An Official Publication of the New Hampshire Bar Association

# NEW HAMPSHIRE BAR NEWS

September 16, 2020 *Supporting members of the legal profession and their service to the public and the justice system.* Vol. 31, No. 4


## Ethics & the Practice of Law

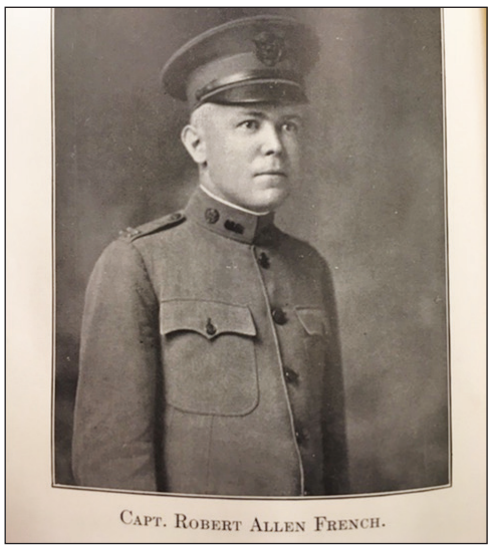
*Look for the annual supplement from the Ethics Committee, featuring opinions on social media and more in the center of this issue.*

# Remembering the Spanish Flu of 1918 and the Granite State Legal Community

**By Misty Griffith and Scott Merrill**

As the COVID-19 pandemic drags into the fall, many Americans have altered their daily lives in ways that may have seemed unimaginable last March. For those who lived through the summer and fall of 1918, similar uncertainties and changes were in the air. That was the year the Spanish flu pandemic caused over 670,000 deaths in the U.S. and over 2,700 deaths in New Hampshire.

The Spanish flu, or "pestilence," as it was sometimes called at the time, infected up to as many as 500 million people worldwide. The origins of the flu are still unknown, according to the National Center for Biotechnology Information, but likely began in the U.S. in March of 1918.


Capt. Robert Allen French.

Robert Allen French graduated from Harvard Law in 1908 and practiced law in Nashua until June of 1918. (Photo/ Courtesy of the NHBA)

The so-called "Spanish" flu was given that name, not because it originated in Spain, but because during World War I, neutral Spain was the only country in Europe that was covering the influenza crisis. U.S. newspapers were encouraged to downplay the virus so as not to negatively impact morale during the war.

The Spanish Flu pandemic occurred in three waves in the United States. The first wave was in the spring of 1918 followed by a significant abatement of cases during the summer months. The second, and far deadliest wave, occurred from September to early November 1918, followed by a lesser wave during the winter of 1919.

The Spanish flu was unusual in that many of the deaths were among previously healthy 25-35 year-olds. In New Hampshire, the legal community lost several of its young members in the fall of 1918.

The 1919 Proceedings of the NH Bar Association has three obituaries for young attorneys that mention the flu:

- Capt. Robert Allen French (Sept. 13, 1882-Dec. 17, 1918) "was attacked by that deadly pestilence which at that time removed from our sight so many of our friends."
- Arthur La Flamme (January 16, 1888- Sept. 25, 1918) "was taken ill by influenza which later developed into

**FLU** *continued on page 19*

# Bar's Legislative Advocacy in Review

## A 'Bizarre' Year For Legislation in the Granite State

**By Scott Merrill**

The legislative session that began in January all came to a crash in March with Governor Sununu's emergency orders. Eventually, only 39 bills were enacted into law out of 891 originally introduced.

According to John MacIntosh, the Bar Association's legislative representative at the Statehouse, "It's been a bizarre year. We've never seen anything like this."

"It feels like the session that never was. We've never seen a year where only 39 bills are signed into law," he said, attributing the low number of bills passed this session to a confluence of events beginning with the Governor's state of emergency orders in March and fueled by

**REVIEW** *continued on page 16*

**PRACTITIONER PROFILE**

# NH Attorney Has Long Career Handling Police Misconduct

**By Kathie Ragsdale**

Police misconduct may be high on the public's radar in recent months, but it's an area in which North Conway attorney Wayne C. Beyer has been laboring and learning for decades.

Long before the George Floyd, Ahmaud Arbery and Breonna Taylor cases made headlines, Beyer was building a reputation as an authority on police misconduct, defending officers as lead counsel in more than 300 police misconduct and corrections cases involving charges ranging from excessive force, to positional asphyxia, to failure to render medical assistance.

As a trial lawyer, author and lecturer, Beyer has a diverse career history. He has worked at two New Hampshire law firms and also as an assistant attorney general (previously known as assistant corporation counsel) for the District of Columbia, chief of staff of the U.S. General Services Administration and chief administrative appeals judge of the U.S. Department of Labor Administration.

But "the cases that really moved me were the police liability cases," Beyer says of his work. Especially with

cases involving death, "there are so many interesting factors."

"There are both sides," he adds. "There's the mother of a dead person, a grieving parent or sometimes both parents, on one side of the case. They have lost their loved one. And on the other side is your client, somebody who has taken a human life and that's something that will change your life forever. You're dealing with very important and sometimes very sad facts."

Beyer recently authored a 1,540-page book, "Police Misconduct: A Practitioner's Guide to Section 1983" (Juris Publishing), including 18 chapters covering the law, with 12 on practice. He believes recent high-profile cases involving alleged officer misconduct are not reflective of policing as a whole in this country.

"You have a very large number of officers, with tens

**BEYER** *continued on page 18*

## INSIDE



Periodical Postage paid at Concord, NH 03301

## THE DOCKET

**Message from the President.** NHBA President Dan Will reflects on the importance of community and perseverance in the midst of a pandemic. **PAGE 2**

**Remembering her Mentor.** Susannah Colt pays tribute to her late mentor and friend Paul McEachern. **PAGE 4**

**Tips from the Judge.** Don't miss Judge N. William Delker's insightful and important tips for holding video hearings. **PAGE 5**

**Mourning Governor Merrill.** Granite State leaders pay tribute to former Governor Stephen Merrill who passed away September 5. **PAGE 12**

**Court in the COVID era.** Cheshire County holds state's first in person trial in months. **PAGE 22**

**Evictions Moratorium Update.** Moratorium could help Granite Staters who lost previous protections. **PAGE 23**

**Environmental, Telecomm, Utilities & Energy Law**

What is one's 'Due Diligence' when it comes to environmental site assessements? Find out the answer - and more - in this month's practice area section. **PAGES 26-31**

**Lessons Learned for District Court.** The United States District Court for the District of NH held its first Jury trial in early August. **PAGE 32**

# The Enduring Nature of Community

**President's Perspective**

**By Daniel E. Will**

Solicitor General,
NH Attorney General's Office, Concord NH

In recent years, I've really enjoyed attending the summer bar meeting and I looked forward to this year's meeting in particular. Scratched due to COVID. Pretty much whatever you might substitute for "summer bar meeting" in that first sentence got scratched as well. Let's face it, while Zoom book club meetings and cocktail parties were novel back in March, they don't really make up for the toll that COVID has taken on community. Even shouting at your neighbor from the end of your driveway is getting old.

My wife's family has deep roots in Cape Elizabeth, Maine, where her parents have retired and her uncle and mother grew up. Joan Benoit-Samuelson also grew up there and put Cape on the map by winning an Olympic marathon in 1984. In 1998, she launched the Beach to Beacon, a local 10K road race that's 6.2 miles, going through Cape and finishing at Portland Head Light. Over the years, the B2B has swelled to 6500 runners, including some of the most elite in the world.

We happened to be in town the weekend of that first race and, along with several thousand others, came out to see what the fuss was all about. Somewhere late in the race, as the 10-minute milers crossed the line in droves to the sustained cheers of bystanders who had been cheering for a couple of hours, my father-in-law and I looked at each other and spontaneously said, "We have to run this next year." We did. And the next one, and the next one. By 2018, we had run 19 Beach to Beacons.

You might be in last place, but cross the finish line, and you enter into a giant festival with music, food and the collision of runners and spectators milling about and sharing stories. We 10-minute milers suffer during a 10K in August. At 6.2 miles, the race is more than two miles longer than I ever run any other day of the year. But, we are part of the B2B community and endure the suffering every year to reconnect and catch up with it. Whenever I see someone wearing a race t-shirt from any year, I have something in common and a reason to say hello.

We broke the streak in 2019. Just before the race, my 78 year old father-in-law suffered a spinal cord injury that had all of us wondering whether he'd walk again. From his hospital bed, unable to move anything below his chest, he announced that he would run next year's B2B. My family ran the 2019 race without him.

Initially they had to hoist him out of bed, but by May, he'd graduated from a walker and a rollator to canes and walking sticks. And, by May, the race was cancelled. All of us have cursed COVID often, but, I really gave it an earful that day. In all of our years as suffering 10-minute milers, my family had never collectively needed that community more. We weren't remotely alone.


Will's father-in-law, Peter McCarthy, with his physical therapists before the race. (Photo/Courtesy of Dan Will)

The widespread interrupting of community is one of COVID's most insidious legacies. Schools and colleges, book clubs and athletic teams, offices and neighborhood block parties are all just different forms of community, inspired by a need to encounter others in person and to join one another in different pursuits. COVID interrupted our B2B community, no different than it interrupted special and important communities unique to all of us. By the end of March, most of us were already beginning to feel the onset of an isolation that left us lonely, restless and anxious.

My father-in-law decided he would complete a B2B in 2020, official race or not. His dedicated team of physical therapists dug in, and prepared him. They found a small Maine company that manufactures a three-wheeled device called Afari, designed to provide support and balance to allow people like him to run. They fastened homemade signs to telephone poles and trees along the course, and made a t-shirt he wore on race day. They and my mother-in-law arranged for friends to come out along the course and cheer him on.

A few Saturdays ago, he and his lead physical therapist crossed the start line and, two and a half hours later, ran across the finish line. He completed his race under his own power, running 100 yards in each mile, his lead physical therapist at his side throughout. A small crowd of medical professionals, family and friends celebrated at the finish line – socially distanced and masked, but also enjoying the traditional post-race donuts – joined by dog walkers in the park, curious about just who was the sweaty old guy with the entourage and the strange tricycle looking contraption.

This has been an inspiring chapter in my family's story, but before you cue the *Chariots of Fire* soundtrack, consider that this chapter is really about the enduring nature of community. Community affords us the chance to join with others in our pursuits, support and encourage them, and take their support and encouragement along the way. COVID certainly deprived my family of the B2B community we look forward to reconnecting with year over year, but, in my father-in-law's case, a new, albeit smaller and stranger community filled in the vacuum, and it grew out of his worst setback. The community is still there, as we sip cocktails while talking to people through Zoom or yelling at them in the next yard. It just looks different.

NEW HAMPSHIRE BAR NEWS

(ISSN 1051-4023)
An official monthly publication of the New Hampshire Bar Association.

EDITOR
Scott Merrill
603-715-3234
smerrill@nhbar.org

ADVERTISING AND SPONSORSHIP SALES COORDINATOR
Donna J. Parker
(603) 715-3263
dparker@nhbar.org

BAR PRESIDENT
Daniel E. Will, Esq.

EXECUTIVE DIRECTOR
George R. Moore, Esq.

DIRECTOR OF MARKETING, COMMUNICATIONS & MEMBER OUTREACH
Lynne G. Sabean, Esq.
(603) 715-3250
lsabean@nhbar.org

MEMBER SERVICES COORDINATOR
Misty Griffith, Esq.
(603) 715-3227
mgriffith@nhbar.org

MARKETING & PUBLIC RELATIONS COORDINATOR
Kailah Millen
(603) 715-3229
kmillen@nhbar.org

WEBSITE COORDINATOR
Nancy Gross
(603) 715-3253
ngross@nhbar.org

Subscription price: $160/year to non-members; members, included in annual dues; $80/year to students. Advertising rates on request. Periodical postage paid at Concord, New Hampshire 03301. Postmaster: send address changes to New Hampshire Bar News, 2 Pillsbury Street, Suite 300, Concord, NH 03301.

CONTACT US:
**news@nhbar.org**
2 Pillsbury Street, Suite 300
Concord, New Hampshire 03301
(603) 224-6942
Fax (603) 224-2910
**www.nhbar.org**

New Hampshire Bar Association
@NHBAR
New Hampshire Bar Association

NEW HAMPSHIRE
BAR ASSOCIATION
Equal Justice Under Law

# Call For NHBA Award Nominations

## Vickie M. Bunnell Award for Community Service

Instituted in 1998 to honor the memory of Vickie M. Bunnell "A Country Lawyer" and to applaud the community spirit that is a hallmark of our profession, this award is presented to an attorney from a small firm (four or fewer attorneys) who has exhibited dedication and devotion to the community by giving of their time and talents, legal or otherwise.

## Distinguished Service to the Public Award

This award is presented to the nominee who best exhibits service to the public on behalf of the administration of justice.

## Outstanding Service in Public Sector/ Public Interest Law Award

This award is presented to a member of the New Hampshire Bar, or an organization employing eligible members, who, at the time of the nomination, have at least five years of service, up to and including the time of the nomination, in government service, military service, law enforcement, public interest law services (including prosecution, public defense, legal advocacy in low-income communities or for individuals with disabilities at a nonprofit organization), or at an organization that is described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code. Qualified individuals/organizations may be nominated more than once. The nomination form can be found at **www.nhbar.org/bar-awards/.**

Nominations should be submitted by November 20, 2020 to: NHBA MYM Award, 2 Pillsbury Street, Suite 300, Concord, NH 03301-3502 or email Allison Borowy at **aborowy@nhbar.org**. The Awards will be presented at the Midyear Membership Meeting, February 5, 2021.

## Nominations Sought for the Philip Hollman Award for Gender Equality

Established on the occasion of Judge Philip Hollman's retirement from the Superior Court bench in 2003, this award is designed to honor his efforts as a stalwart advocate for gender equality in the legal system.

A Hollman award recipient is someone who is dedicated to promoting respect and fair treatment toward all members of the judicial system. This person acts as a leader, educator, and role model on such issues. Last year's recipient was Attorney Christina Ferrari of Bernstein Shur.

A nominee may be a Bar member, a court or law firm employee, or an employee of a state department or agency that is part of the legal system. The award will be presented during the 2021 Midyear Meeting, on Friday, February 5.

To submit a nomination or to learn more visit **www.nhbar.org/gec**
Submit nominations by **Thursday, November 5**.

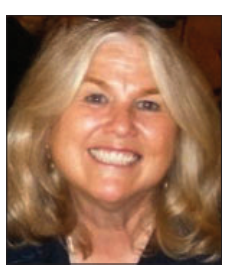
NEW HAMPSHIRE
BAR ASSOCIATION
GENDER EQUALITY COMMITTEE
Equal Justice Under Law

Visit the Gender Equality Committee webpage today!
**www.nhbar.org/gec**

# The Ministerial Exception Expands

**By Nancy Richards-Stower and Debra Weiss Ford**

Editor's note: *This is the 18th N.H. Bar News article co-written by employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate). Here they discuss this summer's two U.S. Supreme Court decisions appealed from the Ninth Circuit* (Our Lady of Guadalupe School v. Morrissey-Berru, *and* St. James School v. Biel, as Personal Representative of the Estate of Biel*) consolidated under the name* Our Lady of Guadalupe School v. Morrissey-Berru, *591 U.S. (2020) which expanded the scope of the "ministerial exception" in employment discrimination cases.*



Ricards-Stower

Weiss Ford

**Nancy:** Deb, the "ministerial exception" of *Our Lady of Guadalupe* has zero effect on New Hampshire's anti-discrimination laws because RSA 354-A (already) totally exempts employers with religious affiliations:

*Employer "does not include ... [any non-profit] religious association or corporation... Entities claiming to be religious organizations, including religious educational entities, may file a good faith declaration with the human rights commission that the organization is an organization affiliated with, or its operations are in accordance with the doctrine and teaching of a recognized and organized religion to provide evidence of their religious status. (RSA 354-A:2(VII)).*

**Debra:** However, employees of those same New Hampshire religiously-affiliated employers (assuming the threshold number of employees) *are* covered by federal discrimination law unless they fall within the "ministerial exception" expanded by this decision, which involved the claims of two teachers employed by different private Catholic schools in Los Angeles. Morrissey-Berru sued under the Age Discrimination in Employment Act (ADEA); and Biel sued under the Americans with Disabilities Act (ADA). Both teachers had similar contracts which required them to "model and promote" the Catholic "faith and morals." Both taught religion and both prayed with their students. Both taught regular academic courses. Neither was deemed "a minister."

**Nancy:** Morrissey-Berru taught 5th and 6th grades and all subjects, including religion. She was expected to attend faculty prayer services; she *"was informed that the hiring and retention decisions would be guided by the Catholic mission."* She taught prayers, and was evaluated on whether Catholic values were "infused" through all subject areas. The employer refused to renew her contract, claiming she had difficulty administering new reading/writing programs.

**Debra:** Biel worked as a 5th grade teacher and her contract was similar, requiring her to teach Catholic religious doctrines and sacraments, and she also prayed with her students. Her employer declined to renew her contract, alleging poor performance after she requested a leave of absence to treat the breast cancer that eventually caused her death.

**Nancy:** In ruling the teachers could proceed, the Ninth Circuit applied the "ministerial exception" factors of *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012).

**Debra:** Nance, we wrote all about that in the April 13, 2012 *Bar News*: "The U.S. Supreme Court Affirms a Ministerial Exception to Employment Lawsuits." In brief, the 2012 *Hosanna-Tabor* decision held that the government could not interfere with the hiring, discipline or firing of a minister without impermissible entanglement under both religion clauses of the First Amendment of the United States Constitution:

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...*

**Nancy:** That *Hosanna-Tabor* plaintiff suf-

**EXCEPTION** *continued on page 8*

# Paul McEachern's Tireless Fight for Equity and Justice

Letter to the Editor

**By Susannah Colt**

During two out of the four times Paul McEachern ran for governor of New Hampshire, he steadfastly refused to take the pledge of no new taxes. He felt the total reliance on property taxes was an unfair tax system and that it really amounted to an income tax in disguise. "Our homes don't earn money so we have to pay our property taxes from our income," he said during his 2004 campaign.

Paul, who died on August 18 at 82, acknowledged that running for governor without taking the pledge was not a logical decision. "It's an emotional decision," he admitted. "We're pitting town against town again. It's the lowest common denominator of a democracy when government preys on those least able to respond. It makes the entire educational funding system a farce."

Paul's tireless effort to create a more equitable tax system in New Hampshire

will be one of his many legacies.

For me, however, making me into the lawyer I became will be his legacy. In 1989, I was a law school graduate from the University of Dayton who canvassed the state of New Hampshire with my resume because I desperately wanted to move to this beautiful and pristine state. I received a call from Shaines & McEachern in Portsmouth inviting me to interview. I don't know why I got the job, but I am eternally grateful to Paul McEachern and Robert Shaines for taking a chance on me.

Paul took me under his wing and taught me that putting your heart and soul in whatever you do makes you the best person you can be. He had a strong devotion to the law, always guiding me to the statutes and the case law as my guide.

Seven months after I arrived in New Hampshire, I successfully passed the bar and was admitted to the New Hampshire Bar. I went to the swearing-in ceremony in Concord and upon my return I was greeted at the door by Paul and one of our clients, who handed me a bouquet of 12 red roses.

Paul had me working on the rose-

**McEACHERN** *continued on page 9*

I really enjoyed Attorney Rufro's Letter to the Editor in the *Bar News* August 19, 2020. He made his point very well without rancor, but with great tongue-in-cheek aplomb and excellently researched historical facts.

My only small "disagreement" with said letter was when Attorney Rufro said, "…equal justice under the law…is seen … not in terms of social class (in the USA)." I would remind him and your readers that "social class" is a Marxist concept. In the U.S, we are all of the same "social class" and the "equality under the law" we strive for is equal opportunity-not equal outcome. But that is an argument for another day. Again. An excellent "OP/ED". Thank you.

Robert H. Fryer

Bench Notes

# Five Tips for Successful Advocacy in the World of Video Hearings

When the COVID-19 pandemic prompted the New Hampshire Supreme Court to suspend all in-person trials and hearings in March, the judiciary quickly increased its use of video conferencing to meet our constitutional responsibility to adjudicate cases and controversies. This shift from live hearings to advocacy via a computer screen was dramatic for many practitioners. In those early days of the pandemic, gaffs and awkward presentations were understandable and forgiven. After months of practice, all of us should have now fine-tuned our video presentation.

With in-person court proceedings still limited, video advocacy is likely here for the foreseeable future. With that in mind, below are five suggestions for successful advocacy by video.

1. **Formality is important:** Many law offices have closed during the pandemic, forcing lawyers to "appear in court" from home. Still, it is essential that attorneys create a space and environment at home that replicates the formality of court. Whether an attorney is making a case from a home office or a kitchen table, he or she needs to stage the setting appropriately. If I am distracted by the pictures on the wall, the disarray of your open closet, or your cute cat bounding in and out of the video, I am not paying close attention to your legal arguments.

   Recently, the superior law clerk committee interviewed almost 20 law school students virtually. Most staged their interview settings against a neutral background, using either a blank wall or curtain as a backdrop. This helped us focus on the candidate and the interview, and not the distractions of the setting. Throughout the interviews, I thought, "If law students can set up their video interviews like this, then lawyers can take the same care when they participate in hearings." It is easy for all of us to allow the informality of our home surroundings to prevent us from treating the proceeding with formality. As a result, we need to take special care to be intentional in the way we set up our home workspace.
2. **Pay attention to your camera:** There are some basic rules of etiquette in court that are so ingrained that they go unmentioned when we talk about effective oral advocacy in the courtroom. How a


**By Judge N. William Delker**
New Hampshire Superior Court

lawyer appears and behaves in court effects the court's perception of that person. Good eye contact is a hallmark of a confident lawyer. No litigator would think of facing away from the judge and talking to the wall when making an argument in court. Yet, when it comes to the video presentation, many lawyers do not adequately consider their own presentation on the screen.

One lawyer who regularly appears before me in video hearings has positioned his camera to show only the top of his head. Others, who are working with two monitors, forget to direct their attention to the one with the camera, meaning I am looking at the side of the lawyer's face. All of this matters because, just like in the courtroom, the style of your video presentation influences the effectiveness of your advocacy.

All video conferencing programs allow us to see ourselves – and assess how we appear to other participants in a hearing – before we go live. Take the time to do this.

3. **Lighting matters:** Avoid sitting in front of bright windows and under harsh lights. From their first year in law school, attorneys learn that their credibility is essential for long-term success. Often the backlight causes the individual's features to be shrouded in darkness. Your credibility becomes hard to judge when your face is obscured by shadows. Video already blunts the personal connection with the judge. Don't further compromise the judge's ability to read your facial expressions with bad lighting.

   Bad lighting may also interfere with the

**TIPS** *continued on page 8*

Committee Corner

# The Restorative Power of the Public Protection Fund

*Editor's Note: The Committee Corner is a new, ongoing* New Hampshire Bar News *feature that will allow Bar Members to learn more about how the Bar Association's numerous committees function, and to gain information about how to access the services provided by committee.*

**By Neil B. Nicholson**

Reading about it in the news makes you cringe. It's the story of a rogue and deceitful lawyer who steals from their client. The disheartening stories are similar. It could be a lawyer who accepts a client retainer and vanishes in the wind, never performing any legal work for the client. Or a lawyer who holds funds in a trust account and spends the money on personal items rather than for the client's benefit. It might be a lawyer who settles a case and leads the client on for months without ever distributing the settlement proceeds to the client because they have been stolen and already spent. Each one of these stories leaves you disappointed and hurt – both because you know it is not representative of the New Hampshire Bar at large, and because it feeds your uncle more skepticism to keep telling bad lawyer jokes.

> "What hardly anyone knows, including many lawyers, and certainly not your uncle, is that lawyers remain the only profession who step up and reimburse a client who has been victimized by another lawyer who stole from them. That's important enough to repeat."

What hardly anyone knows, including many lawyers, and certainly not your uncle, is that lawyers remain the only profession who step up and reimburse a client who has been victimized by another lawyer who stole from them. That's important enough to repeat. We, as lawyers, are the only professional association who have developed a system whereby we reimburse a person who has been victimized by another lawyer who lost their way and stole money from their client. This restorative power operates through the New Hampshire Bar Association's Public Protection Fund Committee. For the past decade, I have been privileged to work together with some great people on the committee as we try and make things right when a client is defrauded. Let me explain how it works.

## What is the Public Protection Fund?

The New Hampshire Supreme Court established the Public Protection Fund (the "Fund") through Supreme Court Rule 55. The Fund provides a public service and promotes confidence in the administration of justice and the integrity of the legal profession by providing some measure of reimbursement to victims who have lost money or property because of theft or misappropriation by a New Hampshire attorney. The Fund is administered by the New Hampshire Bar Association's Public Protection Fund Committee (the "Committee"), under the general oversight of the New Hampshire Supreme Court. You fund the Fund. Every attorney licensed in New Hampshire makes an annual contribution into the Fund as part of the licensure process.

**FUND** *continued on page 7*

Cybersecurity Corner

# Coronavirus Tracking Must Comply with Privacy and Security Laws

**By Cameron G. Shilling and John F. Weaver**

As attorneys and staff return to the office, law firms will be collecting sensitive health and personal information about employees, clients, vendors and other visitors to detect coronavirus symptoms, prevent transmission of COVID-19 and track social interactions. Though federal and state law previously prohibited collection, use and disclosure of employee health information, the pandemic has prompted regulators to permit such activities, as long as we comply with information privacy and security laws.

Because most law firms do not typically handle this type of sensitive information about these individuals, we are generally unfamiliar with the regulations that apply, and are unaware of and unprepared to implement the privacy and security controls necessary for these circumstances.

The following are key steps for firms to take:

1. Provide an appropriate written notice to individuals about the particular health and personal information collected, used and disclosed, and the legally permissible purposes for which the firm will do so. Obtain written consent from individuals that complies with applicable privacy laws before engaging in such activities.
2. Ensure that the collection, use and disclosure of health and personal information is only for purposes specifically permitted by applicable privacy laws. Adopt a written policy governing these activities (or ensure the firm's existing policy addresses this situation) and train all employees with access to such information about the policy and regulations.
3. Notify individuals of their rights with respect to the collection, use and disclosure of their health and personal information, such as limiting the use of the information, obtain copies of the information, and requesting that the firm destroy it. Honor and enforce those rights whenever exercised by individuals.
4. Implement security controls appropriate to protect the sensitive nature of the information in both hard copy and electronic formats. If the firm plans to use an online application to collect and manage this information, conduct appropriate due diligence to ensure that the provider complies with privacy and security laws, and enter into an appropriate data processing agreement with the vendor.

As attorneys and staff return to the office, law firms need to take steps to protect both the safety of our employees, clients and other visitors, as well as the privacy and security of the sensitive health and personal information we collect and use to do so. Working with an experienced information privacy professional to implement the foregoing steps will enable the firm to accomplish both of these important objectives.

*Cam Shilling chairs and John Weaver are members of McLane Middleton's Information Privacy and Security Group. Founded in 2009, the group assists businesses and private clients to improve their information privacy and security compliance and address any security incident or breach that may arise.*

Cam Shilling

John Weaver

The *Bar News* has launched this regular column devoted to cybersecurity and information privacy. Contact **news@nhbar.org** if you'd like to contribute an article on these critical issues facing the profession.

# LawLine Thank You

August's Lawline was hosted once again by Wescott Law in Laconia, on Wednesday, August 12th. Over 30 calls were answered by the volunteer attorneys, and information and brief advice was provided on a variety of topics.

The Bar would like to thank Attorneys Allison Ambrose, Paul Fitzgerald, Rod Dyer, Shawna Bentley, Sarah Rubury, and support staff member Dawn Scribner, for volunteering their time for this very important public service. Wescott Law has hosted LawLine every year for over sixteen years, and their consistent participation and commitment to providing the public with this free legal resource is greatly appreciated.

The Lawyer Referral Service, NH Courts, and NH Legal Service programs refer many people to Lawline who do not have easy access to an attorney for a quick question. We are very thankful to have this resource to assist them. Callers often express their gratitude for the service and for the attorneys who provide it.

We are currently recruiting LawLine hosts for 2021. If you are interested in volunteering two hours of your time to provide brief legal advice (anonymously) to the public, please contact Eryon Greenburg at **egreenburg@nhbar.org**. LawLine is always held the second Wednesday of each month, from 6:00-8:00 pm. You provide the place and the volunteers to take calls, and the Bar provides a light dinner.

**Fund** from page 5

## Who are the Committee Members?

The President of the New Hampshire Bar Association in conjunction with the association's Board of Governors approves the nine members of the Committee. The Committee must include at least two public members. Five members constitute a quorum. All decisions of the Committee are made by a majority of the members present and voting. The Committee's current members include Thomas J. Quarles, Jr., Esq., Chair, of Devine Millimet; Keith F. Diaz, Esq., Vice-Chair, of Bussiere & Bussiere; Marissa Chase, Executive Director at New Hampshire Association for Justice; Tracy L. Culberson, Esq., General Counsel at Office of Public Guardian; Karen DeFusco, National Certified Guardian at Office of Public Guardian; John P. Kacavas, Esq., Chief Legal Officer and General Counsel at Dartmouth-Hitchcock; Neil B. Nicholson, Esq., of Nicholson Law Firm; Danielle L. Pacik, Esq., Deputy City Solicitor at City of Concord; and Andrea Jo Schweitzer, Esq., of McLane Middleton. Longtime public Committee members Sandra Keans and Jay Haines recently retired from the Committee. Paula D. Lewis is the Committee's NHBA Staff Liaison.

## Does the Fund Reimburse Every Claim?

No, because the Fund does not reimburse all losses. A loss must have occurred while the attorney was providing legal services or while the attorney was engaged in a fiduciary capacity, such as a trustee, guardian, conservator, etc. The theft or misappropriation needs to have been of money or other property with a determinable monetary value. The theft or misappropriation must have occurred after June 1, 1998.

Supreme Court Rule 55, PPFC Regulations, and even some case law control the specific processes for reimbursement. I highlight some key elements in pursuing a claim to keep in mind should you ever refer a client to the Committee because of another lawyer's defalcation, or should you decide to assist a client in making a claim. Of course, you should review and rely on your own interpretation and application of Supreme Court Rule 55 and PPFC Regulations to successfully pursue a claim.

A limitations period applies to claims. To be considered timely, claims for payment must be submitted in writing, under oath, and shall explain specifically the defalcations which led to the losses in question. Such claims must be submitted within three years of the time when the victim discovered or first reasonably should have discovered the defalcations and the resulting losses, but in no event later than one year after the lawyer in question has been suspended or disbarred from practice, has resigned while under investigation, or has died or been judged mentally incompetent before the suspension, disbarment, or resignation proceedings have been commenced or concluded.

The Fund was created as a last resort from which a victim might obtain some measure of relief. Therefore, under the rules and regulations, a claimant must exhaust reimbursement sources from all other sources before payment from the Fund occurs. A claimant has the burden of proof to demonstrate reasonable efforts occurred to collect from the assets, insurance and sureties of the attorney who caused the loss, and that attorney's law firm, as well as from any other third parties who might be liable to the claimant. It is not necessary to exhaust all other potential sources for reimbursement before filing a claim.

A cap on recovery exists. The maximum amount of reimbursement to all claimants against the Fund in respect to all conduct of any one lawyer is $250,000 in the aggregate. The maximum amount of reimbursement to any one claimant, or all claimants, against the Fund in any Fund year are $250,000 and $1,000,000, respectively, in the aggregate. Payable claims are subject to pro-rata reductions if aggregate claims exceed these caps.

## How Do I Pursue a Claim and What is the Process for a Decision?

If you believe a client may qualify for reimbursement from the Fund, promptly complete a Statement of Claim Form and file it with the New Hampshire Bar Association, 2 Pillsbury Street, Suite 300, Concord, NH 03301, Attn: Public Protection Fund Committee. The Committee conducts an investigation of the claim to determine compliance with all elements of the rules and regulations to pay reimbursement to a claimant. Most often an individual Committee member is assigned as the investigator on the claim.

The assigned Committee member has broad authority to investigate the claim. The investigating Committee member may conduct telephonic or in-person interviews, request and review records, and conduct analysis on the claim to bring forward for the Committee's further collaboration and consideration. The Committee can request a hearing with the claimant to obtain additional facts before making a final decision. Ultimately, the Committee decides on whether a claim meets the eligibility requirements or not. Upon conclusion of the investigation, the Committee provides a written decision to the claimant, along with a check for approved claims. A claimant has appellate rights to the New Hampshire Supreme Court in the event the Committee denies part or all of a claim.

## How Much Did the Public Protection Fund Committee Award This Past Reporting Year?

The Fund's reporting year ends on May 31st. In the 2019-2020 cycle, the Fund paid out $400,000.00 in approved claims. The Committee approved $500,000 in claims during the last reporting year, which due to applicable rules and regulations do not always get paid out in the same reporting year. The amount of current claims under investigation is $256,331.15. The Fund's current balance is $1,441,419.60. This includes your collective contribution of $148,165 into the Fund in June.

## Conclusion

So, the next time you read about one of these cringe-worthy stories, take pride in knowing that your profession is like no other. Even though you had nothing to do with the wrong that occurred to that victimized client, you have already taken steps to make it right. While I'll laugh along at a funny lawyer joke, I also relish the opportunity to share about the restorative power of the Fund to those who express animosity toward lawyers. Please do the same. It is a noble profession. The Fund is one more truth of that.

For further information about the NHBA PPFC, call 603-715-3289.

*Neil B. Nicholson represents the injured in state and federal courts in NH, MA and VT and is the managing member of Nicholson Law Firm. Reach him at neil@nicholson-lawfirm.com or www.nicholson-lawfirm.com.*

## Tips from page 5

effectiveness of your presentation. It can be distracting when a lawyer is positioned with a bright light or window directly behind the individual. The glare naturally attracts the judge's attention away from the lawyer and toward the light.

4. **Sound matters:** No judge would tolerate audible text alerts in court. No lawyer in the courtroom would think it acceptable to loudly crinkle paper while opposing counsel is making her argument. Yet video presentations commonly include distracting noise: the bing of email or text notifications, a ringing phone, the click of computer keys, a barking dog, the hum of an air conditioner, and the shuffling of paper all occur regularly during hearings. Every video conferencing program has a mute feature. If your space is limited, you need to sort pleadings or other documents near your computer microphone, or there is risk of background noise, use the mute function.
5. **Don't multi-task:** Just because video conferencing allows you to multi-task, it does not mean you should. If you are answering an email during a hearing, you are not paying attention to what your opponent is saying. The best practice for video hearings is—just as in the courtroom—to sit quietly and listen respectfully to your opponent's argument. This minimizes the chance of creating distracting, extraneous noise and keeps you focused on what is happening in your case.

"Just because video conferencing alows you to multi-task, it does not mean you should. If you are answering an email during a hearing, you are not paying attention to what your opponent is saying."

Many lawyers and most judges are eager to return to the regular court operations with live hearings. It is likely, however, that video hearings will continue to have a place in court even after the current crisis passes. Developing some basic etiquette will make you a better lawyer and more effective advocate in our increasingly online world.



## Exception from page 4

fered from narcolepsy and was a "called teacher," one trained in the religion of her employer, the Lutheran Church-Missouri Synod. She took theological courses, passed oral exams and obtained the endorsement of her local Synod district. Once "called," she received the formal title of "Minister of Religion," even though most of her time was spent on non-religious matters. In contrast, "lay teachers" were not required to have the special training, nor even to be members of the Lutheran Church, even as they shared the same basic duties as the "called teachers". The court limited its ruling to the hiring and firing of the religious leaders and did not *"express [a] view on whether the exception bars other types of suits..."*

**Debra:** *Hosanna-Tabor* was an easy call. The plaintiff's special training and acceptance by her local Synod was a six-year process; her congregation had to elect her to become a commissioned minister and provided her with a special housing allowance. She taught religion four days a week and led prayers three times a day. She took her students to chapel services and led two services, choosing the liturgy, music and giving a short message based on Bible verses. That most of plaintiff's day was spent on non-religious matters and lay teachers performed the same religious and non-religious tasks she did were not determinative. In the end, it was a case of a minister bringing a discrimination suit upon the church's decision to fire her.

**Nancy:** The result? The teachers lost because the court found they were covered by the "ministerial exception," even though they were not called ministers, did not consider themselves to be ministers, nor were they trained as ministers. The hook? They were required to carry out important religious duties:

[*W]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow.* (Slip. Op., 27-28)

**Debra:** Subsequently, "who is a minister" produced more litigation, and there likely will be even more, since the 7-2 decision in Our Lady of Guadalupe School held that the "ministerial exception" is broader than the *Hosanna-Tabor* factors. Justice Sotomayor, in her dissent, warned that "thousands of Catholic teachers may lose employment-law protections because of today's outcome."

"The teachers lost because the court found they were covered by the 'ministerial exception,' even though they were not called ministers, did not consider themselves to be ministers, nor were they trained as ministers.

# Co-parenting During a Pandemic

**By Abbie E. Goldberg**

As I'm sure you know, there is emerging (mostly anecdotal) evidence that separated and divorced parents are facing unique struggles during the COVID-19 pandemic. My study—which consists of a 15-20 minute anonymous survey, examines how separated, divorced, or divorcing parents are navigating coparenting during COVID-19. The goal of this study is to increase understanding of the challenges that parents are facing in order to better help parents (and the professionals guiding them) as they manage these unprecedented struggles.

Individuals may complete the survey if they are separated from their child(ren's) other parent (even if they are still living in the same home), in the process of getting a divorce from their child(ren's) other parent, or are already divorced from their child(ren's) other parent. I am interested in including people of all genders and sexual orientations.

Participation is entirely voluntary, responses are anonymous, and participants should not put any identifying information on the survey itself. Responses cannot be traced back to participants, any question may be left unanswered, and participants may drop out at any time.

At the conclusion of the survey, participants will be given a list of relevant resources related to divorce, coparenting, and COVID-19. Participants will also have the option of being entered into a drawing for one of five $50 Amazon gift cards. Specifically, they will be redirected to a separate link, not connected to their data, that allows them to enter their name and email.

If you would like to learn about findings of the study, please visit (or "like") the Facebook Page for this project: Divorced and Separated Parents During Covid-19. **https://www.facebook.com/Divorced-and-Separated-Parents-During-Covid-19-109060060901521**

The link to the survey is: **https://clarku.co1.qualtrics.com/jfe/form/SV_0AiAF9Id47Gcdoh**

## McEachern from page 4

bearing client's case, doing research and drafting the complaint that we were going to file on his behalf. I had put Paul's name as the attorney and he told me to revise that to make me the attorney now that I'd been sworn in. It was the greatest honor and signal of his confidence in me I could have ever received as a new attorney.

That case went all the way to the Federal Court of Appeals and we won. I remember the advice Paul gave me as I was about to leave for the appellate argument in Boston. "Be sure to pour your glass of water before you start your argument, otherwise you will likely spill it in the middle of the argument." That was such sage advice that I've followed it everywhere I go and have never cried over spilt water.

During the eight years I practiced at Shaines & McEachern, Paul and I had many opportunities to drive to Concord for hearings and meetings. We devised a game to make the trip just a little more interesting. He'd purchased a new Ford Taurus that had a thermometer which measured the outside temperature. That was a newfangled feature in cars back then. We would each guess what the temperature was going to be in Concord or wherever we went. At first he won every time. He knew the various elements that affected New Hampshire climate. Over time I learned his tricks and began to win the game on occasion. He never let me back down from the challenge.

I learned from Paul that being a lawyer was a sacred trust. No matter what kind of case we were working on it always involved a real person who had put their trust in the law and hoped that the lawyers they hired earned that trust. It was not about money. It was about justice.

> "I learned from Paul that being a lawyer was a sacred trust... It was not about money. It was about justice."

Paul encouraged my work in the areas of civil rights for the LGBT community and on behalf of survivors of domestic violence. Paul and his partners willingly put the muscle of the firm behind the *pro bono* work I did on those causes. I could never have helped pass legislation to protect the LGBT community from discrimination or obtained a conditional pardon for June Briand from the governor if I hadn't been mentored and trained by Paul McEachern.

New Hampshire has lost one of its staunchest advocates for equity and justice for all the people of this state. He worked tirelessly until the very end and has now earned the privilege to rest in peace. Now, we must pick up the mantle and make sure to vote in the upcoming elections for equity and justice for all.

(Susannah Colt lives in Whitefield.)

*These articles are being shared by partners in The Granite State News Collaborative. For more information visit collaborativenh.org.*

# RSVP NOW!

NEW HAMPSHIRE
BAR FOUNDATION
Strengthening Justice for All

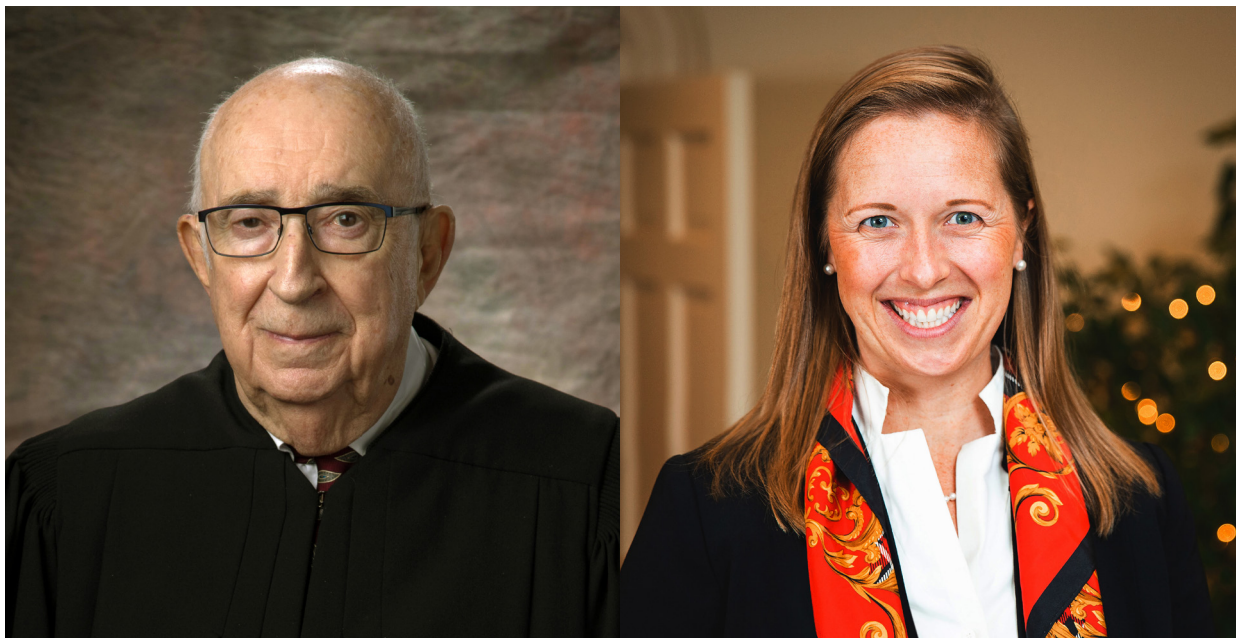
# Virtual Awards & Fundraiser

*"Our Vision Exceeds 2020"*

## Tuesday, September 22, 2020 - 5-6PM

**Join us <u>online</u> as we honor this year's award recipients:**

- Hon. Norman H. Stahl *(Frank Rowe Kenison Award)*
- Atty. Caroline K. Leonard *(Robert E. Kirby Award)*



**RSVP to get details on viewing the awards ceremony and fundraiser through a special live video event. (Some portions prerecorded.)**

**This event is made possible in part through the generosity of the following firms and organizations:**

*Southern Range:* McLane Middleton
*White Mountain Range:* Devine Millimet
*Seacoast:* Abramson, Brown & Dugan; Amity Insurance Agency, Inc.; Gallagher Callahan & Gartrell, P.C.; Tenn and Tenn, P.A.;
*Great North Woods:* Bank of New Hampshire; N.H. Bar Association; Rath, Young & Pignatelli, P.C.; Waystack Frizzell Trial Lawyers
*Merrimack Valley*: Ansell & Anderson, P.A.; Brayman, Houle, Keating & Albright, PLLC; Burns, Bryant, Cox, Rockefeller & Durkin, P.A.; CATIC; Hage Hodes, P.A.; Jackson Lewis, P.C.; Merrimack County Savings Bank; Orr & Reno, P.A.; Shaheen & Gordon, P.A.;
UNH Franklin Pierce School of Law; Upton & Hatfield, LLP; Wescott Law, P.A.

Proceeds from this event support civil legal aid for the disadvantaged and law-related education in NH.
Donate anytime to the NH Bar Foundation at www.nhbar.org/nh-bar-foundation/

## PRESENTERS

***Hon. Gary E. Hicks***

***Hon. Andrea K. Johnstone***

***Hon. Landya Boyer McCafferty***

***Atty. Gordon J. MacDonald***

**You'll need to RSVP to access and attend this free event.**
**Sign up now at www.nhbar.org/rsvp/**

# Community Notes

The New Hampshire Women's Bar Association would like to extend their congratulations to **Justice Anna Barbara "Bobbie" Hantz Marconi**, the 2020 Marilla M. Ricker Achievement Award recipient. Please stay tuned for details on the NHWBA 2020 Virtual Fall Reception, which will take place on Thursday, October 15th.

Along with the New Hampshire Society of CPAs, The New Hampshire Women's Bar Association is hosting a fun-filled day on and off the golf course at Stonebridge Country Club in Goffstown on Monday, September 21st from 9am - 1pm.

Congratulations to New Hampshire Women's Bar Association Board Vice President, Attorney **Lindsey Courtney**. She has been appointed the new executive Director of the Office of Professional Licensure and Certification.

Attorneys **Charla Stevens** and **Linda Johnson**, served as panelists for a free webinar entitled, "The Child Care Dilemma: Balancing the Legal and Practical Aspects of Business and Family Needs." Go to: **https://www.mclane.com/The-Child-Care-Dilemma-Balancing-the-Legal-and-Practical-Aspects-of-Business-and-Family-Needs**

In accordance with RSA 328-C:4, I, the supreme court appoints the Honorable **Jennifer A. Lemire** to the Board of Family Mediator Certification. Judge Lemire shall serve a three-year term commencing on September 2, 2020, and expiring on September 1, 2023.

# Coming & Going

Shaheen & Gordon, P.A. has once again bolstered its prominent Personal Injury practice with the addition of attorney **Heather Menezes**. She will work out of the firm's Manchester office. Menezes joins the firm with an established record of protecting the rights of plaintiffs. She spent the past 12 years with McDowell & Morrisette.

Hirsch Roberts Weinstein LLP is proud to announce that **Richard Loftus** was elected to the partnership effective September 1, 2020.



## David Bezanson

It is with a heavy heart that we share Dennis Bezanson joined the Lord in heaven. He felt God's love through everyone he interacted with.

In December of 2019, Dennis was diagnosed with aggressive Leukemia and was told if he went through with treatments, he would have roughly 2-5 years. With the support of his loving wife he vowed to do everything he could to fight the disease. While his health did see initial improvements, his condition began to worsen for unclear reasons.

Dennis returned home to the Lord on Saturday, April 14th. As many of you know, Dennis was a man of immense faith. Just as it says in Romans 14:8 - "For if we live, we live to the Lord, and if we die, we die to the Lord. So then, whether we live or whether we die, we are the Lord's."

Please pray for us as we work through this sudden and immense lost. We appreciate your love, support, and faith. Funeral arrangements will be made when our family can celebrate Dennis together.

God Bless all of you.

## Nicholas Bull

Nicholas Bull, 75, died August 9, 2020. He was born June 14, 1945 in Morrison, Ill. He graduated from Phillips Exeter Academy (1963), Harvard University (1967), and Northwestern University School of Law (1970).

Nick practiced law in Maine for over 50 years, with most of his career as a partner at Thompson, Bull, Furey, Bass and MacColl. He was admitted to the Maine and New Hampshire bars. Many of his clients became life-long friends. Nick lived in Cape Elizabeth, Cumberland Foreside, Portland, and Lovell, and was father to Elizabeth (Liza) and Samuel (Sam) from his first marriage to Martha Johansen and Whitney from his second marriage to Jane Jordan. He fostered Charles (Smokey) Wallace and Amy Wallace. He loved hosting his children and ten grandchildren at the cabin he constructed in Lovell, cherishing time spent with family around the outdoor fireplace.

Nick was gregarious, generous in spirit, and loved to have a good time. While he would forever be "from away," he loved his adopted state of Maine, and was a Mainer through and through. He considered his friends his family. He spent several years volunteering for Exeter and Harvard, and was proud to share his alma maters with his children. He was predeceased by his parents, Mason and Kathryn Bull; a sister, Jane, and a brother, Mason. He is survived by his brother, David; and children, Liza Bull, Sam Bull (married to Huyen-Lam Nguyen-Bull), and Whitney (married to Adam Cromie). He is also survived by ten grandchildren; and several nieces and nephews.

The family suggests donations in his memory to the Greater Lovell Land Trust (**https://www.gllt.org**).

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

# Portsmouth Mourns the Loss of Attorney Paul McEachern

**By Elizabeth Dinan**
The Portsmouth Herald

Lawyer, public-access advocate and Democratic stalwart Paul Michael McEachern died August 18 at age 82.

His son, City Councilor Deaglan McEachern, attended a council meeting that Tuesday, he said, after consulting with his family and deciding it's what his father would have wanted him to do. McEachern's son said the family was looking at old photos and memorabilia and he held up a name plate from when his father was assistant mayor of Portsmouth.

Mayor Rick Becksted told Deaglan McEachern, "all thoughts and prayers are with you at this time." He said McEachern "will be sorely missed in this community."

"Thank you for mentioning him," McEachern's son said. "The thoughts and prayers are appreciated."

On August 16, McEachern was on his Dennett Street porch watching boaters in the North Mill Pond for a regatta to raise funds for a stone to name a waterfront park after him, in honor of his securing the park for public access.

The naming came at the suggestion of neighbor Jon Wyckoff, who said Tuesday night, "I'm so sorry to hear that Paul has passed, but in a way glad he was able to see a parade of boats on his Mill Pond with everyone waving respectfully. Another great soldier for the people of Portsmouth. Thank you Paul."

McEachern also arranged for public access to waterfront land at the end of Marsh Lane, and fought in court for client Robert Jesurum to gain public access to the beach through Sanders Poynt in Rye.

He initiated a legal case against the Portsmouth Police Department, leading to the firing of police officer Aaron Goodwin, who was found to have exerted undue influence over elderly resident Geraldine Webber, to inherit the bulk of her $2 million-plus estate. McEachern deposed police officials, made sure the Portsmouth Herald received copies to publish, and his work led to several police resignations.

When a court ruled against paying him for that work, McEachern said, "Consider it my gift to Portsmouth."

Last year he represented a group of citizens called "Revisit McIntyre" which, he said, was formed to advocate for alternative plans, for redeveloping the federal Thomas

J. McIntyre Federal Building, than what was being proposed by the former City Council. Alternative plans are now being reconsidered.

McEachern was a partner in the law firm of Shaines and McEachern, founded with his late 48-year law partner Bob Shaines. He leaves a wife Shaun and five children, Claire, Alec, Duncan, Deaglan and Molly.

Assistant Mayor Jim Splaine said he knew McEachern since the mid-1960s, when they met at a meeting of the Portsmouth Young Democrats.

"We served together on the 1970 City Council. I helped in his gubernatorial campaigns in 1986 and 2004, we sat next to one another on long legislative days in the New Hampshire House a decade ago," Splaine said.

"I am so happy to have had one last hour two Sundays ago when Secretary of State Billy Gardner and I visited him at his home," Splaine said. "I loved this man."

Gardner said he remembers serving in the New Hampshire House of Representatives with McEachern, when they were young men, and seeing McEachern stand to be counted for votes, often in a small minority. Gardner said most people would go along with the majority, but McEachern "had a lot of courage" to stand for his convictions.

"I mentioned that to Paul not too long ago because I had never told him," Gardner said. "Paul was a very courageous person in that legislature. That one word, courageous, sums it up."

City Attorney Robert Sullivan said, "Paul McEachern is part of the history of the state of New Hampshire and the city of Portsmouth."

"His involvement in government and politics and the important legal issues of the day has carved out a spot for him such that he should always be remembered," Sullivan said.

When he was hired as city attorney in 1982 and knew no one in the city, Sullivan said, McEachern was the first to introduce himself and offer congratulations.

"For the ensuing 38 years, I had virtually constant dealings with Paul because of his law firm and the priority he gave to involvement in civil affairs," Sullivan said.

While they were typically on opposite sides of legal cases, Sullivan said, "As time passed, I became increasingly friendly with him." The city attorney said McEachern was intelligent, witty and "a good man."

"He was a crusader," Sullivan said. "He would see something he thought was a wrong to be righted and he would lead the crusade."

Jesurum said McEachern represented him personally and his business at the Pease International Tradeport, "but he was much more than my attorney."

"Paul was a great son of Portsmouth, of New Hampshire and of the USA," Jesurum said. "He had a unique and crisp legal mind. He crafted lucid, terse documents and was quick to understand the more verbose products of opposing attorneys. In the courtroom, he had an easy-going charm whose cross-examinations got to the truth of a case and the character of a witness."

Jesurum said McEachern is "deservedly being honored by the city of Portsmouth which is dedicating a small park in his honor because he saved it for public use."

"Paul became well-known as a defender of public access," he said. "The Sanders Poynt case was a momentous victory which changed New Hampshire legal precedent after many years of court battle including verdicts from the New Hampshire Supreme Court. Now that the pandemic has closed parking along the entire Seacoast, it is gratifying to see that those court-ordered parking spaces remain open at Sanders Poynt and are in constant use. The Town of Rye should rename Little Harbor Beach after Paul McEachern."

Jesurum called McEachern a deeply ethical man who cared about people and also enjoyed a good laugh.

"We talked a lot and most of it was not about legal matters," he said. "Paul was a good friend, and I will greatly miss him."

McEachern represented former police officer John Connors in a legal case that ended with a 2017 settlement for $330,000. Connors was accused by his own department of malfeasance, insubordination and violating the Police Department's media policy for giving an interview to the Portsmouth Herald

> "New Hampshire has lost one of its greatest public servants today in the passing of Paul McEachern."
> - Ray Buckley, chair of the New Hampshire Democratic Party

about often seeing Goodwin at the home of his neighbor, Geraldine Webber.

Connors said McEachern agreed to take the case, "knowing it would be me and him against the world."

"It was one of the largest police corruption cases in the state of New Hampshire," Connors said. "Paul was a great man, a great friend and he will be sorely missed. He truly had Portsmouth in his best interest."

Ray Buckley, chair of the New Hampshire Democratic Party said, "New Hampshire has lost one of its greatest public servants today in the passing of Paul McEachern. Paul's passion was public service, and it showed in everything he did. Paul pursued progress for Granite Staters in every role he ever had – whether it was his time in the U.S. Navy, as a city councilor and assistant mayor in Portsmouth, as one of the founding members of the New Hampshire Young Democrats, and while representing his community in the State House. Paul was a selfless champion for progressive causes, fighting for social and economic justice, because he knew how important it was to make lasting change for future generations of Granite Staters, and we all will be forever grateful for and better because of his work."

Sen. Jeanne Shaheen said in a statement, "I was very saddened to learn of Paul's passing and my thoughts are with the McEachern family. Paul was a dear friend who cared deeply about New Hampshire and found so many ways to give back to his community, state and country. He served in the Navy and had a passion for serving others throughout his life. He was a proud Democrat who wanted to see government work to improve the lives of Granite Staters. His passing is a great loss to New Hampshire."

*These articles are being shared by partners in The Granite State News Collaborative. For more information visit collaborativenh.org.*

# NH Mourns Former Governor Stephen Merrill

**By Carol Robidoux**
The Manchester Ink Link

Former Gov. Stephen Merrill, who served as the state's 77th governor, passed away Saturday. He was 74.

The family released the following statement late Saturday:

"With regret, we share the news with the State of New Hampshire, that former Attorney General and Governor Stephen Merrill passed away peacefully at his home with his family today. Additional information about remembrance services will be forthcoming. We ask that you please respect the privacy of our family at this difficult time."

Governor Chris Sununu directed all flags on public buildings and grounds in the State of New Hampshire to fly at half-staff, effective immediately.

"Governor Steve Merrill was a dear friend who had an incredibly positive impact on the citizens of our state. He will be missed by everyone who knew him," Sununu said.

Merrill served under Gov. John H. Sununu and was the state's Attorney General before being elected Governor in 1992, serv-

ing two terms. He is known for being the first elected official to coin the phrase, "The New Hampshire Advantage."

As word spread throughout political circles there was an outpouring of admiration and fond memories from associates and former colleagues across social media, including some of the following:

NH GOP: "We are deeply saddened by the passing of former NH Governor Steve Merrill, whose dedication to New Hampshire was exemplified through his public service as our state's Attorney General and our 77th Governor. Our thoughts and prayers are with the Merrill family at this time."

> "I will miss Steve's brilliance, his way with words and wonderful sense of humor."
> - Kelly Ayotte, former U.S. Senator and NH Attorney General

Kelly Ayotte, former U.S. Senator and NH Attorney General: "So sad about the passing of my friend & mentor Governor Steve Merrill. NH has lost one of our best, a great leader & extraordinary person. I will miss Steve's brilliance, his way with words and wonderful sense of humor. My thoughts & prayers are with Heather, Ian & Stephen.

Tom Rath: "Godspeed to Steve Merrill and condolences to his family. He was optimistic, upbeat, funny and loved people and they loved him back."

NH Democratic Party Chair Ray Buckley: "Condolences to former First Lady Heather Merrill & family in the passing of former NH Gov Stephen Merrill. As a legislator I worked closely with him on several issues, he was always fair and kept his word. And nobody had a better smile than Steve Merrill."

U.S. Sen. Maggie Hassan: "I join all Granite Staters in mourning the loss of Steve Merrill. A proud New Hampshire native, Steve faithfully and honorably served New Hampshire families through a life in public service."

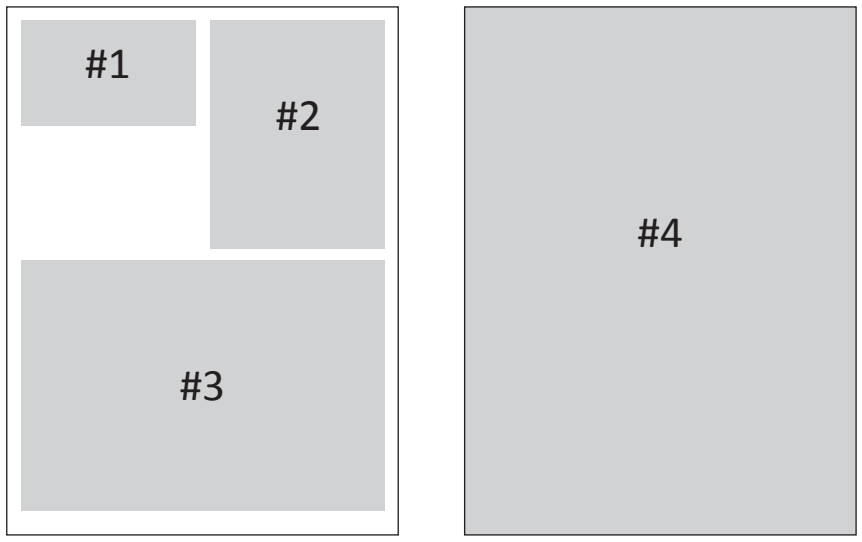
U.S. Sen. Jeanne Shaheen: "I was fortunate to have the opportunity to work with Steve when I served in the State Senate and he was Governor. When I succeeded him, Steve was a reliable confidant who offered insight and advice – one Governor to another."

*These articles are being shared by partners in The Granite State News Collaborative. For more information visit collaborativenh.org.*

## Professional Announcements

| Size Ad | Price | Width | Height |
|---|---|---|---|
| 1/8 page horizontal | $230 | 4.92” | 3.25” |
| 1/4 page vertical | $400 | 4.92” | 6.75” |
| 1/2 page horizontal | $595 | 10” | 6.75” |
| Full page | $1165 | 10” | 13.63” |
| **Additional $50 charge for color** | | | |

Rates & Sizes
JUNE 2020-MAY 2021




If you would like to place an announcement, email **advertise@nhbar.org**

New Hampshire Bar Association

# PRO BONO HONOR ROLL

## July-August 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 July and August 2020. Gold stars indicate attorneys who accepted more than one Pro Bono case during the course of the month.

**BELKNAP**
Leif Becker ★

**CARROLL**
Leslie Leonard
Craig McMahon

**CHESHIRE**
John Prendergast

**COOS**
Catherine Hines

**GRAFTON**
Nancy Barbour
Dawn DiManna
Patrick Hayes
James Laffan
Robert Moore

**HILLSBOROUGH (N)**
Gail Bakis
Nancy Barbour ★
Leif Becker ★
Devin Bolger
R. David DePuy
Steven Dutton
Scott Harris
Carol Kunz
Gena Lavallee ★
Jacqueline Leary
Judith Roman ★
Charla Stevens

**HILLSBOROUGH (S)**
Barbra Black
Lisa-Dawn Bollinger
Patricia LaFrance
Gregory Martin
Robin Melone
Lyndsay Robinson
Tanya Spony
Dawn Worsley

**MERRIMACK**
John Brandte
John Laboe
Roderick MacLeish
Brendan O'Brien
Thomas Reid
Judith Roman ★

**ROCKINGHAM**
Leif Becker ★
Jennifer Hoover
Gena Lavallee ★
Rory Parnell
L. Jonathan Ross

**STRAFFORD**
Leif Becker ★
Michele Kenney
Adam Mordecai

NEW HAMPSHIRE BAR ASSOCIATION
PRO BONO REFERRAL PROGRAM
Equal Justice Under Law

## UPCOMING WEBCAST

**"Survivors Thrive with Legal Advocacy"**
a DOVE Project Webcast
*Thursday, September 24 - 9:00 AM - 12:00 PM*
To register, please visit:
nhbar.inreachce.com/Details/Information/88c8da16-2205-4620-a132-e87e8524df91

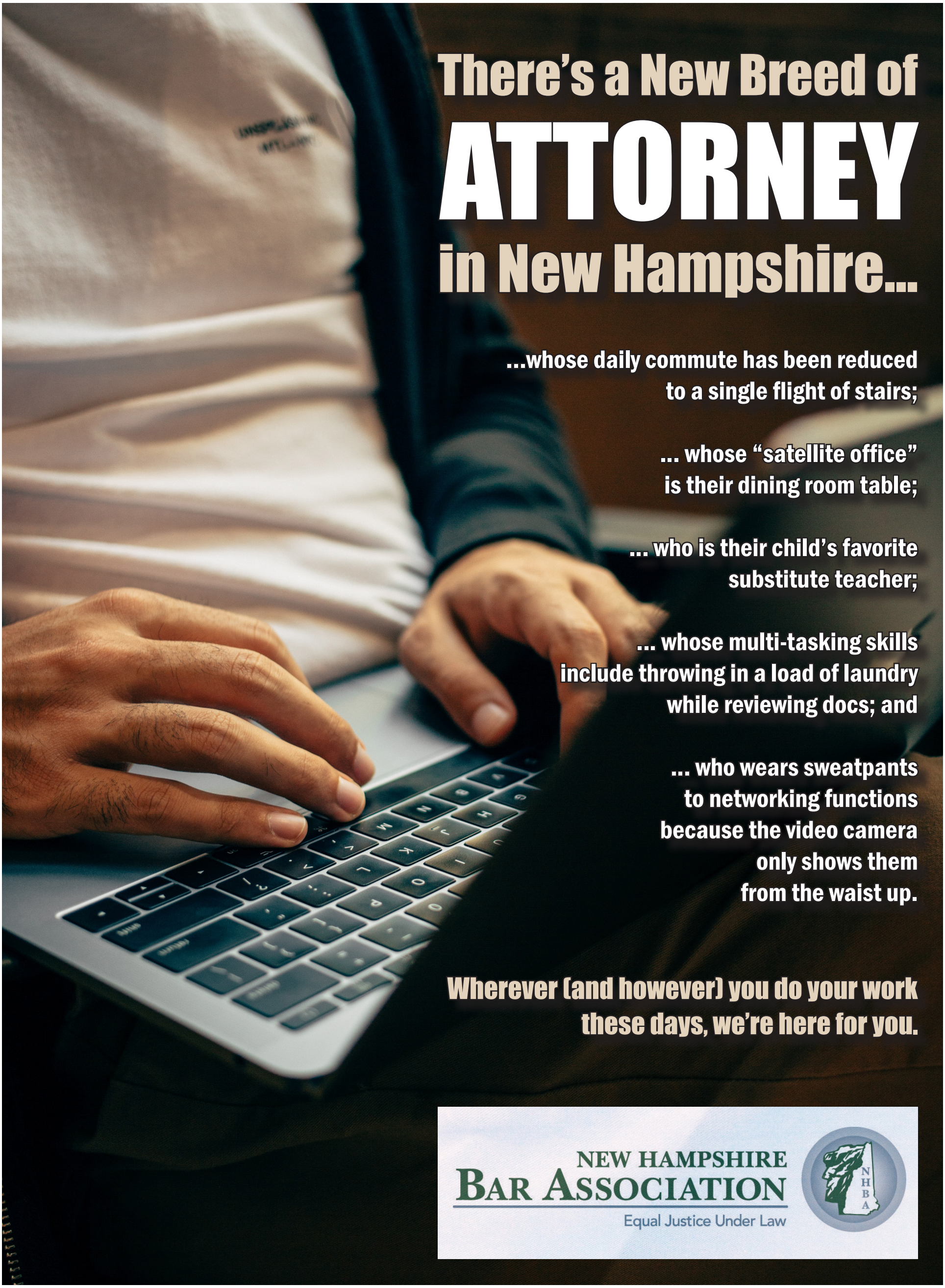
## UPCOMING EVENTS

**October is Domestic Violence Awareness Month**
To learn about local events, contact your DOVE Project partner agency.
Specific contact information at:
www.nhcadsv.org/member-programs.html

**Pro Bono Luncheon w/ the NH Supreme Court**
*Tuesday, October 27 - 12:00PM*
*(See details in the October* Bar News*)*

## OPPORTUNITIES!

- Pro Bono needs volunteers to answer employment/unemployment insurance questions on NH Free Legal Answers. Sign up at nh.freelegalanswers.org
- If you want to help prevent a family from becoming homeless, contact jrabchenuk@nhbar.org.
- Ready for a new Pro Bono case? Email cwooding@nhbar.org


There's a New Breed of
ATTORNEY
in New Hampshire...
...whose daily commute has been reduced to a single flight of stairs;
... whose "satellite office" is their dining room table;
... who is their child's favorite substitute teacher;
... whose multi-tasking skills include throwing in a load of laundry while reviewing docs; and
... who wears sweatpants to networking functions because the video camera only shows them from the waist up.
Wherever (and however) you do your work these days, we're here for you.
NEW HAMPSHIRE
BAR ASSOCIATION
Equal Justice Under Law
NHBA

**Review** from page 1

partisan politics in an election year.

"The legislature, as an institution, is ill equipped to respond to a pandemic," MacIntosh said, pointing out that New Hampshire's 400 House members made physical distancing impossible in their chambers'.

After the stay at home orders went into effect, the Senate moved into the house chambers and the House began meeting at The Whittemore Center at UNH.

Of the 43 pieces of legislation that the Bar Association's Board of Governors took a position on this year, the Board recommended support for only one bill, SB 0525, relative to probate administration and powers of attorney. Like the majority of bills this session, SB 0525 was laid on the table only to die when the legislature concluded its session in May.

Part of the problem contributing to the low number of bills making it through the house has to do with what is called crossover.

Each legislative session includes a crossover date when bills must be moved from one chamber into the other chamber. March 26 was the crossover date for the House and according to MacIntosh it was assumed the House would come together to extend this date as the Senate did. This would have required a two-thirds vote for an extension but the date came and went without a vote.

"The Senate is, historically, more collegial than the House," MacIntosh said, adding that it extended its crossover to the middle of May. "It's turned into a partisan issue. The House couldn't come together for reasons I don't fully understand. I'm wondering if part of this is that if they changed the rules, they would have to be there for three additional months or more."

Because the crossover dates weren't extended, any bill that was laid on the table in the House had no chance of getting off the table without a super majority. All but one of the bills the Bar tracked were killed early on, according to MacIntosh.

HB 1249, which included an allowance for remote notarization of wills during the COVID-19 state of emergency was one of the seven bills that made it out of the House this session. It was signed into law by the Governor in July.

To fulfill its mission as enumerated in Article 1 of the Bar's constitution (excerpted above), the Bar Association maintains a legislation program. The NHBA follows the guidelines of two decisions that authorize, with some limitations, lobbying by unified bar associations.

As a unified bar, the NH Bar Association maintains a legislative program that is more likely to provide background information to broaden legislators' understanding of law than up-or-down advocacy.

Each year, when appointing members to the NHBA Legislation Committee, the Bar president strives to include members representing all major practice areas. When the legislative session opens, the Legislation Committee must, in a very short time, sift through a large number of introduced bills to determine their relevance to the legal community and recommend to the NHBA Board of Governors whether to take an informational or advocacy role.

Both the Legislation Committee and the Board of Governors evaluate the appropriateness of advocacy or opposition to a bill according to the guidelines of two court decisions that address issues regarding the unified bar and legislation.

A 1990 U.S. Supreme Court decision, *Keller v. State Bar of California*, found a legitimate public policy purpose in a state requiring attorneys to belong to a bar association and then set forth general restrictions on political or legislative activities. The NH Supreme Court, in the 1986 *Chapman* decision, set specific limits on the NH Bar's legislative activities.

*Chapman* limits the Bar's advocacy on legislation to issues relating to the efficient administration of the judicial system, the composition and operation of the courts, and the "education, ethics, competence, integrity and regulation, as a body, of the legal profession."

The decision notes that "where substantial unanimity does not exist or is not known to exist within the Bar as a whole, particularly with regard to issues affecting members' economic self-interest, the Board [of Governors] shall exercise caution."

The Legislation Committee reviews a list of bills screened by the Bar's legislative representative, focusing on the bills of general interest to the legal community or courts. Usually, they narrow down nearly 1,000 introduced bills to about 80. On a small number of bills, the Committee recommends either opposition or support under the *Chapman* guidelines.

For a larger number of bills, the Committee may decide to recommend that the Association take an "information" position. On these bills, the Committee suggests that advocacy is not suitable but believes that the Bar Association can help lawmakers by noting potential unforeseen or unintended consequences. The Legislation Committee's recommendations are then forwarded to the NHBA Board of Governors which has final say on the recommendations. Once the legislative positions have been voted on by the Board of Governors, the Association's representative is authorized to convey those positions to the Legislature.

In a large legislature with many members unfamiliar with the complexities of particular areas of law, the Bar Association's legislative representative often is consulted by committee leaders and members to determine a bill's potential impact if it were to become law.

According to MacIntosh, this year there were three House bills opposed by the Bar Association: HB 1193, relative to attorney fees in child support cases; HB 1353, relative to the writ of quo warranto and, HB 1360, relative to confidentiality under the Child Protection Act. All of these bills were killed, MacIntosh said, adding that any bills laid on the table at the end of the session are now dead.

In budget years, Macintosh explained, this practice is more common. "However," he noted, speaking about the vast majority of bills this year, "these are policy bills, education, workers' compensation, criminal justice and they were all killed by the House early on in the session."

### Article 1 of the Constitution of the New Hampshire Bar Association, reads:

*The purposes of this Association are to improve the administration of justice; to foster and maintain high standards of conduct, integrity, competence and public service on the part of those engaged in the practice of law; to safeguard the proper professional interests of the members of the Bar; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the Bar to the public; to carry on a continuing program of legal research and education; and to encourage cordial relations among members of the Bar; all without regard to race, national origin, religion, creed, gender or sexual orientation, and to the end that the public responsibility of the legal profession may be more effectively discharged. The Association shall confine its activities before the General Court to those matters which are related directly to the administration of justice; the composition and operation of the courts; the practice of law and the legal profession.*

| Bill# | Title | Position | Status_Desc |
|---|---|---|---|
| HB 1103 | Relative to the submission of evidence in divorce proceedings. | NHBA Position - Information | House - Inexpedient to Legislate: Motion Adopted DV 188-136 02/13/2020 House Journal 3 P. 6 |
| HB 1133 | Relative to violations of constitutional rights. | NHBA Position - Information Negative | House - Inexpedient to Legislate: Motion Adopted Voice Vote 02/19/2020 House Journal 4 P. 16 |
| HB 1138 | Establishing a commission to expand the rights of minors to legal representation. | NHBA Position - Information Negative | Senate - Introduced 06/16/2020, and Laid on Table, Motion Adopted, Voice Vote; 06/16/2020; Senate Journal 8 |
| HB 1157 | Relative to liability of New Hampshire news media for failure to update stories on criminal proceedings. | NHBA Position - Information | House - Inexpedient to Legislate: Motion Adopted Voice Vote 02/19/2020 House Journal 4 P. 16 |
| HB 1177 | Relative to qualifications of referees in the superior courts and circuit courts. | NHBA Position - No Position | House - Inexpedient to Legislate: Motion Adopted Voice Vote 03/12/2020 |
| HB 1180 | Relative to certain assets in a divorce proceeding. | NHBA Position - Information Negative | Senate - Vacated from Committee and Laid on Table, Motion Adopted, Voice Vote; 06/16/2020 Senate Journal 8 |
| HB 1193 | Relative to attorneys fees in child support cases. | NHBA Position - Oppose | House - Inexpedient to Legislate: Motion Adopted Voice Vote 02/19/2020 House Journal 4 P. 2 |
| HB 1249 | Relative to the commission on the interdisciplinary primary care workforce; relative to multicounty grand juries; and allowing remote notarization of paper estate planning documents during the COVID-19 state of emergency. | NHBA Position - Information | House - Signed by Governor Sununu 07/17/2020; Chapter 17; I. Sec. 10 Eff: 06/30/2022 II. Rem. Eff: 07/17/2020 |
| HB 1267 | Relative to the liability of directors and officers of New Hampshire nonprofit corporations. | NHBA Position - No Position | House - Refer for Interim Study: Motion Adopted Voice Vote 03/11/2020 |
| HB 1270 | Relative to the determination of parental rights and responsibilities. | NHBA Position - Information | House - Inexpedient to Legislate: Motion Adopted Voice Vote 03/11/2020 |
| HB 1294 | Relative to the limited immunity of pharmacists. | NHBA Position - Information Negative | House - Inexpedient to Legislate: Motion Adopted Voice Vote 03/11/2020 |
| HB 1312 | Relative to persons held in civil contempt. | NHBA Position - Information Negative | Senate - Introduced 06/16/2020, and Laid on Table, Motion Adopted, Voice Vote; 06/16/2020; Senate Journal 8 |
| HB 1343 | Relative to the pre-arraignment or pretrial release of a defendant. | NHBA Position - Information Negative | House - Inexpedient to Legislate: Motion Adopted Voice Vote 03/11/2020 |
| HB 1348 | Relative to guardianship by grandparents. | NHBA Position - No Position | Senate - Vacated from Committee and Laid on Table, Motion Adopted, Voice Vote; 06/16/2020 Senate Journal 8 |
| HB 1353 | Relative to the writ of quo warranto. | NHBA Position - Oppose | House - Inexpedient to Legislate: Motion Adopted Voice Vote 03/05/2020 House Journal 6 P. 10 |
| HB 1360 | Relative to confidentiality under the Child Protection Act. | NHBA Position - Oppose | House - Inexpedient to Legislate: Motion Adopted Voice Vote 03/11/2020 |
| HB 1384 | Relative to the re-release of a person on bail. | NHBA Position - Information | House - Inexpedient to Legislate: Motion Adopted Voice Vote 03/11/2020 |
| HB 1395 | Establishing a committee to study ballot access and ways to improve civic engagement in New Hampshire. | NHBA Position - No Position | House - Inexpedient to Legislate: Motion Adopted Voice Vote 03/11/2020 |
| HB 1400 | Establishing a New Hampshire statutory trust law. | NHBA Position - Information | House - Inexpedient to Legislate: Motion Adopted Voice Vote 03/11/2020 |
| HB 1450 | Relative to the powers of the zoning board of adjustment. | NHBA Position - No Position | House - Inexpedient to Legislate: Motion Adopted Voice Vote 02/13/2020 House Journal 3 P. 16 |
| HB 1511 | Relative to actions against tenants. | NHBA Position - No Position | House - Inexpedient to Legislate: Motion Adopted Voice Vote 03/12/2020 |
| HB 1586 | Relative to the statute of limitations for sexual assault. | NHBA Position - No Position | House - Refer for Interim Study: Motion Adopted Regular Calendar 200-123 03/11/2020 |
| HB 1588 | Establishing a mortgage mediation procedure. | NHBA Position- No Position | House - Refer for Interim Study: Motion Adopted Voice Vote 03/11/2020 |
| HB 1594 | Creating an affirmative defense to violation of a restraining order. | NHBA Position- No Position | House - Inexpedient to Legislate: Motion Adopted Voice Vote 03/11/2020 |
| HB 1597 | Relative to dispositional hearings under RSA 169-B. | NHBA Position - No Position | Senate - Introduced 06/16/2020, and Laid on Table, Motion Adopted, Voice Vote; 06/16/2020; Senate Journal 8 |
| HB 1607 | Relative to liability for wrongful acts in an employer/employee relationship. | NHBA Position - Information Negative | House - Inexpedient to Legislate: Motion Adopted Voice Vote 03/12/2020 |
| HB 1611 | Relative to incarceration under a suspended sentence. | NHBA Position - No Position | Senate - Vacated from Committee and Laid on Table, Motion Adopted, Voice Vote; 06/16/2020 Senate Journal 8 |
| HB 1626 | Relative to the role of the guardian ad litem in parenting cases in which domestic violence is suspected or alleged. | NHBA Position - Informaton | House - Inexpedient to Legislate: Motion Adopted Voice Vote 03/11/2020 |
| HB 1629 | Relative to training and procedures for zoning and planning boards. | NHBA Position - Information | Senate - Introduced 06/16/2020, and Laid on Table, Motion Adopted, Voice Vote; 06/16/2020; Senate Journal 8 |
| HB 1657 | Relative to reimbursement of court-ordered services for juveniles. | NHBA Position- No Position | Senate - Introduced 06/16/2020, and Laid on Table, Motion Adopted, Voice Vote; 06/16/2020; Senate Journal 8 |
| HB 1671 | Relative to arrest and search warrants issued by superior court. | NHBA Position - Information | House - Inexpedient to Legislate: Motion Adopted Voice Vote 03/11/2020 |
| HB 1693 | Extending the committee to study whether non-attorney legal professionals could be licensed to engage in the limited practice of law. | | Senate - Introduced 06/16/2020, and Laid on Table, Motion Adopted, Voice Vote; 06/16/2020; Senate Journal 8 |
| SB 0431 | Establishing a commission to study the adoption of remote online notarization in New Hampshire. | NHBA Position - Information | House - Vacated and Laid on Table Motion Adopted Voice Vote 06/30/2020 |
| SB 0437 | Relative to incarceration under a suspended sentence. | NHBA Position - No Position | Senate - Vacated from Committee and Laid on Table, Motion Adopted, Voice Vote; 06/16/2020 Senate Journal 8 |
| SB 0438 | Establishing a commission to study the repeal of truth in sentencing. | NHBA Position- No Position | Senate - Vacated from Committee and Laid on Table, Motion Adopted, Voice Vote; 06/16/2020 Senate Journal 8 |
| SB 0440 | Establishing the New Hampshire collaborative law act. | | House - Vacated and Laid on Table Motion Adopted Voice Vote 06/30/2020 |
| SB 0442 | Relative to alternative dispute resolution. | NHBA Position - Information | House - Vacated and Laid on Table Motion Adopted Voice Vote 06/30/2020 |
| SB 0443 | Allowing judicial referees to issue orders in non-contested probate matters. | NHBA Position - Information | Senate - Vacated from Committee and Laid on Table, Motion Adopted, Voice Vote; 06/16/2020 Senate Journal 8 |
| SB 0444 | Amending the alimony statute due to changes in federal tax law. | NHBA Position - Information Positive | House - Vacated and Laid on Table Motion Adopted Voice Vote 06/30/2020 |
| SB 0460 | Relative to enforcement of zoning violations. | NHBA Position - Information Negative | House - Vacated and Laid on Table Motion Adopted Voice Vote 06/30/2020 |
| SB 0509 | Relative to complaint procedures in cases before the commission for human rights. | NHBA Position - No Position | Senate - Vacated from Committee and Laid on Table, Motion Adopted, Voice Vote; 06/16/2020 Senate Journal 8 |
| SB 0525 | Relative to probate administration, distribution upon intestacy, and powers of attorney. | NHBA Position - Support | Senate - Vacated from Committee and Laid on Table, Motion Adopted, Voice Vote; 06/16/2020 Senate Journal 8 |
| SB 0571 | Relative to the uniform disclaimer of property interests act. | NHBA Position - Information | Senate - Vacated from Committee and Laid on Table, Motion Adopted, Voice Vote; 06/16/2020 Senate Journal 8 |
| SB 0606 | Permitting a supreme court justice to sit as a circuit court judge. | NHBA Position - No Position | Senate - Vacated from Committee and Laid on Table, Motion Adopted, Voice Vote; 06/16/2020 Senate Journal 8 |
| SB 0677 | Relative to protective orders for vulnerable adults. | NHBA Position- No Position | Senate - Refer to Interim Study, Motion Adopted, Voice Vote; 03/11/2020; Senate Journal 6 |

**Beyer** from page 1

of millions of encounters with police," he says. "Now you have video cameras of what people are doing, and I'm in favor of that, but you're only seeing the outrageous ones that people are magnifying into a national problem that I don't think exists."

His data suggests that, of all cases brought against police departments, only about one in 1,000 are successful in court. "That's a far cry from the public perception in terms of police brutality," he adds.

Instead of "the blue wall of silence," Beyer says, police agencies nationally are adopting strategies like crisis intervention, de-escalation and intervention, as well as statements on the sanctity of life, the importance of officers intervening with other officers and the use of intermediate force.

"That's the art of police reform – hiring, training and discipline," he says.

A native of New York State, Beyer spent summers as a child at a family residence in New Hampshire, then moved to the Granite State while in high school. His interest in the law stems back to junior high, when he wrote a well-received report for his ninth-grade class about what it was like to shadow his father's lawyer for a day.

After graduating from Dartmouth with a bachelor's and Harvard with a master's in English literature, he decided law school would provide better career opportunities and, after a two-year hiatus spent teaching, enrolled at Georgetown University Law Center in Washington D.C., where he earned his juris doctor.

"My goal had always been to bypass the Wall Street aspect of law and head straight to New Hampshire," he says.

And so he did, taking a job at McLane,

"Now you have video cameras of what people are doing, and I'm in favor of that, but you're only seeing the outrageous ones that people are magnifying into a national problem that I don't think exists."

Graf, Raulerson & Middleton in Manchester before being recruited to join the General Services Administration in Washington and becoming the chief staff person for the agency. Lunches at the White House – and one with then-Supreme Court Chief Justice Warren E. Burger in his private dining room – provided "a big thrill for me as a fairly young lawyer," Beyer says.

Upon returning to New Hampshire, he took a job with the Concord firm of Cleveland, Waters and Bass and quickly became counsel to most of the police departments in the state for their civil liability cases. That helped prepare him for his next position representing police departments for the District of Columbia from 1996 to 2002.

That work was interrupted when Beyer went to work for the administration of George W. Bush for 10 years, serving as an administrative appeals judge for the U.S. Department of Labor, including two years as chief judge, and briefly as a presidential appointee to the Federal Labor Relations Authority.

He subsequently returned to working for the District of Columbia, handling its high-end police cases.

Ted Williams, a police officer-turned-attorney and a Fox News contributor, was co-counsel with Beyer in some of those cases and considers him "the consummate professional" who "knows and loves the law and also fairly administers the law."

"He's an excellent person, an excellent citizen, an excellent lawyer and certainly a specialist in the area of police administration," adds Williams, who has known Beyer for some 30 years.

It's an opinion shared by Seth Guggenheim, who met Beyer when Guggenheim joined the D.C. Office of Corporation Counsel in November 1998.

"What I most respect about Wayne is how hard he works and the expertise he has developed in defending governments and police officers in excessive force cases," Guggenheim says. "He truly is the 'go-to-guy' in this field of law, and has a celebrated reputation."

Another former colleague in that office, Michael Miller, calls Beyer "about as knowledgeable about police misconduct cases as anybody in the country" and a man who is "hugely responsible and honest and admirable."

Likewise, Robert Deso, former deputy general counsel for the D.C. Metropolitan Police Department, says Beyer "knows the law and how to apply it to the real world of law enforcement in a major city environment. He is a legal scholar, but also very persuasive with a jury."

One of Beyer's D.C. cases was *Evans-Reid v. District of Columbia*, involving an alleged bet among white officers to see which one could kill a Black kid, and an alleged party after one of them shot to death 14-year-old Sean Evans. The allegation had been taken seriously enough that it was under investigation by the U.S. Justice Department's Civil Rights Division for four and a half years and by the Washington D.C. office of the United States Attorney, according to Beyer.

No criminal charges were brought. At the civil trial, the evidence was that the officers conducted a motor vehicle stop and that an intoxicated Sean Evans pulled a gun on an officer who walked up to the passenger's side and the officer shot him. The plaintiff claimed the gun, a B.B. gun, had been planted, but failed to prove that in court. The officers denied the bet and the party, though the judge allowed testimony about them. Ultimately, the judge granted Beyer a directed verdict, and other lawyers handled the appeal, which upheld the trial court's ruling.

Asked about his most memorable New Hampshire cases, Beyer mentions *Lavoie v. Town of Hudson* (1990), involving the death of a man named Bruce Lavoie. The Hudson police chief and other officers, after obtaining a search warrant, had entered Lavoie's apartment at 5 a.m. using a battering ram and Lavoie arose from bed and struggled with an officer whose gun discharged and killed him. The case was settled after discovery but before trial.

In addition to his legal work, Beyer has presented on police misconduct cases for Georgetown University Law Center, the Defense Research Institute, the American Bar Association and the Federal Judicial Center for District and Magistrate Judges and last year held 30 webinars on the subject, attended by thousands.

Retired since 2014, Beyer spent 22 months working on the manuscript for his book, which he hopes to make "a career capstone rather than a stepping stone."

In his spare time, he enjoys golfing, reading classical literature and offering a Republican perspective on a local community television program.

"It's been an interesting career," he says of his legal work. "It's a nice way to make a living because you read, you write and you talk for a living."

**Flu** from page 1

pneumonia."

- Ralph C. Gray (Oct. 31, 1886-Mar. 16, 1919) "…his patriotic zeal was unquenchable and his inability to enter the war irritated him. It was pathetic that he should fall victim to that war disease influenza."


All Kissing Should Now Be Done Through A Handkerchief

(Special to News by United Press).
New York, Aug. 17.—Try this on your best girl.
The New York Board of Health has issued an ukase that, because of the danger of "Spanish influenza" all kissing should be done through a handkerchief.
This may be considered poor taste by some, but the docs declare it is the only safe way.

Byron Champlin's September 2018 article in the *Concord Monitor* titled "Concord and the Great Influenza of 1918," mentions the death of Judge A. Chester Clark, 41, of the Concord Municipal Court. He died Sept. 23 after a week's illness. Clark was a highly regarded jurist, active in state political and civic organizations.

"He was a good judge. Let there be no mistake on this point," editorialized the *Manchester Union* newspaper. "A Democrat, and named for office by a Democratic governor, he made so clean a record, made his judgement such a model of industry, probity and impartial and energetic law enforcement, that a Republican governor continued him in office."

In 1920, then Bar President Leslie Snow, made the following statement regarding the flu pandemic and the court system in the NH Bar Association proceedings:

"It is simply our good fortune that we have not had a recurrence of the situation which existed a few years since; when by reason of illness the burden of work of the whole court was, for a long period, thrown upon two or three members. In the ordinary cycle of events, this may reasonably be expected to recur."

Last March, the "ordinary cycle of events" did recur. President Snow's words ring prophetic and newspaper headlines today seem familiar when comparing the downplayed response of U.S. Health Officials and political leaders responding to COVID-19, with early responses to the threat of Spanish flu.

The New York Health Commissioner Royal S. Copeland responded to the threat of "Spanish" influenza reaching the United States with the prediction that "there is nothing to be alarmed about so far as I can see," according to *The Sun* in New York, on August 17, 1918. He also encouraged citizens to avoid kissing if they could, but that if they must kiss, a handkerchief should be worn. These comments led to sarcastic newspaper headlines across the country, such as "Want to Kiss and Escape Grip? Use Handkerchief!" published in the *Indianapolis Star*, in August of 1918.

While parallels exist between the responses to the Spanish Flu and COVID-19, for New Hampshire's legal community, social and technological changes have occurred over the past 100 years that would have been hard to understand for those attorneys mourning the loss of friends and struggling to maintain justice at that time.

Snow, after all, could not have imagined the 2020 courts' ability to hold remote hearings, drive-through filings, remote notarizations, and socially distant pilot juries in air-conditioned courtrooms.

He certainly would have been confused, and perhaps dismayed, to learn about the meaning of "zoom fatigue."


Red Cross nurses photographed at the Amoskeag Red Cross Carnival at Manchester's Textile Field (now Gill Stadium) in 1918. (Photo/Courtesy of the Mancehster Historical Association)

*The* Bar News *would like to document and preserve the legal community's experiences during the current pandemic for future generations. We are currently accepting (400-600 word) articles or personal reflection pieces focusing on the ways the pandemic and its effects on the economy have shaped your daily life, created new opportunities and/or altered the way you practice law. We will include these reflections in a* Bar News *section beginning in October. For more information contact smerrill@nhbar.org.*

# Continuing Legal Education GUIDE

**September 2020**

**nhbar.org/nhbacle**

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

## Calendar Overview

### SEPTEMBER

**22** Tuesday • 9:00 a.m. - 1:30 p.m.
**Great! Adverse Depositions** *with Robert Musante*
- Webcast • 240 min.

**23** Wednesday • 9:00 a.m. - 12:00 p.m.
**19th Annual Labor & Employment Law Update - Part 1**
- Webcast • 170 min.

**25** Friday • 9:00 a.m. - 4:00 p.m.
**Nuts & Bolts of Criminal Law**
- Webcast
- 360 min. incl. 60 ethics/prof. min.

**30** Wednesday • 9:00 a.m. - 12:30 p.m.
**19th Annual Labor & Employment Law Update - Part 2**
- Webcast
- 190 min. incl. 60 ethics/prof. min.

### OCTOBER

**13** Tuesday • 9:00 a.m. - 1:30 p.m.
**Attacking the Liar's Best Lies** *with Robert Musante*
- Webcast • 240 min.

**23** Friday • 9:00 a.m. - 1:30 p.m.
**Special Needs Trusts and ABLE Accounts**
- Webcast
- 240 min. incl. 60 ethics/prof. min.

**30** Friday • 9:00 a.m. - 4:00 p.m.
**Developments in the Law**
- Webcast
- 360 min. incl. 60 ethics/prof. min.

### NOVEMBER

**5** Thursday • 9:00 a.m. - 4:00 p.m.
**DWI Litigation: Back to Basics**
- Webcast
- 360 min. incl. 60 ethics/prof. min.

**19** Thursday • 8:30 a.m. - 11:45 a.m.
**38th Annual Tax Forum - Part 1**
- Webcast
- 180 min.

**20** Friday • 8:30 a.m. - Noon
**38th Annual Tax Forum - Part 2**
- Webcast
- 180 min.

## Workers' Compensation

**Friday, November 13, 2020**

9:00 a.m. - 4:00 p.m.
*Webcast Only* • 360 min. incl. 60 ethics/prof.

This program will offer input from experienced claimants and defense counsel attorneys of any experience level who practice workers' compensation in New Hampshire, as the program will cover a wide range of topics at various levels of expertise.

**Faculty**

**Corey M. Belobrow**, Program Co-Chair/CLE Committee Member, Maggiotto, Friedman, Feeney & Fraas, PLLC, Concord
**Margaret P. Sack,** Program Co-Chair, Bernard & Merrill, PLLC, Manchester
**Danielle N. Albert**, NH Dept of Labor, Concord
**Joseph D. Becher**, Bernard & Merrill, PLLC, Manchester
**Heather V. Menezes**, McDowell & Morrissette, PA, Manchester
**Jared P. O'Connor,** Shaheen & Gordon, PA, Manchester
**Anne M. Rice**, Rice Law Office, PLLC, Laconia
**Paul L. Salafia**, Devine, Millimet & Branch, PA, Concord

NHMCLE REPORTED

## 38th Annual Tax Forum

**Program Moderator**
**John E. Rich, Jr.**, McLane Middleton

**Part 1 – Thurs., Nov. 19, 2020**

8:30 a.m. -11:45 a.m.
*Webcast Only* • 180 min.

- Federal Tax Update
- CARES and SECURE ACT Update - Retirement and Estate Planning Implications

**Part 2 – Friday, Nov. 20, 2020**

8:30 a.m. -Noon
*Webcast Only* • 180 min.

- Filing an Administrative Adjustment Request (AAR) Under the Centralized Partnership Audit Regime
- Estate Planning in an Election Year
- NH Business Tax Update

**Register at www.nhbar.org/nhbacle**

NHMCLE REPORTED

## CLE HIGHLIGHT

### JOIN US

**Of the 3,600+ Protective Order Final Hearings in 2019, NH Courts reported that only 12% of plaintiffs seeking domestic violence protection and only 5% of plaintiffs seeking stalking protection had attorney representation.**

**Attend the DOVE Project's Live Webcast**
***Survivors Thrive with Legal Advocacy***

**Thursday, September 24, 2020**
**9:00 am - Noon**
**165 NHMCLE Live Minutes; incl. 30 Ethics/Prof.**

**Webcast for DOVE and Pro Bono volunteers only - consider joining. Agree to take two cases within one year, and participate in this FREE CLE.**

**Gain experience, be mentored and prepared, with this Live Webcast to represent victims/survivors of domestic violence and stalking.**

Funding for this project is provided by Grant ID No. 2020VAW20 awarded by the Violence Against Women Grants Office, Office of Justice Programs, U.S. Department of Justice. Points of view in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

**nhbar.inreachce.com**

## 3 Ways to Register

| | |
|---|---|
| **Phone** | (603) 715-3260 |
| **Email** | cmoore@nhbar.org |
| **Website** | www.nhbar.org/nhbacle |

**All webcast registrations must be made online.**

Live Programs • Timely Topics • Great Faculty • Online CLE • CLEtoGo!™ • DVDs • CDs • Webcasts • Video Replays • and more!

# Great! Adverse Depositions:

## *Principles & Principle Techniques*

### Tuesday, Sept. 22, 2020

9:00 a.m. -1:30 p.m.• *Webcast Only* • 240 min.

Featuring Nationally Acclaimed Speaker
**Robert Musante**

Great adverse depositions require the conscious and conscientious application of the integrated set of logical rules that constitute the discipline of deposition cross-examination, rules that best exploit case theory opportunities and best attack case theory problems.

All litigators should have studied this discipline's dozens of rules while still in law school and, later on, should have observed their law firms' experienced litigators effectively employing those rules in every adverse deposition.

## ATTACKING THE LIAR'S BEST LIES:
## "I don't remember" & "I do remember"

### Tuesday, October 13, 2020

9:00 a.m.-1:30 p.m. • *Webcast Only* • *240* min.

Whether at trial or in deposition, the "yes-no" question quite frequently constitutes a Scylla & Charybdis problem for the adverse witness: the "yes" constituting a damaging-to-witness admission, and the "no" creating a risk of the witness being impeached … maybe a BIG risk of a BIG impeachment. Thus, a willing-to-lie witness (and there are so many!!), perhaps coached by an unethical attorney (and there are so many!!), tries to avoid Scylla & Charybdis by claiming "I don't remember X."

# 19th Annual Labor & Employment Law Update

### Part 1 • Wed., Sept. 23, 2020

9:00 a.m. -12:00 p.m.
*Webcast Only* • 170 min.

### Part 2 • Wed., Sept. 30, 2020

9:00 a.m. -12:30 p.m.
*Webcast Only* • 190 min.incl. 60 ethics/prof.

This seminar will address cutting edge developments in employment and benefits law over the past year. This year's program will address significant developments in state and federal law which impact the workplace.

**Faculty**

**Debra Dyleski-Najjar,** Program Chair/CLE, Committee Member, Najjar Employment Law Group, PC, North Andover, MA
**Eric P. Bernard**, Bernard & Merrill, PLLC, Manchester
**Heather M. Burns**, Upton & Hatfield, LLP, Concord
**Lauren Simon Irwin**, Upton & Hatfield, LLP, Concord
**Jennifer Shea Moeckel,** Cook, Little, Rosenblatt & Manson, pllc, Manchester
**Richard C. Nelson**, Devine, Millimet & Branch, PA, Manchester
**Jennifer L. Parent**, McLane Middleton Professional Association, Manchester
**James P. Reidy**, Sheehan, Phinney Bass & Green, PA, Manchester
**Nancy Richards-Stower**, Law Offices of Nancy Richards-Stower, Merrimack
**Marcie E. Vaughan**, Employment Practices Group, Wellesley, MA
**John R. Wilson**, GoffWilson, PA, Manchester

# Nuts & Bolts of Criminal Law

### Friday, Sept. 25, 2020

9:00 a.m. - 4:00 p.m.
*Webcast Only* • 360 min. incl. 60 ethics/prof.

This program will provide the newer attorney, or an attorney new to the field, with an overview of criminal law practice in New Hampshire. It will outline the basic concepts of criminal law practice, including the analysis of criminal cases, preparation for trial, sentencing and collateral consequences.

**Faculty**

**Kathleen A. Broderick**, Program Co-Chair, Manchester City Solicitor's Office, Manchester
**Patricia M. LaFrance**, Program Co-Chair/CLE Committee Member, The Black Law Group, LLC, Nashua
**Ronald L. Abramson**, Shaheen & Gordon, PA, Manchester
**Donald L. Blaszka**, Germaine and Blaszka, PA, Derry
**Deanna L. Campbell,** NH Public Defender, Stratham
**Hon. Kimberly A. Chabot,** 9th Circuit Family Division-Manchester
**Roger C. Chadwick**, Chadwick Fricano & Weber, PLLC, Nashua
**Hon. N. William Delker**, NH Superior Court, Concord
**Jennifer M. Haggar**, Rockingham County Superior Court, Kingston
**Jeremy A. Harmon,** Manchester City Solicitor's Office, Manchester
**Theodore M. Lothstein**, Lothstein Guerriero, PLLC, Concord

# Special Needs Trusts and ABLE Accounts

### Friday, October 23, 2020

9:00 a.m.-1:30 p.m.
*Webcast Only* • *240* min. incl. 60 ethics/prof.

This program will provide essential information about special needs trusts and ABLE Accounts, and how they work. Pitfalls to avoid and new developments will be discussed. The faculty will also discuss how special needs trusts and ABLE accounts interact with each other, and also how they both work with social security payments and MEAD Accounts. The program will have the benefit of the participation of attorney Janelle L. Laylagian of the NH Department of Health and Human Services. This seminar will be enhanced by a very experienced faculty.

**Faculty**

**John S. Kitchen**, Program Chair/CLE Committee Member, Devine, Millimet & Branch, PA, Concord
**Judith L. Bomster**, Butenhof & Bomster, PC, Manchester
**Janelle L. Laylagian**, NH Department of Health and Human Services, Concord
**Theofilos Vougias**, Devine, Millimet & Branch, PA, Manchester

# Developments in the Law 2020

### Friday, October 30, 2020

9:00 a.m. - 4:00 p.m.
*Webcast Only* • 360 min. incl. 60 ethics/prof.

This popular annual CLE seminar is a must for all practicing New Hampshire attorneys. In a convenient one-day format, this program offers a complete survey of imp
ortant legal developments affecting NH practice. Learn from those in the know about significant legislative, rule, case law and procedural changes in major practice areas.

**Faculty**

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

# DWI Litigation: Back to Basics

### Thursday, November 5, 2020

9:00 a.m. - 4:00 p.m.
*Webcast Only* • 360 min. incl. 60 ethics/prof.

This full day program will focus on the practical essentials of DWI litigation, from basic issue analysis, to case preparation and case presentation, through ALS hearing and trial. The title of the program, "Back to Basics," signifies that it is aimed at prosecuting attorneys or police prosecutors, and lawyers in private practice or public defenders, who are relatively new to DWI litigation, or handle the cases relatively infrequently, and want to make sure they are up to speed on the latest developments in these cases.

**Faculty**

**Theodore M. Lothstein,** Program Chair/CLE Committee Member, Lothstein Guerriero, PLLC, Concord
**Allison M. Ambrose**, Wescott Law, PA, Laconia
**Jared J. Bedrick**, Douglas Leonard & Garvey, PC, Concord
**John E. Durkin**, Burns, Bryant, Cox, Rockefeller & Durkin, PA, Dover
**Anthony P. Estee,** Law Office of Anthony Estee, Candia
**Lisa Johnston**, NH State Police Forensic Laboratory, Concord
**Michael P. King**, NH Dept of Safety Bureau of Hearings, Concord
**Mark M. Seymour**, NH Dept of Safety Bureau of Hearings, Concord

**For more information go to nhbar.org/nhbacle**


Swanzey police officer Jesse Mabe leaves after testifying during Monday's trial in Cheshire County Superior Court in Keene. Mabe wears one of the clear face masks all witnesses wore to ward against the spread of COVID-19 while still enabling jurors to observe their demeanor. The proceedings were streamed live, as shown in this screenshot.

# Court in the COVID Era: Cheshire County Holds State's First In-person Trial

**By Paul Cuno-Booth**
The Keene Sentinel

It was the speech Cheshire County Superior Court Judge David W. Ruoff gives jurors at the start of every trial: Don't read news stories about the case. What the witnesses say is evidence; what the lawyers say is not. The defendant is presumed innocent, unless and until the state proves his guilt beyond a reasonable doubt.

But there were some noticeable additions Monday.

"The defendant and his or her attorney are permitted to sit close to each other and to remove their masks from time to time to allow the proper communication, which is guaranteed by the Sixth Amendment to the Constitution," Ruoff said. "You must not consider the fact that the defendant and the defense attorney remove their masks, or that they have been permitted to sit together, as any evidence in this trial."

Ruoff was presiding over the New Hampshire court system's first jury trial of the COVID-19 era. Starting in March, jury trials and most other in-person proceedings were suspended due to concerns about the novel coronavirus spreading. Many hearings have since been held virtually, and cases have

TRIAL *continued on page 33*

# CDC Eviction Moratorium Could Help Granite Staters Who Lost Previous Eviction Protections

**By Jordyn Haime**
The Granite State News Collaborative

A new CDC eviction moratorium could help Granite Staters who are unable to pay rent or are at risk for homelessness.

The new federal moratorium ensures protections for all types of evictions and tenants of all types of housing, and does not strictly apply to pandemic-related hardships. It expires Dec. 31, when tenants must pay all previously unpaid rent.

"In halting evictions, the order will help many people stay in their homes and avoid exposure to COVID-19 in homeless shelters or on the street," said Elliott Berry, NHLA Housing Justice Project Co-Director. "However, this does not absolve tenants from paying rent, and does not address what will happen to people on January 1, when their unpaid rent is due. I cannot emphasize enough how important it is that tenants who are having trouble paying their rent pay as much as they can afford and apply for rental assistance as soon as possible."

Unlike the governor's previous eviction ban, eligible tenants must now sign a declaration form to give to their landlord certifying -- among other requirements -- that they have already applied for rental or housing assistance. In New Hampshire, that means through town and city welfare or local community action programs.

"I think it's really important that renters who are having difficulty understand that…the form isn't like walking up to an ATM machine and pulling out a get out of rent free card. You have to certify that everything in the declaration is true," said Stephanie Bray, Foreclosure Relief Project Director and a managing attorney at New Hampshire Legal Assistance.

Since the state's eviction ban ended July 1, landlord-tenant writs -- the first legal step in the eviction process -- have increased, according to circuit court numbers. In the week before the ban ended, 41 landlord tenant writ cases had been filed statewide. They spiked to 193 by the week of Aug. 10, but went back down to 120 last week.

Last month, Gov. Sununu vetoed House Bill 1247, which would have offered tenants a six-month repayment plan for rent payments that were missed during the coronavirus, and clarified that tenants would not need an eviction notice in order to file for welfare assistance. In a veto message, Sununu wrote that the bill "adds a major structural problem to an already precarious housing environment."

According to Bray, under the new federal moratorium, tenants can use the new declaration at any step of the eviction process.

"We would maintain that it can be used up until the sheriff arrives at your door," she said.

"It is apparent from reading the entirety of the order that the CDC is concerned about making people homeless during a pandemic," Bray added. "I cannot imagine that the CDC is going to be less concerned about making people homeless in a pandemic in January."

Those unable to afford rent payments should first apply for assistance at CAPnh.org or through their local town or city welfare office before signing a declaration form. For legal assistance, visit nhlegalaid.org.

*These articles are being shared by partners in The Granite State News Collaborative. For more information visit collaborativenh.org.*

# Volunteer Lawyers Sought for UNH Undergraduate Mock Trial Virtual Invitational

**Saturday, October 17 & Sunday, October 18**

The University of New Hampshire will host its 12th Annual Intercollegiate Mock Trial Invitational Tournament for undergraduates during the weekend of Oct. 17-18 at UNH's campus in Durham. Due to the COVID-19 Pandemic this year's tournament will be virtual on Zoom. The tournament needs attorneys willing to serve as judges, to preside over mock trial rounds and evaluate students' performances. Attorneys do not need to be sitting judges, active litigators, or familiar with college mock trial to participate – a Zoom account/experience is not required for attorneys interested in judging. Judges will receive a brief training that will equip them for the task.

For each day, there will be one morning and one afternoon trial session, lasting no longer than two and a half hours. 20 judges per round are needed to administer the tournament.

To sign up as a judge for one or more trial sessions, or should you have any questions, please contact: Coach Samuel Harkinson at **sharkinson@hpgr.com**.

# Qualified Immunity under the United States Constitution and Official Immunity under New Hampshire Law

**Date: October 28, 2020**
**Time: 8:30AM – 1:00PM**

The New Hampshire Supreme Court Society in coordination with the New Hampshire Bar Association will be presenting two panels on the judicial doctrine of qualified immunity and the related New Hampshire doctrine of official immunity. These doctrines have become increasingly important for the public in the wake of a national discussion on police accountability.

This presentation will be actively moderated by Constitutional Law Professor John Greabe of the UNH Law Center and will include the following speakers:

- **Karen M. Blum**, Professor Emerita and Research Professor of Law, Suffolk University Law School
- **Attorney Larry James**, Managing Partner at Crabbe, Brown & James, LLP and general counsel for the National Fraternal Order of Police
- **Professor Karen J. Pita Loor**, Associate Dean for Experiential Education and Associate Clinical Professor of Law at Boston University
- **Jay Schweikert** of the Cato Institute's Project on Criminal Justice
- Former New Hampshire Supreme Court Justice, **Charles G. Douglas III**, founding partner of Douglas, Leonard & Garvey, P.C.
- **Attorney Brian J.S. Cullen** Partner at Cullen Collimore, PLLC, Nashua, NH
- **Attorney Lawrence A. Vogelman**, Counsel at Shaheen & Gordon, P.A., Dover, NH

This presentation will be conducted via webinar and lawyers, judges, civics educators, students of all ages, and the general public are encouraged to attend.

**Cost to Attend**: Attorney Members of NHSC Society – $75; Non-Member Attorneys- $150; UNH Law Students and high school students and teachers – Free; Members of the Public – $45. Firm members of law firm corporate sponsors of NHSCS – Free.

NHMCLE does not approve or accredit CLE activities for the NH Minimum CLE requirement. The provider believes this course meets the requirements of NH Supreme Court Rule 53 and may qualify for 165 minutes toward the annual NHMCLE requirement.

For registration information, please contact Danielle C. Gaudreau, Esq. 603-224-8700, **dgaudreau@laboelaw.com**, 6 Loudon Road, Suite 502, Concord, NH 03301.

# N.H. Expands Accessible Absentee Voting

**By Casey McDermott**
NH Public Radio

New Hampshire has launched a new absentee voting system meant to allow more voters to cast a ballot privately and independently.

Until now, New Hampshire did not allow those who are blind or experience other print disabilities to request or complete an absentee ballot without assistance. Accessible voting options are provided at all New Hampshire polling places, but many voters — with the encouragement of state election officials — will rely on absentee voting this fall due to the ongoing pandemic.

The new absentee voting options come as the state faces a lawsuit from a coalition of disability rights advocates, who say officials have known about the barriers inherent to New Hampshire's previous absentee balloting system long before the pandemic.

The state has enlisted the help of VotingWorks, which calls itself a "non-partisan non-profit" election technology provider, to set up the new system.

Under the new system, a qualifying New Hampshire voter can request an accessible absentee ballot electronically and fill it out on their own computer. But as VotingWorks President Matt Pasternack emphasized, the voter's choices will not be shared electronically. Instead, voters will need to print and return a physical copy of their completed absentee ballot — which, he said, provides an added layer of security.

"What's really, really important about this process is printing out the ballot and mailing back in the piece of paper and having the confidence that it was your paper ballot that was counted, and not an online vote," Pasternack told NHPR on Monday. "In no way is this system online voting."

The state says the new system will only be available to "voters who have a print disability that makes use of the system necessary." When requesting the accessible absentee ballot, a voter will have to sign a form confirming that they meet this criteria.

The disability rights groups challenging New Hampshire's absentee voting procedures in court praised the new system as a step in the right direction.

"We are very pleased that the Secretary of State implemented an accessible registration process and voting system so quickly," said Disability Rights Center - New Hampshire Executive Director Stephanie Patrick. "People with disabilities have the right to vote privately and independently, even during a pandemic and now they can do so."

Daniel Frye, one of three voters involved in the lawsuit, said he's "cautiously optimistic" about the potential of the state's new system. At the same time, it came too late to allow him to make full use of it before the state primary, held on Sept. 8. Frye, who is blind, said he already secured an absentee ballot ("regrettably, with the assistance of someone") before the new system was announced.

"That experience was fairly humiliating, because I had to make it clear that it was something I could not do entirely on my own," Frye said. "But I do have my absentee ballot. Now that I do have it, I will endeavor to to lodge my absentee ballot using the accessible system that has been created."

Gov. Chris Sununu recently signed off on the use of $30,000 from the state's CARES Act funding pool to cover the costs of a new accessible absentee voting system. The state has not yet provided a copy of its contract with VotingWorks, the vendor chosen to implement the new system.

Here's how to request an accessible absentee ballot, according to the state's new guidance:

Fill out this special "Application for An Accessible Electronic Absentee Ballot" and email it to your local clerk. An electronic signature will be considered valid on this form.

Call the Secretary of State's Election Division Hotline at 1-833-726-0034 to notify officials after submitting the application.

If approved, you will receive an electronic version of an absentee ballot, which you can sign and fill out on a computer. Again, an electronic signature will be considered valid on this paperwork. You will also receive an absentee ballot packet in the mail.

After filling out your ballot electronically, you will need to print out a copy of the ballot and return it using the official absentee ballot paperwork provided by your local election office. You can return completed absentee ballots by mail or in-person, or in certain circumstances you can ask someone else to deliver it on your behalf.

More information on New Hampshire's accessible absentee voting and registration process can be found on the Secretary of State's website. Voters who need help can contact the Secretary of State's election hotline at 1-833-726-0034.

*These articles are being shared by partners in The Granite State News Collaborative. For more information visit collaborativenh.org.*

# Build Your Business

## ADVERTISE IN NH BAR NEWS


## Is it time to increase your firm's marketing efforts?

Referrals from other attorneys are a major source of new business. Advertising in *Bar News*, the state's only publication about NH law and law practice, is the best way to let your colleagues know about your firm and the focus of your practice. Published by and for the New Hampshire Bar Association, NHBA members receive special pricing on *Bar News* advertising.

**Download the members-only media kit at:**

**HTTPS://WWW.NHBAR.ORG/WP-CONTENT/UPLOADS/2020/06/2022021-MEDIA-KIT-FOR-MEMBERS-NEW.PDF**

*"This is the only advertising we do... Other lawyers frequently mention seeing our ads in the* Bar News, *and we attribute many of our referrals to that advertising."*

– Randy Reis
Reis & Kirkland

*"A great way to let all my fellow Bar members know the type of work I do, and my willingness to work with them on cases. I would strongly advise using the* Bar News *to reach fellow lawyers both here in New Hampshire and throughout the region."*

– Peter Hutchins
Hutchins Law Offices


NEW HAMPSHIRE BAR ASSOCIATION
NHBA
Equal Justice Under Law

The NH Bar Center
is located at
2 Pillsbury St., Suite 300,
Concord, NH 03301

**nhbar.org**

(603) 224-6942

**MEMBER HOTLINE**
(603) 715-3279

**FOR PRICING AND ADDITIONAL INFORMATION, PLEASE CONTACT:**

Advertising and Sponsorship Sales Coordinator

**PHONE:**
603.715.3263

**EMAIL:**
advertise@nhbar.org

# Environmental Due Diligence Gone Wrong

**By Michael J. Quinn**

Practitioners engaged in transactions that involve the transfer of real property understand the utility, and in fact the necessity, of obtaining a Phase I Environmental Site Assessment ("ESA") prior to closing. Having a properly performed ESA in the closing binder can bring with it substantial benefits should the new owner of the property someday need to avail him or herself of a landowner liability defense to environmental liability.[1]

The purpose of this article is not to describe how an ESA is performed, or who should perform one. Rather, the purpose here is to warn of the importance of fully understanding a key definitional requirement of every ESA, and to highlight the fatal consequences of the failure to understand and correctly apply key definitional terms. Those who wish may stop reading now and instead turn to a federal case from the Southern District of New York that makes the risks clear: *105 Mt. Kisco Associates LLC v. Carozza*, slip op., 15-CV-5346 (USDC, SDNY, March 30, 2017).

Before delving into the details of that case, some background is helpful. As most are aware, the Comprehensive Emergency Response Compensation and Liability Act ("CERCLA")[2], better known as Superfund, imposes *strict liability* on the owner of property. With the subsequent Superfund Amendments and Reauthorization


Act ("SARA")[3], a defense to Superfund liability began to develop if a land owner could demonstrate the contaminated property was acquired, after adequate inquiry, without knowledge of the contamination. To make that showing, the owner is required to establish that at the time of acquisition of the property "all appropriate inquiries" ("AAI") into the previous ownership and uses of the property was undertaken, such that the new owner took title to the property with no knowledge of, nor reason to know of, contamination conditions that preexisted acquisition.

The question became how a prospective property purchaser could demonstrate that AAI were undertaken. In response, ASTM International developed standard practices for the conduct of ESAs[4] specifically intended to satisfy AAI requirements.[5] *The Standard*, known today as *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, ASTM E 1527-13,* has been updated and revised at intervals over the course of the past 20 years or more. Today ESAs are routinely performed according to the ASTM Standard as a component of transactions involving real property.

Counsel representing a prospective purchaser must have a working understanding of ASTM E 1527-13, however, in order to preserve the benefit of landowner liability defenses based on a properly conducted ESA. Application of the Standard depends on numerous defined terms, often reduced to acronyms, that must be understood by the purchaser and counsel. Section 3.3 of the Standard defines over 25 acronyms - RECs, CRECs, HRECs, PRPs, NPL etc. Counsel and buyers must understand the significance and implications of each.

A threshold issue, sometimes overlooked in the rush to closing, is who the ESA identifies as the authorized "user" of the report. Section 3.2.98 of E 1527-13 defines "user" as "a potential purchaser of property, a potential tenant of property, an owner of property, a lender, or a property manager."[6] To be eligible for a landowner liability defense, it is mandatory that the party subsequently asserting the defense have been identified in the ESA as a "user" of the document.

A potential problem arises when a buyer/borrower relies on its lender to commission the ESA. Although paid for by the buyer as a cost of closing, it may be that only the lender is identified in the ESA as the "user." This deficiency means of course that the purchaser is not in privity with the consultant for contract purposes. In addition, the owner will also be ineligible to assert an innocent landowner defense and so is, at least potentially, strictly liable for all the costs of assessments and remediation as the current owner of contaminated property. In other words, the defenses will be entirely unavailable.

This is the situation the borrower/property owner faced in the *Mt. Kisco*

**DILIGENCE** *continued on page 30*

# Massachusetts Pioneers the 'Clean Peak Standard'

**The new policy aims to reduce carbon emissions and save millions in otherwise necessary repairs.**

**By Kelsey Sullivan**

This summer, the Massachusetts Department of Energy Resources (DOER) is implementing a first-in-the-nation energy policy known as the Clean Peak Energy Standard or "CPS." The CPS is groundbreaking in that it not only promotes renewable energy production, but is also designed to reduce "peak demand"— the hours of the day, month, or year when electricity demand is highest. As explained below, the CPS has the potential to not only reduce carbon emissions, but also to save grid operators and ratepayers millions of dollars in avoided grid infrastructure investment. In order to understand the mechanics of the CPS, however, it is important to first understand the basics of its predecessor, the Renewable Portfolio Standard, or "RPS."

## What is an RPS?

An RPS requires regulated utilities to obtain a certain percentage (rising over time) of the electricity that they deliver to their customers from renewable energy sources. Mechanically, utilities do so by purchasing Renewable Energy Credits or "RECs." Each REC represents one megawatt of renewable electricity generation. If a utility company does not purchase enough RECs, then it must make "Alternative Compliance Payments" (ACPs) to a fund held by the state public utilities commission (or similar body). That fund is typically used by the state to provide financial support to renewable energy or energy efficiency projects.

According to the industry news outlet *Utility Dive*, 29 states and the District of Columbia have adopted an RPS or similar policy. These policies have played a large role in increasing the amount of renewable energy consumed in this country. The National Conference of State Legislatures, for example, reports that roughly half of the growth in U.S. renewable energy generation since the early 2000s can be attributed to state RPS policies.

## What is the Clean Peak Standard?

While RPS policies incentivize renewable electricity generation, they do not address when renewable sources are deployed to the grid. This is where the CPS comes in. The Massachusetts CPS regulations, which took effect in early August, provide revenue streams to qualified energy resources that can either supply electricity or reduce demand during peak demand periods — sometimes referred to as "shaving the peak." Eligible resources include certain renewable generators, qualified energy storage systems (such as batteries), and demand response technologies.

These resources will generate Clean Peak Energy Certificates (CPECs) for every megawatt hour of electricity that they produce or reduce during "Seasonal Peak Periods" (daily four-hour blocks of time that vary by season, as set forth in the CPS regulations). Retail electricity suppliers in the state are required under the CPS to purchase a certain amount of CPECs—in 2020, the requirement is 1.5% of total electricity sales to end-use customers—and like the RPS, the percentage is designed to increase incrementally each year.

This issue of timing and addressing peak demand is crucial because the entire electricity grid is designed for those few hours of the year when electricity demand is at its peak. Advanced Energy Economy, an industry trade group, reports that 10% of grid capacity is built to meet demand for just 1% of hours during the year. A report produced by the DOER and Massachusetts Clean Energy Center in 2016 sets that ratio even higher—finding that 10% of the peak demand hours in the state during 2013–2015 accounted for 40% of annual electricity spending. By lowering peak demand, the CPS can help electric utilities to defer or avoid infrastructure investments. The DOER estimates that the CPS program will result in $710 of net savings to ratepayers in the first ten years of its life.

In addition to these economic advantages, the time-based approach of the CPS may also help to reduce carbon emissions by reducing or eliminating the use of fossil fuel-fired "peaker plants." Peaker plants are power plants that come online only during hours of high demand. In New England, peakers used to be oil-fired plants, but are now almost always natural gas plants. Relying on fossil fuel-based peaker plants is expensive, and often results in higher carbon emissions during peak hours.

Currently, many states cannot rely on renewable power sources to meet peak demand because the hours of solar and wind power generation do not align with the hours of high electricity use. The CPS addresses this problem by incentivizing energy storage technologies to shift the time availability of renewable generation. Batteries, for example, can be charged when the sun is shining and the wind is blowing, and then deployed to the grid when that energy is needed during the daily peak. This is sometimes referred to as "shifting the peak," and the DOER estimates that it will save 560 thousand metric tons of carbon dioxide emissions in the first ten years of the CPS.

## Conclusion

RPS policies have become vital tools in helping states to meet their renewable energy goals. However, they do not help to "shave the peak" or "shift the peak." Advocates consider the Clean Peak Standard to be the next step in the evolution of the RPS, and a powerful tool for both lowering grid costs and carbon emissions. In the words of a *National Law Review* article published earlier this year, RPS policies encourage renewable energy technologies to just "show up," while the CPS incentivizes them to "show up at the right time." As a state with an RPS policy already in place, New Hampshire could benefit greatly from following the example of its neighbor to the south, and re-designing its energy policy to address peak demand.

*Kelsey Sullivan is an Associate at Rath, Young & Pignatelli working in the firm's renewable energy, corporate, and tax practice groups.*

# Non-Wires Solutions: Can They Really Provide Value to the Electric Distribution System?

**By Brian Buckley**

Last month, the New Hampshire Public Utilities Commission (PUC) released its long-awaited Locational Value of Distributed Generation (LVDG) study. This study provides insights into the value of electric demand reduction at specific locations on the utility distribution system, evaluating which locations are likely to require upgrades to accommodate peak loading constraints. That information has implications for utility distribution planning, and many other jurisdictions are experimenting with strategies to avoid or defer otherwise necessary utility investments. So why should this matter to New Hampshire energy industry stakeholders?

## Basis for a Locational Value Study

The LVDG Study was an outgrowth of a June 2017 PUC order establishing a new alternative net metering tariff. Net metering is the mechanism through which customers are compensated on a $/kWh basis for the net output of their behind-the-meter generation, like small solar photovoltaic systems. A major point of contention in New Hampshire's net metering debate, and other similar proceedings throughout the country, was whether the kWh's that net metering customers generate actually reduce costs associated with the distribution system, and, if so, how the customers should be compensated for reducing those costs.


In 2017, the PUC eventually resolved the issue by reducing the distribution credit paid to net-metered customers for their generation to about 25% of its former value, from a little over $0.04/kWh to approximately $0.01kWh. The PUC also directed its staff to study the locational value of distributed generation to better understand the location-specific value of distributed generation based on the related demand reductions provided on the electric grid. The study authors reviewed nearly 700 substations and circuits on the distribution system of New Hampshire's three regulated electric utilities and identified approximately 45 locations likely to face peak loading constraints over the next ten years.

## Implications for Least-Cost Integrated Resource Planning

Although the LVDG study provided an illustrative analysis matching peak-constrained substations to the load profile of net-metered distributed generation, the study findings are not just applicable to distributed generation. New Hampshire, like many jurisdictions, has a suite of statutes that requires utilities to file, and the PUC to review, utility integrated resource plans (IRPs). IRPs provide regulators and the public with insights into how a utility is planning its system, and whether that planning is being done at the lowest reasonable cost.

More recently, some jurisdictions are taking a closer look through their IRP review processes at whether distributed energy resources (DERs) — such as energy efficiency, demand response and battery storage — can be used to cost-effectively avoid or defer a distribution system capacity need, such as a substation upgrade or replacement. Based on studies and pilot programs completed in neighboring jurisdictions, this appears to be the primary source of value that such "non-wires solutions" may contribute to the distribution system.

Some debate still exists in the industry regarding the appropriate compensation structure for these non-wires solutions that deploy DERs to avoid or defer planned distribution system investments. Some favor a tariff-based structure where net metering compensation is different for circuits facing peak loading constraints. Others have

VALUE *continued on page 30*

# FCC 5G Orders Survive Challenges, Except on Aesthetics

**By Will Dodge**

In my article for last year's *NH Bar News* telecommunications edition, I wrote about some important potential setbacks for 5G deployment, all associated with a case from the D.C. Circuit concerning new Federal Communications Commission ("FCC") regulations designed to streamline federal environmental requirements for small cell wireless facilities on utility poles.

Earlier this month, another very important decision—*City of Portland v. U.S.*, 2020 WL 4669906 (9th Cir., Aug. 12, 2020)—largely affirmed recent FCC orders limiting the powers of municipalities and public utilities to proscribe 5G deployment in public rights of way and utility corridors. The decision and the orders set the table for how 5G is likely to be rolled out in New Hampshire in the near future.

## Small Cell Technology and 2018 FCC Orders

5G technology—named as the fifth generation of cellular wireless since passage of the 1996 Telecommunications Act ("TCA")—provides increased bandwidth in comparison to other types of wireless technology, allowing more devices to be connected to the network at one time. This allows speeds that ensure near instantaneous responses between servers and connected devices.

> "Although 5G technology transmits data at exceptionally fast speeds, it does so over short distances, meaning that full deployment requires a greater number of sites than is true of macrosites (e.g., towers, rooftop arrays)."

Small cell facilities for 5G consist of miniaturized antennas and other operating equipment or "street furniture" mostly mounted on poles, streetlights and buildings. Although 5G technology transmits data at exceptionally fast speeds, it does so over short distances, meaning that full deployment requires a greater number of sites than is true of macrosites (e.g., towers, rooftop arrays).

Concerned over the number of sites needed to realize the benefits of 5G, the FCC issued two orders and corresponding regulations in 2018 pursuant to its authority under the TCA in an attempt to remove perceived barriers to 5G.

In *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd. 7705 (Aug. 2018) (the "Moratoria Order"), the FCC imposed limits on public and private utilities' ability to restrict access to wireless carrier use of utility poles and related infrastructure, while also banning express and "de facto" municipal and state moratoria on 5G siting.

In *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd. 9088 (Sept. 2018) (the "Small Cell Order"), the FCC imposed limits on municipal regulation of 5G in rights of way and elsewhere, including presumptive caps on permitting and licensing fees, rules for aesthetics, "shot clocks" for application processing, and prohibitions on concerns over radiofrequency emissions ("RFE") as a basis for denying applications.

A large array of municipalities and public utilities from around the country challenged the two FCC orders pursuant to the federal Administrative Procedures Act. Wireless carriers and industry groups joined to defend the FCC, though included a challenge to the FCC's failure to create a "deemed approved" remedy to address a municipality's late issuance of permits for 5G facilities.

## Key FCC Provisions Upheld

The Ninth Circuit largely upheld the Small Cell Order, finding that the FCC and the carriers had persuasively established that new regulations were needed to prevent, among other things, large municipalities from imposing costs and legal hurdles that would effectively hinder 5G technology from being built outside of major urban areas due to costs. Key provisions upheld in both the Small Cell Order and the Moratorium Order included the following:

**Municipal Fees.** All fees for 5G deployment must be (1) a reasonable approximation of the state or local government's costs (2) with only objectively reasonable costs factored into the fees, (3) with fees no higher than those charged to similarly-situated competitors in similar situations. Fees are presumptively lawful if less than $500 for each 5G site application, and less than $270 per year per site for recurring fees. Any fees above these levels can be justified only if the municipality's actual costs are shown to exceed the presumptive levels.

**Processing Time.** State and local governments have 60 days to decide applications for 5G installations on existing infrastructure, and 90 days for all other applications (e.g., new poles). "Applications" in this context includes not just zoning approvals, but also building or construction permits and any required right-of-way or municipal pole attachment license. The time limits are presumptive, so a municipality can demonstrate reasons for extending the decision time beyond the "shot clocks." An applicant's recourse

**FCC** *continued on page 31*

# A Call To Thought: How Can We Improve Section 230 Without Killing The Golden Goose?

**By Scott Wanner**

Section 230 of the Communications Decency Act of 1996 (47 U.S.C. § 230) protects Internet Service Providers (ISPs) from liability for torts committed by users that self-publish content on their platforms. Jeff Kosseff aptly described Section 230 in his 2019 book's title, *The twenty-six words that created the internet.*

Today, Section 230 has grown increasingly controversial and is under attack from many sides. Opponents voice concern that the major ISPs (Google, Facebook, etc.) have accumulated too much power over social dialogue and face too little liability over what goes on online.

President Trump's May 2020 Executive Order "Preventing Online Censorship" urges overhauling Section 230 and joins a chorus of critics that includes Democrats as well as Republicans. For instance, former Vice President Joe Biden and Speaker of the House Nancy Pelosi have each lobbed their own attacks at Section 230.

Congress passed Section 230 back in 1996 after conflicting court decisions came down both for and against imposing liability on internet platforms for defamatory content. The common law tort of defamation has long protected persons from the publication of false statements against them. Back when words on paper were our chief concern, "distributors" (remember bookstores?) were safe from liability due to a presumption of ignorance as to the content they sold, whereas "publishers" (remember newspapers?) that exercised editorial control over content risked liability for knowingly contributing to the dissemination of defamation.

By the 1990's, such First Amendment principles had to be applied to content published online. In *Stratton Oakmont, Inc. v. Prodigy Services Co*., a state court found liability where the online platform had exerted editorial control. 1995 WL 323710 (N.Y. Sup. Ct. 1995). Paradoxically, ISPs that remained "hands-off" as to the content users self-published were safe from lawsuits, while ISPs that moderated content on their platforms with proactive rules to protect the public were at risk.

Section 230 was enacted by Congress to overrule *Stratton Oakmont* and has controlled the on-line legal landscape for the past quarter century. Those 25 years have been hugely important in reshaping how people interact and consume information, affecting our economy, education, and almost every other facet of modern human life. The internet emerged as a new limitless space for self-publishing, vastly expanding the "public square" and empowering individuals on a scale never before available.

Section 230 benefits from being both simple and clear. Section 230 established two "bright line" rules, often regarded as the "sword and shield" of ISPs. For the shield, Section 230 protects internet platforms from civil liability for torts that arise from the content users self-publish on-line. For the sword, Section 230 protects internet platforms from civil liability when they promulgate and enforce rules governing good conduct on their platforms. Section 230(c)(2)(A) specifically protects "good faith" criteria ISP's implement to protect minors and the public at large by restricting access to content that is, "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable."

Are internet platforms doing enough self-policing? Arguably not. Facebook curates its social media empire by elaborating evolving rules for users largely due to the dictates of the marketplace. To take one example, Facebook guidelines now allow posting images of female nipples when the subject is breast feeding, a change that came about in response to public feedback campaigns. Twitter recently labeled as misleading President Trump's tweets that voting ballot mailboxes are not sanitized against coronavirus and that children are virtually immune from COVID-19. Yet everyone is also familiar with abhorrent on-line content. While defamation, hate speech and pornography can all be found too much on-line, Section 230 largely limits liability to the authors of content while protecting ISPs. Confidence that government can better monitor the marketplace and improve this state of affairs, if possible at all, presents challenges.

Today, outspoken champions of the importance of Section 230 are few, yet their arguments are strong. At least one scholar has argued that the protections of Section 230 follow from the First Amendment itself. (See 131 Harv. L. Rev. 2027, May 10, 2018). According to the *Harvard Law Review* note, Section 230 reflects a constitutional imperative, not a mere policy choice. And beneath the First Amendment are philosophical considerations about our core values of freedom of thought and expression laid out well in bedrock writings such as John Stuart Mill's defense On Liberty and Walter Lippmann's "The Indispensable Opposition." As explained in a seminal case applying Section 230, *Zeran v. America Online, Inc.*, the "specter of tort liability in an area of such prolific speech would have an obvious chilling effect." 129 F.3d 327 (4th Cir. 1997).

On-line content gatekeepers face practicality considerations which their scale makes impossible to satisfy. Professor Daniel Farber has pointed out that the US Supreme Court's First Amendment jurisprudence, e.g. *New York Times v. Sullivan*, etc., "reflect[s] the fear that certain laws over-deter speech and thus lead to a suboptimal amount of total information disseminated in society." And Professor Daryl Levinson has warned that the prophylactic rules of First Amendment jurisprudence, "depend on such factors as the administrability and expense of a more precise rule and the error costs of false negatives and

**ISPs** *continued on page 31*

## Diligence from page 26

case. Here, the transaction was a refinancing not a conveyance, however the refinancing can be considered a "title transfer" for the purposes of Superfund liability. The borrower did not retain the environmental consultant that performed the ESA; instead its lender entered into the contract with the consultant and the lender was the only identified "user." As is typical however, the expense of the ESA was taken out of closing costs.

After closing, it became evident that an environmental condition that the borrower claimed should have been documented in the ESA was missed. As reported, the result could amount to $30 million in liability. The buyer brought suit against the consultant, but had the claim dismissed for lack of privity of contract.

Failure to be properly identified as an authorized "user" of the ESA also results in a borrower/owner losing the ability to successfully assert a landowner defense to liability under Superfund, consequently facing potential strict, joint and several liability in a government enforcement action. So, the *Mt. Kisco* borrower could be responsible for all study and remediation costs resulting from distant historical[7] activities with which it had no involvement.

The correct way to have handled the transaction would have been for the borrower to have obtained a reliance letter from the consultant explicitly identifying the borrower as a "user" of the ESA. Reliance letters are typically given in this situation, but they need to be requested. That was apparently not done in the *Mt. Kisco* case.

The lesson is never to treat ESA as a commodity and just another box to be checked off the closing list. It is not only a technical endeavor entrusted to environmental consultants, but a legal document of potentially very significant importance that may not become evident until years in the future. Legal counsel should be directly involved with the work of the environmental consultant and must have a sound working understanding of ASTM E 1527-13, or consult with someone who does.

1. Bona fide prospective purchasers (BFPPs), contiguous property owners (CPOs), or innocent landowners (ILOs). https://www.epa.gov/enforcement/landowner-liability-protections.
2. 42 U.S.C. § 9601 et seq.
3. SARA amended the CERCLA in 1986
4. http://www.astm.org/Standards/E1527.htm
5. The story here is more detailed, as ASTM worked to conform its Standard to regulatory requirements found at 40 CFR § 312.20 - All appropriate inquiries.
6. ASTM E 1527-13 § 3.2.98
7. The *Mt. Kisco* court describes radioactive contamination dating back to World War II

*Mike Quinn is a director in McLane Middleton's Administrative Law and Litigation Departments and is the Managing Director of the firm's Portsmouth Office. He can be reached at (603) 334-6925 or mike.quinn@mclane.com.*

## Value from page 27

embraced a different strategy that utilizes technology-agnostic requests for proposals (RFP) to identify potential non-wires solutions that might be offered by third parties. Still other jurisdictions have used performance incentives to encourage energy efficiency program administrators, often the utilities, to geographically target their programs, sometimes in conjunction with an RFP approach. The debate over the best mechanism to encourage strategic locational deployment of non-wires solutions remains unresolved in the industry, and different jurisdictions continue to explore new and innovative approaches.

In New Hampshire, two of the state's regulated electric utilities committed to providing a detailed evaluation of non-wires solutions that might cost-effectively avoid or defer at least one planned system upgrade in their next IRP filings. Both of the evaluations will be filed with the commission within the next six months. Similarly, the state's third regulated electric utility recently issued an RFP for such solutions, although it found that the traditional utility investment would be more cost-effective than the responses received. The LVDG Study may be another tool that can be used by electric distribution utilities and other stakeholders to better understand the potential for non-wires solutions, albeit only on the relatively small portion of New Hampshire's electric distribution system that faces peak demand constraints.

### Incentive Regulation and Non-Wires Solutions

In jurisdictions where regulated utilities follow the traditional cost of service regulation model, customer rates are set according to the utility's cost of doing business. Utility shareholders earn a return on capital investments like poles, wires, and substations. With some exceptions, utility shareholders do not generally earn a return on operating expenses such as tree trimming, property taxes, wages and salaries, healthcare costs, and other costs which are effectively just passed through to ratepayers.

This model has been observed to create an incentive for regulated utilities under cost of service regulation to invest in capital assets. That incentive has the positive effect of encouraging a utility to invest in the upkeep of its distribution system. However, some argue that the inventive places potential non-wires solutions, particularly

"The debate over the best mechanism to encourage strategic locational deployment of non-wires solutions remains unresolved in the industry, and different jurisdictions continue to explore new and innovative approaches."

those that are not owned by the utility, on an uneven playing field with planned utility capital investments.

Neighboring jurisdictions have taken various steps to address this issue. Maine, for instance, enacted a law providing its public advocate with the authority and contracted consultant to review all planned utility investments over a certain dollar threshold for potential avoidance through deployment of non-wires solutions. Rhode Island and New York have explored a shared savings model that allows utilities to earn a share of any ratepayer savings that result when a planned distribution system investment is avoided through deployment of non-wires solutions. In Massachusetts, several utilities have transitioned away from cost of service ratemaking entirely toward a performance-based model where rates change automatically according to a pre-determined productivity factor. Each of these approaches has positive and negative characteristics. In recent orders, the New Hampshire PUC has also expressed an interest in exploring alternatives and enhancements to the traditional utility incentive framework.

Deployment of non-wires solutions to avoid or defer distribution system investments may not always be the right choice for New Hampshire's ratepayers and utilities, but thanks in part to the recently-released LVDG study and other recent commitments from both utilities and regulators, interested energy industry stakeholders will at least have a better understanding of the size and nature of the potential opportunity.

*Brian D. Buckley is a hearings examiner/staff attorney with the New Hampshire Public Utilities Commission; the views expressed in this article are his own and not necessarily those of the Public Utilities Commission or the State of New Hampshire.*

**FCC** from page 28

involves seeking an injunction in federal district court, with no "deemed approved' remedy being added to the regulation.

**Access to Municipal ROW and Infrastructure.** In controlling access to rights-of-way, municipalities are deemed to be acting in a regulatory capacity for the public interest (not as property owners); accordingly, public rights of way and other public ROW infrastructure must be made available for wireless facility deployment .

**RFE.** Based on an updated version of the FCC's 1996 exposure standards, municipal laws for 5G are subject to the prohibition against regulating facilities on the basis of concerns over RFE, except for demonstrating that the FCC standards are met.

**Moratoria.** Municipalities cannot enact express or de facto moratoria over 5G facilities, with "de facto" being laws that unreasonably or indefinitely delay deployment. Municipalities can maintain general regulations regarding construction scheduling without being preempted.

**One Touch Make Ready.** Under the Moratoria Order, 5G infrastructure providers have greater access to poles owned by public utilities through rules relating to make-ready work, including "overlashing" disputes, avoiding costs of remedying prior safety violations by others on an existing pole, securing rate parity with wireline pole attachments, and allowing access to non-utility workers to the upper sections of poles (though only using utility-approved contractors).

The Ninth Circuit also rejected Fifth and Tenth Amendment challenges to both Orders, finding that the FCC had provided just compensation to municipalities through the reasonable fee presumptions, and concluding that the FCC had sufficient authority under the Commerce Clause and the TCA to limit the manner in which 5G siting is regulated at the state and local level.

### Aesthetics Regulations Vacated

In one area — aesthetics — the Ninth Circuit vacated the FCC's regulation in the Small Cell Order as "arbitrary and capricious," and remanded to the FCC for further consideration.

The regulation had stated that municipal aesthetic requirements for 5G would not be preempted if "(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments (e.g., color, shape, size); (3) objective; and (4) published in advance." The Ninth Circuit took issue with "other types of infrastructure deployment," finding that this standard exceeded Congress's TCA provision ensuring that municipalities did not unreasonably discriminate among functionally equivalent services.

The Ninth Circuit concluded that different aesthetic standards could apply to different types of equipment and technology, provided the standards were reasonable. The Ninth Circuit also concluded that an "objective" requirement was overly broad, finding instead that regulations tailored to preserve characteristics of particular neighborhoods would not materially inhibit, materially limit, or effectively prohibit 5G technology. Moreover, "malleable and open-ended" aesthetic criteria could be used at the municipal level to evaluate a 5G site, provided the regulations are technically feasible and reasonably directed at remedying "the intangible public harm of unsightly or out-of-character deployments."

### Effect on New Hampshire Wireless Deployment

The *City of Portland* case is binding law nationwide for the moment, though an appeal to the U.S. Supreme Court appears likely before all of the dust settles. As I remarked last year, New Hampshire has not yet seen widespread small cell deployment, though there have been inroads made in a handful of municipalities. COVID-19 has, to some degree, interfered with even the best laid plans for infrastructure improvements, beyond the legal questions surrounding the FCC's 5G orders. But with the FCC making funds available for 5G technology deployment for rural areas, and with at least some of the legal issues on the FCC Orders now resolved, we should expect to see small cell facilities in New Hampshire communities sometime in the near future.

*William J. Dodge practices telecommunications, energy, and real estate law in NH and VT, and chairs the Regulated Entities Group at DRM PLLC. He also serves on the Board of Directors for the New England Wireless Association.*

**ISPs** from page 29

false positives."

Should the court doors be flung open, forcing ISPs to address every challenge to content individuals publish on their platforms? It is clear that without Section 230's "sword and shield," internet platforms would self-censor otherwise constitutionally protected speech for fear of civil liability, effectively killing the goose of modern technology that has been laying "golden eggs" for decades. Opening this Pandora's Box will lead, for one thing, to illegitimate content takedown requests seeking to quash free speech in social media.

Before amending Section 230 beyond recognition or scrapping it altogether, we should ask whether there exists a better rule to replace Section 230. Entrusting the FCC or the Justice Department to review all on-line content or to scrutinize the "good faith" of ISPs' content regulations should give us pause. The specter of China-styled authoritarian internet regulation is not abstract and shows us how the "hesitation to speak" can override encouraging criticism.

*Scott Wanner is celebrating his 20th year practicing law. Having spent one decade handling civil litigation in private practice, and another decade as in-house counsel for a technology company, Scott is now focused on providing appellate representation in New Hampshire. For a free appeal consultation, you can reach Scott at scottwanneresq@gmail.com.*

# Clarifying the Use of the Circuit Court's COVID Email Boxes

**Place non-emergency filings in the U.S. mail or courthouse drop box**


Court Security Officer Mike D'Alessandro stands by the drop box used for filings at the Dover Circuit Court.

**By Administrative Judge David D. King**

The COVID email boxes, as they are colloquially known, were created when Governor Sununu's Stay at Home Order took effect. At that time, all New Hampshire residents were expected to remain in place except for essential business and emergencies. Circuit Court locations were open in-person for constitutionally-required or emergency filings and hearings; other business was conducted remotely or paused altogether. To the Circuit Court, these extraordinary circumstances necessitated developing a process for people who could not come to the courthouse or print out and file documents in advance to be able to file motions and documents necessary to move their case forward. The COVID email boxes were intended to provide access to justice.

Since the implementation of the Governor's subsequent Safer at Home Order, the Court has restarted many additional case types or hearings within case types. Most hearings are still remote, for the sake of de-densifying courthouses. In addition, all court rules—including all document exchange and filing timelines—are now in effect, unless waived by a judge. This reduces the public's need to use the CO-

**EMAIL BOXES** *continued on page 33*

# Lessons on Conducting a Jury Trial During the COVID-19 Pandemic

**By Daniel J. Lynch and Tracy A. Uhrin**

Due to the emergence of the COVID-19 pandemic, The United States District Court for the District of New Hampshire suspended jury trials in early March. As communicated in a series of monthly standing orders, the court determined that public health considerations necessitated the continuance of jury trials through July.

As more has become known about the virus and effective mitigation techniques, when combined with improving COVID-19 statistical data in New Hampshire, the court believed conditions had sufficiently improved to permit it to conduct a small number of criminal jury trials in August. Thus, the court held its first post-COVID-19 jury trial in early August, which was presided over by Judge Joseph N. Laplante. The following is a short summary of the logistics and protocols the court developed in order to conduct jury trials as safely as possible, which the court thought may be of interest to the bar.

In order to assist the court in making COVID-19 related decisions, it engaged the services of Dr. Erin Bromage, who is providing similar assistance to state and federal courts and corporations across the country. Dr. Bromage visited the Rudman Courthouse and provided guidance on numerous issues, which included an evaluation of the HVAC system, entrance and screening protocols, courtroom and jury box configuration, crowd movement and room capacity, and personal protective equipment.

Based on those recommendations, plexiglass was installed around the witness box and between the podium and counsel tables, counsel each had a designed podium, a platform and additional evidence screens were installed for jurors sitting outside the existing jury box, and a headset system was developed to permit the court to conduct private sidebars with counsel and the defendant from the counsel tables, thus making it unnecessary for counsel to crowd together by the side of the bench to communicate with the judge.

At the juror summons phase, the court informed potential jurors of the steps it had taken for the public's protection and explained the excuse process for jurors who were at high risk for severe illness from COVID-19 (based on CDC standards). Judge Laplante held video conference meetings with counsel and court administrators at least twice a week prior to trial in order to address jury selection and trial logistics as well as evidentiary and witness issues. Judge Laplante also worked with counsel to develop an online jury questionnaire, which included COVID-19 related questions. Because crowd size is a risk factor for COVID-19 transmission, the goal was to try and assure that all jurors who planned to request to be excused due to COVID-19 would do so in advance of jury selection, which would reduce the number of jurors unnecessarily brought into the courthouse.

Prior to the selection date, the court used an automated jury management system to randomly preselect jurors rather than selecting them using the traditional jury wheel and card system in the courtroom. On the date of jury selection, jurors were screened before entering the Rudman Courthouse and were placed in separate courtrooms in groups of 20, with each juror having an assigned seat. The large ceremonial courtroom was used for

**JURY TRIAL** *continued on page 33*

# NH e-Court Program Update

## How to Cancel Pending Submissions in File & Serve

### Typos Happen

As the NH Judicial Branch continues to operate under coronavirus pandemic emergency orders, electronic filing is more critical than ever. Submitting correct filings the first time speeds case processing and shortens the time between submission and filing acceptance. Occasionally, mistakes happen, and pleadings are filed with typographical errors. However, there is a convenient remedy when this happens.

### Before the Court Accepts Your Filing

If you discover an error in your filing and the court has not yet reviewed it (accepted or rejected), you can cancel any erroneous filings right from File & Serve before submitting a second pleading. The best practice is to cancel out your first filing before submitted revised documents. Here are the easy steps to cancel a pending pleading:

Navigate to the ***File & Serve Dashboard***. Click on ***Pending Filings*** and select the appropriate envelope in the list. Then ***click the X*** at the bottom right to cancel the submission. (You will notice "Cancel" on your screen as your mouse hovers over the X.) This action removes the filing from the court's view.

Failing to cancel a pending filing before submitting a new version requires the court to evaluate both pleadings and determine which pleading to accept. This necessitates additional case processing time and delays file acceptance. The best practice is to cancel pending filings before resubmitting revised versions.

### A Word of Caution

Do not cancel a new case with multiple parties entered as this will delete all parties in the envelope requiring the filer to enter the information again. **If you need to cancel a new case filing, please call the Information Center to request the filing be rejected.** That enables you to re-work the envelope without losing other information.

### Pending Filings Review Queue


### *Did you know?*

### Best Practices for Attorney e-Filing

**We Welcome Feedback!** Attorneys and staff using File & Serve are encouraged to submit comments, questions, suggestions, and to share tips for other filers through the NH e-Court Project email box**: NHeCourtProject_Info@courts.state.nh.us.** Every submission will receive a response within three business days. We are always happy to answer questions on how to best use File & Serve, and if you have a tip that you'd like to share, please send it to us, and we may include it in the Bar News NH e-Court Program Update!

**IMPORTANT!**

If you have a question about Superior or Circuit Court case or filing, please call the **Information Center at 1-855-212-1234**. For questions related to Supreme Court, please contact the clerk's office at (603) 271-2646.

**DO NOT** use the NH e-Court Project Information email address for time-sensitive or case-specific questions. The information email address is intended for feedback only, and it is not monitored for current case e-filing support requiring a timely response.

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

## Trial from page 22

continued to move through the system.

But the N.H. Judicial Branch determined that it could not hold virtual criminal trials without "a host of constitutional concerns," Chief Justice of the Superior Court Tina Nadeau said in a June 30 news release. Nor could it postpone them indefinitely; the Sixth Amendment guarantees defendants a "speedy and public trial," even though the vast majority of criminal cases today are re solved through plea agreements.

The plan announced by the court system earlier this summer called for cautiously resuming in-person trials — starting with a pilot in Cheshire County Superior Court due to the county's relatively low rate of infection.

The precautions required to do that safely were on display Monday in the Keene courtroom, during a one-day trial of a Marlborough man on charges of simple assault and resisting arrest. (The Sentinel viewed it via livestream on the judiciary's website due to restrictions on in-person attendance.)

The judge, jury, attorneys and everyone else in the courtroom wore masks. The room had been rearranged because of the need for physical distancing. The two attorneys' tables were placed along the wall opposite the jury box, which held only half the jury. The rest sat in front of it or in the public gallery.

Witnesses testified from an office chair in the middle of the room, rather than the witness stand, which has more surfaces to touch. They wore clear face coverings, so jurors could judge their demeanor as they spoke.

The defense attorney, Joseph S. Hoppock, and prosecutor, Cheshire County Attorney D. Chris McLaughlin, shared a lectern that they wiped down between uses. "I never imagined this would be part of my job," McLaughlin joked at one point.

In an interview after the trial, McLaughlin said it was easy to adjust to the new rules. "I think the hardest thing is just wearing a mask for so long and trying to speak clearly with a mask on in a big room," he said.

More cumbersome was the multi-step jury-selection process completed last week, with successive rounds of questionnaires, teleconferences and in-person questioning, he said. Hoppock, though, said he thought the individual interviews allowed the lawyers to learn more about jurors than the usual group format.

Overall, Hoppock wrote in an email, "I was impressed with the detail and how carefully [the protocols] were applied. While we may be overreacting to a degree, I don't believe that anyone could feel unsafe."

The question before jurors was whether Dana T. Goodnow, 37, of Marlborough, had struck Swanzey police officer Jesse Mabe twice in the face and resisted two officers' efforts to arrest him during a Sept. 27 incident in that town. He was charged with four misdemeanors.

Mabe and the other officer, Joseph Szuch, said they had been called to a home on Pondview Drive that night for a report of a custody dispute between Goodnow's daughter and the father of her young child.

Mabe and Szuch testified that they were in the front yard when Goodnow drove up. The officers said he seemed agitated and walked toward the house in what they thought was an aggressive manner.

Mabe testified that he stepped in front of Goodnow, telling him to stop, and put his hands out in front of him. Mabe said Goodnow raised both his fists and struck him in the face. Szuch said he saw the alleged assault and came over to assist, and the three of them went down to the ground.

Mabe said he was struck in the head again during the tussle. Goodnow became compliant after Mabe struck him twice in the face and he was handcuffed, according to the two officers.

Hoppock contended the officers' force had not been justified. The defense's only witness was Pennie Goodnow, Goodnow's ex-wife. She testified that she was watching the encounter and did not see Dana Goodnow strike Mabe before the officers took him down. She also disputed other aspects of the officers' testimony.

McLaughlin argued her testimony was not credible, in part because she never reported the excessive force she said she had witnessed to the Swanzey Police Department or another authority. She responded that she had figured it wouldn't do any good.

Hoppock also questioned why officers had not taken statements from Pennie Goodnow or Dana Goodnow's daughter about the use of force. At one point, Hoppock suggested a Taser would have been a safer way of stopping Goodnow and asked why Mabe hadn't used one.

"Nothing that had occurred up to that point would have reasonably warranted me deploying a Taser on Mr. Goodnow," Mabe answered. Asked by McLaughlin, Mabe said it would have violated departmental policy and added, "I believe I'd also most likely be violating state law at that point."

The closing arguments were over by 2 p.m. After about an hour, the jury found Goodnow guilty on all counts. His sentencing will be set for a later date. (Only three of the convictions will remain. The fourth count was an alternate version of the same actions and will ultimately be dismissed.)

The court system has continued to hold virtual hearings on plea agreements, which resolve the vast majority of criminal cases. But McLaughlin estimated his office has about five to 10 serious felony cases with incarcerated defendants that are in a "holding pattern" because of the suspension of jury trials.

Up to 400 cases were delayed statewide, Nadeau, the superior court chief justice, said in July. The court system did not respond to a request for an updated figure by press time.

Assuming Cheshire County held a successful pilot trial, she said, the courts would begin scheduling fall trials in other parts of the state.

*These articles are being shared by partners in The Granite State News Collaborative. For more information visit collaborativenh.org.*

## Jury Trial from page 32

jury selection. A small number of jurors were seated in the ceremonial courtroom and the court streamed the proceedings into the other courtrooms where additional jurors were seated.

As the selection progressed, the preselected jurors were lined up outside the ceremonial courtroom in order and brought in one at a time to respond to the voir dire questions. Jurors stood at a standing microphone to address the court and used the sidebar headset system to communicate privately with the judge (this could also be heard by counsel and the defendant). Court staff ensured that each juror used a sanitized headset.

Qualified jurors were placed in two separate courtrooms until the completion of the "for cause" phase of selection and the selection courtroom was disinfected before bringing the jurors back in for the "peremptory challenge" phase. Prior to exercising peremptory challenges, counsel was provided with a seating chart identifying where each qualified juror was seated. Social distancing for the jurors was maintained throughout the entire process.

The trial was held in courtroom 4, which has been retrofitted consistent with Dr. Bromage's recommendations described above. Public attendance was limited to eight people in the trial courtroom, with 15 additional public viewing seats available in an overflow courtroom where the proceedings were being streamed.

In order to minimize the exchange of paper, all evidence, except physical exhibits, was presented and displayed electronically. Witnesses testified while wearing a clear mask provided by the court. All jurors were given level three medical masks for their protection. Judge Laplante and counsel all wore masks throughout the trial. Court personnel changed the microphone cover and sanitized the witness stand between each witness and performed general sanitation of high touch points and bathrooms throughout the day.

The court's ceremonial courtroom was reset after jury selection to serve as the location where the jury would assemble and deliberate. During deliberations, the jury used the Jury Evidence Recording System (JERS) to review exhibits in electronic format, which were displayed on a large screen in the courtroom.

If you have any questions about the jury selection and trial process or have any suggestions on how the court can improve its processes, please feel free to contact Clerk of the Court Dan Lynch (603-225-1477) or Chief Deputy Clerk Tracy Uhrin (603-226-7792).

## Email Boxes from page 32

VID email boxes, as most filings should occur many days before the hearing and as many people can now access post offices, printers, etc. without substantial restrictions. Additional hearings increase the need for court staff to be managing court events rather than monitoring an email box that was intended for limited use.

Thus, the Circuit Court wants to remind the Bar of the appropriate use of the COVID email boxes. The email boxes are to be used only for emergency filings, filings related to emergency hearings, or filings that could not have been obtained and filed prior to a hearing (e.g., a return of service that was completed a day before a hearing, a proposed sentencing order newly reached in a plea agreement, an essential report from a provider in a juvenile case). A judge may authorize additional uses for the email boxes at her/his discretion to serve justice in particular cases, being mindful of the additional work it creates for the limited court staff available at each courthouse location.

All other filings, including exhibits and other documents needing to be exchanged with the other side, should be filed via U.S. mail or delivered to the physical dropbox available at each courthouse security screening. The Court expects this will be the vast majority of filings. Clarifying the intended usage and, where necessary, restricting filings to the COVID email boxes will allow these inboxes to remain viable communication avenues for essential court access in these complicated times.

## New Hampshire Supreme Court Requires 14-Day Self-Quarantine

The New Hampshire Supreme Court issued a new order on Friday, August 21, to require a 14-day self-quarantine period for travelers from outside New England before they enter state courthouses. This order was made in light of the COVID-19 pandemic and in accordance with guidance from federal and state public health officials.

This means that, from now until further notice, litigants and lawyers as well as visitors who have traveled from outside New England must self-quarantine before entering state courthouses or attending live in-person proceedings. Presiding judges have the authority to pre-approve exceptions as long as social distancing, time limits within the courthouse, and other measures to limit contagion risk are observed.

If you have questions about whether you should go to a courthouse, please call 855-212-1234. More information and the Supreme Court order can be found at: **https://www.courts.state.nh.us/aoc/corona-covid-19.html#orders**.

## LEGAL NOTICE

### THE STATE OF NEW HAMPSHIRE SUPREME COURT

**In the Matter of John L. Allen, Esquire**
**LD-2019-0012**

By Order of the New Hampshire Supreme Court dated October 9, 2019 in **Case No. LD-2019-0012, In the Matter of John L. Allen, Esquire**, Andrea Q. Labonte, Assistant General Counsel for the New Hampshire Supreme Court Attorney Discipline Office (the "ADO"), was ordered to publish a notice to the former clients of Attorney John L. Allen and the Law Office of Allen-Fuller, PA, formerly of Manchester, New Hampshire ("Allen-Fuller, PA"), as follows:

**Notice is hereby given to the clients and/or former clients of Attorney John L. Allen and Allen-Fuller, PA,** that the ADO has taken possession of Attorney Allen's and Allen-Fuller, PA's client files and that the files are being stored in Concord, NH. Current and former clients may contact the ADO at 4 Chenell Drive, Suite 102, Concord, New Hampshire 03301 in writing or by telephone at (603) 224-5828 to request the return of their file(s) within 30 days of this published notice. **Please note that if you do not contact the Attorney Discipline Office within 30 days of this notice, your file may be destroyed without additional notice upon further Order of the Court.**

## August 2020

### Criminal Law

**State of New Hampshire v. Michael Munroe, No. 2018-0433**
**August 4, 2020**
***Reversed and remanded***

- Whether criminal defendant provided adequate pre-trial notice of defense pursuant to N.H. R. Crim. P. 14(b)(2)(A) and whether witness statements satisfied medical diagnosis or treatment hearsay exception

The defendant was an inmate at the Rockingham County House of Corrections. A fight broke out between the defendant and another inmate resulting in injuries to the other inmate. The defendant was subsequently charged with one count of assault by a prisoner and found guilty.

On appeal, the defendant challenged the trial court's decision to strike the defendant's notice of self-defense pursuant to N.H. R. Crim. P. 14(b)(2)(A) due to insufficient factual allegations to support the defense, as well as the trial court's decision to permit a witness to testify over a hearsay objection.

Regarding the notice of defense, the trial court determined the factual grounds set forth in the defendant's notice were insufficient to support a self-defense claim because the notice did not contain any facts to suggest that the injured inmate threatened the defendant. On appeal, the Supreme Court stated that a defendant's burden for setting forth the basis for a pure defense is not substantial. It held that the trial court erred when it assessed the grounds set forth in the defendant's notice because N.H. R. Crim. P. 14(b)(2)(A) does not allow the trial court to require a defendant to identify evidentiary support for a noticed defense. In doing so, the Supreme Court explained that N.H. R. Crim. P. 14(b)(2)(A) does not distinguish between a notice of a pure defense—a defense the State must disprove beyond a reasonable doubt—and notice of an affirmative defense—a defense a defendant must prove by a preponderance of the evidence. It reversed and remanded the matter for a new trial and held that the defendant shall be entitled to a jury instruction on self-defense as long as the defense was "supported by some evidence."

Regarding the defendant's hearsay objection, the State elicited testimony from the doctor that treated the injured inmate. The doctor testified to the identity of the inured inmate. On appeal, the Supreme Court held that the trial court unsustainably exercised its discretion in admitting the doctor's testimony because the testimony did not satisfy the hearsay exception set forth in N.H. R. Ev. 802. Specifically, the Court stated that the statement concerning the injured inmate's identify did not satisfy the second part of the N.H. R. Ev. 802 hearsay exception test because it did not describe medical history, past or present symptoms or sensations, their inception, or their cause.

*Gordon J. MacDonald, attorney general (Sean R. Locke, assistant attorney general, on the brief and orally) for the State. Kristen B. Wilson, Kristen Wilson Law, PLLC, of Portsmouth, for the defendant.*

### Landlord Tenant

**Richard Horton & a. v. David Clemens & a.**
**August 11, 2020**
**Affirmed**

- Whether an eviction notice that does not contain the same information as the judicial branch form eviction notice is nonetheless legally sufficient because it contains the information required by RSA 540:3.

Landlords brought possessory action against tenants, providing a notice of eviction demanding rent owed. Pursuant to RSA 540:3, the eviction notice gave the tenants seven days' notice of the eviction, specified the reasons for the eviction, and informed the tenants of their right to avoid eviction by paying arrearage and liquidated damages. The tenants objected and moved to dismiss arguing that the landlords' failure to include in the eviction notice the same information that is provided in the judicial branch eviction form rendered the notice fatally defective. The circuit court dismissed landlords' petition to evict defendants for nonpayment of rent because the eviction notice did not contain the same information contained in the judicial branch form eviction notice pursuant to RSA 540:5, II (2007). The landlords appealed.

On appeal, the Supreme Court explained that RSA 540:2, II(a) authorized landlords to terminate a tenancy for nonpayment of rent "by giving to the tenant or occupant a notice in writing to quit the premises in accordance with RSA 540:3 and 5." The Supreme Court further explained that pursuant to RSA 540:5, II, although landlords are not required to use forms created by the circuit court when seeking to evict a tenant, a landlord's notice of eviction "shall include the same information as is requested and provided in such forms." The Court further explained that the language on the judicial branch form eviction notice was not beyond the scope of the circuit court's authority to create forms that comply with existing law because pursuant to RSA 490:26-d, circuit courts have statutory authority to create judicial forms that are necessary for the effective administration of justice and consistent with the circuit court's constitutional obligations to ensure equal access to justice.

The landlords' eviction notice did not include the information found in the judicial branch form eviction notice, which provides that: (1) the eviction notice is not a court order requiring tenants to vacate property; landlords may proceed with the eviction process if the tenants remain on the premises; (3) the process will involve being served with a writ; (4) the tenants have a right to dispute the reasons for eviction at a judicial hearing; and (5) tenants must file an appearance before the return date in order to dispute the reasons for their eviction. As a result, because the landlords failed to strictly comply with the requirements of RSA 540 et. seq., dismissing the eviction proceedings was appropriate. The landlords were not prohibited from filing a new eviction notice and a new writ of possession.

*Gabriel Nizetic, Plymouth Law Center, of Plymouth, for the plaintiffs. David Clements and April Hanks, self-represented parties, filed no brief. Stephen Tower, on the brief, New Hampshire Legal Assistance, as amicus curiae.*

### Compensation Appeals Board

**Appeal of Laura Leborgne. No. 2019-0464**
**August 12, 2020**
***Reversed and remanded***

- Whether the Compensation Appeals Board improperly considered therapists' failure to submit a Workers' Compensation Medical Form within 10 days of the first treatment as part of its determination that the petitioner failed to establish that treatment was reason-

## At-a-Glance Contributor

**Jonathan P. Killeen**

Shareholder at Boyle | Shaughnessy Law PC in Manchester, NH

able, necessary, and related to workplace injury.

In May 2011 the petitioner injured herself working as a nurse for the respondent, Elliot Hospital, while transitioning a patient from a chair to a bed. The petitioner was subsequently diagnosed with a trapezius strain and from 2012 to 2016 consistently treated with opioids to control her pain. Beginning in 2016, the petitioner's treating physician in New Hampshire prescribed chiropractic treatments and massage therapy. The petitioner then moved to New York and sought treatment from an orthopedic pain specialist who ordered her to continue massage therapy. The petitioner received massage therapy while in New York from two licensed massage therapists from May 2017 to January 2018. The petitioner paid out of pocket for her treatment. Prior to the start of the petitioner's treatments in New York, the respondent had covered the costs of her massage therapy.

The respondent submitted the bills she incurred for the New York massage treatment, which were denied. The petitioner requested a hearing with the New Hampshire Department of Labor which, after a hearing, denied the petitioner's request for reimbursement. The petitioner then appealed the hearing officer's decision to the Compensation Appeals Board ("CAB"). The CAB afforded substantial weight to the petitioner's New York orthopedic pain specialist's opinion that the massage treatments were reasonable and necessary in managing the petitioner's work related injury. The CAB also found the petitioner's New York orthopedic pain specialist's opinions to be more reasonable and sounder than the respondent's doctor's opinions. Nevertheless, the CAB concluded that the petitioner did not meet her burden of proof that the medical treatments were reasonable, medically necessary, and causally related to the workplace injury. In doing so, the CAB noted that the New York massage therapists did not furnish a Workers' Compensation Medical Form within 10 days of the first treatment as required by RSA 281-A:23, V(c). The CAB denied the petitioner's request for a rehearing. The petitioner then filed an appeal to the New Hampshire Supreme Court.

On appeal, the Supreme Court found that the CAB erroneously considered noncompliance with RSA 281-A:23, V(c) in its determination of whether the petitioner's New York treatment was reasonable, necessary, and related to her workplace injury. The Supreme Court reasoned that failure to meet the requirements of RSA 281-A:23,V(c) is irrelevant to such a determination. Rather, the test is whether a petitioner presents objective evidence showing, that at the time the treatment was ordered, it was reasonable for the petitioner to seek further treatment. Moreover, given the CBS's factual findings and credibility determinations regarding the petitioner and her New York physician, there was no competent evidence in the record upon which to affirm the CAB's decision that the petitioner did not meet her burden. Finally, the Supreme Court rejected the respondent's argument that the petitioner was barred on a stand-alone basis from being reimbursed for the New York treatment because the New York massage therapists failed to comply with RSA 281-A:23 ,V(c). Rather, the Court ruled that RSA 281-A:23 ,V(c), which states that "there shall be no reimbursement for services rendered, unless the health care provider or health care facility giving medical, surgical, or other remedial treatment furnishes the report required in subparagraph (b) to the employer, insurance company, or claims adjusting company within 10 days of the first treatment," applies only to health care providers and facilities seeking reimbursement for services rendered—not to a patient-employee who is seeking reimbursement of payments she made out-of-pocket to providers for treatment received.

*Mark D. Wiseman, on the brief, and Callan E. Sullivan, orally, Cleveland, Waters and Bass, P.A., of Concord, for the petitioner. Eric G. Falkenham, on the brief and orally, Devine, Millimet & Branch, Professional Association, of Manchester, for the respondent.*

## Criminal Law

**The State of New Hampshire v. Shawn Minson, No. 2019-0124**
**August 18, 2020**
***Affirmed***

- Whether the trial court erred by denying defendant's motion to suppress evidence obtained resulting from a protective sweep.

Police received information from a confidential informant that the defendant was selling large quantities of drugs and was staying at a motel. The police obtained an arrest warrant for the defendant. The defendant was subsequently arrested at the threshold of his motel room door. In the process of the arrest, police observed women moving in the motel room, which was full of smoke, and one woman quickly turned her back to the officers and the open door while moving her arms and hands. The police then entered the motel room to secure it. Upon doing so, the police discovered money and drugs.

On appeal, the defendant argued that the police violated Part I, Article 19 of the New Hampshire Constitution and the Fourth Amendment of the Federal Constitution when they performed a protective sweep of the motel room and discovered incriminating evidence. The defendant specifically argued that the trial court erred in denying his motion to suppress because the police lacked specific and articulable suspicion that the motel room harbored someone who posed a danger.

The Supreme Court held that the police had specific and articulable information which, when viewed in its totality, gave rise to a reasonable suspicion justifying a protective sweep. Specifically, the defendant was suspected of selling narcotics which when coupled with the police officers' observations of the women's conduct through the open motel door gave rise to sufficient information to lead a reasonably prudent law officer to believe that the motel room contained dangerous individuals warranting a protective sweep.

Additionally, the Supreme Court determined that the trial court did not abuse its discretion when it denied the defendant's request to reopen the motion-to-suppress record following his conviction, but before sentencing, based upon the disclosure of a new police report that evidenced that the defendant sold drugs at a location in Keene, separate from his motel room. The defendant argued that this information proved that the police only knew he was residing at the motel but not that he was selling drugs from the motel. The Supreme Court ruled that the trial court properly exercised its discretion when it concluded that nothing in the new police report would have impacted its analysis on the motion to suppress because the report corroborated the information the police already had; namely, that the defendant sold drugs and was staying at the motel.

*Gordon J. MacDonald, attorney general (Shane B. Goudas, attorney, on the brief and orally) for the State. Christopher M. Johnson, chief appellate defender, of Concord, on the brief and orally, for the defendant,*

## Public Way Discontinuance

**Bellevue Properties, Inc. v. Town of Conway & a., No. 2019-0302**
**August 25, 2020**
***Affirmed***

- Whether trial court applied the incorrect legal standard to evaluate a town's decision to discontinue a public road and whether trial court erroneously concluded that the interests in discontinuing the road outweighed the interests of plaintiff and public in the road's continuance.

The plaintiff owns a hotel that abuts a retail village owned by the defendants. The hotel and retail village are encircled by a road known as Common Court, half of which is privately owned and maintained by the defendants and the other half of which is public and owned by the Town of Conway. Common Court provides access to both the plaintiff and the defendants' properties. The public had access to the hotel from a variety of ways, one of which included a public road that connected to McMillan Lane, which then connected to the public portion of Common Court. The defendants sought to expand their retail village on an undeveloped parcel of land, portions of which McMillan Lane ran through. As a result, the defendants sought to remove McMillan Lane and replace it with a new road that the defendants would build and maintain at their own expense and which would connect to the public sections of Common Court. In order to do so, the defendants submitted a subdivision application to the Town's planning board. While the application remained pending, the Town held a vote and adopted a warrant article pertaining to the discontinuance of McMillan Lane and through which the defendants would take control of, maintain, and keep open to the public McMillan Lane.

The plaintiff appealed the Town's decision to discontinue McMillan Lane to the superior court. The trial court applied a balancing test that considered the Town's interests not only in reduced maintenance costs but also other Town interests. Following a bench trial, the trial court affirmed the Town's decision because the benefits to the Town resulting from discontinuing McMillan Lane outweighed the plaintiff's interests in its continuance. The trial court found, among other things, that through the discontinuance, the Town would save money in maintenance costs on an annual basis and it would allow for the development of land consistent with the Town's plan. In particular, the Town would gain a new road, valued at approximately $1 million, at no cost to the public. The trial court rejected the plaintiff's argument that it would cause harm to the plaintiff's business interests because the plaintiff had to rely on the defendants, private entities, to maintain and provide public access to the new road, as it was too

AT-A-GLANCE *continued on page 36*

uncertain to outweigh the Town's interests in discontinuing the road.

On appeal to the Supreme Court, the plaintiff asserted that the trial court applied an incorrect balancing test to evaluate the Town's decision to discontinue the road and that the trial court erroneously concluded that the Town's interest in discontinuing the road outweighed the interests of the plaintiff and the public in the road's continuance. The Supreme Court concluded that in assessing an appeal of a public highway discontinuance brought by an abutting landowner, the trial court is not restricted to considering solely the Town's interests in reduced maintenance costs. Rather, the trial court may consider other interests taken into consideration by a town because RSA 231:43, the statute authorizing a town to discontinue certain classes of roads, does not specifically require that there be any particular grounds to justify discontinuance. Further, the Court rejected the plaintiff's argument that under the balancing test employed by the trial court, its interests outweighed the Town's interests because the plaintiff would have no recourse against the defendants if they, or their successors, do not maintain or otherwise deny access to the road. In doing so, the Court noted that the plaintiff had current access to the road and the defendants would not cease maintaining the new road or close it to the public based on the defendants' previous history of maintaining other private roads connecting to Common Court. The trial court's factual findings also supported that the plaintiff could obtain an easement over the road. Lastly, the plaintiff failed to identify any evidence that the plaintiff would suffer harm as a result of the discontinuance because hotel guests could continue to access the hotel from at least two other ways.

*Roy W. Tilsley and Christina A Ferrari, on the brief, and Mr. Tilsley orally, Bernstein, Shur, Sawyer, & Nelson, P.A., of Manchester, for the plaintiff. Peter J. Malila, Jr. on the brief and orally, Hastings Malia P.A., of Fryeburg, Maine, for defendant Town of Conway. Derek D. Lick, orally, Sulloway & Hollis, P.L.L.C., of Concord, for defendants 13 Green Street Properties, LLC, 1675 W.M.H., LLC, and Settlers' R2, Inc., joined in the brief of Town of Conway.*

## Political Question

**John Burt. & a. v. Speaker of The House of Representatives, No. 2019-0507**
**August 28, 2020**
***Reversed and remanded***

- Whether the trial court erred in dismissing the plaintiffs' complaint challenging House of Representatives Rule 63 prohibiting carrying or possessing deadly weapons in House Chambers on grounds that the complaint presented a nonjusticiable political question.

Members of the New Hampshire House of Representatives filed suit against the Speaker of the New Hampshire House of Representatives challenging the constitutionality of House Rule 63, which prohibited carrying or possessing a deadly weapon in The House of Representatives. Specifically, the plaintiffs asserted that House Rule 63 violated Part I, Article 2-a of the New Hampshire Constitution, which states all persons have the right to keep and bear arms in defense of themselves, their families, their property and the state. The trial court dismissed the plaintiffs' complaint, reasoning than the issue presented a nonjusticiable question and therefore the trial court lacked subject matter jurisdiction. In particular, the trial court reasoned that the State Constitution grants both houses of the legislature the authority to settle the rules of proceedings in their own house and that it was not the constitutional duty of the judiciary to review the rules of proceedings within the legislative chambers.

On appeal, the plaintiffs argued that the trial court erred because their challenge to the constitutionality of House Rule 63 presented a justiciable issue. The Supreme Court agreed. The Supreme Court reasoned that a controversy involves a political question "where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." While the State Constitution demonstrably commits to the legislature the authority to enact its own internal rules and proceedings—compliance with which are not justiciable—the judicial branch may provide judicial intervention where a claim concerns whether or not a violation of a mandatory constitutional provision has occurred. The Supreme Court concluded that the legislature may not, even in the exercise of its "absolute" internal rulemaking authority, violate constitutional limitations. Therefore, the controversy as to whether House Rule 63 violates the defendants' fundamental right to keep and bear arms under Part I, Article 2-a of the State Constitution is justiciable, and that the trial court erred when it dismissed the complaint.

In reaching its conclusion, the Supreme Court distinguished *State v. LaFrance,* 124 N.H. 171 (1983), a case where the Supreme Court considered the constitutionality of a statute mandating that law enforcement officers be allowed to wear firearms in any courtroom in the state. There, the Court reasoned that the statute violated the separation of powers because it infringed upon the judiciary's inherent authority to make its own internal procedural rules. The Court went on to say in *LaFrance* that "it would not be within the constitutional prerogative of the judiciary to tell either of the other two branches of government who could or could not wear guns in the Executive Council Chamber or in the Representatives' Hall. Here, in distinguishing *LaFrance*, the Supreme Court noted that its commentary on deciding the extent to which any branch of government could regulate deadly weapons in Representatives Hall was dicta and, moreover, that *LaFrance* did not deal with the issue of whether a limitation on an individual's right to bear arms would be constitutional.

The Supreme Court expressed no opinion on whether House Rule 63 was in fact constitutional or not because the trial court did not reach the merits of the constitutional challenge in dismissing the plaintiffs' complaint.

*Dan Hynes on the brief and orally, Liberty Legal Services, of Manchester, for John Burt. James S. Cianci, house legal counsel, on the brief and orally, for the Speaker of the New Hampshire House of Representatives*

# Supreme Court Orders

In accordance with RSA 490:5-a and 5-b, the Supreme Court hereby appoints Preston Hunter of Bedford, to serve as the lay representative on the Court Accreditation Commission. Mr. Hunter is appointed to replace Michael J. Palmeri, whose term expired on June 8, 2020. Mr. Hunter's term begins immediately and expires on June 8, 2023.

Issued: August 14, 2020
ATTEST: Timothy A. Gudas, Clerk of Court
Supreme Court of New Hampshire

◆

***LD-2020-0004, In the Matter of Michael J. Reed, Esquire***

On September 19, 2019, in case no. LD-2019-0011, the court suspended the respondent, Attorney Michael J. Reed, on an interim basis in response to an assented-to petition filed by the Attorney Discipline Office (ADO). The assented-to petition for interim suspension asserted that Attorney Reed "has abandoned client matters by failing to attend scheduled court hearings, failing to respond to clients and opposing counsel, and causing harm to clients," and it included reference to Attorney Reed's acknowledgement that he "is not currently able to competently represent clients due to recent personal and family issues."

On March 10, 2020, the Professional Conduct Committee (PCC) filed a petition in this matter recommending that Attorney Reed be suspended from the practice of law for one year. In accordance with Rule 37(16)(c), the court provided notice to Attorney Reed of that recommendation and ordered him to file a response on or before April 24, 2020, identifying any legal or factual issues relating to the PCC's recommendation that he wished the court to review. The court's order of notice, along with the PCC's recommendation, was sent to Attorney Reed by first-class and certified mail at the latest address provided by him to the New Hampshire Bar Association. See Rule 42E(c). The court's order of notice, along with the PCC's recommendation, was also sent to him at the e-mail address that the PCC provided to the court. Attorney Reed did not file a response to the PCC's recommendation.

In the disciplinary matter that gives rise to the pending recommendation for a one-year suspension, Attorney Reed did not respond to the ADO's requests for information during its investigation and did not attend a scheduled sanction hearing before a PCC panel. The PCC found that Attorney Reed violated the following Rules of Professional Conduct.

1. Rule 8.1(b), which provides that a lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority; and

2. Rule 8.1(c), which provides that a lawyer in connection with a disciplinary matter shall not fail to attend a hearing when ordered to do so by a disciplinary authority.

After reviewing the PCC's recommendation and record, the court accepts the PCC's findings and its recommendation that Attorney Reed be suspended from the practice of law in New Hampshire for a period of one year. Accordingly, the court orders as follows:

(1) Attorney Michael J. Reed is suspended from the practice of law in New Hampshire for a period of one year.

(2) Attorney Reed is ordered to reimburse the Attorney Discipline Office for all costs and expenses incurred by the attorney discipline system in the investigation and prosecution of this matter.

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

DATE: August 25, 2020
ATTEST: Timothy A. Gudas, Clerk

◆

In accordance with RSA 328-C:4, I, the supreme court appoints the Honorable Jennifer A. Lemire to the Board of Family Mediator Certification. Judge Lemire shall serve a three-year term commencing on September 2, 2020, and expiring on September 1, 2023.

September 2, 2020
ATTEST: Timothy A. Gudas, Clerk of Court
Supreme Court of New Hampshire

◆

**ADM-2017-0030, *In the Matter of Caren Lamoureux, Esquire***

Attorney Caren Lamoureux's motion for partial reconsideration of the August 13, 2020 order is granted. Upon reconsideration, the court waives the $815.00 in unpaid bar dues and, therefore, vacates the "on the condition that she pay back dues of $815.00 within the next 30 days" portion of the August 13, 2020 reinstatement order.

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

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

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

# US District Court Decision Listing

## August 2020

* Published

**Criminal Law; Discovery; Grand Juries**

8/18/20 *United States v. Hallet Merrick*
Case No. 20-cr-0009-JD, Opinion No. 2020 DNH 145

The defendant moved for discovery of information relating to the grand jury that returned a superseding indictment against him in July 2020. The defendant requested the discovery on the basis that there could be a question about whether the superseding indictment was returned by a grand jury from which African Americans and other minorities were not excluded. The government assented to the discovery requested by the defendant so long as personal identifying information was excluded. The court granted the motion, and it directed the Clerk of Court to produce the requested information with personal identifying information redacted and prohibited the transmission of the produced material to third parties. 5 pages. Judge Joseph N. Laplante.

**Clean Water Act**

8/27/20 *Conservative Law Foundation v. New Hampshire Fish & Game Department, et al.*
Case No. 18-cv-996-PB, Opinion No. 2020 NH 150

The Conversation Law Foundation ("CLF") brought a citizen suit for injunctive and declaratory relief under Section 505 of the Clean Water Act ("CWA") against various state actors, alleging that the Powder Mill State Fish Hatchery ("the Facility") has been discharging pollutants into the Merrymeeting River in violation of the Facility's National Pollutant Discharge Elimination System ("NPDES") permit. It alleges two types of ongoing CWA violations: Outfall Discharge claims based on current and anticipated releases of phosphorous and other pollutants directly from the Facility's two outfalls and Sediment Discharge claims based on the Facility's past releases of phosphorus that have settled into sediments at the bottom of the river and continue to leach into the river. The court granted defendants' motion with respect to the Sediment Discharge claims and granted in part and denied in part each side's motion with respect to the Outfall Discharge claims. CLF presented two arguments with regards to the Sediment Discharges: that the sediments were point source discharges barred by the CWA, and, in the alternative, that the ongoing release of pollutants violated the CWA and entitled CWA to relief. The court found that both were precluded by the Eleventh Amendment's bar on retrospective relief and awarded summary judgment to defendants. As for the Outfall Discharge claims, because genuine issues of material facts remain with regards to defendants' alleged violations of the state water quality standards, neither party was awarded summary judgment on that count and neither party proved causation to prevail on whether defendants violated the NPDES narrative requirements. The court granted defendants' motion on the formaldehyde discharge claim on the grounds that a singular violation did not constitute ongoing violations under the CWA. The court also granted CLF's motion on the two counts of pH limit violations under the CWA's strict liability provision. Neither party, however, provided sufficient evidence on defendants' discharge of cleaning water or defendants' failure to adhere to its Best Management Practices Plan. The court also awarded declaratory relief to CLF, declaring that defendants violated the pH limits in their 2011 NPDES permit and ordering them to devise and implement a system to cease Outfall Discharges that violate those limits within ninety days. 43 pages. Judge Paul J. Barbadoro.

**Contract; Preliminary Injunction**

08/25/20 *Café Indigo, LLC v. Pearl River Pastry, LLC*
Case No. 20-cv-419-JL, 2020 DNH 148

The court rejected the plaintiff's motion for a preliminary injunction on its claim to enforce a provision of a licensing agreement permitting the plaintiff to audit certain of the defendant's records. The court concluded that though the plaintiff was likely to at least partially succeed on the merits of its claim, it had not demonstrated a risk that it would suffer irreparable harm if it was not permitted to conduct an audit in advance of agreed-to arbitration between the parties. 26 pages. Judge Joseph N. Laplante.

## EXPERIENCED ATTORNEY

Seeking Attorney for busy and rapidly growing Family Law practice in Nashua, NH. Full-time position. Paid-time off (vacation and holidays), incentive bonus plans, employer match IRA, short term disability, and the opportunity to work with wonderful individuals and to grow with the business! The candidate will make frequent court appearances. Must have a J.D. from an ABA-approved law school and be an active member in good standing of the Bar. 1-3 years of Family Law experience preferred; however, willing to train the right individual. Should be willing to network. Must have an ability to work well with others to include staff, opposing parties, and Court personnel.

Please send cover letter, resume, references and writing sample to **xiorli@bernazzanilaw**. Applications will be held in strict confidence.

## Benefits and Coverage Counsel

HealthTrust

HealthTrust, an intergovernmental pooled risk management program operating pursuant to NH RSA 5-B, seeks an experienced Benefits and Coverage Counsel responsible for legal and compliance matters related to employee benefit plans (Medical, Dental, Disability & Life Coverage), wellness programs and FSA/HRA services offered to its Members. Ideal candidates will have working knowledge of employee benefit laws and experience advising health and welfare benefit plans, as well as strong written and oral communication skills.

**Key functions of this position include:**

- Serves as HealthTrust's recognized expert who ensures compliance with applicable employee benefit laws and regulations.
- Provides legal consultation and guidance on complex projects and matters related to HealthTrust's coverages and other employee benefit products and services.
- Drafts and updates coverage program documents and certificates
- Works closely with General Counsel on all legal issues facing the organization.
- Works with a dynamic team of colleagues to strategically plan for and implement new programs and services.

**Qualifications:**

- Juris Doctor Degree, superior academic credentials, and a license to practice law in New Hampshire
- A minimum of 7 years of experience in private or governmental practice of law, with significant experience in legal advice and representation regarding employee benefit plans

To apply, please email resume and cover letter to Alicia Wright at **awright@healthtrustnh.org**.

## Attorney - Corporate Practice Group

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

To learn more about the firm, visit our website at **www.clrm.com**. To apply, please send your resume to Lisa Roy, Hiring Coordinator, at **l.roy@clrm.com**.

COOK LITTLE ROSENBLATT & MANSON p.l.l.c.
*Business Lawyers for Entrepreneurs®*

## Estate Planning and Probate Attorney (Dover NH)

Shaheen & Gordon

Shaheen & Gordon, P.A., Attorneys at Law, is seeking an energetic and self-motivated attorney to join our busy and growing Elder Law, Estate Planning, Probate, and Trust Group in our Dover, New Hampshire office. The candidate must be licensed to practice law in New Hampshire and have relevant experience and/or coursework in the area of elder law, estate planning, and/or probate. Admission in Maine is a plus. The ideal candidate will have 3 or more years of experience. This role offers the candidate the opportunity to work collaboratively with experienced practitioners and directly with clients of his or her own.

Candidates must be able to work independently, have strong written and oral communication skills, and be extremely organized. We look forward to welcoming an attorney who is hard-working, committed to excellence in his or her practice, and dedicated to client service. This is an outstanding opportunity for a new or experienced lawyer to grow his or her career and practice in a collaborative, supportive, fast-paced environment.

Shaheen & Gordon is a non-smoking workplace. We offer a competitive salary and a generous benefits package including health insurance, flexible spending account, health reimbursement, long term disability, life insurance, profit sharing, and 401(k) with employer match.

Tenacity, Creativity & Results – these are the principles that guide Shaheen & Gordon's team. If you want to contribute to a premier and growing law firm, then we want to hear from you. Successful employees at Shaheen & Gordon are confident, respectful, and team-oriented with a high degree of integrity. Interested applicants please forward resumes and salary requirements to **recruiting@shaheengordon.com**.

EOE

RIVERSTONE®
A FAIRFAX COMPANY

**MAKE A DIFFERENCE IN THE MOST COSTLY MASS TORTS IN US HISTORY**

**ARE YOU TIRED OF BILLABLE HOURS?**
**ARE YOU MOTIVATED BY COMPLEX LEGAL PROBLEMS?**

**RiverStone**, a global insurance industry leader specializing in the acquisition and management of insurance portfolios, has created a team tasked with changing the future of national mass tort and pollution litigation through thoughtful, creative claim handling, litigation strategies, and system-wide initiatives. RiverStone is looking for Claims Analysts to join the team.

**Prospective teammates should:**

- Be creative, effective advocates with excellent oral and written communication skills
- Be comfortable challenging the status quo for the better
- Prefer to work in a collaborative, multidisciplinary team toward a common goal

**Successful candidates will:**

- Negotiate directly with attorneys, policyholders, and co-carrier representatives
- Observe and participate in court proceedings with defense attorneys
- Analyze and use data to drive better results
- Evaluate complex coverage and liability issues that impact the litigation
- Identify potential exposures to the company and report to senior-level management on significant pending matters
- Devise and implement creative strategies aimed at improving long-term results for all stakeholders, including policyholders, affiliate insurers, and injured claimants
- Receive individualized training to:
  - Develop claim specific skills and knowledge
  - Understand and evaluate complex coverage issues
  - Implement and integrate those skills to impact the course of litigation

Experience in pollution, mass tort litigation or insurance coverage is preferred but not required. RiverStone offers an exceptional health benefits program, paid maternity leave, company matching 401K, tuition reimbursement, employee stock purchase plan and additional site specific perks (on site gym, yoga classes, personal trainer and more). For additional information, and to apply online, please visit www.trg.com/join-us.

## Arthur G. Greene CONSULTING, LLC

**supporting & advising the legal community**

**Concord law office is seeking a part-time paralegal – experience in personal injury and family law preferred.**

Submit resumes to the firm's consultant:
**Kathy Fortin** at **kwf@arthurggreene.com** or by calling the consulting office in Bedford, NH at 603.471.0606.

Rockingham County

## ASSISTANT COUNTY ATTORNEY

**SCOPE OF POSITION:**
Seeks justice with professionalism, excellence and pride, consistent with the New Hampshire Rules of Professional Conduct, American Bar Association and National District Attorney's Association guidelines, as a criminal prosecutor with a concentration in Superior Court.

**ESSENTIAL JOB FUNCTIONS:**

- Acts as counsel for the State of New Hampshire in criminal matters.
- Works closely with Victim/Witness Coordinators to ensure that all witnesses/victims are properly informed, prepared and supported throughout the prosecution process.
- Presents investigations and cases to the Grand Jury

**REQUIRED EDUCATION AND EXPERIENCE:**

- Juris Doctor from accredited law school.
- 3 years of experience in criminal prosecution, preferred.
- Must be admitted into the New Hampshire Bar Association.

**SALARY RANGE:** $2,261.60 - $3,279.20 Dependent upon experience
**STATUS:** Full Time / Exempt
**SUBMISSION REQUIREMENTS:**
Employment application and resume required.
Apply online: Careers@co.rockingham.nh.us
Walk-in / Mail Applications:111 North Rd, Brentwood, NH 03833
*Equal employment Opportunity*

DRM | Downs Rachlin Martin PLLC

Business Sense·Legal Ingenuity

### Litigation Attorney | Lebanon, NH

Downs Rachlin Martin — one of Northern New England's largest law firms – has an exciting opportunity for a litigation attorney in its Lebanon office. The ideal candidate will have demonstrated experience litigating in New Hampshire courts and an interest in sophisticated commercial litigation, including but not limited to trust and estates litigation and creditors' rights litigation.

### Trust and Estate Planning Attorney | Lebanon, NH or Burlington, VT

DRM is seeking an experienced estate planning attorney to join our busy Trusts and Estates Practice. The ideal candidate has experience in the field of trusts and estates, designing estate plans and drafting all estate planning documents, and has experience with estate, gift, and generation skipping tax planning, the preparation of gift and estate tax returns, and estate and trust administrations.

This is an exceptional opportunity to work with a dynamic, collegial team of trust and estate professionals. The area offers a wide variety of outdoor activities, a vibrant cultural environment, thriving downtowns, welcoming communities and easy access to mountains and lakes.

### Patent Attorney | Burlington, VT or Lebanon, NH

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

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

### Corporate/Commercial Attorney | Lebanon, NH

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

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

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

Apply here: **https://www.drm.com/careers/attorney-job-openings.**

# Classifieds

## POSITIONS AVAILABLE

**ASSOCIATE** – Patch & FitzGerald seeks an energetic, organized litigation associate to join a seasoned team of practitioners. The successful candidate will have 5+ years of experience in workers compensation and/or personal injury work, be a member in good standing of the NH bar and have excellent interpersonal skills. Statewide travel required. Excellent salary and benefits package, flex time during summer. Founded in 1997, Patch & FitzGerald is a statewide boutique specialty firm focusing on workers compensation and personal injury law. For confidential consideration, please direct resumes to Diana Gauthier (**dgauthier@patchfitz.com**).

**ASSOCIATE –** Upton & Hatfield seeks an associate with 3+ years' experience for its Peterborough location to concentrate in the areas of estate planning, probate and business law. The right candidate would have an excellent work ethic, strong communication and interpersonal skills, and a willingness to learn. Community involvement is important. Competitive benefit and compensation package. Please submit resume with writing sample to: Lauren Irwin, Upton & Hatfield, LLP, P.O. Box 1090, Concord, NH 03302-1090 or **lirwin@uptonhatfield.com.** All inquiries will be held in strict confidence.

**ATTORNEY -** Small firm in Nashua looking for motivated attorney to work in Family Law, Bankruptcy Law, and Estate Planning. 0 to 2 years experience. Must be licensed to practice in New Hampshire. License in Mass is plus but not required. Send resume to **joe@annuttolawoffice.com** and include salary requirements.

**LATERAL ATTORNEY** - We seek an attorney with 5+ years' experience. The ideal candidate will have experience in some of the following areas: criminal defense, civil litigation and personal injury. We are also interested in candidates who have developed a successful practice in other practice areas to bring your unique perspective and client base to our firm. Please submit resume and writing sample to **mail@nhlawoffice.com** or Hiring Partner, Douglas, Leonard & Garvey, P.C., 14 South Street, Concord, NH 03301. All inquiries will be held in strict confidence.

**FULL-TIME LEGAL ASSISTANT** – Getman, Schulthess, Steere & Poulin, P.A. a Manchester, NH law firm seeks a full time legal assistant with 3-5 years' litigation experience. Must be detail-oriented, have experience with transcription and have the ability to work independently. We offer a competitive salary and benefits which include medical, dental, disability and life insurance, 401 (k), paid vacation, sick leave, and holidays. Potential for remote work options. Send resume via email to **law@gssp-lawyers.com**.

**LEGAL ASSISTANT**– Casassa Law Office of Hampton, NH is seeking to hire a full or part-time legal assistant. Experience with real estate closings, estate planning and probate administration is beneficial. Salary based on experience. Please send resume to **kathy@casassalegal.com**.

## OFFICE SPACE

**MANCHESTER:** Solo or satellite offices near downtown courts, shared reception, conference room, furnishings, parking and utilities. **rjj911@myfairpoint.net**.

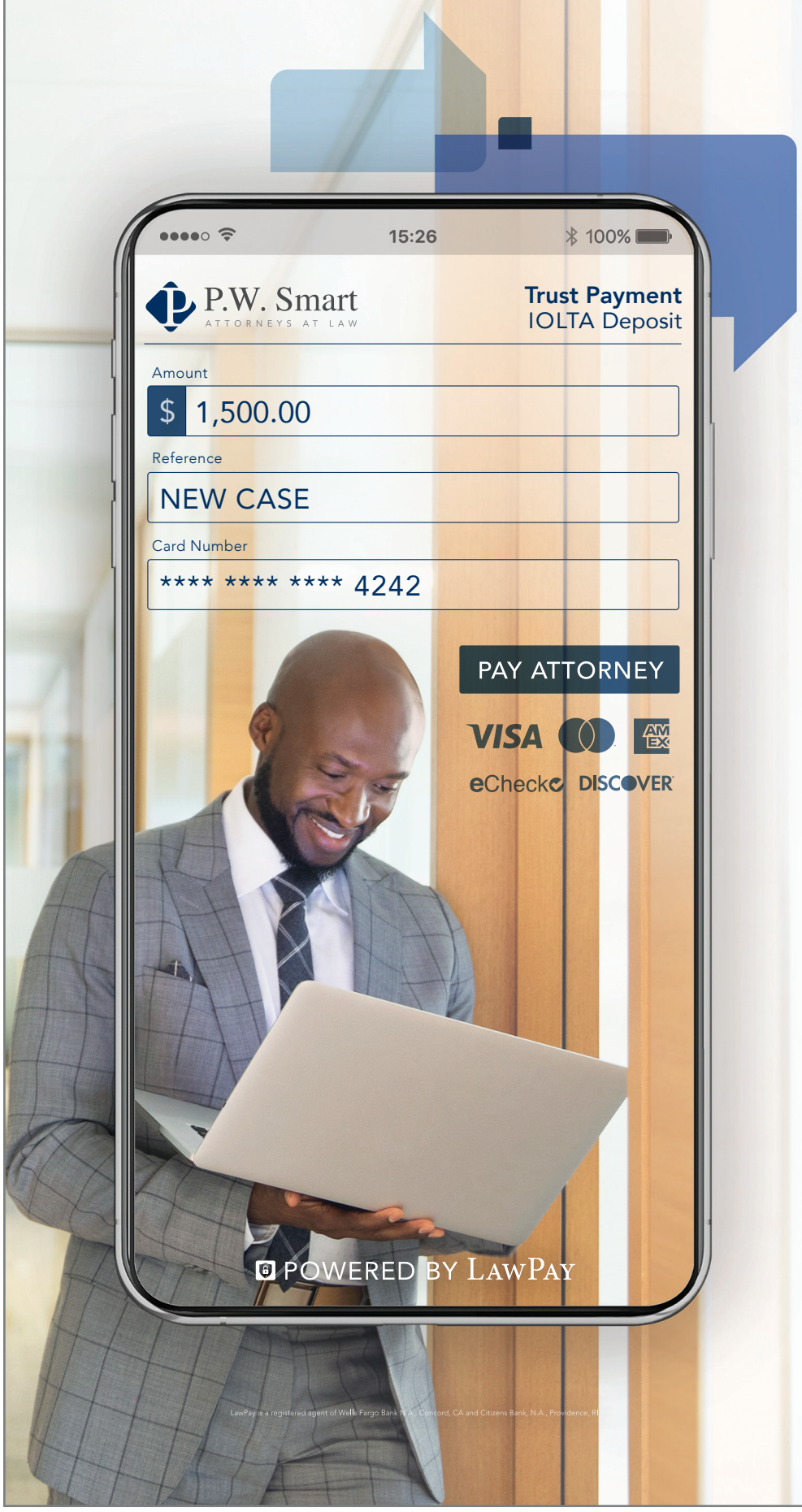
## FOR SALE

**COMPLETE SET OF UPDATED NH RSAs**, $375 or best offer. Contact Fred at 603-623-3543.

LawPay®

AN AFFINIPAY SOLUTION

# POWERING PAYMENTS FOR THE LEGAL INDUSTRY




## The easiest way to accept credit, debit, and eCheck payments

The ability to accept payments online has become vital for all firms. When you need to get it right, trust LawPay's proven solution.

As the industry standard in legal payments, LawPay is the only payment solution vetted and approved by all 50 state bar associations, 60+ local and specialty bars, the ABA, and the ALA.

Developed specifically for the legal industry to ensure trust account compliance and deliver the most secure, PCI-compliant technology, LawPay is proud to be the preferred, long-term payment partner for more than 50,000 law firms.

New Hampshire Bar Association — NHBA — Equal Justice Under Law

## ACCEPT MORE PAYMENTS WITH LAWPAY

888-491-7596

lawpay.com/nhba

LawPay is a registered agent of Wells Fargo Bank N.A., Concord, CA and Citizens Bank, N.A., Providence, RI