020, and expiring on May 31, 2023.

Issued: May 26, 2020
ATTEST: Timothy A. Gudas, Clerk Supreme Court of New Hampshire

In accordance with Rule 53.5(A)(3), the Supreme Court of New Hampshire appoints Superior Court Associate Justice Martin Hoagberg to the Minimum Continuing Legal Education Board, to replace Superior Court Associate Justice Richard B. McNamara, who is retiring. Justice Hoagberg is appointed to serve the remainder of Justice McNamara’s term, commencing July 1, 2020, and expiring July 31, 2022.

Issued: May 26, 2020
ATTEST: Timothy A. Gudas, Clerk Supreme Court of New Hampshire

Pursuant to its constitutional authority and powers of general superintendence over the New Hampshire Bar Association and its members, and upon the recommendation of the New Hampshire Board of Bar Examiners and leadership of the New Hampshire Bar Association in light of the ongoing COVID-19 pandemic, the Supreme Court issues the following order concerning the practical skills course requirement set forth in Supreme Court Rule 42, XIII.

The New Hampshire Bar Association has postponed the June 2020 practical skills course in order to mitigate the risks associated with COVID-19.

For new admits who are currently subject to Supreme Court Rule 42, XIII and who have not yet completed the practical skills course, the time for compliance with that course requirement is extended to three years from the date of admission. This extension does not apply to: (1) any person whose time for compliance with Supreme Court Rule 42, XIII has expired, or (2) any person not yet admitted to the bar.

Issued: May 29, 2020
ATTEST: Timothy A. Gudas, Clerk Supreme Court of New Hampshire

Pursuant to Supreme Court Rule 51(d)(1) (F), the court appoints Loretta S. Platt to serve as the Secretary to the Advisory Committee on Rules. Loretta S. Platt is appointed to replace David Pock, who has resigned.

Issued: June 1, 2020
ATTEST: Timothy A. Gudas, Clerk Supreme Court of New Hampshire

ADM-2014-0075, In the Matter of Kristin M. Hopkins, Esquire
On October 28, 2014, Attorney Kristen M. Hopkins was suspended from the practice of law in New Hampshire for nonpayment of her 2013/2014 bar dues.

On May 1, 2020, the court granted Attorney Hopkins’ petition for reinstatement on the condition that she pay back dues within 30 days. On May 29, 2020, the New Hampshire Bar Association notified the court that Attorney Hopkins has paid all bar dues owed since the time of her suspension.

Attorney Hopkins is reinstated to the practice of law in New Hampshire, effective immediately.

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

ISSUED: June 2, 2020
ATTEST: Timothy A. Gudas, Clerk

In accordance with RSA 490:5-a and 5-b, the supreme court hereby reappoints the following persons to the Court Accreditation Commission:
Honorable James P. Basset, Associate Justice, to serve as the representative of the supreme court, for a three-year term that will expire on June 8, 2023;
Honorable Tina L. Nadeau, Chief Justice, to serve as the representative of the superior court, for a three-year term that will expire on June 8, 2023;
Honorable David D. King, Administrative Judge, to serve as the representative of the circuit court, for a three-year term that will expire on June 8, 2023; and
Attorney Samantha D. Elliott, a lawyer of experience in the trial of cases, for a three-year term that will expire on June 8, 2023.

The court designates Justice Bassett to continue to serve as chairperson of the commission.

Issued: June 4, 2020
ATTEST: Timothy A. Gudas, Clerk Court Supreme Court of New Hampshire

A ruling by a Merrimack County Superior Court judge on disclosure of the Howie Leung report has not yet been issued. Leung is facing felony charges that he sexually assaulted a former Concord student at summer program in Massachusetts.

(Material from the Associated Press was used in this report.)

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Plaintiff sued her former employer alleging age, sex, disability, and intersectional discrimination under the Age Discrimination in Employment Act of 1967 (“ADEA”), Title VII of the Civil Rights Act of 1964 (“Title VII”), and the Americans with Disabilities Act of 1990 (“ADA”). Defendant moved to dismiss the claims under Federal Rule of Civil Procedure 12(b)(6). The court found that plaintiff’s ADEA, Title VII, and ADA claims were deficient because the plaintiff failed to plead any facts supporting the conclusion that she had been subjected to an adverse employment action. The court further found that the Title VII failed to allege any facts supporting an adverse employment action motivated by the plaintiff’s sex. Finally, the court found that plaintiff had failed to identify the statute under which she sought to bring her intersectional discrimination claim.

Accordingly, defendant’s motion to dismiss was granted as to all claims. 16 pages. Judge Paul Barbadoro.

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May 2020

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Employment Discrimination

05/12/20 Giordano v. Public Service Company of New Hampshire d/b/a Eversource Energy

Case No. 19-cv-1231-PB, Opinion No. 2020 NH 078

In this wrongful death case, the court dismissed claims against a Maryland corporation for lack of personal jurisdiction. A New Hampshire manufacturer of aluminum extrusions hired the decedent, a truck driver, to transport a load of extrusions to a customer. During the unloading process at the customer’s Maryland facility, the load crushed and killed the decedent. His widow filed suit against the manufacturer and later added claims against the customer. The court granted the customer’s motion to dismiss for lack of personal jurisdiction because the plaintiff failed to carry her burden on the redolent proof of the specific personal jurisdiction inquiry. Her original and core allegation against the customer depended entirely on conduct in Maryland. Her alternative theories of liability, introduced only after the customer’s motion to dismiss, implicated some New Hampshire-directed communications, but the plaintiff still failed to establish relatedness. 17 pages. Judge Joseph N. Laplante.

Section 1983

05/12/20 Tortorello v. Laconia Police Department, et al.

Case No. 19-cv-250-PB, Opinion No. 2020 NH 077

Plaintiff alleged that his apartment was illegally raided by the Laconia Police Department (“LPD”) during a drug sweep throughout the city. LPD published a press release afterward asking for the public’s help locating those for whom they still had active, drug-related arrest warrants. Plaintiff’s name erroneously appeared on this list, and he sued multiple New Hampshire-based media companies that republished the press release, alleging various state-law tort claims. He sued the City of Laconia, the LPD, and the officer who issued the press release, alleging a violation of his Fourth Amendment right against improper search and seizure, pursuant to 42 U.S.C. § 1983. He also sued the city, the LPD, and the officer for defamation. The city moved to dismiss all the claims against it under Federal Rule of Civil Procedure 12(b)(6). The court found that plaintiff failed to assert a proper Section 1983 claim, as plaintiff impermissibly relied on a theory of vicarious liability against the city for the actions of its officers. Because the court dismissed with prejudice the only claim over which it had original jurisdiction, the court chose not to exercise supplemental jurisdiction over the remaining state-law claims, dismissing them without prejudice to plaintiff’s right to file in state court. 10 pages. Judge Paul Barbadoro.

Classifieds

Classifieds continued on page 35

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DRM is seeking an experienced patent attorney having a portable book of business and a strong background in chemical/biotechnological art to join our Intellectual Property Group in either our Burlington, Vermont, or our Lebanon, New Hampshire Office. The ideal candidate will have the following: Six or more years of patent experience, including preparing and prosecuting patent applications in chemical/biotechnological art or electrical arts, or a former U.S. patent examiner in a chemical/biotechnological art or an electrical art, at least one year of patent experience outside of the U.S. Patent and Trademark Office. The ideal candidate will have a book of business, and be eager to develop new client relationships, and become part of a team of attorneys committed to delivering top-quality service to growing and successful businesses.

This is a unique opportunity to work with a team of sophisticated intellectual property professionals. Burlington is consistently ranked among the best places to live in the U.S. by numerous publications and polls. It provides a vibrant cultural environment, a thriving downtown, welcoming community, easy access to mountains and lakes, and short commutes. Lebanon is located in the Upper Valley, a region along the New Hampshire-Vermont border that includes Dartmouth College, the Dartmouth-Hitchcock Medical Center, and over 120 tech companies, including biotech, medical tech, and software companies, among others, and provides ready access to the college town of Hanover and a wide variety of outdoor activities.

DRM serves a wide range of local, regional, national, and international clients. Our intellectual property lawyers have worked at some of the largest firms, IP boutiques, and corporations in the U.S., and are now at DRM because they have found they can continue to have sophisticated practices while enjoying the many benefits of living in the Vermont-New Hampshire region.

DRM is committed to investing in our attorneys’ professional growth and development. We offer excellent mentorship and training, as well as leading technology, competitive salary, and a comprehensive benefits package, including industry-leading paid parental leave and two generous retirement plans.

**Classifieds**

**THE UNIVERSITY OF NEW HAMPSHIRE FRANKLIN PIERCE SCHOOL OF LAW (UNH LAW), a national leader in practical legal education with a commitment to inclusion, diversity, and quality engagement for all, seeks to hire an Assistant or Associate Clinical Professor to serve as Director Legal Residency Program to begin August 2020. For a complete position description, please visit: [http://jobs.unh.edu/postings/36326]. UNH is an EEO employer.**

**SEEKING LEGAL ASSISTANT/ENTRY-LEVEL PARALEGAL with experience in family law office. Candidate willing to handle diverse range of tasks and work as a team player. Salary competitive with small and medium size firms in NH. Submit resume and cover letter to kim@weibrechtlaw.com.**

**PART TIME BOOKKEEPER/ADMINISTRATIVE ASSISTANT (20-25 hrs/week) wanted for small estate planning and probate law firm in Bedford. Responsibilities include bookkeeping, billing, purchasing, interacting with vendors and assistance with office tasks. Knowledge of Quickbooks is necessary. Timeis is a plus. Applicants should be self-motivated and willing to assume responsibility. Competitive salary and benefits. Please send cover letter, resume and references to psevenk@bordonpa.com.**

**LITIGATION ATTORNEY – Hage Hodes PA is expanding and is seeking a full-time litigation attorney to add to our litigation practice group. Applicants must be admitted to the New Hampshire Bar or eligible for immediate admission. The ideal candidate will have strong written and oral advocacy skills. We offer a competitive salary and benefits package commensurate with experience. Please submit cover letter, writing sample, and resume by e-mail to HR@hagehodes.com. All inquiries kept confidential.**

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Do you like working with entrepreneurs? Are you interested in joining a collaborative and innovative legal practice? Cook, Little, Rosenblatt & Manson, P.L.C. is a highly-regarded boutique business law firm with an opening in its corporate practice group. Our ideal candidate has strong academic credentials and 2-4 years of sophisticated corporate experience. We offer competitive compensation, as well as a platform for you to develop client relationships, become involved with local organizations, work with high-growth businesses, and build your practice in a supportive and collegial environment.

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**North Conway NEW HAMPSHIRE**

Cooper Cargill Chant, northern NH’s largest law firm, serving clients in New Hampshire and Maine, is looking for an attorney to join our vibrant firm. Our firm distinguishes itself by providing sophisticated counsel to a growing local, regional, and national client base, while balancing lifestyle opportunities afforded by our location in the White Mountains. Our lawyers are active members of the communities in which we live, serving on numerous state and local Bar Associations, municipal, and non-profit Boards. We offer a competitive compensation and benefits package.

**CORPORATE ATTORNEY:**

Cooper Cargill Chant seeks an associate attorney with 1-3 years of corporate and transactional experience to provide counsel to closely held businesses, lenders, and the resort community. The ideal candidate will have strong credentials and an ability to work effectively with clients, colleagues, and the community.

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