

Raising the Bar on Diversity

Attorney Peter Nieves helps spearhead a scholarship for UNH Franklin Pierce School of Law Students



Peter Nieves with his children Skye, Sierra, and his wife Bonnie. Courtesy photo/ Peter Nieves

By Scott Merrill

The comfort of knowing someone has your back during hard times is one of those intangible qualities that lawyers often provide their clients.

For minorities in NH, having an attorney who can also relate to their personal experiences and heritage is an added comfort that shouldn't be underestimated, according to attorney Peter Nieves.

Nieves, a patent attorney at Sheehan Phinney and former adjunct professor at UNH Franklin Pierce School of Law, has been working to make sure minorities in the future will be represented by a more diverse population of lawyers in the state.

As part of the SBA/Dean's Task Force on Racial Justice, Diversity, and Inclusion at the law school, he has been central to the creation of a scholarship program with the hopes of raising the number of underrepresented students at the school.

Nieves recalls an experience with a woman he'd met through Hispanic community events he'd attended that made him aware of this need for representation.

The woman had asked for a referral to a local attorney who could handle a family law matter and she was emotionally drained by the situation, he says.

"I referred her to an outstanding attorney who clearly could handle her matter and she later called me and asked if I would attend the meeting with the attorney because she wanted someone 'like her' there, specifically, someone Hispanic," Nieves says.

Nieves, who is Puerto Rican and

grew up in Brooklyn, N.Y., attended the meeting and remembers how grateful the woman was to have him with her.

"Her point was that she desired to have an attorney present who could relate to her, the family unit, her heritage, and more. While hesitant, I attended her initial meeting with the attorney so as to make her more comfortable. I do not know if she became a client of that law firm or not, and I did not know her personally, but she was extremely grateful for my attendance."

Though New Hampshire remains far less diverse than much of America, diversity is growing in the state according to a report by the Carsey School of Public Policy at the University of New Hampshire.

While in 2018, 90.0 percent of the state's population was non-Hispanic white, making New Hampshire one of the nation's least diverse states, this change represents a 5.1 percentage point decrease from 2000. Overall, the shift created a doubling of the proportion of the state that is minority, from 61,600 in 2000 to 136,000 in 2018.

The growing population of minorities combined with the call for racial justice following the killings of a number of Black men and women last summer is what compelled law school Dean Megan Carpenter to put together the task force which released its report and recommendations in September.

The report seeks to increase diversity of the law school's students, staff, and faculty; create a welcoming, inclusive, and diverse community – both inside the

DIVERSITY continued on page 18

The Race for COVID-19 Injury Benefits

By Scott Merrill

As new cases of COVID-19 and hospitalizations continue to rise, the news that a vaccine will be available by the beginning of the year couldn't have come at a better time for Granite Staters.

Of course, for every bit of good news these days, many unknowns remain.

Laying aside issues of whether enough vaccines will be available and how many people will agree to take them, one issue not being talked about, according to personal injury attorney Heather Menezes of Shaheen and Gordon P.A., are benefits for those who experience long-term side effects from a vaccine or other injuries from procedures related to the pandemic.

Attorney Menezes represents individuals injured by vaccines in the Vaccine Injury Compensation Program (VICP). The VICP is a federal program that was established after lawsuits against vaccine manufacturers and healthcare providers threatened to cause vaccine shortages and reduce vaccination rates. The VICP began accepting petitions (also called claims) in 1988.

The VICP is a no-fault system that compensates individuals injured by certain vaccines.

However, currently, the COVID-19 vaccine will not be part of the VICP. Instead, any injuries resulting from the COVID-19 vaccine will be covered under a different program that provides

fewer benefits to those injured by any countermeasure to the COVID-19 pandemic.

The federal program that provides some relief for those seeking benefits related to long-term side effects from vaccines and other pandemic related issues is the Counter Measures Injury Compensation Program (CICP). The CICP is administered by the Health Resources and Services Administration, an agency of the DHHS.

The problem, Menezes said, is that the program isn't being openly promoted, and there is a one-year statute of limitations for claiming benefits. The law states:

The Secretary shall ensure that a State, local, or Department of Health and Human Services plan to administer or use a covered countermeasure is consistent with any declaration under 247d-6d of this title and any applicable guidelines of the Centers for Disease Control and Prevention and that potential participants are educated with respect to contraindications, the voluntary nature of the program, and the availability of potential benefits and compensation under this part.

"The statute says that the government is supposed to promote the coun-

BENEFITS continued on page 17

PRACTITIONER PROFILE

Margaret "Maggie" Goodlander: A Local Attorney With Global Reach

By Kathie Ragsdale

Fittingly, Margaret "Maggie" Goodlander was born on Election Day 1986, her mother's water having broken while still in the voting booth.

Politics have been in her blood practically ever since.

The Portsmouth attorney, 34, has worked alongside U.S. Sens. Joseph Lieberman and the late John McCain, has clerked for Judge Merrick Garland and U.S. Supreme Court Justice Stephen Breyer, has traveled to dozens of countries as part of bipartisan congressional delegations, and has helped



craft landmark legislation regarding immigrants and human rights violations.

She also served as counsel for the U.S. House Judiciary Committee and House Managers during the impeachment trial of President Donald Trump.

These experiences have left her with strong feelings about what she sees as the erosion of constitutional norms, the politicization of the Supreme Court, the interrelationship between foreign and domestic

GOODLANDER continued on page 14

INSIDE

Opinions.....	4	Practice Area Section.....	26-31
NHBA News.....	5-25	NH Court News.....	32-36
NHBA•CLE.....	19,22	Classifieds.....	37-39

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THE DOCKET

NHBA President's Column. Bar President Dan Will reflects on a year of suffering and the wisdom of his 21-year-old daughter. **PAGE 2**

Wellness Corner. Terri Harrington discusses the challenges of inadequate resources for NHLAP. **PAGE 3**

Virtual Ethics. The Ethics Committee explains to attorneys what their ethical obligations are in the virtual world. **PAGE 5**

Civics Education. The ABA's 19th Amendment Traveling Exhibit will be featured in a virtual LRE event in January. **PAGE 7**

MYM Sweets. New Lawyers Committee is sponsoring a Virtual Chocolate tasting at Midyear Meeting on Feb. 5. **PAGE 8**

Military Law. The NH National Guard Judge Advocates are playing a key role in the state's pandemic relief effort. **PAGE 16**

Adapt or Perish. Not all technology is created equal. Check out Patrick Arnold's insightful review of Sinan Aral's *The Hype Machine*. **PAGE 18**

Business Law and Business Litigation

Practice tools for attorneys forming LLCs; Forming benefit corporations; Developing trends in force majeure litigation, and more. **PAGES 26-31**

Putting 2020 Into The Books

Ok, 2020, let's review the bidding. You snuck in, quietly foreshadowing your course in January, when you introduced the coronavirus. By March, you emerged as a lion, cooking up a full blown global pandemic – a first for nearly all of us. If that wasn't enough, you gave us a front row seat to the George Floyd murder and the simmering racial tension that sparked into extended violence and rioting in cities all over the country. You brought us a fractious electoral season, not only at the national level, but certainly highlighted by the presidential election which remains mired in litigation. Oh yeah – I almost forgot. You took us through an impeachment. 2020, you have left most of us feeling isolated, anxious, and unhappy.

I emphasize unhappy. To the point of writing off the year altogether. One of the worst. Can't wait till it is over. Wish it never happened. How many of us have spoken similar words through masks to friends, family, professional colleagues, store clerks, the mail carrier, and the Amazon delivery person. As we round third on 2020, the collective headline casts the year as lacking any redeeming quality.

In a dark twist on the season of hope, I recently came across a picture of a Christmas tree ornament in the form of a miniature dumpster with flames shooting out of it, labeled . . . 2020. While cynically funny, that miniature dumpster fire struck me hard. In a life in which we are lucky to have 80 or 90 years, we can hardly afford to throw one away. But even in "normal" times, we tend to spend a lot of our years deferring present happiness in an often vain hope of buying future happiness. We pack our schedules and work like dogs in pursuit of some imagined future in which we're free of that loathsome colleague, the alarm clock and the obligations in life that prevent us from doing exactly what we want to do when we want to do it. We rush through current years just to get to future years, only to learn that the new set of golf clubs brings at most fleeting happiness.

Nathaniel Hawthorne wrote "happiness is a butterfly, which, when pursued, is always just beyond your grasp, but which, if you will sit down quietly, may alight upon you." I have a close friend who experienced immeasurable tragedy in early 2020 unrelated to the coronavirus; but she had to bear her grief under the additional weight of all that 2020 proceeded to throw at us. During peak isolation in April and May, when most of us had been sent home and told to keep

President's Perspective



By Daniel E. Will

Solicitor General,
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our distance from society, she expressed a strange appreciation for the collective human pause. As her pressing career obligations and family's frantic schedule slowed, she found an unplanned moment to refocus on what seemed important: her family, relationships, appreciation for individual seconds and minutes, as they washed over her. In that moment, the butterfly alighted and if it did not bring outright happiness, it at least brought comfort and peace.

"It has been an extraordinarily difficult year for everyone – no one has been spared. But I have to resist wishing it never happened or hoping for its rapid conclusion because, if I really think about it, I can string together rich moments that wouldn't have occurred but for the events of this year."

According to Arthur Brooks, a Harvard Business School professor and *Atlantic Monthly* columnist, the academic scholarship sifts out into four categories of habits that bear directly on our happiness: faith, family, friends, and work. By faith, Pro-

fessor Brooks does not intend a particular dogma or organized religion exclusively; rather he broadly describes "a structure through which you can ponder life's deeper questions and transcend a focus on your narrow self-interests to serve others." As for family and friends, Professor Brooks describes the results of a 75 year study which reveals that "[p]eople who have loving relationships with family and friends thrive; those who don't, don't." And, ironically, it turns out that work – the one thing from which many of us fantasize being freed one day – is a core pillar of happiness. But not the title or what you earn: "what makes work meaningful is not the kind of work it is, but the sense it gives you that you are earning your success and serving others.

My 21-year-old daughter knows nothing of Professor Brooks, but 2020 sent her home from college in March and wiped out her junior-year athletic season, and she was not remotely happy about it. In November, post-college exile, she sent me several pictures from her unplanned spring and summer at home. In the vernacular of a college kid, she texted, "it was a very very difficult spring/summer, but looking through these pics it didn't seem so bad. We made some good father-daughter mems to remind us of the good parts of 2020."

Her string of pictures captured the two of us working in the first vegetable garden we've had in years, planted at her request; landscaping the front yard; making goofy faces taking selfies; and just passing time on the family room couch in the evening, a sleeping cat between us.

Her text, those pictures. The elusive 2020 butterfly alighted and gave me a few months of borrowed time like my daughter and I had all those years before she left home.

And so, with everything else, 2020 brings to me the wisdom of a 21 year old. It has been an extraordinarily difficult year for everyone – no one has been spared. But I have to resist wishing it never happened or hoping for its rapid conclusion because, if I really think about it, I can string together rich moments that wouldn't have occurred but for the events of this year. Some day we will emerge from the shadow of the coronavirus and some day the immediate social and political wounds will heal, but we will always experience personal and universal hardship and suffering. Maybe the key is to accept that reality, but not let it distract us from day to day habits, the practice of which brings lasting happiness.

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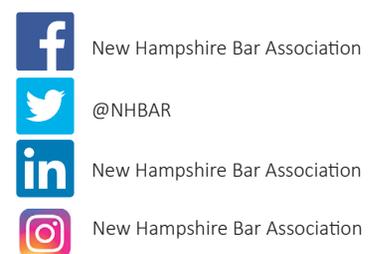
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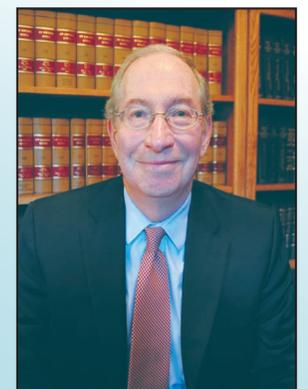
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A Big Year Ahead for NHLAP An Interview with the Executive Director

Terri Harrington, Executive Director of New Hampshire Legal Assistance Program (NHLAP), has concentrated in outreach and education to members of the New Hampshire Bar since joining NHLAP in 2018.



NHLAP focuses on 100 percent confidential assistance to New Hampshire lawyers, judges, and law students who experience substance abuse, depression, stress or other distress that affects well-being and impairs an individual's ability to function and practice law. NHLAP can also aid in the curtailment of malpractice claims and disciplinary complaints.

For months now Harrington says she has been gearing up for the coming year by continuing outreach that is crucial to meet the growing needs of attorneys across the state.

She recently attended the National Conference for Lawyers Assistance Programs with 10 others from the New Hampshire Bar, including Supreme Court Justice Gary Hicks. This year's theme for the conference, held virtually, was *Cultivating Agility And Resilience In Times Of Change*. Harrington says the conference produced some, "eye opening moments, which is what I was hoping for."

The *Bar News* interviewed Harrington recently and the discussion focused on the challenges and successes she has experi-

enced over the past year and what she expects for 2021.

What have you been working on lately?

I've been trying to get a consensus to bring Bar leaders together to talk about barriers. The biggest one I've seen so far is lawyers without insurance and lawyers without jobs or who are underemployed. I've had calls with people who say, I feel like I'm in crisis, I've been prescribed medication but I'm not taking it because I don't have any money. And there's nothing I can do about that. Charla Stevens had a great idea about law firms donating money and the more we talked about it we thought this is something the Bar should be doing. We need to find ways to really help people. I can't do this on my own.

What are some of the current challenges for NHLAP because of the pandemic and how have you been meeting those challenges?

The biggest challenge has been hearing back from people. Last year I thought we were getting good momentum from the newsletter and being out in the community. Before the pandemic there was a steady stream of calls and a lot of self-referrals. People were listening to what I had to say, and they were calling when they thought something was going on. I think people

Coös County Meditation



NHBA Director of Business Operations at the New Hampshire Bar Association, Paula Lewis, meditating on the shore of Lake Umbagog in Errol, NH during early Spring 2020.

were finally comfortable that they weren't getting other people into trouble. But as soon as the pandemic hit I had to shut down my in-person peer support so attendance has dropped off for obvious reasons. These groups are virtual now but it's no where near as robust as it was because people are looking for connection and support. Calls have dropped off drastically.

What was the cause of the drop in calls?

I'm on the listserv with other executive directors and it was universal. We think it's caused by a couple of different

things. First, in the beginning everyone was just holding their breath and waiting for this to be over. The other reason is that depression, drug addiction, and alcohol addiction, seem to all thrive in isolation and no one's observing what others are doing. There's no outside accountability. I had a former LCL member say that if I was still drinking I'd be drunk before noon. So the consensus is that when things are opened back up and we get back out reinforcing our message we'll probably get a

NHLAP continued on page 17

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Our "Wellness Corner" Section Helps You Maintain Work-Life Balance

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"Wellness Corner" is the *Bar News*' newest section, helping attorneys take as good care of themselves as they do their clients. You'll also see more social media posts and web articles on nhbar.org on this important subject.

To learn more about NHBA's Member Services (sorry, "Doggie Spa Day" isn't one of them), contact Misty Griffith at mgriffith@nhbar.org

Letter: A birthday no one should celebrate

In response to Attorney Mark Rufo’s letter in the August 19, 2020 issue of *Bar News*, the Fascist Italian army did not liberate Ethiopia. Italy invaded Ethiopia to expand its white colonial empire. The Italian army was a modern army of tanks, hundreds of planes and modern machine guns versus an army of spears, antiquated guns and 11 airplanes. The Italian Fascists gassed the Ethiopians multiple times and subjugated the people for 5 years. The Fascists did issue a proclamation against slavery but under these circumstances Mussolini does not deserve humanitarian credit. During the 5 years of subjugation there was an active and widespread Ethiopian resistance. Finally the British liberated Ethiopia from Italian rule and Emperor Selassie returned and outlawed slavery. In light of Mussolini’s invading the country, subjugating the people for 5 years, and gassing the people, no one should celebrate Mussolini’s birthday.

Gordon B. Snyder

Letter: Making voting changes permanent is good for the Granite State

To the Editor:

We read with interest the article “A Smooth Election 2020 in the Granite State” in the November issue, which

discussed the efforts made by NH state officials in the lead up to the September primary and November general election to ensure that the voting process worked even amidst a pandemic. The ACLU-NH is grateful for the efforts of our state’s legislature, our election officials, and the efforts of hundreds of activists and organizers across the political spectrum who spent countless hours engaging their neighbors and communities to make sure that all eligible voters knew of the recent law changes and how to vote safely. The success of our state’s elections is a credit to all of these efforts since the outbreak of the pandemic in March.

A significant reason why we saw record turnout in New Hampshire and had our state’s results announced quickly had to do with legal changes made by the legislature in the final weeks of a session upended by COVID-19. While hundreds of bills were tabled due to COVID-19, the legislature came together to pass a bill that made three important (time-bound) changes for conducting an election amidst this pandemic. The legislation permitted anyone to vote absentee due to COVID-19 concerns, and permitted voters to request an absentee ballot for the primary and the general election using a single request form. It also allowed local elections officials to pre-process absentee ballots before Election Day. These reforms were critical to the success of this year’s elections, and while they are set to expire at the end of the year, they should be extended to future elections.

Many voters reported standing in

line on Election Day for the first time this year. Due to social distancing, voting in person took longer, resulting in lines at polling places that rarely saw them in the past. And yet, in the November election, 32% of Granite State voters cast absentee ballots, compared to just 10% in 2016. Across the country we saw a similar story, with the U.S. Elections Project reporting that over 101 million Americans cast ballots by mail or through in-person early voting. Imagine what the lines would have been in our state had an additional 22% of voters shown up in person as opposed to voting absentee. How many people might have seen the longer lines and opted not to vote at all? Or how much more risk to safety and health would people have had to endure to vote?

Additionally, unlike other states in the country that took days to report their election results, New Hampshire reported its results for the presidential election quickly. There was no delay or national criticism because vote counts were released in dribs and drabs, like they were in Arizona or Georgia. This is a credit to the legislation passed earlier this year enabling pre-processing of absentee ballots—and it’s clear that it worked. There is no reason not to enable such pre-processing for future elections.

This election season shows that Granite Staters appreciate having the opportunity to vote absentee—either by mail or at their clerk’s office—and that given the option, many people will choose this option to vote safely and securely. The majority of states already allow any registered

voter to vote absentee without having to specify an excuse. We also believe that the ability to pre-process absentee ballots provides a common-sense, practical tool to ensure that New Hampshire is able to timely report its election results without placing unnecessary burdens on local election officials.

We encourage the legislature to make permanent the changes made for this year’s elections. We hopefully will not be amidst a pandemic come the next election cycle. Even so, easing the process of voting for eligible voters, and giving added flexibility to poll workers for processing ballots makes sense, particularly given how effectively and how successfully these minor changes were this year.

Working together, we can ensure that New Hampshire continues to be a leader in fair, secure, and successful elections.

Henry Klementowicz is a staff attorney at the American Civil Liberties Union of New Hampshire

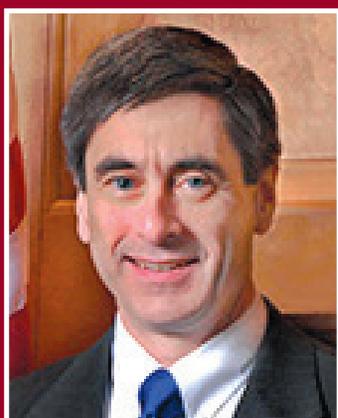
Opinions in Bar News

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NHBA’s Committee on Cooperation with the Courts and Judges David D. King & Susan W. Ashley present

Circuit Court Updates

Mon, Dec 21 • Mon, Jan 25



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The Ethical Obligations of Virtual Meetings Under NHRPC

Dear Ethics Committee,

With virtual meetings replacing in-person meetings in my practice, what ethical obligations should I be thinking about?

Answer:

The duties to keep in mind are competence and confidentiality. With respect to virtual meeting technology, we must maintain a generalist's knowledge of the available technological platforms. When we rely on one of these platforms, we must make reasonable efforts to learn how to use it properly and to understand the risks associated with using that platform. In addition, each time we use any technology, we must assess whether that particular use is reasonable under the circumstances. So for example, for certain legal meetings a standard business platform may be appropriate, such as Zoom, Skype, TeamViewer, GoToMeeting, or Google Meet. Other meetings may require end-to-end encryption, which may be available through platforms such as WebEx Meetings, Google Duo, Microsoft Teams, Signal, WhatsApp, or FaceTime. Practitioners may make the decision to restrict all confidential client communications to end-to-end encrypted enterprise platforms.

Rule 1.1 - Competence

Competent representation of clients includes keeping up with technological developments and understanding the benefits and risks of each technology we rely on in our practice. NHRPC Rule 1.1, Ethics Committee Comment. See also *id.*, ABA Comment [8].

Rule 1.6 – Maintaining Client Confidentiality

We must “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” NHRPC Rule 1.6 (c). What constitutes a reasonable effort is not static, but depends on the circumstances. ABA comments adopted as commentary on the New Hampshire Rules of Professional Conduct offer the following guidance.

Reasonable efforts when evaluating use of a communication technology platform may include:

- Understanding the nature and existence of any threat to maintaining confidentiality during the virtual communication;
- Determining how virtual communications about client matters should be protected;
- Conducting due diligence of a vendor providing communication technology, including their relevant experience and reputation;
- Reviewing and understanding the vendor's terms of use and of any agreements concerning the protection of client information, including the legal and the ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality;
- Understanding how client confidential information is shared in the virtual communication, how it will be transmitted and how and where it will be stored;
- Understanding and using the security measures available in the selected virtual platform;
- Understanding how to label stored client confidential information arising from a virtual meeting;
- Training lawyers and non-lawyer assistants in virtual communication technology and information security;
- Identifying the likelihood of disclosure if appropriate safeguards are not employed in a virtual meeting;
- Identifying the cost of employing appropriate safeguards in a virtual meeting;
- Identifying the difficulty of implementing the safeguards in a virtual meeting; and
- Identifying which safeguards may adversely affect the lawyer's ability to represent the client.

See ABA Comments [18] and [19] to Rule 1.6 and ABA Comment [3] to Rule 5.3 (discussing “reasonable efforts” factors); see also ABA Formal Opinion 17-477R (discussing factors to use in determining whether use of a given medium for electronic communications is reasonable).

You will also want to consider the risk of waiver of the attorney-client privilege, and, where applicable, of work prod-

uct protection, as well as your obligation to comply with laws which govern data privacy and impose notification requirements where electronic information has been compromised. See, e.g., N.H. Rev. Stat. §§ 359-C:19, 359-C:20, 359-C:21 (imposing duty to notify following a breach of personal information).

Bear in mind that if you permit recording of a virtual meeting, you are “responsible for reasonably ensuring adequate protection of client confidences in data held or stored by others, including, e.g., offsite storage and ‘cloud’ storage.” NHRPC Rule 1.6, Ethics Committee Comment.

Rule 5.3 - Responsibilities Regarding Non-lawyer Assistants

While you can never outsource (nor delegate) any duty arising under the RPCs, you may, consistent with those duties, assess where it is reasonable to rely on the expertise of a third party.

Practical Considerations:

- An attorney must understand, and, where appropriate, use firewalls, virus and spyware programs, operating system updates, software and applications updates, strong passwords and multifactor authentication, encryption, and virtual private networks. If you are working from home on a laptop, your greatest security vulnerability may arise not from using a particular virtual meeting platform, but from operating outside the protection of your firm's cybersecurity environment.
- Software vulnerabilities exist in all applications. The process of identifying them, patching them, and updating them is an inherent part of the lifecycle of any application. Get into the habit of manually checking that you are up-to-date with patches and updates every day, even if you are using the auto-updating feature for your operating system and applications.
- Competence requires credibility: when presenting yourself as a professional on camera, bear in mind the basics - background, lighting, sound environment, eye contact level with your camera and sufficient bandwidth to avoid freezing. Be chastened by the stumbles of others, from blinding back-lighting and

incessantly barking dogs to broadcasts of inappropriate attire or conduct. Our reputations are our greatest uninsured assets!

- Understand your platform's settings and controls. If you have not dry-run a platform or feature you have not previously used, to ensure that it performs as you expect, you cannot reasonably be said to understand how to use it. If you were alone on the platform when you tried out a feature, you cannot reasonably be said to have dry-run it. Consider whether a particular meeting warrants including a staff person focused exclusively on managing the technology and if so whether that person ought to be a neutral.
- To take a common example, on Zoom, consider: Enabling Meeting Passwords and Lobby with Approval and Disabling Join Before Host, Guest Chat, Non-Host Screen Sharing, AutoSaving Chats, File Transfer, Remote Control, and Annotations, and locking the Zoom room when the desired attendees have joined.
- While virtual conferencing platforms typically provide for host-controlled recording, any participant can surreptitiously record any meeting using third-party software, including screen-shared images and chat. Consider whether screen-sharing documents is reasonable under your circumstances or whether another method, such as secure encrypted email, is more appropriate to share documents. The same applies for sidebar text communications like chat.
- Virtual meetings such as depositions and alternative dispute resolution sessions may warrant an agreement in writing specifying the platform as well as any ground rules relating to the use of the technology.

Conclusion:

We must make reasonable efforts to stay abreast of technological developments and understand the risks associated with, and learn how to properly use, any technology we rely on in our practice. We must assess whether each particular use of technology is reasonable under the circumstances.



Lauren S. Irwin, Heather M. Burns, Michael S. McGrath, and Brooke L. Shilo

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Cloud Storage and Computing: What Must We Do To Utilize this Technology?

By Cameron G. Shilling

Lawyers and law firms should no longer be asking if we can or should use cloud storage and computing. That technology is simply too ubiquitous and useful to ignore. Rather, we need to be asking how we ensure that the clouds we already use or would like to use provide appropriate information privacy and security controls for our privileged and sensitive client information.

It is ethically permissible to use cloud technology, per New Hampshire Ethics Committee Advisory Opinion #2012-13/4, The Use of Cloud Computing in the Practice of Law. That 2013 opinion contains a thorough analysis of the issue, and recites a lengthy list of factors that we should consider when using clouds, many of which remain relevant today.

As a result, lawyers and law firms are utilizing clouds for a wide variety of purposes, including email, record retention, specialized software applications, disaster recovery, etc. Despite our ethical obligations, many of us use clouds without ensuring that they incorporate safeguards that are appropriately up-to-date and comply with applicable laws, particularly newly emerging privacy laws. While not exhaustive, the following summarizes a few of the most important factors we need to consider when evaluating cloud technology.

1. Access Controls: Requiring a strong password (even if changed routine-

ly) to access client information is no longer a sufficient security control. Multi-factor authentication is the standard of care. While MFA previously commonly required a user to carry a security token or retrieve a code from a mobile device, it can now be more easily accomplished without user involvement by embedding a certificate on the user's computer or mobile device.

2. Encryption: Client information must be encrypted whenever transmitted to or from a cloud, which is called data "in motion." However, as technology advances, so does our standard of care. Some providers are incorporating encryption of data "at rest" in the cloud. Doing so affords an additional safeguard because, if the cloud is accessed or data is exported through a sophisticated cyber attack (which is unfortunately prevalent event now), the information will not be compromised and a breach does not occur because the data was encrypted. Lawyers and law firms therefore need to determine whether the clouds we use incorporate encryption at rest.

3. Due Diligence and Agreements: Client information is only as secure as our weakest cloud. Before we can use a cloud, we need to conduct due diligence that is appropriate to the sensitivity of the information we will be storing in that cloud and the services that technology will be providing. Depending on the nature of the cloud, due diligence often requires either: (a) obtaining from the vendor a certificate of compliance with an industry standard, such as a Service Organization Control 2 Report,

International Organization for Standardization 27001 certification, or statement of compliance with the National Institute of Standards and Technology Cyber Security and Privacy Frameworks, or (b) if such a certificate is not available, obtaining and reviewing the vendor's written information security policy and training program, and following up with appropriate inquiries for further information. In addition to due diligence, we must enter into data-security agreements with clouds we use to handle client information, to contractually solidify those safeguards as well as impose appropriate obligations and liability in the event of a breach.

4. Access Limits and Logging: While we rely on clouds to have appropriate security and privacy controls in place, we remain responsible for managing the level of access we grant to employees and clients. Access should be limited to only the data that they need to perform their jobs and access their information, respectively. Administrator access should be strictly limited to a few people, who should also use regular credentials whenever they are not performing administrator functions. Additionally, we need to configure the cloud's logging functionality to ensure that the technology records access and a broad scope of user activities.

5. Privacy Restrictions and Policies: The privileged and sensitive client information we handle requires steadfast privacy protection. We would never use one client's information to manage another cli-

ent's matter, harvest client information for marketing purposes, or disclose a client's information without express permission from the client. However, these activities are common for many cloud providers, which often intend (and indeed base their pricing and economic model) on using information for their own marketing purposes and selling certain information to data aggregators. We need to ensure that the clouds we use adhere to the same privacy rules we must follow, and that the privacy policies posted publicly on the clouds reflect that commitment.

Cloud storage and computing is so useful and prevalent that it has become unavoidable. Reliance on this technology is ethically permissible, as long as lawyers and law firms ensure that the clouds we use employ appropriate security and privacy controls. We all should commit to invest the time and resources necessary to do so.

Cameron G. Shilling founded and chairs McLane Middleton's Privacy and Information Security Group. The group helps businesses and private clients improve their information privacy and security compliance, and address any security incidents or breaches that arise.



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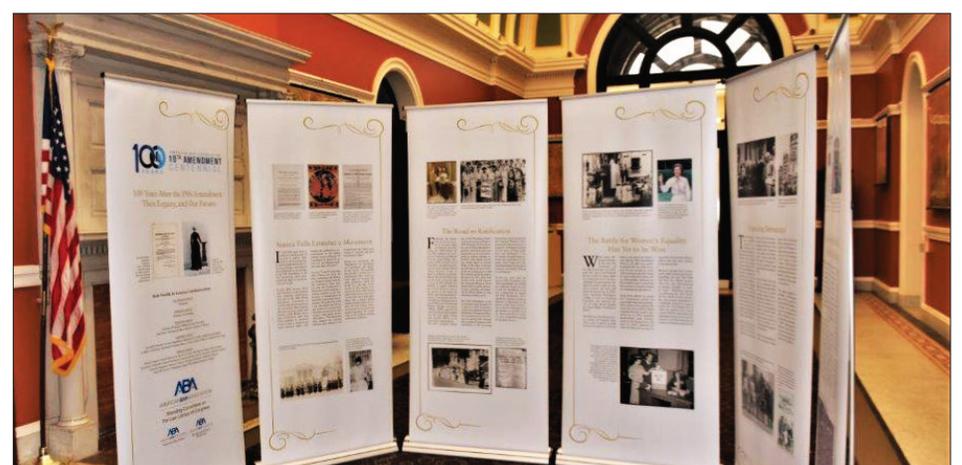
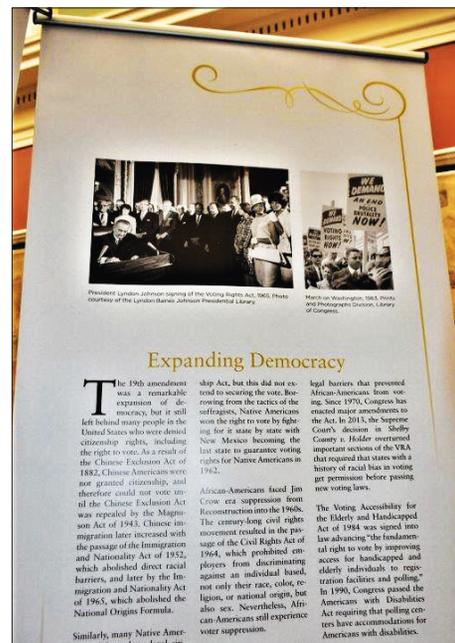
The 19th Amendment Traveling Exhibit Visits Concord, NH

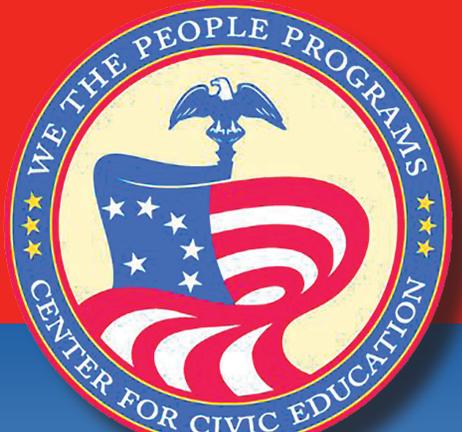
The ABA Standing Committee on the Law Library of Congress launched a 19th Amendment traveling exhibit, "100 Years After the 19th Amendment: Their Legacy, and Our Future." The six-banner free-standing exhibit features historic photos and artifacts and details the story of the battle for ratification, outlining the challenges that remain. The exhibit was recently awarded a 2019 GDUSA American Graphic Design Award.

The exhibit is featured in a 19th Amendment NHBA Law Related Education Virtual event celebrating the 100th Anniversary of the passing of the 19th Amendment that will be released in January.

While at the NH State Library during the month of November, author and historian Susan Ware spoke on the highlights of the exhibit, followed by Linda Upham-Bornstein, PhD and Liz Tentarelli, League of Women Voters NH.

The virtual event was created after the cancellation of two scheduled dates for a 19th Amendment Celebration, including the traveling exhibit. The event has been recorded and its release in January will kick off the 75th Anniversary Celebration of the Law Related Education program – "Empowering Generations of NH Citizens through Civics Education."





NH STATE FINALS - JAN 8, 2021*

In this annual program, students participate in simulated congressional hearings and testify on relevant historical and contemporary issues. This year, hearings will be held virtually on the Zoom videoconferencing platform. We want to extend our sincerest thanks to NHBA attorneys who are putting their technology skills to good use while helping students discover the ongoing relevance of the Constitution and Bill of Rights. This year's State Champion will be recognized in a special Virtual Awards Ceremony. Watch upcoming issues of *Bar News* for coverage of this event.

**For details, contact
Law Related Education Coordinator
Robin E. Knippers at reknippers@nhbar.org
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*Snow date is Jan 11, 2021

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New Lawyers Committee

Virtual Chocolate Tasting, a Sweet Finish to Upcoming NHBA Midyear Meeting

By Misty Griffith

The New Lawyers Committee is sponsoring a Virtual Chocolate Tasting to provide a fun networking opportunity following Midyear Meeting on February 5, 2021. According to Stephanie Tymula, co-chair of the New Lawyers Committee and Managing Partner of LTC Matters, “We recognize that 2020 has had its challenges, but the New Lawyers Committee really wanted to think of an out of the box way to spread some positivity to our fellow New Hampshire lawyers with a fun, upbeat event, everyone can enjoy and what better way is there to awaken everyone’s senses than with CHOCOLATE!”

Each participant will be mailed a box of delicious craft chocolate samples from a variety of New England chocolatiers. Be sure not to eat them ahead of time!

Participants will receive a video link for a virtual chocolate tasting experience led by Victoria Kichuk from Cocoa Beantown in Boston. Victoria is a chocolate educator with a decade of experience leading Boston chocolate tours, teaching classes on the history of the cocoa bean, and hosting guided tastings. She has worked as a consultant for chocolatiers, hotels, restaurants, and bake shops, including a chocolate shop in Hiedelberg, Germany. An expert on the subject of chocolate, Victoria has presented at Harvard and M.I.T.

Victoria has experienced the joys



Victoria Kichuk leads chocolate tasting tours in Boston.

of chocolate in many countries scattered across five continents. She looks forward to sharing her love of all things chocolate with our members. Members who sign up will learn how to appreciate chocolate in a deeper, more nuanced way. This special guided tasting event will include plenty of time for questions and discussion.

Thanks to the generous sponsorship of the New Lawyers Committee this event costs only \$12 per person (actual value is \$50 per person). The Virtual Chocolate Tasting is not limited to new lawyers but is open to all members. Reserve your spot today!

In order to allow adequate time for shipping, reservation deadline for this event is January 20, 2021. Reservations may be made during your Midyear Meeting registration.

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Join us on Friday, February 5 at the NHBA Midyear Meeting (held virtually) as we present Chief Justice McCafferty with her award.

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Visit the NHBA Gender Equality Committee web page at www.nhbar.org/gec

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OFFER \$350,000	Medical Malpractice (IA) Unnecessary prostate surgery	VERDICT \$12.25 MILLION
OFFER \$1.75 MILLION	Medical Malpractice (IA) Overdose of Pitocin leads to neonatal seizures	SETTLEMENT \$9 MILLION
OFFER \$2 MILLION	Medical Malpractice (IA) Delay in treatment of cauda equina syndrome	SETTLEMENT \$6.5 MILLION
OFFER \$15,000	Medical Malpractice (IA) Vasectomy performed instead of circumcision	VERDICT \$2 MILLION

*View additional verdicts and settlements at tl4j.com

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Saying Goodbye to a Friend of the Bar

Tom Richards, a greatly admired and popular attorney passed away after suffering a fatal heart attack early in the day on Friday, October 30, 2020. He was 78 years old.



Tom was born and raised in Exeter, New Hampshire. He attended UNH, where he graduated in 1984 with honors and was elected to Phi Beta Kappa. He went on to law school at NYU, graduating in 1967 as a Root-Tilden Fellow.

Shortly after graduation, Tom returned to New Hampshire and joined the Manchester firm of Sheehan Phinney Bass and Green as an associate in 1967. Thereafter, Tom served as an officer in the US Army and completed a combat tour in Vietnam. He returned to the Sheehan firm, becoming a partner in 1972.

After joining Sheehan Phinney in 1967, Tom's practice consisted of civil litigation, primarily jury trials representing plaintiffs and defendants in corporate and commercial litigation, defendants in products liability litigation, and work in antitrust litigation. He continued to practice at the firm until he retired from active practice.

Tom was lead counsel in several of Sheehan Phinney's more significant cases. In his first major trial as lead counsel, (*Bethlehem Mink Farm v. Jurgielewicz, Rozansky Feeds, Agway and Monsanto*, U.S. District Court for the District of New Hampshire, 1974), Tom achieved an excellent result for his client and won the respect from several adversaries

"To my amazement, in the weekend before trial, Tom absorbed all of the nuances of the dispute, tried the case, and got an incredible result...After that, I never underestimated his sheer intellect and skill."

(there were more than one) in this multi-party trial. The case resulted in over \$1,000,000 in plaintiffs' verdicts, but Tom was able to limit his client's share to \$50,000.00.

In a significant pro bono effort, Tom represented the New Hampshire Bar Association in the disciplinary proceeding and subsequent appeal regarding Attorney Mack Mussman. The decision in *Mack M. Mussman's Case*, 116 N.H. 541 (1976), has served the bar, the court and the public well in subsequent disciplinary matters.

Tom was lead counsel for IBM in anti-trust litigation in New Hampshire with Sanders Associates in the late 1970's. As a result, he was asked to assist in the trial of *Memorex v. IBM*, a trial that took him and Bill Donovan to San Francisco for a six-month trial. The case involved a claim by Memorex that IBM was using anti-competitive tactics to keep its monopoly on the emerging technology of disk storage devices used for recording data on computers. The outcome of the case was an unmitigated success for IBM and is the subject of published district court and 9th Circuit opinions.

After his six-plus month adventure in San Francisco, Tom was involved in a series of interesting cases to which he always brought his fertile mind and unique brand of advocacy. As one of his partners recalled:

"Tom and I worked on a trial where the stakes were so high that our client put the deed on a plane to get it timely recorded. For months, I did most of the work and was petrified that I would have to try the case alone. To my amazement, in the weekend before trial, Tom absorbed all of the nuances of the dispute, tried the case, and got an incredible result. The judge found that the other side breached the covenant of good faith and fair dealing. After that, I never underestimated his sheer intellect and skill."

Tom was generous with his time and skills, serving on the New Hampshire Board of Governors in the 1980's, and was eventually elected President in 1989, overseeing the association's only international annual meet-

ing in Montreal.

Along the way, Tom was admitted to the American College of Trial Lawyers and the International Society of Barristers. He had many friends in the bar because of his down-to-earth manner and willingness to treat kindly the foibles of his adversaries. During retirement, Tom enjoyed woodworking at which he was quite adept and, for a period of time, was the Executive Director of RESOLUTION NOW, an arbitration services group founded with Bob Stein that included several retired New Hampshire judges for whom he served as "Clerk." Tom was always a pleasure to be with, be it business or social, and leaves many friends within the Bar.

Be Part of the Conversation Join a Practice Area Section

Engage with your colleagues throughout the year when you join one (or more!) of the 18 practice area sections of the NH Bar Association.

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*During COVID-19, sections are holding meetings virtually.

To join a section, contact Sections Coordinator Dorene Hartford by email at dhartford@nhbar.org or by phone at 603-715-3257

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Post-surgical infection verdict	\$10,700,000.00
Product liability settlement	\$8,900,000.00
Birth injury settlement	\$7,500,000.00
Surgical error settlement	\$5,100,000.00
Surgical error settlement	\$5,000,000.00
Post-surgical infection settlement	\$4,000,000.00
Wrongful death verdict	\$3,750,000.00
Neurological birth injury settlement	\$3,500,000.00

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- Jennifer L. Parent – McLane Middleton, PA
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- Mary E. Tenn – Tenn And Tenn, PA
- Lisa L. Wolford – Disabilities Rights Center-NH, Inc.

“The strength of a team is each individual member. The strength of each member is the team.” – Phil Jackson

New Bar Foundation Board Members in the Spotlight

Henry R. Klementowicz

Henry is a staff attorney at the American Civil Liberties Union of New Hampshire, which he joined in 2018. ACLU-NH is the New Hampshire affiliate of one of the largest, multi-issue civil rights organizations in the country, with millions of members nationwide. His practice focuses on civil rights and civil liberties. He frequently appears in state and federal court, as well as at the State House, to advocate for voting rights, government transparency, due process, free speech, criminal justice reform and immigrants’ rights. Prior to joining ACLU-NH, Henry worked at the law firm of McLane Middleton, PA, and was a law clerk to the judges of Rockingham County Superior Court. Henry graduated from Columbia University and Georgetown University Law Center.



Lisa L. Wolford

Lisa joined Disability Rights Center-NH in 2020 to lead a new “Special Education and COVID-19” project. She is a graduate of Wellesley College and Cornell Law School. She moved to New Hampshire in 2002 to become a trial lawyer with the New Hampshire Public Defender, where she represented children and adults charged with serious crimes in the trial courts and on appeal. In 2012, Lisa joined the New Hampshire Department of Justice, where she investigated and prosecuted government employees alleged to have committed criminal misconduct, supervised the Criminal Justice Bureau, and worked to improve child abuse and neglect investigation procedures and outcomes. She has extensive appellate litigation experience, having briefed over more than 80 cases and argued more than 30 before the New Hampshire Supreme Court. Lisa is a 2020 recipient of the Outstanding Service in Public Sector/Public Interest Law Award.



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We’re relaunching our Mentor Program in 2021 and are looking for experienced attorneys to help newer ones transition to the New Hampshire legal community and succeed in their practices.

For additional information or to volunteer, contact Misty Griffith, our Member Services Coordinator at (603)715-3227 or mgriffith@nhbar.org



Community Notes

Lawrence Vogelman of Shaheen & Gordon, P.A. was named a 2020 John Adams Award Honoree by the Military Religious Freedom Foundation. Vogel is representing New Hampshire veterans James Chamberlain and Sandra Bell in a lawsuit asking for the removal of a Bible on display at the Veterans Administration Medical Center (VAMC) in Manchester.



A pair of Plymouth State University

professors are revolutionizing the practice of law by introducing the use of data analytics. **Chantalle Forgues**, J.D., MBA, associate professor of business law, and **Daniel Lee**, Ph.D., professor of economics, can identify variables that predict litigation risk and outcomes, potentially helping firms make better hires and operating decisions, avoid lawsuits, and take other cost-saving measures.

Coming & Going

Pierce Atwood LLP is pleased to announce that the firm has further enhanced its top-ranked Trusts & Estates practice by adding attorneys **Laurel Millette**, **Elizabeth Brown**, and **Bonnie Ball Wahrer**.

Laurel Millette joins the firm's Boston office as partner. Her practice focuses on estate tax planning, charitable planning, estate administration, and trust administration services. Prior to joining Pierce Atwood, Laurel was the founder of a boutique trusts and estates practice in Concord, Mass. Laurel received her J.D. from Boston College Law School.

Elizabeth Brown, counsel in Pierce Atwood's Portsmouth, New Hampshire of-

office, has more than 20 years of experience representing individuals and businesses in estate planning, business succession planning, business formations, and corporate governance issues. Elizabeth graduated from the University of Minnesota Law School.

Bonnie Ball Wahrer has joined Pierce Atwood as an associate in the firm's Portland, Maine office. Bonnie represents individuals, families, fiduciaries, and institutional clients in all aspects of trust and estate planning, administration, controversy, and litigation. Bonnie received her J.D. magna cum laude from the University of Maine School of Law in 2018.

Jon S. Auten

Jon S. Auten, 80, of Cornish, died unexpectedly on November 21, 2020. He was a graduate of Phillips Exeter Academy, Colorado State University, and the Detroit College of Law. He spent his early career practicing law in the automotive industry. He then returned to New Hampshire, was admitted to the NH Bar in 1971, and entered private practice. He joined Elliott & Jasper, of Newport, NH in 1992, at which point the firm was renamed Elliott, Jasper & Auten. He retired from the same firm 26 years later in 2018. He had a wide private practice and was well known in the community.

He spent his retirement in Cornish, where he would happily grumble about the time it took to mow his meadows. He was an animal lover who regularly had about two dogs and any number of "barn cats." He died at home, which we are confident would have been his preference.

He is survived by his brother, retired Attorney Hanford L. "Skip" Auten of South Acworth and his sister Mary Auten of Cornish. He is also survived by his two dogs – Louie and Charlie. There will be no services. For those who wish, the family suggests donations in his memory be made to the Cornish Rescue Squad, P.O. Box 235, Cornish Flat, NH 03746.

Robert Joseph Deshaies

Robert Joseph Deshaies, 73, of Exeter NH died suddenly of sepsis at Exeter Hospital on Wednesday, November 4, 2020. Bob was born on April 12, 1947 in Franklin NH, the eldest of five children. His parents were the late Albert S. and Pauline

(Landry) Deshaies. He was a graduate of Franklin High School, Tufts University, and Boston University Law School. He was a partner in the law firm of Healey, Deshaies, Gagliardi and Woelfel in Amesbury MA.

He leaves his wife of fifty-two years, Judith (Jordan) Deshaies, his daughter, Susan Deshaies of Somersworth NH, his granddaughter, Caroline Cromer of Exeter, and his great granddaughter, Charlotte Cromer. He also leaves his sister Mary Denoncour of Palmer, Alaska, his brothers Joseph of Tilton NH, Edward of Webster NH, and his sister Katherine Deshaies of Henniker NH. He also leaves a large extended family of nieces, nephews and cousins.

His passions were his family, the law, and golf. He was a member at Wentworth by the Sea Country Club, and the Amesbury Country Club. He was a longtime member of the Amesbury Lions Club, and several legal and real estate professional organizations. He served on the Exeter Zoning Board of Adjustment for ten years.

The family thanks the Emergency Department and Intensive Care Unit personnel at Exeter Hospital for their valiant efforts to save Bob. Memorial donations may be made in his name to the Amesbury Lions Club c/o Steve Deorocki, treasurer, 530 Exeter Road, Hampton, NH.

No public services will be held due to Covid-19 and vulnerabilities of family members. The Brewitt Funeral Home of Exeter is assisting with arrangements

IN MEMORIAM continued on page 24

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Membership Status Changes

Presented to the Board of Governors November 19, 2020

Active to INACTIVE:

De Grim, Frank, Old Orchard Beach, Maine (Oct. 15)
 Ahern, Christopher, Epsom, NH (Sept. 10)
 Wright, Ellen, Tewksbury, Mass. (Oct. 15)
 Holland, Lee, Maynard, Mass. (Oct. 12)

Active to INACTIVE RETIRED:

DiFruscia, Kathleen, Windham, NH (Nov. 10)

Active to DECEASED:

Hooper, Ashlie, Concord, NH (Oct. 22)

Inactive to ACTIVE:

Lieder Colliton, Caroline, Dorchester, Mass. (Nov. 9)
 Rossi, Lorraine, Middleton, Mass. (Nov. 10)

Inactive to INACTIVE RETIRED:

Sabatello, Alison, Medford, Mass. (Oct. 23)

Inactive to RESIGNED:

Sipos, Joseph, Newton, Mass. (Oct. 15)

Inactive to DECEASED:

Arcidy, Louis, Bedford, NH (Nov. 19, 2019)
 DiLucci, Raymond, Concord, NH (Oct. 16)
 Bartlett, James, York, Maine (Oct. 15)

Inactive Retired to RESIGNED:

Keith, Kathleen, North Andover, Mass. (Oct. 5)

Honorary Active to HONORARY INACTIVE:

Quinlan, Francis, Amherst, NH (June 12)

Suspended to ACTIVE:

Mathews, Gordon, Keene, NH (Oct. 16)

Suspended to DISBARRED:

Richey, Danielle, Conway, NH (Oct. 7)

Resigned to DECEASED:

McNally, W. John, Thetford, Vt. (Aug. 25)

LOTHSTEIN GUERRIERO, PLLC

We are proud to announce that
Kaylee Doty
 is joining our firm as an attorney.



Kaylee graduated from Arizona State University, magna cum laude, in 2016 with a Bachelor's Degree in Political Science. Kaylee then earned her Juris Doctor degree from the UNH Franklin Pierce School of Law. While at UNH, she was the recipient of the Warren B. Rudman Fellowship and a Dean's Scholarship. She has worked with our firm as a paid law student employee since 2019, working with Richard and Ted on complex criminal cases in state and federal court. During the pandemic, with staff periodically out due to quarantines and childcare issues, Kaylee's duties expanded and she learned how to do pretty much everyone's job at the firm! On December 18, 2020, Kaylee will be sworn into the New Hampshire Bar. Welcome Kaylee!

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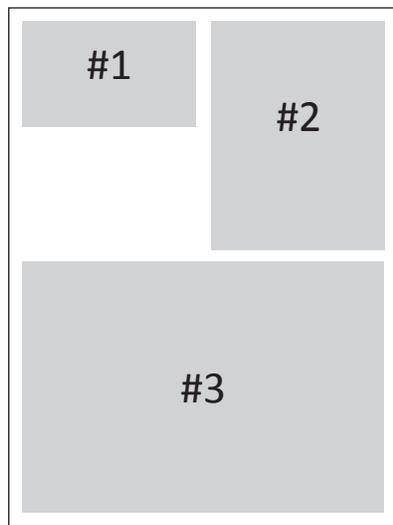
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Rates & Sizes

JUNE 2020-
 MAY 2021



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ATTORNEYS AT LAW

is pleased to announce the election of
Meaghan A. Jepsen and Bridget M. Denzer
 as Directors of the firm.

Meaghan works in our Concord office and assists clients with civil litigation, employment, municipal, and corporate transactional matters.

Bridget works in our Rochester office and assists clients with civil litigation, as well as real estate, commercial, and other transactional matters. Bridget previously worked in our former Alton office.



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**Congratulating
a job well done.**

Bernstein Shur congratulates longtime colleague and friend, **Andru Volinsky**, and wishes him the very best upon his departure from the firm.

We are grateful for his many years of excellence and leadership and for his vital role in founding and growing our Manchester office. We wish Andy, Amy, and their family much health, happiness and prosperity in their future adventures.



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The NHBA Pro Bono Program congratulates **Attorney Angelika Wilkerson Martin** who recently accepted a new grant funded staff attorney position with Legal Advice & Referral Center (LARC) as their Domestic Violence Specialist. For nearly two years, she applied her passion and legal knowledge to assist NHBA DOVE’s coordinator, Pam Dodge with project development, provision of technical assistance and support to volunteer lawyers, and working with crisis center advocates to create links for volunteer lawyers with clients seeking protection from domestic violence through NH courts. Angelika’s professional approach to problem solving, her kind and empathetic response to clients, and her collaborative approach to enhance access to justice has earned her respect from Pro Bono’s staff, volunteer lawyers, and our legal services partners.

In keeping with her professional ambition, this position will advance her objective of expanding services to survivors of domestic violence and stalking while remaining a partner with the Pro Bono Program and its DOVE Project.

“As I reflect on my time working for the Pro Bono Referral Program’s DOVE Project, I can’t help but feel immense gratitude. I’ve been fortunate to have worked with some of the best attorneys the NH Bar has to offer, both in terms of skill and professional dedication to advancing access to justice.”

– Angelika Wilkerson Martin



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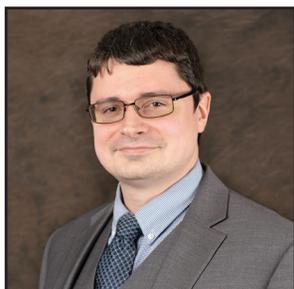
Nickolas S. Arnold

Nick has joined the firm as an associate and will be assisting our clients in all practice areas. He is a graduate of the University of Connecticut and received his J.D. from the University of New Hampshire School of Law. Nick also earned the distinction of Daniel Webster Scholar.



Dianne M. Ricardo

Dianne is a dynamic and versatile attorney with over ten years of experience. She works with clients to develop comprehensive estate plans to ensure their future planning goals are fulfilled. She also has substantial experience handling contested probate and fiduciary claims, including guardianships, will and trust contests, power of attorney accountings, and other probate litigation.



Morgan G. Tanafon

Morgan has joined the firm as an associate and will be assisting clients primarily in our general and business litigation and employment law practice areas. Morgan graduated from the University of Tampa and joined the Army Reserve, serving as a captain, before attending Boston University Law School, from which he received his J.D.



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policy, and the United States' position as a democratic ideal.

"I traveled on 40 congressional delegations around the world," says Goodlander. "The stories we heard from people who believe in the idea of America and the basic things we stand for, and our Declaration of Independence and our Constitution -- we are a beacon of hope."

A Nashua native, she attended Birch Hill Elementary School, where she was exposed to "a robust theater program" and an "extraordinary" teacher, Beverly Carter, while in the first grade. She and Carter stayed in touch over the years and when the teenage Goodlander sought a foreign exchange program in the Middle East while still in high school, Carter's son was able to find her a host family in Libya, making her one of few Americans to travel to that country at the time.

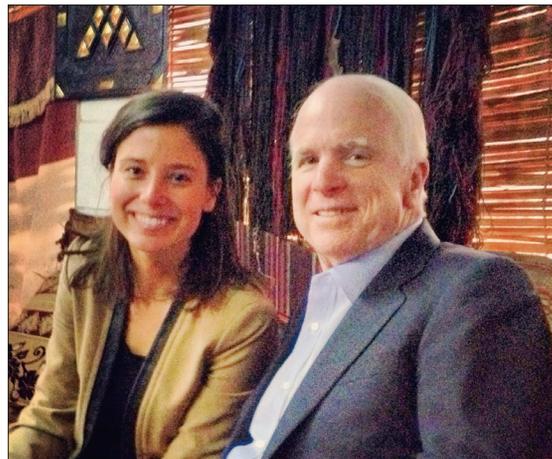
That high school was the Groton School, a private, preparatory boarding school in Groton, Massachusetts, where every day began with a chapel service and the school motto is "service is perfect freedom."

She went on to Yale University, majoring in history, and upon graduation went to work in the U.S. Senate, where she developed an interest in both legislation and the law, especially working as a policy advisor for Lieberman, himself a lawyer.

McCain, whom Goodlander met through her work with Lieberman, soon asked her to work with him on a bipartisan immigration bill and Goodlander hesitated, telling the Republican McCain she had voted for Obama. "He said something like 'I know that, goddamit,'" Goodlander recalls, and the deal was sealed.

She speaks with admiration of the crusty McCain, whose passion some staffers wrongly took for anger, calling him a leader with little ego who "really looked for diverse points of view."

Working on the immigration bill, Goodlander says, was "the honor of a lifetime... It crystallized the deep connection



Goodlander with Senator John McCain

between what we call domestic policy and foreign policy and broke down the barriers between those issues."

Though the bill never received a vote on the Senate floor, it became a blueprint for later proposals that included a path to citizenship for illegal immigrants, and Goodlander says she hopes it will be the basis for successful legislation in the future.

It also helped direct her own future.

"I was writing laws and participating in the legislative process," Goodlander says of her time at the Senate. "It took me pretty much three years of working on The Hill to really decide I wanted to go to law school."

So she did -- again at Yale -- after which Goodlander worked as law clerk for two federal judges, Chief Judge Merrick Garland of the U.S. Court of Appeals for the D.C. Circuit, and Justice Stephen Breyer of the U.S. Supreme Court.

She says the Senate's failure to consider Garland for the Supreme Court, after his nomination by President Obama, was "personally very painful."

"There were several members of the Senate I had come to know very well, including Sen. Lindsey Graham, who I've traveled the world with (as part of congressional delegations) and I respected deeply," she explains. "It was really painful to see them refuse to even meet with Judge Garland, and refuse to fill their constitutional responsibility to provide advice and consent. It was one really profoundly damaging incident that fits into an unfortunate pattern of constitutional hardball. There is abdication of duty and undermining of constitutional norms that have been so important in ensuring that our government functions."

She likewise sees the 2000 *Bush v. Gore* decision by the U.S. Supreme Court, in which the court handed victory to Bush after a contentious Florida recount, as "an extraordinarily damaging moment for the Supreme Court."

"They are still working to recover from that," she adds. "In the last four years there have been a series of additional incidents that really put a strain on the public's perception of the court."

Goodlander says she is glad President-Elect Joe Biden has called for a non-partisan committee to study court reform "because we've reached a point where it's

"She has deep roots in the Granite State combined with mind-blowing international professional experience. I feel profoundly fortunate to have her as a colleague in the New Hampshire bar, a community member, and a dear friend."

Leah Plunkett, Associate Dean at the UNH Franklin Pierce School of Law

confirmation wars, a constitutional lottery, and it shouldn't be that way."

Goodlander left Washington to join the New England firm of Skadden, Arps, Slate, Meagher & Flom drawn in part by its robust pro bono program, and stayed 11 months before being recruited as counsel for Trump's impeachment trial. Charged with abuse of power and obstruction of Congress, the president was acquitted by the Senate last February.

"It wasn't an easy experience," she says of the trial. "I spent a lot of time with librarians looking at 18th Century treatises on what the Constitution meant by high crimes and misdemeanors."

Back in New Hampshire, friend and fellow attorney Leah Plunkett, associate dean at UNH Franklin Pierce School of Law, invited Goodlander to teach administrative and constitutional law at the school, a position she still enjoys.

"Maggie is an all-star," Plunkett says. "I've had the pleasure and privilege of serving with her on the UNH Franklin

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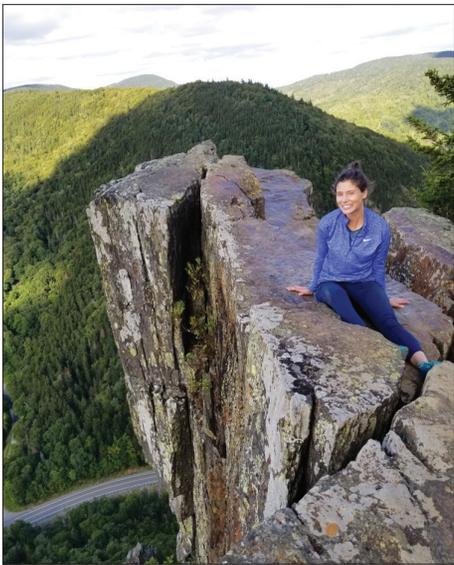
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Goodlander enjoying a moment of leisure.

Pierce School of Law faculty, as well as teaming up in many areas of civic engagement. Maggie's intellect, energy, integrity, and warmth are inspiring and energizing. She has deep roots in the Granite State combined with mind-blowing international professional experience. I feel profoundly fortunate to have her as a colleague in the New Hampshire bar, a community member, and a dear friend."

Goodlander also went to work on a bipartisan bill – passed by the state legislature but vetoed by Gov. Sununu -- that would have created an independent redistricting commission in New Hampshire.

One of those who labored with her on that bill, political strategist and voting rights advisor Lucas Meyer, calls himself "extremely fortunate" to have worked alongside her.

"Her sage wisdom has been invaluable," he says, "whether it was during the process to pass the bipartisan advisory in-

dependent redistricting commission which was vetoed by the governor, or more recently ensuring voting rights during this pandemic. Maggie's tenacity and dedication to our state has led her to quickly become a trusted voice and go-to legal expert."

Goodlander has recently been working on a project with the Ford Foundation on how to restore U.S. global leadership. She is also counsel to Co-equal, a group dedicated to effective oversight of the executive branch.

An intelligence officer in the U.S. Navy Reserve, where she is a lieutenant, she also serves on the board of directors of New Hampshire Legal Assistance and the World Affairs Council of New Hampshire, a nonprofit fostering discussion and citizen involvement in world affairs.

In her spare time, she and her husband like to rollerblade, and she has also taken up gardening and amateur birding during the pandemic.

She considers one of her crowning achievements her work with the Senate Homeland Security & Government Affairs Committee helping to develop and codify the Sergei Magnitsky Rule of Law Accountability Act. The measure authorizes the U.S. government to sanction those it deems as human rights offenders, freeze their assets and ban them from entering the country.

"It's a reminder that, at our best, the United States can be a leader and a beacon for people around the world," she says.

Goodlander will be the moderator for constitutional law scholar Erwin Chemerinsky's discussion of recent U.S. Supreme Court decisions impacting New Hampshire attorneys at the NHBA's Midyear Meeting in February.

LawLine Thank You



Pictured left to right: Monica Ellison, Bridgid Anderson, Attorneys Andrew Dean, Christopher Meier, Dennis Morgan, Leslie Leonard. John Gosnell, behind the camera.

The NH Bar Association would like to thank Cooper Cargill & Chant for hosting November's LawLine on Wednesday, Nov. 11, 2020. Attorneys Andrew Dean, Christopher Meier, Dennis Morgan, Leslie Leonard, and staff members Monica Ellison and Bridgid Anderson fielded more than 29 calls from the public on a variety of legal issues, including family law, probate, and criminal law.

We are currently recruiting LawLine hosts for 2021. Hosts are needed for the months of February, March, April, May, June, July, October and De-

ember. LawLine is held on the second Wednesday of each month from 6:00 pm to 8:00 pm. The Bar forwards phone calls from people who are looking for general legal advice and information to the LawLine host's office, and the host assembles a small group of volunteers to answer them for two hours. The Bar also provides a light dinner for all volunteers.

For more information or to volunteer to host a LawLine event in 2021, please contact NHBA LawLine Coordinator, Linda Sutton at lsutton@nhbar.org.

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NH Guard Judge Advocates Play Key Role in State's Pandemic Relief Efforts

By Maj. Luke Webster and Lt. Col Jeffrey Chang, NH National Guard Judge Advocates

At the direction of Gov. Chris Sununu, the New Hampshire National Guard is the primary military responder for domestic emergencies. Historically, those have included hurricanes, floods, wildfires and civil disturbances. The ongoing COVID-19 pandemic has proven to be an extraordinarily different kind of backyard crisis and represents the longest Guard activation in modern history.

During the response, NHNG judge advocates have demonstrated their subject-matter expertise by drawing on their unique blend of military and civilian legal experiences to provide timely and accurate legal guidance on a wide variety of unprecedented issues. The majority of National Guard judge advocates are traditional or part-time Army and Air Force officers who are experienced civilian attorneys in a diverse range of practice areas in the public and private sector. They serve an essential role as trusted legal advisors to commanders and support staff of the NHNG.

Judge advocates normally rotate through multiple areas of law during their service commitment. They include civil law (legal assistance to soldiers), administrative law (regulatory), contract and fiscal law, labor/employment law, international and operational law, and justice (criminal). Domestic operational law is a more specialized area that encompasses aspects of many of the above-referenced disciplines, which have a nexus with the military's response to the domestic emergencies. Generally, the senior full-time Guard judge advocate of each state or territory is a subject-matter expert in this area of law.

The official motto of the National



Left to right: Maj Natalie Friedenthal, Lt. Col. James Pappaioanou, Maj. Luke Webster, Lt. Col, Jeffrey Chang, Sr. Airman Anna Arnold.

Guard is "Always Ready, Always There." During the state's pandemic relief efforts, which began in late March of this year, several NHNG judge advocates have answered the call and performed essential roles at various levels of the organization.

As COVID-19 started to spread in the United States, NHNG judge advocates have assisted in the planning and preparation for potential missions by reviewing and interpreting a vast amount of information and guidance. When the governor activated hundreds of NH guardsmen, our judge advocates ensured they were fully prepared from a legal perspective. Throughout the response, our judge advocates have helped the NHNG navigate an evolving minefield of legal issues – some entirely new and others variations of more traditional ones. They consistently have provided timely and sound legal advice based upon complex regulatory guidance to ensure that missions – inclusive of mission tasks, usage of personnel and equip-

ment – were both compliant and executed without delay.

Our judge advocates have collaborated successfully with other staff sections and numerous government attorneys (military and civilian) from federal and state agencies to find legally permissible solutions and ensure a unity of effort among key stakeholders. They have been integral in the drafting, negotiation, and execution of multiple interagency agreements, which enabled the NHNG to provide new types of support to other federal and state agencies.

They have interpreted regulatory guidance and provided legal advice on matters arising

from COVID-19, affecting day-to-day operations of the NHNG to include guardsmen, civilian employees, and facilities. Lt. Col. Jim Pappaioanou, who is responsible for providing oversight of legal in- and out-processing of NH guardsmen, noted that this mission, "has highlighted how agile and adaptable our judge advocates need to be in providing legal support for domestic operations, in comparison to attorneys engaged in more traditional areas of practice."

The work of our judge advocates has been integral to the NHNG's ability to support the state's ongoing relief efforts, which has included eight different lines of effort: fixed and mobile testing teams, mapping, PPE warehouse and distribution, support to the New Hampshire Food Bank, augmenting the state's unemployment call center, cybersecurity support, and establishing 14 alternate care/surge locations across the state.

More than 700 NHNG soldiers and airmen have been activated in support of those missions.

As National Guard officers, judge advocates have sworn an oath to defend the Constitution of the United States and the Constitution of the State of New Hampshire against all enemies, foreign and domestic. COVID-19 has certainly proven to be an adversary in many ways to the citizens of New Hampshire. By remaining mission-focused and adaptable, our judge advocates will face these continued challenges head-on and always be ready when our nation and state needs them to do their part to accomplish the National Guard's mission.

The views presented above are those of the authors and do not necessarily represent the views of the U.S. Department of Defense and its components.

Maj. Luke Webster is licensed to practice in New Hampshire and Vermont and currently practices education law. He has served as a judge advocate since 2011 in both the Vermont and New Hampshire National Guard. He currently serves as the 197th Field Artillery Brigade Judge Advocate based in Manchester. He has supported the NHNG response to COVID-19 since March 2020.

Lt. Col. Jeffrey Chang is the General Counsel of the New Hampshire National Guard, and is licensed to practice in New Hampshire, New York, and New Jersey. He has served as a judge advocate since 2006 in both the New Hampshire and New York National Guard and on multiple active-duty tours. Prior to 2008, he practiced matrimonial law in Garden City, New York.

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- Jim Cowles, Walker & Varney P.C., Class of 2015

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Comparison of Benefits under the Vaccine Injury Compensation Program and the Countermeasures Injury Compensation Program	
Vaccine Injury Compensation Program (VICP)	Countermeasures Injury Compensation Program (CICP)
3 Year statute of limitation from first symptom onset or 2 years from the date of death. 42 USC 300aa-16.	1 year Statute of limitation from date of countermeasure. 42 CFR 110.42.
Burden of proof: preponderance of the evidence. 42 USC 300aa-13.	Burden of proof: compelling scientific evidence of direct causal connection. 42 CFR 110.20.
Administered through the Court of Federal Claims. 42 USC 300aa-12.	Administered through an administrative agency of Health and Human Services; no judicial review. 42 USC 247d-6e.
Benefits include past and future pain and suffering (capped at \$250,000). 42 USC 300aa-15.	No pain and suffering damages. 42 CFR 110.2.
Funded by excise tax on covered vaccines. 42 USC 300aa-15. (Compensation is through the Vaccine Injury Compensation Trust Fund)	Countermeasures generally funded by emergency appropriation of Congress. 42 USC 247d-6e.
Can reject award in the program and file a civil lawsuit. 42 USC 300aa-21.	No lawsuit unless fits the willful misconduct exception. 42 USC 247d-6d.
Attorneys' fees and costs paid for by the program for claims filed with a reasonable basis. 42 USC 300aa-15.	No provision for payment of attorneys fees and costs. 42 CFR 110.44.
Created by Heather Menezes, Shaheen and Gordon.	

Benefits from page 1

ter measures fund so that people know about it. But who knows about it? No one knows about it," she said. "They're likely not going to promote the CICP because of concern people won't get the vaccine. But the biggest thing is that there is a one-year statute of limitations for filing."

Menezes also explained that someone injured by a countermeasure, such as a COVID-19 vaccine, right now, could not seek recovery from the manufacturer.

"Potentially liable parties such as vaccine manufacturers are immune from liability under the Public Readiness and Emergency Preparedness Act. That individual could also not seek relief under the VICP. The only recovery available for that person is the CICP. If he or she does not make a claim within 1 year, then that person has no other course of action for that injury. So people need to know about this program."

The one-year statute of limitations for the CICP runs from the time the countermeasure was administered.

"A lot of people don't know they're dealing with an injury caused by a vaccine and they're not immediately thinking, 'let's call a lawyer.' I think most people wait and hope that their pain will go away. But if a person's injury is from a pandemic countermeasure, then that person will be out of luck if he or she doesn't file within a year, period."

While most vaccine-related side effects would be apparent within six weeks to two months, Menezes explained, it is unknown if this would be the case for a COVID-19 vaccine. And the compensation provided by the CICP applies to more than vaccines, she stressed.

"Benefits can apply to any countermeasure that's applied to the pandemic. This includes vaccines but also ventilators, medications, antibody treatments—anything that could conceivably be considered a countermeasure to the pandemic falls under this countermeasures fund," Menezes said.

One difficulty with receiving benefits for countermeasures vaccinations and procedures is the result of the PREP Act that Menezes mentioned, which addresses liability immunity.

A declaration under the PREP Act was made by the Secretary of Health and Human Services on March 10 and made

effective February 4, 2020, for certain medical products to be used against COVID-19.

Countermeasures include any vaccination, medication, device, or other item recommended to diagnose, prevent or treat a declared pandemic, epidemic or security threat.

The PREP Act, enacted on December 30, 2005, is the law which authorizes the CICP to provide benefits to individuals or the estates of individuals who sustain a covered serious physical injury as the direct result of countermeasures under a PREP Act declaration.

According to Menezes, the VICP is the better of the two programs because it provides more benefits and protections to individuals than does the CICP. (See comparison chart above)

The *Bar News* filed a FOIA request with the Health Resources and Services Administration, the agency responsible for administering both the VICP and the CICP, asking for records regarding any benefits paid for COVID-19 related injuries from these programs.

While there have been claims filed, according to the DICP, a records search conducted by the agency stated they have not compensated any COVID-19 related claims at this time.

Menezes believes the public has a right to know how these programs are being administered and that the issue is highly time sensitive. For many, the financial consequences of not receiving benefits, given the one-year statute of limitations could be catastrophic.

"If someone is hospitalized for months and he or she is trying to learn to walk again, how could that person file a claim in one year? A one-year statute of limitations is simply unjust," she says.

"I was appalled to learn that vaccine manufacturers are immune from any liability for the COVID-19 vaccine and that any injuries from the COVID-19 vaccine will not be part of the VICP."

While most vaccines are administered as a public health necessity and very few people experience injuries, Menezes said there is no denying that there can "sometimes be very serious injuries from vaccines."

"Regarding the COVID-19 vaccine, it's horrible that the public is expected to gamble on these vaccines but if there is an injury, there is little available to help with an injury."

NHLAP from page 3

lot more referrals.

What are the challenges ahead?

The fact that we don't have adequate resources in New Hampshire to keep up with this potential surge is the biggest challenge ahead. I think it has the potential to create a crisis. New Hampshire has an overall inadequate number of mental health providers to meet demand.

What is being done to deal with this shortage?

One thing I'm doing is having volunteer trainings over Zoom in January. I think we're going to need to rely on mentors and volunteers to get people through safety checks until they can see professionals because there's such a wait list. I've also done extra training dealing with suicide prevention. Our board has also been talking about whether it's feasible to get extra funds to help people through a crisis and whether this is something we should be doing. I see this as one big barrier right now. Big LAPS have in-house services. Tomorrow if I had my wish list and we had a budget of a couple of million dollars I'd have a LADAC on staff and someone to do counseling, but we don't. Those are some things we've identified. And it's just hard when the phones aren't ringing and I know there are people that need help. Even before the pandemic we weren't reaching the number of people that the statistics say we should be.

Do you think Bar leadership is listening?

I think Bar leaders are finally under-

standing all these different things we're talking about because they're experiencing the isolation and the anxiety for themselves as well as the lack of social stimulation and support. I think people are understanding what it's like to be depressed because this whole thing feels like depression without being depressed.

Are there any programs in the works?

One is the volunteer training program I mentioned. We have a lot of people who have become sober and want to give back. I'd like to find more people who have dealt with anxiety and depression as well. Another program will deal with lawyers who have been through these different scenarios and have come out the other side. Their stories show that these issues don't have to ruin your career. Right now we have four people committed and we're looking for one more.

How high have the number of referrals been lately?

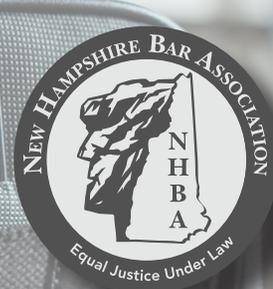
The numbers are a little bit higher right now. I think people are realizing that this pandemic is lasting longer and that people are at the end of their reserves. We're getting a lot of calls about mental health and I do think it's helpful that, generally, the press is talking about these issues during the shutdown. The statistics I've been reading is that over half of Americans are presenting with anxiety and depression that meets diagnostic criteria. So if we have a population of lawyers that are higher than the national average for anxiety and depression, my guess is we are looking at the potential for a full blown crisis.

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We're building a repository for generations to come and we want your stories, observations, tips, and photos on how COVID-19 has affected your practice.

Send your submissions to Publications Editor Scott Merrill at smerrill@nhbar.org



Adapt or Perish: Social Media and the Law in a Changing World

The Hype Machine: How Social Media Disrupts Our Elections, Our Economy, and Our Health – and How We Must Adapt
Sinan Aral

Hyper Analytic Inc.
Hardcover: 416 pages

Review by Patrick Arnold

When Xerox introduced the modern fax machine in the early 1960s, no one questioned its potential to influence elections. Congress never held hearings on how the car phone could be an instrument for nefarious co-conspirators. When compact discs supplanted cassettes, did we question whether they posed a threat to democratic institutions? No. But all technology is not created equal. Social media is different. In *The Hype Machine*, MIT scientist Sinan Aral explores the social media industrial complex. The book takes readers on a profound journey, from the idealistic genesis of social media platforms to the tangible threats this technology poses to our way of life.

Aral begins by discussing how we arrived in the New Social Age. The World Wide Web developed amid a promise of interconnectedness and easy access to knowledge. It would bring us closer together and render us better informed. What a great sell. Instead, the last decade has welcomed influencers flagrantly pushing consumer products, bots directing fake news stories to target audiences, and unprecedented data-mining algorithms. Aral next spends

some time deciphering the economy of the social media ecosystem and explains the neurological factors exploited by the system. This is your brain. This is your brain on social media. Aral provides robust arguments for how the system is designed to “wire us.”

Thereafter, readers find the compelling and disturbing crux of the book: the societal transformations. Social media has permeated every aspect of modern life. Though the 2005 version of one’s self would disbelieve much of what has transpired in 2020, can one imagine explaining Facebook jail and “snoozing” friends to one’s younger self? Interpersonal relationships have also changed. Are we friends on Facebook? Spoiler: it means something different than in the real world.

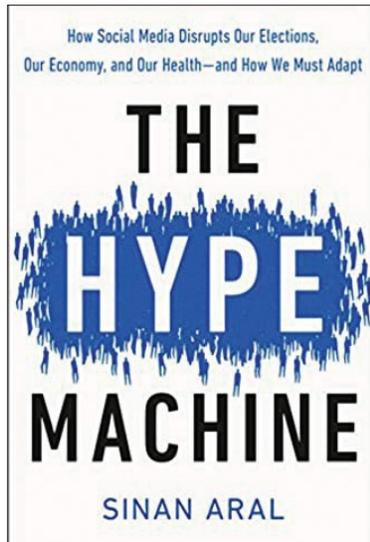
In business, social media has evolved into an indispensable tool for branding, marketing, and HR management. Photographic evidence from spring break was never a best practice, but now it reflects poorly on the company brand. This brings us to social media’s role in political discourse and elections. Gone are the

days when a group of corporate leaders or credentialed professionals must take out a full-page newspaper ad to highlight some issue of concern. One need only secure some high-profile retweets. Unsurprisingly, the political weaponization of misinformation plays a prominent role in the book. The rumor mill formerly relegated to tabloids now enjoys widespread consumption. By design, reasoned discourse has been replaced by ad hominem quips of no more than 280 characters and memes intended to rouse emotional fervor. Aral incorporates many recent examples from across the political spectrum, though the book was published prior to the 2020 general election.

Aral uses the remaining chapters to discuss the inadequacy of current laws and jurisprudence in meeting the challenges of social media. Society is struggling to catch up too. The ability to connect with old friends and relatives across the miles is an understandably popular feature of social media. The prevalence of cyberbullying and a perceived license for unreasoned vitriol, however, is a costly feature. Should we be comfortable with content-based censorship? Unlike the clear role of the fact

finder in a court proceeding, social media enjoys no such precision in rendering judgment on accuracy or appropriateness of posts.

I highly recommend *The Hype Machine* for general audiences and legal practitioners alike for its brilliant research and engaging prose. The book tackles issues and questions especially relevant to attorneys. Social media evidence is now routinely used in every type of litigation. The evolution of social media has invited new causes of actions, new debates on antitrust, privacy, censorship, and new implications for professional misconduct. Moreover, social media is not going anywhere. Accordingly, H.G. Wells and Sinan Aral would advise, we must adapt or perish.



Attorney Patrick Arnold focuses his practice in the areas of civil litigation, criminal defense, and business matters. Attorney Arnold served as a director of the Manchester Development Corporation from 2012 until 2014. He holds membership in the New Hampshire Bar Association, and is a member of the NHBA Section on Business Litigation.

HAPPY HOLIDAYS
Best wishes for a happy, healthy, and prosperous 2021
from our staff to yours.

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Equal Justice Under Law

Diversity from page 1

law school and in the broader community; and make additions and/or changes to the law school’s educational programming to promote knowledge of race and the law, including in the training of lawyers and the provision of legal services.

With more than 75 percent of students at the law school coming from out of state and half of those choosing to remain, Carpenter says she believes the law school can play a significant role in diversifying New Hampshire.

Some of the task force’s recommendations, including the scholarship that Nieves is spearheading, are already being implemented, Carpenter says.

“We are currently raising money for scholarships to make a legal education accessible to diverse populations of students and working to develop an internship program for law firms that would guarantee a summer job for diverse students after their first year of law school,” she says. “We believe that this kind of partnership will help diversify law firms, will expand a pipeline for diverse attorneys in New Hampshire and beyond, and will be attractive to prospective students from diverse communities. And we are increasing our outreach in hiring as we seek to expand the faculty.”

So far, Carpenter says the school has over \$100,000 in a fund dedicated to Diversity, Equity, and Inclusion, and \$30,000 in the Scholarship Fund.

“We can endow the scholarship fund starting at \$50,000, so we must raise more money to have a lasting impact – and we encourage those interested in contributing

to scholarships for diverse populations of students to reach out to our development director, Maria Gudinas.”

Nieves’s hope is to reach \$200,000 in order to provide two or three students up to \$20,000 a year in assistance.

For Nieves, who is married to a New Hampshire native and has made New Hampshire his home, the need for assistance the scholarship will provide reminds him of his own experience struggling to pay for school.

“My parents did not have the resources to provide for college or law school since they were taking care of my grandmother and other matters, so I worked two to three jobs at a time while attending college full time and took loans for law school. A scholarship like this would have been a great help.”

When Nieves isn’t working as a patent attorney or advocating for diversity in New Hampshire, he volunteers by mentoring students and introducing local minority owned businesses to larger corporations for exposure and the potential of providing services. He also has a ministry focused on helping those less fortunate and praying for the sick.

“Prior to COVID, I enjoyed praying with the homeless on Elm Street and taking them for a meal while getting to know them. Some would be passing through so I would be able to direct them to a local shelter, while others were native to the region, but everyone had a story, and many were suffering.”

For more information about the Diversity, Equity, and Inclusion Scholarship Fund contact Maria Gudinas, Director of Development, maria.gudinas@law.unh.edu or 978-430-4253



GUIDE

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Calendar Overview

JANUARY 2021

7 Thursday • Noon - 2:00 p.m.
LLC Practice: Best Practices in Drafting Operating Agreements for New Hampshire Multi-Member LLCs

- Webcast
- 120 min.

12 Tuesday • Noon - 1:00 p.m.
Tech Tuesdays! Cloud Computing - Pros, Cons and Ethical Issues with Barron Henley

- Webcast
- 60 min. ethics/prof.

13 Wednesday • Noon - 1:00 p.m.
Traps for the Unwary: Business Corporations

- Webcast
- 60 min.

26 Tuesday • Noon - 1:00 p.m.
Tech Tuesdays! Electronic Document Management for Lawyers with Paul Unger

- Webcast
- 60 min.

27 Wednesday • Noon - 1:00 p.m.
The Supreme Court 2020-21 Term: An Early Assessment and a Look Ahead

- Webcast
- 60 min.

28 Thursday • Noon - 1:00 p.m.
LLC Practice: What Every NH LLC Formation Lawyer Should Know about the Revised New Hampshire Limited Liability Company Act and NH LLC Case Law

- Webcast
- 60 min.

FEBRUARY 2021

5 Friday • TBD • **VIRTUAL EVENT**
NHBA Midyear Meeting

9 Tuesday • Noon - 1:00 p.m.
Tech Tuesdays! Get The Waste Out of Your Practice - How To Apply Lean Six Sigma Principles to a Law Office with Barron Henley

- Webcast
- 60 min.

10 Wednesday • Noon - 1:00 p.m.
Traps for the Unwary: Litigation

- Webcast
- 60 min.

11 Thursday • Noon - 1:00 p.m.
Protesting Puts Lawyers in a Precarious Position with Stuart Teicher

- Webcast
- 60 min. ethics/prof.

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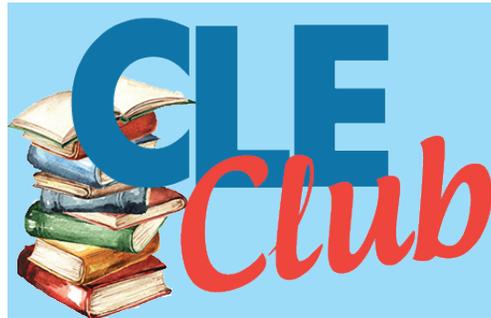
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FRIDAY, FEBRUARY 5, 2021

SCHEDULE-AT-A-GLANCE



PRE-EVENT:

Exhibitor Showcase

EVENT:

Welcome/Bar President

In Memoriam

CLE: Erwin Chemerinsky, Part I
(Recent SCOTUS Decisions)

Break & Exhibitor Showcase

Gender Equality & President Awards

Committee Hollman Award

CLE: Erwin Chemerinsky, Part II

Break & Exhibitor Showcase

CLE: Erwin Chemerinsky Live Q&A
with moderator Maggie Goodlander

Lunch Break & Exhibitor Showcase

Pro Bono Awards

CLE: Robert McWhirter + Live Q&A
(13th Amendment)

Break & Exhibitor Showcase

CLE: Robert McWhirter Live Q&A

POST-EVENT:

Virtual Chocolate Tasting
(additional fee applies)

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UP-TO-THE MINUTE TALKS ON KEY CONSTITUTIONAL LAW ISSUES

FEATURED PRESENTATIONS

UNITED STATES SUPREME COURT UPDATE



Constitutional law scholar **Erwin Chemerinsky** will review key U.S. Supreme Court decisions of the past year, with a focus on those most likely to impact New Hampshire attorneys. A live Q&A session follows, moderated by **Atty. Maggie Goodlander**.

Chemerinsky, Dean of University of California Berkeley Law, is the author of eleven books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction. He frequently argues appellate cases, including in the United States Supreme Court.

Goodlander is a professor of Constitutional Law at Franklin Pierce UNH School of Law. Among her many accomplishments, she served as a law clerk to U.S. Supreme Court Justice Stephen Breyer and Chief Judge Merrick Garland of the U.S. Court of Appeals for the District of Columbia, and as a senior advisor to U.S. Senators John McCain and Joseph Lieberman.

THE 13TH AMENDMENT: FIXING THE FRAMERS' FAILURE



Robert J. McWhirter believes that although the Constitution embodies “created equal” and “the People,” the Framers failed to resolve the conflict between freedom and slavery. This talk on the 13th Amendment discusses how America began to grow into itself. A live Q&A session follows.

McWhirter is a nationally and internationally known speaker and author on trial advocacy, immigration law, and the history of the Bill of Rights. He is a frequent guest on Arizona Horizon and KJZZ as a Constitutional expert and historian. He is a Certified Specialist in Criminal Law with the State Bar of Arizona.

WE SAVED THE MOST DELICIOUS FOR LAST!



Stay after the Meeting for a **virtual chocolate tasting** by Cocoa Beantown (Boston, MA). The additional \$12 registration fee (*\$50 value*) includes samples of fine craft chocolates from several New England chocolatiers and a tasting experience guided by an expert chocolate educator. (*Never fear, we'll send you the samples ahead of time!*)

Register by Jan 20 to be a part of this event.

This special networking social is sponsored by NHBA's New Lawyers Committee.



DUE TO EXCEPTIONAL TIMES, WE LOWERED THE REGISTRATION PRICE FOR THIS YEAR'S ONLINE EVENT TO JUST



(*Chocolate tasting additional \$12)

REGISTER BY JANUARY 25, 2021



Tech Tuesdays *with* Barron Henley & Paul Unger



Barron Henley



Paul Unger

Join us for Tech Tuesdays with Barron Henley and Paul Unger from Affinity Consulting! These vital programs will take a deep dive into technology for the law office. All programs run from Noon to 1:00 p.m.

- ▶ **Cloud Computing – Pros, Cons and Ethical Issues** - Barron Henley 1/12/21
- ▶ **Electronic Document Management for Lawyers** - Paul Unger 1/26/21
- ▶ **Get the Waste Out of Your Practice – How to Apply Lean Six Sigma Principles to a Law Office** - Barron Henley 2/9/21
- ▶ **Avoiding Death by PowerPoint/Courtroom Presentation Technology** - Paul Unger 2/23/21
- ▶ **It's Time For an Upgrade – Much Better Methods for Drafting Complex Documents** - Barron Henley 3/9/21
- ▶ **Document Assembly Technology – What It Can Do For Your Practice and How to Evaluate the Players** - Barron Henley 3/23/21
- ▶ **Microsoft Excel Power Tips for Legal Users** - Barron Henley 4/13/21
- ▶ **Dropbox for Legal Professionals – How to use it Safely, and is it Right for your Organization?** - Paul Unger 4/27/21
- ▶ **Communication Breakdown – It's Always The Same (But It's Avoidable)** - Barron Henley 5/11/21
- ▶ **How to Protect Yourself and Preserve Confidentiality When Negotiating Instruments** - Barron Henley 5/25/21
- ▶ **Avoiding Malpractice: The Good, the Bad and the Ugly of Legal Technology** - Paul Unger 6/8/21
- ▶ **What Every Lawyer Should Know About Developing a Cybersecurity Plan** - Paul Unger 6/22/21



New Hampshire LLC Formation Practice Series

Are you forming an LLC Practice or are you looking for more information on the ins and outs of LLC Practice in NH? Look no further! These programs cover all the issues you need to know.

- I. **Best Practices in Drafting Operating Agreements for New Hampshire Multi-Member LLCs** - January 7, 2021 Noon - 2:00 p.m. ~120 min.
- II. **What Every NH LLC Formation Lawyer Should Know about the Revised New Hampshire Limited Liability Company Act and NH LLC Case Law** - January 28, 2021 Noon - 1:00 p.m. ~60 min.
- III. **Operating Agreements for NH Single-Member LLCs Whose Members are Individuals & for Those Whose Members are Entities** - February 18, 2021 Noon - 1:00 p.m. ~60 min.
- IV. **LLC Formation Practice-Risks Under the NH Rules of Prof. Conduct & Under NH Malpractice Law** - March 11, 2021 Noon - 1:00 p.m. 60 min. ethics/prof.
- V. **Federal & NH Tax Provisions Useful or Required in the Operating Agreements of LLCs Taxable as Partnerships & S Corporations** - April 1, 2021 Noon - 1:00 p.m. ~60 min.

Faculty

John M. Cunningham, Law Office of John M. Cunningham, PLLC, Concord

Amanda L. Nelson, Artium Amore, PLLC, Dover



Traps for the Unwary

Brought to you by the NHBA's New Lawyers Committee

Noon- 1:00 p.m.
Webcast Only • 60 min.

- ▶ **January 13, 2021 - Business Corporations**
Katherine Hedges/Susanne Gilliam
- ▶ **February 10, 2021 - Litigation**
Kirk Simoneau
- ▶ **March 17, 2021 - Probate**
Andrea Schweitzer/Caitlin McCurdy
- ▶ **April 14, 2021- Family Law/Divorce**
Katerina Kalabokis
- ▶ **May 12, 2021 - Landlord Tenant**
Laurie Young/Katherine Hedges
- ▶ **June 2, 2021 - Automobile Accidents**
Stephanie Tymula/Nicole Perreault
- ▶ **June 16, 2021 - Workers' Compensation**
Laurie Young/Lance Tillinghast

Thank you to the NHBA's New Lawyers Committee for organizing these programs for NH Bar members!



The Supreme Court 2020-21 Term:

An Early Assessment and a Look Ahead

Wednesday, January 27, 2021

Noon- 1:00 p.m.
Webcast Only • 60 min.

Supreme Court 2020-21 Term: An Early Assessment

- The Affordable Care Act redux
- Religious liberty and non-discrimination laws
- Separation of powers and the administrative state
- Aftermath of the 2020 election

The Supreme Court's Future

- The death of Justice Ruth Bader Ginsburg
- The confirmation of Justice Amy Coney Barrett
- Stare decisis and doctrinal shifts
- Institutional reform?

Q & A throughout

Faculty

Justin S. St. James, Program Moderator/CLE Committee Member, Justin St. James Attorney at Law, Andover

John M. Greabe, UNH Franklin Pierce School of Law, Concord



Signposts on the Tax Road

Wednesday, March 10, 2020

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

Have you ever wondered what lurking tax issues might trip you up in your practice?

Review common tax issues that could arise in general practice, including issues in: formation of business entities, advising business entities, divorce proceedings, estate planning considerations, estate and trust administration concerns and strategies, personal injury rewards and damages, personal injury settlements, and other areas.

Faculty

Lucy S. Rooney, Program Chair/CLE Committee Member, Connolly Law Offices, PLLC, New London

Daniel J. Connolly, Connolly Law Offices, PLLC, New London

Amy E. Drake, McLane Middleton Professional Association, Manchester

Beth L. Fowler, McLane Middleton Professional Association, Manchester

Anu R. Mullikin, Devine, Millimet & Branch, PA, Manchester

Kristin A. Ross, Van Dorn, Curtiss, Rousseau & Ross, PLLC, Orford

Gregory T. Uliasz, Feniger & Uliasz, LLP, Manchester



For more information go to nhbar.org/nhbacle

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... who wears sweatpants to video meetings because the camera only shows them from the waist up.

Wherever (and however) you do your work these days - and however you celebrate this season - we're here for you.

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Honorable H. Philip Howorth

The Honorable H. Philip Howorth, 87, retired judge of the Nashua District Court, passed away at his home with his family, Monday morning, November 30, 2020, after a period of declining health.

A longtime resident of Nashua, Judge Howorth was born in Columbia, Maryland on July 11, 1933, the only child of the late Harmon and Denise (Johnson) Howorth.

He lived in Narrows, Virginia and Rock Hill, South Carolina during his youth, and went on to graduate from Phillips Exeter Academy. He earned a bachelor's degree from Haverford College in Pennsylvania in 1954 and his Juris Doctor from Harvard University Law School in 1957. An Army veteran, Judge Howorth served in the reserves until his discharge in November 1962.

He began his career in Massachusetts working for Gerry Rappaport, who developed Charles River Park. At the start of his career in New Hampshire, he was associated with Orr & Reno in Concord; the New Hampshire Savings Bank; Hamblett & Kerrigan; Sanders and Associates; and Winer, Lynch, Pillsbury and Howorth (now Winer and Bennett) in Nashua. In 1974, he became corporation counsel for the city of Nashua, a position he would hold until 1984. That year, Governor John Sununu appointed him to be Associate Justice at the Nashua District Court. From 1984 until his retirement in 2003, Judge Howorth served first as associate and then as chief justice of the Nashua District Court. He was well known for riding his bicycle every day to and from the Courthouse, even in inclement weather and dangerous traffic.

Judge Howorth held memberships in the Nashua and New Hampshire Bar Associations, served as treasurer of the Pine Haven Boys Center in Allenstown, New Hampshire, as well as the Mary Sweeney Home in Nashua. He was an experienced sailor and an accomplished cellist, an instrument he played throughout his adult life. Judge Howorth was also a communicant of St. Patrick Church, where he was a member of the choir for many years.

Over the years, he and his wife traveled extensively, visiting Bermuda, Mexico, the Bahamas, and Europe on many occasions. He especially enjoyed Italy, where he explored Sicily and even made the journey to Mount Etna.

Judge Howorth is survived by his wife of 58 years, Anne Haug Howorth, whom he married on August 25, 1962; three children: Claire Kieley and her husband Kevin, Joanna Howorth and Paul Howorth; four grandchildren: Andrez Howorth, Sarah Howorth, Kathryn Kieley and Charlotte Kieley; also many nieces, nephews and cousins.

Donations may be made in his memory to Pine Haven Boys Center, 133 River Road, Allenstown, NH 03275. Arrangements are in the care of the FARWELL FUNERAL SERVICE. www.farwellfuneralservice.com

To Plant Memorial Trees in memory, please visit our Sympathy Store.

Edmund J. Murphy

Edmund J. Murphy, Esq. of Manchester, died November 5th, 2020 after a period of declining health.

He was born in Boston, MA on August 18, 1941, the son of Martin J. and Anne D. (McConnell) Murphy.

Ed graduated from Bishop Bradley

High School in 1959 and St. Mary's University in Halifax, in 1963 (it should have been 1964, but he hated hitchhiking the airline highway back and forth to school, so he did it in three).

He earned his juris doctorate from Suffolk University in Boston and was a self-employed attorney on Manchester's West side for many years. Ed was a member of the NH Bar and Manchester Bar Associations and a lifetime member of the Benevolent Protective Order of Elks and the Raphael Social Club (the other bar associations).

Ed is survived by his beloved lovely bride Elaine "Sammy" (Lesmerises) Murphy, daughters Valerie "Val" Murphy and Jennifer "Jenna-bear" Park - who are and will always be his heart.

His whole world revolves around his grandsons Ethan, Payton, and Wyatt and he will miss them terribly. Ed is thrilled to be reunited with their infant daughter Elizabeth Tara.

Ed, "the baby" of the Murphy family was predeceased by his five siblings, Ann Marie Clancy, Dorothy "Dot" Murphy, Marguerite "Peg" Makere, Joan Hochschartner, and Felix Martin "Phil" Murphy.

Ed's friends are his family by affection, and he's thrilled to catch up with the guys who got there before him. Heaven is a little louder, wilder, and more musical today.

Ed lived most of his life by the ocean. His family owned the McConnell Villa



and the Josephine in Hampton, NH and there are myriad stories of youthful seaside hijinks. Ed returned to the seaside with homes at Granite Point and Fortunes Rocks in Biddeford, Me. There he spent some of his happiest days with his family, friends, and "woofies" - Mickey, Lucky, Max, and Moxie.

Donations may be made in his memory to the Manchester, NH Food Bank, 700 E. Industrial Drive, Manchester, NH 03109.

A CaringBridge Site was created for Edmund. Please feel free to post pictures and send memories for his family to keep for the future.

Visit Edmund's Site: <https://caring-bridge.org/visit/edmundmurphy>. Site Name: edmundmurphy

To send an online message of condolence, please go to www.lambertfuneral-home.com

Benette Pizzimenti

Benette Pizzimenti (nee Steindam), 72, passed away peacefully in her home on Wednesday, November 18, 2020 after a long-standing battle with Parkinson's Disease. Benette and her late husband, Dennis, had been residents of Concord/Bow since 1973.

Benette was born in Brooklyn, NY and grew up in Valley Stream, NY. She attended Valley Stream High School, where she met and began dating Dennis. She graduated from the State University of New York at Buf-



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falo in 1970 magna cum laude with a BA in Art History. She received a MA in Library Sciences from the University of Washington and, upon moving to Concord in September 1973, went to work as a librarian for the Concord Public Library. She left the library in 1981, to attend Franklin Pierce Law School, from which she graduated with a JD degree in 1984. She spent the majority of her law career working for Martin, Lord & Osman, PA in Laconia, NH, until her retirement as partner in 2015.

Benette was always involved in her community, be it through her involvement with Hadassah at her beloved Temple Beth Jacob, volunteering her time with local and national political campaigns, championing women's rights, and volunteering with the Visiting Angels. She was a long-time member of the State of NH Supreme Court Professional Conduct Committee, acting as Vice Chair from 2002-2014, and a Trustee on the board of the Baker Free Library in Bow. She loved gardening, playing Mahjongg, and making art with her granddaughter, Franny. She was extraordinarily kind, generous, gentle, strong, and brave.

Benette was married to the late Dennis Pizzimenti, her soul mate, for almost 48 years. Benette is survived by their daughter, Julia Mehrmann; her son-in-law, Jake and two grandchildren, Frances and Silas. Benette is also survived by her two brothers, Michael Steindam (Lois Simon) and Richard Steindam (Mara), both of New York, as well as by Dennis' two brothers, Bruce and David, and countless friends and family.

There will be a private graveside ceremony.

Frederick Smith, Jr.

Frederick Smith, Jr. passed away in the early morning hours of Tuesday, November 10th, at the age of 91 at Taylor Community in Laconia, NH.

He is survived by his wife, Jane Bennett Willingham Smith of Laconia, NH, daughters Allison Hill Smith of Ithaca, NY, Tory Tashian of Novato, CA, and his son Adam Smith of Arlington, VA. He is also survived by Jane's daughters Sara, and Pam, sons Fred, Mark, and the late Christopher Willingham, granddaughters Leah and Ellery, and grandson Mackintosh.



Fred was born in New Hampton, NH to the late Frederick and Grace (Vohr) Smith on June 28, 1929, and was the youngest of three children (Jinga and Robinson). His father was the Headmaster of The New Hampton School and his mother taught at the school. He attended kindergarten in Bristol, NH, grade school in a one-room schoolhouse in New Hampton, and went on to study at The New Hampton School where he excelled in academics, earning the school's highest award, The Meservey Medal. He also was an outstanding athlete, playing baseball, soccer, hockey, and golf.

Fred entered Dartmouth College in June of 1945, shortly before his 16th birthday. He went on from Dartmouth to Cornell Law School, graduating in 1952, and then joined the law firm of Upton, Sanders, and Upton in Concord, New Hampshire.

After a year with the firm, Fred was commissioned as an Ensign in the U.S.

Navy, serving on the USS Platte in the Pacific from 1953 to 1957. The USS Platte provided logistics support for the US 7th Fleet Operations out of San Diego Harbor, heading to Subic Bay in the Philippine Islands, Formosa, Hong Kong, and Sasebo.

Following military service, Fred moved to Washington, DC to pursue a career in government service.

He joined the State Department as an Attorney-Advisor in the Office of the Assistant Legal Advisor for Inter-American Affairs. In this role, Fred drafted and negotiated international boundary treaties, drafted legislation, and testified on treaties and legislation, as well as holding responsibility for international extradition matters. During this time, he met Sharon Higbie from Kalamazoo, MI and they were married at the National Cathedral in Washington, DC. Fred and Sharon's family grew with the birth of their three daughters, including the late Meredith Chase Smith, and a son.

Promoted to Assistant Legal Advisor for Security and Consular Affairs, Fred was then awarded a fellowship to study at Harvard University's Kennedy School of Government, earning a Master's degree in Public Administration. Fred then served as Deputy Assistant Secretary of State for Security and Consular Affairs, was selected to head the U.S. Delegation to the United Nations Conference on Rights and Duties of States in Vienna, Austria, and in 1976 was selected as the Consul General for Consular Affairs at the American Embassy in Mexico.

Following assignments as a Foreign Service Inspector and Director of the Foreign Service Grievance Staff back in Washington, DC, Fred was selected as the Consul General for Consular Affairs in Toronto Canada. After Canada, Fred held positions in the Bureau of Consular Affairs retiring from the Foreign Service with the rank of Minister-Counselor after 31 years of government service. He went on to serve on the Board of Appellate Review, as a Consultant to the U.S. Arms Control and Disarmament Agency, and a Senior Reviewer and Legal Advisor.

Jane Bennett Willingham and Fred Smith were married on July 10, 1999 in the New Hampton Community Church. While they had known each other since childhood, it was not until the late '90's that they blended their families. Rekindling a cherished friendship from early summer days when Jane Bennett spent summers in New Hampton with her parents, they reconnected when Fred purchased a second home in New Hampton, and started spending more time back in the bucolic "small gore of land."

They shared many friendships and interests related to their home town as well as golf, literature, the outdoors, travel, music (Pemigewasset Choral Society), and many other activities.

An interment for Fred took place on Friday, November 13th at the New Hampton Village Cemetery. The family is planning a small gathering late in 2021 as state and CDC guidelines permit.

In lieu of flowers, Fred asked for those so inclined to consider a donation to The New Hampton School at <https://www.newhampton.org/giving/make-a-gift>, an institution that meant so much to him over his life, or to a charitable institution of their choice.

Arrangements by Emmons Funeral Home of Bristol, NH.

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Three Things You Should Know About LLC Forms

By John Cunningham

The key practice tools for New Hampshire lawyers who form LLCs for their clients are their LLC forms—i.e. the blank model operating agreements that they use as starting points in drafting tailored operating agreements for the specific LLC



members and managers they are representing. Starting on Jan. 7, 2021, I will be teaching a series of five one- or two-hour CLE-credit webinars for the New Hampshire Bar Association on LLC formation practice. (See page 22 for more information.)

The first webinar will be on best practices in drafting operating agreements for multi-member LLCs. That webinar will be based on Form 6.2, the template form for multi-member LLC operating agreements in *Drafting Limited Liability Company Operating Agreements*, my Wolters Kluwer LLC formbook and practice manual. You can access the summary table of contents and detailed table of contents of this form by clicking on the “Form 6.2” button on the home page of my website, www.llc199A.com. My best-practices webinar will discuss three key questions about forms for operating agreements for multi-member LLCs and about the agreements themselves. If you won’t be attending that webinar or if you would like a preview of it, I’ll summarize this discussion here.

The first question you need to ask about LLC forms is how many of them you need in order to be fully equipped for your LLC formation practice. The key to answering this question is to understand that every LLC, including the more than 50,000 New Hampshire LLCs currently in good standing, has three—and only three—principal structures. These are their ownership structure, their management structure and their federal tax structure.

- An LLC’s ownership structure may consist of one member, two members, or three or more members.
- Single-member LLCs may have any of three basic management structures—management by the member, management by the member and a non-member assistant manager (for continuity of management if, for some reason, the member is unable



to manage), and management by a non-member.

- Multi-member LLCs, too, may have any of three basic management structures—a general partnership structure, in which all the members are also managers; a limited partnership structure, in which one or more members are managers and the other members are not; or a corporate structure with the equivalent of shareholders, directors, officers and employees.
- Most single-member LLCs should be taxable either as sole proprietorships or as S corporations. Most multi-member LLCs should be taxable as partnerships under Internal Revenue Code Subchapter K although a few should be taxable under Subchapter S. A key factor in choosing among these structures for single-member and multi-member LLCs is often Internal Revenue Code section 199A. Section 199A provides owners of pass-through businesses, simply because their businesses are pass-through, with annual federal income tax deductions of up to 20 percent of their “qualified business income” (roughly the equivalent of their net business income). Pass-through businesses include sole proprietorships, S corporations and entities, such as most multi-member LLCs, taxable as partnerships. Section 199A is overwhelmingly complex. However, deciding how to apply it is indispensable in any LLC formation.

Once you’ve determined the ownership, management and tax structure of the LLC your client wants to form, it will become clear to you that there are 10 basic kinds of LLCs with these structures and that, in order to be fully equipped to form these LLCs, you need 28 forms. (See Exhibit A under the Form 6.2 button in www.llc199A.com.)

The second question is what legal and tax issues your forms should cover. The answer varies significantly among the various

types of single-member LLCs. However, for most multi-member LLCs, the answer is generally 28 issues. These issues are identified in the captions to Sections 1 through 28 in the summary table of contents in Form 6.2. However, as you’ll see from the detailed table of contents of that form, these 28 sections address, either by themselves or in numbered subsections, 205 subsidiary issues. Why 28 and 205 rather than other numbers? The answer is empirical: In any form, you need to address all of the relevant legal issues (a total of about 20 issues), consisting of issues under the governing LLC act and any other legal issues that you know may be important for your clients from your own practice experience, from operating agreements by other LLC lawyers with which you happen to review, and from discussions with other LLC lawyers. And you need to address all relevant federal and state tax issues (a minimum of about eight issues).

The third question is what should be the contents of the provisions set forth under the captions of each of the above 28 sections and 205 subsections. In order to answer this question, you need to know that on the basis of their purposes and the chief characteristics of their members, there are five main types of LLCs. These are:

- LLCs for corporate joint ventures and other entity joint ventures (e.g. joint ventures of two or more LLCs);
- “Protected series” LLCs, which are permitted under the laws of Delaware and several other states but not under New Hampshire law (but which can nevertheless be useful to many New Hampshire business owners);
- LLCs which contain complex financial provisions for LLC income- and loss-sharing among the members (and which also must normally contain complex federal tax provisions);
- LLCs for use by venture capital investors;

and

- “Main Street LLCs.”

Form 6.2 can be used as the basis for operating agreements for any of the above types of LLCs. However, most LLCs formed by even the largest and most sophisticated New Hampshire law firms are Main Street LLCs. The chief characteristics of Main Street LLCs are as follows:

- One or more members of most or all Main Street LLCs (whom I’ll refer to here as “unrepresented members”) are unable or unwilling to hire their own personal lawyers to protect their interests in their LLCs; rather, they rely for this understanding on lawyers drafting operating agreements for the LLC itself, in joint representations or for other individual members. However, it is critical for unrepresented members to obtain a specifically personal understanding of the impact on them of the legal and tax rules that will govern their LLC membership rights and duties under their LLC’s operating agreement. Otherwise, they may unknowingly face serious penalties for violating operational or estate planning requirements set forth in these agreements, such as non-competition and business opportunity requirements and membership right distribution requirements if they die or become disabled while they are members. You can’t play soccer if you don’t know the rules.

However, very few unrepresented members are likely to know their LLC rights and duties when they set about forming their LLCs. Thus, they must learn them—and must identify them when post-LLC formation issues arise—from the “off-the-shelf” operating agreements implicit in the governing LLC act as explained to them by a lawyer who does not represent them or—the much better option—in written operating agreements by these lawyers.

- If the LLCs of these unrepresented members have written operating agreements, these agreements must be written by the lawyers drafting them in plain English, with only a minimum of legalese and paragraphs, and with an intuitively logical structure reflected in single-level and two-level tables of contents. If lawyers draft them in accordance with these guidelines, then, to the maximum extent possible, they can be understood by the above un-

LLC continued on page 31

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Trends in Force Majeure Litigation After Eight Months of COVID-19

By Michael A. Delaney

Whether your client is a hairdresser, builds skyscrapers, owns a concert venue, or is an NFL star sitting out this year's season, COVID-19 has impacted countless businesses and professionals in fulfilling their contracts.



At the onset of COVID-19, business lawyers across the nation scrambled to write blogs and present Zoom seminars on how courts might approach the non-performance of contracts during COVID-19. Since then, corporate attorneys have been revamping boilerplate force majeure clauses for struggling industries to address unsure deliverables during unpredictable times.

By now, most clients understand that many contracts have clauses that excuse performance where events occur that are beyond the control of the parties. These force majeure clauses vary among industries. The clauses excuse performance either wholly or for the duration of the force majeure event. Some clauses limit damages and some allow for early termination when a force majeure event occurs. Typical clauses contain easily defined terms, such as floods or hurricanes, and



more cryptic terms, such as "acts of God," "disruption of the labor force," "shortages of labor or materials," and "government laws." The most expansive clauses include catch-all phrases such as "circumstances beyond the control of the parties," which terms are construed narrowly by the courts. Because force majeure is a creature of contract, it is different than the common law excuse doctrines of impossibility of performance and commercial impracticability.

Certain trends are developing in force majeure litigation during COVID-19. A few lessons can be gleaned from the de-

veloping jurisprudence over the past eight months.

Concurrent Force Majeure Events

What is the COVID-19 force majeure event? This pandemic has undefined boundaries and time limits, which distinguish it from other force majeure events, such as a natural disaster or a work strike. It can be argued that COVID-19 appears in many forms - as a relentless virus and disease, a global financial crisis, a series of on again/off again government restrictions on business operations and non-essential activities, disparate local and in-

ternational travel restrictions, and abrupt, unexpected changes in human behavior. The far-reaching effects of COVID-19 complicate the factual inquiry into what events or factors have caused deficiencies in performance or justify early contract termination because of the pandemic.

Since the causes of nonperformance in the era of COVID-19 may be elusive or multi-factored, litigants invoking force majeure are pleading multiple force majeure events in the alternative. For example, in the airfare credit card litigation between Santander and American Airlines, the bank pled alternatively that its early contract termination under a force majeure clause was justified because the cessation of air travel between the United States and Brazil was caused by (a) the pandemic; (b) resulting government-imposed restrictions; and (c) unprecedented decline in demand for air travel, with each event independently excusing performance under the contract's force majeure clause. *See Banco Santander (Brasil), S.A. v. American Airlines*, No. 20-cv-3098 (E.D.N.Y. 2020).

Causation

Although legal commentary has fixated on the narrow question of whether COVID-19 will fit within the terminology of boilerplate force majeure clauses, courts seem less focused on that threshold

TRENDS continued on page 30

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Business as a Force for Social Good? Benefit Corporations Have Been Slow to Take Root in NH

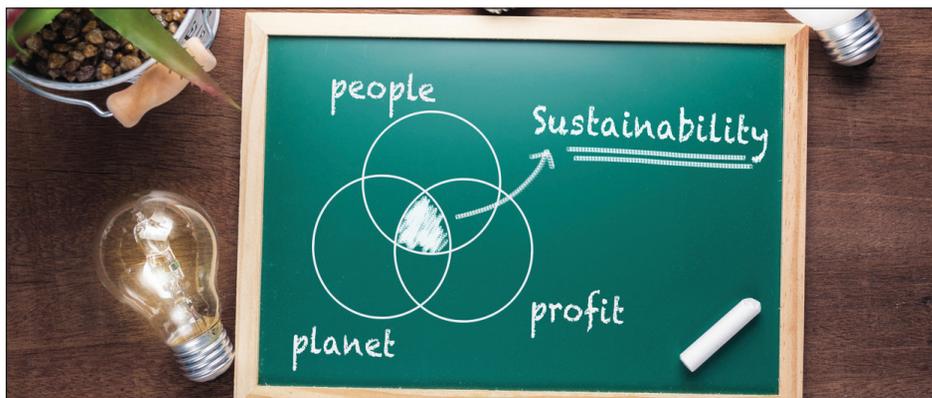
By Andrew Grosvenor

In early 2015, New Hampshire officially adopted the benefit corporation entity type under RSA 293-C. This legislation allowed for a new class of for-profit corporation that pursues social and public benefit purposes and consid-



ers its impact on a broader group of stakeholders (employees, neighbors, suppliers, community) beyond its shareholders. Benefit corporations do not receive any special tax benefits, but they do feature protections for social or environmental corporate missions. Benefit corporations must appoint a benefit director who is responsible for the company's benefit activities and reporting. Each benefit corporation is required to file a publicly available annual benefit report, which details the corporation's efforts to achieve its public benefit purpose and measures results against an objective third-party standard.

Forming a company as a benefit corporation, along with achieving "B Corp" certification, serves as a strong signal to customers that a company is committed to sustainability. Benefit corporation status may additionally aid a company in recruiting employees who are looking for meaningful work and in accessing the growing community of investors and



funds focused on sustainability and social responsibility.

Distinct from the benefit corporation as a legal entity, "B Corp" certification is a third-party standard for businesses, roughly analogous to LEED certification for sustainable buildings. B Corp certification is conducted by B Lab, a non-profit organization that also promotes model benefit corporation statutes around the world. B Corp certification is designed to accommodate businesses of all sizes, in all industries. The certification process looks holistically at a business's impact on the environment, employees, customers, community (including suppliers, neighbors, and satellite facilities), and corporate governance. The goal is to help each business identify areas for improvement and to take steps towards greater sustainability and broad societal benefit. A score of 80 or above on a 200-point scale is sufficient for certification. The process is

rigorous—recertification is required every two years—and B Lab conducts regular audits. Along with operational, marketing and recruiting benefits, B Corp certification gives a company access to a community of like-minded businesses and resources, such as regular conferences and gatherings, to help take the next steps towards a more sustainable business model. It's not necessary to convert into a benefit corporation in order to become certified - LLCs, partnerships, and sole proprietors can all be B Corps - but as of 2017, C and S corporations cannot be certified without converting.

After an initial surge in interest, the "B Corp" movement has slowed considerably in our state. In 2017, there were six certified B Corps in New Hampshire, and as of 2020 that number has grown slightly to 10. Interestingly, New Hampshire's newest B Corps cover a wider range of industries, including financial planning, banking, and

consulting—sectors that have been more cautious about making the transition to B Corp certification but may now see it as a valuable competitive differentiator.

The New Hampshire Secretary of State's office still has not created a separate Articles of Incorporation form for benefit corporations. Currently, Form 11-Articles of Incorporation includes a checkbox for new corporations to elect benefit corporation status, but the form does not include any explanation and may be confusing for DIY filers. It's likely that this form has resulted in inadvertent benefit corporation filings because the state has many more benefit corporations than it does certified B Corps.

Fortunately there are some excellent resources out there for businesses and attorneys looking to get involved in using business as a force for good. First off, B Lab's website (www.bcorporation.net) is full of useful information, including guidance through the certification process, sample language for corporate governance documents, state by state guides, and a directory of certified B Corps worldwide. B Lab is a fantastic starting point for anyone interested in the movement.

Another outstanding resource for NH social entrepreneurs is the Hannah Grimes Center in Keene (www.hannahgrimes.com). The Center offers hands on coaching for startup businesses, workshops, co-working space, and access to a wide network of local expertise. The Hannah

B CORPS *continued on page 31*



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Will Remote Workers Impact Jurisdiction In Commercial Disputes?

By Jennifer Parent

Many businesses today have a number of employees working remotely. While these home-based arrangements started as a temporary answer to the stay at home orders, a number of them have remained in place and are expected to continue well into 2021.



Companies now have employees engaging in work in states different from their principal places of business. What does this mean for personal jurisdiction when it comes to business disputes? A recent decision from the United States District Court for the District of Massachusetts found in one contract dispute that an executive of a New Hampshire based plaintiff who was working from his home in Boston was not sufficient to support personal jurisdiction over the defendant.

Plaintiff's Allegations

In *Collision Communications, Inc. v. Nokia Solutions and Networks OY*, the plaintiff brought claims against the defendant for breach of contract, breach of covenant of good faith and fair dealing, detrimental reliance, negligent and intentional misrepresentation, quantum meruit and violation of Massachusetts General Law Chapter 93A.¹ The plaintiff, a Delaware company with a principal place of business in Peterborough, New



Hampshire, designs software to run with original equipment manufacturers (OEMs) for cellular basestations.² The defendant is a Finnish telecommunications equipment company with a principal place of business in Finland.³

The companies began talks in 2015 to determine if their two technologies would integrate, resulting in a written proof of concept agreement.⁴ In May 2017, at a meeting in New Hampshire, the parties considered furthering their business relationship and, as alleged, discussed the terms for a commercial agreement.⁵ The plaintiff alleged that the defendant reassured it that an agreement was in place even if not signed in a written contract and encouraged the plaintiff to continue working on the technology.⁶ The parties held a meeting in Finland the next month, and for the remainder of 2017 and until November 2018, communications continued, with drafts

being exchanged, but no written agreement was finalized before the defendant claimed there had never been an agreement between the parties.⁷

The plaintiff brought the above action in federal court in Massachusetts and the defendant moved to dismiss for, inter alia, lack of personal jurisdiction. The defendant contended that there were insufficient contacts between the parties in Massachusetts. The plaintiff countered by arguing that its chief operating officer (COO), who had email and telephone communications with the defendant that led to the claims at issue, worked primarily out of his home in Boston and that the defendant had knowledge of this remote work.⁸

Long Arm Statute and Due Process

Under the Due Process Clause of the

Fourteenth Amendment, “a court may not assert jurisdiction over a defendant unless ‘the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.’”⁹ This analysis requires a case specific inquiry into relatedness, purposeful availment, and reasonableness.¹⁰ Where federal court jurisdiction is based on diversity, the court must also determine whether the plaintiff has satisfied the state’s long-arm statute.¹¹

Concluding that the plaintiff had failed to meet its burden under the Massachusetts long-arm statute, the District Court found that the defendant’s contacts with the Commonwealth were “too fortuitous and incidental” as it “did not choose to work specifically with [the COO] over Plaintiff’s New Hampshire-based employees, nor did [the COO] work from Massachusetts at Defendant’s request or to Defendant’s benefit.”¹² The COO also used his work email with no physical address in the signature block and the defendant had contact with other executives, including the plaintiff’s president, regarding the terms of the business agreement.¹³ The parties never had an in-person meeting in Massachusetts and neither party is registered to do business in Massachusetts.¹⁴

The District Court further concluded that even if the plaintiff had met the long-arm statute requirements, there was no jurisdiction under the Due Process Clause.¹⁵ Based on the factual allegations, the plaintiff had failed to demonstrate any nexus between its claims and the defendant’s activities in that

REMOTE continued on page 31

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Trends from page 27

question. Rather, many courts have bypassed the threshold question entirely and instead have focused directly on whether the pandemic is the cause of the alleged nonperformance or delayed performance, assuming without deciding that the pandemic falls within the scope of the force majeure clause. *See e.g., Future Street Ltd. v. Big Belly Solar, LLC*, 2020 WL 4431764 (D. Mass. July 31, 2020) (“Even assuming arguendo that the pandemic and effects of same are a force majeure under the Agreement, [plaintiff] has not shown

that its failure to perform its obligations under the Agreement were caused by same. . .”).

Where nonperformance can be attributed to some events that might qualify as a force majeure event, and others that do not, complicated causation issues are presented. Typically, the force majeure event does not need to be the sole cause impacting performance, so long as the defect in performance would not have occurred but for the force majeure event. As the pandemic lingers on, causation issues will be litigated with greater frequency, and courts will consider more cases where parties raise multiple, intervening causes

for nonperformance in an effort to break the alleged causal link between the pandemic and any deficiency in performance.

Mitigation Measures

A failure to mitigate the effects of a force majeure event may be litigated as a factor that disrupts the proximate causation linking a force majeure event and nonperformance. *See e.g., Butler v. Nepple*, 54 Cal.2d 589, 599 (1960) (labor strike did not excuse performance where invoking party could have found an alternative supplier whose increased costs were not “extreme and unreasonable”). Efforts to mitigate the effects of the pandemic on business commitments may take on increased significance in upcoming force majeure litigation.

Preliminary Relief

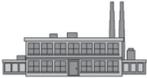
Plaintiffs and defendants alike have had limited success seeking preliminary relief in COVID-19 force majeure litigation. The extraordinary nature of the pandemic has not altered the limited circumstances where courts will entertain extraordinary relief on a preliminary basis. Courts typically view force majeure as an affirmative defense. Whether government restrictions or other COVID-related factors excuse performance is viewed as a factual question that requires the development of a full record. Clients should be adequately counseled that the applicability and scope of a force majeure clause may require focused discovery and a hearty evidentiary record. *See e.g., Palm*

Springs Mile Associates, Ltd. v. Kirkland Store’s, Inc., 2020 WL 5411353 (S.D. Fla. September 9, 2020) (dispositive motion denied where factual questions controlled whether government restrictions prevented payment of rent).

“As the pandemic lingers on, causation issues will be litigated with greater frequency, and courts will consider more cases where parties raise multiple, intervening causes for nonperformance in an effort to break the alleged causal link between the pandemic and any deficiency in performance.”

With even more difficult COVID-19 times ahead of us, the pandemic will continue to provide courts and litigants with opportunities to develop jurisprudence concerning the applicability of force majeure clauses and the common law excuse doctrines.

Michael Delaney is a director in McLane Middleton’s Litigation Department. He can be reached at (603) 628-1248 or michael.delaney@mcclane.com.



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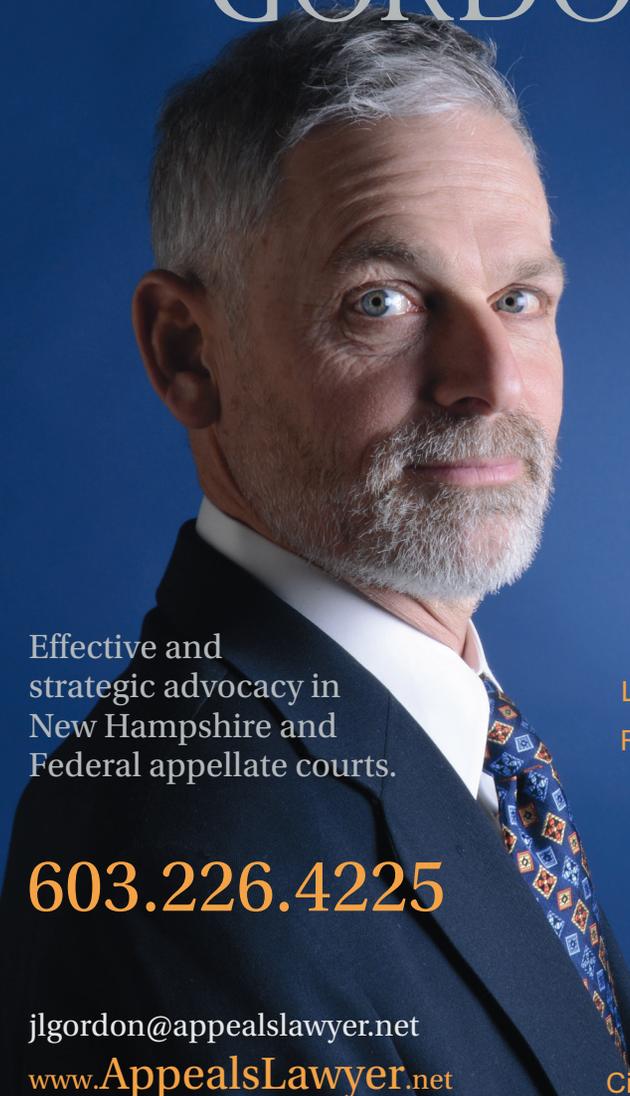
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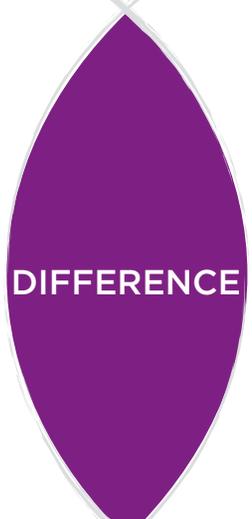
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B Corps from page 28

Grimes Center works with a number of non-profit and socially-responsible businesses and should be on the contact list for any aspiring B Corp.

Our state also happens to be home to W.S. Badger, a maker of wellness products that has been recognized multiple times as a “Best for the World” and “Best for the Environment” company. Those looking for a model of what a B Corp can do and what the nuts and bolts public reporting process looks like can turn to www.badgerbalm.com for a wealth of information.

These are just a few of the resources available in the growing community of NH businesses working to improve our environment and society.

Andrew Grosvenor is an associate with Merritt & Merritt, New Hampshire's only B-Corp certified law firm. To learn more about the B Corp movement, visit bcorporation.net.

Remote from page 29

state, that the defendant purposeful availed itself of that forum, or that exercising jurisdiction was reasonable. Ultimately, the District Court found that

“Massachusetts cannot be said to have an interest in adjudicating a dispute between a New Hampshire company incorporated in Delaware, and a Finnish company, merely because the latter directed communications to an employee of the former who happened

to be in this state...Similarly, the most effective resolution of this matter is not likely through adjudication in this forum when Plaintiff is located in New Hampshire and will have witnesses and documents outside of the Commonwealth.”¹⁶

Rather than dismiss the action, the District Court transferred the case to the District of New Hampshire pursuant to 28 U.S.C. §1631. A motion to dismiss for failure to state a claim is currently pending in that transferred case.¹⁷

While the facts in this contract dispute did not establish personal jurisdiction over the defendant, there may be circumstances where remote-work sufficiently satisfies the jurisdictional hurdles. Given the prevalence of these remote-work arrangements, these types of jurisdictional challenges are expected.

Endnotes

1. No. 19-CV-12251-ADB. The decision is dated September 2, 2020.
2. *Id.* at *2.
3. *Id.*
4. *Id.*
5. *Id.* at *3.
6. *Id.* at *3-*4.
7. *Id.* at *4.
8. *Id.* at *8.
9. *Id.* at *6 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).
10. *Id.* at *13-19.
11. *Id.* at *6-7.
12. *Id.* at *10-11 (citations omitted).
13. *Id.* at *8-9.
14. *Id.* at *9.
15. *Id.* at *13-*19.

16. *Id.* at *18 (citation omitted).
17. No. 1:20-CV-00949-JD.

Jennifer Parent has more than 24 years of experience litigating and resolving disputes for companies and business owners in a wide range of complex commercial cases and employment matters. She can be reached at jennifer.parent@mclane.com

LLC from page 26

represented members on a careful first reading.

A fuller discussion of the above three

questions will be set forth in the 40 pages of the sentence outline I'll provide to attendees of the Jan. 7, 2021 best-practices LLC webinar.

John Cunningham is a New Hampshire lawyer licensed to practice in New Hampshire and Massachusetts. He is the principal of his own law firm, the Law Offices of John M. Cunningham, PLLLC, and he is of counsel to the firm of McLane Middleton, P.A. His practice is focused on LLC law and tax, Internal Revenue Code section 199A and estate planning. His telephone number is (603) 856-7172. His e-mail is lawjmc@comcast.net. The link to his website is www.llc199A.com.



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NH Supreme Court Opens the Door for Virtual Quorums

By Scott Merrill

The New Hampshire Supreme Court issued its opinion Nov. 17 on the question of whether a remote quorum of the House of Representatives violates Part II, Article 20 of the state's constitution. According to the justices' opinion it does not.

Joseph A. Hoell Jr., of Milford, secretary of the New Hampshire Firearms Coalition Inc., previously filed a memorandum in support of an affirmative answer to the question. He was joined on the memorandum by Andrew J. Manuse, chairman ReopenNH.

Attorney Penny S. Dean, arguing on behalf of Hoell and Manuse, said the general court is trying to "get around the constitution" by meeting remotely amid the pandemic.

"The bottom line is that in this state we take representation very seriously," Dean said during oral arguments on Oct. 29. "The framers of this constitution were very clear and the language used throughout expected that our representatives would not make sausage in private but in full view of all the constituents that would be there."

Dean referred to the process and the interaction that takes place between House members while voting in their chamber and argued that seeing this on a screen does not meet the state constitution's definition

of "present."

"I think what we have here is that the general court is trying to get around the constitution," Dean said. "People don't want to just see the votes at the end if it's a roll call vote. What they want to see is the process and the interaction between the individuals. And if this is allowed, as a practical matter, there's going to be texting back and forth, there may be phone calls, many things that the public will not be able to see when you only have a two-inch square."

Questioned by Justice Anna Barbara Hantz Marconi about whether a virtual presentation is similar to being in the gallery, Dean replied emphatically that it is not.

"Even with a 50-inch screen you're only going to see a two-inch square," she said. "The public has a right to see what goes on."

The main question during oral arguments was what constitutes a quorum.

Attorney James Cianci, arguing on behalf of the House of Representatives, said the question of what meets the requirement for a quorum focuses on the definition of what constitutes being "present" in the state's constitution.

"That definition is not preclusive," Cianci said. "The legislature can adopt rules to meet constitutional requirements and in this case we argue that it can adopt

rules to meet the quorum requirement under the constitution."

Cianci cited a U.S. Supreme Court case from 1892, *U.S. v. Ballin*, which defined how Congress determines a quorum "to do business."

"At that time the court said a legislative body can use any method that will be reasonably certain to ascertain the presence of a quorum. What we're looking for clarification from this court is on the following: 'can the House adopt a rule whereby it can reasonably ascertain a quorum through remote participation?' And we believe that it can," Cianci said.

Asked by Justice James P. Bassett about issues that involve limiting access to the public raised by Attorney Dean, Cianci said that reasonable access is required but that the legislature defines what that entails.

This would not mean that the doors to the gallery could be closed, Cianci pointed out.

"The legislature, under Part II, Article Eight, couldn't meet in secret. However, the method with which it provides public access is within the purview of the legislature."

Ian R. A. Oxenham, arguing on behalf of Rep. Lee Oxenham, said remote sessions do not disenfranchise voters or block public access to the legislative process.

"I would say we have the opposite situation," Oxenham stated. "When we have in-person sessions during a pandemic then legislators who are infected or have symptoms have to stay away from those sessions and cannot vote. For example, my own client, Rep. Oxenham, had COVID-19 symptoms earlier this year and as a result was

not allowed to take part in any house sessions during March and not able to vote on 98 roll-call votes."

"Not being able to have representatives being able to vote far outweighs people not being able to see facial expressions and hand gestures of other representatives," he said.

The issue of what it means to be "present" in the state's constitution was the issue that Attorney Paul Twomey, also arguing on behalf of the House, emphasized.

"This case boils down to one word in Article 20. It has nothing to do with public access in the gallery. The House didn't ask questions about the gallery. The question before us is what does the word [present] mean in Article 20," Twomey said. "I ask you to think about 'present' and what it means is to be able to hear, speak and vote, and that is the purpose of that clause."

In her closing arguments Attorney Dean returned to the issue of language in the state's constitution.

"The framers fought over language. They were clear. And they clearly use the word present in terms of gathering in groups," she said. "The House has the ability to make its own rules and as long as it's reasonable they have that right. But they cannot trample the constitution. The fact is that our founding fathers used a language about meeting in groups and this should tell us what they intended."

The Supreme Court's opinion allows for quorums during virtual sessions, "as long as the requisite number of representatives is 'present.'"

In New Hampshire, a majority of the members of the House of Representatives are required for a quorum to do business.

"Stay Home But Pay Up" - Taxing Telework During a Global Pandemic: *New Hampshire v. Massachusetts*

By Graham W. Steadman

On Oct. 19, the New Hampshire Department of Justice filed a much-anticipated "Motion for Leave to File Bill of Complaint" with the United States Supreme Court, challenging Massachusetts' authority to tax the personal income of tens of thousands of New Hampshire residents who ceased commuting to the Bay State due to the COVID-19 pandemic. If decided, the case may establish constitutional parameters on a state's authority to tax out-of-state telework—a practice that has exploded since March and will likely continue long after the pandemic subsides.

The accompanying 33-page "Bill of Complaint" accuses Massachusetts of violating both the Commerce Clause and the Due Process Clause of the United States Constitution by confiscating income not sufficiently related to Massachusetts. The Supreme Court of the United States has original jurisdiction over suits between states, and thus the complaint was filed there. See 28 U.S.C. § 1251(a).

The Commerce Clause forbids states from engaging in economic discrimination in interstate commerce. The Due Process Clause prevents states from seizing property when there is an insufficient nexus between the property and the taxing state.

New Hampshire's Commerce Clause claim relies on the four-part

test first established by the Supreme Court in *Complete Auto. Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Under that test, the Court assesses whether a tax is: (1) applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state." See *id.*; *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1793 (2015). All prongs of this test must be satisfied for a tax to be constitutional. New Hampshire alleges that Massachusetts has violated all four prongs.

New Hampshire's Due Process count alleges that the pervasiveness of telework by New Hampshire residents has severed any meaningful connection between the income generating activity, *i.e.*, the work that now occurs exclusively in New Hampshire, and the services funded by the Massachusetts income tax (e.g., the maintenance of roads, public transportation, or utilities that New Hampshire commuters regularly used pre-pandemic). See *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272-73 (1978) (stating that the Due Process Clause places two restrictions on a state's power to tax income: (1) no tax may be imposed, unless there is some minimal connection between the activity and the taxing; and (2) "the

TELEWORK continued on page 36

New Hampshire Superior Court Cancels Jury Trials for the Month of January

Trials in other counties and smaller hearings will continue as scheduled until further notice.

In light of rapidly rising COVID-19 infection rates and limited air circulation in four county courthouses, Chief Justice of the Superior Court Tina Nadeau has made the decision to cancel jury trials in Sullivan, Strafford, Hillsborough Southern District, and Belknap counties for the month of January 2021.

"In our monthly meeting with Judicial Branch expert, Dr. Erin Bromage, he reported that the months of December and January will be particularly challenging in terms of increased COVID-19 infection rates and cases. As a result and in light of suboptimal air filtration and ventilation systems in some counties, the Court is canceling jury trials and grand jury proceedings in Sullivan, Strafford, Hillsborough Southern District and Belknap counties for the month of January 2021," noted Chief Justice Nadeau. "However, ventilation in the four affected county courthouses is still adequate to safely conduct smaller, necessary in-person hearings and the courthouses will remain open for current limited operations. In addition, we continue to conduct video and telephonic hearings throughout the day in all court locations."

Two additional cases scheduled in Belknap County in December have also been cancelled, *State v. Otto Keller* and *State v. Adam Littizao*.

"Cancelling these cases is a difficult decision," said Nadeau, "and it was made to ensure the continued health and safety of jurors, court staff, and parties to these cases."

Nadeau noted, however, that the decision to cancel trials in these counties would not affect the trial schedules and grand jury proceedings in other counties with lower infection rates and better ventilated courthouses. Trials scheduled to take place in Rockingham County, Hillsborough County Northern District, Cheshire, and Merrimack County will continue as scheduled until further notice. Also jury trials are still on track to proceed in Coos, Grafton and Carroll counties. Trials in the four counties affected will likely resume when infection rates subside.

"While we are confident in proceeding in these other counties," Nadeau said, "we will continue to evaluate the safety of conducting jury trials and grand jury proceedings on a week-to-week basis."

For more information on jury trials in New Hampshire, see the NHJB website.

NH Supreme Court Advisory Committee On Rules

Second Revised Public Hearing Notice re. Rule 12 (g)

Pursuant to the order of the New Hampshire Supreme Court dated November 24, 2020, both the public meeting and the public hearing scheduled for December 18, 2020 before the New Hampshire Supreme Court Advisory Committee on Rules **shall be conducted by way of a completely remote proceeding via Webex video conferencing.** The Committee will hold a PUBLIC HEARING at 12:30 p.m. on Friday, December 18, 2020, via Webex video conferencing, to receive the views of any member of the public, the bench, or the bar on Superior Court Civil Rule 12(g), which relates to Motions for Summary Judgment. The Committee's public meeting, which shall also be held via Webex video conferencing, shall be held following the conclusion of the public hearing. **The options and instructions for joining via Webex the public hearing, which begins at 12:30 p.m., and public meeting are as follows:**

Option 1. Join Through Your Computer or Laptop

Go to www.webex.com, and click "Join a meeting"
Enter this meeting information number: 173 811 7413
Enter this meeting password: ACR121820
Enter your name and your e-mail address

Option 2. Join Through Your Smartphone

Download the Cisco Webex App to your phone
Click "Join Meeting"
Enter this meeting information number: 173 811 7413
Enter your name and your e-mail address (if prompted)
Enter this meeting password: ACR121820

Option 3. Join by Telephone Only

Dial 1-408-418-9388
Enter this meeting information number: 173 811 7413#

Additional explanatory information is available here:

<https://help.webex.com/en-us/nrbgeodb/Join-a-Webex-Meeting>

In April 2019, the New Hampshire Supreme Court ordered that Superior Court Civil Rule 12(g) would take effect on July 1, 2019. The Court further ordered that in June 2020, the Advisory Committee on Rules should begin "to evaluate how the rule has worked in practice and as soon as possible thereafter, . . . recommend whether the rule should remain in effect or should be amended further."

Comments addressing how Rule 12(g) has worked in practice, whether the rule should remain in effect, and whether the rule should be amended further may be submitted in writing to the secretary of the Committee at any time **on or before Monday, December 14, 2020.** Comments may be e-mailed to the Committee at:

rulescomment@courts.state.nh.us

Comments may also be mailed or delivered to the Committee at the following address:

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

Any suggestions for rules changes unrelated to Superior Court Civil Rule 12(g) may be submitted in writing to the secretary of the Committee for consideration by the Commit-

tee in the future.

Superior Court Civil Rule 12(g) provides as follows:

(g) Motions for Summary Judgment.

(1) *Motion for Summary Judgment.* Motions for summary judgment shall be filed, defended and disposed of in accordance with the provisions of RSA 491:8-a as amended. Such motions and responses there-to shall provide specific page, paragraph, and line references to any pleadings, exhibits, answers to interrogatories, depositions, admissions, and affidavits filed with the court in support of or in opposition to the Motion for Summary Judgment. Only such materials as are essential and specifically cited and referenced in the Motion for Summary Judgment, responses, and supporting memoranda shall be filed with the court. In addition, except by permission of the court received in advance of filing the memoranda, no such motion, response, or supporting memorandum of law shall exceed 20 double-spaced pages. The purpose of this rule is to avoid unnecessary and duplicative filing of materials with the court. Excerpts of documents and discovery materials shall be used whenever possible.

(2) Statement of Material Facts.

(a) *Content.* Every motion for summary judgment shall be accompanied by a separate statement of the material facts as to which the moving party contends there is no genuine issue to be tried, set forth in consecutively numbered paragraphs, with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents. Failure to include the foregoing statement shall constitute grounds for denial of the motion.

(b) *Additional Service of Electronic Form of Statement of Material Facts to other Parties.* At the time the motion and separate statement of material facts are filed with the court, the statement of material facts shall also be contemporaneously sent in electronic form by email to all parties against whom summary judgment is sought in order to facilitate the requirements of the following paragraph. The statement of material facts in electronic form shall be sent as an attachment to an email and shall be in a Microsoft Word document (or a document convertible to Word) unless the parties agree to use another word processing format. The requirement to email the statement of material facts to the opposing party does not alter the date or method of service. The requirement for transmission by email of the statement of material facts in electronic form shall be excused if (A) the moving or any opposing party is appearing pro se, (B) the attorney for the moving party certifies in an affidavit that he or she does not have access to email, (C) the attorney for the moving party certifies in an affidavit that an opposing party's attorney has no email address or has not disclosed his or her email address, or (D) the parties believe that the process outlined herein will be unworkable due to particular circumstances in their case and receive advance approval from the Court for filing separate documents.

(3) The Non-Moving Party.

(a) *Response to the Motion and the Statement of Material Facts.* The non-moving party shall have 30 days after filing to object to a motion for summary judgment, unless another deadline is established by order of the court. An objection to a motion for summary judgment shall include a response to the moving party's statement identifying the facts the moving party contends are material and undisputed. In its response, the nonmoving party shall indicate which, if any,

of the purported undisputed facts identified in the moving party's statement the nonmoving party contends are in dispute. The form of the nonmoving party's response shall be consistent with the requirements of paragraph b. For purposes of summary judgment, any fact set forth in the moving party's statement of material facts shall be deemed to have been admitted unless controverted as set forth in this paragraph.

(b) *Filing a Single Document Containing all Parties' Positions.* To permit the court to have in hand a single document containing the parties' positions as to material facts in easily comprehensible form, the opposing party shall save the moving party's statement of material facts as a new document and shall set forth a response to each directly below the appropriate numbered paragraph, including, if the response relies on opposing evidence, page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents. Where the obligation to send the statement of material facts in electronic form has been excused, the response to the statement of material facts may be in a separate document.

(c) *Statement of Additional Material Facts.* Along with its response to the moving party's statement of facts, the nonmoving party may assert an additional statement of material facts with respect to the claims on which the moving party seeks summary judgment, each to be supported with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents.

(d) *Filing a Single Document with Additional Material Facts.* Such an additional statement shall be a continuation of the opposing party's response described in Paragraph (g)(3)(a), with an appropriate heading, and shall not be a separate document. Where the party opposing summary judgment includes such an additional statement in its response, the response, including the additional statement, also shall be sent in electronic form by email to the moving party, unless excused as provided in Paragraph (g)(2).

(4) *The Moving Party's Reply to Additional Material Facts.* The moving party shall reply to the opposing party's addi-

tional statement of material facts within 20 days of filing and in the manner required by Paragraph (g)(3), resulting in a final, single consolidated document for the court's consideration, unless the obligation to send the additional statement of material facts in electronic form has been excused. For purposes of summary judgment, any fact set forth in the opposing party's additional statement of material facts shall be deemed to have been admitted unless controverted as set forth in this paragraph.

(5) *Page Limits.* Neither the statement of material facts as to which there is no genuine issue to be tried nor the response thereto shall be subject to the 20-page limitation in paragraph (g)(1) of this rule.

(6) *Cross-Motions.* Cross-motions for summary judgment and oppositions thereto shall comply with the requirements of Paragraph (g)(3), with the result that there shall be a single consolidated document for both motions for summary judgment (multiple documents may only be filed with advance leave of court) containing the respective statements of material facts and responses thereto, unless excused as provided in Paragraph (g)(2).

(7) *Partial Summary Judgment.* Where a plaintiff successfully moves for summary judgment on the issue of liability or a defendant concedes liability and the case proceeds to trial by jury, the parties must provide the trial judge with a statement of agreed facts sufficient to explain the case to the jury and place it in a proper context so that the jurors might more readily understand what they will be hearing in the remaining portion of the trial. The court shall present the jury with the agreed statement of facts. Absent such an agreement on facts, the court shall provide such a statement.

(8) *Sanctions for Noncompliance.* The court need not consider any motion or opposition that fails to comply with the requirements of this rule and may deny or grant a motion for summary judgment based on the failure of the moving party or the non-moving party to comply with this rule.

New Hampshire Supreme Court
Advisory Committee on Rules
By: Patrick E. Donovan, Chairperson and
Lorrie Platt, Secretary
November 24, 2020

Notice of Judicial Vacancies to be Filled

Superior Court AND Circuit Court vacancies will be considered by the Judicial Selection Commission.

- An Application may be downloaded from the websites of the Governor or the NH Bar Association. Applications may also be requested by calling 224-1988. Please be sure to use the 2017 version of the Application.
- Each new candidate must submit a paper application and all accompanying documents, including writing samples, via standard mail to Chuck Douglas, 14 South Street, Concord, NH 03301 as well as an e-mail copy to chuck@nhlawoffice.com.
- Completed applications must be received no later than 5 p.m. on Friday, January 8, 2021.
- Candidates who previously submitted an Application to this Commission and wish to reapply now, may do so by email to the Judicial Selection Commission Chair at chuck@nhlawoffice.com to confirm your intent to be considered but to rely on your prior Application. A re-applicant must also submit an updated affirmation regarding professional conduct and an updated consent and release, which are Exhibits A & B & C to the 2017 Application. Please print Exhibits A & B & C and complete and scan in as a PDF document and attach the updated Exhibits A & B & C to an email. All updates are due by the Application deadline of 5 p.m. on Friday, January 8, 2021.
- Please direct questions to Attorney Chuck Douglas at 224-1988.

November 2020

Criminal Law/Constitutional Law

State v. Shaw
An appeal from Rockingham County
No. 2019-0072
Nov. 19, 2020
Affirmed.

- Whether the trial court erred in denying the defendant's request for in camera review of any prior reports of force or other disciplinary actions of the witness officers.
- Whether the trial court erred in failing to instruct the jury that the State must prove that the "the defendant 'refused to produce his driver's license on demand of a law enforcement officer for the purpose of examination by the officer'" in order to establish the crime of disobeying an officer.

Evidence was admitted upon which it could be found that, though the license plate of the vehicle the defendant was operating was obscured, the trailer attached to it was registered to him. A check of this registration revealed that the defendant's license had been suspended in New Hampshire, which resulted in an officer stopping the defendant. Upon being stopped and asked for his license, the defendant refused. The officer, with backup, ordered the defendant out of the vehicle, but the defendant refused to comply despite being notified that he was under arrest and that the officers would pull him out of the vehicle if he did not exit on his own. The officers broke the defendant's window to access the door lock but were unable to unlock the door. Accordingly, they began pulling the defendant out through the window, during which the defendant was kicking and punching the officers with keys between his knuckles. Even after several attempts at utilizing a TASER device and notifying the defendant he was under arrest for assaulting the officers, the defendant refused to exit, even holding onto the steering wheel to prevent his extraction from the vehicle. Once out of the vehicle, the defendant failed to comply with instructions to put his hands behind his back and the officers delivered a punch to his ribs and additional use of a TASER device to get the defendant's hands behind him.

Reviewing the trial court's failure to conduct an in camera review of the offi-

cer's personnel files for prior excessive force complaints or disciplinary actions under an unsustainable discretion standard, the Court examined RSA 105:13-b. The statute pertains both to the production of exculpatory evidence and relevant evidence. More specifically, it applies to the automatic production of exculpatory materials in the witness officer employee files (RSA 105:13-b, I), the production of officer personnel files after in camera review is used to determine whether the material is exculpatory (RSA 105:13-b, II), and to the production of witness officer personnel files when, though not exculpatory, the judge specifically rules "that probable cause exists to believe that the file contains evidence relevant to that criminal case," in which case the judge will conduct an in camera review to determine the existence and extent of relevant materials therein. (RSA 105:13-b, III). Under RSA 105:13-b, III, the burden is on the criminal defendant seeking production of information from the personnel file to "establish that there is a realistic and substantial likelihood' that relevant evidence would be obtained from the file" by presenting a "plausible theory of relevance."

The Court agreed with the State that the defendant waived arguments that RSA 105:13-b only applied to his request for disciplinary actions, not excessive force complaints; arguments that all the information sought was exculpatory; and arguments that he had met his burden of demonstrating probable cause with respect to disciplinary file materials. The Court found that the defendants' assertions of relevancy regarding force complaints was merely conclusory and therefore insufficient to establish probable cause of relevancy to support in camera review of protected personnel files, particularly where much of the events leading up to and surrounding the defendants were captured on video submitted for review to the jury.

Regarding the defendant's jury instruction challenge, the Court determined whether the instruction was consistent with RSA 265:4, I(e), the statute defining the charged crime, by conducting a statutory interpretation. Taking the statute in conjunction with a mirroring statute, RSA 263:2, the Court held that the jury instruction was consistent with the statutes' intent of requiring that the officer be afforded an opportunity to examine the validity of the license whether produced for viewing or taken in hand by the officer.

The Court accordingly upheld the convictions.

At-a-Glance Contributor



Shenanne Tucker

Practiced law in New Hampshire and Maine since 2002, and currently is predominantly privately employed working in insurance.

Gordon J. MacDonald, attorney general, with Susan P. McGinnis, senior assistant attorney general (on the brief and orally), for the State.

Stephanie Hausman, deputy chief appellate defender, of Concord (on the brief and orally), for the defendant.

Property Law/Constitutional Law

State v. Beattie & a.
An appeal from Coos County No. 2019-0460
Nov. 19, 2020
Reversed and remanded.

- Whether the trial court erred in dismissing the landowners' preliminary objections to the State's taking in fee simple of .93 acres of their land along with the State's taking of permanent and temporary easements.

The landowners challenged the necessity and public benefit of the State's taking of certain of their real property when NH Route 2 in Lancaster alteration was desired. In its review, the trial court applied a fraud or gross mistake standard of review (RSA ch 230) instead of a de novo review under RSA ch 498-A.

The landowners were notified of that changes to the highway would come near to or impact their property. The landowners failed to attend the public hearing on the project and later declined the State's offer to purchase the portions of their property required for the highway project. The State therefore filed a declaration of taking regarding the property at issue in response to which the landowners filed an answer and preliminary objections and requested transfer to the superior court.

The superior court determined that RSA ch 498-A, the eminent domain procedure act, required operation in conjunction with an "enabling statute." Finding RSA ch 230 to be the applicable enabling statute, the superior court granted the State's motion to dismiss for failure to allege fraud or gross mistake.

Upon appeal, the Court examined RSA 230:14, I, which establishes the procedures by which highway laying out and alternations are to be determined. The Court then turned to RSA ch 498-A which provides the procedure for challenging eminent domain takings of private property. By its own terms, RSA chapter 498-A is "to provide a complete and exclusive procedure to govern all condemnations of property for public uses including the review of necessity, public uses, and net-public benefit, and the assessment of damages therefor." The statute further repeals inconsistent statutory provisions.

Agreeing with the property owners that RSA ch 498-A supersedes RSA 230:14, I and also that de novo review ap-

plies under the statute, the Court rejected the State's arguments that such an interpretation would "impermissibly enlarge the rights of a [landowner] to challenge necessity or net-public benefit" or work to nullify the fraud or gross mistake review provisions under RSA 230:14, I. Accordingly, the Court reversed and remanded.

Gordon J. MacDonald, attorney general, with Allison B. Greenstein, assistant attorney general (on the brief and orally), for the State.

Waystack Frizzell, Trial Lawyers, of Colebrook (Jonathan S. Frizzell and Sandra L. Cabrera on the brief, and Mr. Frizzell orally), for the defendants.

Sovereign Immunity/ Standing to Sue State

Clifford E. Avery v. Cmm'r, NH Dept. of Corrections.
Appeal from Merrimack County, No. 2019-0051
Nov. 20, 2020
Reversed and Remanded.

- Whether the trial court erred in dismissing plaintiff's breach of contract suit against the NH DOC based on findings that the plaintiff's suit for specific performance was barred by sovereign immunity and/or because he lacked standing.

Prior to the plaintiff's breach of contract lawsuit, the plaintiff had been part of a 42 U.S.C. §1983 class-action lawsuit in which the federal district court determined that the NH DOC had violated the Eight Amendment by subjecting inmates to cruel and unusual punishments. As part of the proceedings in the federal lawsuit, the NH DOC was ordered by consent decree to provide, and confirm by regular inspections, conditions and services that met specified standards. In subsequent contempt proceedings regarding alleged noncompliance with the decree, the decree was first modified and was then ultimately developed into a settlement agreement that, by its terms, "constituted a settlement agreement enforceable by the courts of the State of New Hampshire." Years later, the plaintiff sued for alleged breaches of this settlement agreement. Upon the defendant's motion, the trial court dismissed the plaintiff's breach of contract action, finding that the plaintiff's action for specific performance was barred by sovereign immunity and that the plaintiff failed to allege an injury to himself to establish standing.

The Court noted that the DOC is immune from suit unless it has consented to suit by way of a limited and specific statutory waiver. Though at the time the trial court heard the DOC's motion to dismiss RSA 491:8 established waiver of immunity only in contract suits seeking monetary awards, while on appeal the statute was subsequently amended to expand the scope of waiver also to "specific performance and other equitable remedies that are not limited to money damages." Therefore, the DOC withdrew its defense on the scope of the statute, but preserved its argument that the agreement was not a type of contract subject to RSA 491:8.

In the interests of judicial economy, the Court took up the DOC's preserved arguments. Finding the settlement agreement to be an express contract with the

Need to schedule a Mediation?

FEBRUARY 2020

Su	Mo	Tu	We	Th	Fr	Sa
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17	18	19	20	21	22	23
24	25	26	27	28	29	30

Fast-track scheduling at www.NHMediators.org

AMENDED ORDER

Pursuant to Supreme Court Rule 51(d) (1)(A)(iii), the Supreme Court reappoints Circuit Court Judge Michael H. Garner to the Advisory Committee on Rules.

Pursuant to Supreme Court Rule 51(d) (1)(A)(v), the Supreme Court reappoints Janet Spalding to the Advisory Committee on Rules.

Pursuant to Supreme Court Rule 51(d) (1)(A)(ix), the Supreme Court reappoints Abigail Albee, Clerk of the Belknap County and Carroll County Superior Courts, to the Advisory Committee on Rules.

These members are reappointed to serve three-year terms commencing on January 1, 2021, and expiring on December 31, 2023.

Issued: November 13, 2020

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

In accordance with Supreme Court Rule 37(4)(a), the Supreme Court reappoints the following members to the Hearings Committee of the Attorney Discipline System:

Attorney Andrea Amodeo-Vickery
Attorney Brooksley C. Belanger
Attorney Andrew F. Cotrupi
Attorney Michael J. Iacopino
Attorney Barbara R. Keshen
Attorney Jason R.L. Major
Attorney John P. Newman
Susan R. Chollet, non-attorney member
Richard Darling, non-attorney member

These members are reappointed to serve three-year terms commencing on January 1, 2021, and expiring on December 31, 2023.

Issued: November 16, 2020

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

In accordance with Supreme Court Rule 37(3)(a), the Supreme Court reappoints the following members to the Professional Conduct Committee of the Attorney Discipline System:

Attorney Margaret R. Kerouac
Attorney Mona T. Movafaghi
Kathleen Ames, non-attorney member
Ronald K. Ace, non-attorney member

These members are reappointed to serve three-year terms commencing on January 1, 2021, and expiring on December 31, 2023.

Issued: November 16, 2020

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

In accordance with Supreme Court Rule 37(5)(a), the Supreme Court reappoints Mr. Stephen Bartlett and Attorney Sally H. Mulhern to the Complaint Screening Committee of the Attorney Discipline System, to serve three-year terms commencing on January 1, 2021, and expiring on December 31, 2023.

Issued: November 16, 2020

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

After consultation with the members of the New Hampshire Supreme Court Advisory Committee on Rules by e-mail, the secretary of the Committee and the chairperson of the Committee have recommended to the Supreme Court that, in light of the current status of the ongoing COVID-19 pandemic, the Committee's public meeting and public hearing scheduled for December 18, 2020, should be converted from a hybrid remote and in-person proceeding to a completely remote proceeding via Webex video conferencing. Accordingly, the Supreme Court hereby orders that the Committee's public meeting and public hearing scheduled for December 18, 2020, shall be conducted by way of a completely remote proceeding via Webex video conferencing. A copy of the Second Revised Notice of Public Hearing is attached to this order.

Issued: November 24, 2020

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

The Supreme Court of New Hampshire, pursuant to RSA 490:4, directs that proceedings in every State court in New Hampshire be suspended on Friday, February 5, 2021, to facilitate continuing judicial and legal education and to accommodate judges' meetings being held in conjunction with the mid-year meeting of the New Hampshire Bar Association. A judge or master may decide not to suspend proceedings if the judge or master and the lawyers on a case do not plan to attend the mid-year meeting, or if the judge or master, in his or her discretion, decides that the efficient administration of the court or ensuring justice in a particular case compels that a case be scheduled for a hearing or trial, or that a hearing or trial continue to be litigated, on that day.

Issued: December 1, 2020

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

In accordance with Supreme Court Rule 37(4)(a), the Supreme Court appoints Attorney Anthony John Naro to the Hearings Committee of the Attorney Discipline System, for a three-year term commencing January 1, 2021, and expiring December 31, 2023.

Issued: December 1, 2020

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

In accordance with Rule 42(II)(a), the Supreme Court reappoints Attorney Peter G. Beeson to the Committee on Character and Fitness, to serve as the Professional Conduct Committee member of the Committee on Character and Fitness. Attorney Beeson's term shall commence January 1, 2021, and shall expire on December 31, 2022.

Issued: December 8, 2020

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

State within the meaning of the statute, the Court held that recently amended RSA 491:8 did apply to the settlement agreement at issue and established a statutory waiver of sovereign immunity with respect to the plaintiff's breach of contract action.

The Court also determined that the plaintiff had sufficiently alleged that his interests have or will be directly affected by the DOC's alleged breach of contract to establish the requisites of actual dispute and legal injury to create standing. In a contract action, the plaintiff seeks to protect his "interest in having promises performed," and thus the alleged breach of the promises is the alleged legal injury that results in actual, not theoretical, dispute. Whereas the plaintiff was a party to the settlement agreement, his interest in enforcement of its terms is not abstract and its breach would not be a "generalized wrong allegedly suffered by the public at large."

Accordingly, the Court reversed and remanded.

Clifford E. Avery, pro se plaintiff, on the brief.

Gordon J. MacDonald, attorney general, with Lisa L. Wolford and Anthony J. Galdieri, senior assistant attorneys general (on the brief), for the defendant.

Amicus briefing by New Hampshire Legal Assistance (Elliot Berry and Kay E. Drought), Disability Rights Center-New Hampshire, Inc., of Concord (Pamela E. Phelan and Todd R. Russell), American Civil Liberties Union of New Hampshire Foundation, of Concord (Gilles R. Bissonnette and Henry R. Klementowicz), Paul Blackmer, and Darrin Partlow.

Taxation

Northern N.E. Telephone Operations, LLC d/b/a FairPoint Communications-NNE v. Town of Acworth & a.
Appeal from Merrimack County, No. 2018-0570

Nov. 6, 2020

Affirmed in part, reversed in part, and remanded.

- Whether the trial court erred in granting summary judgment in favor of FairPoint based on its finding that the Towns' taxation of FairPoint was ultra vires for failing to satisfy RSA 72:23, I (b).
- Whether the trial court erred in granting FairPoint certain tax assessment abatements.

FairPoint utilized municipal rights-of-way in several municipalities for its use of utility poles and related instruments to provide telecommunication services. Under RSA 231:160, licenses can be sought for the installation and use over municipal rights-of-way. Certain exceptions from formal licensure for preapproved infrastructure across land that later becomes a public highway exist under the statute (legally permitting such use if copies of relevant documentation are provided). RSA 72:8-a and 72:6 permit Towns to collect property tax on (1) "the value of FairPoint's poles and conduits" (taxed as real estate) and (2) on "the value of FairPoint's use or occupation of municipal rights-of-way" (when the agreement of use or occupation provide for such property tax assessment). As a result of the tax assessed by a number of Towns on its use and occupation of preexisting poles, Fair-

Point sought abatement. The trial court consolidated the suits against defendants, appointing "representative municipalities," and took up the issues in two phases ("Phase 1" to determine arguments of statutory construction and ultra vires at the summary judgment stage and "Phase 2" to try the facts regarding whether the tax assessments were to be abated due to being excessive).

Following phase 1, the trial court held that the licensing requirements of RSA 231:160-a did not "automatically include the statutorily required tax-shifting language" and declined to find that FairPoint's use or occupation constituted a "perpetual lease" of the municipal rights-of-way. The trial court then proceeded to Phase II with two "test cases," in which select tax years imposed by the Towns of Durham and Hanover were given a bench trial. Once abatement was ordered, the Towns appealed.

On appeal, the Court reviewed the trial court's findings pertaining to taxation of FairPoint's use or occupation of the municipal rights-of-way. Construing the statutory language of RSA 72:23, I (b), the Court found that at the relevant times, the FairPoint permissions to use existing poles under RSA 231:160-a were "other agreements" that were required by the statute to include a provision "for the payment of properly assessed real and personal property taxes by the party using or occupying said municipal property" in addition to other related terms. Under the statute, FairPoint's use and occupation of existing poles was legally permitted upon submission of the requisite documents and without further proceedings (such as would be required to effectuate an amendment to such licensing), creating a "deemed" license, so long as issuance was "lawful." The Court concluded that, by the statutes' terms and purposes, to be lawful, such permissive use necessarily, and as a matter of law, incorporated the provisions of RSA 72:23, I (b). The Court rejected the Towns' alternative argument that the use by FairPoint of the poles created a type of perpetual lease that would not require inclusion of taxation language to permit assessment. Instead, the Court found that the use did not rise to the level of "ownership" and that RSA 72:23, I required tax shifting language in leases to permit taxation.

Regarding Phase 2 of the trial court's determinations, the Court declined to decide on appeal what valuation expert methodology was appropriate, instead deferring-in the absence of legislative directive-to the trial court's reasonable judgment to select one or more of "five appraisal techniques in valuing utility property original cost less depreciation (rate base or net book), comparable sales, cost of alternative facilities, capitalized earnings, and reproduction cost less depreciation." Further, the Court left determinations of expert credibility and discovery disputes to the determination trial court, and found adequate supporting evidence in the record.

Accordingly, the Court affirmed in part, reversed in part, and remanded for further determinations. Justices Houran and Brown concurred in part and dissented in part.

Devine, Millimet & Branch, PA of Manchester (Matthew R. Johnson on the brief and orally, for the plaintiff.

Mitchell Municipal Group, P.A. of Laco-nia (Walter L. Mitchell and Laura Spector-Morgan on the brief and Ms. Spector-Morgan orally) for the defendant.

November 2020

* Published

ENVIRONMENTAL; CONTRACTS

11/25/2020 *Sierra Club, Inc., et al. v. Granite Shore Power LLC, et al.*

Case No. 19-cv-216-JL, Opinion No. 2020 DNH 205*

This environmental case concerned the operation of Merrimack Station, a coal-fueled power plant on the Merrimack River. Since 1992, the Station has operated under an EPA-issued permit regulating its discharge of pollutants into the River. In 2019, the plaintiffs, Sierra Club, Inc. and Conservation Law Foundation, Inc., alleged that the owners of Merrimack Station violated three conditions in the EPA permit. The owners moved for summary judgment, arguing that a new permit issued by the EPA in 2020 removed or replaced the portions of the old permit that formed the basis of the plaintiffs' complaint, rendering the plaintiffs' claims moot. The court denied the motion for summary judgment because the portions of the old permit featured in the plaintiffs' complaint remain in effect under EPA regulations until the parties' administrative appeals of the new permit are resolved. The defendants also moved for partial summary judgment on one count of the complaint alleging violations of a reporting requirement within the permit; the defendants argued that they consistently complied with

the reporting requirement, based on their indisputable interpretation of it. The court denied this motion because genuine disputes of material fact remained as to the meaning of the reporting requirement and, thus, the defendants' record of compliance with it. 24 pages. Judge Joseph N. Laplante.

AMERICANS WITH DISABILITIES ACT; INDIVIDUALS WITH DISABILITIES EDUCATION ACT; EXHAUSTION OF ADMINISTRATIVE REMEDIES

11/2/2020 *Tveter v. Pinkerton Academy et al.*

Case No. 16-cv-329-PB, Opinion No. 2020 DNH 193

This lawsuit arose from Pinkerton Academy's handling of Elizabeth Tveter's requests for educational services and her attempts to participate in school sports after she became disabled. The court granted the defendants' motion for summary judgment on the sports-related claims for discrimination, harassment, and retaliation under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. The court concluded that those claims in substance sought relief from the denial of a free appropriate public education and therefore had to be exhausted through the administrative procedures prescribed by the Individuals with Disabilities Education Act, which the plaintiff had failed to do. The plaintiff's remaining negligence claims were also deficient because no reasonable jury

could find based on the summary judgment record that the defendants breached their duty of reasonable supervision on two occasions when the plaintiff was injured. 36 pages. Judge Paul Barbadoro.

SOCIAL SECURITY

11/10/2020 *McCusker v. SSA*

Case No. 19-cv-853-PB, Opinion No. 2020 DNH 196

Cindy Marie McCusker challenged the denial of her application for disability insurance benefits on four separate grounds. Addressing McCusker's arguments seriatim, the court found that (1) McCusker failed to

show that the ALJ erred in failing to identify complex regional pain syndrome as a severe medically determinable impairment or otherwise committed a reversible error when considering her associated symptoms in crafting her residual functional capacity ("RFC"); (2) the ALJ supportably discounted her subjective reports regarding the intensity, persistence, and limiting effects of fatigue and pain as not entirely consistent with the evidence in the record; (3) the ALJ's RFC finding was supported by substantial record evidence; and (4) the ALJ supportably relied upon a vocational expert's testimony in finding that jobs existed in the national economy that McCusker could perform. 24 pages. Judge Paul Barbadoro.

Telework from page 32

income attributed to the State for tax purposes must be rationally related to values connected with the taxing State.").

Pre-pandemic, Massachusetts permitted New Hampshire residents working in Massachusetts to prorate their income tax liability based upon the number of days they worked from home in New Hampshire. See 830 CMR 62.5A.1(5)(a) (2008). Now, however, Massachusetts seeks to tax the income of New Hampshire residents who have been teleworking "due solely to the Massachusetts COVID-19 state of emergency" as if they were still commuting to Massachusetts each day. Mass. Department of Revenue, Technical Information Release 20-5, Massachusetts Tax Implications of an Employee Working Remotely due to the COVID-19 Pandemic (Apr. 21, 2020).

Clashes over the taxability of telework are not new. To the chagrin of its neighbors, New York has enforced its so called "convenience rule" to tax out-of-state teleworkers for years. Under that rule, non-residents who work for New York employers and telecommute part-time—either for their own convenience or the convenience of their employer—must pay income tax to New York on all of their wages, even if their wages may also be taxed by their home state. See Nicole Belson Goluboff, *Tolls on the Broadband Commute: State Tax Limitations on Interstate Telework*, 20-

SPG Media L. & Pol'y, 217 (2013). Over the years, the United States Supreme Court has declined to hear at least two cases challenging the constitutionality of this practice. See *Zelinsky v. Tax Appeals Tribunal of State*, 1 N.Y.3d 85, 88, 801 N.E.2d 840, 843 (2003), cert. denied, 541 U.S. 1009 (2004); *Huckaby v. N.Y. Div. of Tax Appeals*, 4 N.Y.3d 427, cert. denied, 546 U.S. 976 (2005).

The Court's original jurisdiction is not commonly invoked, and in this case, Massachusetts will likely argue that New Hampshire residents, not the state, should bring suit in the lower courts. This case, however, may pique the Court's interest. First, the facts presented create a clear-cut opportunity for the Court to set an outer limit on a state's authority to tax telework, while still allowing the legislative branch to enact more targeted and specific reforms in this arena. Second, Massachusetts enacted the challenged rule based upon exigencies associated with the pandemic. At that time, it appeared that the pandemic would be short-lived. Now, with the pandemic having extended more than nine months, the basis for this "emergency rule" is strained at best. The Supreme Court may wish to resolve the matter for that reason. The Court will decide whether to accept this case in the coming months.

Graham Steadman is an associate in McLane Middleton's Litigation Department. He can be reached at (603) 628-1189 or graham.steadman@mclane.com.

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DCYF – Attorney II

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For questions about this position please contact Attorney Deanna Baker, Legal Director at (603) 271-1220.

Classifieds

Classifieds from page 37

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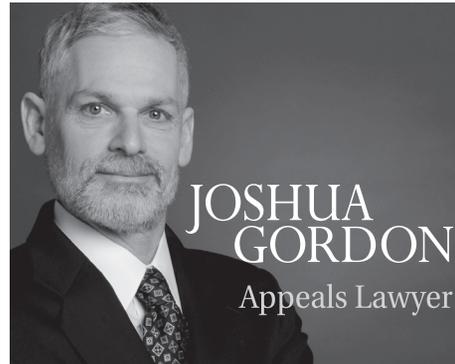
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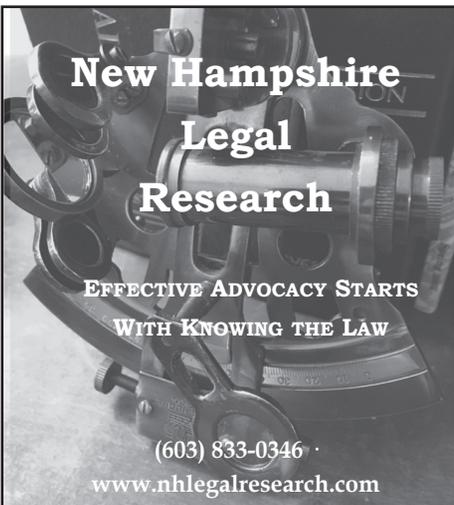
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The ideal candidate must have experience with the following job responsibilities, which include, but are not limited to:

- Requesting, reviewing, and organization of medical records
- Preparing medical evidence for hearings and trial
- Scheduling of depositions, mediations, and independent medical examinations
- Management of personal injury files
- Preparation of correspondence, motions, and objections
- Knowledge of court rules and discovery deadlines
- Assistance with discovery and document management

- Proficiency with electronic filing systems in state and federal courts and the ability to file pleadings in both state and federal courts
- Strong computer skills, including Microsoft Office, Outlook, Excel, Adobe, scanning and maintaining electronic files
- Excellent communication skills with clients, court staff, claims adjusters, and opposing counsel

The ideal candidate must be organized and have the ability to multi-task and work under pressure. Attention to detail and proofreading skills are a must have. We look forward to welcoming someone who takes pride in their work, is enthusiastic, and who will thrive in a fast-paced environment.

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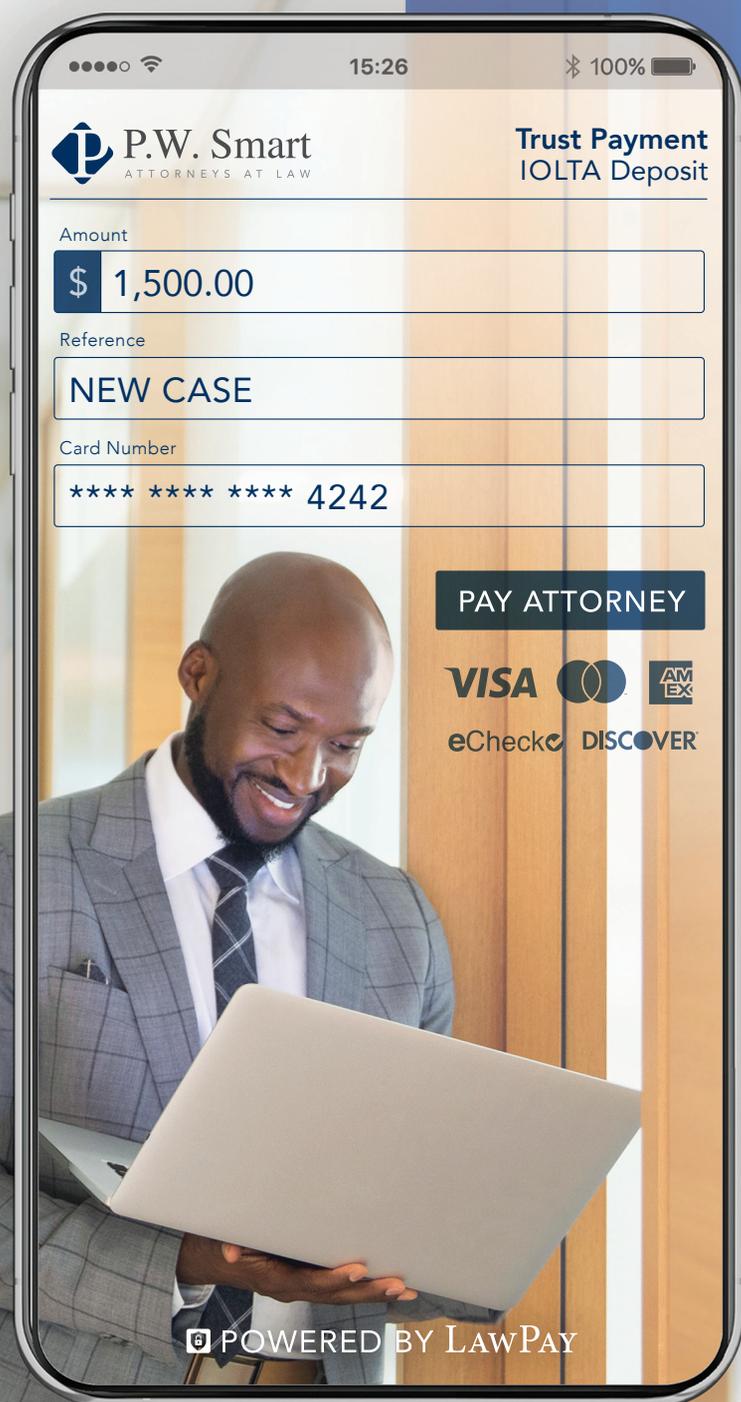
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