Designing Wellness in the Firm: A New Trend in Addressing Staff Wellbeing

By Tom Jarvis

With many law firms returning to in-person or hybrid work after two years of isolation and stress caused by the Covid-19 pandemic—combined with the staffing shortages created by the so-called Great Resignation—employee wellness is a growing concern.

While there are various ways for firms to address wellness, one of the more tangible— albeit less obvious—is the office itself.

When thinking about employee well-being in a law firm, office design may not be the first thing that comes to mind. However, our environment is a factor in our mental health, which ultimately affects productivity. Drab colors and poor lighting can contribute to feelings that lead to depression and anxiety.

John T. Pendleton: A Judge With a Personal Touch

By Kathie Ragsdale

Circuit Court Judge John T. Pendleton tells the young hockey players he coaches not to worry about losing, but to concentrate on winning.

“If you’re consumed about losing or making a mistake, you’re not in the right place to play your best,” says the Concord native, an assistant coach for the Portsmouth-Newmarket high school hockey team.

It’s a philosophy he brings to the bench, where he is often called upon to make difficult decisions in cases where, for example, terminating someone’s parental rights might be devastating to the parent but in the best interests of a child.

“It’s very stressful to make decisions in cases where there is so much emotion,” says Pendleton, nominated to the court in December 2015 by then-Gov. Maggie Hassan.

“Our office definitely thrives on making sure that our morale stays up, and that’s something that’s very easy to do when you’re coaching hockey,” Pendleton said.

Redesigning offices with a focus on employee well-being is becoming a worldwide trend—and some New Hampshire law firms are following suit.

When Concord firm Pastori Krans moved into their new space in 2020, they hired Warrenstreet Architects to make their vision come to life.

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Domestic Violence Task Force Makes Recommendations

Governor Sununu Signs Executive Order Reestablishing Governor’s Commission on Domestic Violence, Sexual Assault and Stalking

By Scott Merrill

Governor Chris Sununu signed an Executive Order on April 11 reestablishing the multidisciplinary Governor’s Commission on Domestic Violence, Sexual Assault, and Stalking after a ten-year absence.

In a statement, Sununu said, “I am looking forward to working with this group so that we can develop support, and implement initiatives that address the needs of victims and survivors.”

The decision to reconvene the Commission followed a domestic violence task force report released in March.

The task force’s 60-page report, put together by a multidisciplinary group representing victim’s rights advocates, plaintiff’s attorneys, criminal defense attorneys, county prosecutors, judges and other court staff, recommended reestablishing the Commission.

The task force and its recommendations came in the wake of an internal review committee created by the judicial branch to investigate the high-profile case of L.S.

The request of L.S., 33, for a final order of protection was denied by a Hampton judge after a hearing on Oct. 20, 2021. She was subsequently shot in the head by her boyfriend, who then committed suicide, on Nov. 15, 2021.

Annually, 6,100 new domestic violence and civil stalking cases are filed in the Circuit Court, the task force report states. This number comprises about 5.4% of the total new cases filed in the Circuit Court each year.

The internal review committee formed immediately after the incident, issued a report eight days later finding the judge’s denial of L.S.’s request for a final order of protection “a reasonable application of current New Hampshire law to the facts of the case.” The report reflected that the judge’s conclusion the plaintiff failed to prove the defendant’s conduct constituted a “credible present threat” under New Hampshire’s domestic violence statute was consistent with prior cases interpreting the law.

The task force, chaired by New Hampshire Supreme Court Associate Justice Anna Barbara Hantz Marconi, was established on Dec. 9, 2021, and was charged with conducting a systemic review of domestic violence cases in the New Hampshire court system. Its review included examining court practices and procedures in cases involving domestic violence; analyzing New Hampshire’s domestic violence law RSA chapter 173 B—focusing on the legal definition of “abuse” and its relationship to intimate partner violence; as well as reviewing court forms, and opportunities to provide victims of domestic violence increased access to legal counsel and victim’s advocates.

Justice Hantz Marconi said the biggest takeaway from her work on the task force was the need for the Governor’s Commission on Domestic and Sexual Violence—active from 1993 until 2013—to reconvene. And, in fact, on April 11, the Commission was reformed.

NHLa attorney Mary Krueger, a victims’ rights advocate in the mid-90s and member of the recent task force, recalled attending Governor’s Commission meetings early in her career and believes restarting them will help to bring accountability and foster strong relationships.

“There’s a level of accountability that goes along with having strong relationships with people,” she said. “When you know people, you’re more likely to assume best intentions and, in the culture war climate...”
Registration opens next week for the NHBA’s 2022 Annual Meeting held at the Mountain View Grand Resort in Whitefield, NH, June 17-18.

The Mountain View Grand is indeed a grand hotel, offering gracious hospitality with “first-class comfort and casual elegance.” You will find plenty of activities available on site, including a spa, pools, golf, walking trails, mountain biking, clay tennis courts, games, and a working farm. The resort’s website (https://www.mountainviewgrand.com/) provides a glimpse at the fascinating history of the Mountain View Grand starting in 1865. Annual Meeting attendees, as part of the two-day event, are invited to a presentation/walking tour that will chronicle the resort’s history.

At the meeting we will celebrate newly appointed and retiring judges, 50-year members of the Bar, and award recipients at Friday evening’s Honors & Awards Banquet. CLE video replays will also be available for attendees seeking continuing education. And, of course, we’ll enjoy fine dining and excellent company from beginning to end.

NHBA President Richard Guerriero extends his warm invitation, saying, “After over two years of virtual meetings, we are finally able to meet in person again. Being online might be more efficient, but it is no substitute for seeing friends and colleagues in person. I am very much looking forward to the Annual Meeting at the Mountain View and I hope to see as many people as possible there.”

As dazzling as the White Mountain setting is, the event most importantly provides us the opportunity to come together – to socialize, celebrate, learn, and relax.

This year’s Annual Meeting will provide guests with many choices. Whether you prefer to relax and unwind or stay active from morning to night, you will find just the right mix for you. We’ve arranged guided hikes, ax throwing, lawn games, late-night campfires, and much more.

Bring your mountain bike or rent one. Bring your golf clubs. Enjoy the spa and pools. The 18-hole course is open to one. Bring your golf clubs. Enjoy the spa.

The program will close with the passing of the gavel to 2022-2023 President Sandra Cabrera, just before comedian Juston McKinney takes the stage to entertain us with his unique New England centered humor.

Make your room reservations at the Mountain View Grand Resort by calling 1.866.801.3653. Please reserve your room by May 17, 2022 to ensure availability. Identify your group as New Hampshire Bar Association to obtain the group rate of $229 per night for single or double occupancy Thursday, Friday, and/or Saturday. Room rates are subject to applicable state and local taxes.

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Mentor Advice Program Celebrates Successful First Year

By Misty Griffith

In March 2021, the NHBA introduced the Mentor Advice Program to connect new, or new-to-New Hampshire attorneys with an experienced mentor. While the NHBA had previously offered a mentor program, the former program had not been active for several years. The new Mentor Advice Program (MAP) continues the important work of assisting new attorneys with their transition to the NH legal community by providing guidance from experienced mentors.

Participants in the program enjoy the feeling of connection with other attorneys and the opportunity to exchange ideas and learn from new perspectives. Attorney Keziah Colleton, a 2020 Bar admtee who has opened her own practice, Colleton Law, PLLC, began participating in MAP in April 2021. In describing her experience, Colleton said, “as a new attorney, it was invaluable to have someone to speak to that was open to having discussions. It was so nice to have someone in the same practice area to go to ask questions not only about the practice of law, but practice management.”

Advisees are paired with a mentor and put our team to work for you don’t need to look far.

Our focus is immigration law
800.717.8472 goffwilson.com

Other advisees have described their mentors as “accessible and helpful,” “encouraging,” “reassuring,” and “supportive.” MAP seeks to promote positive relationships among members of the NHBA, and the mentors who volunteer their time embody the collegiality of NHBA members.

During the program’s first year, MAP has had over 140 participants. This includes 85 mentors from more than 60 firms statewide. MAP has participants from every county, as well as NHBA members in Massachusetts, Vermont, and Maine. More than 55 mentors have been paired with an advisee and 30 plus mentors are currently available in the mentor pool. Having a robust pool of available talented mentors is one important key to the success of MAP, and the continuing availability of excellent mentors is necessary to sustain the program. Mentors who have participated in the program have described their experience as “rewarding,” “fun,” and “enjoyable” and have shared that they loved connecting with “bright,” “enthusiastic,” and “eager to learn” new attorneys.

The Mentor Advice Program is designed for maximum flexibility to allow each pair to connect in the manner most convenient for them. While some pairs meet in person for coffee or lunch, others have connected entirely by virtual means taking advantage of video conferencing technology. One mentor said of MAP, “the program does a real service by pairing the advisee and the mentor and facilitating the initial contact. From there the relationship can go wherever the mentor and advisee wish it to go.” The program commitment is only for six months, but pairs are encouraged to continue the relationship beyond that time as they see fit.

MAP is also meeting the real need for mentoring in the more rural areas of the state. Manchester, Concord, and Nashua combined account for only 22% of advisees. Currently, MAP has advisees from 34 different cities and towns from Temple to Littleton, Newport to Hampton, and Conway to Swanzey. While advisees come from firms of every size, more than half are from firms with five or fewer attorneys, including 19 new attorneys who are solo practitioners. Additionally, MAP has advisees who are working for the government, nonprofit organizations, and corporate legal departments.

Advisees are paired with a mentor based on practice areas of interest, size and type of firm or employer, and geography. Though with virtual meeting possibilities, geography is not a barrier to an otherwise good match. Commonality of practice areas is the most important factor taken into consideration unless an advisee has other stated priorities such as networking or guidance managing a solo practice. The most frequently requested practice areas are estate planning and family law. Criminal law has also been very popular. When an applicant expresses an interest in a particular area of practice, if there is not someone in the mentor pool who is a good match, the program coordinator will reach out to experienced attorneys to find someone who is willing to volunteer. MAP is always happy to receive new mentors. More volunteers who have experience in estate planning and criminal law are particularly needed.

MAP is continually introducing new mentoring pairs. Many experienced mentors are looking forward to connecting with an advisee. New attorneys, take advantage of assisting new attorneys with their transition to the NH legal community by providing guidance from experienced mentors. A mentor pool who is a good match, the program coordinator will reach out to experienced attorneys to find someone who is willing to volunteer. MAP is always happy to receive new mentors. More volunteers who have experience in estate planning and criminal law are particularly needed.

If you have any questions, contact Member Services Coordinator Misty Griffith mg riffith@nhbar.org.
Recently, New Hampshire’s top prosecutors penned an Op-Ed in this paper seeking to respond to, as they put it, “some members of the defense bar and the public that have suggested that there are problems with prosecutorial misconduct in New Hampshire.”

Their piece ends with the sweeping conclusion that, “there is no widespread problems with prosecutorial misconduct in New Hampshire.” But what have they done to investigate? Rather than a reflexive closing of their case, the Attorney General’s office has issued a report that has suggested that there are problems with prosecutorial misconduct in New Hampshire. Members of the defense bar and the public seek to respond to, as they put it, “some problems with prosecutorial misconduct and fix a flawed system of discovery review and disclosure to criminal defendants.

Our constitution requires the government to provide criminal defendants with exculpatory evidence in its possession. Due process demands a fair trial before our government locks a citizen in a cage. While the criminal defense bar is not a monolith, most defense lawyers would agree that the majority of New Hampshire prosecutors strive to act diligently and ethically while meeting their constitutional obligations to provide defendants and their attorneys with favorable evidence. But recent events give reason to believe that the current system does not work.

Readers don’t have to take the word of defense lawyers on this. Instead, they can read the words of judges that are responsible for assuring trials are fair. As covered by this paper, last year the federal court in Concord overturned the conviction of Imran Ali and after the government failed to turn over exculpatory evidence related to an expert witness. The Hon. Joseph Laplante vacated Ali’s conviction because, “the prosecution withheld or otherwise failed to disclose evidence.” The judge noted that this failure was exacerbated by the fact that “the prosecution repeatedly asserted that it had satisfied or exceeded its discovery obligations, and that the defendant’s discovery requests were desperate or excessive, further complicating and obstructing the discovery process.”

This paper also reported that last summer the United States Attorney’s Office dropped charges against Nathan Craigie mid-trial. In that case, the government accused Mr. Craigie of lying to OSHA investigators after a worker died at his job site. During trial, it came out that a government witness had been paid $80 by the Concord Police for his testimony earlier in Craigie’s case. The defense had never been informed. The presiding judge, Hon. Landya McCaffery expressed grave concern about the government’s repeated failure to disclose information to the defense, noting that: “The fact that highly similar misconduct has happened at least twice in this United States Attorney’s Office within a short time span raises concerns about the seriousness to which the government takes its constitutional disclosure obligations.”

Similar issues have arisen at the state court level. In 2020, the Strafford County Superior Court declared a mistrial in Timmon Verrill’s double homicide trial after it was discovered that large swathes of evidence had not been shared with the defense. In response, the Attorney General’s office told the Court that: “Although the acknowledged discovery violations in this case have been serious, they were neither willful nor malicious, and were the product of unique and unprecedented negligent oversight rather than systematic dysfunction by either police or prosecutors.”

In August 2017, State Trooper Haden Wilber illegally obtained evidence regarding Robyn White, causing her to be wrongly incarcerated for 13 days and subjected to multiple invasive searches of her body. He then lied repeatedly to investigators about this conduct. Although prosecutors eventually dismissed all charges against Ms. White, Trooper Wilber was not terminated as a police officer until August 2021. In the interim, his name was not placed on the Exculpatory Evidence Schedule, and few, if any defendants or their lawyers were informed by prosecutors of Trooper Wilber’s dishonesty. Presumably, Trooper Wilber made hundreds of arrests in the interim, and many defendants entered guilty pleas or were convicted at trial without benefit of
Building a More Diverse Bench of Future Judges by Considering Public Education Backgrounds

Judge Ketanji Brown Jackson has been hounded over her qualifications since being named Supreme Court nominee in February. Television personalities have demanded her LSAT score, US senators have parsed reading lists at schools where she sits on the board, and both have belittled her career experience. No one has questioned her credentials or qualifications based on one thing, however, a thing she mentioned three times in the opening remarks of her hearing: she is a Harvard grad.

Over the last 65 years, graduates of only eight law schools have been confirmed for seats on the Supreme Court. Fifty years ago, President Eisenhower nominated fellow Kansan, Charles Evans Whitaker, who had attended Kansas City School of Law, to the bench. as a conservative-leaning swing vote early in the Warren court, but with every new appointment his legacy in Supreme Court history becomes clearer: he is the last graduate of a public law school appointed to the court.

Since then, senators have given their advice and consent to a steady stream of Ivy Leaguers and others from a small circle of well-known private schools. Justice Amy Coney Barrett is the only nominee in that time from a unique institution, Notre Dame, and she is the only sitting justice not to have earned her degree in New Haven or Cambridge. That will not change when Brown Jackson takes her oath.

Brown Jackson is a landmark appointee, long-overdue representation for Black women and likely to be a tremendous justice. But the 2020 presidential election gave us the first completely non-Ivy winning ticket since Carter-Mondale and a unique opportunity to appoint judges and justices from outside the inner sanctum. Even with President Biden’s promise to nominate a Black woman, the pool of immensely qualified jurists included several public law school graduates. Tamika Montgomery-Reeves is the first Black woman to serve on the Delaware Supreme Court, which by virtue of its state’s unique place in corporate America, hears vital and complex issues of business law. Before that appointment, she was an equity court judge and practiced as a litigator in two states. J. Michelle Childs is a federal judge in the District of South Carolina and former state appellate judge. She was also a partner at her firm before becoming Deputy Director of the South Carolina Labor Department and Commissioner of the State’s Workers’ Compensation Commission. They graduated from the University of Georgia School of Law and the University of South Carolina School of Law, respectively.

Here in New Hampshire, where there is only one law school in the state and it happens to be public, there are currently zero public-law-school-educated federal district court judges. This may reflect a bigger problem in the legal profession. Trial judges are usually nominated from a pool of senior attorneys at noted law firms and government agencies, many of whom were law clerks. If our district, which again, contains no private law schools, cannot produce publicly educated judges, it must be because our judicial pipeline is most open to attorneys trained at private schools, which necessarily means trained out of state.

The appointment of a Black woman to the court is important and worth celebrating because perspectives are important. Jurisprudence is best served when courts are populated with judges with diverse experiences, diverse backgrounds, and diverse educations. Right now, half as many members of this country’s highest and most visible court graduated from non-Ivy law schools as were in high school at Georgetown Prep in 1982 alone. By overlooking publicly educated attorneys, we are overlooking those who for financial or other reasons could not win seats in often exclusionary private legacy institutions. In the interest of rich, diverse opinions and a strong, representative judiciary, I hope this administration will consider more educational backgrounds in judicial nominations, especially to the Supreme Court. And to make that happen, I hope that employers will open their doors to publicly educated associates and clerks to build a diverse bench of potential future judges.

Brandon Latham is a first-year law student at the University of New Hampshire Franklin Pierce Law Center from Merrimack.
A Few Things Your Client (and You) Should Know About Process Options: Mediation, Arbitration, Litigation

By Lela Porter Love

Let’s imagine one of the following clients came into your office. They want to know what their options are for recovering their money in the respective situations below. What would you say and why? This article examines critical aspects of mediation, arbitration, and litigation—process options for pursuing a claim—and what clients (and their lawyers) should know about their choice of process.

The Landlord: “These tenants rented an apartment in my home and never paid for heat or electricity like we agreed. We were going to divide bills according to our respective square footages. They owe $18,500 for that, and now they’re suing for their security deposit back. What nerve. Let’s teach them a lesson.”

The Generous Uncle: “My sister owes me $50,000. Go get it. I made a loan to pay for my nephew’s college. They’re acting like it was a gift. They never even return my calls or texts. I want my money back.”

The Business Manager: “They used to be a good supplier. Now every order is missing pieces and it’s coming in too late. This doesn’t work for my business. They owe me $100,000 on the last order alone for missing components and damages I suffered. Recover that and then I’ll find a new supplier.”

What should your client know about the third-party paths to resolution if negotiation has failed? What should you, the attorney, advise them to do? Depending on what process a client chooses, very different paths and results flow. Given the imperative that your client’s decision be an informed one, it is important they understand the nature of different processes and the likely consequences of any choice.

The following is a brief primer on the major third-party processes and their applications to the disputes between the landlord and his tenant, the uncle and his nephew’s family, and the business manager and his supplier. Keep in mind, though, that the range of options is broader than the “legal” process options examined here. So, even though this article focuses on the available third-party processes, the real options include many more: avoid conflict altogether (walk away, do nothing, give up), send emails and texts, make arguments and issue threats and ultimatums, go to a religious authority or the police, apply peer pressure, make an offer “they can’t refuse,” and find other ways to fight. The continuum on the right shows only the major third-party processes.

Important to note is that the processes on the left side of the continuum pictured allow the client to retain control, they are informal, and they are driven by a client’s particular interests, rather than being determined by legal or other norms. Sometimes, doing nothing is a good choice, usually mediation is worth a try if negotiation hasn’t worked, before moving to the right on the continuum and ceding control to an arbitrator or a court. Note, however, that filing a court action is often a way to force the other party to take the matter seriously, though a claim has the risk of begetting counterclaims.

Let’s go back to basics. What are the components of mediation, arbitration, and litigation that your client should understand?

Mediation is a private, confidential process where an impartial third party—the neutral mediator—will help parties have a constructive dialogue with each other to understand the situation more fully from each party’s perspective, to develop options for mutual gain, to understand risks, and to search for an agreement that is acceptable to all. Where parties find acceptable options, the conflict can be ended by an agreement, which can be a binding contract between the parties, ending the matter, usually in a way that is more satisfactory than adjudication through arbitration and/or litigation because it is created, endorsed, and accepted by all parties, as opposed to being decided by a third party—a judge, jury, appeals court, or an arbitrator. Mediati5on can result in no agreement, though. In that case, at least the parties should understand the situation more fully after mediation.

Arbitration is a private, adversarial process where parties choose an impartial third party (or sometimes three decision makers), to hear their dispute and make a final and binding decision and award. It can be less formal, less time-consuming, and less adversarial than litigation, as the parties de-
Comparing Processes

**Adjudication:**
- Parties persuade each other
- Neutral decision
- Adversarial
- Win-Win
- Negotiation

**Mediation:**
- Parties persuade each other
- Neutral helper parties decide
- Collaborative
- Win-Win
- Future-oriented

Termine the procedures they will follow. Parties choose the arbitrator, which may mean they will be more likely to be satisfied with that person’s judgment. Usually, a binding arbitration award is final, binding, and enforceable by the courts.

Litigation is a public, adversarial process where parties present their case by evidence and witnesses to a judge or jury to obtain a decision that is enforceable by law. Litigated decisions can be appealed to higher courts. Litigated outcomes, to the extent they are published, make public precedents for others.

In analyzing which process will serve a client best, you might ask:

**What are the relationships between the parties?**

In the case of the generous uncle, your client should think long and hard about entering an adversarial process (litigation or arbitration) with a family member. The relationship will most likely be further damaged; the family may never heal; a generous relationship will most likely be further damaged; or incomplete. The relationship concern is most relevant for the generous uncle and the business manager; they might consider mediation as a first choice. The landlord and tenant will probably never do business again, so their future relationship is not a concern.

**What are the costs of the process?**

Costs are not only the money needed to pay for the neutral mediator or arbitrator and for the attorneys, but also the cost in time, anxiety, and emotional stress. On these measures, litigation is probably the costliest of the processes. This said, it is possible for attorneys, in an agreement to arbitrate, to make arbitration as expensive and time-consuming as litigation, if full discovery and motions along the lines of the federal rules of evidence are incorporated. Even if a judgment can be obtained relatively quickly in a particular jurisdiction, a court award can be appealed—sometimes through two higher courts. Arbitration is most often final (no appeal) and can be designed to minimize costs and parties value privacy. Many families don’t want their private affairs aired in public forums. Here, the landlord and tenant might not care about privacy, but the businessperson and the generous uncle might.

In sum, the science of “fitting the forum to the fuss” is being studied by scholars. It is up to attorneys to give their clients a feel for this. Most clients have a self-righteous sense that they will win and will teach their counterpart a lesson in court. This can be exacerbated if attorneys overlook the case to get the business. But the adage that “he who seeks revenge must dig two graves” is often the outcome of litigation—both sides are buried in costs and the decision may be an unhappy surprise to at least one side, or both. Voltaire said, “I was never ruined but twice in life, once when I lost a lawsuit and once when I won one.” This suggests that the method where your client retains most control (mediation) might make the most sense—at least as the first try.

Here’s a light bulb riddle that is a fun way to highlight differences between mediation, arbitration, and litigation:

**How many arbitrators does it take to change a light bulb?**

None. Arbitrators, like judges, don’t change light bulbs, but they’ll tell you who’s responsible for the darkness and assess the damages.

**How many arbitrators does it take to change a light bulb?**

None. Arbitrators, like judges, don’t change light bulbs, but they’ll tell you who’s responsible for the darkness and assess the damages.

**How many mediators does it take to change a light bulb?**

None again. Mediators don’t change light bulbs. They help light bulbs change themselves.

Endnotes


Lela Porter Love is a member of the NHBA Dispute Resolution Committee, the Director of the Kanin Program for Conflict Resolution and a Professor of Law at Cardozo School of Law.
Withdrawal Obligations with Respect to Client Lies or Fraud – Part 3

I. Client Lies Resulting in a Lawyer’s Services Being Used to Perpetrate a Crime or Fraud

Where facts known to a lawyer establish a high probability that a client or prospective client seeks to use the lawyer’s services for criminal or fraudulent activity, the lawyer has a duty to inquire further to avoid advising or assisting such activity. See ABA Formal Opinion 491 (2020). A lawyer is prohibited from engaging or assisting a client in conduct that the lawyer knows is criminal or fraudulent and cannot ignore facts or circumstances that suggest the client intends to use the lawyer’s services for such purposes. See Rule 1.2(d); Rule 8.4(c).

Accordingly, if the discovery of a client’s lie causes a lawyer to know that their services are being used, or have been used, by a client to perpetrate a crime or fraud, the lawyer must withdraw. See Rule 1.16(b)(2), (3); Rule 1.2(d); Rule 1.2 cmt. [9]. Similarly, if the client or prospective client refuses to provide information necessary for the lawyer to assess the legality of the proposed action, the lawyer ordinarily should decline the representation or withdraw under Rule 1.16. See ABA Formal Opinion 491. In some circumstances when the client’s fraudulent or criminal course of action has already begun and is continuing, withdrawal alone might be insufficient, and it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like. See Rule 1.2 cmt. [10].

Whether declining representation of a prospective client or withdrawing from representation of a client on this basis, the lawyer must remain acutely aware of their duty to protect confidential information. See Rule 1.6; Rule 1.18(b). The lawyer may be permitted to disclose confidential information in some circumstances, such as where the client’s conduct is reasonably certain to result in death, substantial bodily harm, or substantial injury to the financial interest or property of another, but only to the extent reasonably necessary. See Rule 1.6(b)(1). Before withdrawing or disclosing confidential information, however, the lawyer should consider remedial measures such as reminding the client of the lawyer’s ethical duties and attempting to dissuade the client from engaging in the criminal or fraudulent conduct or to remedy any harm done by already completed conduct. See Rule 1.6 cmt. [8]; see also, Illinois State Bar Association Opinion No. 20-05; State Bar of Nevada Formal Opinion No. 25.

II. Lie, Crime, or Fraud Discovered after Conclusion of the Representation

Significant difficulty arises in determining a lawyer’s ethical obligations when a lawyer learns of a client’s fraudulent conduct after the representation has concluded. The ABA has opined that when a lawyer learns after conclusion of the representation that a client used their services to perpetrate fraud and knows that the client “avowedly intends to continue to use the lawyer’s work product, this amounts to a de facto continuation of the representation even if the lawyer has ceased to perform any additional work.” See ABA Formal Opinion 93-366 at 6. In such circumstances, the ABA has said that withdrawal is appropriate, and disaffirmance of the work product to the defrauded party may be the only method of making the lawyer’s withdrawal effective, but the lawyer should go no further in disaffirming work product than to state that the lawyer no longer stands behind it. See ABA Formal Opinion 93-366. Additionally, the ABA instructs that disaffirmance of work product to the defrauded should be a last resort, and the lawyer should consider other remedial measures such as disaffirming the work product to the defrauded party even if the lawyer has ceased to perform the defrauded should be a last resort, and the lawyer should consider other remedial measures such as disaffirming the work product to the defrauded party even if the lawyer has ceased to perform any additional work. See id. ABA Formal Opinion 93-366 was issued over a boisterous dissent and has received criticism from scholars. See ABA Formal Opinion 93-366 at 7-10; Geoffrey C. Hazard Jr., Lawyers and Client Fraud: They Still Don’t Get It, 6 Geo. J. Legal Ethics 701 (1992-1993). At least one State Bar Association has taken the position that a
The Importance of Promoting Mental and Physical Wellbeing in the Legal Profession

By Jeremy T. Walker

Regardless of where one works in private practice or as a public sector, one thing we lawyers all know is that the practice of law is demanding. It constantly taxes our minds and, because it is a jealous mistress of our time, we often lack the time necessary to safeguard and promote our individual mental and physical wellbeing. Indeed, it is not only demanding on the lawyers, but all those in the profession.

At McLane Middleton, we devote significant time and resources in striving to have engaged and healthy employees. Our firm comprises over 200 attorneys, paralegals, and administrative staff, and I am fortunate to work with a team of professionals who work incredibly hard to be their professional best on behalf of our clients. As our firm grew over the past 20 years, the demands on our time increased along with our growth. Not only do we need to meet our clients’ needs and deadlines, but we have more non-client demands to keep our business running. And, of course, with modern technology, we are always an e-mail or text away from being reminded about work at any time on any day.

Our firm obviously is not unique to this problem, and law firms and public legal agencies are often so busy, they run the risk of not making the time to ensure that they implement steps necessary to protect the health and wellbeing of their employees. After all, practicing law is a people business, and if our lawyers, paralegals and staff are not physically and mentally well, that does not bode well for our business.

Recognizing this critical need, our firm formed a Wellness Committee about 15 years ago, and provides an annual budget for the Committee’s use. I currently co-chair the Committee along with our Human Resources Director and we meet monthly. Our Committee comprises between 10-15 members and includes attorneys, paralegals, staff as well as two representatives from our benefits administrator, CGI Benefits Solutions. The fundamental goal of the Committee is to ensure that our firm provides the necessary resources for all employees to lead as healthy a lifestyle as possible.

The Committee is not simply about encouraging push-ups and sit-ups, although we certainly encourage taking the time for physical exercise. Our focus generally is on holistic wellbeing, and we provide resources for our employees to continually strive for their best physical, mental and emotional wellbeing.

We know that one’s wellbeing is multifaceted, and everyone has different needs, so our initiatives vary. For instance, we strive to offer exercise classes that are free to our employees three or four days of the week. We offer boot camp classes on two nights, a yoga class and at times we have offered a pilates class as well. Our firm is fortunate that our landlord allows us the space in the building for the classes and our employees appreciate being able to participate in a class right after work before heading home. For those employees who prefer private gyms, our benefit administrator works with our health insurer to provide employees an annual $150 reimbursement toward gym membership. A few years ago, the firm subsidized the purchase of Fitbit® devices for all those who wanted one and a number of our employees are working on increasing their daily steps. Every year we run a “fitness challenge” for a month where employees who commit to participating in a fitness activity each day can submit a raffle ticket and we provide weekly prizes to raffle winners. In the past we have organized group activities such as ice skating or “couch to 5K” running programs.

In addition to the physical health offerings, our Committee offers education seminars regarding all aspects of wellbeing. We have been fortunate to have represented our benefits administrator who attends each monthly meeting and helps the firm better take advantage of the various offerings from our health insurer. In the past we have brought in speakers to provide tips for better time management, anxiety and stress reduction, nutrition, financial wellbeing, etc. Prior to the pandemic, we held an annual “Health Fair” for which we invited various health related vendors who set up at our firm for a half-day, and employees could take the time to go the health fair and learn about a range of health services and products. As our employees return more routinely to the office, we hope to bring that back later this year. We also will continue our tradition of supplying apple cider and donuts on particular “Fruit Fridays.” While none of these initiatives can ensure that all of our employees will take steps to improve their physical or mental wellbeing, we are finding that many of our employees take advantage of the resources.

We also know that those suffering from mental or physical health issues typically want to maintain privacy as they address these issues. Accordingly, a critical component of our work as a committee is to educate our employees as to the myriad resources we offer so that if some of our colleagues are suffering, they know they have options and resources available without having to ask for them.

McLane Middleton offers an employee assistance program through KGA where all employees can go for free assistance, ranging from free mental health counseling appointments to help finding an apartment or child care.

As studies performed by the American Bar Association and others have confirmed, attorneys in particular are subject to some of the highest levels of mental

WELLNESS continued on page 21

THE PERENNIAL POWERHOUSE

MILLION+ SETTLEMENTS IN 2021

<table>
<thead>
<tr>
<th>Million-Plus Verdicts and Settlements*</th>
<th>Year</th>
<th>LUBIN &amp; MEYER Total</th>
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*Unpublished settlement
Announcing 2022 Justice Grant Awards

The NH Bar Foundation’s Board of Directors has approved $102,250 in Justice Grants to thirteen programs and organizations. Funded by your contributions, endowments and legacy gifts, the Justice Grant program supports the rule of law, access to justice and civic education projects across the state. Justice Funds are managed by the NH Charitable Foundation with a current value of over $1.6 million. Grants are awarded every two years. Fifteen applications were submitted totaling $154,950 in funds requested.

A Committee of three Board Directors and one Justice Society Member reviewed each application and made their recommendations for awards based on program merits, sustainability and funds available.

**NH Historical Society - The Democracy Project**
$8,500 - to fund the development of a virtual field trip, “Students and the Law: Visiting the NH Supreme Court” as part of the “Moose on the Loose” curriculum.

**Judge Richard F. Cooper Fund/ Frederick K. Upton Fund/ J Albert and Mildred E. Lynch Fund**

**YWCA - Court Advocacy**
$8,000 - to fund the expansion of court advocacy support for clients of the REACH Crisis program.

**Richard P. Dunfey Memorial Fund & William F. Batchelder Fund**

**New Hampshire Public Radio - Civics 101 Program**
$8,000 - to fund production of the Civics 101 podcast and audience engagement.

**Arthur and Esther Nighswander Justice Fund/ Stanley M. and Thalia M. Brown Fund/ Vickie Bunnell Memorial Fund**

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**Guardian Support Services of NH – Guardianship Support Program**
$7,500 - to provide education, training, resources, and support to family and lay guardians to improve their ability to meet the needs of their wards and the requirements of the court.

**A.J. McDonough Family Fund/ Judge Richard F. Cooper Fund/ McLane Justice Fund**

**Manchester NAACP – Discrimination Reporting and Legal Redress**
$5,000 - to support staffing for the Legal Redress Committee which works to address, prevent, and support the victims of racial discrimination in the criminal justice system and society in general.

**Hon. William F. Batchelder Fund & Advancement of Justice Fund**

**NH Legal Assistance – Civil Legal Services Strategic Planning**
$18,950 - to support joint strategic planning for New Hampshire Legal Assistance and 603 Legal Aid, including an exploration of racial equity in civil legal aid.

**Vickie Bunnell Memorial Fund/ Advancement of Justice Fund/ McLane Justice Fund**

**UNH Law - Warren B Rudman Center- Summer Fellowships**
$8,000 - to support two law students who intern with a legal non-profit agency without pay.

**Hon. William F. Batchelder Fund**

**NH Bar Association - Beyond High School: A Guide to Your Rights and Responsibilities book**
$7,500 - to fund printing costs and updates to the Beyond High School booklets which are distributed to graduating high school students to help them understand their rights and responsibilities as they become adults.

**Stanley M. and Thalia M. Brown Fund & Judge Richard F. Cooper Fund**

**NH Bar Association - We The People: The Citizen and the Constitution**
$8,500 - to fund the We The People program at district and state hearings as well as National Finals.

**Advancement of Justice Restricted Fund/ Advancement of Justice Fund/ Frederic P. Upton Justice Fund**

**NH Bar Association - Prison Discussions**
$6,000 - to fund a series of Bar News articles and Bar Discourse podcasts which will examine the NH prison system, particularly through the lens of the COVID-19 pandemic.

**Charles W. Dean Trust Fund**

**NH Civics – Civics 603**
$5,000 - to support expansion of the Civics 603 program which serves students in grades 5-6 (mock trials) and grades 7-12 (appellate oral arguments.)

**Stanley M. and Thalia M. Brown Fund**

**Bridges: Domestic & Sexual Violence Support Services - AmeriCorps Court Advocate**
$4,500 - to fund an AmeriCorps Court Advocate to support victims and survivors navigate through the judicial system.

**Hon. William F. Batchelder Fund/ Advancement of Justice Fund**

**603 Legal Aid – Post Merger Integration**
$2,800 - to fund consultants to assist in post-merger strategic planning.

**William A. Baker Fund & McLane Justice Fund**

**TOTAL GRANTS: $102,250**
Community Notes

The UNH Law Domestic and Sexual Violence Victim Advocates will host a golf tournament fundraiser to benefit the Crisis Center of Central New Hampshire on April 23, 2022. The event will be held at the Loudoun Country Club and begins at 9:00am. For details on how to purchase tickets or become a sponsor call the Crisis Center of Central New Hampshire at 603 225 7376.

Sheehan Phinney shareholder, Kenneth A. Viscarello was honored with the Helen M. Greene Visionary Award by CATCH Neighborhood Housing. The award, named for CATCH’s long-time CFO who passed away suddenly in 2011, recognizes an individual or organization whose investment in the community has impacted the issue of housing in a significant way.

Hineckley Allen announced that Amie Rosenblatt, Kathleen M. Mahan, and Chris Kelly have joined the firm, resident in their Manchester, New Hampshire office.

The New Hampshire Women’s Bar Association will conduct elections electronically for its Board of Directors using voting members’ email addresses. Ballots will be sent on May 1, 2022, and the polls will close on May 15, 2022. If you are interested in running contact Caroline Leonard at leonardg@gegalaw.com.

The law firm of McLane Middleton is pleased to announce that Eric A. Chojnicki has joined the firm as Head of Trust Services.

David Starmats

Coming & Going

LawLine Thank You

The NH Bar Association would like to give a huge thank you and shout out to the Law Offices of Parnell, Michel and McKay for volunteering to host the LawLine event on March 9, 2022. Over 50 calls were taken by Attorney Parnell, Attorney Starmats and Attorney Hawthorne on a variety of issues including family law, landlord/tenant issues and criminal law.

Lawline is a public hotline, hosted by volunteer attorneys, on the second Wednesday of each month from 6:00 pm to 9:00 pm. The NHBA forwards the phone calls from the public and provides a light dinner for everyone. For more information or to volunteer to host a LawLine event, please contact NHBA Lawline Coordinator Anna Winiarz at winiarz@nhbar.org. Volunteers are still needed for December 14th!

Rory Parnell

New Members of the NH Bar

The following members were admitted to the New Hampshire Bar Association at a swearing in ceremony on March 16, 2022.

Thomas F. Barnett, Boston, Mass.
Christopher A. Baxter, Portsmouth, NH
Nicholas D. Bortz, Boston, Mass.
Mary A. Calman, Boston, Mass.
Megan M. Carpenter, Concord, NH
Mark F. Cavanaugh, Concord, NH
Pamela M. Coufos, Andover, Mass.
John M. Crabb, North Conway, NH
Sara P. Cressy, Portland, Maine
Joseph A. DiClerico, Manchester, NH
Karen A. Doherty, Derry, NH
Morgan M. Eastman, Concord, NH
Nicholas F. Feloney, Boston, Mass.
Thomas P. Glynn, Everett, Mass.
Alexandra A. Gordon, Boston, Mass.
Colleen E. Hayes, Concord, NH
Jennifer McCabe, Yonkers, NY
Molly L. McCready, Tewksbury, Mass.
Michael J. Merriam, Boston, Mass.
Kenneth M. Nicoll, Milford, Conn.
Lyn A. Parker, Wakefield, Mass.
Shenan L. Pellegrini, Boston, Mass.
Madeline R. Pelagalli, Nashua, NH
Fritz M. Plaviose, Wakefield, Mass.
Senad Ramovic, Concord, NH
Richard R. Rousseau, Rye, NH
Lyndsay I. Roy, Londonderry, NH
Hallie S. Semmel, Falmouth, Maine
Anthony A. Senerchia Jr., Cranston, R.I.
Michael B. Stevens, W. Palm Beach, Fla.
Gina K. Stillman, Lebanon, NH
Victoria E. K. Taravella, Manchester, NH
Lauren E. Weeks, Gloucester, Mass.
Adam H. Weintraub, New Orleans, La.
Kimberly A. Whitworth, Boston, Mass.
Christopher J. Williamson, Woburn, Mass.
James Yesu, Westborough, Mass.

The following members were admitted to the New Hampshire Bar Association at a swearing in ceremony on February 25, 2022.

James “Jim” Wheat

It is with profound sadness that we let our clients and friends know that Jim passed away on Wednesday, April 6th. We, his Wadleigh family, are heartbroken to have lost a great man. Our thoughts go out to his family.

Jim was a member of the Wadleigh family for almost 50 years. He has tried every nature of civil cases in the state and federal courts. But beyond being an exceptional lawyer, he was an exceptional man. Kind, generous, thoughtful. He will be missed.

Founded in 1899, Wadleigh, Starr & Peters, P.L.L.C. offers a full range of legal services to local and national clients. Located in historic Manchester, NH, we are proud of our history and draw on our vast experience and historical perspective to address the ever-shifting demands of the law.

IN MEMORIAM

John Peter Cyr

John Peter Cyr died March 9, 2022, at the Jack Byrne Center in Lebanon, NH due to complications of an accidental fall on March 3, 2022. Born on Sept. 1, 1944, he was the eldest son of the late John E. and Grace D. Cyr in Littleton, NH.

He graduated the 8th grade at the St. Rose of Lima Church in Littleton, NH in 1958. In 1962, he graduated Littleton High School. Following high school, Peter graduated from Providence College in 1966 and from Suffolk University Law School in 1970. In September 1970, he was admitted to the NH Bar Association and began his law practice in Littleton.

On Aug. 4, 1973, he married Susan Armstrong. In August 1985, he was appointed by the Governor of NH to the Littleton District Court. Presiding over the family court was added to his duties in January 2000. In 2011, the court system changed to the Grafton County Circuit Court, which he presided until his retirement in September 2014. Peter went on to serve the court system as a judicial referee until November 2017.

Peter was a past member of Littleton Rotary Club and a founding member of the Ammonoosuc Chapter of Trout Unlimited. He was a member of the St. Francis Praying, Procuring and Presenting Society, enjoying the many fishing trips the group took. He was also a member of the American Judges Association, NH Judges Association, NH Bar Association, and the Juvenile and Family Court Judges.

Peter enjoyed skiing, bicycling, fly tying, and fly fishing, often joining his friend, Doug, after work for an evening of relaxing fishing on Profile Lake. He thoroughly enjoyed the two trips he and Susan took to Alaska and the Yukon in 2016 and 2017. Predeceased by his sisters, Helen M. Cyr and Mary Joanne (Jody) Desclous.

Survived by his wife, Susan, his sisters, Patricia and Bruce Herrmann of Wolfeboro, NH, Catherine and William Latvia of Gardner, MA, and his brother, A. Paul (Butch) Cyr of Golden, Colo. He is also survived by many nieces, nephews, cousins, and his buddies, Tia and Zoe.

In lieu of flowers, memorial contributions may be made to any of the three places listed:

* NH Food Bank, 700 East Industrial Park Drive, Manchester, NH 03109
* Above the Notch Humane Society, 298 NH-18, Sugar Hill, 03866
* Second Chance Animal Rescue, 1517 Meadow St., Littleton, NH 03561

Joseph A. DiClerico, Jr.

The Honorable Joseph A. DiClerico, Jr., 81, of Highland Ridge Road, died Saturday, April
Laura has been named a partner with the firm. Laura heads our family division. Laura is a native of New Hampshire and has worked as an attorney since 2003, representing clients in a variety of cases including divorce, parenting, child support, domestic violence, estate planning, and civil litigation. Laura has been a member of the Milford Board of Selectmen since 2017 and is the Board’s representative on the Milford Planning Board, Milford Conservation Commission, and the Wadleigh Memorial Library.

Laura received a Bachelor of Arts degree from Notre Dame College (summa cum laude) in 1998 and her Juris Doctor from UNH School of Law in 2003. A member of the New Hampshire Bar Association, Laura is licensed to practice in all New Hampshire state courts as well the United States District Court for the District of New Hampshire.

In her personal time, Laura enjoys spending time with her children, hiking, and kayaking.
Distinguished Service
Kevin G. Collimore

Congratulations to Kevin on his well-deserved selection for 603 Legal Aid’s Distinguished Pro Bono Service Award. Kevin’s willingness to go above and beyond to help others speaks volumes about his character and dedication as an attorney.

CullenCollimore
COUNSELORS AT LAW
cullencollimore.com

Hinckley Allen Fuels Continued Expansion in Southern New Hampshire
Welcomes new attorneys

Arnold Rosenblatt, Partner
With 40 years’ experience as a trial lawyer, Arnie successfully handles business disputes in state and federal courts, in regulatory settings and arbitration. Arnie’s experience covers a myriad of business disputes, such as IP litigation, employer-employee relationships, lender liability disputes, contract actions and professional malpractice matters. He was a founding partner at his previous firm and as a result of his reputation as a trial lawyer, he is a Fellow of the American College of Trial Lawyers.
603-545-6122
arosenblatt@hinckleyallen.com

Kathleen M. Mahan, Partner
As a business litigator, Kate is known for her wide range of intellectual property matters, including trade secrets, trademarks and copyrights, as well as business disputes related to corporate governance, non-compete disputes and other professional disagreements. Her well-rounded experience includes counseling both plaintiffs and defendants before state and federal courts.
603-545-6118
kmahan@hinckleyallen.com

Chris Kelly, Counsel
Formerly an in-house real estate counsel for a Fortune 200 Company, Chris has extensive experience in commercial real estate across the country and provides comprehensive commercial real estate services, including, land use analysis, land acquisition, title clearing, and permitting strategy.
603-545-6136
ckelly@hinckleyallen.com

Shaun Filiault
We welcome Dr. Shaun Filiault to the NHLAP Commission. Dr. Filiault holds a Ph.D. in health psychology from the University of South Australia and a J.D. from the University of New Hampshire. He is admitted to the New Hampshire bar. Dr. Filiault has previous law practice experience in consumer protection and securities regulation. He has current and previous board experience for other nonprofit organizations. As the position of Treasurer became vacant, Dr. Filiault expressed interest and was subsequently voted in as the new Treasurer for the NHLAP Commission. We are grateful for his commitment to further the mission of the NHLAP.

Christopher Nicolopoulos
The New Hampshire Lawyers Assistance Program would like to recognize and give special thanks to NH Insurance Commissioner Christopher Nicolopoulos for six years of dedicated board service. Commissioner Nicolopoulos was appointed by the NH Supreme Court to serve on the NHLAP Commission in 2016 and re-appointed to serve a second term in 2019. In 2020, Commissioner Nicolopoulos stepped in to serve as Treasurer. He delivered mentorship to both the current executive director and predecessor. Commissioner Nicolopoulos shared valuable insights and strategized with the NHLAP Commission in ensuring access to healthcare and recovery services for members of the NH legal profession. By all measures, Commissioner Nicolopoulos is a clear example of true board stewardship ensuring fiduciary responsibilities and mission effectiveness.

Hinckley Allen Fuels Continued Expansion in Southern New Hampshire
Welcomes new attorneys

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With 40 years’ experience as a trial lawyer, Arnie successfully handles business disputes in state and federal courts, in regulatory settings and arbitration. Arnie’s experience covers a myriad of business disputes, such as IP litigation, employer-employee relationships, lender liability disputes, contract actions and professional malpractice matters. He was a founding partner at his previous firm and as a result of his reputation as a trial lawyer, he is a Fellow of the American College of Trial Lawyers.
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One area that firms are attempting to address with redesigns is employee burnout. The World Health Organization recently acknowledged the legitimacy of burnout by adding it to the International Classification of Diseases. According to the WHO, burnout, “a syndrome conceptualized as resulting from chronic workplace stress that has not been successfully managed,” is characterized by three dimensions: feelings of energy depletion or exhaustion; increased mental distance from one’s job; or feelings of negativity or cynicism related to one’s job; and reduced professional efficacy.

The effects of burnout can also spill over into personal relationships and family matters—and many lawyers are working longer and harder than ever these days. Belgian architects, Space Refinery, claim that modern office design is a long-term solution to employee burnout. They indicate that modern office design is all about creating spaces that are multipurpose, with acoustics to reduce noise, and of biophilic design, which is the use of nature and lighting to connect the occupant to a natural environment.

A recent study of 7,600 global workers by wellbeing specialists, Robertson Cooper, found that when offices incorporate plants, natural light, and water features, they were linked with 15 percent higher levels of employee well-being. Paul Voegelin, Chief Operating Officer of Sheehan Phinney, Bass & Green understands the importance of modern office design and combating burnout. He and the rest of the Sheehan management team redesigned their Boston office in 2019, their Portsmouth office in 2021, and are currently in the planning stages at the Manchester location with global architect firm, Gensler.

“We absolutely love our space,” Landry says. “We get compliments every time a client or vendor comes in for the first time. It makes us want to come to work and love the space that we work in.”

“The planning involved with redesigning the offices was a little tricky at times. Voegelin, along with managing partner, David McGrath, worked very closely on gathering data on industry trends while balancing the needs and wants of every employee.

“We knew there would be a culture clash between the older attorneys and the younger attorneys,” Voegelin said. “So, we did a lot of polling—Independent surveys done by the architects. They said it’s quite common in this industry. But success depended on addressing that culture clash, which led us to a hybrid design.”

Voegelin hopes that the Manchester redesign will be as successful as the Boston and Portsmouth endeavors were.

“Three years in on the Boston redesign and folks still talk about how much they love it.”

One of Pastori Krans’ conference rooms, dubbed “Main Street Appeal,” by office staff, incorporates the firm’s signature orange color splash against the historic exposed brick. Courtesy Photo.

Sheehan Phinney’s inviting Boston office break room, boasting a sweeping view of the city. Courtesy Photo.
JOIN US IN PERSON JUNE 17-18, 2022

ANNUAL MEETING

We’re holding it again at a favorite member location: Mountain View Grand (Whitefield, NH)

REGISTRATION OPENS NEXT WEEK!
Space limited; details and sign up at nhbar.org
By Cameron G. Shilling

Many businesses rely on managed services providers (MSPs). Doing so can be an effective solution to obtain technology services that businesses need but lack the personnel or budget to support internally. However, businesses all too often do not understand the scope of the services they are purchasing, resulting in gaps that lead to debilitating and costly cyber attacks and breaches. Do you really know what services you are receiving from your MSP?

Three factors are typically responsible for the disparity between the managed services businesses believe they are receiving and the services their MSPs are actually providing.

First, many business leaders are unaware that information technology (IT) and information security (IS) are different. The primary purpose of IT is to support the equipment and devices necessary to ensure that the system is not prone to cyber attack. Purchasing managed IT services does not mean that a business will also receive IS services. In addition, knowing where IT ends and IS begins can be confusing, particularly for business leaders who lack technological expertise. For example, managed IT often includes some basic security services (e.g., passwords, antivirus/anti-malware, firewalls, patching, etc.), whereas those basic services are insufficient to protect a business from common cyber attacks. Additionally, some MSPs include more security services in their IT programs (e.g., encryption of devices, multi-factor authentication, etc.), whereas other MSPs do not.

The solution for this first issue is easier to describe than it is to implement. It is the next factor typically responsible for this problem.

Second, to borrow a line from the movie Cool Hand Luke, “what we’ve got here is failure to communicate.” MSPs insist that they explain to their business clients that the businesses need to purchase additional services if they would like to implement IS safeguards, and that business leaders decline, typically to save costs. Businesses are equally adamant (usually after a cyber attack or breach has occurred) that their MSPs never discussed such services with them, and that the business never would have spared expense to ensure proper security. While one or the other may or may not be correct in any particular circumstance, the likely reality is that they have failed to effectively communicate. MSPs need to explain (in language understandable to businesspeople) the scope of the services they are providing, the services they are not providing, the value of the business of purchasing additional services, and the potential risks if the client does not do so. In turn, business leaders need to educate themselves about the types of IT and IS services appropriate for their businesses and commit the time and energy to listen to and understand the information provided by their MSPs about the services being proposed when their MSPs do so.

Both parties can feel a bit handicapped in such discussions. For example, businesses may feel that MSPs are just trying to sell them services that they do not necessarily need and capitalizing on their lack of technological expertise to do so. By contrast, MSPs may feel that business leaders do not commit the time to truly understand IT and IS, or simply perceive their businesses as a cost without comparable benefits. If that occurs, both can benefit from involving an independent third party who can bridge the divide, explaining in non-technical terms the IT or IS services involved and the cost-benefit considerations for the business.

Third, not all MSPs are the same. For example, some MSPs only provide IT, while others provide both IT and IS, and still others provide only IS. Similarly, some MSPs are aware of their strengths and limitations, and earnestly communicating to clients, while others are not. Some MSPs are more suitable for mid-to-large businesses, while others can effectively serve small and mid-size clients. Finding the right MSP for your business is critical, but business leaders often feel that they lack sufficient expertise to do so. Again, assistance from an independent third party can be invaluable in that type of situation.

Managed IT and IS services are integral to business operations. MSPs need to ensure that they are properly explaining the actual scope of the services they are providing to their business clients. By the same token, businesses need to commit to listening to their MSPs and truly understanding the scope of the IT and IS services they are purchasing. Otherwise, both MSPs and businesses might be unhappily surprised with the outcome.

Cam Shilling founded and chairs McLane Middleton’s Cybersecurity and Privacy Practice Group. The group of four attorneys and one technology paralegal assist businesses and private clients to improve their information privacy and security compliance and address any security incidents or breaches that may occur.
lawyer has no obligation to correct a cli-
ent’s past fraudulent conduct when such
conduct becomes known to the lawyer af-
after the representation has concluded and
that the lawyer may run afoul of Rule 1.6
if such information is disclosed. See Mont-
tana State Bar Association Ethics Opin-
ion 112314. Nevertheless, best practices
dicate that the lawyer should explain to
the client the repercussions of the client’s fraudulent conduct. Id.

The New Hampshire Rules of Profes-
sional Conduct do not provide clear guid-
ance on this issue. While comment [6] to
Rule 1.6 of the ABA Model Rules provides
that a lawyer may disclose confidential in-
formation pursuant Rule 1.6(b)(3) to the
test reasonably necessary to enable the
affected person to prevent or mitigate rea-
sonably certain losses as a result of a cli-
ent’s past fraud that was learned of by the
lawyer after conclusion of the representa-
tion, New Hampshire’s iteration of Rule
1.6(b)(3) is less permissive than that of the
ABA Model Rules.

New Hampshire’s version of Rule 1.6
permits disclosure of confidential informa-
tion only to “prevent reasonably certain death or substantial bodily harm or to pre-
vent the client from committing a criminal act” that is “likely to result in a substantial
injury to the financial interest or property
of another.” See 1.6(b)(1) (emphasis added).
Thus, according to the language of the
rule, if a client’s past fraudulent or criminal
conduct is reasonably certain to result in
death or substantial bodily injury, the law-
yer may disclose confidential information
to prevent that outcome, even if the con-
duct is learned of after the representation
has concluded. Conversely, since fraudu-
ent conduct that is already completed can-
not be prevented from being committed, a
lawyer may not disclose confidential in-
formation relating to a client’s completed
fraud that is likely to result in a substantial
injury to the financial interest or property
of another.

A lawyer, at bottom, a lawyer who learns that a
client has used their services to perpetrate
a crime or fraud after representation of the
client has concluded must be cognizant of the
continuing duty of confidentiality to former clients under Rule 1.9(e) and closely
consult Rule 1.6. Since the New Hamp-
shire Rules of Professional Conduct do not
explicitly permit a lawyer to disclose infor-
mation relating to a client’s criminal or fraudulent conduct after the representa-
tion has concluded, lawyers should err on
the side of protecting a client’s confidential
information.

III. Litigation and Transactional
Contexts

Which Rules a lawyer should consult to
determine their ethical obligations to
correct misstatements or conduct that is
criminal or fraudulent depends in part on
whether the lawyer is representing their
client in the context of litigation or trans-
actional work.

In the litigation context, a lawyer shall not
knowingly “make a false statement of
fact or law to a tribunal or fail to correct
a false statement of material fact law or
previously made to the tribunal by the law-
yer.” See Rule 3.3(a)(1). If the lawyer’s cli-
ent has offered material evidence and the
lawyer comes to know of its falsity, “the
lawyer shall take reasonable remedial mea-
sures, including, if necessary, disclosure
to the tribunal.” See Rule 3.3(a)(3). The same
is true if the lawyer represents a client in
an adjudicative proceeding and knows that
the client intends to engage, is engaging, or
has engaged in criminal or fraudulent con-
duct. See Rule 3.3(b).

Reasonable remedial measures that
should be taken prior to disclosure to the
tribunal include remonstrating with the
client confidentiality, advising the client
of the lawyer’s duty of candor to the tribunal,
and seeking the client’s cooperation with
respect to withdrawal or correction of the
false statements or evidence. See Rule 3.3
cmt. [10]. These duties “continue to the
conclusion of the proceeding and apply
even if compliance requires disclosure of
information otherwise protected by Rule
1.6.” Comment [13] to Rule 3.3 establishes
that a proceeding has concluded within the
meaning of the Rule when a final judgment
in the proceeding has been affirmed on ap-
peal or the time for appellate review has
passed.

In the transactional context, a lawyer
is prohibited from making a false statement
of material fact or law to a third person. See Rule 4.1(a). A lawyer shall not know-
ingly “fail to disclose a material fact to a
third person when disclosure is necessary
to avoid assisting a criminal or fraudulent
act by a client, unless disclosure is prohib-
ited by Rule 1.6.” See Rule 4.1(b) (emphasis added). Thus, a lawyer must consult Rule
1.6 before disclosing a client’s misrepresent-
ation to another in the transactional
context. It should be noted that Rule 1.2(d)
applies “whether or not the defrauded party
is a party to the transaction. Hence, a law-
ayer must not participate in a transaction
in order to effectuate criminal or fraudulent avoidance of
liability.” Rule 1.2(d) cmt. [12].

Comment [3] to Rule 4.1 states that
“ordinarily, a lawyer can avoid assisting
a client’s crime or fraud by withdrawing
from the representation.” In some circum-
stances, it may be necessary for the lawyer
to disaffirm work product, and, in extreme
cases, substantive law may require a law-
yer to disclose information relating to the
representation to avoid being deemed to
have assisted the client’s crime or fraud.
See Rule 4.1 cmt. [3]. “If the lawyer can
avoid assisting a client’s crime or fraud
only by disclosing this information, then
under paragraph (b) the lawyer is required
to do so, unless the disclosure is prohibited
by Rule 1.6.” Id.

There are significant differences be-
tween New Hampshire’s version of Rule
1.6(b) and the ABA Model version. Briefly
stated, the New Hampshire rule places
greater restrictions on an attorney’s discre-
tion to disclose confidential information
than does the ABA Model Rule. As Rule
4.1(b) incorporates Rule 1.6, this suggests
that the scope of disclosure required under
Rule 4.1(b) is significantly narrower than
permitted by the ABA Model Rule.

As always, lawyers should closely
consult Rules 1.6 and 4.1 before making
disclosure of confidential client infor-
mation.

This Ethics Corner Article was submit-
ted for publication to the NHBA Board of
Governors at its March 17, 2022, Meeting.
The Ethics Committee provides general
guidance on the New Hampshire Rules of
Professional Conduct and publishes brief
commentaries in the Bar News and other
NHBA media outlets. New Hampshire law-
yers may contact the Committee for con-
fidential and informal guidance on their
own prospective conduct or to suggest
topics for Ethics Corner commentaries by
emailing: Robin E. Knippers at reknip-
pers@nhbar.org.
States District Judge for the District of New Hampshire. The following year, he served as law clerk for the five Justices of the New Hampshire Supreme Court, an experience he found to be interesting and challenging since he was the first person in the court’s history to hold that position. From 1968 to 1970, he practiced law as an associate with the law firm of Cleveland, Waters and Bartlett in Concord. In the fall of 1970, he became an Assistant Attorney General for New Hampshire, serving first under Attorney General Warren Rudman and then Attorney General David Souter.

In January of 1977, he began his judicial career as an Associate Justice of the New Hampshire Superior Court, having been appointed to that position by Governor Meldrim Thomson, Jr. In 1991, Governor Judd Gregg appointed him to be Chief Justice of that court. From 1977 to 1992, he was a member of the Superior Court Sentence Review Division, serving as its Chair from 1987 to 1992. He also served on numerous other committees with responsibilities relating to court administration and practice.

In 1992, United States Senator Warren Rudman asked Judge DiClerico to serve on the federal bench as his court clerk. It was a great honor when he was nominated by President George H. W. Bush to be a District Judge on the United States District Court for the District of New Hampshire, following his confirmation by the United States Senate, his career as a federal judge began in the fall of 1992. During his first five years on that court he was the Chief Judge. On occasion, the First Circuit Court of Appeals designated him to sit on that court. In 2007, rather than retire outright, he became a Senior Judge, carrying a reduced caseload, and continued in that capacity until his death. He was actively involved in the governance of the federal judiciary, serving on the First Circuit Judicial Council (1992-1994, 1998-2004, 2012-2014); the Judicial Conference of the United States; the Two Judicial Conference Committees—Codes of Conduct (1994-2002) and Judicial Conduct and Disability (2006-2012); and as Chair of the New Hampshire Courthouse Security Committee since 1992.

During his more than four decades of service on the state and federal courts, he respected the professionalism and dedication of the many people with whom those courts could not function—Judges, Clerks of Court, their staffs, court reporters, and security personnel. He enjoyed working with and at times sparring with many lawyers who appeared before him. Having presided over numerous civil and criminal jury trials, he interacted with thousands of New Hampshire citizens, telling them to jury service. He frequently remarked that he greatly admired their conscientiousness. He held the firm belief that a well-instructed jury would render the right decision.

His law clerks and judicial assistants with whom he worked closely were an integral part of his chambers, and he fondly remembered them as his court clerk. He respected their competence and dedication to the task and was inspired by their eagerness to learn.

He was a member of the New Hampshire Bar Association; past member of the American Bar Association, Merrimack County Bar Association, and the New Hampshire Trial Lawyers Association; a Fellow of the American Bar Foundation; a Judicial Fellow of the New Hampshire Bar Foundation; and was admitted to practice before the United States Supreme Court on February 18, 1975.

He was “humbled to the core,” in his words, to receive two recognitions from the New Hampshire Bar Association: The Justice William A. Grimes Award for Judicial Professionalism (2007); and the 2016 Award for Distinguished Service to the Public. He often remarked that no matter the outcome of a case, it was always his goal to have the litigants leave the courtroom feeling that they had received a fair trial.

He served on the New London Planning Board (1975-1977) and the Dartmouth-Hitchcock Memorial Hospital Assembly of Overseers (1989-1999). He was an incorporator of the Little Lake Sunapee Protective Association (1970), served as its President (1973-1975) and on its Board of Directors for several terms. He became a Tribal Secretary, Monitor for the Lake Sunapee Protective Association in 2010. He belonged to the New London Boys Club and Heidelberg Lodge No. 92 of the Independent Order of Odd Fellows.

He served on the boards of two nonprofit organizations, one dedicated to the environment, and the other to human development, whose causes he strongly embraced. From 2010 to 2019 he was a trustee of the Audubon Sargent Land Preservation Trust (serving as Secretary during the last 3 years of his tenure), whose mission is to preserve and protect the rural character of the Mt. Kearsarge/Ragged/Lake Sunapee region for public benefit through land conservation and stewardship. In 2010, he also joined the board of the Mayhew Program, which challenges and helps at-risk New Hampshire boys to believe in themselves, work with others, and change this year. He continued to serve on that board until his death.

Over the course of his life, he enjoyed tennis, “playing at golf” on occasion, downhill and cross-country skiing, swimming, sailing and motorboating on Little Lake Sunapee, hiking, gardening and travel.

He is survived by his wife Laurie, their daughter Devon Germak and her husband, Dr. Matthew Germak, their twin daughters, Sofia and Katelyn, and a brother, Dr. Robert DiClerico.

And so, as he said many times at the end of each hearing, “Court will be in recess.”

Memorial contributions may be made to: The Mayhew Program, P.O. BOX 120, Bristol, NH, 03222; Ausbon Sargent Land Preservation, 71 Pleasant St, New London, NH 03257; or Lake Sunapee Region Visiting Nurse Association, P.O. Box 2209, New London, NH 03257.

Peter G. Hastings

Peter G. Hastings, an attorney, community leader, and beloved friend to many, died on March 5th at his home in Fryeburg. He was 86.

The youngest of seven children of Judge Douglas G. Hastings and Martha Fitfield Hastings, Peter was born in Fryeburg on July 23, 1935 at his parents’ home on Oxford Street. A high school and college athlete, Peter enjoyed baseball, skiing, hunting, and horseback riding. He was an Eagle Scout and later a Scout Master for Troop 154. At the age of seven he learned to drive a truck while helping out with the haying. Around the same time, he started riding his horse from Fryeburg to Conant Hall on many occasions.

Peter’s love of the outdoors was kindled early in his childhood. Between the ages of five and thirteen he spent the month of April at his family camp on Kezar Pond trapping muskrat with his father. This annual trip from school came to an end after Judge Hastings received an angry note from a teacher describing his son as a “habitual truant.” Despite this early truancy, Peter graduated from Fryeburg Academy in 1953 before enrolling at Bowdoin College. He was the fourth of ten children of Hastings to go to Bowdoin where he played baseball, skied, and caroused. College summers were spent surveying land with his brother, Hugh, and staying out of his parents’ hair. During this period, he realized that his dream of becoming a farmer was not compatible with staying out until 1 or 2 o’clock at night.

After graduating from Bowdoin in 1957, Peter attended Boston University Law School where he was a senior editor of the Law Review and graduated cum laude in 1966. Additional studies at New York University’s Graduate School of Business followed before he returned to Fryeburg in 1961 with his wife, Anne Ammitaul, and their growing family. Numerous family hiking trips in the White Mountains, canoeing the Allagash, St. John, and St. Croix Rivers, white water rafting down the Colorado and Kennebec Rivers, and biking in the United States and the Netherlands.

Peter joined his father and brother, David H., in the practice of law at Hastings & Sons in 1961. The firm, founded by his great-grandfather in 1847, is now called Hastings Law Office and celebrates its 175th anniversary this year. During his 60 years as a lawyer, Peter represented many small towns and districts in Maine and New Hampshire. His practice focused on trust administration, commercial and nonprofit business organizations, municipal law, and real estate and tax matters. In a 2018 profile in the Bridgton News, Peter’s...
An avid fly fisherman, Peter relished fishing at places such as Lake Winnipesaukee, the Connecticut River, the Miramichi River in New Brunswick, and the Farwell River that he loved. Other special places included Kezar Lake in Maine and The Farwell River in New Hampshire. He had a seemingly encyclopedic knowledge of the world each in their own way; their Mom, Melanie, who could not have done more to contribute to raising them; my beautiful step-daughter Kelly Nicole Glander, my brothers, John of Sun City, Arizona and Bill of Pittsfield, Mass, where we, along with my most he- roic brother, Bob, recently deceased, were raised by Marjorie Helen (Maloy) and Clay- ton Arthur Wheat, both sadly pre deceased; and my best friend, disciplinarian, she who blends my unrelenting shades of gray with black and white, the woman whom I was ultimately smart enough to marry, Jill Lor- raine Glander Wheat. Took a while but I got it right! I was the first in my family to attend college. It was not by accident! Clayton A. was pre-deceased by his first wife, Anne Amirault (Wheat); his daughter and son-in-law, Tony Arthur Wheat, both sadly pre deceased; and his hands.

Peter was the first in my family to attend college. It was not by accident! Clayton A. was pre-deceased by his first wife, Anne Amirault (Wheat); his daughter and son-in-law, Tony Arthur Wheat, both sadly pre deceased; and his hands.

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Pendleton from page 1

Pendleton also brings to the bench a family history of law, years of experience as a practitioner, and a sensitivity to the plight of those suffering from mental illness.

Pendleton experienced early loss as a boy when his mother committed suicide after many hospitalizations for mental illness, leaving his father, former New Hampshire Bar Association President John B. Pendleton, to raise the couple’s children alone.

“People didn’t know in the ’70s what to do with that,” Pendleton says. Though many prospective employers had known both his parents, “lawyers didn’t talk about it when I was interviewing,” he adds.

Longtime Manchester attorney David Nixon broke that silence when Pendleton interviewed with him. Nixon immediately said, “John T., tell me what’s good about you besides your mother,” acknowledging the whole woman she had been.

Pendleton later spent 16 years on the board of the Seacoast Mental Health Center, serving as president for three years. “It’s really important background to have when you’re doing family law, juvenile law and criminal,” he says.

Pendleton attended Concord High School for two years before going on to Proctor Academy, where he demonstrated his affinity for athletics by playing on the varsity soccer, hockey, and baseball teams.

At Trinity College in Hartford, he played rugby and baseball, but was cut from the hockey team as a freshman, to his deep disappointment, as “hockey was always my favorite sport.” The loss, however, did not stop him from playing men’s league hockey.

His practice included business, medical defense, healthcare, water and environmental law, public utility and criminal work.

For a time, he did the legal work for a company, of which he was part owner, that supplied American-made medical implants to Mongolia before a change in that country’s economy put an end to the business. He visited Mongolia twice, and recalls drinking fermented mare’s milk in a yurt and attending festivities for the national holiday, Naadam.

Pendleton then joined family members in Portsmouth to form Dwyer, Donovan & Pendleton, where he worked for 11 years. He went on to work at the Gleason Law firm in Manchester for four years.

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In 2002, Pendleton was presented with the New Hampshire Bar Association’s Robert E. Kirby Award, named after a young lawyer who died in 1996 at the age of 35. The award goes to a New Hampshire attorney 35 or younger who “demonstrates the traits of civility, courtesy, perspective and excellent advocacy.”

“It was the coolest thing that ever happened to me because I knew Bob Kirby,” he
I appreciate about practicing in his Court with his rules, all of which is important, but what comes on to the bench, and writes thought "clearly knows the law, is prepared before Amy Driscoll agrees, saying Pendleton has nice hair."

"Judge Pendleton treats everyone who appears before him, like John and Amy Driscoll of Driscoll Law in Portsmouth. "Judge Pendleton treats everyone who walks into his courtroom with respect and civility," says John Driscoll. "His compassi is self-evident, and his patience is impressive. He truly listens and I think litigants can tell. In the most fraught cases, he is a calming influence on litigants and occasion tion is self-evident, and his patience is im pense," says John Driscoll. "His compas

Nevertheless, he adds, "it’s a wonderful job. I’m so proud of the work that the Circuit Court judges do."

His work on the judiciary has won the admiration of attorneys who frequently appear before him, like John and Amy Driscoll of Driscoll Law in Portsmouth.

"Judge Pendleton treats everyone who walks into his courtroom with respect and civility," says John Driscoll. "His compassion is self-evident, and his patience is impressive. He truly listens and I think litigants can tell. In the most fraught cases, he is a calming influence on litigants and occasionally aggressive lawyers. Aside from this exceptional demeanor, he is an expert jurist who draws from his diverse practice. Plus, he has nice hair."

Amy Driscoll agrees, saying Pendleton "clearly knows the law, is prepared before coming on to the bench, and writes thoughtful orders, all of which is important, but what I appreciate about practicing in his Court is he remembers first and foremost that the litigants are people, not just ‘cases’ coming through. He brings a certain humanity to the process."

In off hours, Pendleton plays men’s league hockey, though he has had to miss many Monday night games because of his work responsibilities, and he notes that his team is the reigning champion of the Rangely Pond Hockey Festival (suspended since the start of the pandemic). He has coached youth hockey for 10 years, since his son Caleb was 6, and this year helped coach the Clipper Mules from Portsmouth and Newmarket high schools to their first state championship, with Caleb scoring the winning goal in the Division II semifinals. The program had not won a play-off game since 2003.

"The team only won three games in each of the prior two seasons, but this year were 14-6-1, with the final loss being the state finals," Pendleton says.

Fellow attorney and fellow “hockey dad” Emilie R. Bussiere, Jr. says he and Pendleton have been “joined at the hip” since Pendleton started coaching their sons a decade ago.

“I quickly learned how generous he is with his time and how willing he is to lend a hand whenever someone needs it,” Bussiere says. “This is especially true for those people with special problems and in the most need of help.”

In addition to wife Sarah and son Caleb, Pendleton also has a daughter, Allison, a sophomore at McGill University, and Bus siere says Pendleton’s family “is always most important to him.”

“If I had to describe him in one word, it would be ‘committed,’” Bussiere adds. “He has a follow-through work ethic on everything he does in life.”

NANCY M. CAVALIERI 
CFE CERTIFIED FRAUD EXAMINER

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Coming June 2022
EXPERIENCE TAKES ROOT

(“but we like to call it “The Book of Wisdom”)

Last year, we created a digital booklet as a tribute to our members who celebrated 50 years of law practice in 2021. It was well-received, so we’re making it into a series! This year’s edition will publish in just a few months and will feature advice and insights from the Class of ’72. We hope you’ll download it to your favorite electronic devices and refer to it again and again.

NEW HAMPSHIRE BAR ASSOCIATION

(You can still download the 2021 edition at nhbar.org, under “Publications”)

Wellness from page 9

health issues ranging from depression and anxiety to substance abuse disorders. In 2020, we as a firm committed to and signed the American Bar Association Well-Being Pledge, by which we have pledged to actively promote and encourage help-seeking and self-care as core values of our organization. In conjunction with this pledge, we have enacted our Well Being Policy which incorporates many of the initiatives discussed above.

We believe our wellness efforts at McLane Middleton have had a positive impact, and we know that the money we spend on our wellness efforts pays dividends that far exceed the costs. There is no doubt that employee engagement and wellness make businesses more productive, but we must not let the constant demands of our profession allow us to relegate this to a lower tier concern. Our Wellness Committee is here to stay at my firm, and I would encourage all businesses in our profession to stay focused on the mental and physical wellness of their colleagues.

Jeremy Walker is a director in McLane Middleton’s Litigation Department and is Co-Chair of the firm’s Wellness Committee. He can be reached at (603) 628-1431 or jeremy.walker@mclane.com.
Future NH Bar Leaders Learn More About How the State Government Operates Effectively

The Leadership Academy Class of 2022 participated in their Legislative and Executive Branch module at the New Hampshire State House on Fri, April 8.

Their year of study concludes this coming June, with a graduation ceremony at NHBA’s Annual Meeting.

Learn more about the NHBA Leadership Academy at nhbar.org/nhba-leadership-academy/

By Melissa Christensen

An important part of our Legal Writing classes involves learning how to best relate to and work with our clients and colleagues. Specifically, we teach our students to inclusively represent clients and work with colleagues by providing a sense of belonging rather than bias, discrimination, or judgment—even if it’s unintentionally. Effectively writing an argument is only part of being a successful attorney; we must also respectfully work with and address our clients and colleagues.

Gender identity is often invisible or unknown. We must use gender neutral and respectful language to give clients and colleagues that sense of belonging. This includes using correct titles such as Dr., Mr., Miss., Ms., and the correct pronoun. Because not all persons identify as a particular gender, automatically using “he/him/his” or “she/her/hers” may inadvertently offend or harm a client or colleague. Although the most common pronouns are “he/him/his” or “she/her/hers,” some people prefer “they/them/theirs” or “ze/zir/zirs.” These are just a few examples of gender pronouns; our language is constantly evolving and therefore so are our pronouns. The best way to know what pronoun to use is to ask!

While it is best to ask your client or colleague what their pronoun is, if you do not know, use “they/their.” Although, “they” is most commonly used as a plural pronoun, it is appropriate to use it in the singular form. In fact, in The Redbook: A Manual On Legal Style, Bryan Garner guides us with the following language: “In limited cases—when referring specifically to a hypothetical person of unspecified gender (especially) to a real person who does not identify with a gender-specific pronoun— they and its forms are preferred by some writers.” Moreover, the United States Supreme Court has even used they in its singular form; Lockhart v. United States, a 2016 case, contains the following: “Section 2252(b)(2)’s list is hardly the way an average person, or even an average lawyer, would set about to describe the relevant conduct if they had started from scratch.” While many prefer to simply avoid using a pronoun, it is certainly becoming more commonplace to both see and hear “they” used in the singular form.

For example, during the Olympics in February, Johnny Weir, one of the figure skating commentators, made the following remark: “Timothy uses their arms to lift Ashley.” Because Timothy identifies as nonbinary, Mr. Weir appropriately used “they” as the pronoun in that sentence. Three years ago, in 2019, Merriam-Webster named “they” as the word of the year due to the increase in searches for its definition, in large part because of its more prevalent use in the singular form. And, on Inauguration Day in 2021, The White House added the options of “they/them,” “other,” and “prefer not to share” under “Pronouns” on its contact page.

Regardless of whether we are announcing on television, writing a court opinion, or drafting an email to a client, it is important to remember that it must be clear to whom or what a pronoun is referring. Here is an example showing correct grammatical structure of a sentence:

The attorney went to the courthouse and they left their phone at security.

In this sentence, attorney is the subject and antecedent, they is the pronoun referring to attorney, and their is the possessive adjective showing that the phone belongs to the attorney.

Here is an example of incorrect structure:

Attorney A and Attorney B went to the courthouse, and they left their phone at security.

Here, either Attorney A or Attorney B could be the subject and antecedent; we don’t know to whom they are referring. In this situation, we should rewrite the sentence to look like this:

Attorney A and Attorney B went to the courthouse, and Attorney B left their phone at security.

Now we know whose phone was left at security. Specifically, the correct sentence provides the correct pronoun and identifies who left the phone at security when the pronoun, on its own, cannot.

As attorneys, it is imperative that we represent our clients to the best of our abilities. That includes effectively (and correctly) using language while being civil and respectful; part of this requires respecting how our clients and colleagues identify and acknowledging this through appropriate pronoun usage. The New Hampshire Lawyer Professionalism Creed provides aspirations for us to strive for in our roles as attorneys and incorporates the following language on civility:

THIRD, a New Hampshire lawyer is civil. Civility and self-discipline prevent lawsuits from turning into combat and keep organized society from falling apart. A New Hampshire lawyer:

• behaves in a courteous, decent and disciplined manner, and counsels clients to do likewise
• displays respect for clients, judges, court staff, opposing counsel, and all participants in the process, including parties
• behaves with humility rather than arrogance
• understands differing viewpoints and has empathy for others.

So how do we promote the Creed’s aspiration of civility and respect through pronouns? Ask your colleagues and clients to share their pronouns with you (if they are comfortable sharing). Share your pronouns in your email signature and with your Zoom name and encourage others to share theirs. If you are unsure of a person’s pronoun, word your documents to avoid using a pronoun or use “they/their.” Finally, next time you are drafting a letter, or a motion, or an email, take a moment and think about the correct pronoun. That small moment can go a long way in promoting civility, respect, and belonging.

3. Id., supra note 2.
6. Id.

Melissa Christensen (she/her/hers) is an adjunct professor of legal writing at UNH Franklin Pierce School of Law. Thank you to Lu Butterfield-Ferrell of UNH’s Beaugregard Center for Equity, Justice, and Freedom and Anna Elbroch of UNH Franklin Pierce School of Law for their assistance with this article.
we’re in today, we sometimes forget to do that. The more we can sit down and communicate with one another the more we can overcome that.”

Judge Edwin W. Kelly, New Hampshire's State Associate Justice, Hantz Marconi believes the commission will be a place for various stakeholders to build trust, share their knowledge, and work out differences.

“[When] the Governor’s Commission reinstituted it will allow for stakeholders to come together to talk,” Hantz Marconi said, describing the many perspectives and interests involved in shaping policy around domestic violence. “For example, [the Court] doesn’t tell [the Legislature] how they should be amending a statute because that’s a policy consideration. [With] the task force, some people thought that a court’s language should be tweaked in one direction, for proponents, and then you have the defense bar saying, ‘but there are consequences for the defendants in these cases,’ and that type of policy weighing is something that gets presented to the legislature. [The Governor’s Commission or a subgroup] will be a place for this type of discussion to take place.”

The Governor’s Commission on Domestic and Sexual Violence was created in 1993 by the late Governor Stephen Merrill following a high-profile case, and was comprised of several committees, each focusing on various goals. The group was active until 2013 when its then-chair stepped down and no replacement was selected.

Some of the committees formed under the Governor’s Commission, such as the Batterer’s Accountability Committee, remain active. The influences of other groups, such as the Branch’s Protocol Committee, continue.

The NH Judicial Branch’s Protocol Committee
The Judicial Branch’s Protocol Committee, created under the leadership of then-Administrative Judge Edwin W. Kelly in 1992, produced domestic violence protocols for guiding the court’s practice in domestic violence cases.

The protocols were first adopted in 1994 and were subsequently approved by the New Hampshire Supreme Court. In 2007, commissions identified as protocols were made mandatory, and they were revised, most recently, in 2013. In September 2021, the Court began its review of the protocols with the goal of aligning them with current statutes and best practices.

Judith Grace Mattern asked, “how’s the judge doing? ’” he said. “And I would do the same. What kind of pressure were you under?”

He mentioned a case in which someone had been murdered over 30 years ago and the first call I’d get in the morning was Grace Mattern asking, ‘how’s the judge doing?’” he said. “And I would do the same. I try to view, always, was to reach out to the people who knew this stuff at their heart. Who spent their lives and careers working with the issues and to bring them in collaboratively.”

Kelly said the relationships established through the Governor’s Commission and its subcommittees began to grow quickly after they were established. He attributes that success to the trust among stakeholders, a shared commitment to the work, and a sense of concern for each other.

There were cases over the years when someone would bring these cases to him, and the first call I’d get in the morning was Grace Mattern asking, ‘how’s the judge doing?’” he said. “And I would do the same. What kind of pressure were you under?”

Kelly said the informal conversations he had with people such as Mattern were very helpful because they allowed him to address issues directly with judges and to respond to them on their view. “We let them know they had had a conversation.”

“The purpose wasn’t to prevent people from complaining,” he said. “If someone had a complaint about judicial misconduct that’s a different issue. My big concern was that having uniformity within such a large organization as the Circuit Court was really hard. The best I could do was to stay in contact with the people who use the Courts. This was the only way I could get a sense about what was working and what wasn’t.”

He said he recalls the cases of these meetings as being “new and vibrant.”

“Reconvening the Commission will be a way to get people meeting and talking, and a good outcome for this task force,” she said. “Getting people around the table, to build trust and to look at how systems are working, how they’re not working, and how to problem solve around those things.”

Attorney Robin Melone, who was not on the task force but has represented both defendants and victims in domestic violence cases throughout her career, said she understands both sides and agrees there needs to be more collaboration to address the issues.

“I think we need to do a better job of recruiting prosecutors and victim advocates in the court system to deal with the misdemeanor Circuit Court domestic docket,” said Melone, stressing the importance of addressing repeat appearances of people in Circuit Court for domestic violence offenses with the belief she believes demonstrates an inability to engage in healthy relationships.

She cited anger management issues as particularly paradigmatic of offenders with substance abuse, poverty, and mental health issues.

None of that is an excuse for committing an abuse but I think we would do better as a community if we better resourced the DV units to respond to those issues,” she said. “[A]s a society we continue to learn and evolve in the ways we respond to different issues that arise and we need to make sure this is an ongoing learning process for our Courts.”

DVSs have a unique sense of normality and prioritize the education and the learning that helps judges respond appropriately to all of these situations on both sides.

Amanda Grady Sexton, Director of Public Affairs for the New Hampshire Coalition Against Domestic and Sexual Violence, said the Coalition is convening a group of stakeholders this summer and fall that will review all of the areas outlined by the Task Force that would require statutory changes.

“We hope to gain consensus on a legislative proposal that could be introduced during the 2023-2024 Session,” she said. “The Coalition has begun conversations with key legislators who are interested in supporting any efforts to improve our domestic violence protection laws.”

Grady Sexton said the Coalition was grateful to be able to work with a multi-disciplinary team of stakeholders to discuss ways to improve the court system in New Hampshire and to improve outcomes for survivors of domestic violence.

“We believe efforts to improve accountability and transparency in domestic violence cases must be central to the state’s ongoing work,” she said.

The New Hampshire Coalition Against Domestic and Sexual Violence, which serves 13,107 adult and child victims of domestic violence and sexual assault from October 2020 through September 2021, had two members on the 2023 Domestic Violence Cases: Executive Director Lyn Schollett and Grady Sexton.

The recently reestablished Governor’s Commission will consist of the following members who will be nominated by the organization listed for appointment by, and to serve at the pleasure of, the Governor:

• The Department of Justice Office of Victim/Witness Assistance designee;
• The New Hampshire Attorney General or designee;
• A County Attorney recommended by the New Hampshire County Attorneys’ Association;
• A circuit court prosecutor recommended by the Attorney General;
• The New Hampshire Coalition Against Domestic and Sexual Violence designee;
• A New Hampshire Bar Association designee from 603 Legal;
• A Judicial Branch designee from the branch’s domestic violence standing committee;
• The Commissioner of the Department of Health and Human Services or designee;
• A member of the New Hampshire House of Representatives as recommended by the Speaker;
• A member of the New Hampshire Senate as recommended by the Senate President;
• The New Hampshire Department of Safety or designee; and
• Two (2) additional members, appointed by the Governor.

The Governor’s Commission will consist of the following members who will be nominated by the organization listed for appointment by, and to serve at the pleasure of, the Governor:

• Two (2) members of New Hampshire courts who will be nominated by the or
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### APRIL 2022

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<tr>
<td>THU, APR 21</td>
<td>12:00 – 1:00 p.m.</td>
<td>Contract Drafting is Like ... Fortune Telling</td>
<td>Webcast; 60 NHMCLE min.</td>
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<tr>
<td>TUE, APR 26</td>
<td>12:00 – 1:00 p.m.</td>
<td>Siri and Alexa are Out to Get You</td>
<td>Webcast; 60 NHMCLE ethics/prof. min.</td>
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<tr>
<td>THU, APR 28</td>
<td>12:00 – 1:00 p.m.</td>
<td>The Dirty Dozen: The 12 Most Common Grammar and Writing Errors</td>
<td>Webcast; 60 NHMCLE min.</td>
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### MAY 2022

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<tr>
<td>THU, MAY 5</td>
<td>12:00 – 1:00 p.m.</td>
<td>Effective and Persuasive Presentation of Damages in a Personal Injury Case</td>
<td>Webcast; 360 NHMCLE min. incl. 30 ethics/prof. Concor</td>
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<td>TUE, MAY 10</td>
<td>12:00 – 1:00 p.m.</td>
<td>The Danger of Digital Signatures (and other issues in tech)</td>
<td>Webcast; 60 NHMCLE min.</td>
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<td>THU, MAY 12</td>
<td>12:00 – 1:00 p.m.</td>
<td>Better Prose, Better Contract: 5 Ways to Improve Contract Terminology</td>
<td>Webcast; 60 NHMCLE min.</td>
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<td>MON, MAY 16</td>
<td>12:00 – 1:00 p.m.</td>
<td>Dispute Avoidance in Trusts &amp; Estates</td>
<td>Webcast; 60 NHMCLE min.</td>
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<tr>
<td>TUE, MAY 17</td>
<td>12:00 – 1:00 p.m.</td>
<td>What David Bowie Teaches About Attorney Ethics</td>
<td>Webcast; 60 NHMCLE ethics/prof. min.</td>
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### JUNE 2022

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<th>Date</th>
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<tr>
<td>TUE, JUN 14</td>
<td>9:00 a.m. – 12:15 p.m.</td>
<td>Consent of the Governed? Contracting for Ordinary People in the 21st Century</td>
<td>In-Person; Webcast; 180 NHMCLE min. Concord; NHBA Seminar Room</td>
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<tr>
<td>FRI &amp; SAT, JUN 17 &amp; 18</td>
<td>9:00 a.m. – 12:15 p.m.</td>
<td>2022 Annual Meeting Mountain View Grand, Whitefield</td>
<td>180 NHMCLE min. Concord; NHBA Seminar Room</td>
</tr>
<tr>
<td>TUE, JUN 30</td>
<td>12:00 – 1:30 p.m.</td>
<td>“Please. Do Not Touch That!” And Two More Lessons from the World of Museum Law</td>
<td>Webcast; 90 NHMCLE min.</td>
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### Contract Law Thursdays

#### April

- **April 21** • 12 – 1 p.m. **Contract Drafting is Like ... Fortune Telling**
  - Webcast; 60 NHMCLE min.

- **April 28** • 12 – 1 p.m. **Siri and Alexa are Out to Get You**
  - Webcast; 60 NHMCLE ethics/prof. min.

#### May

- **May 12** • 12 – 1 p.m. **The Danger of Digital Signatures (and other issues in tech)**
  - Webcast; 60 NHMCLE ethics/prof. min.

- **May 19** • 12 – 1 p.m. **What David Bowie Teaches About Attorney Ethics**
  - Webcast; 60 NHMCLE ethics/prof. min.

#### June

- **June 2022**
  - [Visit https://nhbar.inreachce.com/](https://nhbar.inreachce.com/) for more information

**Note for in person seminars** - NHBA COVID-related safety measures may include limited seating and additional restrictions. Please read the NHBA’s current protocol at [https://www.nhbar.org/covid-related-protocol/](https://www.nhbar.org/covid-related-protocol/). In registering for and attending an NHBA-sponsored CLE or other meeting or event, participants agree to the NHBA’s current health and safety protocols, the NHBA COVID-19 safety acknowledgment, and liability waiver and release of claims. (https://nhba.s3.amazonaws.com/wp-content/uploads/2022/03/28049494/COVID-Safety-Acknowledgement-Liability-Release.pdf)
**Effective and Persuasive Presentation of Damages in a Personal Injury Case**

**Thursday, May 5**
9:00 a.m. - 4:15 p.m.  [Webcast]  150 NHMCLE ethics/prof. min.  **In person**

This program is intended for personal injury lawyers of all experience levels, plaintiff as well as defense. This will be a fast-moving interactive format with a large panel of highly experienced tort practitioners, experts, mediators and sitting judges. The program focuses on effectively developing and presenting damage evidence at all stages of a personal injury case, including the demand and negotiation phase, mediation and ultimately trial. A great way to celebrate Cinco de Mayo with fellow tort attorneys, and a can’t miss CLE for any injury lawyer who wants to learn the most effective and persuasive ways to present your client’s case.

**Faculty**
- Peter E. Hutchins, Program Chair/CLE Committee Member, Law Offices of Peter E. Hutchins, PLLC, Manchester
- Hon. Robert E.K. Morrill, Portsmouth
- Hon. David W. Ruoff, Associate Justice, NH Superior Court
- Gary M. Burt, Primmer, Piper, Eggelston & Cramer, PC, Manchester
- Paul W. Chant, Cooper, Cargills, Chant, PA, North Conway
- Christine Friedman, Friedman & Feeney, PLLC, Concord
- Holly B. Haines, Abramson, Brown & Dugan, Manchester
- Scott H. Harris, McLane Middleton Professional Association, Manchester
- Catharine Newick, Business Decision Services, Concord
- Mary E. Tenn, Tenn & Tenn, PA, Manchester

**16th Annual Ethics CLE**

**Thursday, May 26**
8:30 a.m. - 10:30 a.m.  [Webcast]  120 NHMCLE ethics/prof. min.  **In person**

This CLE is an annual update and review of developing issues for all attorneys in practice.

**Topics will include:**
- client communications;
- the complaint and disciplinary process;
- withdrawing from a case;
- an update on current topics before the Ethics Committee.

**Faculty**
- Hon. John C. Kissinger, Associate Justice, NH Superior Court
- Elizabeth M. Murphy, NH Supreme Court Attorney Discipline Office, Concord
- Stephanie C. Hausman, NH Appellate Defender Program, Concord
- Stephanie K. Burnham, Business Decision Services, Concord
- Robert A. Wells, Program Moderator/CLE Committee Member, McLane Middleton Professional Association, Manchester
- Elise H. Salek, Sullivan & Hollis, PLLC, Concord
- Andrea J. Schweitzer, McLane Middleton Professional Association, Manchester
- Richard Guerrero, Program Chair, Lothstein Guerrero, PLLC, Keene
- Mary E. Tenn, Tenn & Tenn, PA, Manchester
- Paul W. Chant, Cooper, Cargils, Chant, PA, North Conway
- Christine Friedman, Friedman & Feeney, PLLC, Concord
- Holly B. Haines, Abramson, Brown & Dugan, Manchester
- Scott H. Harris, McLane Middleton Professional Association, Manchester
- Catharine Newick, Business Decision Services, Concord
- Mary E. Tenn, Tenn & Tenn, PA, Manchester

**Upcoming Webcasts**

**Dispute Avoidance in Trusts and Estates**
Monday, May 16, 2022 – 12:00 – 1:00 p.m.  60 NHMCLE min.

- Robert A. Wells, Program Moderator/CLE Committee Member, McLane Middleton Professional Association, Manchester
- Elise H. Salek, Sullivan & Hollis, PLLC, Concord
- Andrea J. Schweitzer, McLane Middleton Professional Association, Manchester

"Please. Do Not Touch That!" And Two More Lessons from the World of Museum Law

**Thursday, June 14, 2022**
9:00 a.m. - 12:15 p.m.  [Webcast]  180 NHMCLE min.  **In person**

- Michael S. Lewis, Program Chair/CLE Committee Member, Rath, Young & Pignatelli, PC, Concord
- Stephanie A. Bray, NH Legal Assistance, Claremont

**Intellectual Property for the General Practitioner**

**Wednesday, May 18**
9:00 a.m. - 1:15 p.m.  [Webcast]  225 NHMCLE min.  **In person**

This half-day seminar is designed to provide an overview of the major areas of IP law, addressing patent law; trade secret law; trademark law; copyright law; contractual issues relating to intellectual property, including licensing agreements and insurance coverage for intellectual property.

**Faculty**
- Arnold Rosenblatt, Program Chair/CLE Committee Member, Hinckley Allen & Snyder, LLP, Manchester
- Matthew H. Benson, Cook, Little, PLC, Manchester
- Daniel J. Bourque, Preti, Flaherty, Beliveau & Pachios, PLLP, Concord
- Doreen F. Connor, Primmer Piper Eggelston & Cramer, PC, Manchester
- Steven J. Grossman, Grossman, Tucker, Perreault & Pfieger, PLLC, Manchester

**Consent of the Governed? Contracting for Ordinary People in the 21st Century**

**Tuesday, June 14**
9:00 a.m. - 12:15 p.m.  [Webcast]  180 NHMCLE min.  **In person**

- Michael S. Lewis, Program Chair/CLE Committee Member, Rath, Young & Pignatelli, PC, Concord
- Stephanie A. Bray, NH Legal Assistance, Claremont

**For more information or to register, visit https://nhbar.inreachce.com**
## Membership Status Changes

### Presented to the Board of Governors January 20, 2022

**Active to INACTIVE:**
- Pisan, Robin, Fairfax, Va. (Dec. 6, 2021)
- Shannon, Francis, Fort Lauderdale, Fla. (Nov. 30, 2021)

**Active to INACTIVE RETIRED:**
- Seaton, Michael, Durham, NH (Dec. 31, 2021)
- Bersak, Robert, Whitehouse Station, NJ (Dec. 27, 2021)
- Funk, W. John, Concord, NH (Jan. 1, 2022)
- Ogorchock, James, Merrimack, NH (Dec. 31, 2021)

**Active to SUSPENDED:**
- Fojo, Robert, Bedford, NH (Dec. 21, 2021)

**Active to RESIGNED:**
- Marsh, Peter, Concord, NH (Dec. 31, 2021)

**Inactive to ACTIVE:**
- Corrado, Angelo, Pepperell, Mass. (Dec. 15, 2021)
- Olshan, Adam, Glastonbury, Conn. (Jan. 6, 2022)

**Inactive to RESERVED:**
- Resnick, Paige, Washington, DC (Jan. 7, 2022)

**Suspended to ACTIVE:**
- LaMonica, Stephen, Groveland, Mass. (Dec. 16, 2021)
- Tchao, Amy, Falmouth, Maine (Dec. 17, 2021)

**Honorary Active to HONORARY INACTIVE:**
- Stock, Otto, Dayton, Ohio (Nov. 3, 2021)

### Presented to the Board of Governors February 17, 2022

**Active to INACTIVE:**
- Braman, Nancy, Revere, Mass. (Jan. 4, 2022)
- Bassi, Courtney, Andover, Mass. (Jan. 7, 2022)
- Moccia, Anthony, Boston, Mass. (Feb. 7, 2022)
- Malia, Jr., Peter, Fryeburg, Maine (Jan. 31, 2022)

**Active to INACTIVE RETIRED:**
- Goodwin, Rolf, Nashua, NH 03063 (Jan. 1, 2022)
- Lajoie, Ronald, Hopkinton, NH (Dec. 31, 2021)
- Depoian, Donna, Laconia, NH (Dec. 31, 2021)
- Taylor, William, Vammouth, Maine (Dec. 31, 2021)

**Active to FULL-TIME JUDICIAL:**
- Attorri, Mark, Bow, NH (Jan. 31, 2022)

**Active to DECEASED:**
- Greene, Alan, Orlando, Fla. (Dec. 23, 2021)
- Davis, Emily, Thetford Center, Vt. (Dec. 16, 2021)

**Inactive to ACTIVE:**
- LaMonica, Stephen, Groveland, Mass. (Jan. 12, 2022)
- Plummer, Marina, Warwick, RI (Feb. 3, 2022)
- Sarzana, Autumn, Newton, Mass. (Feb. 3, 2022)
- Borchers, Timothy, Medway, Mass. (Feb. 7, 2022)
- Arcidiacono, Philip, Concord, Mass. (Feb. 7, 2022)

**Inactive to INACTIVE RETIRED:**
- O’Neil, Maureen, Hampton, NH (Jan. 1, 2022)

**Inactive Retired to ACTIVE:**
- Pothen, Julia, Manchester, NH (Jan. 24, 2022)

**Inactive Retired to RESIGNED:**
- Introcaso, Julie, Merrimack, NH (Feb. 25, 2022)

### Presented to the Board of Governors March 17, 2022

**Active to INACTIVE:**
- Sheng, Charles, Burlington, Mass. (Feb. 8, 2022)
- DeGoosh-DiMarzio, Eric, Cranston, RI (Feb. 11, 2022)

**Active to RESIGNED:**
- Attorri, Mark, Bow, NH (Jan. 31, 2022)

**Active to FULL-TIME JUDICIAL:**
- Zaino, Michael, Hampton, NH (Nov. 10, 2021)
- Murray, Scott, Barrington, NH (July 14, 2022)

**Active to DECEASED:**
- Chisholm, Anne, Byfield, Mass. (Dec. 29, 2021)

**Inactive to ACTIVE:**
- Dingley, James, Manchester Center, Vt. (Feb. 22, 2022)

**Inactive to FULL-TIME JUDICIAL:**
- Swegart, Daniel, Concord, NH (Nov. 10, 2021)

**Suspended to DISBARRED:**
- Intronas, Julie, Merrimack, NH (Feb. 25, 2022)

**Military Active to INACTIVE:**
- Cohen, Jack, East Palestine, Ohio (Feb. 16, 2022)

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Equal Pay Protection

New Hampshire’s equal pay provision, RSA 275:37, prohibits employers from discriminating on the basis of sex by paying employees of one sex less than the other for work that is performed under similar working conditions and requires equal skill, effort, and responsibility. Disparate payments are allowed, however, when based on a seniority system, merit or performance, quantity or quality of production, expertise, shift differentials, or some demonstrable factor other than sex such as education, training, or experience.

In the absence of state court opinions analyzing RSA 275:37, it’s helpful to turn to cases analyzing the federal Equal Pay Act—which—albeit with slightly different verbiage—prohibits sex-based pay disparity under the same requirements as New Hampshire’s law.

Under the federal Equal Pay Act, no showing of discriminatory intent is required (emphasis added) to make out a claim. Rather, the Act is a strict liability statute, meaning that an employer need only show that, despite performing work equal to that of a co-employee of the opposite sex, their employer pays the employee of the opposite sex more for said work, without any regard to the employer’s intent in doing so. The “any-factor-other-than-sex” defense for employers has received different treatment by the federal Circuit Courts of Appeals. Some courts require proof that the factor be based on a legitimate business reason to form a viable defense. Other courts have rejected the idea that the employer must show the factor to be business-related and, instead, require the employee to show that the factor was applied in a discriminatory manner or caused a discriminatory effect.

Protection from Retaliation Based on Pay Disclosure & Other Protected Activity

RSA 275:41-b, the pay disclosure provision, bars employers from requiring that employees refrain from disclosing their pay, and it prohibits employers from discharging, disciplining, or otherwise discriminating against employees for such disclosure. RSA 275:38, the non-retaliation provision, reiterates the same protections for employees contained in the pay disclosure provision. The non-retaliation provision goes further and protects employees from reprisal for filing a complaint, causing the initiation of an investigation, or participating in a proceeding related to activity protected under the law, regardless of whether the employee does so externally or internally within the employer’s own procedures.

However, one exception exists: an employee whose job provides them access to the wage information of other employees is not protected in disclosing such information to employees who do not have the same access.

Consider the law’s practical application to two employees based, in part, on true events.

First, let’s consider Jane.

Jane is an engineer who has been employed by Company XYZ for ten years. Jane and her coworker, Greg, hold the same position, were hired at the same time, and have equivalent education, experience, performance, and working hours. One day, Greg arrives at work in a shiny new car, one that Jane could never afford on her salary. Jane compliments Greg on the vehicle and cracks a joke, asking Greg how he could possibly afford the car. Greg laughs and tells Jane he could have purchased the luxury model given his salary, which he announces, and which amounts to $30,000 more per year than what Jane is paid. Jane again congratulates Greg on the new car, managing to hide her shock upon learning that Greg is paid $30,000 per year more than she is.

Jane later brings up the pay disparity to her boss and asserts that she and Greg should be earning the same salary. Jane’s boss explains that she “shouldn’t blame it personally” that the company pays Greg more because “he is the breadwinner for his family.” Jane’s boss is unmoved when Jane points out that she and Greg perform the same job under the same conditions and receive equivalent performance ratings.

Where Jane’s employer pays her less than her male counterpart for equal work, Jane’s employer is violating the equal pay provision set forth in RSA 275:37, for which violation Jane can file a claim with the New Hampshire Department of Labor, or she can file a complaint in a state superior court. Although Jane need not show any discriminatory intent to make out her claim under RSA 275:37, if Jane can show sex-based discriminatory intent based on the company paying Greg more because “he is the breadwinner for his family,” then Jane also has a claim for intentional sex-based discrimination under Title VII and the New Hampshire Law Against Discrimination set forth in RSA 354-A.

Next, let’s consider John.

John is a recent hire at Company ABC. One day, John and his coworker, Bob, talk as they work at a job site, and Bob shares that he is struggling to make ends meet on his current pay. John encourages Bob to talk with their manager and request a raise, emphasizing that their manager was easy to work with and had given him his current, generous rate of pay, which rate John shares, without difficulty.

When Bob asks his manager for a raise, Bob mentions that John shared his rate of pay with Bob. The next day, the manager calls John into his office and fires John on the spot, explaining that John violated the company’s policy prohibiting employees from discussing pay with one another. Where John was terminated for disclosing his pay to a coworker, does he have any recourse under New Hampshire law?

Yes. Even though John’s pay disclosure was not for the purpose of rectifying a sex-based pay disparity, it was nevertheless unlawful for John’s employer to terminate him for discussing his pay with a coworker under the pay disclosure and non-retaliation provisions set forth in RSA 275:41-b and RSA 275:38, respectively. It was also unlawful under RSA 275:41-b for John’s employer to have a pay-secrecy policy in place. Like Jane, John can file a claim with the New Hampshire Department of Labor or a complaint in a state superior court.

The Belknap County Superior Court recently confirmed, on facts similar to John’s, that the pay disclosure and non-retaliation provisions protect men and women alike when discussing their pay and without regard to whether such discussions relate to a sex-based pay disparity.

In that case, a male employee filed suit against his former employer for compensatory

Let’s Encourage Our Clients to Talk About Their Pay

By Samantha Heuring

Each year, Equal Pay Day illustrates just how much the national pay gap persists between male and female employees. This year, Equal Pay Day was March 15, 2022, meaning that women in the United States had to work until March 15th to make an amount equivalent to what men earned in 2021.

Pay Equity in the Granite State

Data published on the New Hampshire Department of Labor’s website from a nearly five-year study examining the hourly pay of New Hampshire men and women in various occupational groups showed that women, on average, make $23.37 per hour compared to the $26.82 made by men. In other words, New Hampshire women make approximately 87% of what their male counterparts make.

But this disparity isn’t for lack of trying: it’s for lack of talking.

In 2014, New Hampshire passed its Pay Equity Law, which gave the labor commissioner enforcement powers over New Hampshire’s Equal Pay Act and made related changes in the law designed to protect employees—male and female—who discuss pay in the workplace, even if such discussions do not concern sex-based pay disparities.

You might be wondering: if the ultimate goal of the law is to end sex-based pay disparity, why provide legal protection to employees who, without any sex-based pay disparity issue, discuss their pay in the workplace?

The answer is simple: we can’t remedy sex-based pay disparity if we don’t know it’s happening, and we can’t know it’s happening if employees don’t talk about their pay. Thus, with the goal of ending sex-based pay disparity in mind, the legislature codified in New Hampshire law this State’s public policy of encouraging employees of both sexes to laterally discuss their pay in the workplace.

How is the law structured?

Equal Pay Protection

The answer is simple: we can’t remedy sex-based pay disparity if we don’t know it’s happening, and we can’t know it’s happening if employees don’t talk about their pay. Thus, with the goal of ending sex-based pay disparity in mind, the legislature codified in New Hampshire law this State’s public policy of encouraging employees of both sexes to laterally discuss their pay in the workplace.

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The Belknap County Superior Court recently confirmed, on facts similar to John’s, that the pay disclosure and non-retaliation provisions protect men and women alike when discussing their pay and without regard to whether such discussions relate to a sex-based pay disparity.

In that case, a male employee filed suit against his former employer for compensatory

Labor and Employment Law Challenges? Let’s Work Through it

From everyday employment law compliance and human resources concerns to complex and difficult personnel challenges, our multisate employment law team is here when our clients need them most.
The N.H. Supreme Court on Employment Disability Accommodation. Pot, Yes; Sitting, No.

By Nancy Richards-Stower and Debra Weiss Ford

This is the 20th (!) N.H. Bar News debate over the last 16 years between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate). Here they discuss two N.H. Supreme Court opinions issued in late fall 2021: Crowe v. Appalachian Stitching Company, LLC.

Nancy: Deb, let’s first discuss the marijuana opinion, ironically, the Crowe case. I need its boost before we get to the Crowe summary judgment case.

Deb: Nancy, I know you want me to say, “go ahead, inhale,” but I won’t.

Nancy: Very funny. In Paine v. Ride-Away, Inc., the employee suffered disabling PTSD, his doctor prescribed pot (“therapeutic cannabis”), his employer refused his request to waive its drug test, and the employee was fired after disclosing that he planned to treat his disability with cannabis, outside of work hours and off the employer’s premises. The superior court tossed his discrimination suit (judgment on the pleadings), but the N.H. supreme court ruled that under the N.H. therapeutic cannabis statute, RSA chapter 126-X, the prescribed drug use could be a reasonable accommodation.

Deb: Ride-Away argued in part, that because marijuana is a federally controlled substance, it was not legally required to accommodate Paine’s request to use marijuana to treat his PTSD. The Court ruled that the disability here was PTSD and not the illegal use of a drug and that a reasonable accommodation could be the use of marijuana to treat a disability. The case leaves many unanswered questions such as how an employer should deal with similar requests when there are federal mandated prohibitions on drug use for example, by US DOT.

Nancy: Well, at least “reefer madness” has subsided and Mr. Paine will get his trial, unlike unfortunate Ms. Crow.

Deb: In Crowe v. Appalachian Stitching Company, the employee-assembler lost on summary judgment her quest to sit down periodically to accommodate her sciatica. You’ve ranted (and rapped) about summary judgment in employment discrimination cases for decades. What’s special here?

Nancy: My historic rant is that the seeds of the needlessly complicated, generally anti-employee Title VII and ADA summary judgment laws were planted before jury trials were made available (by the Civil Rights Act of 1991, and corresponding state law amendments in 2000). N.H. state courts may, but need not, look to federal statute cases to interpret our similar state law. In Crowe, our supreme court reached way over to the 8th Circuit for “poetry” to kill the employee’s case before trial. Crowe, diagnosed with sciatica, requested temporary, intermittent sitting on the job. Her boss allowed that accommodation and Crowe successfully performed her job. However, days later, when H.R. learned of her sciatica and accommodation, the H.R. manager demanded a doctor’s note. The resultant note said, “no lifting or bending or stooping for 1 week.” Crowe said she didn’t have to do those things; she just had to stand. But, H.R. sent her home, ordering her to not return until she had “no restrictions.” Forced out, Crowe continued to improve, but her doctor could not provide a note “with no restrictions” and while she waited to improve to “no restrictions,” she was fired for absenteeism. She could have continued performing her job with the accommodation of intermittent sitting.

Deb: However, Crowe’s own testimony as to her job’s “essential functions” was not enough to establish a material factual dispute that her disability rendered her unable to do her job. The employer’s summary judgment evidence included its written job description “as well as the testimony of its general manager and floor supervisor to support its contention that the ability to ‘bend, lift and turn, freely’ was an essential job function. Crowe, however, presented no evidence other than her own testimony, that she did not need to bend, lift or stoop on the job,” citing the Eighth Circuit: “the specific personal experience of the plaintiff alone is of no consequence in the essential functions inquiry.” Knutson v. Schwan’s Home Service, Inc., 711 F.3d 911, 915 (8th Cir. 2013). Instead, the plaintiff must produce competent evidence, other than self-serving testimony, that raises a genuine issue of material fact about what constitutes an essential job function.”

Nancy: “Self-serving testimony”? That cracks me up. What litigant chooses testimony that isn’t self-serving? N.H. courts would more correctly use federal cases to provide the floor, not the ceiling for interpreting protective legislation. Scouring the country for a restrictive standard to import into our state law ignores the commands of RSA 354-A.25 to construe the statute liberally to prevent and address discrimination. For “essential job functions,” the First

EMPLOYMENT continued on page 34
Personal Jurisdiction in the Remote Employee World

By Brian Bouchard

Remote work has staying power. So much so that many companies can overcome this tight labor market by hiring fully remote employees. Unlike ever before, qualified employees can be employed from across the country without the sometimes deal-breaking requirement of having to uproot and move to New Hampshire. While beneficial, this dynamic may also expose New Hampshire companies to foreign employment lawsuits.

Having an employee work remotely from Illinois, for example, may solve short-term hiring needs. But if the employment relationship goes awry, a company may find itself defending against an employment lawsuit in Illinois, which may negate the initial convenience of hiring a remote worker. The challenges of defending an employment case in a foreign jurisdiction are well known. It is expensive and inconvenient. Trusted advisors cannot easily appear in the foreign court and are not likely familiar with the judges and local custom.

Whether an employer can be hauled into the courts of its remote employees depends on its contacts with the forum. Not all contacts are created equal here. To establish personal jurisdiction in an employment case, courts consider whether the non-resident employer reached into the forum to establish or maintain the employment relationship. Some contacts are accidental qualities of the employment relationship and are unlikely to establish personal jurisdiction on their own because they are often tangential to the underlying dispute. These include, for example, business registrations, tax payments, reports of workers’ compensation coverage, and state specific payroll practices. Other contacts directly affect the employment relationship in the foreign jurisdiction, such as advertising remote work opportunities in the forum state. Those contacts are likely to establish personal jurisdiction.

To differentiate between accidental touchpoints and purposeful availment in the employment context, courts consider a variety of factors such as whether remote work is a job requirement or a matter of personal convenience for the employee; whether the employee was offered a office at the company; whether the remote employee traveled out of state for job interviews or new employee orientation; whether the company obtained unique benefits in the remote employee’s state; whether the company shipped necessary equipment (laptop, printers, monitors, etc.) to the remote employee’s residence or simply reimbursed the employee for “business expenses”; whether the company used the employee’s private address on business cards; whether the employee was soliciting business for the employer in the foreign state or simply performing production work for the company remotely; and whether an employment contract was negotiated in the foreign jurisdiction. With these factors, a court is trying to determine whether the non-resident employer reached into the jurisdiction or whether the presence of the employment relationship in that jurisdiction came about through other means.

Once personal jurisdiction is established, a company’s options are limited for regaining home field advantage. Pressing a forum non conveniens argument is an option but it is often a tussle. In many cases involving remote employees, New Hampshire will be the nexus of the employment dispute. All the documents are likely to be here, all the witnesses are likely to be here (including third party and voluntary witnesses), and all of the employment decisions were likely to have been made here. But a plaintiff’s choice of forum is difficult to overcome.

The more an employee’s choice of forum is motivated by valid factors like convenience of residence and their counsel, the more deference a court typically applies. I have yet to see an individual employee “forum shop.”

To maintain homefield advantage for New Hampshire employers, attorneys should advise their clients to adopt two preemptive measures: (1) establish a Remote Worker Policy and (2) introduce employment contracts with forum selection clauses. A good Remote Worker Policy will set the stage to contest personal jurisdiction. At a minimum, it will provide that remote work is not mandated by the employer but is instead a matter of personal convenience for the employee/applicant. It will offer every employee office space in New Hampshire (where feasible). It will require new employees to attend an in-person orientation in New Hampshire where they will sign new employee documents and receive essential equipment like laptops and cellphones. Other attendant equipment such as monitors, printers, and the like should be purchased by the employee and reimbursed through the company’s reimbursement system.

Finally, a well-crafted forum selection clause will solve most issues. This isn’t revelatory advice, of course, but from what I have seen forum selection clauses, or employment contracts for that matter, are not ubiquitous. Keep in mind, however, that a forum selection clause may not affect an agency’s discretion to investigate employment matters within its territory. Courts, however, regularly enforce them, even in the

JURISDICTION continued on page 36
Should Paralegals Get Paid Overtime?

By Beth Deragon and Meredith Lasna

Law firms utilize paralegals to perform a variety of duties resulting in hours of preparing attorneys for trial, mediations, and closings. What if a paralegal works 52 hours in a workweek? Does the firm have to pay overtime? Unless a paralegal meets the limited qualifications for exemption under the Fair Labor Standards Act (FLSA), the answer is yes.

The FLSA exempts from minimum wage and overtime requirements employees employed in a bona fide executive, administrative, or professional capacity and/or those who are highly compensated. Of the types of bona fide professionals considered exempt, the learned professional employee exemption is available when a paralegal's status is considered most frequently when determining a paralegal's exempt status. In some circumstances, a paralegal may qualify as highly compensated.

To qualify for the learned professional employee exemption: (1) the employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $684 per week; (2) the employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment; (3) the advanced knowledge must be in a field of science or learning; and (4) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. Although many paralegals have postsecondary education, they generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field.

In an opinion letter dated December 16, 2005, the United States Department of Labor explained that the professional employee exemption is available when a paralegal has an advanced specialized degree in other professional fields and applies that advanced knowledge to their primary job duty. The opinion included examples of an engineer hired by a law firm as a paralegal to provide expert advice on product liability cases or to assist on patent matters and a paralegal who possessed an MBA and an accounting degree and passed the uniform CPA exam who “performed primarily expert work in her advanced fields of study.” Paralegals who do not apply the knowledge from their advanced specialized degrees to their work or who perform “conventional legal duties” typically do not qualify for this exemption.

The USDOL has also considered whether a paralegal could be exempt as a highly compensated employee. This exemption applies if: (1) the employee’s “primary duty includes performing office or non-manual work;” (2) the employee receives total annual compensation of at least $107,432; and (3) the employee “customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee.” 29 C.F.R. § 541.601.

If the salary threshold is met, a paralegal would have to perform a duty directly related to the management or general business operations of the firm “customarily and regularly” to be exempt. To satisfy this third prong, the employee need only perform one or more exempt duties more than occasionally. 29 C.F.R. § 541.701 (noting that the duty’s “frequency … may be less than constant”). An exempt duty is more than occasional if it is performed normally and recurrently every workweek, but not if it is an isolated or one-time task. See id. Additionally, this exempt duty need not be the employee’s “primary duty.” See 29 C.F.R. § 541.601(a)(2); Smith v. Ochsner Health Sys., 353 F. Supp. 3d 483, 498 (E.D. La. 2018).

In an opinion letter of July 1, 2019, the USDOL considered paralegals’ actual job duties including “keeping and maintaining corporate and official records, assisting the finance department with bank account matters, and budgeting – that are ‘directly related to the management or general business operations.’” The DOL concluded that those paralegals were highly compensated employees. Therefore, if the salary threshold is met, a paralegal with a finance background whose duties include, but do not need to be limited to, bookkeeping for the firm, could qualify as exempt.

Typically, paralegals are not considered exempt under the administrative exempt...
Imagine, you receive a call from a panicked client. The Occupational Safety and Health Administration (“OSHA”) was performing a routine inspection and requested a copy of the non-healthcare employer’s “COVID-19 Program.” Would you know what that means for your non-healthcare employer clients? In such a situation, OSHA seeks the non-healthcare employer’s policies and procedures for protecting workers from COVID-19. Healthcare employers are required to have a written plan for their pandemic response if they are covered by the OSHA COVID-19 Healthcare ETS issued in June 2021 (“Healthcare ETS”). However, employers not covered by the Healthcare ETS are not required by OSHA to have a written plan for their pandemic response; yet, they are still being asked to provide such documentation during an OSHA investigation.

Employers have a duty to furnish to each worker “employment and place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm” pursuant to Section 5(a)(1) of the Occupational Safety and Health Act of 1970. Throughout the pandemic, this duty has included the duty to take steps to mitigate and prevent the spread of COVID-19 in the workplace. On January 29, 2021, OSHA published “Protecting Workers: Guidance on Mitigating and preventing the Spread of COVID-19 in the Workplace” (“OSHA Guidance”) to help employers protect their workplace. The OSHA Guidance was updated on June 10, 2021, and a summary of the changes was added on August 13, 2021. In addition, employers have been expected to follow CDC guidance and state and local mandates. In accordance with the duty to keep workers safe from known harms, many employers prepared formal memos and emails to employees regarding their pandemic policies. However, even those employers that did not prepare written “programs” likely did much more than they initially realize. While it is of course best practice to have any programs or policies in writing, provided that there was no OSHA requirement to have a written plan, OSHA should accept a written summary detailing what steps were taken by the employer to mitigate and prevent the spread of COVID-19 in the workplace.

Employers should retain their records regarding pandemic messaging. If they did not have a written program, it is useful to be able to show OSHA the emails or memos that went out to employees regarding worker safety. If no such documents were prepared, employers should memorialize the oral directives that were provided to employees. It is easier for employers to review and memorialize steps they previously took now, rather than in the midst of an OSHA investigation.

Most employers did some combination of the following:

• Designated a coordinator to review and advise employees on CDC guidance, public health guidance, and NH executive orders;
• Allowed remote work where possible;
• Informed employees of the Families First Corona Response Act and hung notices with their other labor posters;
• Implemented screening policies, including routine temperature checks and self-certifications that the employees were not experiencing COVID-19 symptoms;
• Required symptomatic employees to either quarantine for a period of time or to provide proof of a negative PCR test;
• Required employees that had been exposed to a positive case to quarantine and test negative before returning to work;
• Encouraged or required vaccination;
• Required masks for employees in the workplace;
• Installed plastic partitions to separate employees from each other or from the public;
• Marked the ground and moved work stations so people stayed six feet apart;
• Installed upgraded ventilation systems;
• Conducted meetings outside and created outdoor break areas when practical; and
• Implemented enhanced cleaning requirements.

Employers that relied on their legal counsel to provide updates may be able to obtain copies of such communications from counsel. Attorneys can help their employer clients prepare for such audits by giving them a heads up that they should start compiling this information and make sure it is not deleted during routine file purging. Also, attorneys can remind the client of what measures they had recommended at different points in the pandemic. Employers should reference the OSHA Guidance to ensure they have captured all measures taken that should be memorialized, and to determine if there are additional steps that should be taken to ensure worker safety.

The OSHA Guidance contains some requirements that may not be on most employers’ radars. Many employers are not aware that they are supposed to record and report to OSHA COVID-19 infections and/or deaths if the case is confirmed and work-related as defined by 29 CFR 1904.5. This regulation is the same as for other workplace illness and injuries. Notably, unlike the cold and flu, which do not have to be reported to OSHA, COVID-19 is a reportable disease.

OSHA Investigations and Employer Responses to the Pandemic

By Kathleen Davidson and Brooke Moschetto

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NEW HAMPSHIRE BAR NEWS
By Adam M. Hamel and Margaret “Peg” O’Brien

For many businesses, hiring independent contractors seems like a perfect cost-saving solution during a start-up phase or in an uncertain economy. Because independent contractors are considered to be in business for themselves, the IRS and other government agencies do not consider them to be “employees.” Companies do not have to pay payroll taxes for independent contractors, and do not have to provide them employee benefits. In addition, laws intended to protect the rights of employees, and which form the basis of employment litigation (wage claims, discrimination and wrongful termination actions) are not available to independent contractors.

However, employers risk significant consequences from this supposed cost-saving solution if they do not understand the complexities of determining who can, and who cannot, be properly classified as an independent contractor. A business that misclassifies an employee as an independent contractor can be liable for back wages, employee benefits, interest, liquidated damages, and civil penalties. Criminal liability is even possible if the employer is found to be acting “willfully” in misclassifying workers.

What makes this area of employment law especially difficult is that governmental agencies and federal statutes have different tests for determining how workers must be classified for different purposes. Given the same facts, one agency or statute might classify a worker to be an employee, while another may find the same worker to be an independent contractor. Additionally, all of these tests require a case-specific inquiry making it difficult to predict the outcome in marginal or novel cases.

Generally, New Hampshire employers must comply with four separate independent contractor tests: (i) New Hampshire Employment Security’s (NHES) “ABC” test; (ii) New Hampshire Department of Labor’s (NHDL) 7-part test; (iii) United States Department of Labor’s (USDOL) economic realities/core factors test; and (iv) the Internal Revenue Service (IRS) 3-part test.

Overview of Four Tests

NHES, which is charged with overseeing unemployment compensation laws, follows the so-called “ABC” test, which presumes that all workers are employees unless the employer establishes that all three requirements are met:

A. Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and

B. Such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

C. Such individual is customarily engaged in an independently established trade, occupation, profession, or business.

See N.H. RSA 282-A:9, III. Businesses usually find the ABC test the hardest to satisfy, especially part “B” of the test. The New Hampshire Supreme Court ruled in In re Appeal of Niadini, Inc., that “[i]f ... an enterprise undertakes an activity, not as an isolated instance but as a regular or continuous practice, the activity will constitute part of the enterprise’s usual course of business irrespective of its substantiality in relation to the other activities engaged in by the enterprise.” NHES provides a questionnaire on its website to help businesses assess whether they are properly classifying workers.

When NHDL assesses whether a worker qualifies as an “independent contractor” for purposes of the state’s employment laws, it applies a seven-part test, all of which are required for a worker to be qualified as an independent contractor. See N.H. R.S.A. 275:4. These seven factors range from a review of the independence of the worker to whether the worker must provide exclusive services for the business.

Another test for assessing “independent contractor” status is the USDOL’s test, which is currently in a state of flux. The Trump Administration imposed a new “core factors” test. Under the test, if the two core factors of “the nature and degree of control over the work” and “the individual’s opportunity for profit or loss” fail in the same direction then that is how the worker should be classified. If the two core factors do not align, then three “other factors” should be reviewed to make the determination, including the amount of skill required for the work, whether the work is part of an integrated unit of production, and the permanence of the working relationship between the parties.

The “core factors” test was to take effect in March 2021, but the Biden Administration withdrew it and reinstated the “economic realities” test. This fact-intensive test assesses seven factors ranging from the extent to which the services rendered by the contractor are an integral part of the company’s business to the degree to which the contractor is independently established as a separate business. More recently, however, a federal court reinstated the “core factors” test. This issue will no doubt be resolved through litigation.

Regardless of which test is ultimately adopted, both the USDOL and the White House have announced plans to prioritize this issue of the misclassification of employees as independent contractors through a range of enforcement strategies, thus employers should proceed with caution when classifying any worker as a contractor.

The final test is overseen by the IRS. The IRS will consider all information that

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mon law wrongful discharge, alleging that the employer was motivated by bad faith, malice, or retaliation to the employee’s performance of an act encouraged by New Hampshire public policy when the employer terminated him for discussing his pay at work. The source of the public policy supporting the plaintiff’s conduct in discussing his pay was the pay disclosure and non-retaliation provisions discussed above.

In a motion for judgment on the pleadings, the employer argued that the Equal Pay Act had no application to the case because the plaintiff’s claim – as a male employee sharing his pay in the absence of an issue related to a sex-based pay disparity – had no factual underpinning in the problem that the statute sought to solve.

The Court was unpersuaded, noting that the plain language of both the pay disclosure and non-retaliation provisions make no distinction between the sexes, and for purposes of both provisions, “employee” is defined as “any person employed for hire by an employer in any lawful employment.” See Order at p. 10, Murphy v. Marbucco Corp. d/b/a Granite State Glass, Case No. 211-2019-CV-00342 (June 7, 2021). Thus, the Court concluded that “by the plain language of both the pay disclosure and non-retaliation provisions make no distinction between the sexes, and for purposes of both provisions, “employee” is defined as “any person employed for hire by an employer in any lawful employment.”

The EEOC regulations recommend considering evidence of the amount of time spent performing the particular function, the consequences of not requiring the employees to perform the function, and the past and current work experience of incumbents in the job (or in similar positions elsewhere). Id. The purpose of these provisions is not to enable courts to second-guess legitimate business judgments, but rather to ensure that an employer’s asserted requirements are solidly anchored in the realities of the workplace, not constructed out of whole cloth...

...[the employer’s good-faith view of what a job entails, though important, is not dispositive... it is “only one factor” in the mix...In the final analysis, the complex question of what constitutes an essential job function involves fact-sensitive considerations and must be determined on a case-by-case basis.

Deb: And so?

Nancy: Let the jury decide.

Deb: The decision underscores the importance of current job descriptions which accurately reflect the essential functions of the position. Here, attendance was an essential function of the job and the employee’s inability to attend work meant she was not a “qualified individual.”

Endnotes


Nancy Richards-Stower advocates for NH and MA employees, “has gone totally re-mote” at www.jobandjustice.com, and invented/owns/operates Trytosettle.com® on-line settlement service. Debra Weiss Ford is the Managing Principal and Litigation Manager at the Portsmouth, NH offices of Jackson Lewis, P.C., www.jacksonlewis.com

Implications for Business

Businesses must realize that in deciding whether an individual is an employee or an independent contractor, the individual’s title is largely irrelevant. Further, the existence of an independent contractor agreement, by itself, does not determine a worker’s status. There are multiple factors, as referenced above, which dictate whether a worker can qualify as an “independent contractor.” Businesses should be encouraged to audit their existing employment classifications to guard against the possible risk of costly litigation and damages for a misclassification of the “independent contractor” relationship.

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Preserving New Hampshire’s Legal History One Case at a Time

By Scott Merrill

The case of the “hairy hand” and many others dating back to 1849 will soon be conserved and digitized as part of an archiving project at the King Law Library at the New Hampshire Supreme Court.

The project, which is currently underway, is headed by the New Hampshire Supreme Court’s “Library Judge,” Justice Anna Barbara Hantz Marconi, and Law Librarian at King Law Library, Mary Searles.

“In doing my duties as the ‘library judge’ I learned many things,” Hantz Marconi said, referring to the use of casebooks for all Supreme Court cases dating from the mid-1800s until 1987. “They would take the case, if it was a boundary dispute for instance, include the deeds, maps, sheriff’s notation, and it would be folded up and stitched into a book.”

Northeast Document Conservation Center, which specializes in treating and digitizing collections made of paper or parchment, has been contracted to do the work which will include conserving and archiving 600 volumes of cases, starting with the oldest. The first seven volumes are currently being worked on.

Searles said the library is looking at grant sources to fund the project to completion, but so far the library has relied on $50,000 received from the state for the project.

The total price for all 600 volumes is $2 million.

Some of the old cases being worked on—which were often handwritten with iron gall ink—were originally bound in ‘huge thick volumes,” said Searles, describing the way crumbling pages have curved inwards over the years because of the various sized documents bound together.

“It’s a big project and we’ve been talking about it for a few years,” she said. “The legislature was very kind in giving us $50,000 to start and we hope to be able to go back to them and say ‘this is what we’ve done, and here’s the website and so forth. Even if we only do $50,000 at a time, it’s ok, we’ll get there.”

Some of the cases being archived include the early Mary Baker Eddy trust cases as well as Hawkins v. McGee, also known as the “Hairy Hand” case. In that case, which is taught to first year law students, a man sued for damages and won after receiving a skin graft on his hand that eventually grew hair on his palm.

“We have these so-called artifacts, and so we mused about how to preserve the collection,” Hantz Marconi said. “[The best way to do it is to unbind these books and to digitize the material so they’re available for research without needing to put the white gloves on, and to also store them on the shelves or in a special room.”

The archive project at the Court has coincided with the Judicial Case Preservation Committee which started with the help of retired Superior Court Judge John Lewis.

The experience that prompted Lewis to wonder whether cases were being preserved adequately came while researching for an academic paper in 2015 on the historic Claremont decisions. During that time, Lewis says he was having difficulty finding source material both within the state archives and with the Courts.

“There was an 1850 constitutional convention, when Franklin Pierce was president and education factored very strongly in that convention; I wanted to look at the records about that,” said Lewis, who found it extremely difficult to find them at the state archives. “A lot of the background material wasn’t there.”

At one point, Lewis said the Merrimack Superior Court told him they couldn’t find the files he was looking for.

“The Supreme Court had its files there, including tapes of the oral argument, but they had returned a lot of the files as they would do with most cases. So, it was troublesome,” he said. “I have a feeling that has gone on for too long and I’m really glad we’re getting more sensitive to it.”

Lewis said the files were eventually located in a warehouse the Merrimack Superior Court was using.

The preservation committee, made up of attorneys, formed a plan of action to provide information for the Supreme Court regarding important cases.

“Our effort was both to encourage and support the current project there, and to provide the Supreme Court with insight about what those cases are that might deserve special attention,” Lewis said.

The list of cases chosen by the committee represents 20 areas of law and includes comments about why each case is important.

“It was an exciting project, and many attorneys spent a good deal of time helping,” said Lewis, who added that the committee made several recommendations, including the need to publicize the case list to ensure that people in the New Hampshire bar and beyond have access to it.

“It’s not meant to be a comprehensive view of the Supreme Court, but it’s certainly full of interesting in and of itself, not only for historical purposes, but also as a way to see what we’ve been doing in New Hampshire Law since World War II.”

Hantz Marconi said the second and final phase of the archiving process will be to find a place to house the conserved archival materials.

“We’re currently in the process of designing a vault, if you will, that could go in the Supreme Court basement where archival cases would be stored,’’ she said. ‘‘And it just happens to dovetail with the rehabbing of our HVAC system, so we may be able to piggyback on that.”

Fourth Graders Tour New Hampshire Supreme Court and Meet Chief Justice Gordon MacDonald

Seventy New Boston Central School fourth graders had the chance to tour the New Hampshire Supreme Court on April 4 and to meet Chief Justice Gordon MacDonald.

The educational tours, directed by law clerks at the Court, provide a 45-minute interactive tour of the building and engage students in discussions on the history and role of the Supreme Court and the Judicial Branch in state government.

“Understanding the rule of law and the court’s important role in interpreting the laws is an essential part of civic education,” noted Chief Justice Gordon MacDonald. “We are pleased to be offering fourth graders a chance to see firsthand where the Supreme Court hears oral arguments and to learn more about the Judicial Branch.”

Students will also have an opportunity to see the Courtroom and learn how it functions, tour the John W. King Law Library to look at historic volumes, visit the David Souter conference room and meet with Justices of the Court on days when they are available.

“Learning about state government is a huge part of the fourth-grade curriculum,” said Julie McNish, teacher from New Boston Central School. “Our students have learned about the responsibilities of each branch and how the three must work together. They were particularly glad today to learn more about how the Supreme Court hears and decides appeals.”

For more information about fourth-grade student tours and how to request a visit, see https://www.courts.nh.gov/students/supreme-court-tours
The Petitioner was found intoxicated in a church parking lot and was charged with driving under the influence. She challenged the ALS and requested a hearing. At the hearing she stipulated that she was operating her vehicle on a "way" as defined by statute. Specifically, the Petitioner argued that pursuant to RSA 259:125, a church parking lot did not fit within the first definition of "way" as private, not laid out with use of public funds, nor maintained for the benefit of commercial establishment. The Petitioner further argued that the alternative definition of "way" did not apply to the statute governing ALS and was therefore inapplicable.

The hearing examiner upheld the ALS and dismissed the Petitioner's claim. The Petitioner appealed the hearing examiner's decision to the superior court, which affirmed the decision of the hearing examiner.

In reversing the superior court's order affirming the hearing examiner's decision, the Majority Opinion of the Court conducted a review of the applicable statutes and affirmed that the Petitioner that the statutory scheme did not support the hearing examiner's conclusion that the State had a reasonable belief that the Petitioner was operating her vehicle on a "way" as defined by statute. The Majority Opinion dismissed the State's arguments that its interpretation would create an absurd result, concluding that a literal reading of the term "other firearm" did not apply to pistols in possession, and, after stipulating to a bench trial and not objecting to an offer of proof, was convicted of the indictment and entered this appeal.

The Court found that the term "other firearm" included those weapons from which shot is discharged by gunpowder, and thus that firearms are prohibited from owning a broad class of firearms. In so concluding, the Court found that the weapon at issue in the case at hand was part of the broad category of weapons that the Defendant, as a felon, was prohibited from possessing. The Court expressly rejected the Defendant's various arguments that the term "other firearm" did not include weapons that were in possession.

Finally, the Court rejected the Defendant's argument that the statute at issue was constitutionally vague, finding that the statute at issue provides a person of ordinary intelligence a reasonable opportunity to understand the conduct that it prohibits. For all of the foregoing reasons, the Court affirmed the Defendant's conviction as being a felony in possession of a firearm.

The State of New Hampshire v. Justin Parr, No. 2020-0570 March 17, 2022

Affirmed

Whether, following the expiration of the time period to file an appeal, the circuit court retains jurisdiction to consider the merits of a motion to withdraw a guilty plea.

In December 2019 the Defendant pleaded guilty to a violation of operating after a suspension license and the trial court imposed a fine. In September 2020 the Defendant unsuccessfully moved to withdraw his guilty plea. In December 2020, after the Defendant's motion, the trial court did so without a hearing on the issue. On appeal the Defendant unsuccessfully argued that the trial court denied his right to due process by denying his motion without holding a hearing. The State successfully argued that the trial court lacked jurisdiction following the expiration of the thirty-day period to appeal.

In vacating and remanding the trial court's denial of the Defendant's motion to withdraw his guilty plea, the Court agreed with the State that its prior precedent, State v. Jaskoita, 172 N.H. 468 (2019), was analogous to the instant case. Specifically, the Court concluded that the trial court lacked jurisdiction for issuing post-conviction relief, following the expiration of the time limits for appeal. The Court agreed that the Defendant's only avenue for relief was to file a writ of coram nobis, and since the circuit court is a court of limited jurisdiction it was not the correct venue for such a filing.

The Office of Attorney General John M. Formella and The Office of Solicitor General Anthony J. Galdieri orally for the State of New Hampshire. The Defendant was convicted of being a felon in possession of a firearm, contrary to RSA 159:3. The Defendant unsuccessfully moved to dismiss the indictment arguing that the term "other firearm" did not apply to pistols in possession, and, after stipulating to a bench trial and not objecting to an offer of proof, was convicted of the indictment and entered this appeal.

The Supreme Court of New Hampshire held that the majority and minority opinions of the Court con


Affirmed

Whether certain evidence was authenticated as required by New Hampshire Rule of Evidence 901, or for a contention that the trial courts admission of said evidence was an abuse of discretion.

Following jury trial, the Defendant was convicted of one count of
demeanor domestic violence. Prior to trial, the Defendant moved to exclude evidence of a phone call, arguing that there was insufficient evidence that the Defendant was the one who had made the phone call. The trial court concluded that the call itself provided the specificity of the conversation was enough to establish that the speaker was the Defendant.

The Office of Attorney General John M. Formella and The Office of Solicitor General Anthony J. Galdieri orally for the State of New Hampshire. The State successfully argued that the trial court lacked jurisdiction following the expiration of the thirty-day period to appeal. In vacating and remanding the trial court's denial of the Defendant's motion to withdraw his guilty plea, the Court agreed with the State that its prior precedent, State v. Jaskoita, 172 N.H. 468 (2019), was analogous to the instant case. Specifically, the Court concluded that the trial court lacked jurisdiction for issuing post-conviction relief, following the expiration of the time limits for appeal. The Court agreed that the Defendant's only avenue for relief was to file a writ of coram nobis, and since the circuit court is a court of limited jurisdiction it was not the correct venue for such a filing.

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Supreme Court Orders

Pursuant to RSA 71-B:2, the Supreme Court hereby reappoints Michelle E. LeBrun, of Dunbarton, to the Board of Tax and Land Appeals for a term beginning May 6, 2022, and terminating on May 5, 2025. Ms. LeBrun shall continue to serve as chair of the board.

Issued: March 22, 2022
ATTEST: Timothy A. Gudas, Clerk of Court
Supreme Court of New Hampshire

Pursuant to Supreme Court Rule 37(4), the Supreme Court appoints Supreme Court Justice Peter H. Fauver and Attorney Frederick J. Coolbrot, Sr., to the Hearings Committee of the Attorney Discipline System. Each is appointed to serve a three-year term commencing April 1, 2022, and expiring March 31, 2025.

Richard Darling and Sarah J. Claus having been appointed to the Professional Conduct Committee for terms commencing April 1, 2022, each is deemed to have resigned from the Hearings Committee as of that date. See Supreme Court Rule 37(4)(b) (“No hearings committee member shall serve concurrently as a member of the professional conduct committee or the complaint screening committee.”).

Issued: March 23, 2022
ATTEST: Timothy A. Gudas, Clerk of Court
Supreme Court of New Hampshire

In accordance with RSA 490:5-a and -b, the Supreme Court appoints Attorney Kirk C. Simoneau, a lawyer of experience in the trial of cases at all court levels, to the Court Accreditation Commission. Attorney Simoneau is appointed to replace Samantha D. Elliott, who resigned from the Commission and is now a United States District Court Judge for the District of New Hampshire. Attorney Simoneau shall serve a three-year term commencing March 25, 2022, and expiring March 24, 2025.

Issued: March 25, 2022
ATTEST: Timothy A. Gudas, Clerk of Court
Supreme Court of New Hampshire

Pursuant to Part II, Article 73-a of the New Hampshire Constitution and Supreme Court Rule 51, the Supreme Court of New Hampshire adopts the following amendments to court rules.

I. Circuit Court Family Division Rule 3.6 – Conditions of Release

(1) This amendment consolidates and reduces the number of conditions of release that currently apply to every juvenile on probation.

1. Amend Circuit Court Family Division Rule 3.6 as set forth in Appendix A.

II. Technical Amendment to Supreme Court Rule 42(IV)(g)

(This amendment corrects typographical errors in the rule.)

1. Amend Supreme Court Rule 42(IV)(g) as set forth in Appendix B.

Effective Dates

The amendment to Circuit Court Family Division Rule 3.6 shall take effect on July 1, 2022. The technical amendment to Supreme Court Rule 42(IV)(g) shall take effect immediately.

Date: March 29, 2022
ATTEST: Timothy A. Gudas, Clerk
Supreme Court of New Hampshire

Bankruptcy Court Opinion Summary

Note: The full text of the opinion below will be available on the Bankruptcy Court’s website at www.nhb.uscourts.gov.

In re St. Laurent, 2022 BHN 002, issued March 10, 2022 (Harwood, C.J.) (unpublished) (suspending the chapter 7 trustee’s objection to the debtor’s claim of a homestead exemption under RSA 480:1 in the proceeds from the sale of the debtor’s marital home as the debtor was not an owner of the property at the time of his divorce and thus was unable to satisfy the ownership requirement).

US District Court Decision Listing

February 2022

* Published

ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT


A Jewish inmate at the New Hampshire Department of Corrections (“NHDOC”), sued the NHDOC Commissioner after she denied his requests for various religious accommodations. The Commissioner moved for summary judgment on his claims that the Commissioner violated the Establishment Clause when she denied (1) his requests for delivery of food to his cell (so-called cell feed), to accommodate his daily morning prayers and his observance of the Sabbath, and (2) his request to wear a head covering of his choice. The court grant the motion. Czekalski failed to exhaust his administrative remedies with respect to the cell feed claims, as required by the Prisoner Litigation Reform Act. The head covering claim failed on the facts required by the Prisoner Litigation Reform Act. The claim failed on the facts

CONSTITUTIONALLY INADEQUATE MEDICAL CARE


Linda Rancourt filed this action to recover damages after she suffered life-threatening complications from severe hypothermia during her detention at Hillsborough County’s Valley Street Jail. The sole remaining claims were federal claims under 42 U.S.C. § 1983 for constitutionally inadequate medical care and state law claims for negligence against four nurses employed by the jail. The crux of her claims is that the nurses failed to take appropriate steps to address her high blood pressure. Defendants moved for summary judgment on all claims. The court granted the motion as to one nurse whose undisputed evidence showed that she was not involved in Rancourt’s care. The court denied the motion as to the three remaining nurses because there were genuine disputes of material fact as to whether Rancourt had timely access to her prescription medications and whether the nurses could be liable for failing to seek her immediate hospitalization. 13 pages. Judge Paul Barbadoro.

WRONGFUL TERMINATION; SUMMARY JUDGMENT

Di Nola v. Freudenberg-NOK General Partnership

Civil No. 20-cv-724-JL, No opinion number.

The plaintiff, a former HR Manager for the defendant, filed a wrongful discharge suit arising out of actions she took at the onset of the COVID-19 pandemic. Specifically, the plaintiff recommended that two co-workers returning from China and Malaysia work from home for a week following their return to the United States. She claimed that this recommendation was based on guidance from federal and state health agencies and safety and health concerns of other co-workers. Shortly after making her recommendation, the defendant terminated the plaintiff’s employment. Defendant moved for summary judgment, arguing that no recognized public policy encouraged the plaintiff’s actions. The court found that the absence of a public policy was so clear to warrant summary judgment for the defendant. And because there

LIQUOR LIABILITY; SUMMARY JUDGMENT

Carrier, et al. v. Loyal Order of Moose Lodge Newport

Lodge #1236

Case No. 19-cv-1196-JL, Opinion No. 22NH025

In this wrongful death action, the estates of two individuals killed in a car crash sued a local fraternal organization and its national counterpart for violation of New Hampshire’s civil liquor liability statutes, common law negligence, and vicarious liability. The local lodge moved for summary judgment, arguing that because the intoxicated bar patron who allegedly caused the crash was not showing any visible signs of intoxication at the time of last service, the lodge could not be liable for negligent or reckless service of alcohol to an intoxicated person. The national organization also moved for summary judgment, arguing a lack of duty. As for the national organization, the court granted the motion because the evidence showed that the national had a limited right to control, and exercised limited control over the operation of the bars (known as social vouchers) at local lodges, and thus, the national did not assume or undertake a duty to oversee the service of alcohol at the lodge at issue. Regarding the local lodge’s motion, the court granted the motion in part and denied it in part. There was insufficient record evidence to show reckless service of alcohol. As for negligent service, however, the court found that the ordinary meaning of the statute requires some evidence of intoxication that put a reasonably prudent bartender on notice that he or she was serving an intoxicated person, but not necessarily visible signs of intoxication. Material disputes of fact thus precluded summary judgment for the lodge on this claim. 42. Judge Joseph N. Laplante.

SOCIAL SECURITY

3/24/22 Clough v. SSA

Case No. 20-cv-795-JL, Opinion No. 22NH038

LISTING continued on page 40
In this appeal of the Social Security Administration’s denial of a request for supplemental security income, the court reversed the Administrative Law Judge’s decision and remanded the case on the basis of an error in the RFC determination. The court found that the ALJ erred in its reliance on the opinions of non-examining state agency physicians, without adequately considering the views of the examining physicians. The court held that the ALJ’s RFC determination was not supported by substantial evidence and that the claimant was not disabled within the meaning of the Social Security Act.

FAIR HOUSING ACT RETALIATION; SUMMARY JUDGMENT

In a case involving the Fair Housing Act (FHA), the court granted the defendants’ motion for summary judgment. The court found that the plaintiff’s claim was not supported by substantial evidence and that the defendants were entitled to judgment as a matter of law.

FAIR HOUSING ACT REASONABLE ACCOMMODATION; PERMISSIVE JOINDER

In a case involving the Fair Housing Act, the court granted the defendants’ motion for permissive joinder. The court found that the plaintiff’s claims were not supported by substantial evidence and that the defendants were entitled to judgment as a matter of law.

BREACH OF CONTRACT; PRIORITY OF DEBT PAYMENTS

In a case involving the breach of a contract for the sale of property, the court granted the plaintiff’s motion for summary judgment. The court found that the defendant had breached the contract and that the plaintiff was entitled to specific performance.

This case arose from an admitted failure by Old Dutch Mustard Company d/b/a Pilgrim Foods ("Old Dutch Mustard") to pay in full for electricity produced by Electricity N.H., LLC d/b/a ENH Power ("ENH") and delivered by ENH.

ENH later sued Old Dutch Mustard for breach of contract. Its summary judgment motion asserted that it was owed $306,061 in unpaid charges. Old Dutch Mustard disputed approximately $128,000 of the total amount claimed because it argued that ENH’s charges, acting as ENH’s agent, improperly disregarded its instructions to apply its payments to ENH’s charges. The court concluded that ENH was barred from complying with Old Dutch Mustard’s demand by the PUC-approved tariff. Accordingly, the court granted ENH’s motion in full.

Brian Pearson sued Tyler Eldridge, an officer with the Ossipee Police Department, under 42 U.S.C. § 1983 for allegedly violating his Fourth Amendment rights to be free from unreasonable seizures and excessive force. Eldridge moved for judgment on the pleadings based on qualified immunity. The court denied the motion. Eldridge’s argument failed to appreciate that the immunity analysis is the same for police officers as for other public officials.


denied the motion. Plaintiff had not demonstrated any manifest error of law or fact in the underlying Order as to the absence of evidence of defendants’ disparate indifference to any substantial risk of serious harm, and as to the existence of a substantial burden under RLUIPA; and plaintiff’s post-judgment transfer to the Northern New Hampshire Correctional Facility had mooted his RLUIPA claims for injunctive relief. 17 pages. Judge Joseph N. Laplante.

FAIR HOUSING ACT RETALIATION; SUMMARY JUDGMENT


In a case against her former landlord, involving claims that the plaintiff had suffered unlawful retaliation for her complaints to the local housing authority, in violation of the Fair Housing Act ("FHA"), the court found that the plaintiff’s claim was not supported by substantial evidence and that the defendant was entitled to summary judgment.

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POSITIONS AVAILABLE

GENERAL COUNSEL – REAL ESTATE ATTORNEY – Unique opportunity to join a boutique full-service commercial real estate company as GC of title, closing, and real estate tax abatement services. Ideal candidate will have 5+ years of experience working in New England and be knowledgeable in real estate closings - placing title insurance, ensuring clear title, conducting closings and other related matters. Preference will be given to candidates with experience in Massachusetts, Maine, or Vermont practice. Candidate must have the ability to work with independence without supervision and collaboratively with a team of professionals. Salary and bonus structure is competitive with partner level compensation at a typical NH law firm. Benefits package includes health insurance, 401(K), and paid time off. Remote, in-office, or hybrid work arrangements available. Please direct resume to jkim@cole-exact.com.

ATTORNEY – Manchester firm with north country satellite office seeks attorney for permanent position. We are an established firm providing a variety of services to our long term corporate and government clients. Our attorneys are expected to work closely with paralegals, regulatory compliance, attention to detail and overall legal skills. Entry level position requires 0-2 years experience. Compensation commensurate with experience. Please send your cover letter and resume electronically to: Randall Pratt, Esq., employment@prattlawpc.com.

ASSOCIATE – Portsmouth law firm with business, creditor, consumer collection and financial institution defense practice seeks two litigation associates. Massachusetts, Maine, and New Hampshire residents preferred. Position requires court appearances, drafting pleadings, working closely with paralegals, regulatory compliance, attention to detail and overall legal skills. Entry level position requires 0-2 years experience. Compensation commensurate with experience. Please send your cover letter and resume electronically to: Randall Pratt, Esq., employment@prattlawpc.com.

ASSOCIATE – Friedman Feeley, PLLC is seeking an associate with 2-7 years litigation experience to handle discovery, drafting motions, and pretrial preparation, in state and federal courts. We are a busy Concord based practice. Candidates should be admitted to practice in NH and MA, and have familiarity with case management in both states. We offer a flexible work environment and competitive benefits. The successful candidate will have an excellent opportunity for career growth. Please send your resume in confidence to ngelman@friedmanfeeley.com.

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STAFF ATTORNEY – New Hampshire Public Defender is seeking a full-time, 40 hour per week, full-time general defense attorney. Applicants must have a demonstrated commitment to indigent criminal defense and extensive practice experience. Applicants must be admitted to the New Hampshire Bar or be eligible for immediate admission by waiver. Interested attorneys should submit a resume, cover letter, and a law school transcript (unofficial transcript is acceptable) to our Recruiting Coordinator through the Employment section on our website: www.nhpd.org.

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ENFORCEMENT AND RULEMAKING SUPERVISOR – Would you like to help ensure safe drinking water for New Hampshire? NHDES seeks an Enforcement and Rulemaking Supervisor for the Growing Drinking Water and Groundwater Bureau. The successful candidate will supervise three professionals who support a staff of 60 responsible for ensuring that public water systems and other regulated water users comply with requirements to protect public health and the environment. To apply, search for Job ID 24379 at https://das.nh.gov/jobs/search/employment. APPLY. Closes June 30, 2022.

CITY PROSECUTOR – City of Portsmouth, NH seeks City Prosecutor to provide professional legal services to the City primarily as Police Prosecutor. Advises the Police Department and Legal Department on criminal matters and represents the State on behalf of the PD in Court on misdemeanor and violation level offenses, city ordinance violations. For City Attorney's Office, drafts pleadings in land use appeals cases, drafting legal memoranda, responds to public records requests, reviews contracts. Juris Doctor Degree from accredited law school required, admitted to NH Bar Association. Salary range $64,693.42–$78,336.25. For full job description and to apply, please visit the following link: https://nhportsmouth civitalsforms.com/CareerPortalJobDetail.aspx?ReqID=954024, SourceId=7165.

TOWN SOLICITOR – The Town of Londonderry is seeking a full-time attorney for an in-house counsel position. Must be an admitted attorney of New Hampshire Bar. Incumbent will be integral part of Town leadership team, and serve as internal legal advisor to Town departments and boards on a broad range of municipal legal issues including planning, zoning, land use, elections, regulatory issues, employment law, taxation and the right-to-know law. Also assists departments with grant writing and administration. Pay range $90,000 – $110,000 DOG, with excellent benefits. For a complete job description and how to apply, please visit NH page of Town website (londonderry.nh.org) or email ldribik@londonderrynh.org. Closing date: May 6, 2022 at 5:00 PM, EDE.

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Downs Rachlin Martin — one of Northern New England’s largest law firms – has an exciting opportunity for a litigation attorney in its Lebanon office. The ideal candidate would have experience litigation in New Hampshire courts and an interest in doing sophisticated litigation.

CORPORATE/COMMERCIAL ATTORNEY (LEBANON, NH)

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

LABOR & EMPLOYMENT ASSOCIATE

DRM has a great opportunity for a labor and employment attorney in its Burlington, Vermont or Lebanon, New Hampshire office. Helpful experience includes representing clients before administrative agencies in employment-related claims, litigating on behalf of management, counseling on employment matters and familiarity with traditional labor matters. The ideal candidate has 1 to 3 years of relevant experience, including a clerkship, and wants to be part of a team of attorneys committed to delivering top-quality service to growing and successful businesses. From its offices in Vermont and New Hampshire, DRM’s labor and employment law group has a sophisticated regional employment practice and a national labor practice.

TAX ATTORNEY

Downs Rachlin Martin is seeking an attorney with at least 3 years of experience to join its tax practice at its Burlington, Vermont office. Qualified candidates should have substantial experience addressing complex commercial transactions, with a strong background in partnership and corporate tax matters. Experience should include structuring mergers and acquisitions, business formations, debt and equity financings, workouts, private equity and venture capital transactions. Experience with executive compensation, New Markets and other tax credit issues would be valuable in this position. Our practice includes controversy representation across a wide range of state and local tax matters necessitating excellent research, writing and verbal skills. There is an opportunity to succeed to an established tax practice.

CORPORATE/COMMERCIAL ATTORNEY (BURLINGTON, VT)

Downs Rachlin Martin – one of Northern New England’s largest law firms – has an opportunity for a corporate/commercial attorney to practice within its dynamic business law group in Burlington, Vermont. The ideal candidate will have over six (6) years of relevant experience working with colleagues and clients on matters involving venture capital transactions (entity formation, seed financings, capitalization tables, portfolio management), mergers and acquisitions (asset and stock purchases, mergers, due diligence) and debt and equity financings (mortgages, Uniform Commercial Code, promissory notes and loan agreements). The firm’s business law group is engaged in a wide variety of transactions locally, nationally and internationally. A partial book of business is preferred. This is an opportunity to become part of a team of attorneys committed to delivering top-quality service to growing and successful businesses.

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The COO will work closely with the Managing Director, three-person Executive Committee, and our team of Equity Members to provide operational insights and develop strategic plans that fuel the growth of our multi-state, 30 attorney firm.

The ideal candidate will have a demonstrated record of success within a large or mid-sized firm, strong communication, planning, and financial skills and experience supervising a business office team.

The COO is responsible for the Firm’s day-to-day administrative and operational functions and will participate in and help execute our strategic initiatives with a focus on increasing the Firm’s productivity, efficiency, and profitability. The COO will oversee all of the Firm’s business and financial matters, including operations, human resources, finance, marketing & business development, information technology and facilities management.

This is an exciting opportunity as the firm grows and strengthens our regional presence. This position will be based in our Concord, NH headquarters. Qualified candidates may go to our website at Sulloway.com to learn more. Please send confidential resumes to the Managing Director at cpyles@sulloway.com.

In addition to a commitment to exceptional client service, Sulloway is committed to increasing diversity in the legal profession and to supporting the communities where we live and work. People from all backgrounds are valued and integrated into every part of our Firm. Diverse candidates, including veterans and individuals with disabilities, are encouraged to apply.

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

CORPORATE ATTORNEY:

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

Please send letter of interest and resume to Hiring Partner Leslie Leonard at lleonard@coopercargillchant.com. For further information, visit www.coopercargillchant.com

Candidates should submit a resume, with cover letter stating salary requirement, to John Gosnell at jgosnell@coopercargillchant.com.
Assistant County Attorney

The Office of the Grafton County Attorney currently has a full time position available for a highly motivated attorney. The Assistant County Attorney is primarily responsible for the prosecution of cases in the Superior Court with a focus on early case resolutions and alternative sentencing options. Other responsibilities include discussing legal aspects of criminal cases with police, community relations and program development. Applicant must have Juris Doctor Degree and be a member in good standing of the NH Bar. Flexibility with some telework options may be considered.

**Come Join Our Team!**

Salary range $62,212-$86,112

Grafton County offers an exceptional benefit package including:

- 100% employer paid health insurance plans, 12 Paid Holidays, Generous Earned Time Package and much more!

Please send resume and cover letter to:

Grafton County Human Resources
385 Dartmouth College Hwy., Box 3, North Haverhill, NH 03774

(Applied online, visit: www.co.grant.nh.us/employment-opportunities)

E-mail: hr@co.grant.nh.us

E.O.E.

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REAL ESTATE ATTORNEY

Join a team that puts its People First! First American is seeking to fill an immediate need for an experienced real estate attorney to join its Concord NH underwriting team. First American’s Agency Division is dedicated to providing our policy-issuing agents with resources, services and underwriting guidance needed to achieve new levels of success. Responsibilitie include providing underwriting support, counsel and authorization to agents, customers and company personnel related to the issuance of title insurance commitments and policies. Position requires admission to the NH Bar. The ideal candidate will have 8+ years of title underwriting related experience and a familiarity with real estate law and conveyancing practices. We are looking for a results-oriented self-starter interested in career growth to work independently and collaboratively with our team.

We offer a competitive compensation and benefits package which includes health insurance, paid time off, 401K, commuter Advantage Program, fitness discounts, adoption assistance, and much more. Become a part of our team and discover our award-winning culture for yourself!

For confidential consideration, please direct resumes to: jwilg@firstam.com

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Director of Legal Graduate Programs

The University of New Hampshire Franklin Pierce School of Law seeks candidates for Director of Legal Graduate Programs.

UNH Law offers 10 masters and online degree programs. This new faculty position will serve as the lead academic head for these programs and growing residential and online certificate, as well as an important teacher.

We seek candidates who are experienced with adult and graduate education, ideally in a law school context, and who can teach and counsel those populations successfully. A successful candidate will be collaborative and will build a program that improves student outcomes.

The successful candidate will hold a J.D. degree from an ABA-accredited law school, or an advanced legal degree from an ABA-accredited law school and legal degree from a second country and demonstrate success in US legal settings. The candidate will also have a minimum of three to five years of experience in higher education administration.

The ideal candidate will have experience teaching non-JD populations and/or adult students and interacting with students from different nationalities and cultural backgrounds. This person must also have expertise in institutional procedures around accreditation, program development and online teaching.

For additional information and details on how to apply, please visit: https://jobs.usnh.edu/postings/46095.

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Staff Attorney

Pease Development Authority, a New Hampshire State Agency with operational authority for two airports, a deep water sea port, a 27-hole golf course and a thriving business park, seeks a full time Staff Attorney for a challenging position in its Legal Department. The Staff Attorney reports to the General Counsel/Executive Director and is responsible for providing legal counsel and support to the Pease Development Authority (PDA) Board of Directors, Executive Director, and Staff on a wide range of issues. Essential duties include:

- Preparing, reviewing and interpreting lease and sublease agreements, amendments, contracts, licenses, insurance, service agreements, and other agreements.
- Provide assistance to Human Resources Division regarding labor and employment law matters, including but not limited to the initial review of complaints, grievances, inquiries, incidents and related disciplinary matters for PDA employees.
- Conducting research and providing legal expertise and advice to the General Counsel and PDA management staff; assisting outside counsel as needed.
- Reviewing and coordinating approvals of sub-subleases and mortgages entered into by tenants of the PDA within approved authority.

Education and/or Experience:

- Juris Doctorate from an American Bar Association recognized law school and a minimum of 3 years of experience practicing law.

Knowledge/Skills/Abilities:

- Ability to apply principles of logical or scientific thinking to a wide range of intellectual and practical problems.
- Knowledge and ability to establish, implement and maintain compliance with Federal and State laws. Ability to stay abreast of changes and updates in laws and regulations.
- Ability to negotiate complex real estate transactions related to development and leasing of airport lands, buildings, warehouses, hangars and other properties.
- Knowledge of general business, real estate, and airport law practices.
- Knowledge of public policy development.
- Knowledge of employment law.
- Knowledge of environmental law.
- Knowledge of procurement and contracting.
- Knowledge of risk management and insurance.
- Demonstrated ability to prioritize and execute numerous projects simultaneously under tight deadlines.

The salary range for this position is $75,000-$120,000. The PDA offers an excellent benefits package including comprehensive medical and dental insurance, life and disability coverage, paid leave, and enrollment in the NH Retirement System.

For more information or to apply, please send your resume and cover letter to:

Pease Development Authority, Human Resources
55 International Drive, Portsmouth, NH 03801

Attn: Tammy Coppola
1coppola@peasedev.org

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DCYF – Attorney II

NH Department of Health & Human Services

Position Number #44380 – Manchester District Office

Starting Salary Range: $58,636.50 to $83,869.50

The N.H. Department of Health and Human Services, under the supervision of the N.H. Department of Justice, currently has an attorney position available representing the Division for Children, Youth and Families. This position is located in the Manchester District Office.

Duties include: Representation of the Division for Children, Youth and Families in litigation involving the Division’s child protection program. Litigation activities include drafting pleadings and motions, conducting discovery, legal research and writing, preparing witnesses for trial, negotiating settlements, and presenting evidence and oral argument at court hearings and trials.

Requirements: J.D. from a recognized law school, N.H. Bar membership, a driver’s license and/or access to transportation for statewide travel and four years’ experience in the practice of law, preferably in the area of abuse and neglect or family law.

How to APPLY: Please go to the following website to submit your application electronically through NH 1st: http://das.nh.gov/jobs/search/employment.aspx. Please reference the position number that you are applying for: #44380 Attorney II. Position will remain open until a qualified candidate is found. EOE.

For questions about this position please contact Attorney Deanna Baker, Legal Director at (603) 271-1220.
Foley Hoag LLP is seeking a LEGAL RECRUITING ADMINISTRATIVE ASSISTANT who will be responsible for administrative and organizational support of the recruiting process for the hiring of entry-level associates, summer associates and lateral attorneys.

**Responsibilities**

- **Monitor** lateral attorney and student applications via the hiring mailbox and applicant tracking database and forward applications to Legal Recruiting Director and Managers as appropriate.
- **Alongside** Legal Recruiting Operations Specialist, maintain recruiting database/applicant tracking system and other relevant candidate files, generate statistical reports, maintain hiring statistics, and other database duties as assigned.
- **Assist** with posting attorney and legal personnel open positions on the Department and other job boards as appropriate.
- **Maintain** search firm fee agreement files and process payment of placement fees.
- **Maintain** expense spreadsheets and process department expenses, including candidate travel reimbursements, vendor invoices and check requests, summer program event invoices, Manager and Director expense reimbursements, etc.
- **Assist** with compiling all new hire paperwork and documentation and add new attorney and legal personnel hires to firm’s new hire onboarding system.
- **Under** the direction of Legal Recruiting Operations Specialist, process payment of individual attorney bar membership renewals, execute on group bar registrations and group association renewals, and assist with maintenance of membership database.
- **Handle** other administrative duties for the department, including scheduling meetings and events, conference room reservations, IT needs, filing and record-keeping, etc.

**Requirements**

- Bachelor’s degree
- One year of law firm or professional services administrative experience preferred
- Proficiency in the use of computer programs, including Microsoft Office (Word, Excel, PowerPoint); proficiency in database programs (e.g., LawCruit, viDesktop) and other technical proficiency would be a plus
- Excellent oral and written communication skills
- Strong interpersonal skills, team-orientation, and the ability to interact effectively with personnel at all levels of the firm
- Strong organizational skills, superb attention to detail, and self-direction
- Ability to multi-task, manage, and prioritize projects effectively
- Flexibility and professionalism in responding to shifting demands
- Ability to exercise good judgment and to recognize and treat confidential information in a professional manner

**How to Apply**

Please apply now through the firm’s website at: [https://foleyhoag.com/careers/current-openings](https://foleyhoag.com/careers/current-openings)
Insurance Defense Attorney

Description:
At Liberty Mutual, we’re committed to delivering exceptional legal services to our customers around the world, working to uphold and protect our policyholders’ rights and positively impacting our business. As an Insurance Defense Attorney at Liberty Mutual, you’ll join a diverse team that values a healthy work-life balance and enjoy benefits that include eligible performance bonuses, 20 days of flexible time off each year, personal holidays, a pension plan and a 401(k) plan with matching contributions. If you’re looking for a place to build a long-term career while making a positive difference, consider joining our legal team where you’ll represent Liberty Mutual and our policyholders in moderately complex civil litigation and workers’ compensation matters involving claims for monetary damages or compensation for personal injuries or property damage of a moderate value.

We encourage you to apply and bring your expertise if you’re a:
• Engaged legal professional: You’ll manage the entire legal process, from investigation and discovery through trial prep and court proceedings, representing clients in depositions, site inspections, court hearings, trials, etc. and negotiating settlements as required.
• Strategic partner: Researching all applicable laws and findings, you will develop appropriate legal strategies for all stages of litigation and share them with claims representatives and insured clients.
• People person: You’ll establish and maintain good relationships with claims representatives and insured clients and occasionally conduct training sessions for Legal, Claims or other departments.
• Effective communicator: You’ll develop and render clear, unambiguous legal opinions and strategies, and draft legal documents including pleadings and motions.

What you’ve got:
• Membership in the NH Bar
• Appropriate special licenses to practice before boards or federal courts preferred
• A minimum of one-year experience as an attorney

Skills
• Talent for cultivating strong working relationships with internal and external partners
• Aptitude for detailed, analytical thinking
• Process-oriented mindset, with proven ability to meet deadlines and stay organized

Knowledge
• Familiarity with the latest developments in the practice of law, as well as pertinent knowledge in related fields
• Familiarity with insurance law a plus
• Proficiency with technologies that reduce costs and facilitate the practice of law and remote work

Education
• JD degree

Please apply online https://jobs.libertymutualgroup.com/job/15362220/insurance-defense-attorney-bedford-nh?mode=job&isJobBoard&isIndeed.com&isComp=false&paid=false&Leg or by contacting Jamie Shumway Jamie.shumway@libertymutual.com.

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(603) 715-3279
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Advertising and Sponsorship Sales Coordinator
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EMAIL: advertise@nhbar.org
The City of Concord is seeking a highly skilled attorney with 3-5 years’ experience to fill an Assistant City Prosecutor position to manage criminal cases in the City Prosecutor’s Office. Salary Range: $74,526.40 - $107,910.40, plus a competitive benefits package. Submit cover letter and resume to the Human Resources Department via the Application: at https://www.governmentjobs.com/careers/concordnh. The position will remain open until filled. For more information visit www.concordnh.gov or call (603) 225-8535, or TTY at 1-800-735-2964 or 7-1-1. “An Equal Opportunity Employer M/F/D/P/V and LGBTQ”
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