Disability Rights Center-NH is Fighting for the Right to Vote

By Kathie Ragsdale

Cheryl Killam was excited as she drove to the polls in the spring of 1984, in part because her name was on the ballot as a proposed delegate to the upcoming state Constitutional Convention.

But when she arrived at her polling place in Hampstead, New Hampshire, the polio survivor found that snow covered the handicapped ramp she would need to navigate her wheelchair into the building. She struggled to maneuver to the top of the ramp, only to find that the door was locked. It took a stranger’s help to get her inside.

The experience spurred Killam to dedicate much of her life to advocating for disabled people and their right to vote. She spent six years, 2002 through 2008, as the accessibility specialist for the New Hampshire Governor’s Commission on Disability. She criss-crossed the state, assessing polling places and courthouses for their accessibility.

The effort to ensure that disabled individuals have equal opportunities to vote continues today, as organizations like the New Hampshire Disability Rights Center and others work with the Secretary of State’s office to effect change. Despite continuing challenges, advocates agree that progress has been made.

Then came the Americans with Disabilities Act, which became law in 1990, prohibiting discrimination against individuals with disabilities in all areas of public life. This was followed by the Help America Vote Act, signed into law in 2002, which includes provisions to make polling places accessible to those with disabilities, and requiring that at least one voting system at each polling location be available to those with disabilities.

Because of such measures, “in terms of wheelchair accessibility, they pretty much have nailed it,” Killam says of polling places.

VOTE continued on page 15

PRACTORIAN PROFILE

A Family Law Attorney with a Range of Passions

By Kathie Ragsdale

Marianne L. Rousseau is likely the only family law practitioner in New Hampshire who also breeds dogs, competes in equestrian dressage, plays classical guitar and takes voice lessons.

She is equally at ease in a courtroom, in a saddle, or parading one of her Labrador retrievers before the judges at Westminster.

The senior partner and managing director of Pembroke-based Rousseau Law & Mediation, PLLC, Rousseau grew up in Lowell, Massachusetts with an early love of both music and animals, including the dogs and cats she had as childhood pets.

She earned a bachelor of music from the University of Lowell and a masters in music, magna cum laude, from the Peabody Conservatory of Music of Johns Hopkins University in Baltimore, before beginning a career as a practitioner in New Hampshire.

ROUSSEAU continued on page 17

Pilot Jury Trial Planned for August

By Scott Merrill

The New Hampshire Superior Court will hold a pilot jury trial in Cheshire County next month and given the court’s concern for the safety of everyone involved it could be the cleanest courthouse in the state.

The New Hampshire Judicial Branch remained open during the declared Emergency Order that ran from March 13 until June 15 but saw significant restrictions in foot traffic in public courthouses, and the Superior Court put on hold nearly 1,000 jury trials. With new guidelines from the CDC and low infection rates in northern counties, the court began making plans to gradually resume jury trials, both grand and petit, starting in Cheshire County.

At the start of the pandemic, according to the Chief Justice of the Superior Court Tina Nadeau, the court was concerned with striking a balance between maintaining the right to a speedy jury trial and the safety of those entering the court rooms.

“One idea was to have a virtual jury trial,” Nadeau said, adding that constitutional concerns and the potential for technical glitches became apparent very quickly. “Some of the concerns about this were ‘how does a virtual trial effect the right to cross examine, and can the jury accurately examine the behavior of the witness while appearing virtually?’”

Potential technical problems included what to do in the case of a lost call and the difficulty, or impossibility, of identifying who was in the room with the juror.

“We decided to opt for a safe return to jury trials by following the CDC recommendations as well as those of the state’s chief medical officer,” Nadeau said. “We want to start with one trial and we’re doing jury selection virtually so that when we actually come in they will come in one member at a time for individual voir dire. This will cut down on a massive number of people being in the courtroom at one time.”

PILOT TRIAL continued on page 30

Inside

Opinions......... 4-6 Practice Area Section........... 24-29
NHBA News......... 17-19  NH Court News........... 34-36
Member Benefits... 20-21 Classifieds........... 37-39
NHBA CLE......... 22-23 PAGES 2-5

Periodical Postage paid at Concord, NH 03301

THE DOCKET

Interview with the new President. Dan Will, the first public sector president at the Bar Association, discusses his goals and his passions. PAGE 2

Opinions. Wallner vs. Sununu, Bankrupt Immigration Policies, Calls for Racial Justice and the Bar’s call for justice. PAGES 4-6

The Ethics Committee. Stephanie K. Burnham provides a detailed account of the committee’s important work. PAGE 7

Cybersecurity. Cameron Schilling provides some important guidance for those planning on returning to work. PAGE 9

Remembering Skip. A series of inspiring anecdotes from those who knew Ernest (Skip) T. Smith. PAGES 12-13

The ADA turns 30. Progress has been made for those with disabilities and vigilance and advocacy remain strong. PAGE 15

Federal Practice, Bankruptcy Law and International Law

The Small Business Reorganization Act; Subchapter V helping small businesses; the International Criminal Court in Afghanistan, and more. PAGES 24-29

Hanging up the Robe. Merrimack County Superior Court Judge Richard McNamara retired on July 4th. PAGE 32
Dan Will: The New Hampshire Bar Association’s First Public Sector President

Dan Will became New Hampshire’s first Solicitor General in August of 2018. He became president of the New Hampshire Bar Association in June.

Before entering the public sector, Will was an attorney for Devine Millimet where he practiced in the areas of business and commercial litigation and also served on the New Hampshire Judicial Council.

Will recently answered questions from the New Hampshire Bar News to share more about his background with members of the Bar.

What has your path towards the law and your current position been?

After law school at Boston College, I clerked for two years – for a federal district judge and then for Judge Stahl on the First Circuit. At the time, I was trying to decide whether to work in Boston or come to New Hampshire, and I wound up at Judge Stahl’s old firm, Devine Millimet, for about 21 years. I began to want to include public service into my career, and the opportunity to be New Hampshire’s first Solicitor General lured me over to the Attorney General’s office in August 2018.

What is the most rewarding and the most challenging part of your job?

I’m the first person to hold the position of Solicitor General, so that’s been the most challenging part of your job?

It’s hardly an insight to say these are troubled times. The pandemic has spread so much pain and suffering, both personal and economic. It has become clear that those that are most vulnerable in our community are experiencing the economic brunt of the crisis. Through this hot mess, one thing is becoming a reality – a tremendous challenge every day.

Who inspires you personally?

My own family inspires me more than anyone else. My wife and two adult daughters – they work hard and set high standards for themselves and they are also compassionate, empathetic people. They plow through setbacks and take care of each other. In our family, we don’t let each other off the hook, and over the years, their approach to life has inspired me to keep working at it as hard as I can, and all three are sources of deep inspiration.

Beyond my family, I don’t necessarily have anyone specific in mind, but inspiring people seem to surround me. As you get to know people you encounter in your day-to-day life, you realize they’ve overcome some significant adversity, give support and service to others, deal with career setbacks, disabled or dying family members, support communities, all in a graceful way that does not attract attention.

WILL continued on page 19

Just Check the Box

By George Moore

Executive Director

It’s hardly an insight to say these are troubled times. The pandemic has spread so much pain and suffering, both personal and economic. It has become clear that those that are most vulnerable in our community are experiencing the economic brunt of the crisis. Through this hot mess, one thing is sure to become a reality – a tremendous surge in our fellow citizens desperately needing legal assistance with no meaningful ability to pay.

Remember, many of these potential clients would not have qualified for help from New Hampshire Legal Assistance or LARC or New Hampshire Pro Bono because they shaping the position. And, it has been really rewarding to be doing work I haven’t done before. For example, prior to coming over to the Attorney General’s office, I had no experience with criminal law. Also, this office has a strong collaborative culture which has made it really rewarding to work with colleagues on different legal issues and strategies. I’ve enjoyed arguing issues in court, but also working with people in the office to solve the myriad of issues that come up regularly. The public service and collaboration with dedicated colleagues are definitely the most rewarding parts.

Probably the biggest challenge is that the resources are scarce and the workload is heavy. Prior to arriving here, I never understood the breadth of the scope of the Attorney General’s responsibilities. People here are extremely dedicated and hardworking, and there is a constant load of complex cases and problems that we handle. Things like last year’s homicide numbers or this year’s COVID-19 really tax the office, but people rise to the occasion and continue to produce world-class work.

I get a lot of pride out of being a small part of what this office accomplishes, but it is a challenge every day.

By Daniel E. Will

Solicitor General

NH Attorney General’s Office, Concord NH

willing continued on page 19

President’s Perspective

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Bar Governance

...continued on page 18

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A publication of the New Hampshire Bar Association, 2 Pillsbury Street, Suite 300, Concord, NH 03301

Vol. 112, No. 7
July 2020

ISSN 1051-4033

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The past several months have often presented a mixture of the strange and the familiar. This was the case June 19th when the New Hampshire Bar Association held its Annual Business Meeting remotely.

The meeting, which usually happens at the Saturday night banquet on the last night of the Annual Meeting weekend, was held at the Bar center this year, with President Edward D. Philpot, Jr. presiding from his office.

Family, friends, and colleagues are typically in attendance to honor the outgoing President and the President Elect, but due to the continued social distancing guidelines this year’s meeting and the passing of the gavel to the Bar’s new president, Dan Will, was held in the conference room at the Bar Center.

“It’s a time to really get to enjoy the company of our colleagues and their families,” Philpot said. “We missed that this year, and I’m sorry that I couldn’t celebrate Dan Will and his assumption of the role of President. In addition to being a great lawyer and board member, Dan is a terrific person with a great sense of humor and a true commitment to the profession.”

“The virtual meeting worked, but it was no substitute for the real thing. Dan, Richard and Sandra are a solid team and I look forward to great things from our organization, and to play whatever small part I can. So, while I’m sad that we could not spend time together in person this year, I look forward to twice as much fun in 2021!”

Members of the Board of Governors and the New Hampshire Bar Association applaud from remote locations during the passing of the gavel from Edward D. Philpot.

Above: President Edward D. Philpot passing the gavel “on screen” to incoming president Dan Will (below).

Dan Will discussing some of the goals he has for his Presidency.

NHBA President Dan Will and Executive Director George Moore.

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Standing Ruling Makes No Sense

By Chuck Douglas and Michael Lewis

The litigation pending before the Hillsborough County Superior Court, captioned Wallner v. Sununu, is a case study in how far the influence of judicial avoidism will go to frustrate the will of the people. The case is about the Governor’s decision to bypass the legislature’s Fiscal Committee with regard to how the state will spend federal stimulus funds conferred by Congress in response to COVID-19.

The case is now before Superior Court Judge David Anderson. Judge Anderson had two chances to recognize the standing of the elected Speaker of the New Hampshire House of Representatives. Judge Anderson failed to do so on both occasions.

Under Judge Anderson’s rulings, Stephen Shurtleff did not attain the status of “taxpayer” for the purpose of appearing in our state courts. We are astounded by this decision to deny the Speaker standing as a “taxpayer” and we write because we are concerned that others might apply his erroneous analysis and close our state courts to thousands of other “taxpayers” who seek to challenge the legality of government conduct under Part I, Article 8, as amended by an 83% popular vote.

As you assess what we write here, it is worth noting that we, the two writers of this essay, disagree about the legality of the Governor’s actions, quite publicly. One of us thinks the Governor has acted legally, and his thinking has so stated in newspapers throughout the state. The other has stated that the Governor’s conduct is illegal and unconstitutional and has published a piece in one newspaper to that effect.

Despite this disagreement, however, we are writing because both of us have thought about the implications for Part I, Article 8, as amended through the ratification process in November 2018, and are concerned enough about Judge Anderson’s decision to share why we believe that his standing decisions were wrong.

As amended, Part I, Article 8 (now available on the Secretary of State’s website), provides in relevant part: “All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. The public also has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State, shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer…”

Speaker Shurtleff, a longtime voter and taxpayer, is an “individual taxpayer eligible to vote” and so has “standing to petition the Superior Court” to challenge state spending decisions as he did in the case.

Judge Anderson engaged in a construction and application of Part I, Article 8, that reads at least one sentence out of it all together (“The public also has a right to an orderly, lawful, and accountable government”) and rendered conclusions that defy both the plain language of Part I, Article 8’s expansive standing provisions and its history. Indeed, Judge Anderson concluded that amendments to Part I, Article 8, passed in 2018 and designed to reverse the New Hampshire Supreme Court’s decision in Duncan v. State, did not reverse the holding of that decision but, rather, left the decision as the law of the land in New Hampshire, unscathed. No legislator involved in the design and proposal of the constitutional amendment would share that view.

RULING continued on page 8

The Use of Social Media in Turbulent Times

In my first column for the Bench Notes series, I wrote about the temptation of judges to retreat into social isolation to avoid conflicts of interest. I firmly believe that it is essential for judges to remain engaged in the community to the maximum extent consistent with our obligations under the Code of Judicial Conduct. But, I also recognize that doing so presents challenges. One such challenge is social media, especially when the feeds are inundated with emotional conversations around contentious but important issues such like racial justice, the government’s response to COVID-19, and the November elections.

This difficulty also extends to law clerks whose own canons of conduct require them to act in ways that promote impartiality and integrity of the judiciary. It becomes a particular challenge when some view online silence as indifference to the important and emotional causes that will shape the future of our country.

The simplest solution for judges and law clerks to avoid conflicts of interest is just to abstain from the use of social media altogether. In my mind, that is not a satisfying answer for a few reasons. First, given how ubiquitous Facebook, Twitter, Instagram, and the other platforms have become in contemporary life, it is hard – and perhaps unfair – to avoid them. Second, social media provides a valuable space to connect with family and friends, and to learn about the currents affecting the wider world. More importantly, social media plays such an outsized role in the lives of the victims, defendants, witnesses, and litigants who appear before us, a judge would be ill-equipped to understand their perspective if the judge was not conversant in this online world.

However, with engagement comes risk. Canon 3(B)(9) prohibits judges from making “any public comment that might reasonably be expected to affect [the] outcome or impair [the] fairness” of any “pending” or “impending” cases. Similarly, Canon 3(B)(10) states, “with respect to pending or disposed cases, controversies or issues that are likely to come before the court,” a judge is not allowed to “make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.” More generally, Canon 2(A) provides: “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

The bread and butter of Facebook and other platforms is to “like,” “share,” “follow,” and “friend” various people and posts. There is little risk that “liking” a post about a fun, new vacation destination will result in a conflict of interest. It is quite another thing to post an emoji expressing support of or opposition to the Black Lives Matter movement, the effort to defund the police, or the government’s response to the COVID-19 pandemic. The important policy debates that underlie these social move-
Opinions

Immigration During Covid-19: Give Me Your Tired, Your Poor – Wait a Minute, Not So Fast!

By George Bruno

United States immigration is bankrupt. Literally. U.S. Citizenship and Immigration Services (USCIS), our country’s agency charged with administering naturalization, processing visas, and granting green cards, is running out of money and soon will be insolvent. Often referred to as a broken sys-
tem, U.S. immigration is funded by fees gen-
erated by petitioners and applicants. Since immigration has been largely halted since March when CoViD-19 began to take hold, the agency, now slowly reopening, is seeking a $1.2 billion emergency appropriation from Congress. If this fails, it must begin laying off as many as 15,000 employees by end of summer, according to Department of Home-
land (DHS) officials. Curiously, if given the funds, DHS is proposing to pay it back to the U.S. treasury. Reading between the lines, this means that families, employers, students and other applicants can expect to pay higher fil-
ing fees on top of existing hefty fees, some running into thousands of dollars for services which have seriously deteriorated in recent years.

Speaking figuratively, U.S. immigration has been trending bankrupt through a series of misguided policies, at least since 2017, and perhaps earlier. Given the ex-
tended attention over building “the wall” on our southern border (because Mexico is not sending “its best”), the Muslim travel ban, the exhibition of immigrant chil-
dren in cages, the ongoing litigation to expel DACAs, US immigration policy seems to change weekly with one new regulation after another. This is ironic. From its beginning, the dedicated thrust of the Trump Admin-
istration has been to eliminate regulations in federal agencies across the board, reducing restrictions on air and water quality, work-
place safety, food production, business prac-
tices, and even ethics in government. Yet, in the world of immigration, the Administration is piling them on.

As I write this, it is hard to keep up with the changes. USCIS regulations have often been compared to the IRS in their complex-
ity and byzantine nature. What is becoming clear is that the President is using the corona-
virus’ threat to public health and security to accelerate his efforts to limit both legal and illegal immigration. It confirms the classic observation that elections have consequence-
s.

Let’s put a spotlight on just the month of June 2020, and some of the immigration initiatives that unfolded.

Work visas: going, going, gone

On June 22, under Proclamation 10014 of April 22, 2020, as amended, President Trump suspended processing of temporary work visas, including H1B (professionals with de-
grees), L (intra-company transfers of overseas employees) and J (e.g., au pairs, interns, camp counselors, vacation work-study) and others until the end of the year. Also halted, were the processing of H2B seasonal worker visas, excluding agricultural (loggers, apple pickers, landscapers, utility maintenance, etc). And while this latest order is described as temporary, much like the 2018 “tempo-
rary” Muslim travel ban, these executive or-
ders have a way of continuing without end. The impact of revoked or delayed job offers will be felt throughout New Hampshire and around the country in industry, technology, tourism, health care and other sectors.

With 30 million unemployed, as the economy recovers, the rationale is that the jobs should go to Americans first. There is a certain logic to that, and it is a good sound bite. The countervailing argument is that (a) H1B professionals are capped at a scant 60,000 annually after a lottery sorts through over 200,000 applications, L executive and skilled intracompany transfers a small frac-
tion of that, (b) many Americans do not qual-
ify for the available jobs, and (c) if the busi-
nesses cannot find the help they need in our domestic market, they will simply reduce in-
novation in science and technology at home and ship the work abroad, something not so farfetched as remote employment spreads.

The closer reality is that COVID-19 has become a convenient cover, as part of the President’s re-election strategy, to reduce immigration in all of its forms, including for families, workers, students, investors, refu-
gees and more.

IMMIGRATION continued on page 18

The Bar is Taking Action on Diversity Issues

To the Editors,

I am writing with respect to the recent open letter concerning recent events involving racial injustice. The New Hamp-
shire Bar Association reaffirmed our commit-
tment to equal access to justice for all our citizens, and to work towards that goal in our everyday practice.

Attorney Sullivan goes on to lament that the Association did not act, and condemn several of our members who had expressed their view, through social media, that the protestors should be swept from the streets. To that, I say two things. First, we are a unified Bar, and under the Chapman decision, must restrict our public comments to matters directly concerning the adminis-
tration of justice, not contentious political issues. Second, the members in question were simply exercising their 1st Amend-
ment options. Like it or not, they still have that right.

A final point, and a positive one brought up by Attorney Sullivan, was that the Bar should do more than write letters and take action. In fact. the NHBA is doing just that. At the June Board of Governors meeting, the Board took the initial steps to establish a diversity initiative, to explore how we can improve our sensitivity to diverse issues in our work and provide better outreach to our own diverse members. So – we agree, as At-
torney Sullivan says, “let’s not just talk, lets act.”

George Moore, NHBA Executive Director

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By Kathleen Sullivan

Thank you.

Kathleen N. Sullivan

The letter received from longtime member and former Democratic Party Chair Kathleen Sullivan commented on the Bar’s recent open letter concerning recent events involving racial injustice. The New Hamp-
shire Bar Association reaffirmed our commit-
tment, as an organization, to equal access to justice for all our citizens, and to work towards that goal in our everyday practice.

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IMMIGRATION continued on page 18

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Letter to the Editor

To the Editors,

I am writing with respect to the recent commu-
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mediate past NHBA presidents regarding the killing of George Floyd, Juneteenth and the NHBA motto, “Equal Justice Un-
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The recent letter was welcome, but it could have gone further, especially given the comments on social media of a former member of the NHBA, and also to ask our diverse members. So – we agree, as At-
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George Moore, NHBA Executive Director

www.nhbar.org  JULY 15, 2020 5
“Equal Justice Under Law” - Message From The New Hampshire Bar Association

Concord, NH, June 19, 2020– The New Hampshire Bar Association’s motto proudly proclaims, “Equal Justice Under Law.” This phrase serves as a guiding principle, and fundamental tenet of our organization’s commitment to law, equality, and justice. The recent death of George Floyd in Minneapolis has triggered protests nationwide, including here in New Hampshire and brings forward the fact that for many this ideal rings hollow. We find this painful. Equally painful is the recognition that while George Floyd’s death serves as a catalyst for change, it is only one of a long list of injustices highlighting the ingrained racism that still exists in our society.

Today we celebrate Juneteenth, marking the end of slavery in the United States. On this important day, mindful of the recent, painful events we have witnessed and experienced, let us all rededicate ourselves to our mission, and redouble our efforts to live up to the ideal that our motto proclaims. Let us make it our mission to support the equal administration of justice for all as a state and nation. Let us support all citizens of our state, and our country, in the peaceful assertion of their constitutional and civil rights and let us work to extend that ideal to all communities.

The Bar Association recognizes that individual attorneys may have personal reactions regarding the recent events. That is their right, but their statements are not statements of the Bar Association. The Bar Association is the administration of justice. That means promoting a system of laws that guarantees equal rights for all citizens of all races. This is not a political view. It is the law. It is a bedrock principle of American justice. Our mission, motto, and purpose demand action, especially now, so that equal justice becomes a reality for all citizens.

The elimination of discrimination is of paramount importance. Our members and our courts work daily to improve and support the administration of justice through the guiding principles of trust, integrity, and service. Our association has, and will keep working, on improving access to justice in many ways, through our participation in the access to justice commission, the pro bono program, and our law related education services. Further, our association works to support our members in the practice of law, providing continuing legal education and other essential resources to improve the administration of justice in New Hampshire. In all our work, we will strive to keep the issues of inequality and injustice in our collective consciousness, and to respond to the needs of our community and our system of justice in so doing. We encourage our members to bring additional ideas to our attention by reaching out to the Board of Governors. Working together, we can do what needs to be done to ensure that “Equal Justice Under Law” is more than a motto.

Ed Philpot, Immediate Past President
Dan Will, President

New Hampshire Women’s Bar Association is Committed to Equity, Diversity and Inclusion

The New Hampshire Women’s Bar Association (NHWBA) condemns the recent murders of Breonna Taylor, Ahmed Arbery, George Floyd, Rayshard Brooks, and others at the hands of systemic racial violence, and hate have no place in our society, communities. Racism, intolerance, oppression, and others at the hands of systemic racial injustice that pervades our country and communities. Racism, intolerance, oppression, and hate have no place in our society, and we cannot stand silent. Gender equity does not exist in a vacuum – it goes hand in hand with racial equity, and we must stand as effective allies with the Black men, women, and children who are affected by such racism, intolerance, oppression, and hate. We must say their names as we renew our commitment to advocate for equity, diversity, and inclusion in the legal profession and beyond.

Their lives matter. As attorneys, we have certain privilege and obligation to speak up and fight for those who cannot, which includes those who are suffering at the hands of inequity and injustice. We must work together to become stronger allies for our colleagues, friends, and neighbors who are marginalized, and to use our voices to fight against racial inequity not only in the legal profession, but in all aspects of our society. We must call out racism for what it is when it happens, and continue to strive for human rights regardless of skin color and equal justice under the law.

We urge you to join us in a call to action for the New Hampshire legal community to use our resources, skills, and time to make change and to be anti-racist. For a list of resources to get you started please visit nhwba.org.

In solidarity,
The New Hampshire Women’s Bar Association Board of Directors

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Abramson, Brown & Dugan is the only law firm in New Hampshire with lawyers selected as New England Super Lawyers in the practice areas of Personal Injury – Medical Malpractice on behalf of injured plaintiffs. Attorneys Mark Abramson, Kevin Dugan, and Holly Haines were each recognized for their work in these practice areas and are the only three attorneys to have been recognized in New Hampshire.

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The Ethics Committee: Providing Guidance and Support for New Hampshire’s Legal Community

By Stephanie K. Burnham

The Ethics Committee provides guidance to members of the New Hampshire Bar and Judiciary on issues and questions related to the Rules of Professional Conduct (RPC). The Ethics Committee seeks a wide variety of members from different geographic areas, practice areas, firm sizes, as well as attorneys practicing in both the public and private sector. While the Ethics Committee’s primary focus is the members of the New Hampshire Bar and Judiciary, the Committee receives inquiries from all over the country, and even the world, on topics of current interest and previous publications. The Ethics Committee focuses on answering questions from members of the New Hampshire Bar through informal communications like the Helpline, by proposing amendments to the RPC, and by rendering Opinions, Practical Ethics Articles, and Ethics Corners on topics of interest relating to the RPC. Even though the Ethics Committee provides guidance, none of the publications are binding on the New Hampshire Bar. The Ethics Committee has a Helpline for quick reference by members of the Bar. The Ethics Committee Helpline telephone number is 603-715-3259, or you can email the Ethics Committee at reknippers@nhbar.org. Members of the Bar can also reach out to the Ethics Committee, through Robin, on topics that are not necessarily urgent but that the member of the Bar may be looking for more in-depth guidance on. The Ethics Committee will then review those inquiries at the next Committee meeting and determine how to best handle that inquiry.

Ethics Committee Opinions, Ethics Corners and Practical Ethics Articles

Ethics Committee Opinions are an in-depth analysis and application of the RPC to a specific situation or question. Most often, these Opinions are the result of an inquiry from a member of the Bar, but on occasion, the Committee may select a topic from current events or another organization publications, such as the ABA or other states’ Ethics Committees. Some recent Ethics Committee Opinions include: Disclosure of a Client’s Identity, Border Law and Confidential Client Information; Practical Considerations and Ethical Obligations, and Providing Legal Services in Exchange for a Client’s Goods and Services. Ethics Corners and Practical Ethics Articles are also designed to analyze and apply the RPC to issues of general interest to the Bar. These publications tend to be shorter and take a broader approach to a topic of interest. Most recently, the Ethics Committee published a series on Lawyers and Texting as well as Practical Tips: Ethics and Diligent Client Communications. You can find past Opinions, Ethics Corners and Practical Ethics Articles on the New Hampshire Bar Website at https://www.nhbar.org/resources/ethics/. The Ethics Committee is currently working with the New Hampshire Bar Association to update the website to provide not only the most recent topics, but historical publications as well.

Annual Ethics Committee Bar Supplement

Each year in September the Ethics Committee publishes their Annual Supplement. This is a collection of publications generated by the Ethics Committee, including past Opinions, Articles and Corners, all related to the same topic. This year the Annual Supplement will center around Social Media. The purpose of the Supplement is to gather relevant written materials together in one place for quick reference by members of the Bar.

Amendments to the Rules of Professional Conduct

The Ethics Committee works with the Board of Governors, Attorney Discipline Office, and the Supreme Court Advisory Committee on Rules to offer amendments to the Rules of Professional Conduct. Within the last couple of years, the Committee has advocated for a change to Rule 8.4(g) to ban harassment and discrimination based on the ABA Model Rule. The Committee has also undertaken to update Comments to the RPC when needed to reflect more current practice, publications, and Court decisions, that impact the RPC.

The Ethics Committee routinely meets the second Wednesday of every month from September to June from 2:30 pm to 4:30 pm. There are attendance requirements to ensure we have a Quorum to conduct business and to make sure that the Ethics Committee’s important works are completed. Members are asked to attend every meeting, if possible, and to collaborate with other members on writing projects to help get the Committee’s materials published. If you are interested in joining the Committee please contact Robin E. Knippers, we welcome all members of the New Hampshire Bar who are interested in lively discussions of Ethics topics.

Stephanie K. Burnham is the Chair of the Ethics Committee. She practices in Wills, Trusts & Estates, Probate and Bankruptcy law at Hage Hodes, PA in Manchester, NH.
constructed immunity protections for government officials and police that bear no resemblance whatsoever to the concept of governmental accountability. We both believe that Judge Anderson is an able judge, but his standing analysis is consistent with a negative view of popularly adopted constitutional protections that people have won for themselves at the ballot box, but that some judges dislike. As lawyers are absorbed in a tradition of lawyering, they are taught to view the law, conceptually, as a construct that is ever more obscure and inaccessible to a democratic society whose government is based on the consent of the governed, transparency, accessibility, and democracy.

Rather than a cribbed reading of the 2018 additions to our Bill of Rights, judges should see the fact that the entire debate centered upon Duncan v. State in 2018. Judicial ego should not block the courthouse door based upon the overwhelming bipartisan vote that put the question to the voters. Because Article 8 is in Part I of our State Constitution’s Bill of Rights, it should always be given a liberal reading consistent with the goal of access to our courts and not a narrow one.

Chuck Douglas is a former Superior Court judge and New Hampshire Supreme Court justice who is now a practicing attorney.

Michael Lewis is an attorney and an Adjunct Professor of Law at the University of New Hampshire School of Law.

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By Cameron G. Shilling

While our attention has been focused on coronavirus, cyber criminals have concentrated on infecting us with different viruses. As we rapidly transitioned to remote work, hackers capitalized on weaknesses like (a) insecure Wi-Fi, (b) employee personal computers used to access firm networks, (c) video conferencing that does not prevent downloading of malware, (d) infected external drives used to store firm information, and (e) compromised/weak passwords used to access email and other primary business systems.

As firms reopen, the return of employees presents not only a risk of transmission of Covid-19, but also a spread to firm networks of cyber viruses. Indeed, many firms are unaware that hackers have already infected their systems via remote access applications used during the pandemic and are waiting for a return to normal activity before paralyzing firms with ransomware or stealing funds.

To avoid becoming a victim, firms should take as much care when returning employees to their networks as they do to reconnect, to ensure that any malicious application is removed before it can spread.

1. Before returning employees to the network, conduct an ad hoc risk assessment with an experienced information security professional to identify risks to your firm.
2. Scan all laptops with advanced security software before permitting them to be reconnected to the network. Normal anti-virus/anti-malware is often insufficient to detect the malware, ransomware, and “zero-day” viruses created during the pandemic.
3. Scan the network with such advanced software before permitting employees to reconnect, to ensure that any malicious application is removed before it can spread.
4. Require employees to change their passwords before or at the time they reconnect and ensure that such passwords are truly complex.
5. Implement multi-factor authentication for all primary systems, both on premise and in the cloud.
6. Ensure all operating systems and applications are updated and patched.
7. Disable USB ports on firm computers or ensure that such applications are updated and patched.
8. If employees were permitted to access the network using personal computers, terminate such access, recover all firm information, and ensure that such information is permanently erased from those computers.

While we are all eager to return to more normal operations and financial stability, rushing to do so without proper preparation may result in a security incident that is as time-consuming, costly, and damaging as the coronavirus shut-down. Following the steps above will both diminish the risks that firms face when reopening, as well as create businesses with stronger information security controls for the long term.

Cam Shilling chairs 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.
By James J. Tenn, Jr.

Today, we live in a time where a global pandemic has caused untold suffering for many families in New Hampshire and across our nation. The health impacts caused by the COVID-19 virus are but one of the many challenges we confront. Tough economic times and job loss are at record high levels, and we see significant disruption in the marketplace. Those with the least to lose are often hit the hardest, and, in distress, they turn to the network of civil legal service providers for help.

At the request of the New Hampshire Supreme Court, the New Hampshire Bar Foundation has for decades served as the steward of the Interest on Lawyers Trust Accounts program—the IOLTA program. The New Hampshire Bar Foundation is a national leader in IOLTA administration, and actively engages with banks and credit unions to enhance IOLTA revenues by securing above-market interest rates paid on accounts. New Hampshire’s IOLTA program has been one of the largest and most consistent sources of non-government funding for civil legal services in our state, and that funding is made possible by the hard work and honest accounting of New Hampshire lawyers.

The New Hampshire Bar Foundation is pleased to report that funding for civil legal aid programs through the Interest on Lawyers Trust Accounts program is $950,000 for the fiscal year beginning June 1, 2020. This allocation is essential for the civil legal services providers now confronting an increased demand for services. The New Hampshire Bar Foundation’s board of directors approved this substantial award at its May 12, 2020 meeting, acting on a recommendation by the IOLTA Grants Committee, the five-member group that reviews all grant applications.

This year, as has been the case for at least the last decade, the bulk of IOLTA funds will go to four providers of non-criminal legal services for low-income people in New Hampshire. The four recipients are NH Legal Assistance, the New Hampshire Bar Association’s Pro Bono Lawyer Referral Service, Disability Rights Center, and Legal Advice & Referral Center. Additionally, funds also have been awarded to the New Hampshire Bar Association’s Modest Means Legal Services program, which matches low and moderate income people with lawyers charging discounted rates for legal services. Also, the New Hampshire Bar Foundation awarded funds for the Law School Loan Repayment Assistance program, a program which provides assistance for student loan reimbursement to New Hampshire lawyers working for civil legal aid programs funded by IOLTA.

The following are the specific grant amounts awarded for Fiscal Year 2020-2021:

- New Hampshire Legal Assistance: $561,750
- New Hampshire Pro Bono Lawyer Referral Service: $218,750
- Disability Rights Center-NH: $58,750
- Legal Advice and Referral Center: $43,750
- NHBA Modest Means Program: $7,000
- Law School Loan Repayment Assistance Program: $60,000

The New Hampshire Bar Foundation continues to be a careful steward of the IOLTA Program. Since its inception in 1982, when IOLTA was first established in New Hampshire, our state was second in the country to implement an IOLTA program, enabling interest earned on client money in small amounts or held for short periods to be directed for charitable purposes, such as funding for civil legal services and law-related education. This key funding mechanism is now used in all states and in Canada.

James J. Tenn, Jr., of Tenn and Tenn, PA, is a trial lawyer, whose practice includes personal injury, criminal defense matters, parenting disputes over children, and divorce in New Hampshire. Jim is a member of the Best Lawyers in America, one of the oldest and most respected peer-review publications. Jim is also included in Super Lawyers, a rating service of outstanding lawyers who have attained a high degree of peer recognition and professional achievement. Jim has been recognized by New Hampshire Magazine as a top lawyer and as an ideal attorney.

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With a donation of between $10 to $99 a month, you will receive a ceramic mug emblazoned with the NH Bar Foundation logo and a fun cartoon.

Or, with a donation of $100 or more a month, you will receive a stunning Simon Pearce coffee mug etched with the NH Bar Foundation logo.

Join the Mug Club today and take your morning cup of coffee from satisfying to fulfilling.
Francis Xavier “Fran” Quinlan

Francis Xavier “Fran” Quinlan, 91, died peacefully on June 12, 2020. He will be remembered for his warmth, his wonderful wit, and his zest for life.

A longtime resident of Jaffrey and Peterborough, NH, he was born on September 19, 1928 in Winchester, MA. He attended Reading High School in Massachusetts, and graduated from Harvard College in 1950. Fran served in the US Navy during the Korean War, on the USS Eugene A. Greene as a sonar operator. After the war, he attended Boston College Law School and graduated in 1959.

Fran was a self-made man who took great pride in his work. He worked as an attorney at Cheever and Sullivan in Wilton, NH before starting his own law firm in Jaffrey, NH in 1962 where he practiced until 2015. He also served on the Jaffrey Planning Board, Zoning Board and Village Improvement Society, and was a Director of the Monadnock Bank.

Fran enjoyed a long and happy marriage to Virginia Cary “Ginny” Quinlan, who passed away in 2013. They loved traveling to France, England and the Virgin Islands, and were loyal Red Sox, Bruins and Celtics fans. They were members of the Keene Country Club and the Thornhike Club where Fran went swimming into his 80s. He also enjoyed skiing, tennis and golf.

Fran was an enthusiastic watercolorist. He exhibited paintings at the Jaffrey Civic Center, but took greater pleasure in giving his paintings to friends. He spent many hours in his vegetable garden every summer, and took up beekeeping in recent years.

He is survived by his sons Timothy Quinlan of Falmouth, MA, and Mark Quinlan of Amherst, NH, and his grandson Sam Quinlan of Lake Tahoe, CA. His son Henry Quinlan of Jaffrey, NH, predeceased him. For the safety of family and friends, no services will be held. However, remembrances are welcomed at csnh.com/obituaries.

In lieu of flowers, memorial contributions may be made to the Southern Poverty Law Center, or the American Civil Liberties Union.

Yolande Noella Caron

Yolande Noella Caron, of Manchester, died January 1, 2020, one week after her 88th birthday, at The Manor at Birch Hill following a period of declining health. She was born in Manchester on December 24, 1931, the daughter of Dr. Ovide and Aloysia (Lemelin) Lamontagne. She was educated at St. Anthony’s Grammar School and what is now the Presentation of Mary Academy in Hudson, NH. She later enrolled at Rivier.

IN MEMORIAM continued on page 16

NOTES continued on page 16

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Remembering Ernest T. Smith III (1932-2020)

By Russell F. Hilliard

I have to start by explaining why I am writing about Ernest T. Smith III, known to all as Skip. But first, let me say I have approached this with some trepidation, as Skip was not a fan of the organized bar. He mercilessly chided me about my bar activities. I’m not sure he would be happy about this piece, but here we go.

In 1976, shortly after passing the bar exam, I was appointed to assist Skip in his defense of a homicide case (this was before the Public Defenders’ Office had a homicide unit). Working together, I spent most of my time during the last months of the year in the Upton office at 10 Centre Street in Concord. This eventually led to my joining the firm in 1980, and giving me the opportunity to view Skip in action until his retirement in 1994.

An incident in the mid 80s provides insight to why he loved practicing law, in a very personal way. I never knew him professionally, but, of course, I have heard that what her long lost uncle had done was devastating. He was playing along with the primrose path insisting how sure he or she was of the fact as Skip played with the witness, all the while letting the jury in on the joke. No one did it better.

Joe Steinfield

The Smiths lived on Ridge Avenue in Claremont, about a half mile from where I grew up. Skip’s mother, Jane, and my mother were very close friends. My grandfather used to say, “Jane Smith is tops in Claremont.” Her father, Mr. Brownlee, had been the president of Coca Cola in Atlanta (see below), and Mrs. Smith had a charming southern accent. Her husband, Ernest, for whom Skip was named, ran the Coca Cola Bottling Company in Claremont and was known to all as “Coca Cola Smith.”

Skip was six years older than me, so I didn’t know him well as a child. However, our families both had houses on Lake Sunapee, and I can remember being on the lake in our Chris Craft with Skip and his sister, Sandy.

I did get to know Skip in later years, partly because we were both Fellows of the American College of Trial Lawyers. I was always delighted by the fact that two Claremonters had somehow been reunited thanks to ACTL.

So, the news of his death strikes me in a very personal way. I never knew him professionally, but, of course, I have heard about his excellent trial skills.

Bruce Felmy

Skip was one of a kind, an incredible trial lawyer, but you could never quite figure exactly his plan until the second week of trial. Great sense of humor, but also very sincere and engaged with colleagues. I always thought of Skip as the great trial lawyer that escaped—to skiing, flying fishing and the world out West. It was always just a matter of knowing something before it was out and was still out there. I think the Upton sabbatical plan forgot to latch the corral gate with Skip.

Back in the early 90s, I tried a very, very long medical negligence trial involving an attempted suicide case and was lucky to get a several million dollar jury verdict. After seeing the verdict reported in the press, Skip wrote me a handwritten note which I never forgot.

Bruce, I saw the news article about your recent jury verdict in the attempted suicide case. Congratulations. I have to say I do not know any other trial attorneys who would have even taken that case … those about actually winning it.

Faint praise, but classic Skip.

John Broderick

Skip lived life fully and on his terms. He left the practice as you know at the very top of his game. Easy to say, but very hard to do. He was a great lawyer.

I met Callahan, John Malmberg, and I think it was Skip, several years ago with Judge Cann that I will never forget. Skip represented a former lawyer from a large New Hampshire firm who left the practice and moved to Florida and was never to be seen caddy on the senior PGA Tour. His sister and her two adult children lived in Concord. He was not close to them and they almost never saw him. But, a year or so before Skip took up his representation his client had paid a visit to his sister and stayed a week or so. He reconnected with his sister’s adult children - his niece and nephew- during his visit.

Skip’s client brought him a small suitcase of cash. It was never quite clear where it came from, but there was no question it was lawfully his. For what ever reason before he left, he asked his sister to hold onto the money. Maybe he had tax problems but it was never quite clear why he left it. But, he apparently told his sister that he would be back for it. When he asked for the money back a year later, his sister, learned about his death and his niece and nephew had spent it. They claimed he had given the money to them as a gift. Skip sued and a jury trial followed. Before Judge Cann in Merrimack County Superior Court. Mike Callahan had the niece, I had the nephew and John Malmberg had the sister. Doreen Connor, a newly admitted lawyer, was on the jury.

In any event, our clients claimed that Skip’s client gave them the cash as a gift. They had spent it. So, we were pursuing the gift defense knowing it wouldn’t like ly be a winner. Skip’s cross of the niece was devastating. He was playing along with the gift theory and agreeing with her that what her long lost uncle had done was extraordinary since she almost never saw him during her entire life. Skip finally asked her if she agreed it was the most she ever seen. She did. He then walked towards her to ask this question, “Did you ever thank him?” The case was over, although it limbered on a bit longer.

When the jury was out, Judge Cann advised counsel that the jury had a ques tion. The four lawyers went into chambers. He told the jury’s question sounding somber: “Are we limited in our award of damages to the Ad Dumann of the win?” Ouch!! That qualifies as the ugliest question a jury ever asked in any case I ever tried. Catching my breath, I said to Judge Cann: “That could go either way don’t you think?” We all laughed. Skip won.

Jack Middleton

My experiences with Skip were similar to those of other lawyers. We all found Skip a very bright and skilled trial lawyer with a great sense of humor, a real pleasure to litigate cases on the same side or different side. I remember a case in which he was representing the parents of a private school student suing the school. I represented the school. We took deposits on the campus, when we broke for lunch, I took him to the library, we reviewed the evidence and he quickly had everyone laughing. Not many lawyers could pull that off. That was Skip.

Jim Shirley (the “Carnac” story)

Skip represented a client that was ousted from the Claremont airport by the airport authority. Skip’s client was developing a stunt airplane. Skip claimed that Claremont’s breach of the agreement with his client ruined the startup business and caused millions in lost profits. K. William Clarison, the airport authority, was on the other side. The trial went on for weeks in Sullivan County Superior Court. Among the catalog of defenses raised by Clarison was the contention that Skip’s client had never been to the airport. After seeing the verdict reported in the press, Skip wrote me a handwritten note: “Is it a $10 check to the Claremont Airport Authority?” Skip blows open the envelope and a check flutters to floor. Skip picks it up and announces to the jury, “Why, yes it is.”

If I remember correctly, Skip got a $10 million verdict that was ultimately reduced by about half. Russ can straighten out the details on the amount. [RFH note: Pretty darn close. Settled just after Skip’s opening statement on retrial. See Great Lakes Aircraft Co. v. Claremont, 135 N.H. 270 (1992)].

Jim Wheat

The last thing I received from Skip was a fax depicting a smiley face bent over a guillotine. The caption read “Have a nice day!” I tacked it to my wall for years.

David Slawsky

When I think of Skip, I’m reminded of a Dave Nixon story. Dave was presi dent of the NH Bar Association. He saw Skip as a rising star and wanted to tell a letter appointing him chairman of a Bar committee—might have been the Committee on Cooperation with the Courts. As Dave recalled, Skip’s response was, “I’m not interested.”

George Moore

I first met Skip when I was sent to attend a deposition by the Senior Partner at Devon Millimet. I was working for, Matt Reynolds. Anyone who knew Skip continued on page 13
On Thursday May 28th I received an email from Barbara Brown, Skip’s former assistant, informing me of Skip’s passing. Although it had been thirty years since I last actively practiced law in New Hampshire, I kept in touch with Barbara. Sadly, I lost touch when he moved from Steamboat Springs to Austin, Texas, but I never forgot all that he taught me in the three years I practiced law at Upton, Sanders & Smith (now Upton & Hatfield).

I first met Ernest T. Smith III in my third year of law school and was immediately struck by the fact that there was a twinkle in his eyes that lead me to believe he loved mischief. During the interview with Skip, all we talked about was skiing, as I had taught it full time between college and law school. As I recall, there was no discussion of the law. So, it appears that Skip hired me solely on my skiing abilities and not based upon my academic abilities.

So, it was that in September of 1987, I started working as Skip’s associate. In just three short years, I gained a lifetime of experience the thanks to Skip. Not only did I gain so much experience, like briefing and arguing three cases in front of the New Hampshire Supreme Court, it was experience guided by one of the best lawyers the Granite State had ever produced.

In the Spring and Summer of 1989, Skip and I tried the case of Great Lakes Aircraft Company v. The City of Claremont in the Sullivan County Courthouse. The case took two months to try, so every day we traveled to Newport from Concord, and during those trips I learned a lot about Skip.

He was born in the South and moved to Claremont, New Hampshire when his dad purchased the Coca Cola Bottling plant. He attended the University of New Hampshire but left to join the Navy where he flew jets off an aircraft carrier, during the Korean War, he flew jets off an aircraft carrier, and when it was time to settle down, he married Sandra, the love of his life. He attended Middlebury College, where he excelled. Married with a child, he attended Boston College Law School and excelled there as well.

Skip was hired in 1962 at Upton, Sanders & Upton. There he started his long and storied legal career. He was a great trial lawyer, and he tried everything from murder cases to wrongful death cases. Trying a case was like a puzzle for Skip. He would leave no stone unturned. The law was not a grind to him, it was hard work, but it was always fun, or at least he made it seem that way. During the Great Lakes trial, we worked very hard and long hours, but we also laughed… a lot. The Great Lakes case, which I believe was the highest verdict of its time, 5.25 million dollars, was a suit brought by our client against the City of Claremont with regard to the plant being built in that area of the airport. That quadrant was not to be used for manufacturing. As a result of the FAA’s objection, the city shut down the construction and our client was basically bankrupted.

Skip thought of things others would never dare to try. Somehow he convinced the judge to allow us to make our opening statements at Parlin Field in Newport. Skip arranged to have our client fly the plane for the jury. The Great Lakes plane was an open cockpit and was used for stunts at air shows. The plan was to have the plane take off and immediately do a snap roll. As the plane lumbered down the runway, Skip turned to me and said, “If the plane crashes, grab the trial bags and head to the car.” The plane did not crash, and the rest is history.

The best way to describe the person that Skip Smith was is by repeating a story he told me about when he was on the wait list at Harvard Law School. He had gotten an appointment with the dean of the law school to discuss his situation. As he told it, he introduced himself, and stated to the dean that he was married with a child and needed to know if he was going to get into the law school. He described the meeting in detail. The dean sat at a large desk with a large window directly behind him as the sun shined in. Skip sat in a small chair in front of the desk, the dean slowly turned his chair to gaze out the window to ponder his decision as to whether Ernest T. Smith III was Harvard Law School material, and when he turned back around to tell Skip his decision, Skip was gone. Skip is gone again, but I will never forget him.

I read the New York Times cover to cover and completed the crossword puzzle. The record should further reflect that attorney “A” didn’t bother to personally question the witness.”

When I returned to the office, I saw Matt, who asked me how it had gone. Being a young lawyer, I told him that everything seemed to have gone as we anticipated, with the possible exception that for some unknown reason Skip Smith had indicated at the end of the deposition that one of the defense attorneys had spent the entire time reading the New York Times. I asked Matt why in God’s name would Skip do that? Matt laughed and said that was just Skip being Skip. He knew that lawyer “A’s” claim manager was getting copies of all the transcripts because it was such a big case, and he’d read what he got for his money that day.

My Travels with Skip
A remembrance by John K. McDonald, Esq.

Prior to joining SL&V, Bailey practiced at two Massachusetts regional law firms. Bailey received his law degree from Boston University School of Law, where he was a Notes Editor for the Journal of Science and Technology Law, and his undergraduate degree from the University of New Hampshire with high honors, where he was elected Phi Beta Kappa.

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Tel: (603) 627-3700 • Fax: (603) 641-8900 • www.slvlaw.com
2020 Attorney Honor Roll

The attorneys listed here each accepted one or more cases referred by the New Hampshire Pro Bono Referral Program during the months of March through June 2020. Gold stars indicate attorneys who accepted more than one Pro Bono case during the course of the month.

BELKNAP
John Garvey
Katherine Lacey
Allen Lucas

CARROLL
James LaMontagne

CHESHIRE
Brian Shaughnessy
David Ward

GRAFTON
Dawn DiManna
Robert Hunt
Jack Kauzers
Roderick MacLeish
Judith Roman
Charles Sheng
James Thaxton
Joshua Bearce

HILLSBOROUGH (N)
Stephen Bennett
Ann Butenhof
Thomas Elwood
Scott Harris
Katherine Hedges
Kathleen Hickey
Marilyn Mahoney
Joseph Prieto
Mark Rouvalis
Olivier Sakellarios
Kirk Simoneau

HILLSBOROUGH (S)
Michael Croteau
Patricia LaFrance
Penina McMahon
Emma Stilson

MERRIMACK
Leif Becker
Jonathan Cohen
Julie Connolly
Marilyn Mahoney
Alice Ronson

ROCKINGHAM
Leif Becker
Beth Fowler
Penina McMahon
Kimberly Shaughnessy
Justin Shepherd
Mark Sullivan

STRAFFORD
Cindy Bodendorf
Kenneth Murphy
Christopher Regan
Richard Samdperil
Thomas Torr

SULLIVAN
Roderick MacLeish
Kenneth Walton

It is one of the most beautiful compensations of this life that no man can sincerely try to help another without helping himself.”

– Ralph Waldo Emerson

Second Quarter 2020 Law Firm Honor Roll

Our thanks to the following law firms who made it possible for their attorneys to participate in Pro Bono. This list includes firms whose attorneys accepted cases from April through June 2020. This list does not include the hundreds of firms whose attorneys have ongoing cases.

BELKNAP
Wescott Law

GRAFTON
Bramen & Loftus
Caldwell Law
Deachman & Cowie

HILLSBOROUGH (N)
Brennan Lenehan
Butenhof & Bornster
Devine Millimet & Branch
Hage Hodes
Harvey, Mahoney & Bakis
McLane Middleton
Sakellarios & Associates
Shaughnessy Raiche

HILLSBOROUGH (S)
Black Vitelli Pennock
Morneau Law
Shepherd & Osboorne

MERRIMACK
Cohen & Winters
Davis | Hunt Law

ROCKINGHAM
Coughlin Rainboth Murphy & Lown
Samdperil & Welsh

STRAFFORD
Bamford Dedopoulos & Regan

SULLIVAN
Elliot Jasper Auten & Shklar

OUT-OF-STATE
Gregg Hunt Ahern & Embry

Free Legal Answers Volunteers for Second Quarter Report 2020

This list represents attorneys who have answered questions on Free Legal Answers in the months of April, May and June.

Catherine Baumann
Martha Davidson
Michael DiRusso
Michael Fisher
Randy Gordon
David Gottesman
Scott Harris
Barbara Heggie
Courtney Herz
Robert Howard
Abigail Kline
Andrea Labonte
Marcey LaFleur

David McGrath
Catherine McKay
Rory Parnell
Pamela Stephanie
Christopher Regan
Jonathan Ross
L. Phillips Runyon III
Jane Schirch
Catherine Shanelaris
Brian Shaughnessy
James Shepard
Kelsey Sullivan
Angelika Wilkerson
The ADA Turns 30
New Hampshire Disability Rights Center Still Fighting for Integration

By Mike Skibbie

This month marks thirty years since the Americans with Disabilities Act (ADA) was signed into law. From the use of curb cuts and ramps, to accessible transportation and voting, the ADA has fundamentally altered our understanding of what it means to live with a disability.

As we celebrate three decades of this civil rights law, we remember one of the most important ADA cases in New Hampshire, Amanda D. v. Hesser, a case that continues to change mental health services in the state.

In passing the ADA in 1990, Congress rightly observed that “individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.”

With the ADA, Congress, for the first time, identified the segregation of people with disabilities as a form of discrimination: “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”

The “integration mandate” of the ADA is designed to address the segregation problem. The regulations issued pursuant to the ADA which apply to public entities state that disability services are to be administered “in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” A “setting” is defined as a space “that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.”

The United States Supreme Court took up the integration issue in 1999 and concluded that persons who qualify for services in the community and wish to receive them there are entitled under the ADA to live outside institutions so long as integrated services can be reasonably provided. In the Olmstead v. L.C. opinion, Justice Ginsburg described the impact of segregation of people with disabilities:

“Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relationships, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”

Although states can attempt to defend their use of institutions through the use of the “fundamental alteration” defense, often by

ADA continued on page 30
In Memoriam from page 11

College, then attended the Notre Dame Hos- pital School of Nursing, graduating as presi- dent of her class.

Following her nursing studies, she mar- ried Guy R. Caron in 1954, and after living on various Air Force bases during Guy’s military service, they returned to Manchester to raise their family.

Yolande was a woman of extraordinary talent and beauty. An accomplished classi- cal pianist, she returned to college in 1976 to complete her bachelor’s degree at Rivier, graduating summa cum laude. In her 50s, with her children grown, she pursued a law degree, graduating with honors from Frank- lin Pierce Law Center in 1987. She became a member of the New Hampshire Bar Associa- tion in 1988.

As a wife and mother, Yolande provided a loving, lively home. Trips to the Lamontagne family farm in Rochester, stays at Wal- lis Sands in Rye, and endless summers at the camp on Glen Lake provided her children and grandchildren with many wonderful memories. She was truly the heart of the fam- ily, and her children cherished her as a lovin- ging, caring parent with endless patience and wise counsel. They also appreciated her tol- erance of their “shenanigans” on more than one occasion.

She had many hobbies and past-times. She and Guy regularly traveled to Bermuda with friends, and she was an accomplished snorkeler, water skier and tennis player. Ev- ery Christmas Eve (her birthday), she and Guy opened their home to an assortment of friends and family, enjoying the laughter and warmth of good company during the holi- days.

In lieu of flowers, donations may be made to the National Autism Association (nationalautismassociation.org), or the Café Martin Foundation (thecafemartin- foundation.org), founded in memory of Yolande’s nephew, John Martin, and which provides awareness, community and support to those affected by ALS and terminal illness, as well as the nonprofits that help them.

The family wishes to thank the staff of The Manor at Birch Hill for their care during Mrs. Caron’s stay, and the Visiting Nurse As- sociation’s Hospice team for their outstanding support and compassion.

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

Notes from page 11

Golden Named to the Leadership Greater Manchester Class of 2021

Sheehan Phinney attorney Chloe F.P. Golden has been accepted to the Leadership Greater Manchester Class of 2021.

Leadership Greater Manchester is a program designed to recognize and nurture existing leadership talents from diverse sectors of the com- munity. Through the exchange of view- points and experi- ences, participants are exposed to the challenges, opportu- nities and vital issues affecting the greater Manchester commu- nity.

Golden is a member of the firm’s Busi- ness Litigation Group. She is admitted in NH, has her J.D., magna cum laude, from University of New Hampshire Franklin Pierce School of Law and her B.A., cum laude, from Brescia University.

Reidy Elected as College of Labor and Employment Lawyers Fellow

Sheehan Phinney shareholder James P. “Jim” Reidy has been elected as a Fellow of the American Bar Association’s College of Labor and Employment Lawyers class of 2020.

The College of Labor & Employment Lawyers is a non-profit professional associa- tion consisting of leading lawyers nationwide in the practice of Labor and Employment Law. Their Fellows are recognized as distin- guished members of the labor and employ- ment community who promote achievement, advancement and excellence in the practice by setting standards of professionalism and civility, by sharing their experience and knowledge and by acting as a resource for academia, the government, the ju- diciary and the community at large.

Reidy is the co- chair of the firm’s La- bor and Employment practice group. He practices in the areas of management side labor and employment law with an emphasis on assisting employers in effectively avoiding, or defending against, employment disputes.

Changes from page 11

Ben is an associate in McLane Middle- ton’s Litigation Department. Prior to joining the firm in 2016, Ben was a litigator in the Chicago office of a national law firm.

Sheehan Phinney Expands Affordable Housing Group

Sheehan Phinney welcomes Aedyn N. Fisher to its Real Estate Group, where she will work primarily in Affordable Housing and Low-Income Housing Tax Credits. Fisher joins the firm from Pret, Flah- herty, Beliveau & Nault, where she served as a Legal Resident to the Honorable Andrea K. Johnston, U.S. District Court for the District of New Hampshire.

In Memoriam from page 11

College, then attended the Notre Dame Hos- pital School of Nursing, graduating as presi- dent of her class.

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Rousseau from page 1

classical guitarist and lutenist. She performed in venues ranging from Baltimore to Boston and also taught music at Gordon College, Brandeis and other schools of higher education.

But the life was not altogether satisfying. “I was performing a lot and teaching a lot but musicians don’t really get paid very well and you’re running yourself ragged all the time,” Rousseau says. “One of my professors in music school said, ‘you should really do something that gives you security.’”

She debated between veterinary and law school and decided on the latter, receiving her juris doctor from New England School of Law 11 years after earning her masters. She looked forward to a new career, possibly preparing musicians’ contracts.

Then came a stint at the Hillsborough County Attorney’s Office, working with abuse and neglect cases. Though she didn’t care for the criminal aspect of the work, she fell in love with family law.

“It’s not just a job, because you affect people’s lives,” says Rousseau, a member of the New Hampshire Conflict Resolution Association and chair of the New Hampshire Family Mediator Certification Board. “The most important thing I teach my people at this law firm is, when people call, you really should answer that call as soon as possible…. You’re dealing with people at a very critical point in their lives. It’s not just a case.”

Rousseau handles many court-appointed mediations, in addition to those she sees through her practice.

“When someone calls, I give them all their options,” she says of her clients. “Ultimately, the choice is theirs. Litigation is extremely expensive and takes a very long time so if people can work things out, it (mediation) is financially better for them.”

The work has won her the admiration of colleagues like attorney John Durkin, who has known her for more than 20 years and describes her as “professional, competent and compassionate.”

The opinion is echoed by Deborah Kane Rein, a mediator for Hess Gehris Solutions, and a former Marital Master.

“I have seen Marianne as a litigator and as a mediator,” Rein says. “She has always held a strong belief in alternative dispute resolution, and her litigation style shows her commitment to effective advocacy without personal destruction. Her deep caring and compassion for her clients, and her reassuring yet masterful demeanor, make her an especially effective mediator.”

Rousseau also practices some animal law, helping with contracts for fellow dog breeders, horse owners and boarding facilities, and litigating animal-related disputes. She has trained therapy dogs that she takes to hospitals and nursing homes to visit patients.

Visitors to her law office might find “one or two” of her 13 dogs on the premises, one of the ways in which she sees her varied interests as overlapping. For clients in stressful situations, she adds, the animals have “a very calming effect.”

For herself, riding horses is “a good physical outlet after you’ve had a brutal day,” Rousseau says.

Rousseau competes in classical dressage with her Friesian Sporthorse, Valentino.

“There are a series of exercises and you get judged on how precisely you execute the various maneuvers,” she says of the sport. “It takes a lot of practice and really being attuned to the horse. It is very similar to the courtroom. It’s all in the preparation and concentration.”

Rousseau brings a similar exactitude to her work breeding Labrador retrievers, using the kennel name Cederay Labrador Retrievers.

“It’s a very complicated thing if you do it right,” she says of breeding. “You have to be very careful about the health of the animal…. I don’t let anyone near them until they’ve had their shots, around seven weeks. I do all the clearance on mom and dad — hips, elbows, hearts, eyes. I’ve been breeding since 1992, so I know all the lines of the parents.”

She has also been showing dogs since 1992, and has appeared at the Westminster Kennel Club Dog Show, the famed event that has been hosted annually in New York City since 1877. She took a ribbon on her first visit. “That was pretty exciting,” she says. “It’s crazy in that place. There are millions of people. It’s a little overwhelming for the dogs but a lot of fun.”

Rousseau no longer performs music professionally, but takes voice lessons “just for fun” and likes to host karaoke parties with her husband.

She recognizes that her diverse interests might not suit everyone but “all of it just works for me,” she says. “It’s a good mix of activities.”

Marianne Rousseau and Valentino competing at a dressage show.

Marianne and her championship dog Dickens showing at the Westminster Kennel Club. The dog also holds a hunting title.
**Immigration** from page 5

**DACA Lives**  
On June 18, the U.S. Supreme Court in DHS v. Regents of the University of California, in a 5-4 decision written by Chief Justice John Roberts, sent the DACA case, aka Deferred Action for Childhood Arrivals, back to the trial court. This followed a tortu- ous three-year litigious journey by President Trump to kill the program. President Barack Obama established this program by Execu- tive Order 13608 on May 1, 2012 after re- peated failures by Congress to enact immi- gration reform.

The Court held that the Government failed to strictly follow the exacting require- ments of the Administrative Procedure Act in terminating the popular program, thus saving about 800,000 undocumented early child- hood arrivals from immediate deportation. DACA was given a temporary reprieve while the Court invited the President to try again to abolish DACA without being “arbitrary and capricious.” No doubt the administration will attempt to do so though there is little time re- maining with an election in November.

Meanwhile, the door remains open for a limited time for expiring DACAs to renew their status for two more years as they be- come due, including a $495 filing fee (plus attorney fees), not an inexpensive exercise for a family with several children.

As an aside, not taking into account the human toll on mixed American-immigrant families and affected communities, econo- mists have noted that excluding DACAs from our labor force could result in the loss of $215 billion in economic activity and an associated $60 billion in federal tax revenue over the next ten years, with proportionate impact in New Hampshire. Why would we do that to ourselves?

The wall, it’s “Big and Beautiful”  
After three years of concerted effort, construction of the 1,500 plus mile wall along the Mexican border just cannot seem to get done, despite it being the President’s

**Thinking of Travel — not so fast.**  
As Europe begins to open their economy because of reduced COVID-19 cases, the welcome mat for Americans remains tentative. The reasoning is logical. The virus is surging in parts of the U.S. and many countries want no part of it. For example, on June 27, Germany reported five COVID-19 related deaths, an amount exceeded by the daily consistent with sickness’ inci- dence in populations being obvious, Belize, where I served as U.S. Ambassador dur- ing the Clinton Administration, has closed its international airport to flights from the United States as a precaution until mid-Aug- ust to prevent the arrival of any infectious Americans.

The news of our neighbor to the north, before dear colleague, you rush off to Ile- d’Orleans for your annual summer vaca- tion, consider first the possibility of extend- ing indefinitely the 30-day Canadian- American border at the Derby Line on the Vermont border or the Pittsburg crossing. That’s because on June 20, the Acting Sec- retary of Homeland Security, Chad Wolf, re-issued a directive prohibiting COVID-19 positive travelers from entering the U.S. If you continue, a “hats off” is due to the volunteer

**Lockem Up**  
As Americans practice anti-virus safety precautions like “social distancing,” wearing masks and others, this is not so easy if you are in jail, and especially if you are an immigrant detainee. The virus has generated a spate of lawsuits throughout the U.S. against DHS seeking bond hearings and release for those incarcerated where confinement is typically overcrowded, and facilities are unprepared to deal with COVID-19 threats or actual out- breaks among both staff and detainees.

Close to home, the Strafford County Jailer, Mark Freitas, as the federal court for immigrant detainees from Maine, Vermont and New Hampshire, has been the subject of litigation by the ACLU/NH and several NH law firms following reports of guards contracting the virus at the federal detention facility. Notably, ACLU/NH lead counsel, Giles Bissonnette, along with other firms involved in the litigation, i.e., Nelson Parent LLP, Whately Kallas LLP, Shaffer- Goody Earle, Newman Law Office PLLC, and Hinckley Allen & Snyder LLP, have had significant success on behalf of more than 60 local detainees and their families. Actions involving tens of thousands of immigration detainees from Maine, Vermont or the Pittsburg crossing. That’s because on June 20, the Acting Sec- retary of Homeland Security, Chad Wolf, re-issued a directive instituting the virus at the fact-

**Check the Box** from page 2

Commitment to equal justice under law and equal access to our justice system for all of our citizens. While the letter was primarily motivated by the social justice claims of our fellow citizens protesting on our streets, it applies equally to being dedicated to ensur- ing that everyone has access to the system, hopefully with the advice and representa- tion of a lawyer.

Concepts such as “equal justice under law” are phrases that are given lip service by many, but acted upon by few. Now is one of those times where action is needed. The New Hampshire Pro Bono Program has a long and distinguished history. It is a nation- al leader in getting the private Bar involved in providing free representation to vulner- able and deserving populations within our state. They are expanding into new areas, such as bankruptcy and unemployment matters. They offer training, realizing that many volunteers don’t practice in an area where there is a Pro Bono need. Think about taking a case. Firm managers – encourage your lawyers to get into the system and volunteer. Call Ginny Martin, the pro- grams long time Director here at the Bar Center, with any questions. Alternatively, call Brian Shaughnessy, the chair of the Pro Bono Board and eviction law expert. Every lawyer who volunteers gives real and tan- gible meaning to the phrase “equal justice under law.”

If, at the end of the day, you cannot vol- unteer your services, use philanthropy to put teeth into the phrase “equal access to justice for all.” The New Hampshire Bar Founda- tion’s annual fund drive is in the middle of its campaign to raise additional money for all the legal service organizations that work together to make the social safety net available for those who may fray, but will not break. The Foundation manages the money it collects with amazing efficiency, with over 90% of the donations going directly to the operating or- ganizations on the front line.

I will let you all in on a little-known fact. New Hampshire Judges give donations to the New Hampshire Bar Foundation to support legal services. After his death this past February, the Bar Foundation learned the Judge Bean had made a bequest to the Bar Foundation in the memory of his veteran’s life insurance policy. These actions are emblematic of Judge Bean’s commitment to make the system fair and accessible for all New Hampshire citizens. We often extoll the closeness and collegiality of our Bar. While this is true, let us take ac- tion on that caring for one another and extend it to our fellow citizens so as to ensure equal access and justice for all. Through action and stepping up in this crisis, those goals will more, not less, to us when we weather the storm and come out the other side.

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**I will let you all in on a little-known fact. New Hampshire Judges give donations to the New Hampshire Bar Foundation to support legal services.**
We are uniquely situated in NH to take advantage of the latest wellbeing enhancement: Forest Bathing. The latest post in the Harvard Health Blog from the Harvard Medical School touts the practice of forest therapy. Inspired by the Japanese practice of shinrin-yoku or forest bathing, the idea is to engage in a walk under a canopy of trees with a trained guide. The purpose is to remain present in the body and experience all the sensations of nature while decreasing levels of cortisol, or stress hormones. Additionally, trees give off phytoncides which enhance immunity and have antimicrobial properties, so important right now. A recent study in the UK demonstrates that spending at least 120 minutes in a week in nature improves overall physical and mental wellbeing. There is no end to available trails, paths, sidewalks, and parks open to NH residents all around the state. If you do not have the time to find a forest therapy guide, simply get outside in the Granite State and take advantage of the latest wellbeing therapy guide, Forest Bathing.

Don’t hesitate. Don’t go it alone.

NH Lawyer Assistance Program

Under Supreme Court Rule 58, all contact with NHLAP, whether with lawyers, judges, law students, or concerned third parties, is confidential. In addition, NHLAP employees are exempt from reporting professional misconduct under Rule 8.3, and prohibited from doing so under Rule 37.

Membership Status Changes
Presented to the Board of Governors June 19, 2020

Active to Inactive
Andrus, Mark, Herriman, Utah (April 10)
Bickford, G. Thomas, Wolfeboro, NH (May 18)
Chang, Elizabeth, Fairfax, Va. (April 8)
Conway, Daniel, San Antonio, Texas (May 31)
DeVito, Janet, Hopkinton, NH (May 31)
Doyal, William, Joplin, Mo. (May 4)
Driscoll, Christopher, Lynn, Mass. (May 31)
Dubois, Roland, Contoocook, NH (May 2)
Eldridge, Sheri, Gilmanton, NH (May 31)
Gillies, Peter, Fitchburg, Mass. (June 5)
Hahn, Edward, Manchester, NH (June 1)
Hayes, Thomas, Bedford, NH (May 31)
Hixon, Leila, Cohasset, Mass. (June 1)
Lanagan, Paul, Colbyville, Texas (April 25)
O’Rourke, Alicia, Alton, NH (May 31)
Pribis, William, Concord, NH (May 20)
Shea, Alison, Winchester, Conn. (April 15)
Wortman, Thomas, Lakeville, Minn. (June 1)
Whitehead, Matthew, Natick, Mass. (May 26)

Active to Inactive Retired
Alfin, Susan, Sturbridge, Conn. (April 30)
Berube, Michael, Somersworth, NH (May 8)
Bisbee, George “Dana”, Hampton, NH (May 31)
Fitzgibbon, Helen, Bedford, NH (June 3)
Greer, Stephen, Lincoln, NH (May 5)
Kahn, David, Lyne, NH (May 29)
Lang, Rogers, Manchester, NH (May 31)
Mitchell, Doanld, Center Sandwich, NH (April 30)
Patterson, Stephen, Portsmouth, NH (May 8)
Vachon, Dennis, Strafford, NH (May 31)

Active to Pro Bono Active
Blaine, Quentin, Plymouth, NH (May 31)

Active to Resigned
Sanborn, Rebecca, Derry, NH (May 7)

Active to Full-Time Judicial
Curran, John, Londonderry, NH (April 10)

Active to Deceased
Daly, John, Exeter, NH (February 7)

Inactive to Active
Albright, Samantha, Haverhill, Mass. (May 31)
Casey, Jason, Kensington, NH (May 22)
Hillman, James, Star Valley Ranch, WY (May 6)
Horwitz, Allison, Worcester, Mass. (June 4)

Powers, Kevin, Mansfield, Mass. (June 3)
Ralston, Jessica, Killington, Vt. (June 1)

Inactive to Inactive Retired
Degulis, Joseph, Salisbury, NC (June 2)
Murphy, Jill, Newburyport, Mass. (June 2)
Noyes, Ashley, Keene, NH (May 21)
Robinson, Paul, Playa Vista, Ca. (April 23)
Rogers, Paula, Concord, NH (May 15)

Inactive to Resigned
Levy, Radenry, Brighton, Mass. (May 1)

Suspended to Active
Hopkins, Kristen, Dover, NH (June 2)
Wisik, Heather, Boca Raton, Fl. (June 2)

Judicial to Inactive Retired
Smukler, Larry, Concord, NH (May 21)

Pro Bono Active to Inactive Retired
Fisher, John, Nashua, NH (May 22)

Honorary Active to Deceased
Manis, George, Concord, NH (May 18)

Honorary Inactive to Honorary Active
Richardson, Gary, Biddleford Pool, Maine (June 5)

Resigned to Deceased
Prolman, David, Naples, Fla. (April 28)

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Calendar Overview

**AUGUST**

4  Tuesday • Noon - 1:00 p.m.  
Bostock v. Clayton County: SCOTUS’s Ruling on Title VII  
• Webcast  
• 60 min.

5  Wednesday • 9:00 a.m. - 3:30 p.m.  
In-House Counsel Essentials  
• Webcast  
• 325 min. including 75 min. ethics/prof.

6  Thursday • Noon - 1:00 p.m.  
3 Steps to Becoming a Powerful Legal Negotiator with Stuart Teicher  
• Webcast  
• 60 min.

7  Friday • Noon - 1:00 p.m.  
How NH LAP Works: What Happens When NHALAP Receives a Call for Help?  
• Webcast  
• 60 min.

11 Tuesday • Noon - 1:00 p.m.  
Resolving COVID-19 Contractual Disputes with Lenne Espenschied  
• Webcast  
• 60 min.

13 Thursday • Noon - 1:00 p.m.  
LIFESTYLE: Management: An Approach to Lawyer Time Management with Stuart Teicher  
• Webcast  
• 60 min.

14 Friday • 9:00 a.m. - 11:45 a.m.  
Immigration Law  
• Webcast  
• 150 min.

19 Wednesday • 9:00 a.m. - 2:00 p.m.  
Business Split-Ups: Issues Arising from Corporate and Limited Liability Company Fractures  
• Webcast  
• 240 min. including 30 min. ethics/prof.

20 Thursday • Noon - 1:00 p.m.  
Everything I Learned About Arty Ethics I Learned from the Kardashians with Stuart Teicher  
• Webcast  
• 60 min. ethics/prof.

25 Tuesday • Noon - 1:00 p.m.  
Basic Addiction Science: a Primer on the Neuroscience of Addiction  
• Webcast  
• 60 min.

26 Thursday • 9:00 a.m. - 12:15 p.m.  
Rules of the Roads ...a look at NH road laws  
• Webcast  
• 180 min. ethics/prof.

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BOSTOCK v. CLAYTON COUNTY: SCOTUS’s Ruling on Title VII

Tuesday, August 4, 2020
Noon - 1:00 p.m.
Webcast • 60 min.

Join this experienced panel of plaintiffs’ and defense counsel for an in-depth discussion of questions raised and those that were answered by this case, which held that the discrimination on the basis of gender identity and sexual orientation is unlawful sex discrimination under Title VII, and that a plaintiff can prevail in a disparate treatment case when there is more than one “but for” cause of the challenged action, even in non mixed-motive cases.

Faculty
Julie A. Moore, Program Chair/CLE Committee Member, Employment Practices Group, Wellesley, MA
Mark T. Broth, Drummond, Woodsom & MacMahon, Manchester
H. Jon Meyer, Backus, Meyer & Branch, LLP, Manchester
Nancy Richards-Stower, Law Offices of Nancy Richards-Stower, Merrimack
Daniel P. Schwarz, Jackson Lewis, PC, Portsmouth

NEW WORLD OF IMMIGRATION: Developments, Complexity, Challenges and Ethical Concerns

Friday, August 14, 2020
9:00 a.m.-Noon
Webcast • 165 min. incl. 60 min. Ethics/Prof.

Recent USCIS regulations, Presidential Proclamations, government layoffs, and COVID-19 have had significant impact on employment of foreign workers in NH as well as immigrants residing in NH. The New Hampshire Bar Association will host a half day webinar addressing recent developments for NH businesses who rely on foreign workers to meet their staffing and hiring needs, as well as attorneys who represent non-immigrant families.

Who Should Attend?
Business owners, HR professionals, persons responsible for staffing and hiring, attorneys advising employers about immigration compliance, and attorneys representing non-immigrants in the criminal justice system as well as in family-law matters.

Faculty
Debra Dyleski-Najjar, Program Chair/CLE Committee Member, Najjar Employment Law Group, N. Andover, MA
Ronald L. Abramson, Shalven & Gordon, PA, Manchester
John R. Wilson, Goff Wilson, PA, Manchester

In-House Counsel Essentials

Wednesday, August 5, 2020
9:00 a.m.-3:30 p.m.
Webcast • 325 min. incl. 75 min. Ethics/Prof.

This program will enable members of the NH Bar (as well as foreign jurisdictions) who practice in-house or have corporate clients to better understand the issues that are dealt with on a daily basis. Gain insight into topics that may not be on everyone’s agenda but can reap many benefits in the long run.

Faculty
Eric A. Ivanov, Program Co-Chair/CLE Committee Member, Lactalis US Yogurt Division, Londonderry
Arnold Rosenblatt, Program Co-Chair/CLE Committee Member, Cook, Little, Rosenblatt & Manson, PLLC, Manchester
Andrew J. Burke, General Counsel - Barton & Associates, Inc., Peabody, MA
Steven J. Grossman, Grossman, Tucker, Perreault & Pfleger, PLLC, Manchester
Caroline K. Leonard, Gallagher, Callahan & Gartrell, PC, Concord
Jennifer Shea Moeckel, Cook, Little, Rosenblatt & Manson, PLLC, Manchester
Julie A. Moore, CLE Committee Member, Employment Practices Group, Wellesley, MA
Edward J. Sackman, CLE Committee Member, Bernstein, Shlit, Sawyer & Nelson, PA, Manchester

Business Split-Ups Issues Arising from Corporate and Limited Liability Company Fractures

Wednesday, August 19, 2020
9:00 a.m.-2:00 p.m.
Webcast • 240 min. incl. 30 min. Ethics/Prof.

When a corporation or limited liability company dissolves and there is a dispute among the owners, there are a myriad of legal considerations and ramifications. This informative and insightful program will feature a panel of experienced practitioners discussing the legal issues that attorneys must help clients address during the dissolution of a business. The seminar will also look at resolving disputes among business owners that arise after an acquisition, merger or some other change of ownership.

Faculty
Arnold Rosenblatt, Program Chair/CLE Committee Member, Cook, Little, Rosenblatt & Manson, PLLC, Manchester
Samantha D. Elliott, Gallagher, Callahan & Gartrell, PC, Concord
Scott W. Ellison, Cook, Little, Rosenblatt & Manson, PLLC, Manchester
Jamie N. Hage, Hage Hodes Professional Association, Manchester
James P. Harris, Sheehan, Phinney, Bass & Green, PA, Manchester
Richard J. Maloney, Maloney & Kennedy, PLLC, Auburn

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NH Lawyers Assistance Program

How NHLAP Works- What Happens When NHLAP Receives a Call for Help?

Friday, August 7, 2020
Noon-1:00 p.m.
Webcast • 60 min.

This presentation is a practical approach to understanding how NHLAP assists N.H. lawyers. Presentation by Terri Harrington, Esq., Executive Director of N.H. Lawyers Assistance and Brian Moushegian, Esq., General Counsel of the N.H. Supreme Court’s Attorney Discipline Office.

Rules of the Roads ...a look at NH road laws

Wednesday, August 26, 2020
9:00 a.m.-12:15 p.m.
Webcast • 325 min. incl. 75 min. Ethics/Prof.

This program will speak to various aspects of roads, both private and public, from the perspective of different stakeholders: municipality, landowner, surveyor and title attorney. How are roads created, relocated, discontinued and what is the difference between private and public roads? What about maintenance of the road? Who owns the road or some part thereof? How are they located and planned physically? What impact do these various issues have on the ability to obtain a building permit? Who regulates the various aspects of roads?

Faculty
Laura Spector-Morgan, Program Co-Chair/CLE Committee Member, Mitchell Municipal Group, PA, Laconia
Carol E. Willoughby, Program Co-Chair/CLE Committee Member, First American Title Insurance Company, Concord
Paul J. Alfanfo, Alfanfo Law Office, PLLC, Concord
Michael B. Bemis, Steven J. Smith & Associates, Inc., Gilford
Christopher L. Boldt, Donahue, Tucker & Ciandella, PLLC, Meredith
The Small Business Reorganization Act: A Summary of Cases Decided Thereunder To Date

By James S. LaMontagne

On February 19, 2020, the Small Business Reorganization Act (SBRA) was enacted. The SBRA amended the Bankruptcy Code to add a new streamlined chapter 11 process for small businesses. This new process aims to make chapter 11 more expeditious and less costly by eliminating certain procedural hurdles, expediting timeframes and waiving certain administration costs. Since the enactment of the SBRA, there have been a handful of cases addressing a debtor’s belated eligibility for Subchapter V and what it means to be a “small business debtor.”

In Progressive Solutions, Inc., 2020 LEXIS 467 (Bankr. C.D. Cal. 2020), a small business debtor filed a motion 15 months after its chapter 11 petition date requesting authorization to amend its petition to proceed under Subchapter V. The court concluded that it could find “no legal reason” to restrict a pending chapter 11 small business debtor from re-designating its case as a Subchapter V case but qualified its conclusion by noting that it would not be permissible for a debtor to make a belated Subchapter V election if “vested rights” of a party-in-interest would be impaired. Despite its substantive analysis, the Court denied the motion on procedural grounds, finding that a motion to amend the petition was not proper. The court instructed Rule 1009 provided clear procedures for amending a petition and for parties to later object to those amendments (including a designation as a Subchapter V debtor).

In Moore Props. Of Person Cty., LLC, 2020 LEXIS 550 (M.D.N.C 2020), the debtor filed its bankruptcy case on February 10, 2020 and designated itself as a small business debtor. Fourteen days later, the debtor filed an amended petition electing to proceed under Subchapter V. On objection to the Subchapter V election, the court addressed whether (1) the debtor, whose case was pending on the effective date of the SBRA, could elect to proceed under Subchapter V; and, (2) whether the debtor, who did not meet the definition of a small business debtor on the original petition date but did meet the definition under SBRA, was eligible to proceed under Subchapter V. In deciding the first issue, the Court held that the application of Subchapter V “does not alter the rubric under which debtors may affect pre-petition contractual rights of creditors, much less vested property rights,” and therefore may be applied in chapter 11 cases pending at the time of the SBRA’s effective date. With respect to the second issue, the court found that the debtor had designated itself as a small business debtor on the original petition date, that designation controlled until and unless the court ordered otherwise, and because that designation had not been previously challenged, the debtor, as a small business debtor, was entitled to make the election to Subchapter V.

In Body Transit, Inc. 613 B.R. 400 (Bankr. E.D.PA 2020), the court, relying upon Progressive and Moore, held that a small business debtor has the right to amend its chapter 11 petition to elect to proceed under subchapter V and, once the amendment has been filed, the case should proceed under Subchapter V until an objection is timely filed and sustained by the court. The court further stated that the proper standard in evaluating an objection to a belated Subchapter V election is whether the amendment was made in bad faith or would unduly prejudice a party.

In Double H. Transportation, LLC, 2020 LEXIS 1341 (Bankr. W.D. TX 2020), the court struck a debtor’s amended petition re-designating to Subchapter V, filed 3.5 months after its petition date, because the re-designation would have created a “procedural quagmire” and likely create cause to dismiss or convert the debtor’s case. The court reasoned that the debtor had not filed a plan within the 90-day deadline under Subchapter V and as a result, the debtor’s bankruptcy case would be subject to dismissal or conversion to chapter 7 for “cause” if the debtor were now permitted to proceed as a Subchapter V case.

In Ventura, 2020 LEXIS 985 (E.D.N.Y 2020), the court permitted an individual chapter 11 debtor to amend her petition to proceed under Subchapter V as a small business debtor at the confirmation hearing on the secured creditor’s proposed plan some 15 months after the individual petition was filed.

Cases continued on page 27
Subchapter V Streamlines the Chapter 11 Process for Small Businesses

By Joseph A. Foster and Christopher M. Dube

Chapter 11 of the Bankruptcy Code was enacted to provide financially troubled businesses an opportunity to reorganize by restructuring bank debt, discharging trade debt, and rejecting burdensome contracts and leases. Over the years it became clear that, while the statute worked well for large enterprises, chapter 11 was simply too expensive for small businesses to utilize effectively. The reporting obligations, statutory hurdles to confirm a plan, and litigious nature of the process caused many small businesses to avoid filing for bankruptcy and, for those who did file, made successful reorganization an expensive and uncertain prospect. This explains, in part, a dramatic decline in the number of chapter 11 cases filed. Forty-two chapter 11 cases were filed in NH and 323 in Massachusetts in 1997, whereas only 16 chapter 11 cases were filed in New Hampshire and 105 in Massachusetts in 2017.

Recognizing that chapter 11 was not an effective resource for small business debtors, Congress enacted the Small Business Reorganization Act (“SBRA”) which added subchapter V to chapter 11, effective February 19, 2020. See, 11 U.S.C. §§1181-1195. The recently adopted CARES Act increased the threshold to $7,500,000 until March 26, 2021.

Subchapter V was available to debtors with aggregate non-contingent liquidated secured and unsecured debt of up to $2,725,625, not less than 50% of which arose from commercial or business activities. See, 11 U.S.C. §101(51D). The recently adopted CARES Act increased the threshold to $7,500,000 until March 26, 2021.

Subchapter V to chapter 11, effective February 19, 2020. See, 11 U.S.C. §§1181-1195. A subchapter V small business debtor can be an entity or an individual (i.e., sole proprietorship). As originally adopted, the subchapter V was available to debtors with aggregate non-contingent liquidated secured and unsecured debt of up to $2,725,625, not less than 50% of which arose from commercial or business activities. See, 11 U.S.C. §101(51D). The recently adopted CARES Act increased the threshold to $7,500,000 until March 26, 2021.

Subchapter V to chapter 11, effective February 19, 2020. See, 11 U.S.C. §§1181-1195. A subchapter V small business debtor can be an entity or an individual (i.e., sole proprietorship). As originally adopted, the subchapter V was available to debtors with aggregate non-contingent liquidated secured and unsecured debt of up to $2,725,625, not less than 50% of which arose from commercial or business activities. See, 11 U.S.C. §101(51D). The recently adopted CARES Act increased the threshold to $7,500,000 until March 26, 2021.

Subchapter V gives a debtor more control of the chapter 11 process, shortens the time to confirmation of a plan, and eliminates statutory hurdles; all of which makes the process much less costly to utilize. A trustee is appointed in each case, but his or her role is to facilitate the development of a consensual plan of reorganization. The small business debtor remains in possession of, and operates, its business as the case proceeds. Some of the benefits of new subchapter V include:

• No creditors’ committee is appointed unless the court orders otherwise for cause. This unburdens the debtor from the cost of committee professionals and devotion of valuable time and resources to responding to committee requests for information and often litigious activity.
• Administrative expenses that accrue during the case can be paid over time through the plan without creditor consent.
• A disclosure statement is not required unless the Court orders otherwise for cause. Valuable time and resources required to prepare and seek approval of a disclosure statement can be focused on the plan.
• The so-called “absolute priority rule” does not apply in subchapter V cases, making it more likely that the owners can retain an interest in the reorganized debtor.
• No quarterly fees are payable to the United States Trustee avoiding what can be a significant drain on the debtor’s cash flow during the pendency of a case.
• If the debtor operates as a sole proprietorship, a mortgage secured by the debtor’s personal residence can be modified if the loan proceeds were used primarily for business purposes.

Most importantly, the SBRA modified plan approval requirements in ways that greatly enhance the prospect of confirming a plan and successfully reorganizing. Only the debtor has the authority to propose a subchapter V plan of reorganization and the plan can be approved without the consent of a class of impaired creditors. This materially changes the dynamics of plan negotiations. Impaired creditors can no longer leverage their vote and the threat of a competing plan to force the debtor to make concessions that threaten the viability of the plan. A plan must still be “fair and equitable” to be confirmed. To meet this standard in a subchapter V case, the small business...BUSINESSNESS continued on page 27

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A New Structure for Small Business Bankruptcies

By Steve Notinger and Deb Notinger

Small Business bankruptcy reorganizations have often been too difficult and too expensive to undertake because there were no substantive Bankruptcy Code provisions to deal specifically with small businesses. The “one size fits all” version of Chapter 11 of the Bankruptcy Code (11 U.S.C. §101 et seq.) just did not work. On February 19, 2020, the Small Business Reorganization Act (“SBRA”), added an entirely new subchapter to the Bankruptcy Code, “Subchapter V,” dedicated exclusively to reorganizing small businesses. This amendment added several significant substantive changes to the Bankruptcy Code and streamlined the small business bankruptcy process to make it easier and less expensive for the Debtor.

What is a small business? It is a business (other than real estate) with less than $2,725,625 of undisputed debt, of which 50% must come from “commercial business activities.” This limit was increased to $7,500,000.00 in the CARES Act for cases filed between March 27, 2020 and March 27, 2021.

Many lawyers who have tried a small business Chapter 11 reorganization under the pre-SBRA Bankruptcy Code discover that they have to comply with rules that were enacted in 1978 and were focused “commercial business activities.” This limit was increased to $7,500,000.00 in the CARES Act for cases filed between March 27, 2020 and March 27, 2021.

Many lawyers who have tried a small business Chapter 11 reorganization under the pre-SBRA Bankruptcy Code discover that they have to comply with rules that were enacted in 1978 and were focused entirely on large, public, multi-national manufacturing companies. Under Chapter 11 a detailed disclosure statement needs to be filed and approved; then a reorganization plan needs to be filed and approved, all of which require substantial time and money from the Debtor. There could be a creditor’s committee appointed, to be paid for by the Debtor. The plan could be defeated by voting. All of these steps were almost always unnecessary and prohibitively expensive for a small business, which usually has a small creditor pool and one lender.

Under the new law, there is a fast process. There is no disclosure statement, no creditor’s committee and the Debtor has to file a reorganization plan within 90 days, which can be extended only for circumstances beyond the Debtor’s knowledge and control. Affirmative voting is eliminated. Pre-SBRA, those filing for Chapter 11 bankruptcy often faced problems with a dominant creditor that controlled the voting in the case, usually a lender, which could turn its position into a blocking position. Under SBRA, there is no voting requirement to confirm a reorganization plan, so a plan can be confirmed over the objection of a dominant creditor if it otherwise complies with the Bankruptcy Code. The SBRA also eliminates a huge impediment to confirmation: that at least one non-insider class of creditors must vote for the plan. 11 U.S.C. 1129(a)(10).

The owner of a Debtor can now keep its equity in the business in a “cranddown” without paying creditors in full. Under pre-SBRA law, in order to keep equity in your business, upon objection by the unsecured creditor class, you either needed to pay that class in full or provide new value (in essence buy your equity position). Most small business owners do not have property to donate as new equity, so they could not confirm their plan over objection. Under SBRA if there is an objection to confirmation, then the Debtor has to pay all of its disposable income for 3 to 5 years to creditors to overcome any objection on these grounds. The unsecured

BANKRUPTCIES continued on page 27
Cases from page 24

In allowing the amendment, the court found that 1) it had the discretion to reset timelines to allow the debtor to avail herself of the newly enacted law; and 2) the debtor fit within the definition of “small business debtor” even though 96% of her debt was a mortgage note on her primary residence in which she, six years after the mortgage, operated a bed and breakfast.

In Wright, 2020 LEXIS 1240 (Bankr. S.C. 2020), the Court ruled that the definition of “small business debtor” is not limited to debtors currently engaged in business or commercial activities and allowed the debtor to proceed under Subchapter V even though he was “addressing residual business debt” from 2 businesses that had ceased operating more than a year earlier.

Jim is a partner at Sheehan Phinney and the firm’s practice group leader of the Bankruptcy, Restructuring and Creditor’s Rights Group. Jim’s diverse practice includes the representation of clients involved in financially distressed situations, insolvency and commercial disputes.

Businesses from page 25

debtor must commit all of its projected dispos- sal income over the life of the plan (3-5 years) to its creditors. Disposable income is defined to mean income received by the business not reasonably necessary to be expended for the continuation, preservation, or operation of the business. The intent is to enable a business owner to retain ownership in the business, earn a reasonable living, and responsibly run the business in return for which it must pay its net income to its creditors. As case law develops, the parameters of the definition will undoubtedly be developed.

While oftentimes legislation is adopted as a response to a crisis, in this instance it came at just the right time. According to the American Bankruptcy Institute, in the first four months since the effective date of the SBRA, more than 470 cases were filed under subchapter V nationwide. Through June 24, 2020, fewer than a dozen cases had been filed in Maine, New Hampshire, and Massachusetts, but that number will surely increase in the coming months. Time will tell, but Subchapter V should make reorganization under the Bankruptcy Code more accessible and achievable for small businesses.

Joe Foster chairs, and Christopher Dube are members of, McLane Middleton’s Bankruptcy Practice Group. Joe can be reached at 603-628-1175 or joe.foster@mclane.com. Christopher can be reached at 603-628-1437 or Christopher.dube@mclane.com.

Bankruptcies from page 26

creditor class does not need to be paid in full absent new value as in a traditional Chapter 11.

As further relief, the SBRA provides that administrative claims can be paid over time, eliminating the problem in a regular Chapter 11 that administrative claims be paid in full in cash upon confirmation of the reorganization plan. The SBRA also recognizes that many small business owners pledge their homes as collateral for a business loan. The SBRA provides that a home mortgage that secures a business debt can be modified in an SBRA plan, unlike a purchase money mortgage on the residence.

There are some downsides. If you are filing Chapter 11 to delay and buy time to regroup, Subchapter V may not be for you. A small business case is an election made on the original bankruptcy schedule at the time of filing. You can still file a “regular” Chapter 11 case under the Bankruptcy Code. Under the SBRA a standing trustee is appointed. The role of this trustee is largely advisory. The trustee does not run the business or collect assets like a Chapter 7 or 11 trustee. Any Debtor considering an SBRA filing must be aware that a trustee is appointed to oversee the case and recommend options to the court. It is possible the trustee would recommend closure of the business rather than reorganization, and it is unclear at this point how a trustee’s role will play out. Nevertheless, it appears the benefits of the SBRA far outweigh the discomfort of having a third party trustee involved in the business. It appears Congress has finally given some substance to the small business provisions of the Bankruptcy Code.

What should happen as a result of the SBRA is that there should be more settlements, particularly between a lender and Debtor, since some of the weapons the lender has to kill a plan under a regular Chapter 11 case are unavailable. Debtors will still need to prove they have a viable business, but the business receives significant relief from the new SBRA laws.

Steven Notinger has practiced in the area of business bankruptcy law and business law for the past 30 years in Nashua, New Hampshire. He has also been a bankruptcy trustee in Chapter 7 and 11 cases. He has represented a wide range of clients in his cases from secured creditors, to landlords, to committees and especially debtors. He lives in Nashua with his wife Deb and 4 children.

Deb Notinger has also been an attorney for over 30 years. After starting out as a general practitioner, she joined Steve in his bankruptcy practice for many years, before moving on in the last few years to add a thriving trusts and estates practice at Cleveland, Waters & Bass, P.A. in Concord to her practice. Deb continues to handle Steve’s trustee litigation and represents lenders on a regular basis in the bankruptcy world.
A Healthy Nation Needs Immigrants

By John Wilson

Since March, news of hospitals struggling to acquire ventilators, coronavirus tests, and PPE has made national headlines. But underlying states' and municipalities' struggles to acquire medical equipment is a much more serious issue: a lack of healthcare personnel. Immigrants play an oversized role in the U.S. healthcare system, filling positions ranging from surgeons to home health aides, and are essential contributors to the health and wellbeing of the nation, especially in times of crisis.

According to the Migration Policy Institute, in 2018 more than 2.6 million immigrants of all statuses—for example, naturalized citizens, legal permanent residents, Deferred Action for Childhood Arrivals (DACA), Temporary Protected Status (TPS) recipients and refugees—were employed as healthcare workers in the U.S.

Immigrants in U.S. Healthcare

More than one in four doctors and surgeons practicing in the U.S. are foreign born, and without their contribution the U.S. would face a critical shortage of the highest-skilled members of the healthcare system. The American Medical Association projects the U.S. will face a lack of up to nearly 122,000 physicians by 2032, and despite the tightening supply of doctors, only about 1,500 of the approximately 4,000 foreign doctors in residence at U.S. teaching hospitals are able to stay and practice in the country.

Another issue factoring into the shortage of U.S. doctors is their age. Roughly one in five U.S. doctors are over the age of 65 and more than a quarter of U.S. doctors are between the ages of 55 and 65. Conversely, the smallest demographic of practicing physicians in the U.S. are between the ages of 55 and 65. Approximately, the smallest demographic of practicing physicians in the U.S. are those 35 years old and younger, representing slightly more than one in ten practicing doctors.

Much like doctors, the nation is also facing a shortage of nurses. According to the Bureau of Labor Statistics’ (BLS) Employment Projections, Registered Nursing (RN) is among the top occupations in terms of growth, projecting the need for 203,700 new RNs annually through 2026. Currently, there are simply not enough nurses in the pipeline to meet expected demand. Further, systemic problems hamper the ability to train people to fill these positions with U.S. workers. According to the American Association of Colleges of Nursing (AACN), more than 75,000 applicants were turned away from baccalaureate and graduate nursing programs in 2018 due to factors ranging from an insufficient amount of faculty and lack of classroom space to budget constraints.

Compounding the lack of enough new nurses entering the field is the aging population of existing nurses. The average age of an RN is about 50 years old, which is roughly eight years older than the age of the average U.S. worker. Immigrants are valuable contributors to the nation’s nursing ranks, representing 15% of U.S. nurses and filling over 500,000 jobs. More so, a nursing degree is the most commonly underutilized degree held by immigrants. Approximately 118,000 immigrants with undergraduate degrees in nursing are working below their skill level or sidelined altogether. Programs helping these people overcome obstacles such as credential recognition and professional licensing is one way to fill these much-needed openings and is a step that was taken by states such as New Jersey and California at the height of COVID-19.

Foreign-born workers also fill 38% of home health aide jobs in the U.S. and are responsible for caring for some of the most vulnerable members of our population. Similar to U.S. doctors and nurses, the need for home health aides is nearing a crisis. Employment in the in-home aide field is projected by the BLS to grow 36% by 2028 compared to 5% growth in all occupations over that time—making it one of the country’s fastest-growing careers and a position that the U.S. will struggle to fill; the expected number of U.S. workers that gravitate toward those positions is projected to shrink 1.5% over that time.

Immigrants also play a substantial role in other aspects of healthcare. According to New American Economy, immigrants represent one in five lab technicians, one in five retail pharmacists, and one in eight respiratory therapists. Similarly, foreign medical graduates account for a substantial proportion of U.S. biomedical scholarship; roughly one-fifth of research articles are contributed by immigrants, and they serve as principal investigators for 12.5% of National Institutes of Health (NIH) grants and 18.5% of clinical trials.

Immigrants are also improving the nation’s wellbeing outside of traditional healthcare positions. Analysis from the CATO Institute found that eight of the major companies developing treatments and vaccines for COVID-19 are heavily dependent on foreign workers, hiring more than 11,000 immigrants and H-1B high-skilled foreign workers from 2010 to 2019. According to the Mercatus Center at George Mason University, immigrants account for 40% of medical and life scientists and 20% of biological scientists.

Healthcare is not an industry where immigrants compete with U.S. workers for jobs. In 2018, there were 27 open medical positions—such as surgeons, doctor, and registered nurse—for every unemployed healthcare practitioner. In fact, the shortage of healthcare professionals is a global issue.

A study by the World Health Organization (WHO) projects the need for 40 million healthcare workers worldwide by 2030 and models estimate that 18 million of those jobs will go unfilled due to a lack of qualified candidates. It’s expected that low- and middle-income countries will be the worst affected by the shortage of qualified healthcare professionals, but growing demand will fuel global competition for people in sought-after occupations.

“Uncertain times.” It’s a phrase used often these days, and while we currently live in an unpredictable moment, there is one thing you can depend on: the contribution of the immigrant community to the health and wellbeing of the nation. Whether it’s at the hospital, in our homes, or at the nation’s labs, immigrants continue the tradition of improving life in the U.S.

John Wilson is President and Partner of GolfWilson, P.A., a global immigration law firm. His practice focuses exclusively on global immigration both inbound and outbound assisting employers, employees and families. Jwilson@golfwilson.com

John will be presenting at the NHBA’s CLE program on Immigration Law. See page 23 for more details.
The International Criminal Court’s Investigation of US Service Members in Afghanistan: Politics by Other Means?

By Naomi Kalies McNeill

International law is often confusing to those new to the field. It is a body of law made up of treaties, case law, scholarly opinions, and the actions and practices of nations. Yet, it is also generally unenforceable. Treaties are often treated as a series of promises, not binding obligations. Decisions by international courts are ignored by the losing side. International institutions serve as forums for negotiations and to trade barbs. In many ways, international law fits Clausewitz’s old adage about war even better: it is politics by other means. Despite all of this, however, international institutions are still doing important work as fact-finding bodies.

The tension in international law between political posturing and tangible results can be seen in the recent decision of judges in the Appellate Division at the International Criminal Court (ICC) to authorize the ICC Prosecutor’s Office to open an investigation into war crimes and crimes against humanity committed in Afghanistan, including by US forces. The ICC Prosecutor, Fatou Bensouda, has been monitoring the conflict in Afghanistan since it began, and preliminary investigations were launched in 2006. The Prosecutor sought authorization for a formal investigation with an eye towards prosecuting multiple individuals, not only members of the Taliban and affiliates such as the Haqqani Network, but also, Afghan government and US forces. US military and intelligence personnel are accused of committing unlawful killings and torture both in Afghanistan and elsewhere through the use of black sites under the practice of rendition.

The Appellate Division authorized the Prosecutor to investigate the actions of US forces despite the fact that the US is not a member of the ICC and has never ratified the Rome Statute, which created the court and set forth the court’s powers and jurisdiction. This decision set off a firestorm of objections from the Trump Administration, in particular State Pompeo.

Does the ICC Have Jurisdiction over US Troops and Intelligence Officers?

The ICC has jurisdiction over all actors in Afghanistan because Afghanistan is a member of the ICC, and jurisdiction is based in the territory of member states. Article 12 of the Rome Statute establishes two bases for jurisdiction: (1) the territory of a member state or (2) the nationality of the accused. Only one basis is necessary to establish jurisdiction. Afghanistan became a member of the ICC in 2003. Therefore, the ICC is able to investigate and prosecute violations of international law committed within Afghan territory. It is also able to investigate and prosecute actions at black sites within the territories of other member states. This is true even though the US has never ratified the Rome Statute and has filed objections against the ICC exercising jurisdiction over US personnel.

Another basis for jurisdiction arises under Article 17 of the Rome Statute whereby a state with jurisdiction over an individual accused of violating international criminal law refuses or is unable to investigate and prosecute in its own courts. Although President Obama put an end to the most objectionable practices employed by US forces in the War on Terror, the Obama Administration declined to investigate or prosecute any US service member for alleged violations of international law committed in accordance with US policies. President Trump has indicated even less willingness to investigate and prosecute violations of international law going so far as to pardon two service members prosecuted by the US military. In addition to these executive actions, the US Congress also passed the American Service Members Protection Act in 2002, which authorizes the president “to use all means necessary” (including the use of force) to release American soldiers detained or imprisoned by the ICC. All of these actions support ICC jurisdiction.

What is the Likely Impact of US Objections to the Investigation?

As a non-member of the ICC, the US does not have any obligation to assist or cooperate with the Prosecutor’s Office as it conducts its investigation. Afghanistan, however, is a member-state and does have such an obligation. Whether Afghanistan actually will cooperate depends on how much government continues to rely on US support. As negotiations between the US and the Taliban progress, the likelihood of a cooperative environment for an ICC investigation becomes smaller and smaller. Neither the US nor the Taliban have an incentive to cooperate and an Afghan government dependent on these powers would be even less motivated to do so. Even if there were sufficient cooperation to lead to a potential prosecution of a US service member, US opposition would likely mean that no such prosecution would ever be commenced.

Given the political obstacles, it seems counterintuitive that the ICC would authorize an investigation at this time. The rationale, of course, comes back to politics. Many in the international community see the ICC investigation as a way to counterbalance the Trump Administration’s isolationist attitude in foreign affairs and general unwillingness to challenge human rights violations. By authorizing the investigation, the ICC made a statement that it is committed to upholding international legal principles. That the investigation may never lead to a conviction by the ICC does not matter. The ICC investigation, even without official cooperation, is still likely to be the best source of evidence regarding what happened during the conflict against the Taliban and other suspected terrorist groups in the region. This will be of value to others in bringing local prosecutions or civil damages suits. It will also be of great value as a historical record, which may be enough motivation to act despite the current political environment.

Naomi Kalies McNeill is a law clerk of the Outagamie County Circuit Court in Appleton, Wisconsin. She holds a JD from the University of New Hampshire Franklin Pierce School of Law and an LLM in International Law with international Relations from the University of Kent’s Brussels School of International Studies. All views expressed are her own.

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claiming that providing services in more integrated settings will be too costly, the good news is that in most circumstances community-based services are less expensive, especially if care is taken to design programs like Medicaid to support such services.

The Amanda D. case was based on the integration mandate. Investigations by the Disability Rights Center-NH and the United States Department of Justice (USDOJ) concluded in 2011 that people with mental illness in New Hampshire were being unnecessarily institutionalized at New Hampshire Hospital and other public facilities, and that significant numbers of people were at risk of such institutionalization.

A class-action lawsuit alleging violations of the ADA and other federal statutes was filed in the United States District Court in early 2012. DRC-NH was joined in the litigation by Devine Millimet and two national disability rights organizations, the Center for Public Representation and the Judge David L. Bazelon Center for Mental Health Law. The USDOJ joined the case as a plaintiff-intervenor that spring.

After Judge Steven McAuliffe granted class certification in September 2013, the parties reached a settlement, which was approved by the court the following February. The agreement requires the state to provide community-based services and supports to people who would otherwise be unnecessarily institutionalized at New Hampshire Hospital or the Glencliff Nursing Home. These include:

- multi-disciplinary Assertive Community Treatment (ACTs) services sufficient to serve 1500 individuals
- expanded supported housing services
- community housing for persons with complex medical needs and mental illness residing at the Glencliff Home
- expanded supported employment programs
- mobile crisis services in the Concord, Manchester, and Nashua regions
- improved transition planning at both New Hampshire Hospital and the Glencliff Home
- development of a quality assurance system
- more than five years after the settlement was approved, the implementation process continues.

In his most recent report, issued in January of this year, the independent expert reviewing the state’s compliance with the settlement stated that in the years since the settlement was reached, “a number of positive steps have been taken to improve the quality and effectiveness of [community mental health] services.” However, he cautioned that “the state remains out of compliance with the CMHA in several critical areas.” The areas identified by the expert include housing, Glencliff Home transitions to the community, and ACT services.

Disability Rights Center-NH and the Department of Justice continue to monitor the state’s efforts at compliance with the Amanda D. settlement. As that process continues, the state has moved in the direction of expansion of mobile crisis services. In 2019, legislation was passed which required the establishment of a statewide system of mobile crisis services for children. This would be a significant improvement to the children’s behavioral health system, and there is hope that when the system is established it will be available for adults as well.

People with disabilities have without question benefited from the ADA in the thirty years since its passage. Cases like Amanda D. have to some extent furthered community integration for people receiving state-provided services. The experience of that litigation, however, is a demonstration that passage of a civil rights statute does not remove the need for continued vigilance and advocacy so that progress continues.
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Judge Richard McNamara: A Career of Service, Fairness, and Compassion

By ALYSSA DANDREA
The Concord Monitor

Richard McNamara was a newly minted graduate of the University of New Hampshire School of Law when he was recruited by Governor John Lynch to serve on the newly created business court in Concord. McNamara, a native of New Jersey, had enrolled as an undergraduate at Boston College to study English literature. He loved history and writing but he hadn’t considered a career in law until one of his college roommates suggested it. To his delight, he was immediately taken by the concept of the business court, which provides a designated forum for the resolution of complex business cases.

“I was always told to leave the world a little better than you found it, and that if you’ve done that, you’ve done as much as anyone can expect of you,” said McNamara during a recent interview with the Monitor in an otherwise empty courtroom in Concord. “I promised to stay as long as I could and to get as much done as I could, but I always knew I’d have to retire at age 70.”

Due to the mandatory retirement age of 70 years under the New Hampshire’s Constitution, McNamara will hang up his black robe for the final time this week and officially retire on July 4. His retirement, though planned, comes as the state’s courts remain open on a restricted basis due to the coronavirus.

Judge Andy Schulman, who currently sits in Rockingham County, has been re-assigned to Merrimack County Superior Court in Concord, and will preside over many cases that McNamara otherwise would have heard. Additionally, Judge David Anderson will be the new head of the state’s business court, which will move from Merrimack County to the northern division of Hillsborough County Superior Court in Manchester.

When the Executive Council confirmed then-Gov. John Lynch’s nomination of McNamara to the Superior Court bench in 2009, McNamara became the first judge of the state’s newly created business court, which provides a designated forum for the resolution of complex business cases.

By that time, McNamara, who was 59, had practiced for 30 years at Wiggin & Nourie in Manchester, which has since dissolved. The law firm offered him a job in 1979 after he had spent four years as a product liability attorney at the paper company genetic al’s office. In his early years at Wiggin & Nourie, McNamara took on some court-appointed criminal cases, including a capital murder in the 1980s, but his primary focus was commercial litigation. That experience made him a prime candidate for the business court judgeship.

McNamara said predictability is important to business people and they need that assurance that the courts will enforce contracts. He said the business court finalized gave businesses a forum in which their cases could be resolved, whereas previously, the cases would be deprioritized over criminal matters and handled by judges who didn’t necessarily have a working familiarity with the subject matter.

Superior Court Judicial Evaluation Notice

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

Hon. David A. Anderson
Hillsborough County Superior Court- Northern District

Hon. Peter H. Bornstein
Grafton and Coos County Superior Courts

Hon. N. William Delker
Rockingham County Superior Court

Hon. Martin P. Honigberg
Rockingham County Superior Court

Hon. Lawrence A. MacLeod, Jr.
Grafton County Superior Court

Hon. Diane M. Nicolis
Hillsborough County Superior Court- Northern District

Hon. Daniel I. St. Hilaire
Rockingham County Superior Court

Hon. Charles S. Temple
Sullivan and Merrimack County Superior Courts

Hon. Brian T. Tucker
Hillsborough County Superior Court-Southern District

An evaluation may be completed online at www.courts.state.nh.us until AUGUST 28, 2020. On the Judicial Branch website, look to the left side of the page under Resources and you will see a link for Judicial Performance Evaluations. Click on the Current Superior Court Evaluations link and choose the specific Judge you would like to evaluate. While responses will be shared with the judges being evaluated, they are treated as confidential, and the identity of the respondent will remain anonymous.

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

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

Law Student Leads Effort to Remove Mental Health Questions from Bar Application

By Victoria Saxe

On June 19, 2020, the New Hampshire Supreme Court Committee on Character and Fitness announced the state will no longer inquire about applicant mental health history, diagnosis, or treatment when determining character and fitness for bar admission. The Committee was prompted to consider the removal of such questions after the Mental Health Alliance (MHA), a student organization at the University of New Hampshire School of Law, sent a formal request to the committee earlier this year.

The MHA was started at UNH Law in Spring 2019 by students seeking to increase awareness and reduce stigma related to students accessing mental health support and resources during law school. Third-year law student Sofia Hyatt helped start the group and has served as its chair since the group’s inception. As the MHA began facilitating conversations on campus about student mental health, Hyatt observed that one barrier to accessing mental health support frequently cited by her classmates was the fear of how accessing treatment would be viewed by bar examiners. Hyatt observed that this concern reflected a broader national trend among law students, the majority of whom reported experiencing mental health challenges during law school but do not seek support. At the same time, Hyatt started to learn about student initiatives like MHA on other law school campuses and how a growing list of states were beginning to remove questions asking about applicant mental health from their bar applications.

In their written request to the Committee, the MHA stated: “There is no way to count how many law students refrain from seeking therapy for mental health challenges during law school, because they remain silent in protection of their futures. These students are led to believe that if they see a mental health provider for support, they will be required to provide this information to the bar examiners. The MHA request also cited a 2015 Resolution of the American Bar Association House of Delegates which recommended states narrowly tailor character and fitness inquiries to avoid discouraging applicants from seeking mental health support and to eliminate barriers to bar admission for applicants with disabilities. "Questions about applicant mental health and substance abuse are problematic. They discourage applicants from seeking valuable resources for fear of forced disclosure of private health information," the MHA explained in the request. "Moreover, if an applicant is in fact experiencing issues that impact their ability to practice law in a competent, ethical, and professional manner these issues are likely to arise in other areas of the application, such as debts, criminal history, disciplinary history, or on the student certification by the Dean of the BAR EXAM continued on page 35
Administrative Law

Vacated and Remanded

• Whether the New Hampshire Board of Tax and Land Appeals (BTLA) erred in dismissing the petitioner’s appeal of the denial of their real estate tax abatement for failure to comply with the signature and certification requirement of N.H. Admin. R., Tax 203.02.

The petitioners contacted Attorney Randall F. Cooper regarding an abatement application. He was going on vacation but agreed to represent them and complete the application on his return. Upon his return, he completed the application and signed on their behalf. The BTLA denied the abatement application and the petitioner’s appeal for failure to obtain the taxpayer’s signature. The petitioners then filed a petition for review, arguing that the failure was “due to reasonable cause and not willful neglect.” N.H. Admin. R., Tax 203.02(d).

Cooper was away on vacation; Cooper to the signature and certification required and that the taxpayer was not indifferent. The Court focused on “whether the taxpayer was indifferent, nor intentional failure” can show that it was not reasonably pos vacating and remanding the BTLA’s down, the BTLA in denying the petitioner’s appeal of the denial of their appeal on finding that the petitioner “did not demonstrate that the failure was “due to reasonable cause and not willful neglect.” N.H. Admin. R., Tax 203.02(d).

The petitioners’ appeal of the trial court’s decision was affirmed.

Municipal Law


• Whether the Technical Review Group (“TRG”) is a “public body” as defined by RSA 91-A:1-a and subject to open meeting requirements.

The TRG is a work team, with no decision-making authority, established by the city’s city manager. The TRG is intended to advise applicants and review projects submitted to the planning board. The applications and plans on are loaded into a database to be reviewed by the planning board but are also publicly available for inspection. The TRG holds meetings that are not open to the public. The plaintiff filed suit seeking declaratory and injunctive relief on the grounds that it violated the Right-to-Know Law’s open meeting requirement, but after a bench trial the court denied the plaintiff’s “prayers for relief” and an appeal followed.

The Court reviewed RSA 91-A (Right-to-Know Law) de novo. The plaintiff argues, but the Court is not persuaded, that the TRG is an “advisory committee” under RSA 91-A:1-a, 1 and therefore a public body. The Court reviewed the applications for compliance but does not make recommendations. The plaintiff makes arguments around the TRG’s “primary purpose” that the Court finds unpersuasive. The Court relies on statutory construction to find that the purpose of the body’s consideration is the deciding factor in relation to “primary purpose” and the TRG doesn’t provide advice so they are not an advisory committee.

Next, the plaintiff argues the streamlined information gathering process between the municipal officials and the applicant triggers an open meeting requirement. The Court, relies on Bradbury, 116 N.H. at 389-90, to illustrate the difference between policy making authority and application assistance to show that the TRG is not involved in “governmental programs and decisions.” Therefore, the Court found that the TRG was not an “advisory committee” or a “public body” and not subject to open meeting requirements, RSA 91-A:1-a, 1; RSA 91-A:1-a, 4; and RSA 91-A:2, II respectively.

• Whether the city’s copy fee schedule is prohibited by RSA 91-A:4, IV.

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• Whether the cost of the security system installed is an “economic loss” as defined by RSA 651:62, III(a).

The defendant pled guilty to burglary but disagreed with the trial court’s amount of restitution owed the homeowners. As part of this plea, he agreed to pay a maximum amount, but he did not concede that the cost of the security system was compensable as restitution. After the plea and sentencing hearing, the State filed a memorandum of law and the trial court found that the expense was an “economic loss” under RSA 651:62, III(a) and the defendant appealed.

The Court is not persuaded by the State’s arguments that “allowing the reimbursement advances the statute’s purpose of ‘increase[ing], to the maximum extent feasible the number of instances in which victim’s receive restitution.” The Court reviewed the trial court’s legal conclusions de novo. Because the statute is part of the Criminal Code they construed the statute’s meaning “according to fair import of [its] terms and to promote justice,” RSA 625.3 (2016); “construing all part of the statute together to effectuate its overall purpose and to avoid an unjust result” Carrier, 165 N.H. at 721; and within the context of the statute as a whole.

The Court found that the State did not prove that the expense represents a “loss” but that it would leave the homeowner’s in a better position because they did not previously have a security system. The State further argues that the security system is similar to the types of compensable expenditures under RSA 651:62, III(a). The Court agreed with the defendant that trial de novo.

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Civil Procedure

June 5, 2020

Affirmed

• Whether the plaintiff’s complaint was improperly dismissed on res judicata grounds.

The plaintiff brought a complaint against the defendant for breach of contract that was dismissed by the trial court when neither party appeared at a scheduled trial management conference. The plaintiff filed a motion to re-open that was denied because it was not timely filed within 10 days. Then, the plaintiff filed suit against the defendant on various charges including breach of contract. The defendant argued that the breach of contract complaint was barred on res judicata and the trial court agreed that the prior dismissal “constituted a judgment on the merits, as it was effectively issued “with prejudice.”

The Court reviewed de novo. The only question before the Court was whether the dismissal of the previous suit “with prejudice” constituted a judgment on the merits and would therefore satisfy the last element of res judicata. The Court looked at the case’s procedural history. The present case’s procedural history is nearly identical to Foster, 136 N.H. at 730 and the Court followed that Court’s reasoning in concluding the trial court did not err in dismissing the case on res judicata grounds.

The plaintiff argues, and the Court disagrees, that where the order was silent and procedural it should have been presumed to be “without prejudice.” The Court reasoned that the trial court could have reopened the case rather than treating it as a motion to reconsider as untimely but that would have had little effect and delayed the resolution. Therefore, the trial court’s conclusion that the dismissal was “with prejudice” was supported by the events and the reasoning in Foster so the Court affirmed the trial court’s order.

Prieto Law, of Manchester (Joseph Prieto and Wesley Gardner on the brief for the plaintiff; Gallagher, Callahan & Gartrell, P.C. of Concord (John A. Curran on the brief) for the defendant.

NH Superior Court Judicial Assignments: July – September 2020

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Supervisory Justice

Assignments commence on the first Monday of each month

Schedule is subject to change.

Effective 7/1/20

Supreme Court Orders

ADM-2014-0071, In the Matter of Franz P. Frechette, Esquire

On October 28, 2014, Attorney Franz P. Frechette was suspended from the practice of law in New Hampshire for nonpayment of his 2013/2014 bar dues.

On April 3, 2020, Attorney Frechette filed a petition for reinstatement pursuant to Rule 42A(D)(1). After review, the court grants the petition.

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

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

ISSUED: June 22, 2020

ATTTEST: Timothy A. Gudas, Clerk of Court Supreme Court of New Hampshire

RSA chapter 679, effective July 1, 2020, establishes a Housing Appeals Board. In accordance with RSA 679:2, the Supreme Court appoints the following members to the board:

1. Attorney Gregory E. Michael, to serve a five-year term as chair of the board, beginning July 1, 2020, and expiring June 30, 2025.

Issued: June 25, 2020

ATTTEST: Timothy A. Gudas, Clerk of Court Supreme Court of New Hampshire

At-a-Glance from page 33

court erred, finding its interpretation of the statute was too broad. They construed the statute to embrace only items similar in nature to the types of “remedial treat- ment and care” in RSA 651:62, III(a) and the security system was not similar.

The Court then addressed the dis- sent’s arguments, finding: 1) based on the statutory language the statute is limited to “the types of items particularized,” 2) if they had followed dissent’s construction it would have rendered “‘other expenses incurred as a direct result of a criminal offense’ superfluous,” and 3) based on the State’s arguments there would be virtu- ally no limit compensable expenses. The Court analyzes but declines to follow the reasoning in Wisconsin Court of Ap- peals State v. Queever, 887 N.W.2d 912 (Wis. Ct. App. 2016), where a defendant had perpetrated a series of burglaries on a homeowner and was likely to do so again. Additionally, the Court points out that the majority of courts that have addressed this issue have also found that a security sys- tem is not compensable as restitution.

The dissent would affirm the trial court’s findings. They accept the trial court’s factual findings, based on evi- dentiary hearing, that the State had met it’s burden of proof, by a preponderance of the evidence, that the security system was a reasonable charge as a direct result of the defendant’s criminal offense. Like the majority, the dissent reviews the statutory interpretation de novo. The dissent found the majority had narrowly construed the restitution statute, inconsistent with legis- lative intent, rendering the phrase “other expenses incurred as a direct result of a criminal offense superfluous.” The dissent highlights that the principal ejusdem ge- nera, that the majority and the defendant rely on, can be articulated in two ways but that applying it is inconsistent with legis- lative intent. The dissent disagrees with the defendant’s argument that the causal connection is too attenuated. The restitu- tion statute, which the dissent interprets according to its plain meaning, does not preclude the trial court from finding caus- al connection between the burglary and the purchase of a security system.

Gordon J. MacDonald, attorney general (Stephen D. Fuller, Senior assistant at- torney general on the brief, and Sean R. Locke, assist attorney general orally) for the State. Thomas Barnard, senior assis- tant appellate defender of Concord, on the brief and orally for the defendant.

The dissent found restitution statute, inconsistent with legis- lative intent. The dissent disagrees with the defendant’s argument that the causal connection is too attenuated. The restitu- tion statute, which the dissent interprets according to its plain meaning, does not preclude the trial court from finding caus- al connection between the burglary and the purchase of a security system.

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McNamara from page 32
ter and the relevant laws.

The New Hampshire Supreme Court Committee on Character and Fitness reviewed the request and input provided by the MHA and other constituents at its May meeting. In announcing its decision to remove inquiries into applicant mental health, the Committee said it “was persuaded that these questions discouraged law students from seeking necessary treatment for mental health and substance abuse problems when such services are critical to student well-being.” The announcement went on to quote character and fitness committee chair Joseph F. McDowell, III, Esquire: “A diagnosis standing alone does not equate to misconduct that reflects on an applicant’s character or ability to practice law in a professional manner. We believe removing these questions will encourage law students and attorneys to stay healthy and seek treatment when needed.”

The Committee’s announcement also acknowledged the input it received from numerous constituencies, including former Chief Justice Broderick.

“I admire the law students who petitioned for change and am grateful to the Committee and the Court that they saw the need, too,” Justice Broderick said.

Prior to the announcement, New Hampshire Supreme Court Character & Fitness Questionnaire asked in Question 11: “Do you currently have any condition (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?” An affirmative answer required applicants to then answer Question 12 with an explanation and list of the names and addresses of all past and current treatment providers.

With the removal of these two questions, New Hampshire joins at least twelve other states who have removed similar inquiries into applicant mental health history, diagnosis, and treatment, including New York, Connecticut, Louisiana, Arizona, California, Illinois, Massachusetts, and Washington.

Hyatt and the MHA are thrilled by the announcement.

“We are so excited that moving forward, students planning to apply to the New Hampshire bar will no longer have to fear about disclosing private health information. We believe this is an important step towards de-stigmatizing mental health and substance abuse challenges in the legal profession in New Hampshire, and hope that more students feel comfortable seeking help.”

“A powerful change for and by NH law students,” UNH Law Professor Buzz Scherr tweeted after the announcement. “Law students can make change happen.”

Victoria Saxe is a third-year law student at the University of New Hampshire School of Law where she is a Warren B. Rudman Public Interest Fellow and Daniel Webster Scholar. Victoria helped start the Mental Health Alliance at UNH Law during her 1L year.

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